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NUREMBERG'S LEGACY CONTINUES: THE NUREMBERG TRIALS' INFLUENCE ON HUMAN RIGHTS LITIGATION IN U.S. COURTS UNDER THE ALIEN TORT STATUTE

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I. INTRODUCTION

In March of 2005, four Palestinian families and the parents of Rachel Corrie,[1] an American, filed a lawsuit against Caterpillar, Inc.[2] under the Alien Tort Statute ("ATS")[3] and general federal

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[1] Rachel Corrie was a young American woman who the Israel Defense Forces ("IDF") ran over and killed with a Caterpillar bulldozer while she was protecting a home from an illegal demolition in the Occupied Palestinian Territory ("OPT"). Complaint at 1, 12, 14, Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (No. C05-5192FDB) [hereinafter Corrie Complaint]; Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1022–23 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007) (affirmed on political question basis).

[2] The Plaintiffs are not able to sue the IDF or Israel in U.S. courts because of the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1602–1611 (2000 & Supp. IV 2004).

[3] 28 U.S.C. § 1350 (2000). This provision has also been referred to as the Alien Tort Claims Act ("ATCA"). Flores v. S. Peru Copper Corp., 414 F.3d 233, 236 & n.1 (2d Cir. 2003). The statute allows non-citizens to bring claims for certain human rights violations, even if such violations occur abroad. The statute reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The "law of nations" is generally equated with "customary international law." *Flores*, 414 F.3d at 237 n.2 ("In the context of the ATCA, we have consistently used the term 'customary international law' as a synonym for the term the 'law of nations.'"); *see also* Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).

Typically, claims under the ATS are for violations of the law of nations (as opposed to treaties) because under U.S. law, claims can only be brought pursuant to a treaty if the treaty is self-executing (which the U.S. considers few human rights treaties to be), or where specific legislation has been passed creating a cause of action under a treaty, such as the passage of the Torture Victim Protection Act in 1991. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)); 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987); *see also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (discussing self-operating treaties as opposed to those executed by legislative acts), *overruled in part on other grounds*, United States v. Percheman,

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jurisdiction,[4] for aiding and abetting the Israel Defense Forces' ("IDF") commission of war crimes and other human rights violations by knowingly providing the IDF with bulldozers used to illegally demolish civilian homes, resulting in deaths and injuries.[5] In the Plaintiffs' response to Caterpillar's Motion to Dismiss,[6] and in their appeal to the Ninth Circuit,[7] the Plaintiffs rely heavily on the Nuremberg WWII military tribunals'[8] prosecutions of the German industrialists,[9] many of whom were convicted for aiding and abetting the Nazis in their atrocities.[10] In particular, the Plaintiffs rely on *In re Tesch* (also known as *The Zyklon B Case*), where top

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32 U.S. (7 Pet.) 51 (1833).

[4] 28 U.S.C. § 1331 (2000). Because the Corries are not aliens, they cannot bring their claims on behalf of their daughter under the ATS; rather, they bring their claims under section 1331, arguing that they have a right to bring claims for violation of the law of nations as a matter of federal common law. Corrie Complaint, *supra* note 1, at 4.

[5] Corrie Complaint, *supra* note 1, at 1–2. The Complaint was filed on March 16, 2005. The First Amended Complaint was filed on May 2, 2005. First Amended Complaint, *Corrie*, 403 F. Supp. 2d 1019 (No. C05-5192FDB). The case was dismissed on November 22, 2005 and now is on appeal before the Ninth Circuit Court of Appeals. Appellants' Opening Brief, Corrie v. Caterpillar, Inc., No. 05-36210 (9th Cir. Mar. 20, 2006) [hereinafter Corrie Appellants' Opening Brief].

[6] Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss at 16, *Corrie*, 403 F. Supp. 2d 1019 (No. C05-5192FDB) [hereinafter Corrie Brief in Opposition to Motion to Dismiss].

[7] Corrie Appellants' Opening Brief, *supra* note 5, at 24, 27.

[8] Major German war criminals were tried at Nuremberg by the International Military Tribunal ("IMT") created through the London Agreement, to which was attached the Charter of the IMT. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *available at* http://www.icls.de/dokumente/imt_london_agreement.pdf; Charter of the International Military Tribunal art. 1, Oct. 6, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter], *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm. Other trials took place in fora administered by one of the allies in the territorial zone it was occupying ("zonal tribunals"), and were conducted pursuant to the IMT's Control Council Law No. 10. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. III, Dec. 20, 1945, *available at* http://www.yale.edu/lawweb/avalon/imt/imt10.htm. Two such tribunals were the U.S. military tribunal and the British military tribunal. KENNETH C. RANDALL, FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM 170–71 (1990). Although other trials took place in military and domestic tribunals around the world, the precedent influencing ATS litigation in the United States arose from the IMT and the cases against individuals complicit in the crimes who were prosecuted by the U.S. and Britain. *See In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 55–56 (E.D.N.Y. 2005).

[9] The U.S and British military tribunals prosecuted forty-three German individual corporate executives in various industries for their roles in WWII atrocities, such as slave labor, spoliation, and the production and distribution of the gas used to kill the Jews. These trials came to be known as the "industrialist cases." Allison Marston Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War*, 46 VA. J. INT'L L. 651, 653 (2006); *see infra* note 109.

[10] *See* Corrie Brief in Opposition to Motion to Dismiss, *supra* note 6, at 24; Corrie Appellants' Opening Brief, *supra* note 5, at 24, 27.

company officials were convicted for knowingly supplying Zyklon B—the poison gas used to kill Jews—to the Nazi regime for use in concentration camps,[11] and on *United States v. Flick*,[12] where a civilian industrialist was convicted for contributing money vital to the Nazi's financial existence, while knowing of their crimes.[13]

Similarly, in the recent case of *In re South African Apartheid Litigation*,[14] the plaintiffs relied on the industrialist cases to support their claims of aiding and abetting against several corporate defendants they alleged were complicit with the apartheid regime in South Africa.[15] Specifically, they alleged that certain of the defendants were willing and active collaborators with the apartheid government in creating deplorable labor conditions akin to prison-like conditions and profiting from the cheap labor.[16] The plaintiffs argue, "Like Nazi-era firms that profited from forced labor during World War Two, defendants actively sought cooperation with the regime to secure profits."[17] They continue, "Just as Nazi industrialists faced international tribunals for their complicity in Nazi forced labor regimes, corporations that actively cooperated with the apartheid regime and its discriminatory and repressive practices may be found liable under the ATS."[18]

These arguments demonstrate the degree to which plaintiffs in domestic human rights litigation are pointing to the Nuremberg

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[11] *In re* Tesch (*The Zyklon B Case*), 13 Ann. Dig. 250 (Brit. Mil. Ct. 1946), *reprinted in* 1 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93 (1947) [hereinafter LAW REPORTS OF TRIALS OF WAR CRIMINALS].

[12] United States v. Flick (*The Flick Case*) (Dec. 22, 1947), *in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1 (1952) [hereinafter TRIALS OF WAR CRIMINALS].

[13] *Id.* at 1216, 1220. For example, responding to Defendant's argument that there could be no human rights violation when a company was merely providing a legal product, the *Corrie* Plaintiffs argue, "In the Nuremburg Trials, defendants were convicted of selling Zyklon B to the Nazis, even though such product was a legal, non-defective good that had both criminal and legal uses." Corrie Appellants' Opening Brief, *supra* note 5, at 27. Defendant Caterpillar emotionally rejected the analogy, writing, "The Israeli government is not the Nazi regime. . . . Selling a commercially available piece of construction machinery to the Israeli government is hardly similar to providing poison gas to the Nazi government knowing that it will be used for the mass extermination of people." Reply in Support of Motion to Dismiss by Defendant Caterpillar, Inc. at 14, Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (No. C05-5192FDB).

[14] 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

[15] *Id.* at 549; Brief for Plaintiffs-Appellants at 13, *In re* S. African Apartheid Litig., No. 05-2326 (2d Cir. Aug. 19, 2005) [hereinafter Apartheid Appellants' Brief].

[16] Apartheid Appellants' Brief, *supra* note 15, at 9–14.

[17] *Id.* at 13.

[18] *Id.* at 19.

trials,[19] and the industrialist cases in particular, to support their theories of corporate complicit liability. These arguments are having some success. In the last three years, three federal district courts have relied on the Nuremberg trials in finding that corporations can be found liable for aiding and abetting human rights violations abroad,[20] two of them analyzing the industrialist cases in detail to support their holdings.[21]

Attempts to hold corporations liable for human rights violations are the most recent examples of the degree to which the Nuremberg trials have significantly affected human rights litigation in the United States under the Alien Tort Statute.[22] It is also the most controversial because corporations were not prosecuted at Nuremberg, and there remains the unresolved question about whether corporations are, or should be, bound by international human rights norms.[23]

There have been other criticisms of using the Nuremberg trials as precedent in modern human rights litigation. Some have criticized the Nuremberg trials as "victors' justice," implying that use of any precedent from the Nuremberg trials is inappropriate.[24] Others have suggested that precedent from the trials established to prosecute uniquely horrible crimes should not be used in other human rights litigation where the crimes were not as horrible, especially with regard to complicity standards, such as aiding and

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[19] In this Article, "the Nuremberg trials" refer to the International Military Tribunal at Nuremberg and the WWII military tribunals. *See supra* notes 8–9 and accompanying text.

[20] Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *3, 4 (N.D. Cal. Aug. 22, 2006); Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church II*), 374 F. Supp. 2d 331, 333–34 (S.D.N.Y. 2005); *In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 56–58 (E.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church I*), 244 F. Supp. 2d 289, 315 (S.D.N.Y. 2003); *see also* discussion *infra* Part II.D–E.

[21] *See Agent Orange*, 373 F. Supp. 2d at 56–58; *Presbyterian Church I*, 244 F. Supp. 2d at 315–16.

[22] In fact, even before the onslaught of corporate liability cases the ATS has seen over the last decade, the Nuremberg trials have been extremely influential in the developing ATS jurisprudence in the United States, as discussed *infra* at note 156 and accompanying text.

[23] *See infra* notes 126–27; *see also, e.g.*, *Agent Orange*, 373 F. Supp. 2d at 55–57 (describing an expert affidavit submitted on behalf of the defendants, noting that corporations were not prosecuted at Nuremberg); *Presbyterian Church I*, 244 F. Supp. 2d at 315–16 (refuting defendant Talisman's argument that because corporations were not prosecuted at Nuremberg, it was inappropriate to apply precedent regarding corporate liability and complicity standards derived from the Nuremberg trials to corporations under the ATS).

[24] Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801, 805–06 (1997). For discussion of others who have criticized the trials as victors' justice, see generally HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 122–25 (2d ed. 2000).

abetting.[25] One writer has criticized the use of Nuremberg's legacy to support ATS jurisdiction over conduct occurring abroad, arguing that the Allies had a unique connection to the crimes they were prosecuting, which does not exist in domestic human rights litigation.[26]

This Article both traces the Nuremberg trials' tremendous influence on human rights litigation in the United States under the ATS, which has culminated most recently in the area of corporate complicit liability, and argues that the use of the Nuremberg trials as precedent in modern domestic human rights litigation is appropriate. Part I traces the Nuremberg trials' influence on ATS litigation in the United States, which began with the very first modern ATS case, and notes that the dramatic increase in claims against corporations for complicity in human rights violations has led courts to rely even more heavily on precedents from the Nuremberg trials over the last three years, a trend that will likely continue. Part II addresses criticisms that using Nuremberg precedents in modern ATS litigation is not appropriate, refutes these criticisms, and argues that plaintiffs' and courts' reliance on the precedents is both appropriate and helpful. With regard to corporate complicity specifically, Part II argues that the fact that corporations themselves were not prosecuted at Nuremberg or in the industrialist cases should not foreclose corporate liability today, noting that even though corporations were not prosecuted, the tribunals spoke in terms of corporate actions and liability when prosecuting industrial executives. For these reasons—in combination with the rise in multinational and transnational corporations, their complex structures, and their increasing influence—courts are correct to look to the industrialist cases as precedent in determining corporate complicity liability for human rights violations.

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[25] John Haberstroh, *The Alien Tort Claims Act &* Doe v. Unocal*: A* Paquete Habana *Approach to the Rescue*, 32 DENV. J. INT'L. L. & POL'Y 231, 263, 265–66 (2004) (criticizing the complicity standards used in the Nuremberg military tribunals cases as inappropriate "for matters of less-than-extraordinary evil"). For more detailed discussion of this criticism, see *infra* Part II.

[26] Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals about the Limits of the Alien Tort Statute,* 80 NOTRE DAME L. REV. 111, 127–28 (2004) (criticizing the use of Nuremberg prosecutions as precedent for what he describes as "full-blown" universal jurisdiction of the type used in modern ATS litigation). For more detailed discussion of this criticism, see *infra* notes 230–32 and accompanying text.

II. THE NUREMBERG TRIALS' INFLUENCE ON HUMAN RIGHTS LITIGATION IN THE UNITED STATES UNDER THE ALIEN TORT STATUTE

As has been noted by numerous scholars and commentators, the Nuremberg trials opened the door to a new era in international human rights. The Nuremberg trials' well-known legacies include, *inter alia*, (1) disposing of the notion that States should not concern themselves with human rights violations occurring within the borders of another State (especially with regard to that States' own citizens), and (2) establishing individual accountability for human rights violations.[27] The Nuremberg trials' impact in these areas cannot be overstated, leading to the U.N. Charter[28] and the U.N. Declaration of Human Rights,[29] as well as providing the groundwork for the establishment of the various international criminal tribunals[30] and, most recently, the International Criminal Court.[31]

Much less noted, however, and thus less known, is the far-reaching impact the Nuremberg trials have had in the development of human rights jurisprudence under the ATS in the United States, especially over the last decade. Moreover, the Nuremberg trials' influence has notably increased over the last three years, especially as more corporations are finding themselves defendants in such litigation.[32] Plaintiffs and courts are increasingly relying on the Nuremberg trials, and the industrialist trials in particular—where British and U.S. military tribunals tried several German corporate industrial executives for complicity in war crimes and other human rights violations—to find corporations complicit in human rights abuses.[33]

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[27] *See* STEINER & ALSTON, *supra* note 24, at 112–13.

[28] *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 42 (1992).

[29] *See* STEINER & ALSTON, *supra* note 24, at 137–39 (tracing the development of the U.N. Declaration of Human Rights from the Nuremberg Tribunal to the U.N. Charter).

[30] Such criminal tribunals include the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 193, 205 (2d ed. 2001) (discussing similarities between the Nuremberg Tribunal and the ICTY and ICTR, respectively).

[31] *See* STEINER & ALSTON, *supra* note 24, at 113, 137–39, 1192–95.

[32] *E.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church I*), 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

[33] *E.g.*, Kadic v. Karadžić, 70 F.3d 232, 240–42 (2d Cir. 1995) ("[P]rivate persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of

The Nuremberg trials have significantly influenced human rights litigation in the United States in at least five distinct ways.[34] First, the Nuremberg trials created space for the initial acceptance of civil subject-matter jurisdiction over acts occurring abroad, and they continue to legitimize such jurisdiction.[35] Second, the Nuremberg trials have served as the main source for the recognition that crimes against humanity, war crimes, and forced labor are violations of customary international law giving rise to claims under the ATS. Third, the Nuremberg trials have served as direct legal precedent for individual liability for private, non-state actors who violate human rights.[36] Fourth, the Nuremberg trials have been the primary legal precedent for finding that corporations are bound by international law, even though no corporations were prosecuted at Nuremberg.[37] Last, the Nuremberg trials have served as a key precedent for theories of complicit liability, such as aiding and abetting, under the ATS.[38] These precedents have created the jurisprudential backbone for the increasing number of corporate liability cases under the ATS.[39]

A. Subject-Matter Jurisdiction

The Nuremberg trials greatly impacted early human rights litigation in the United States in the most fundamental way: by creating the legal space for such litigation in the first place. Prior to the Nuremberg trials, there existed no specific legal precedent for subjecting offenses such as war crimes and crimes against humanity, such as genocide, to the principle of universal

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international humanitarian law."); *see also infra* Part II.D.

[34] *Kadic*, 70 F.3d at 241–42.

[35] *See* RANDALL, *supra* note 8, at 170.

[36] *Id.* at 187–88; *Kadic*, 70 F.3d at 243.

[37] *E.g.*, *Kadic*, 70 F.3d at 241–42, 243; *Presbyterian Church I*, 244 F. Supp. 2d at 315–19.

[38] *Presbyterian Church I*, 244 F. Supp. 2d at 321–24.

[39] Clearly, the Nuremberg trials, as well as those originating from the other WWII tribunals, have had enormous *indirect effects* on civil human rights litigation in the United States. Most indirect effects are difficult to measure. Others are more easily ascertainable. For example, many ATS cases do not cite the Nuremberg or war crimes trials directly, but do cite the various international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), in finding that an international law norm has reached the level of customary law and/or to support theories of complicity. Because the international criminal tribunals have to a large degree been influenced by Nuremberg in many ways, and often cite the Nuremberg trials, Nuremberg continues to influence ATS cases which cite the tribunals. *See, e.g.*, *Kadic*, 70 F.3d at 241–42.

jurisdiction.[40] Because of Nuremberg, the idea that there is universal jurisdiction over those who commit such offenses gained legitimacy. In addition, in the aftermath of World War II, members of the United Nations recognized that offenses such as crimes against humanity and genocide were the concern of all States, and that each State's domestic institutions, such as courts, should be responsible for remedying these wrongs.[41]

Moreover, although the Nuremberg trials concerned criminal actions, commentators and scholars suggested there was no reason why such jurisdiction should not also occur in the civil context.[42] As stated by one commentator, "The exercise of universal jurisdiction in civil actions obviously serves the values that underlie the burgeoning international criminal law."[43] The implication was, and continues to be, that given modern jurisdictional concepts, courts have subject-matter jurisdiction over civil actions arising from human rights violations that occur abroad.[44]

1. Concepts of Universal Jurisdiction Gave Life to Modern ATS Litigation

This paradigm shift was borne out in the United States in the seminal 1980 ATS case of *Filartiga v. Pena-Irala*.[45] The ATS had originated in 1789 as part of the First Judiciary Act of the new U.S. Congress.[46] It was for the most part, however, dormant for nearly 200 years until the Center for Constitutional Rights brought the *Filartiga* action.

In *Filartiga*, a Paraguayan doctor and his daughter brought an ATS action against a former military leader who had tortured their

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[40] *See* RANDALL, *supra* note 8, at 171. Universal jurisdiction refers to a State's power "to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the [traditional] bases of jurisdiction . . . is present." 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

[41] RANDALL, *supra* note 8, at 189–90.

[42] *Id.* at 188–89.

[43] *Id.*

[44] *Id.* at 170, 188–89. Courts in the U.S. must still have *personal* jurisdiction over the defendant. This means that the defendant must reside in the jurisdiction of the court, have sufficient contact with the jurisdiction to meet the constitutional requirements of fairness, or be served with the lawsuit while within the jurisdiction (known as "tag" jurisdiction). *E.g.*, Burnham v. Superior Ct., 495 U.S. 604 (1990); Kulko v. Superior Ct., 436 U.S. 84 (1978).

[45] 630 F.2d 876 (2d Cir. 1980).

[46] *Id.* at 878.

son/brother to death in Paraguay, after they discovered that the former leader resided in New York.[47] The district court dismissed the case, finding that the ATS did not provide the courts with subject matter jurisdiction over the claim because the torture and killing had occurred abroad.[48] In a ground-breaking decision, the Second Circuit Court of Appeals reversed the district court. After finding that the prohibition against torture had risen to the level of "the law of nations,"[49] the court held that the ATS did provide for subject-matter jurisdiction even though the torture occurred within another sovereign's borders and involved conduct of a sovereign's official against another of the sovereign's citizens.[50] In so finding, the judge relied on the U.N. Charter's conception of universal jurisdiction[51] and the Universal Declaration of Human Rights,[52] both of which grew out of WWII and Nuremberg,[53] stating, "The United Nations Charter . . . makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern."[54] The court further rejected the argument that violations of international law do not occur when the aggrieved party is a national of the offending state, saying such was "clearly out of tune with the current usage and practice of international law. The treaties and accords cited above . . . all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments"—rights, the court found, that could be enforced by suits brought under the ATS.[55]

Thus, the Second Circuit relied on the new understanding of the universal concern with human rights, as well as the universality of human rights so profoundly birthed by Nuremberg, in finding that it had jurisdiction over the claim, even though the act occurred outside the United States and involved claims concerning the conduct of a foreign official in his own country with respect to another of the country's citizens.[56] As the court in *Filartiga* concluded:

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[47] *Id.* at 878–79.

[48] *Id.* at 880.

[49] *Id.*

[50] *Id.* at 887.

[51] *Id.* at 881 (relying specifically on Articles 55 and 56 of the United Nations Charter in support of the concept of universal jurisdiction under international law).

[52] *Id.* at 882.

[53] *See infra* text accompanying notes 230–35.

[54] *Filartiga*, 630 F.2d at 881.

[55] *Id.* at 884–85 (footnote omitted).

[56] *Id.* at 882, 884–85, 887–88.

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. . . . Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[57]

With this, *Filartiga* opened the door to the modern era of international human rights litigation in the United States.

2. The Jurisdictional Debate Continued and was Finally Settled by the U.S. Supreme Court in 2004

The *Filartiga* court's holding that the ATS provided subject-matter jurisdiction for claims by a non-citizen whose human rights had been violated in his own country by the country's officials was the subject of early debate. For example, four years after the *Filartiga* decision, the U.S. Court of Appeals for the District of Columbia in *Tel-Oren v. Libyan Arab Republic*[58] questioned whether the ATS should be read to require "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens."[59] Most courts over the next two decades, however, followed *Filartiga*, finding that non-citizens could bring ATS claims for violation of the law of nations so long as the norm at issue was "'specific, universal and obligatory.'"[60] Just as in *Filartiga*, this was largely due to the recognition of universal

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[57] *Id.* at 890.

[58] 726 F.2d 774 (D.C. Cir. 1984). In *Tel-Oren*, survivors and representatives of civilians, mostly Israelis, tortured and murdered during a bus attack sponsored by the Palestine Liberation Organization (PLO) brought an ATS claim against the Libyan Arab Republic and the PLO for funding the organization that committed the attack. *Id.* at 775.

[59] *Id.* at 813 (Bork, J., concurring).

[60] *E.g.*, Sarei v. Rio Tinto PLC, 456 F.3d 1069, 1077 (9th Cir. 2006) (quoting Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1132 (C.D. Cal. 2002)), *withdrawn*, 487 F.3d 1193 (9th Cir. 2007); Hilao v. Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church I*), 244 F. Supp. 2d 289, 306 n.18 (S.D.N.Y. 2003).

jurisdiction that arose from the Nuremberg trials.[61] For example, the district court in *Doe v. Saravia*[62] acknowledged that the concept of universal jurisdiction was now well-accepted, primarily because of the Nuremberg trials.[63]

In 2004, the United States Supreme Court, opining on the ATS for the first time in the case of *Sosa v. Alvarez-Machain*, accepted this view as well.[64] In *Sosa*, the Court settled an issue long in dispute among the various courts of appeals—whether the ATS created causes of action, or whether it was jurisdictional only, and if it was jurisdictional only, whether causes of action exist under U.S. federal common law (which, as the Court confirmed, includes the law of nations),[65] or whether Congress has to enact specific statutes to provide for causes of action, like it did in passing the Torture Victim Protection Act ("TVPA") in 1991.[66] The Court ruled that the ATS is a jurisdictional statute only, but it also found that causes of action already exist under our federal common law due to its incorporation of the law of nations without the need to enact any other legislation.[67]

In so holding, the Court accepted the view that jurisdiction under the ATS exists even for acts by another country's foreign official against that country's own citizens. In questioning whether it should allow federal courts to hear claims limiting the "power of foreign governments over their own citizens, and to hold that a

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[61] *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters' note 1, at 256 (1987); *see also supra* note 40.

[62] 348 F. Supp. 2d 1112 (E.D. Cal. 2004). In *Saravia*, the plaintiff brought an action for complicity against the former chief of security of El Salvadoran paramilitary groups under the ATS and TVPA for the death of an archbishop in El Salvador. *Id.* at 1118.

[63] *Id.* at 1156–57. "Following the Second World War, the United States and other nations recognized 'war crimes' and 'crimes against humanity,' including 'genocide,' as crimes for which international law permits the exercise of universal jurisdiction." United States v. Yousef, 327 F.3d 56, 105 (2d Cir. 2003) (footnotes omitted).

[64] 542 U.S. 692 (2004). Alvarez-Machain was abducted from Mexico, held overnight, brought to the United States, and handed over to U.S. authorities, who wanted to try him for the murder of a Drug Enforcement Administration agent. *Id.* at 697–98. After Alvarez-Machain was acquitted, he brought a civil action under the ATS. The Supreme Court dismissed the ATS case on the grounds that "a single illegal detention" of one night did not rise to the level of a violation of the customary international law and, thus, could not be the subject of a suit under the ATS. *Id.* at 738.

[65] *Id.* at 729–30.

[66] *See id.* at 713; *Saravia*, 348 F. Supp. 2d at 1145.

[67] *Sosa*, 542 U.S. at 724–25 (finding that the ATS provided federal district courts with jurisdiction over claims of certain violations of international law primarily because there was a congressional understanding that courts at the time would recognize private causes of action for violations of the law of nations).

foreign government or its agent has transgressed those limits,"[68] the Court stated that "modern international law is very much concerned with just such questions,"[69] reflecting the modern international law regime so greatly influenced by Nuremberg.

B. Influence on Customary International Law Norms

The Nuremberg trials have also significantly influenced ATS litigation by contributing to the establishment of which norms give rise to claims under the ATS. As discussed above, to bring a case under the ATS, the norm must be "specific, universal and obligatory."[70] *Sosa* added to this test, stating that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"—offenses against ambassadors, violations of safe conduct, and piracy.[71] In addition, the Court advised lower courts to be very cautious and "vigilant doorkeep[ers]" in recognizing any norm that might give rise to claims under the ATS, noting a variety of concerns.[72] Although most courts agree that the *Sosa* test is functionally the same as the "specific, universal and obligatory" test utilized in nearly all prior ATS decisions,[73] other courts have found the standard more onerous.[74]

Both before and after *Sosa*, courts have consistently looked to the Nuremberg trials to determine whether the international law norm cited meets this test, with many specifically stating that the Nuremberg trials may be used as a direct and definitive source.[75]

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[68] *See id.* at 727.

[69] *Id.*

[70] *See supra* note 60 and accompanying text.

[71] *Sosa*, 542 U.S. at 724, 732.

[72] *Id.* at 729.

[73] *E.g.*, Sarei v. Rio Tinto PLC, 487 F.3d 1193, 1201–02 (9th Cir. 2007), *reh'g en banc granted*, Nos. 02-56256, 02-56390, 2007 WL 2389822 (9th Cir. Aug. 20, 2007); Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005); *In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 54 (E.D.N.Y. 2005); Doe v. Liu Qi, 349 F. Supp. 2d 1258, 1320 (N.D. Cal. 2004); Doe v. Saravia, 348 F. Supp. 2d 1112, 1144 (E.D. Cal. 2004).

[74] *See* Mujica v. Occidental Petro. Corp., 381 F. Supp. 2d 1164, 1177 n.12 (C.D. Cal. 2005); *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 547–48 (S.D.N.Y. 2004).

[75] *See, e.g.*, *Mujica*, 381 F. Supp. 2d at 1180; Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church II*), 374 F. Supp. 2d 331, 338 n.11 (S.D.N.Y. 2005); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 255 (D.N.J. 1999); *see also* Doe v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *vacated*, 403 F.3d 708 (9th Cir. 2005). The court in *Unocal* stated, "We however agree . . .

Looking to Nuremberg, courts have found that norms such as crimes against humanity (including genocide), war crimes, and forced labor are norms that give rise to such claims.[76]

1. Crimes Against Humanity

The origins of crimes against humanity as violations of international law lie in the Nuremberg trials, and those origins have led directly to cognizable claims under the ATS. As *Sarei v. Rio Tinto PLC* noted in 2002, "'[a]fter World War II, the United States Army prosecuted war crimes in accordance with established principles of international law. Because of the atrocities that had occurred in the concentration camps, a new category, "crimes against humanity," was added to international law.'"[77] Moreover, courts adjudicating ATS cases have adopted Nuremberg's description of what constitute crimes against humanity: "murder, extermination, enslavement, . . . or persecutions on political, racial or religious grounds . . . of entire racial, ethnic, national or religious groups."[78]

[that] we should apply international law as developed in the decisions by international criminal tribunals such as the Nuremberg Military Tribunals for the applicable substantive law." *Unocal*, 395 F.3d at 948. Although the decision was later vacated, its reasoning remains influential. *See infra* note 105.

[76] Courts have often treated genocide as a crime against humanity in their analysis. *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 244 n.18 (2d Cir. 2003); Quinn v. Robinson, 783 F.2d 776, 799–800 (9th Cir. 1986); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1150 (C.D. Cal. 2002), *aff'd in part, vacated in part, and rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn*, 487 F.3d 1193 (9th Cir. 2007). Moreover, although the Nuremberg trials clearly were influential in the codification of genocide as *jus cogens* after World War II, Nuremberg was not as influential in establishing genocide per se as cognizable under the law of nations. There were other sources—before and after Nuremberg—that made violations of this norm clearly actionable, such as the Paris Peace Treaties signed after WWI and the Convention on the Prevention and Punishment of the Crime of Genocide. *See infra* notes 82, 111–12 and accompanying text. Moreover, because the norm against genocide is so well-established as "specific, universal and obligatory," often there is little reason to cite Nuremberg or other precedent as evidence of its jus cogens nature or normative importance. *See infra* note 185. However, it is important to note that one of the earliest and most important cases, and one of many later cases cited for the proposition that genocide is actionable under the ATS, is the 1995 *Kadic* decision, which specifically referred to the aftermath of the atrocities of WWII to demonstrate that genocide is cognizable under the ATS. Kadic v. Karadžić, 70 F.3d 232, 241 (2d Cir. 1995).

[77] *Sarei*, 221 F. Supp. 2d at 1150 (quoting United States v. Schiffer, 831 F. Supp. 1166, 1180 (E.D. Pa. 1993)). In *Sarei*, a group of residents of Bougainville, Papua New Guinea ("PNG"), allege that they and their family members were victims of numerous international law violations (such as war crimes, crimes against humanity, and racial discrimination) by mining company Rio Tinto, with the assistance of the PNG government. *Id.* at 1120.

[78] *Id.* at 1150 (alterations in original) (quoting Quinn v. Robinson, 783 F.2d 776, 800 (9th Cir. 1986)).

In deciding a human rights case brought not under the ATS but under federal question jurisdiction,[79] a 1985 California district court appears to be the first U.S. court to rely on the Nuremberg trials in finding that claims for crimes against humanity are cognizable as violations of customary international law.[80] In *Handel v. Artukovic*, the plaintiffs sought "compensatory and punitive damages against the defendant for his alleged involvement in the deprivations of life and property suffered by the Jews in Yugoslavia during World War II."[81] The court noted that Nuremberg affirmed that crimes against humanity were violations of the law of nations, finding that the concept of "laws of humanity"—which had initially been put forward at the 1919 Paris Commission after World War I—had gained international acceptance by World War II.[82] The court held, "[i]t therefore seems clear that defendant's alleged actions constituted a violation of international law when they were committed."[83]

A few courts in early modern ATS jurisprudence recognized crimes against humanity as cognizable claims without relying specifically on Nuremberg, although Nuremberg was clearly influential in these cases.[84] The first ATS case to specifically rely on the Nuremberg trials in finding that "crimes against humanity" were violations of specific, actionable norms under the ATS was the 2001 case of *Estate of Cabello v. Fernandez-Larios*.[85] In *Cabello*, the court held that crimes against humanity were violations of customary international law, finding that "the ruling of the

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[79] 28 U.S.C. § 1331 (2000). Only non-citizens can bring claims under the ATS. *Id.* § 1350.

[80] *See* Handel v. Artukovic, 601 F. Supp. 1421, 1429 (C.D. Cal. 1985). However, the court dismissed the plaintiffs' claims because 28 U.S.C. section 1331 restricted the court's jurisdiction to claims that "arise under" the "laws of the United States." *Id.* at 1426–27.

[81] *Id.* at 1424.

[82] *Id.* at 1429.

[83] *Id.*

[84] *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232, 236, 243 (2d Cir. 1995) (distinguishing crimes against humanity from war crimes, recognizing that "[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II"). For whatever reason, the court decided to refer to crimes against humanity collectively with "war crimes," and as discussed in the next section, relied heavily on Nuremberg. Doe v. Karadžić, 866 F. Supp. 734, 736 n.4 (S.D.N.Y. 1994). The initial *Doe v. Unocal* case also raised claims of crimes against humanity, and although the court recognized the claim, it did not analyze it. Doe v. Unocal Corp., 963 F. Supp. 880, 883 (C.D. Cal. 1997). Similarly, the plaintiffs brought claims for, *inter alia*, crimes against humanity in *Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 5 (D.D.C. 1998). The court recognized the claim, along with others, by relying on the Geneva Conventions. *Id.* at 8.

[85] *See* Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1360 (S.D. Fla. 2001). In *Cabello*, a Chilean prisoner's estate brought an ATS action against a former Chilean soldier for extrajudicial killing, torture, crimes against humanity, intentional infliction of emotional distress, and other claims. *Id.* at 1350–51.

Nuremberg Tribunal memorialized the recognition of 'crimes against humanity' as customary international law."[86]

Between 2002 and 2004, before *Sosa* was issued, four other cases—three in federal district courts and one in the Second Circuit Court of Appeals—relied on the Nuremberg trials in upholding ATS claims for crimes against humanity, finding that the norm was specific and universal enough to meet the ATS standard.[87]

Since *Sosa*, courts have continued to rely directly on the Nuremberg trials as evidence that crimes against humanity are violations of specific and universal customary international law norms—reliance which will take on even more importance in light of the post-*Sosa* increased scrutiny over which claims give rise to ATS claims.

Doe v. Saravia was the first decision after *Sosa* that addressed whether crimes against humanity are violations of norms that are "specific, universal and obligatory," and it continued to rely heavily on the Nuremberg trials in finding that they are.[88] The court noted that "[t]he prohibition against crimes against humanity was first" codified in the IMT Charter,[89] and stated, "In its final ruling on the criminal liability of Nazi leaders, the International Military Tribunal acknowledged the status of crimes against humanity under international law and convicted several defendants of this crime."[90] Like other cases mentioned, the court also adopted the

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[86] *Id.* at 1360; Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (citing Robert H. Jackson, Final Report to the President on the Nuremberg Trials (Oct. 7, 1946), *in* ROBERT H. JACKSON, THE NÜRNBERG CASE xiv–xv (1971)); *see also* IMT Charter, *supra* note 8, at art. 6(c) (defining and authorizing punishment for crimes against humanity).

[87] Flores v. S. Peru Copper Corp., 414 F.3d 233, 244 n.18 (2d Cir. 2003) ("[C]rimes against humanity . . . have been enforceable against individuals since World War II."); Villeda Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1299 (S.D. Fla. 2003) ("Crimes against humanity have been recognized as violation of customary international law since the Nuremberg Trials in 1944."), *aff'd in part, vacated in part sub nom.* Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242 (11th Cir. 2005); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1150 (C.D. Cal. 2002) ("It [is] well-settled that a party who commits a crime against humanity violates international law and may be held liable under the ATCA."), *aff'd in part, vacated in part, and rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn*, 487 F.3d 1193 (9th Cir. 2007); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1352 (N.D. Ga. 2002) ("Crimes against humanity have been recognized as a violation of customary international law since the Nuremberg trials and therefore are actionable under the ATCA.").

[88] Doe v. Saravia, 348 F. Supp. 2d 1112, 1144, 1154–55 (E.D. Cal. 2004). In *Saravia*, the plaintiff brought an action under the ATS and the Torture Victim Protection Act (TVPA) against a former chief of security for the organizer of El Salvadoran paramilitary groups, alleging that the former security chief was complicit in the 1980 assassination of an El Salvadoran archbishop. *Id.* at 1118.

[89] *Id.* at 1154.

[90] *Id.* at 1155 (citing *The Nurnberg Trial*, 6 F.R.D. 69 (1946)). The court also noted that

definition for crimes against humanity as set forth by the Nuremberg Charter.[91]

Another recent and important post-*Sosa* decision finding that there is a customary international law norm against crimes against humanity by relying on the Nuremberg trials, was the 2005 decision in *Mujica v. Occidental Petroleum Corp.*[92] Importantly, the *Mujica* court rejected the defendant's argument that Nuremberg jurisprudence serves only as "aspirational" for ATS purposes, finding it could rely on Nuremberg as a source of customary international law.[93] As the court stated:

> The Nuremberg trials imposed enforceable obligations. . . . Of the twenty-two defendants prosecuted in the "Major War Criminals" trial, twelve were sentenced to death, seven received prison sentences, and three were acquitted. War crimes and crimes against humanity were two of the charges brought against these defendants. This type of severe punishment would suggest that the Nuremberg Charter did not merely express an "aspiration."[94]

Demonstrating the critical role Nuremberg plays in ATS litigation in the area of norm-setting, the court noted that in establishing crimes against humanity as actionable norms, "Plaintiffs' best evidence is the Nuremberg Charter's prohibitions against crimes against humanity."[95]

In fact, every court to have considered the issue after *Sosa* has found that crimes against humanity are actionable norms, and all relied on Nuremberg.[96]

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the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") "have affirmed the status of crimes against humanity under international law" that began at Nuremberg. *Id.*

[91] *Id.* at 1156. The *Saravia* court also noted that several other federal courts had accepted the "well-established nature of crimes against humanity and their actionability under the [ATS]," citing the Second Circuit's decision in *Flores*, and the district court decisions in *Aldana*, *Sarei*, and *Cabello*, all noting that crimes against humanity have been recognized and punished since the Nuremberg Tribunal's recognition that such crimes violate customary international law. *Id.* at 1156–57.

[92] 381 F. Supp. 2d 1164, 1179–80 (C.D. Cal. 2005). Columbian citizens brought ATS and TVPA actions against an oil company for injuries and deaths of family members that occurred when the Columbian military bombed their village. *Id.* at 1168–69.

[93] *See id.* at 1179–80. The court also cited to *Flores* for the proposition that "[c]ustomary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II." *Id.* at 1180–81 (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 244 n.18 (2d Cir. 2003)).

[94] *Id.* at 1180 (footnote and internal citations omitted).

[95] *Id.* at 1179.

[96] In addition to *Saravia* and *Mujica*, other cases rely on Nuremberg to establish crimes

2. War Crimes

Courts have also found war crimes to be actionable under the ATS, with nearly all relying on the Nuremberg trials, as well as the Geneva Conventions.

The first case to have addressed the issue in any detail is the 1995 Second Circuit decision in *Kadic v. Karadžić*, which relied specifically on the Nuremberg trials to confirm that war crimes were violations of the law of nations that could give rise to claims under the ATS.[97] In the early 2000s, several courts followed suit, similarly finding that war crimes were actionable under the ATS, with nearly all relying on the Nuremberg trials.[98]

After *Sosa*, courts have continued to find that war crimes are violations of customary international law for which claims can be brought under the ATS, all similarly pointing to Nuremberg. For example, in 2005, the court in *Presbyterian Church II* found that war crimes were cognizable claims under the ATS, stating that the Nuremberg Tribunals "occupy a special role in enunciating the current content of customary international law norms" because they were charged with prosecuting war crimes.[99]

Thus, although not as influential as they were in establishing crimes against humanity as actionable, the Nuremberg trials have been influential in establishing war crimes as cognizable claims under the ATS.

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against humanity as actionable. *E.g.*, Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *2, 6 (N.D. Cal. Aug. 22, 2006) (affirming that crimes against humanity violated customary international law and met the *Sosa* standard for accepted norms); *In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 135 (E.D.N.Y. 2005) ("*The Nuremberg Charter represents the first time that crimes against humanity were established in positive international law.*" (quoting M. Cherif Bassiouni, *Crimes Against Humanity*, *in* CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 107, 107 (Roy Gutman & David Rieff eds., 1999), *available at* http://www.crimesofwar.org/thebook/crimes-against-humanity.html)). "'Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II.'" *Bowoto*, 2006 WL 2455752, at *3 (quoting *Flores*, 414 F.3d at 244 n.18).

[97] Kadic v. Karadžić, 70 F.3d 232, 243 (2d Cir. 1995).

[98] *See, e.g.*, *Flores*, 414 F.3d. at 244 n.18; Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church I*), 244 F. Supp. 2d 289, 315–16 (S.D.N.Y. 2003); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1150 (C.D. Cal. 2002), *aff'd in part, vacated in part, and rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn*, 487 F.3d 1193 (9th Cir. 2007).

[99] Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church II*), 374 F. Supp. 2d 331, 338 & n.11 (S.D.N.Y. 2005); *see also* Sarei v. Rio Tinto PLC, 456 F.3d 1069, 1078 (9th Cir. 2006) (examining the issue post-*Sosa* and affirming the lower court's decision that war crimes violate "specific, universal and obligatory" norms under the ATS, finding that "*Sosa's* gloss on this standard does not undermine the district court's reasoning"), *withdrawn*, 487 F.3d 1193 (9th Cir. 2007).

3. Forced Labor

Courts adjudicating ATS claims involving forced labor have also looked to the Nuremberg trials in finding that forced labor is a violation of the law of nations and, thus, constitutes a cognizable claim under the ATS. Most of the cases arose directly out of forced labor that occurred during World War II, and their holdings have remained important even though most of the cases were ultimately dismissed under the political question doctrine.[100]

The 1999 *Iwanowa* case was the first ATS case to specifically look to Nuremberg in holding that forced labor violated the law of nations, finding that the use of unpaid, forced labor during World War II violated clearly established norms of customary international law.[101] The court stated that "[t]he Nuremberg trials for the first time made explicit and unambiguous what was theretofore, as the tribunal has declared, implicit in International Law, namely, that . . . to exterminate, enslave or deport civilian populations, is an international crime."[102]

Another important case that relied on Nuremberg for the principal that forced labor violated the law of nations was the 2001

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[100] The political question doctrine is a judicial and/or jurisdictional doctrine based on a violation of the constitutional separation of powers of government, wherein a court finds that the issue sought to be adjudicated should be deferred to the legislative or executive branches of government. *See* Alperin v. Vatican Bank, 410 F.3d 532, 544 (9th Cir. 2005) (citing Baker v. Carr, 369 U.S. 186, 210–11 (1962)). Most of the claims arising out of the Holocaust have been dismissed based on this doctrine either because decisions were already made regarding reparations, or because the allied forces had already made decisions about who would be prosecuted for the various crimes committed during the Holocaust. *See, e.g.*, *In re* Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370, 383–84 (D.N.J. 2001) (dismissing an action against a German company and its American subsidiaries for damages resulting from plaintiff's forced labor in construction of a military airbase in Nazi Germany during World War II because of the German Parliament's July 2000 passage of a law creating a foundation to make payments to Nazi-era victims for claims against German industry); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 485 (D.N.J. 1999) (holding that "responsibility for resolving forced labor claims arising out of a war is constitutionally committed to the political branches of government, not the judiciary"); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 279, 282 (D.N.J. 1999) (dismissing class actions brought against German corporations to recover, *inter alia*, compensation for slave labor under the Nazi regime after a thorough analysis of the history of the agreements that followed World War II, finding that "the remedies, if any, lie in German legislation and the bilateral agreements that flowed from the Transition Agreement. . . . [T]he questions whether the reparation agreements made adequate provision for the victims of Nazi oppression and whether Germany has adequately implemented the reparation agreements are political questions which a court must decline to determine").

[101] *Iwanowa*, 67 F. Supp. 2d at 440.

[102] *Id.* (internal quotation marks omitted) (alteration in original) (quoting JACKSON, *supra* note 86, at xiv–xv).

case of *In re World War II Era Japanese Forced Labor Litigation*,[103] which relied on the Nuremberg trials as well as *Iwanowa's* holding in so finding.[104]

Finally, although the case was later vacated for other reasons, in 2003, the Ninth Circuit in *Doe v. Unocal Corp.*,[105] a case involving Unocal's complicity with the Myanmar military in committing human rights violations against villagers while building a pipeline, also affirmed that forced labor was a violation of the law of nations, relying on the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal.[106]

Thus, the Nuremberg trials have been primarily responsible for forced labor being recognized as a cognizable claim under the ATS.

C. Liability of Non-State Actors

One of the Nuremberg trials' most important precedents was that individuals could be held accountable for committing human rights violations.[107] However, another very important precedent from the Nuremberg trials that has tremendously influenced human rights litigation in the United States is that individuals can be held

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[103] 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001), *aff'd*, Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003), *amended and superseded by* 324 F.3d 692 (9th Cir. 2003).

[104] *Id.* at 1179 (citing *Iwanowa*, 67 F. Supp. 2d at 440).

[105] Doe v. Unocal Corp., 395 F.3d 932, 936 (9th Cir. 2002), *reh'g en banc granted by* 395 F.3d 978 (9th Cir. 2003). "Villagers from the Tenasserim region in Myanmar allege[d] that the Defendants directly or indirectly subjected the villagers to forced labor, murder, rape, and torture when the Defendants constructed a gas pipeline through the Tenasserim region." *Id.*

The case has a complicated procedural history. In the first published decision, the district court denied Unocal's motion to dismiss the case. Doe v. Unocal Corp., 963 F. Supp. 880, 897–98 (C.D. Cal. 1997), *aff'd in part and rev'd in part by* 395 F.3d 932 (9th Cir. 2002). A second district court judge later granted Unocal's motion for summary judgment. Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1311 (C.D. Cal. 2000), *aff'd in part and rev'd in part by* 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted by* 395 F.3d 978 (9th Cir. 2003), *vacated*, 403 F.3d 708 (9th Cir. 2005). The Ninth Circuit, in the decision discussed above, overturned this case and later decided to rehear it *en banc*, stating that the panel opinion could not be cited as precedent. Doe v. Unocal Corp., 395 F.3d 978, 979 (9th Cir. 2003). Before the Ninth Circuit was able to issue a new opinion, the case was settled. *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6. After the parties settled, the court dismissed the appeal and, by agreement of the parties, also vacated the district court's summary judgment dismissal. Doe v. Unocal Corp., 403 F.3d 708, 708 (9th Cir. 2005). That leaves the first decision denying Unocal's motion to dismiss the only decision considered "good law."

[106] *Unocal Corp.*, 395 F.3d at 945, 947. In addition, the 2000 *Unocal* district court decision, which was also later vacated, *Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005), acknowledged that slave labor is "well accepted" to be a crime against humanity, and relied quite heavily on the Nuremberg precedents in so doing. *Unocal Corp.*, 110 F. Supp. 2d at 1304, 1309–10.

[107] STEINER & ALSTON, *supra* note 24, at 99, 100.

responsible for human rights violations even if they are not government officials, or state actors. For example, WWII military tribunals convicted at least forty-three private German citizens for committing war crimes, even though the tribunals specifically held that their actions were independent of those of their governments and, thus, did not constitute "state action."[108] Most of those cases arose out of the U.S. and British Military Tribunal's prosecutions of the German industrialists who either directly engaged in egregious human rights abuses, such as slave labor, or who aided and abetted the German government's genocide and other abuses.[109]

The military tribunals explicitly rejected the defendants' argument that as private individuals they could not be indicted for war crimes or crimes against humanity.[110] As one commentator has noted, the Nuremberg Tribunal "squarely grasped the reality that individuals and other nonstate actors are capable of violating international law."[111] This was later recognized by the Genocide Convention,[112] and more recently by the ad hoc international

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[108] *See infra* note 109.

[109] *See, e.g.*, United States v. Krauch (*The I.G. Farben Case*) (Dec. 28, 1948), *in* 8 TRIALS OF WAR CRIMINALS, *supra* note 12, at 309 (convicting members of I.G. Farben, a German chemical and pharmaceutical company, for spoliation and using slave labor, but acquitting defendants of supplying poison gas to the Nazis because they did not have knowledge as to how the gas would be used); United States v. Krupp (*The Krupp Case*) (July 31, 1948), *in* 9 TRIALS OF WAR CRIMINALS, *supra* note 12, at 467, 667 (convicting defendants for war crimes due to exploitation and abuse of slave labor); United States v. Flick (*The Flick Case*) (Dec. 22, 1947), *in* 6 TRIALS OF WAR CRIMINALS, *supra* note 12, at 681, 852, 1186 (convicting a civilian steel industrialist for aiding the SS's criminal activities by contributing money to the Nazi government with knowledge of its criminal activities, and for engaging in slave labor and spoliation); *In re* Tesch (*The Zyklon B Case*), 13 Ann. Dig. 250 (Brit. Mil. Ct. 1946), *reprinted in* 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra* note 11, at 101 (convicting Bruno Tesch, a distributor of Zyklon B, for providing the poison gas to concentration camps knowing that it would be used to kill civilians).

[110] *See The Flick Case*, *in* 6 TRIALS OF WAR CRIMINALS, *supra* note 12, at 1192 (as quoted in Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 120 n.119 (2002) [hereinafter Ramasastry, *Corporate Complicity*]); *see also* Kevin M. McDonald, *Corporate Civil Liability Under the U.S. Alien Tort Claims Act for Violations of Customary International Law During the Third Reich*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 167, 176 n.49 ("It can no longer be questioned that the criminal sanctions of [customary] international law are applicable to private individuals." (alteration in original) (internal quotation marks omitted) (quoting *The I.G. Farben Case*, *in* 8 TRIALS OF WAR CRIMINALS, *supra* note 12, at 1136)); Ole Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order*, 10 EURO. J. INT'L L. 763, 767 (1999) ("'The laws and customs of war are binding no less upon private individuals than upon government officials and military personnel.'" (quoting *The Krupp Case*, *in* 9 TRIALS OF WAR CRIMINALS, *supra* note 12, at 1375)), *available at* http://www.ejil.org/journal/Vol10/No4/100763.pdf.

[111] RANDALL, *supra* note 8, at 48.

[112] Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9,

criminal tribunals for the former Yugoslavia and Rwanda, and the International Criminal Court.[113]

This precedent has proved to be critical in ATS litigation against non-state actors, and will continue to be so because the U.S. Supreme Court has not yet decided whether private, non-state actors can be liable under the ATS, and the circuit courts are split over this issue.[114] For example, in the case of *Tel-Oren*, the U.S. Court of Appeals for the District of Columbia Circuit opined that only state actors could be held liable for violations of international law.[115] In so holding, although the court looked to Nuremberg, it found that the concept of "individual liability" used by the IMT for prosecuting war crimes referred only "to individuals acting under color of state law."[116] Notably, however, the court did not discuss the industrialist cases.

In 1995, the Second Circuit, in the ground-breaking case of *Kadic v. Karadžić*,[117] found that non-state actors *could* be held liable for certain violations of the law of nations, such as genocide, war crimes, and crimes against humanity.[118] The *Kadic* court specifically relied on the Nuremberg trials and their findings that individuals who were non-state actors could be held liable for these

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1948, 102 Stat. 3045, 78 U.N.T.S. 277, *available at* http://www.unhchr.ch/html/menu3/b/p_genoci.htm ("Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.").

[113] *E.g.*, Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90, *available at* http://www.un.org/law/icc/statute/99_corr/cstatute.htm.

[114] Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) (noting that there has been disagreement as to whether there is a sufficient international consensus that "international law extends the scope of liability for a violation of a given norm to . . . private actor[s]," but declining to resolve the issue).

[115] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792, 793 (D.C. Cir. 1984) (Edwards, J., concurring). The specific holding was arguably limited to torture, but the court's language appears to cover all acts by a private individual. *Id.* at 794. The general consensus is that for certain violations, such as torture and extrajudicial killing, state action is required for there to be individual responsibility. Kadic v. Karadžić, 70 F.3d 232, 243 (2d Cir. 1995).

[116] *Tel-Oren*, 726 F.2d at 793 (Edwards, J., concurring). The court relied on Article 8 of the IMT Charter, which reads, "The fact that the defendant acts *pursuant to orders of his Government or a superior* shall not free him from responsibility, but may be considered in mitigation of punishment." *Id.* at 793 n.23 (emphasis added) (internal quotation marks omitted).

[117] In *Kadic*, victims of the conflict in Bosnia-Herzegovina brought claims under the ATS against the "President of the self-proclaimed Bosnian-Serb republic of 'Srpska'" for war crimes committed during the conflict. *Kadic*, 70 F.3d at 236–37.

[118] *Id.* at 240–43. The court found that state action was required for other acts, such as torture and extrajudicial killing, unless such acts were "perpetrated in the course of genocide or war crimes." *Id.* at 243.

violations.[119] With regard to genocide, the court relied on, *inter alia,* Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal, noting that it provides for "punishing 'persecutions on political, racial, or religious grounds,' regardless of whether the offenders acted 'as individuals or as members of organizations.'"[120] With regard to individual liability for war crimes, the court noted that "[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II,"[121] and that such liability "remains today an important aspect of international law."[122]

Eight years later, in *Flores v. Southern Peru Copper Corp.*,[123] the Second Circuit re-affirmed the liability of non-state actors for crimes against humanity, genocide, and war crimes, citing *Kadic*, and once again relying on Nuremberg precedents.[124] Likewise, in the 2006 case of *Bowoto v. Chevron Corp.*, a California district court similarly found that liability exists for non-state actors—in this case, a corporation—for acts such as crimes against humanity, genocide, and war crimes, relying on *Kadic* and *Flores*.[125]

Given that the U.S. Supreme Court has not yet settled the issue of whether private actors can be held liable under the ATS, these decisions and their reliance on Nuremberg have large implications not only for individuals acting outside of state action but also, as described below, for the liability of corporations which either directly engage in, or are complicit in, human rights violations.

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[119] *Id.* at 240–43.

[120] *Id.* at 241 (internal quotation marks omitted) (quoting *In re* Extradition of Demjanjuk, 612 F. Supp. 544, 556 n.11 (N.D. Ohio 1985)).

[121] *Id.* at 243 (citing Telford Taylor, *The Nuremberg War Crimes Trials*, 27 INT'L CONCILIATION 243, 304 (1949)).

[122] *Id.*

[123] 414 F.3d 233, 236–37 (2d Cir. 2003) (involving claims under the ATS against an American mining company, whose pollution from a Peruvian operation had caused severe lung disease).

[124] *Id.* at 244 & n.18. Other courts have also cited to *Kadic* in affirming that war crimes and crimes against humanity do not require state action. *See, e.g.*, Bigio v. Coca-Cola Co., 239 F.3d 440, 444, 447–48 (2d Cir. 2001) (affirming that some violations are actionable when committed by a non-state actor, but ultimately finding that the defendant had not committed such a violation), *rev'd*, 448 F.3d 176 (2d Cir. 2006); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1144 n.122 (C.D. Cal. 2002) (quoting *Bigio*, 239 F.3d at 448), *aff'd in part, vacated in part, and rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *withdrawn*, 487 F.3d 1193 (9th Cir. 2007).

[125] Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *2–3 (N.D. Cal. Aug. 22, 2006) (citing *Kadic*, 70 F.3d at 236, 241–44, and *Flores*, 414 F.3d at 244 n.18). In *Bowoto*, plaintiffs sued Chevron for its complicity with the Nigerian military and police force in committing murder and other human rights violations while protecting its oil fields. *Id.* at *1.

D. Corporate Liability

In the mid-1990s, especially after the *Kadic* decision held that private individuals could be liable for certain human rights violations, the number of lawsuits brought against corporations increased[126]—a trend that has continued over the last decade. However, like the issue of private individual liability, whether corporations can be liable under the ATS remains an open question at the U.S. Supreme Court, and some scholars also believe such liability is unclear.[127] Moreover, corporate defendants are increasingly arguing that they are not bound by international law norms.[128]

Although the case was ultimately dismissed on political question grounds, the decision that first addressed specifically whether corporations could be held liable for violations of international law under the ATS was the 1999 case of *Iwanowa v. Ford Motor Co.*[129] *Iwanowa* arose out of forced labor imposed during World War II by a German manufacturer of motor vehicles and its American parent company.[130] The district court rejected outright the defendant's claim that private corporations were not bound by international law norms.[131] Although the court did not directly cite the Nuremberg trials, it relied on *Kadic* for the proposition that private actors could be held liable for certain violations of human rights, which, as

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[126] As early as 1988, however, some U.S. district courts began assuming, without analysis, that corporations could be liable under the ATS. *See, e.g.*, Carmichael v. United Techs. Corp., 835 F.2d 109, 113–14 (5th Cir. 1988); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 273 (D.N.J. 1999) (noting that U. S. courts have applied "customary international law" in analyzing claims of "torture or other egregious conduct" (citing *Kadic*, 70 F.3d at 240)); Bigio v. Coca-Cola Co., No. 97 Civ. 2858 (JSM), 1998 WL 293990, at *2 (S.D.N.Y. June 5, 1998), *rev'd on other grounds*, 239 F.3d 440 (2d Cir. 2000); Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 348–49 (C.D. Cal. 1997); Doe v. Unocal Corp., 963 F. Supp. 880, 892 (C.D. Cal. 1997).

[127] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004); *see also* RATNER & ABRAMS, *supra* note 30, at 16 ("It remains unclear . . . whether international law . . . imposes criminal responsibility on groups and organizations.").

[128] *See, e.g.*, *In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 54 (E.D.N.Y. 2005) ("Defendants argue that corporations cannot be held liable under international law. There is substantial support for this position."); Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church I*), 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003) ("Talisman contends that . . . corporations are legally incapable of violating the laws of nations."); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 443 (D.N.J. 1999) ("Defendants contend that the Complaint does not allege violations of international law because such norms bind only states . . . , not private corporations.").

[129] 67 F. Supp. 2d at 445, 485.

[130] *Id.* at 431.

[131] *Id.* at 443–45.

described above, had relied heavily on the Nuremberg trials in reaching this conclusion.[132] The court then took this holding to its logical conclusion and found that corporations could be liable under the ATS.[133]

In 2003, courts began citing the industrialist cases to support their decisions that corporations are indeed bound by international law and, thus, can be liable for human rights violations.[134] This reliance is likely in response to corporations' continual and growing arguments that they are not bound by international law, emboldened by the fact that the issue is still unresolved at the highest level.

As discussed above, the Nuremberg trials clearly established that private individuals could be held liable for human rights violations.[135] Corporations, however, were not prosecuted at Nuremberg. As the tribunal stated in *The I.G. Farben Case*, "the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings."[136]

Although these courts concede that corporations were not prosecuted in the Nuremberg trials, the courts looked beyond this, noting that the tribunals spoke in terms of *corporate* actions and liability during adjudication of the industrialist cases.[137] The tribunals also focused on the nature of the corporations and their role in perpetuating the violations.[138] This, in combination with the precedent of private individual liability, has provided the jurisprudential backbone for these courts' decisions regarding corporate accountability under the ATS.

For example, in the 2003 *Presbyterian Church I* case, the court rejected an argument by Talisman that corporations are "legally incapable of violating the law of nations," by directly relying on the Nuremberg trials,[139] and stating that "[t]he concept of corporate

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[132] *Id.* at 443–44, 445; *see supra* text accompanying notes 117–22.

[133] *See Iwanowa*, 67 F. Supp. 2d at 445.

[134] *See In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 57–58 (E.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church I*), 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003).

[135] *See supra* Part II.C.

[136] *See* United States v. Krauch (*The I.G. Farben Case*) (Dec. 28, 1948), *in* 8 TRIALS OF WAR CRIMINALS, *supra* note 12, at 1153.

[137] *Agent Orange*, 373 F. Supp. 2d at 57; *Presbyterian Church I*, 244 F. Supp. 2d at 315–16.

[138] *Agent Orange*, 373 F. Supp. 2d at 57; *Presbyterian Church I*, 244 F. Supp. 2d at 315–16.

[139] *Presbyterian Church I*, 244 F. Supp. 2d at 315–16. Sudanese residents alleged that defendants collaborated in ethnic cleansing of non-Muslim Africans around oil concessions.

liability for *jus cogens* violations has its roots in the trials of German war criminals after World War II."[140] The court reviewed the industrialist cases in particular, noting that although Talisman correctly pointed out that corporate entities were not put on trial, the tribunals consistently spoke in terms of *corporate* liability—not just individual liability.[141] The court noted, for example, that the tribunal in *The I.G. Farben Case*—which involved the actions of the Farben Corporation—discussed the charges "concerning *Farben's* . . . activities[,] . . . offenses against property . . . *committed by Farben*, and . . . [t]he *action of Farben*."[142] As the court noted, "[t]he language of the decision makes it clear that the court considered that the corporation *qua* corporation had violated international law."[143]

The court also reviewed *The Krupp Case*, finding that language used by the tribunal, such as the tractor factory's "detention by the *Krupp firm* constitute[s] a violation of Article 43 of the Hague Regulations [. . . and] the *Krupp firm*, through defendants . . . participated in these violations,"[144] "makes it clear that while individuals were nominally on trial, the Krupp company itself, acting through its employees, violated international law."[145] The court noted that the tribunals' decisions are significant both because they "constitute[] a basis for finding corporate liability for violations of international law, [and] because the language ascribes to the corporations involved the necessary *mens rea* for the commission of war crimes and crimes against humanity."[146]

In 2005, the district court in *In re Agent Orange* analyzed the industrialist cases in even more detail, relying on them to similarly find that corporations could be civilly liable for violating international law.[147] The court's detailed analysis of the

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Id. at 296.

[140] *Id.* at 315.

[141] *Id.* (emphasis added).

[142] *Id.* at 315–16 (first emphasis added) (quoting Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 477 (2001)).

[143] *Id.* at 316.

[144] *Id.* (emphasis added) (second alteration in original) (quoting Ratner, *supra* note 142, at 478 n.134).

[145] *Id.*

[146] *Id.* The district court in *Presbyterian Church I* issued another decision in 2005, wherein it reaffirmed its 2003 decision regarding corporate liability, citing, *inter alia*, the IMT decisions from Nuremberg. Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church II*), 374 F. Supp. 2d 331, 333–34 (S.D.N.Y. 2005).

[147] *In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 56–58 (E.D.N.Y. 2005). In the case, several Vietnamese nations sued the manufacturers and

Nuremberg trials was a response not only to the defendant's argument that it was not bound by international law, but also to an affidavit submitted by an international law expert for the defendant, arguing that "'[i]nternational law does not, in the context of international criminal law or elsewhere, impose obligations or liability on juridical actors or artificial persons such as corporations.'"[148]

In its analysis, the court acknowledged that "[i]t is apparently true that the international criminal tribunals beginning with Nuremberg have not provided for corporate criminal responsibility."[149] However, as in *Presbyterian Church*, the court noted that in the Nuremberg trials—especially in the proceedings against Krupp and other German corporate executives—the prosecutors recognized "that it was the corporations through which the individuals acted."[150] The court also noted "that Telford Taylor in his masterful text, *The Anatomy of the Nuremberg Trials*, heads chapter 18 'The Indicted *Organizations*,' which describes the German corporate organizations that were essential to [the] execution of [the crimes]."[151]

The court further opined that "[l]imiting civil liability to individuals while exonerating the corporation directing the individual's action . . . makes little sense in today's world," agreeing with the *amicus* that the defendants failed to provide any policy reasons why corporations should not be held civilly liable for certain violations of international law.[152]

Also in 2005, the district court in *Presbyterian Church I* and *II* revisited the issue for a third time in *Presbyterian Church III*, relying on the *Agent Orange* court's in-depth analysis of the Nuremberg trials in reaffirming its earlier opinions on corporate liability, stating that the *Agent Orange* court "carefully treated the defendants' objections to corporate liability before decisively rejecting them, surveying the Nuremberg Trials."[153]

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distributors of Agent Orange and other herbicide used during the Vietnam War, arguing that the use of the chemicals was in violation of the law of nations. *Id.* at 15. The case was ultimately dismissed, however, on the grounds that the use of the chemicals as a defoliant was not a violation of customary international law at the time. *Id.* at 145.

148 *Id.* at 55 (alteration in original) (quoting Decl. of Kenneth Howard Anderson, Jr. ¶ 89, *Agent Orange*, 373 F. Supp. 2d 7 (Nos. MDL 381, 04-CV-400)).

149 *Id.* (citing Decl. of Kenneth Howard Anderson, Jr., *supra* note 148, ¶¶ 91–92).

150 *Id.* at 57.

151 *Id.* at 57–58 (citing TAYLOR, *supra* note 28, at 501).

152 *Id.* at 58–59.

153 Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church III*), No.

In the 2006 *Bowoto* case, the district court similarly rejected Chevron's argument that corporations could not be held liable for human rights violations under international law.[154] In so holding, the court cited cases that specifically relied upon the Nuremberg precedents—such as *Agent Orange* and the *Presbyterian Church* cases—stating that it "agrees with these decisions, and therefore holds that defendants may be held liable for the violation of any international law norm that is binding on private entities."[155]

Thus, a review of these cases demonstrates the degree to which courts are relying on the Nuremberg industrialist trials to support corporate liability. In fact, the industrialist trials have been the only precedent of any significance to which these courts have cited. Given that the issue of corporate liability is still undecided by the U.S. Supreme Court, the importance of the Nuremberg industrialist trials cannot be overstated and will likely prove critical when the U.S. Supreme Court ultimately decides the issue.

E. Complicit Liability

Another area in which the Nuremberg trials have greatly influenced the development of ATS jurisprudence is in the recognition and development of standards for complicit liability for human rights violations, such as aiding and abetting. As one notable plaintiffs' human rights litigator stated recently, "One of the main theories . . . in most of the corporate cases under the [ATS], is aiding and abetting[,] . . . . [a] standard [derived] directly from Nuremberg."[156]

The U.S. and British prosecution of the German industrialists in particular relied on aiding and abetting theories in finding the industrialists guilty of egregious human rights violations during WWII.[157] These acts of aiding and abetting, as discussed in more detail *infra* in Part II.E.1, included knowingly providing to the German government the poison gas used against the Jews, as well as providing money and other forms of support.[158]

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01 Civ. 9882 (DLC), 2005 WL 2082847, at *4 (S.D.N.Y. Aug. 30, 2005).

[154] Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *9 (N.D. Cal. Aug. 22, 2006).

[155] *Id.*

[156] Richard Herz, *Text of Remarks: Corporate Alien Tort Liability and the Legacy of Nuremberg*, 10 GONZ. J. INT'L L. 76, 77 (2006), *available at* http://www.gonzagajil.org/content/view/139/26.

[157] *See supra* notes 8–13, 109 and accompanying text.

[158] *See infra* Part II.E.1; *see also supra* notes 8–13, 109 and accompanying text.

The first significant case to adjudicate whether aiding and abetting claims could be brought under the ATS was the 2000 district court case of *Bodner v. Banque Paribas*, which relied directly on the Nuremberg trials in finding that such claims could be brought.[159] In *Bodner*, which like *Iwanowa* arose out of the Holocaust, the plaintiffs sued banks they claimed were complicit with the Vichy and Nazi regimes in plundering their private property.[160] With regard to the aiding and abetting claims, the plaintiffs referred to the work of the Nuremberg tribunals as evidence that the content of customary international law included aiding and abetting.[161] The court agreed, finding that if the plaintiffs were able to substantiate their aiding and abetting claims at trial, they "clearly will have demonstrated violations of contemporary international law and ample basis for federal subject matter jurisdiction pursuant to the ATCA."[162]

Nuremberg's influence on complicit liability increased in 2003, when the court in *Presbyterian Church I* found that the industrialist cases supported aiding and abetting liability under the ATS, and relied on the cases in determining the standard for such liability.[163] The court cited the Statute of the International Military Tribunal and the Allied Control Council Law No. 10 in finding that theories of complicity with regard to war crimes and genocide are well-developed in international law and, thus, present a cognizable claim under the ATS.[164] The court found that *corporate* liability for complicity logically follows from this, noting that in *United Kingdom v. Tesch*, the supplier of Zyklon B, the poison used for mass executions at many German concentration camps, was condemned by the British military court for violations of "the laws and usages of war."[165]

In addition, the court looked to the ICTY and its reliance on *The*

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159 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000).

160 *Id.* at 122. In addition to conspiracy and aiding and abetting of certain crimes, the plaintiffs also alleged direct participation. *Id.* This discussion centers primarily on the complicity claims.

161 *Id.* at 128 ("Plaintiffs refer to United Nations resolutions and the work of the Nuremberg tribunals as further evidence of the content of customary international law and the Court finds that such analogies have merit.").

162 *Id.*

163 Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church I*), 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003).

164 *Id.*

165 *See id.* (citing *In re* Tesch (*The Zyklon B Case*), 13 Ann. Dig. 250 (Brit. Mil. Ct. 1946), *reprinted in* 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS, *supra* note 11, at 93).

Zyklon B Case in ruling that the standard for aiding and abetting liability is knowing, substantial practical assistance.[166] The court further cited *The Zyklon B Case* in finding that providing the "means to carry out crimes constitutes substantial assistance, even if the crimes could have been carried out some other way."[167] The court also ruled that there must be "some knowledge that the assistance will facilitate the crime," noting that the United States War Crimes Tribunal acquitted several businessmen who ran I.G. Farben, accepting their argument that they believed Zyklon B would be used as a delousing agent.[168]

Although the decision was later withdrawn,[169] the 2002 Ninth Circuit *Unocal* decision's reasoning has continued to be influential in the area of aiding and abetting liability under the ATS. In 2000, the district court had relied on the Nuremberg industrialist cases in finding that a corporation could be liable for complicity in human rights violations,[170] but only where there was "active participation" in the underlying violations.[171] The district court dismissed the case, finding that the plaintiffs did not allege the facts necessary for such liability.[172] The Ninth Circuit, although it agreed with the district court that aiding and abetting was a cognizable claim under the ATS based on the Nuremberg trials, reversed the district court, finding that the court incorrectly interpreted the industrialist cases' discussion of "active participation," which the Ninth Circuit found went solely to overcoming the industrialist defendants' necessity defense and was not required to establish complicit liability.[173]

In considering what the standard should be, the Ninth Circuit agreed with the district court that it should apply the substance of international law "as developed in the decisions by international criminal tribunals such as the Nuremberg Military Tribunals," rather than domestic law.[174] Then, like the district court in

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[166] *See id.* at 323, 324.

[167] *Id.* at 324 (citing Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 688 (May 7, 1997) ("For example, if there had been no poison gas or gas chambers in the *Zyklon B* cases, mass exterminations would not have been carried out in the same manner."), *available at* http://www.un.org/icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf).

[168] *Id.* at 324.

[169] Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003), *amended by* 403 F.3d 708 (9th Cir. 2003).

[170] Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1308–10 (C.D. Cal. 2000).

[171] *Id.* at 1310.

[172] *Id.*

[173] *Doe*, 395 F.3d at 947–48 & n.21, 953 (discussing *The Krupp Case* in particular).

[174] *Id.* at 948.

Presbyterian Church I, the court adopted the standard of "knowing practical assistance . . . which has a substantial effect on the perpetration of the crime" for imposing liability in aiding and abetting,[175] noting that the standard "goes back at least to the Nuremberg trials."[176] The court noted that both the actus reus standard for aiding and abetting (substantial and practical assistance) and the mens rea standard (knowledge) it adopted were based on a thorough analysis of international case law consisting "chiefly of decisions by American and British military courts and tribunals dealing with Nazi war crimes, as well as German courts in the British and French occupied zones dealing with such crimes in the aftermath of the Second World War."[177]

Although the decision was later withdrawn, the *Unocal* court's application of international law derived from the Nuremberg trials in adjudicating claims for aiding and abetting has been highly influential in subsequent cases.[178]

1. The Importance of Nuremberg Post-*Sosa*

Nuremberg's influence with regard to aiding and abetting liability has taken on new significance after the 2004 *Sosa* decision due to the Court's discussion regarding the scrutiny to be given to tort claims in violation of the law of nations, and the uncertainty of whether such scrutiny applies to theories of liability, such as aiding and abetting. As discussed earlier, although most courts agree that the *Sosa* test is functionally the same as the "specific, universal and obligatory" test, most courts used the latter, while other courts have held that the standard is higher.[179] Moreover, the Supreme Court did not decide whether this test should be applied to theories of liability, such as aiding or abetting, or whether it should apply only to underlying norms.[180] The Ninth Circuit recently found that the *Sosa* test does not apply to theories of vicarious liability, including

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[175] *Id.* at 950, 951 (citing Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 192–98 (Dec. 10, 1998), *available at* http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf).

[176] *Id.* at 949.

[177] *Id.* at 950–51 & nn.26–27.

[178] *E.g.*, *In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 83 (E.D.N.Y. 2005) ("That the opinion was later vacated does not deprive its reasoning of persuasive power.").

[179] *See supra* notes 73–74, 88 and accompanying text.

[180] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

aiding and abetting, but that federal common law should apply.[181]

However, shortly after *Sosa*, the district court in *In re South African Apartheid Litigation*[182] applied *Sosa's* test (which it found to be more onerous) to claims of aiding and abetting, finding that such claims were not cognizable under the ATS in light of *Sosa*.[183] In so finding, the court rejected the notion that the Nuremberg and other international criminal tribunals are applicable precedents, further finding that "[n]one of these sources establishes a clearly-defined norm for [ATS] purposes."[184]

Since *Sosa*, every other court to consider whether aiding and abetting is customary international law, thus giving rise to a claim under the ATS, has found in the affirmative—with nearly all pointing exclusively to the Nuremberg trials as precedent.[185]

As discussed earlier, the 2005 *Agent Orange* decision is perhaps the most extensive review of the Nuremberg trials in ATS litigation. In that case, the court relied on the industrialist cases in finding that aiding and abetting liability exists when corporations assist states that engage in human rights abuses, holding that the prohibition against aiding and abetting war crimes and other human rights violations is recognized as customary international law.[186] In fact, the court referred to the theories under which plaintiffs sought to hold corporations liable (which were primarily aiding and abetting theories) as "Nuremberg theories."[187]

With regard to the standard for aiding and abetting, the court agreed that it should be "'practical assistance, encouragement, or moral support,'" relying on *Presbyterian Church I*, which relied in

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[181] *See* Sarei v. Rio Tinto PLC, 456 F.3d 1069, 1078 (9th Cir. 2006), *withdrawn*, 487 F.3d 1193 (9th Cir. 2007). The district court in *Corrie v. Caterpillar* also applied the *Sosa* test to the aiding and abetting claim, but that decision has been effectively overruled by the *Sarei* decision. Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005).

[182] 346 F. Supp. 2d 538 (S.D.N.Y. 2004). Plaintiffs brought claims against numerous corporate defendants for their complicity in the South African government's apartheid policy. *Id.* at 542.

[183] *Id.* at 547, 549–50.

[184] *Id.* at 549–50.

[185] Reflecting the unsettled issue of whether the *Sosa* test should apply to theories of liability, discussed *supra* at text accompanying notes 73–76, the Ninth Circuit in *Sarei* found that courts should determine liability by drawing on federal common law where well-settled theories of vicarious liability exist. *Sarei*, 456 F.3d at 1078. In so doing, the court found that "claims for *vicarious liability* for violations of jus cogens norms are actionable under the [ATS]." *Id.* This reasoning alleviates the need to look to international law to determine whether such types of liability are cognizable.

[186] *See In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 53, 57–59 (E.D.N.Y. 2005).

[187] *Id.* at 52.

turn on the Nuremberg precedents.[188] In addition, the court analyzed *The Zyklon B Case* in detail and relied on it to craft the elements required for plaintiffs to prevail on an aiding and abetting claim under the ATS.[189]

The court also relied on another significant contribution from the Nuremberg trials in rejecting a proffered defense—that of a command by a higher authority,[190] noting that the defense of "the government told me to do it" was not accepted under international law.[191] The court stated, "The proposition that commands from the state and higher authorities within the state can not justify a person's commission of, or knowing participation in, an international crime was repeatedly made before the Nuremberg Military Tribunals."[192] The court also cited to *The Flick Case*,[193] which involved slave labor, noting that "[t]he fact that Flick, one of the key defendants, was the head of a huge privately-operated corporate consortium responding to Nazi government requests was no defense."[194]

Recently, in the 2006 *Bowoto* decision, the court confirmed aiding and abetting liability against a corporation as a cognizable claim under the ATS, relying on the *Presbyterian Church* decisions as well as *Bodner*.[195]

Thus, one can see that Nuremberg has been highly influential in courts' determinations that those who are complicit in human rights abuses, including corporations, can be liable under the ATS, even if

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[188] *Id.* at 53, 54 (quoting Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002) (quoting Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 235 (Dec. 10, 1998), *available at* http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf)).

[189] *Id.* at 91–94. The court said that plaintiffs could prevail on their claim if they could establish: 1) that the usage was at the time illegal under international law; 2) "the defendants *knew how* their product would be used"; and 3) they supplied the product knowing of its intended illegal use. *Id.* at 91.

[190] *Id.* at 94–95.

[191] *Id.* at 91.

[192] *Id.* at 94–95.

[193] *See* United States v. Flick (*The Flick Case*) (Dec. 22, 1947), *in* 6 TRIALS OF WAR CRIMINALS, *supra* note 12, at 1191–92 (discussing the liability of an individual defendant acting under orders from the state).

[194] *Agent Orange*, 373 F. Supp. 2d at 96.

[195] Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455752, at *3, 9 n.14 (N.D. Cal. Aug. 22, 2006). In 2005, the court in *Presbyterian Church II* affirmed its earlier decision regarding aiding and abetting when re-examining the issue after *Sosa*, specifically rejecting defendant Talisman's arguments that international law does not recognize aiding and abetting, and that "knowing practical assistance . . . which has a substantial effect on the perpetration of the crime" was not the appropriate standard. Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church II*), 374 F. Supp. 2d 331, 337–38, 340 (S.D.N.Y. 2005) (quoting Doe v. Unocal Corp., 395 F.3d 932, 951 (9th Cir. 2002)).

they do not directly engage in such abuses. When the time comes for the Supreme Court to decide whether there can be aiding and abetting liability under the ATS, and if it looks to international law to ascertain the answer, the Nuremberg trials—and the industrialist cases in particular—will likely be front and center.

In summary, Nuremberg has been critical to the development of civil human rights litigation in the United States. When one reviews the ATS cases over the last twenty years, it is difficult to dispute that but for the Nuremberg trials, the ATS would not be the powerful statute it is today. It is questionable if it even would be invoked much at all. Furthermore, the Nuremberg trials' influence will continue, and even increase, especially in those cases involving corporate complicity in human rights violations.

III. THE APPROPRIATE USE OF THE NUREMBERG TRIALS AS PRECEDENT IN ATS LITIGATION

Given the strong influence the Nuremberg trials have had in ATS litigation, there have been criticisms of the Nuremberg trials' use in civil human rights litigation, and some question their growing influence, particularly in the area of corporate complicity.

The reasons for such criticisms vary. Some criticize the Nuremberg trials as "victor's justice," suggesting that the trials are not legitimate precedent in other human rights proceedings.[196] Others argue that the crimes prosecuted at Nuremberg were so uniquely horrible that precedent arising from them, such as the establishment of aiding and abetting liability, is inappropriate for use in the human rights litigation we see today.[197] The reason for criticism regarding the use of the Nuremberg trials to support jurisdiction under the ATS over acts occurring abroad is that the Allies had a connection to the atrocities they prosecuted in a way that U.S. courts do not have with regard to their adjudication of crimes occurring abroad.[198]

Others criticize the use of the industrialist trials to support liability of corporations generally and for corporate complicity

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[196] *See, e.g.*, Simpson, *supra* note 24, at 805 ("[T]he trials of war criminals have generally occurred only where defeat and criminality coincide.").

[197] *See, e.g.*, Haberstroh, *supra* note 25, at 263–66 ("Special rules for conditions of absolute evil should not underpin generalized international law.").

[198] *See, e.g.*, Kontorovich, *supra* note 26, at 159 ("[T]he interests of third-party nations are not directly implicated, and their intervention will likely appear as officious intermeddling . . . .").

standards, given that corporations were not prosecuted at Nuremberg.[199] Some also use this fact to suggest that corporate entities are not bound by international human rights standards.[200]

A. Victor's Justice

Criticisms of the application of Nuremberg precedent to other human rights trials[201] surround arguments that the Allies themselves were guilty of severe human rights violations, such as the bombing of Dresden and the explosions of the atomic bombs that killed innocents, and thus came to the trials with "unclean hands."[202] Others criticize the fact that those at Nuremberg were tried for crimes that were either not yet recognized as illegal, or for which individual liability had not yet been recognized.[203] However, arguments that because the trials were "victor's justice" their precedents should not be used in ATS litigation are simply not persuasive. The architects were quite conscious that they were creating future precedent, and structured the trials and defined the crimes with this in mind. Moreover, the trials had procedural safeguards to ensure their fairness. In addition, principles arising out of Nuremberg have been re-analyzed and approved in many different venues over the last sixty years, resulting in incorporation into international law with confidence by the international community.

1. The Trials' Architects Made Decisions Conscious That They Were Setting Precedent for the Future

According to one scholar who has analyzed the relevant documents, "Allied parties were sincerely concerned that the trial be seen as legitimate and serve as a precedent for future generations."[204] It was an important goal of those responsible for

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[199] *See supra* notes 134–36 and accompanying text.

[200] *See supra* notes 134–38 and accompanying text.

[201] This criticism, of course, has not been limited to civil human rights litigation under the ATS, but also to other criminal tribunals such as the ICTY and ICTR. *See, e.g.*, Simpson, *supra* note 24, at 808–09 (drawing out instances of victor's justice in the contexts of the former Yugoslavia and Rwanda).

[202] *Id.* at 804–06.

[203] Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 841–42 (1990); *see also* Simpson, *supra* note 24, at 814–15 (discussing the problematic ambiguity in international law).

[204] Fogelson, *supra* note 203, at 850.

the trials that Nuremberg have a "prospective effect."[205]

In fact, "[t]he Allies decided to try and punish those who perpetrated the [Holocaust in a way that would] establish clear principles of international law that would promote peace and deter war *in the future*."[206] Unlike what happened after WWI, "they sought to establish principles to inform and guide the future acts of all nations so as to ensure . . . human rights."[207]

For example, those who forged the trial plan for Nuremberg, Justice Jackson and Telford Taylor, understood that "[b]y maintaining that international law forbade the Nazi crimes, the major world powers would be legally constrained from repeating similar crimes in the future," and they would not be able to "credibly [argue] that the law was unfair."[208]

This can be seen from how they compromised on the claim of Crimes Against Peace. Although the Charter gave to the Tribunal jurisdiction only over German acts (and not acts of the Allies—undoubtedly one reason for some of the argument regarding "victor's justice"), the compromise on the language contained in the Charter "made possible its application in the future because the crimes it defined were expressed in universal language."[209]

2. The Trials Had Procedural Safeguards

The policymakers behind the Nuremberg trials, aware even at the time that there was criticism, took pains to counter these allegations.[210] First, "[t]hey applied law that was grounded in existing international law, highlighted historical antecedents and more recent international agreements, and argued that they applied law that was completely consistent with these precedents."[211]

They also inserted safeguards to ensure the fairness of the procedure.[212] In fact, several defendants were acquitted in the trials,[213] suggesting there were serious due process safeguards and

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[205] *Id.* at 867.

[206] *Id.* at 837 (emphasis added).

[207] *Id.*

[208] *Id.* at 844.

[209] *Id.* at 846–47.

[210] *See id.* at 858–59.

[211] *Id.* (footnotes omitted).

[212] *Id.* at 859.

[213] *E.g.*, United States v. Krauch (*The I.G. Farben Case*) (Dec. 28, 1948), *in* 8 TRIALS OF WAR CRIMINALS, *supra* note 12, at 1208–09; Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 423 (1998)

overall fairness.[214]

3. The Same Principles have been Tried and Tested, and Incorporated into International Law

The principles arising from Nuremberg have withstood the test of time. They have been incorporated into U.N. declarations and treaties, as well as used in criminal tribunals since. In fact, the United Nations and the Nuremberg Charter were developed contemporaneously, with the result that "several of the principles contained in the Nuremberg Charter were also built into the United Nations Charter."[215] And the "United Nations has continued to promulgate humanitarian resolutions that further elaborate the doctrines applied at Nuremberg."[216]

In addition, the African Charter on Human and Peoples' Rights, American Convention on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Declaration of the Rights and Duties of Man (to which the U.S. is subject), have each incorporated articles reflecting the Nuremberg principles.[217] Moreover, many of the same standards have been adopted by other tribunals, such as the ICTY and ICTR.[218] Thus, the Nuremberg principals have been legitimized

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[hereinafter Ramasastry, *Secrets and Lies?*] (of twenty-three defendants in *The I.G. Farben Case*, ten were acquitted of all charges).

[214] Perhaps the greatest criticism about fairness has to do with the area of conspiracy, a concept that had not been recognized by many of the Allies legal systems, and for "organizational complicity"—belonging to an organization that had been found to be criminal. Ramasastry, *Secrets and Lies?*, *supra* note 213, at 410. However, the use of conspiracy at Nuremberg was narrow. The IMT's test required a "knowing agreement or concrete plan to wage an aggressive war," only recognizing conspiracy for "limited actions pertaining to crimes against peace," and judges were reluctant to find guilt based solely on membership. *Id.* at 411, 449. In any event, no ATS case has prevailed on a theory of "organizational conspiracy," or even "conspiracy" generally, and plaintiffs typically do not argue such a theory.

[215] *See* Fogelson, *supra* note 203, at 870–71.

[216] *Id.* at 872.

[217] *See generally* African Charter on Human and Peoples' Rights, June 26, 1981, *reprinted in* 2 HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 330 (1997) [hereinafter HUMAN RIGHTS]; American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, *reprinted in* 2 HUMAN RIGHTS, *supra*, at 14; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, *reprinted in* 2 HUMAN RIGHTS, *supra*, at 73; American Declaration of the Rights and Duties of Man, May 2, 1948, *reprinted in* 2 HUMAN RIGHTS, *supra*, at 5; *see also* Fogelson, *supra* note 203, at 873.

[218] *See, e.g.*, Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, ¶¶ 131–47 (Dec. 10, 1998), *available at* http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf; *see also* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgement in Sentencing Appeals, ¶¶ 65–69 (Jan. 26, 2000), *available at* http://www.un.org/icty/tadic/appeal/judgement/tad-asj000126e.pdf (upholding defendant's appeal in part on the ground that the Nuremberg

and incorporated into the fabric of international law.

Finally, any argument that the Nuremberg decisions should not be used as precedent because Nuremberg was "victor's justice" does not adequately explain why simply because a trial arose out of power discrepancies, any rule of law developed from such a trial does not have precedential value. After all, the fact is that many—if not most—trials reflect some type of power discrepancy. Governments classify certain individuals as criminals and try them because they have power over them. And even though our own government undoubtedly has engaged in wrongful or criminal conduct, that does not mean that principles established from criminal trials have no value.

B. Crimes Were Uniquely Horrible

One writer, John Haberstroh, suggests that the ICTY's exclusive focus on the Nazi-era cases is troubling "because it would naturally be expected to generate a mens rea standard of culpability appropriate only for such perpetrators of unmatched evil."[219]

He further argues that the Nazi-focused military tribunals were "not adverse to establishing catch-all standards that [would] ensure[] that nearly any German with any coercive authority at the . . . concentration camp[s] would be found guilty of a crime against humanity."[220] Haberstroh writes that the Nazi-era tribunals and the ICTY and ICTR have "devised such exceptional standards because of a perceived duty to convict large numbers of individuals culpable in widespread outbreaks of extraordinary evil."[221] He states, "[s]pecial rules for conditions of absolute evil should not underpin generalized international law."[222]

Haberstroh goes on to explain that "war crime trials and their standards are for 'the Hitlers, the Goerings, the Pol Pots, the

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trials did not distinguish between war crimes and crimes against humanity for the purposes of imposing a more serious sentence). *But cf.* Haberstroh, *supra* note 25, at 260–64 (criticizing the ICTY's standards—derived in part from an analysis of the Nuremberg trials—for determining aiding and abetting liability as "peculiarly broad" and less stringent than the American standard).

[219] Haberstroh, *supra* note 25, at 263. He also criticizes the ICTY and the ICTR for their "exclusive" reliance on Nazi-era military tribunal cases for determining complicity standards. *Id.* at 261–64. He would rather the tribunals look solely to "state practice." *See id.* at 270. However, he fails to recognize that the Nuremberg trials are evidence of states' consensus regarding international law.

[220] *Id.* at 263.

[221] *Id.*

[222] *Id.* at 266.

Milosevics, the Karadžić, and other architects of genocide,'" and that such trials should not be for "'ordinary murderers.'"[223] By so suggesting, he acknowledges that the Nuremberg trials and their standards are in fact appropriate for serious violations of human rights, and are not simply limited to the Nazi atrocities. Additionally, because of the requirement that any norms giving rise to claims under the ATS must be something akin to customary international law, typically only the most serious types of violations will be brought under the ATS. Given that, there appears to be no legal reason why precedent from Nuremberg should not be used in these cases.

In addition, the architects of the Nuremberg trials knew they were establishing rules for the future—rules that would serve to hold those who perpetrated human rights violations accountable.[224] Once a rule of law is established, it de-legitimizes it to suggest that it applies to certain acts but not others. Moreover, such selective enforcement is bound to create a sense of injustice for those who suffer from human rights violations that are not seen as the "most extraordinary," which in turn can lead to turmoil and more violence.

In fact, the World Jewish Congress and the American Jewish Committee—both of which serve the population victimized by the Holocaust—recognize this, and have gone on record supporting the use of the ATS for groups who suffered from abuses less extraordinary than the Holocaust.[225] Both organizations submitted a joint amicus brief in support of the petitioner in *Sosa*, reminding the court that the ATS "enabled victims of the Holocaust to bring well-founded claims for violations of 'the Law of Nations' in U.S. courts,"[226] and urging that the ATS be preserved for other potential claimants—stressing that the ATS "provides a vitally important means of redress for non-citizen victims of violations of the law of nations, particularly since [ATS] claimants often cannot seek justice in their home countries or in other fora."[227] In *Sosa*, the violation at issue was arbitrary detention, which the Supreme Court found did not meet their normative test.[228]

Finally, many of the responses to the victor's justice arguments

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[223] *Id.* at 265.

[224] *See* discussion *supra* Part III.A.1.

[225] Brief for the World Jewish Congress and the American Jewish Committee as Amici Curiae in Support of Respondents, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339).

[226] *Id.* at 3.

[227] *Id.* at 1–2.

[228] *Sosa*, 542 U.S. at 736, 738.

are equally applicable in response to the position that precedent from the Nuremberg trials should not be applied in other human rights litigation because the trials and the conduct they prosecuted were extraordinary: the architects knew they were devising rules and standards to in fact be used in the future; the trials had procedural safeguards such that precedent created from them is legitimate; and the principles from the Nuremberg trials have been tried and tested, making their way into modern international human rights law.[229]

C. The Allies Had a Specific Connection to the Crimes

Noting that the Nuremberg tribunals have been seen as examples of universal jurisdiction over international human rights violations, one commentator argues that war crimes prosecutions, such as those that occurred at Nuremberg, are often inappropriately "cited as precedents supporting current efforts to universalize jurisdiction over human rights cases," and the ATS in particular.[230] Although he recognizes that the Nuremberg tribunals invoked concepts of universality, he states, "they were clearly not strangers to the crimes they were prosecuting."[231] Rather, "[t]hey had established a strong nexus with the offenses by fighting and winning the war in which the enemies' war crimes had been committed," thus arguing that "such cases [*inter alia*, Nuremberg tribunals] provide inadequate precedent for full-blown [universal jurisdiction] of the *Filartiga* variety."[232]

However, *Filartiga* was not a "full blown" universal jurisdiction case of the kind allowing adjudication with absolutely no connection to the plaintiffs, the crime, or the defendant. Rather, like any civil case in the United States, the court in an ATS case must have personal jurisdiction over the defendant,[233] meaning that the

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[229] *See supra* Part III.A.

[230] Kontorovich, *supra* note 26, at 127.

[231] *Id.*

[232] *Id.* at 127–28. Kontorovich further argues that in any event, "as the occupying powers, [the Allies] succeeded to the prosecutorial prerogatives of the defeated nations, and thus could be said to be simply exercising territorial jurisdiction." *Id.* at 128. He argues that for a modern case to come under universal jurisdiction of the ATS, it should meet the customary international law norm that is substantially comparable to piracy under the law of nations, acts that occurred on the high seas. *See id.* at 132, 161; *see also* RANDALL, *supra* note 8, at 172 (noting that "war crimes and crimes against humanity are . . . analogous to piracy in that they are typically committed in locations where they will not be prevented or punished easily").

[233] *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

district where the case is brought has a connection to the defendant and an interest in ensuring that the defendant over which it has control is held accountable for its conduct.[234] At Nuremberg, the defendants were not subject to the jurisdiction of the Allies at the time the acts for which the industrialists were tried were committed; the only jurisdictional connection the Allies had to the defendants during the trials was that the Allies were the occupying force. Thus, the jurisdictional basis is arguably the same—if not greater—in ATS litigation where the court must have some jurisdiction over the defendant: either the defendant resides in the judicial district, has ongoing and continuous connections with the district, or can be found and served in the district.[235]

Criticism regarding jurisdictional precedent fails to appreciate that the Nuremberg trials, and thus the precedent they created, did not occur based simply on the atrocities committed during WWII. Rather, "[i]t emerged out of lessons the Allied Powers drew from the deplorable experiences of the . . . period [between WWI and WWII], that culminated in horrors such as the [H]olocaust."[236] After WWI, the international community, through the League of Nations, executed various treaties to protect minorities, as various minorities had been suffering severe discrimination and violence.[237] However, because the idea that states had complete sovereignty over their populations and no other state had a right to intervene was as strong as ever after WWI, dictatorial and brutal regimes flourished during the 1930s and 40s while "democratic nations . . . stood passively by," seemingly helpless.[238] One of the results was the Holocaust, which served as a brutal awakening to the rest of the world.[239] "During [WWII], the Allied Powers were widely convinced that the way human rights were treated anywhere in the world was a matter of concern to all human beings everywhere."[240] The Nuremberg trials, and the rise of the United Nations afterward, including the various human rights declarations and treaties (all

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234 *See* 28 U.S.C. §§ 1332, 1391 (2000).

235 *See id.* § 1391; RANDALL, *supra* note 8, at 173; Kontorovich, *supra* note 26, at 127–28.

236 *See* George William Mugwanya, *Expunging the Ghost of Impunity for Severe and Gross Violations of Human Rights and the Commission of Delicti Jus Gentium: A Case for the Domestication of International Criminal Law and the Establishment of a Strong Permanent International Criminal Court*, 8 MICH. ST. U.-DETROIT C. L. J. INT'L L. 701, 711 (1999).

237 *Id.*

238 *Id.* at 711–12.

239 *Id.* at 712.

240 *Id.*

reflective of customary international law[241]), ensured that the world community now had at least some tools to do something about violence and human rights abuses, which were not only recognized as morally wrong, but which could lead to instability and further violence.[242]

Nuremberg set a precedent that accountability for human rights violations is a "legitimate and appropriate response[] to offen[s]es against humanity/human rights, and therefore, a necessary modality for the protection and enforcement of human rights."[243]

D. Corporations Were Not Prosecuted at Nuremberg, and Are Not Bound by International Human Rights Standards

As discussed above, because corporations were not specifically prosecuted at Nuremberg, some argue that using precedent from those trials in corporate complicity trials today, such as using *The Zyklon B Case* for precedent establishing aiding and abetting liability, is inappropriate.[244] Others argue that the failure of the Nuremberg tribunals to prosecute corporations is evidence that corporations are not bound by international law, and thus are not appropriate defendants in human rights litigation.[245] Neither argument is persuasive.

This Article will not go into the same level of detail many scholars have as to why corporations can and should be liable for human rights violations,[246] but will offer analysis about why using precedent from the Nuremberg trials to hold corporations accountable is appropriate.

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[241] Kontorovich refers to customary international law as "CIL." Kontorovich, *supra* note 26, at 112.

[242] *See* Mugwanya, *supra* note 236, at 711–14.

[243] *Id.* at 731.

[244] *See supra* notes 134–36 and accompanying text.

[245] *See supra* notes 134–38 and accompanying text; *see also* Brief for Defendants-Appellees at 56–61, Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co. (*In re* Agent Orange Prod. Liab. Litig.), No. 05-1953-cv (2d Cir. Feb. 6, 2006), *available at* http://www.ffrd.org/Lawsuit/Brief_for_Appellee.pdf.

[246] *See, e.g.*, Andrew Clapham, *The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States*, *in* FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 233, 233 (Ramesh Thakur & Peter Malcontent eds., 2004) (discussing the international criminal law obligations of corporations and other legal entities); *see also* Ramasastry, *Corporate Complicity*, *supra* note 110, at 106–08 (discussing *The I.G. Farben Case*).

1. The Tribunals Spoke in Terms of Corporate Liability

No documents appear to exist that suggest that the Allies even considered prosecuting corporations.[247] However, the law of the modern or multinational corporation did not exist in 1945, and the idea of enterprise liability or corporate complicity had not been fully developed at that time.[248] Thus, it is no surprise that the Allies did not prosecute corporations specifically.

The tribunals did, however, speak in terms of corporate action and corporate liability. As was recognized by the courts in *Presbyterian Church I* and *Agent Orange*,[249] the tribunals at Nuremberg discussed many of the industrialist cases in terms of the corporations themselves having been active in, and thus responsible for, human rights violations.[250] In fact, the prosecutors deliberately targeted corporations to highlight the role that organizations had played during the war and the symbiotic relationship they had with the Hitler regime.[251]

Anita Ramasastry has completed perhaps the most in-depth analysis of how the tribunals in the industrialist trials spoke in terms of corporate liability and corporate actions.[252] As she notes, "A parsing of the judgments rendered at Nuremberg by the [IMT] and the USMT involving industrialists and other commercial actors reveals an underlying implication that the corporations for which they worked had also committed international war crimes."[253]

As Ramasastry notes, the case of I.G. Farben is perhaps the first attempt by a court "to impose liability on a group of persons who were collectively in charge of a company."[254] In the case, the USMT[255] prosecuted the defendants for "acting through the

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[247] The author did extensive research on this topic and found nothing. In addition, Andrew Clapham, an expert in the area of corporate responsibility in human rights, indicated in communication with the author's assistant that he is also unaware of any such discussion or consideration.

[248] Ramasastry, *Secrets and Lies?*, *supra* note 213, at 423, 449.

[249] *See In re* Agent Orange Prod. Liab. Litig. (*Agent Orange*), 373 F. Supp. 2d 7, 57–59 (E.D.N.Y. 2005) (noting that despite the Nuremberg tribunals' failure to find corporate liability, the Supreme Court has acknowledged that corporations can be held liable for their torts); Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Presbyterian Church I*), 244 F. Supp. 2d 289, 315–16 (S.D.N.Y. 2003).

[250] Ramasastry, *Corporate Complicity*, *supra* note 110, at 105; Clapham, *supra* note 246, at 238.

[251] Clapham, *supra* note 246, at 233–34.

[252] Ramasastry, *Corporate Complicity*, *supra* note 110, at 105–13.

[253] *Id.* at 105.

[254] *Id.* at 106.

[255] USMT refers to the United States Military Tribunal, which prosecuted the German

instrumentality of Farben in the commission of their crimes."[256] The USMT noted that the prosecution's theory was that the defendants, both individually and collectively, used the "Farben organization" as an instrument through which they committed their crimes; the indictment itself specified the acts committed by the company as well as its officials.[257]

The USMT, convicting thirteen of the company's twenty-three top directors, based much of its findings on the role of Farben as a corporate entity, with the focus on the nature of the corporation and its role in perpetrating certain crimes.[258]

> Although limits on the USMT's jurisdiction precluded it from holding Farben liable . . . the [tribunal] found that, as a corporate entity, Farben had violated Article 47 of the Hague Regulations on the Laws and Customs of War. . . .
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> . . . .
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> . . . [T]he Tribunal also noted that Farben, as a corporate entity, had been directly involved in war crimes and crimes against humanity. [259]

Most importantly, the Tribunal expressly recognized that a corporation, as a legal person, could violate international law.

> Where private individuals, including *juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law. . . . Similarly, where a private individual or a *juristic person* becomes a party to unlawful confiscation of public or private property . . . [it] constitutes conduct in violation of the Hague Regulations.[260]

Similarly, in *The Krupp Case*, the USMT engaged in a lengthy and detailed discussion "of the actions of the Krupp firm as the prime actor and perpetrator of the various war crimes and crimes against humanity."[261] "As with the Farben decision, the Tribunal state[d] that the firm itself violated the Hague Regulations . . . ."[262]

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industrialists after WWII. *Id.* at 104.

[256] *Id.* at 106 (internal quotation marks omitted).

[257] Ramasastry, *Secrets and Lies?*, *supra* note 213, at 423–24.

[258] *Id.* at 423.

[259] Ramasastry, *Corporate Complicity*, *supra* note 110, at 107.

[260] *Id.* at 108 (quoting United States v. Krauch (*The I.G. Farben Case*) (Dec. 28, 1948), *in* 8 TRIALS OF WAR CRIMINALS, *supra* note 12, at 1132–33).

[261] *Id.*

[262] *Id.* at 110.

Even in *The Zyklon B Case*, the British military tribunal discussed the acts of the firm that distributed Zyklon B, and the company's officers were convicted based on their knowledge of what the company was doing.[263]

Thus, even though corporations themselves were not prosecuted, it is clear that the Nuremberg military tribunals found that corporations engaged in war crimes and violated international law.

2. The Concept of Corporate Liability Has Evolved and Now Exists

a. Corporations are juridic persons

First, corporations are "juridic persons," bound by domestic and international laws which apply to private actors, such as individuals.[264] Moreover, corporations can be held liable criminally and civilly under agency theories based on acts of their employees if the employees were acting within the scope of their employment or pursuant to their employment.[265]

Given that private individuals can be held liable for certain violations of international law, and given that corporations are juridic persons subject to suit, there is no reason why liability should not extend to corporations.

b. The attributes of multinational corporations suggest liability is appropriate

Second, the growth of multinational corporations over the last twenty-five years, the manner in which they operate, and the lack of safeguards ensuring good corporate governance, justify and provide strong support for holding corporations liable under Nuremberg's standards.

For example, especially with a multinational corporation, several employees' actions collectively might lead to corporate misbehavior.[266] Each individual's action separately may not be the

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[263] Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 158–59 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

[264] Shaw W. Scott, Note, *Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atrocities*, 89 MINN. L. REV. 1497, 1515 (2005).

[265] Ramasastry, *Corporate Complicity*, *supra* note 110, at 121.

[266] *See id.* at 97.

cause of egregious activity or harm; rather, "[t]he sum of the activity as a whole is egregious."[267] Corporate actors operating in different divisions, or in different countries, may exacerbate this problem. Such collective harm might also make it difficult to parcel out and attribute the requisite *mens rea* to individuals for purposes of liability, but that might not be the case for corporations as a whole. And even where individuals who engage in bad behavior can be held accountable, the corporate entity continues to exist and may continue misconduct.[268]

Third, the culpability of corporations for their involvement in human rights violations arguably should be greater outside the context of wartime, where there are not pressures to comply with government requests. In such situations, corporations cannot argue that they were acting out of national interests, or through pressure of the government. As Ramasastry states, "[Multinational corporations] that work with repressive regimes today arguably present a stronger case for the imposition of liability," because they "are acting purely for profit rather than out of the national interest,"[269] and they are not operating in a war, where they may be pressured or forced by the government into engaging in certain acts.

There are other reasons to hold corporations accountable as well. Holding corporations accountable will also better achieve compensation for individuals who have been subjected to human rights abuses, as corporations typically have access to much greater resources than individuals. In addition, subjecting a corporation to payment of large sums of money may serve to deter a corporation in a way that prosecuting individuals would not. Corporations, as entities, try to deliver the greatest value to their shareholders, and this leads them to engage in a cost-benefit analysis. If the financial rewards of bad conduct are greater than what they may have to pay, there is no real incentive to stop.

Holding corporations civilly liable through the ATS is also politically and socially responsible. There is a strong national interest in showing the world that corporations within U.S. jurisdiction will be held to account—at least to account to compensate those harmed—for complicity in human rights violations abroad.

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[267] *Id.*
[268] *Id.* at 96.
[269] *Id.* at 118.

c. The international community now recognizes the role of multinational corporations in affecting human rights

In addition to corporations clearly being proper defendants under U.S. law, this evolution of the role of multinational and transactional corporations has led the international community to increasingly recognize that some of these corporations can and do violate human rights, and should be held accountable.[270] Prior to the mid-1970s, there was little international attention to the role of corporations in human rights abuses. In a 1974 declaration, for the first time the United Nations called for a code of conduct for transnational corporations.[271] More recently, the United Nations issued the Global Compact in 1999.[272] In August of 2003, the Sub-Commission on the Promotion and Protection of Human Rights of the U.N. Human Rights Commission adopted the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights."[273] Thus, the international community has recognized that corporations are in fact bound by international human rights laws.

IV. CONCLUSION

As this Article has demonstrated, the influence of the Nuremberg trials has been crucial to the development of modern human rights litigation under the ATS. Because of Nuremberg, U.S. courts have accepted arguments that the ATS provides for subject matter jurisdiction over human rights violations that occur abroad, even where such violations involve a government official's conduct toward the government's own citizens. In addition, the Nuremberg trials have directly influenced the norms considered to be the "law of nations" which meet the "specific, universal and obligatory" test of the ATS, an influence taking on new importance after *Sosa*.

Most recently, the Nuremberg trials' precedent regarding private individual responsibility, combined with the industrialist trials'

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[270] *See, e.g.*, Scott, *supra* note 264, at 1533–34 (discussing several attempts by the United Nations to create a transnational corporate code of conduct).

[271] *Id.*; G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/9559&Lang=E.

[272] For more information, see http://www.GlobalCompact.org.

[273] U.N. Econ. & Soc. Council [ECOSOC], 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).

discussion of corporate action and corporate liability, have significantly impacted both plaintiffs' arguments and court decisions involving corporate complicity liability for human rights violations. This influence will likely continue.

Although some legitimately criticize the use of precedent from the Nuremberg trials in modern human rights litigation, especially in the area of corporate liability, such criticisms are ultimately unpersuasive. First, the architects of Nuremberg were quite conscious of the precedent they were creating for the future. Given the human rights violations that occurred between WWI and WWII, culminating in the horror of the Holocaust, the architects wanted to ensure that the precedent they were creating would be used in the future to hold human rights offenders accountable. Thus, they took care to ensure adequate safeguards in the trials such that precedent arising from them would be legitimate. In fact, these standards have been legitimatized and incorporated into various international treaties and resolutions.

In addition, even though corporations themselves were not prosecuted at Nuremberg, there are legitimate historical explanations for this failure that should not preclude corporate accountability today, especially in a civil context. Moreover, the tribunals prosecuting the industrialists spoke in terms of corporate action and liability, implicitly finding that the corporations themselves were capable of engaging in human rights abuses as entities. These reasons, combined with the growth of multinational and transnational corporations over the last sixty years, including growth in their organizational complexity and influence, provide solid foundation for the use of Nuremberg precedent in human rights litigation today.

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