Domestic Corporations and the Alien Tort Statute

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This Comment analyzes the history, jurisprudence, and contemporary status of the Alien Tort Statute, which allows foreign citizens to bring suit in US courts for violations of international law. It attempts to answer two unresolved questions relating to the Alien Tort Statute. First, can domestic corporations be sued under the statue? Based on an analysis of the statute's text, its history, and lower court decisions, this Comment argues that they rightly should be. This Comment will also define what sort of conduct suffices for an Alien Tort Statute lawsuit to be brought against a domestic corporation and concludes that a domestic corporation must have violated international law either within the United States or in territory un

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I. INTRODUCTION

The Alien Tort Statute (ATS) gives federal courts jurisdiction over civil tort actions brought by aliens in violation of the laws of nations or treaties of the United States.[1] Originally passed as part of the Judiciary Act of 1789, the ATS lay mostly dormant until 1980, when it was resuscitated as a major area of both litigation and scholarly debate.[2] Since that time, a veritable explosion in ATS litigation has occurred.[3]

A succession of Supreme Court cases has dealt with the scope and application of the ATS, holding that federal courts should not recognize private claims for violations of international law less specific than those that were recognized when it was first enacted,[4] that the ATS does not apply extraterritorially and that "mere corporate presence" does not suffice to apply it domestically,[5] that the ATS cannot apply to foreign corporate defendants without congressional action,[6] and that "allegations of general corporate activity" are not enough for domestic application.[7]

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1 28 U.S.C. § 1350.

2 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397–98 (2018).

3 Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 811 (2008) (counting 185 cases between 1980 and 2008 claiming jurisdiction under the ATS in comparison to twenty-one cases from 1789 to 1980).

4 Sosa v. Alvarez-Machain, 542 U.S. 692, 719, 732 (2004).

5 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) [hereinafter *Kiobel II*].

6 *Jesner*, 138 S. Ct. at 1408.

7 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

However, the Supreme Court's ATS jurisprudence has, thus far, left a pair of vital questions unanswered.[8]

First, it remains unclear whether the ATS can be used to bring claims against domestic corporations.[9] The Courts of Appeal have disagreed on the answer to this question, with the Second Circuit in particular obstinately refusing to recognize domestic ATS corporate liability.[10] The problems caused by this disagreement among the circuit courts include not only the fact that the law is being applied in an inconsistent and contradictory manner, but also that valid ATS lawsuits are being blocked. For example, the Second Circuit in one case found that the "[p]laintiffs have satisfied all of the jurisdictional predicates [for an ATS lawsuit] but one," which was the fact that "this Circuit has ruled that customary international law does not recognize liability for corporations."[11] The harms caused by this legal barricade are vastly exacerbated by the fact that the Second Circuit's jurisdiction contains New York City, the location for an enormous amount of business and financial transactions.[12] If someone were to want to sue a domestic corporation under the ATS, there are good odds that New York City would be one of the places where that lawsuit could be brought. This question remains a pressing issue for domestic corporations, with one study calculating that approximately one-third of all ATS cases involved a corporate

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8 At least one previous article has tread somewhat similar ground to this one. *See* Amanda A. Humphreville*, If the Question Is Chocolate-Related, the Answer Is Always Yes: Why* Doe v. Nestle *Reopens the Door for Corporate Liability of U.S. Corporations Under the Alien Tort Statute*, 65 AM. U. L. REV. 191 (2015). However, that article is outdated; it preceded both *Jesner* and *Nestlé*. It also focuses on policy to a much greater degree than this Comment.

9 Kayla Winarksy Green & Timothy McKenzie, *Looking Without and Looking Within:* Nestlé v. Doe *and the Legacy of the Alien Tort Statute*, AM. SOC'Y INT'L L. (July 15, 2021), https://perma.cc/7KZ8-EUHP.

10 For post-*Sosa* cases, compare *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014), *rev'd on other grounds sub nom. Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021), *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011) ("[C]orporate liability is possible under the Alien Tort Statute . . . ."), and *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (observing that the ATS "grants jurisdiction from complaints of torture against corporate defendants"), with *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010) [hereinafter *Kiobel I*] ("For now, and for the foreseeable future, the Alien Tort Statute does not provide subject matter jurisdiction over claims against corporations."), *aff'd on other grounds*, 569 U.S. 108 (2013).

11 Licci by Licci v. Lebanese Canadian Bank*, SAL*, 834 F.3d 201, 212 (2d Cir. 2016); *see also In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 157 (2d Cir. 2015) (affirming dismissal of the plaintiffs' ATS claims solely on corporate liability grounds under *Kiobel I*), *aff'd sub nom.* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

12 *See* Richard Florida, *What Is the World's Most Economically Powerful City?*, ATLANTIC (May 8, 2012), https://perma.cc/JQ25-9MN7 (describing New York City as the most economically powerful city in the world).

defendant.[13] While only a small portion of ATS cases brought against corporations have resulted in victories for the plaintiffs,[14] one such case ended with a judgment for $80 million,[15] and settlements for sums like $15.5 million[16] have also been made.[17] Merely litigating an ATS case can cost a corporation upwards of $15 million in attorneys' fees.[18] Judgments in ATS cases brought against non-corporate defendants have also reached high levels,[19] including a default judgment for an eye-popping $190 million.[20] Because of these risks, it would be extremely beneficial for domestic corporations to be able to properly assess their current vulnerability to lawsuits brought under the ATS. However, the Supreme Courts' refusal to answer this question and disagreement among the circuits make this impossible. Moreover, much of the reasoning used by the Supreme Court to foreclose the applicability of the ATS to foreign corporations could also apply to domestic corporations.[21] At the same time, in the most recent Supreme Court decision to address this issue, *Nestlé USA, Inc. v. Doe*, five justices "saw no reason to distinguish between corporations and natural persons as defendants," but fell short of recognizing a right under the ATS to bring claims against domestic corporations.[22] Domestic corporations should properly be exposed to liability under the ATS.

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13 Stephens, *supra* note 3, at 811–14.

14 *Id.* at 814.

15 Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) (finding this verdict in case where plaintiffs alleged they had been forced to work for defendant in concert with Cuban government).

16 *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, CTR. FOR CONST. RTS. (Jun. 8, 2009), https://perma.cc/ZJY5-WNN5.

17 It seems that a good number of ATS cases have settled, but it is exceedingly hard to find any concrete information on the terms.

18 Daphne Eviatar, *A Big Win for Human Rights*, NATION (Apr. 21, 2005), https://perma.cc/V3EV-3LKE.

19 *See, e.g.*, Tachiona v. Mugabe, 234 F. Supp. 2d 401, 442 (S.D.N.Y. 2002) (judgment for $70 million); Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1159 (E.D. Cal. 2004) (judgment of $10 million ordered by court); Arce v. Garcia, 434 F.3d 1254, 1259 (11th Cir. 2006) (affirming jury verdict of $54 million); Paul v. Avril, 901 F. Supp. 330, 336 (S.D. Fla. 1994) (judgment for $41 million); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1360 (N.D. Ga. 2002) (judgment for $140 million).

20 Alejandre v. Republic of Cuba, 996 F. Supp. 1239, 1253 (S.D. Fla. 1997).

21 *See, e.g.*, Jesner v. Arab Bank PLC, 138 S. Ct. 1386, 1402–03 (2018) (describing the "general reluctance to extend judicially created private rights of action" and noting that "[t]his caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations").

22 William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), https://perma.cc/4TBH-N263.

A further question remains: what is the analysis used to decide whether alleged domestic conduct is sufficient under the ATS? It is clear from Supreme Court precedent that "mere corporate presence"[23] and "allegations of general corporate activity"[24] are not enough. This Comment will further argue that there must be violations of international law on US soil or in areas outside the jurisdiction of any nation to support an ATS lawsuit.

II. THE STATUS OF INTERNATIONAL LAW IN AMERICAN COURTS

In a recent decision, a federal court stated that "there is no authority in international law that United States national courts must recognize, except insomuch as Congress or the President incorporates some part of it through constitutional channels into national law."[25] However, this is facially untrue; international law has long appeared in (and been recognized by) US courts without any legislative or executive action at all. "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."[26] As a result, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[27] For example, ambiguous statutes are construed to avoid "unreasonable interference with the sovereign authority of other nations," a rule of construction that reflects "principles of customary international law" that "Congress ordinarily seeks to follow."[28] The Supreme Court has also used international law as "persuasive authority to interpret various provisions of the U.S. Constitution."[29] While there has long been scholarly debate about the precise position of international law in federal courts,[30] it is clear that such a role persists.[31]

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23 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

24 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

25 United States v. Martinez, 599 F. Supp. 2d 784, 799 (W.D. Tex. 2009).

26 Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004) (quoting Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796)).

27 The Paquete Habana, 175 U.S. 677, 700 (1900).

28 F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004).

29 Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 198 (2011).

30 *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998), *with* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

31 *See Sosa*, 542 U.S. at 730–31 (2004) (citations omitted) ("We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law

Of course, customary legislative and executive mechanisms used to incorporate international law exist alongside the judicial processes. The president has the "Power, by and with the Advice and Consent of the Senate, to make Treaties" with foreign nations, and any "treaty ratified by the United States is . . . the law of this land."[32] The president can also make "executive agreements with other countries, requiring no ratification by the Senate or approval by Congress."[33] Federal statutes and regulations may further be established to implement treaty provisions or directly incorporate international law.[34] Still, the products of all of these mechanisms are subject to interpretation by federal courts.[35]

III. THE ALIEN TORT STATUTE

The ATS is one of those statutes that directly incorporates international law. The ATS is both short and seemingly simple, stating that 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."[36] The text of this statute has changed little since it was originally passed as part of the Judiciary Act of 1789, which provided that federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[37] One might think that the ATS would be a common litigation path used by foreign aliens, but the history of the ATS is scanty at best.

A. The Origins of the Alien Tort Statute

In a famous quotation, Justice Henry Friendly of the Second Circuit referred to "[t]his old but little used section" as "a kind of

might lose some metaphysical cachet on the road to modern realism. . . . [t]he position we take today has been assumed by some federal courts for 24 years . . . . Congress . . . has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.").

32 U.S. CONST. art. II, § 2, cl. 2; Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996).

33 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003).

34 Am. Soc'y Int'l L., *Uses of International Law in U.S. Courts*, *in* BENCHBOOK ON INTERNATIONAL LAW § I.C–5 (Diane Marie Amann ed., 2014), https://perma.cc/7UNR-PWNA.

35 *Id.*

36 28 U.S.C. § 1350.

37 Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77.

legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came."[38] Despite his befuddlement, the history and background of the ATS is discernable from the available historical materials.[39]

The origins of the ATS are found during the Founding Era, when "the inability of the [Articles of Confederation] government to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems."[40] Because the Continental Congress lacked substantive legislative powers, all it could do to try to address this problem was pass a resolution urging the individual states to create judicial remedies for foreign individuals.[41] Apparently, only one state followed the urging of the national government.[42] Perhaps unsurprisingly, the United States experienced diplomatic in the following years that underscored the need for a broader grant of federal power to deal with claims brought by foreign nationals.

First to occur was the 1784 "Marbois-Longchamps Affair," in which one Charles Julian de Longchamps, a Frenchman of ill repute, verbally threatened and then caned M. Marbois, the secretary of the French legation in Philadelphia.[43] This incident proved to be a great embarrassment to the national government; not only did Longchamps manage to briefly escape arrest after convincing his captors to allow him to change clothes at his home, but the Continental Congress, being "obviously . . . incompetent to deal with the situation," "was compelled to request the states to urge their officials to arrest an adventurer who had publicly assaulted a member of the diplomatic staff of a great power."[44] The assault became a national news story, with leading figures like Thomas Jefferson, Benjamin Franklin, and George Washington

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[38] IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds by* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010). Lohengrin is defined as a "mysterious knight" who refuses to answer questions about his origin. ENCYCLOPEDIA BRITANNICA, https://perma.cc/CM22-86AW (last visited Feb. 13, 2022)

[39] William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488–89 (1986) ("Notwithstanding frequent complaints about the obscurity of section 1350's origins, a thorough study of available historical materials provides a fairly clear understanding of the statute's purpose."). *But see* Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004) ("But despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive.").

[40] Jesner v. Arab Bank PLC, 138 S. Ct. 1386, 1396 (2018).

[41] Casto, *supra* note 39, at 490.

[42] *Sosa*, 542 U.S. at 716.

[43] Alfred Rosenthal, *The Marbois-Longchamps Affair*, 63 PA. MAG. HIST. & BIO. 294, 294 (1939) (Longchamps had been involved in a series of previous run-ins with the law.).

[44] *Id.* at 295, 299.

discussing it in their letters.[45] Virginia and Pennsylvania responded by passing legislation attempting to head off any future such incidents, but no other states followed their lead.[46]

The second incident occurred during the ratification period following the Constitutional Convention. A New York City constable "entered the house of the Dutch Ambassador and arrested one of the Ambassador's servants."[47] The Ambassador protested to John Jay, Secretary of the U.S. Department of Foreign Affairs, but Jay was forced to conclude "[t]hat the federal Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases . . . ."[48]

In response, the Framers used the Constitution to give the Supreme Court original jurisdiction over "all cases affecting Ambassadors, other public ministers and Consuls."[49] The First Congress built on this foundation in the Judiciary Act of 1789, in which it created both alienage jurisdiction and the ATS.[50] The ATS does not appear to have been a topic of much interest to the Congress, with no major mention of it in the records of congressional debates or the correspondence of the drafting senators.[51] However, the Supreme Court got it right when it observed that "the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf . . . . The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect."[52] The ATS was passed in response to a specific problem, and it cannot be assumed that it was not intended to have an immediate effect.

B. The Pre-Modern Era of the Alien Tort Statute

Mentions of the ATS in the federal registers are rare before the 1980s. One author counted a total of only twenty-one cases between 1789 and 1980.[53] Because these cases are scattered

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45 *Id.* at 299; Casto, *supra* note 39, at 492 n.143.

46 Casto, *supra* note 39, at 492.

47 *Id.* at 494.

48 *Id.* at 494, n.152 (citing *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J. CONT'L. CONG. 109, 111 (1788)).

49 Sosa v. Alvarez-Machain, 542 U.S. 692, 717 (2004).

50 *Id.*

51 Casto, *supra* note 39, at 495; *see also Sosa*, 542 U.S. at 718.

52 *Id.* at 719.

53 Stephens, *supra* note 3, at 811.

across nearly two-hundred years of history, this Comment will confine itself to a discussion of the most relevant incidents.[54]

The first recorded case involving the ATS, *Moxon v. The Fanny*, occurred in 1793.[55] This was an action by the owners of a British ship to get damages for its seizure in American waters by a French privateer.[56] The district judge stated that ATS was not a proper avenue for the action, since "[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for."[57] *Moxon* is noteworthy because it was brought as an *in rem* action under admiralty jurisdiction,[58] a procedure where, as a "legal fiction," "the vessel itself is named as a defendant."[59] The next important early case, which dealt with the capture of a Dutch merchant ship by an American privateer, was *The Vrow Christina Magdalena*.[60] To answer the question of "[w]hether this court has any and what jurisdiction relative to matters arising on the high seas," the judge turned to the Judiciary Act, noting that "[t]he court shall have . . . concurrent jurisdiction . . . where an alien sues for a tort only in violation of the law of nations, or a treaty of the United States."[61] Like *Moxon*, *Christina Magdalena* was also brought as an *in rem* action.[62] Unlike in *Moxon*, the plaintiff in *Christina Magdalena* was successfully able to establish jurisdiction under the ATS.[63]

If near-contemporaries of the ATS saw no problem with using it to bring a suit against the artificial entity of a ship via an *in rem* action, it is hard to believe that bringing a case against a corporation, which was seen as "an artificial being, invisible, intangible, and existing only in contemplation of law"[64] would be that different.

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54 For an approximately complete list of pre-modern ATS cases, see Susan Simpson, *All* Alien Tort Statute Cases Brought Between 1789 and 1990*, THEVIEWFROMLL2 BLOG (Dec. 18. 2010), https://perma.cc/8XBQ-JFKB; Susan Simpson, *Alien Tort Statute Cases Resulting in Plaintiff Victories*, THEVIEWFROMLL2 BLOG (Nov. 11, 2009), https://perma.cc/J6GA-SD5Y.

55 17 F. Cas. 942 (D. Pa. 1793).

56 *Id.*

57 *Id.* at 948.

58 *Id.* at 947 ("The procedure here is in rem . . . .").

59 David James DeMordaunt, *Admiralty In Rem and In Personam Procedures: Are They Exempt from Common Law Constitutional Standards?*, 29 SANTA CLARA L. REV. 331 (1989).

60 13 F. Cas. 356 (D.S.C. 1794), *aff'd sub nom.* Talbot v. Jansen, 3 U.S. 133 (1795).

61 *Id.* at 358.

62 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1942 (2021) (Gorsuch, J., concurring).

63 *Id.*

64 Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

The 1960s contained a series of cases where the ATS was used to bring claims against unions.[65] While the claims all failed on a variety of grounds, none of them saw it as important that the defendants were unions, The 1960s also had various cases featuring corporations as defendants, all of which also failed to reach the merits of the issue.[66] However, none of these cases mentioned that there were any problems with applying the ATS to corporations, let alone domestic corporations. As an example, one can look to the Second Circuit's decision in *IIT v. Vencap, Ltd.* in which the court rejected the ATS as the basis of jurisdiction for an action against domestic corporations without any mention of their identity. [67]

There are two important takeaways from this overview of the first 190 years of ATS litigation. First, all these cases take it for granted that the ATS was enacted as a fully formed and immediately operational statute standing on the common law of nations; there is no mention or implication that additional enabling legislation would be required to put it into action.[68] In addition, both corporations and corporation-like entities were sued under the ATS without any potential issues being raised as to these types of defendants. In *Christina Magdalena* and *Moxon*, the ATS was used to sustain jurisdiction against a personified inanimate object (a ship).[69] In *Khedivial Line*, the court dealt with an ATS claim against a labor union.[70] And in *Vencap* the Second Circuit assumed that a corporation could be sued under the ATS.[71]

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65 *See* Khedivial Line, S. A. E. v. Seafarers' Int'l Union, 278 F.2d 49, 51–52 (2d Cir. 1960); Madison Shipping Corp. v. Nat'l Mar. Union, 282 F.2d 377, 378 (3d Cir. 1960); Upper Lakes Shipping Ltd. v. Int'l Longshoremen's Ass'n, 33 F.R.D. 348, 350 (S.D.N.Y. 1963).

66 Damaskinos v. Societa Navigacion Interamericana*, S.A., Panama*, 255 F. Supp. 919 (S.D.N.Y. 1966) (suit against British and Panamanian corporations); Seth v. Brit. Overseas Airways Corp., 216 F. Supp. 244 (D. Mass. 1963), *aff'd,* 329 F.2d 302 (1st Cir. 1964) (lawsuit against British corporation); Valanga v. Metro. Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966) (lawsuit against domestic insurance company); Abiodun v. Martin Oil Serv., Inc., 475 F.2d 142, 144 (7th Cir. 1973) (lawsuit against Illinois corporation).

67 519 F.2d 1001 (2d Cir. 1975), *abrogated on other grounds by* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

68 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 721 (2004).

69 The Vrow Christina Magdalena, 13 F. Cas. 356 (D.S.C. 1794), *aff'd sub nom.* Talbot v. Jansen, 3 U.S. 133 (1795); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793).

70 *Khedivial Lines*, 278 F.2d at 50.

71 *Vencap*, 519 F.2d 1001.

C. The Modern Era of the Alien Tort Statute

The modern era of ATS litigation began in 1980, occasioned by the Second Circuit's decision in *Filartiga v. Pena-Irala*.[72] This case dealt with a suit between Paraguayan citizens in the United States, two of whom alleged that the defendant had wrongfully caused the death of their relative through torture while serving as Inspector General of Police in Asuncion, Paraguay.[73] The Second Circuit relied on the ATS to find that jurisdiction existed in the case, stating that "[i]n light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture . . . by virtually all . . . nations . . ., we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[74] Like the pirate and slave trader, "the torturer has become . . . *hostis humani generis*, an enemy of all mankind."[75]

The court continued by embracing an interpretation of the ATS that brought it into the modern age, concluding that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today" and embraced an expansive view of the "law of nations."[76] Finally, the Second Circuit finished off this sea-change in interpretation of the ATS by establishing that the "constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."[77]

It is hard to overstate the impact *Filartiga* had on human rights actions in the federal court system. One author regarded that case as "opening the epic period of human rights litigation in this country . . . . In a sense, all current human rights litigation owes its fortune to *Filartiga*. The rediscovery of the Alien Tort Statute was much like finding the Holy Grail."[78] Another author observed that "[t]o its supporters, *Filartiga* is the *Brown v. Board of Education* of international human rights, a decision that spawned two decades of ground-breaking litigation."[79] One study

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72 630 F.2d 876, 878 (2d Cir. 1980).

73 *Id.* at 878–80.

74 *Id.* at 880.

75 *Id.* at 890 (emphasis added).

76 *Id.* at 880–81.

77 *Id.* at 885.

78 David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 256 (1996).

79 William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002).

in 2008 counted approximately 185 human rights lawsuits since *Filartiga*, with twelve resulting in either a settlement or a judgment for the plaintiffs.[80]

The cases that dealt with the ATS in the two decades after *Filartiga*, while interesting, are of limited precedential use owing to the more recent string of Supreme Court decisions.

The other major event from this period that deserves mentioning is Congress's passage of the Torture Victim Protection Act of 1991 (TVPA), which provides that individuals who act under the authority or color of law of a foreign nation are liable for damages stemming from acts of torture and extrajudicial killings.[81] The TVPA, codified as a note following the ATS, sidestepped debates about whether the ATS required an additional statute to enable claims to be brought under modern human rights law by expressly creating a cause of action for victims of torture.[82] The TVPA has therefore been described as "the only cause of action under the ATS created by Congress rather than the courts."[83]

In the context of this Comment's overall focus, it is important to note that the Supreme Court has already ruled that lawsuits against corporations are excluded from being brought under the TVPA. In *Mohamad v. Palestinian Authority*, the Supreme Court looked to the language and vocabulary of the statute to determine whether the defendant organizations could be held liable for the imprisonment, torture, and killing of a naturalized American citizen.[84] The TVPA "imposes liability on individuals," but "[i]t does not define 'individual.'"[85] Therefore, the Court looked to the "ordinary meaning" of individual, concluding that "no one . . . refers in normal parlance to an organization as an 'individual.'"[86] Moreover, it observed that "this Court routinely uses 'individual' to denote a natural person, and in particular to distinguish between a natural person and a corporation" and "Congress does not, in the ordinary course, employ the word any differently."[87] Therefore,

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80 Stephens, *supra* note 3, at 811.

81 The Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1992).

82 Jesner v. Arab Bank PLC, 138 S. Ct. 1386, 1398 (2018).

83 *Id.* at 1403 (citing Mohamad v. Palestinian Authority, 566 U.S. 449, 453–456 (2012)).

84 566 U.S. 449, 449 (2012).

85 *Id.* at 453.

86 *Id.* at 454.

87 *Id.*

the TVPA "authorizes liability solely against natural persons," excluding organizations like corporations.[88]

IV. THE RECENT SUPREME COURT JURISDICTION ON THE ALIEN TORT STATUTE

Starting in 2004, the Supreme Court has weighed in multiple times on the new era of ATS litigation occasioned by *Filartiga*, generally narrowing the circumstances under which ATS lawsuits can be brought.[89]

A. *Sosa v. Alvarez-Machain* and the Opening of the ATS Door

The Supreme Court first considered the ATS twenty-four years after *Filartiga* had revolutionized its application in *Sosa v. Alvarez-Machain*.[90] In 1985, a DEA agent was captured, tortured, and murdered in Mexico. Respondent Humberto Alvarez-Machain (Alvarez) was believed to be involved, and a group of Mexicans, including petitioner José Francisco Sosa, abducted Alvarez and brought him to the United States.[91] Alvarez was eventually able to secure his release and he began a civil suit against Sosa under the ATS for a violation of the law of nations.[92]

The Supreme Court used this opportunity to resolve some of the largest outstanding issues relating to the ATS. First, Alvarez argued that the ATS "was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law."[93] The Supreme Court rejected this argument, concluding instead that the ATS was jurisdictional in nature based on its history, context, and language.[94] Sosa, however, went further and argued one could not seek relief under the ATS without a further enabling statute establishing specific causes of action.[95] The Supreme Court disagreed with Sosa, explaining that "there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf."[96] At the same time, the

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88 *Id.* at 456.

89 Sarah E. McMillan, *Novel Approaches to Expect in Inevitable U.S. Climate Litigation*, ABA SCITECH L. 16, 20 (2021).

90 542 U.S. 692 (2004).

91 *Id.* at 697–98.

92 *Id.*

93 *Id.* at 713.

94 *Id.* at 713–14.

95 *Id.* at 714.

96 *Id.* at 719.

Court, depending on early materials like *Moxon*, inferred that Congress "intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations," a list limited to offenses against ambassadors, violations of safe conduct, and actions arising out of piracy and prize captures.[97]

Building on that foundation, the Supreme Court then opened the door to the further creation of causes of action under the ATS by federal courts, observing that nothing since the enactment of the ATS "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[98] After cautioning federal courts to be careful when recognizing a new cause of action,[99] the Supreme Court then stated that permissible claims under the ATS include only those based on "a norm of international character accepted by the civilized world and defined with a specificity comparable to" the offenses Congress had in mind when the ATS was originally enacted.[100] To give an example of this standard, the Court cited[101] the early case of *United States v. Smith*. [102] This case states that defining piracy "may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted." [103] While this is phrased in a somewhat confusing way, it seems to mean that the norm must either already have a known and accepted definition or be carefully described. *Smith* also makes it clear that acceptance by the civilized world requires virtually universal approval: "And the general practice of all nations in punishing all persons . . . who have committed this offence [of piracy] is a conclusive proof that the offence is supposed to depend . . . upon the law of nations, both for its definition and punishment."[104]

This newly established test was then applied to the case at hand to conclude that illegal detention of less than a day does not violate an international norm that is well-defined enough to create a federal remedy.[105]

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97 *Id.* at 720.

98 *Id.* at 725.

99 *Id.* at 725-28 (observing a need to be cautious since the common law's importance had receded since 1789, federal general common law had been discarded, such a decision is normally more suited to the legislature, the non-judicial realm of foreign relations is involved, and the judicial role does not encourage creativity).

100 *Id.* at 724–25.

101 *Id.* at 732 (2004).

102 18 U.S. 153 (1820).

103 *Id.* at 160.

104 *Id.* at 162.

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

The Court characterized the acknowledgment that further causes of action could be recognized as an "understanding that the door is still ajar subject to vigilant doorkeeping."[106] As shall be seen, the opening of this Pandora's Door came to be regretted by some on the Court, and many of the subsequent cases have focused on narrowing the aperture that *Sosa* created.

In a footnote, the Court noted that, besides the issue of the definitiveness of the norm, "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor *such as a corporation* or individual."[107] This statement appears to imply that one should look to international law on a norm-by-norm basis to determine whether a corporation could be found liable, thereby implying that corporate liability is possible (at least for some norms). However, *Sosa* contained no further elaboration on this point.

B. The Creation of the *Kiobel* Test

A case dealing with the ATS next reached the Supreme Court in 2013 when the Court heard *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel II*"). [108] This case involved claims brought by a group of Nigerian nationals who alleged that the defendant corporations had aided and abetted the Nigerian government in violations of the law of nations that occurred within Nigerian territory.[109] This case contains a pair of vital takeaways.

First, the Court decided whether claims brought under the ATS can reach conduct in a foreign country.[110] To answer this question, the Supreme Court concluded that the canon of interpretation known as the "presumption against extraterritorial application" applies to the ATS.[111] This canon presumes "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States;[112] thus, "[w]hen a statute gives no clear indication of an

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106 *Id.* at 729.

107 *Id.* at 733 n.20 (emphasis added).

108 569 U.S. 108 (2013).

109 *Id.* at 111–12.

110 *Id.* at 115.

111 *Id.* at 116 ("But we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.").

112 EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

extraterritorial application, it has none."[113] The purpose of this presumption is to "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[114] Since "nothing in the statute [the ATS] rebuts that presumption," actions seeking relief for violations of the law of nations occurring *outside* the United States are entirely barred.[115]

The Supreme Court also set out the proper test for claims that involve conduct both within and without the United States: "[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[116] As a demonstration of how to do so, the Court cited to *Morrison v. National Australia Bank, Ltd.*[117] In that case, the Court had looked to the "focus" of congressional concern in the Securities Exchange Act of 1934 ("the '34 Act") to determine whether a claim involving some domestic and some foreign conduct could properly be brought under that act.[118] While the plaintiffs alleged that certain banking executives had made misleading statements and manipulated financial models on American soil, the Court decided that the focus of the '34 Act was not on the place where alleged deception had occurred, but on "purchases and sales of securities in the United States."[119] Because the case did not involve any such purchases or sales (they had occurred in Australia), the case was dismissed.[120] While clarifying, this citation to *Morrison* would prove to be an area of contention among the lower courts and remains a major source of confusion in ATS law.[121]

At the end of its opinion, the Court states that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required."[122] In other words, mere corporate presence is not enough to hold a corporation liable under the ATS.

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113 *Kiobel II*, 569 U.S. at 115 (quoting Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247 (2010)).

114 *Id.* at 116.

115 *Id.* at 124.

116 *Id.* at 124–25.

117 561 U.S. 247, 266–67 (2010).

118 *Id.*

119 *Id.*

120 *Id.* at 273.

121 Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 194–195 (5th Cir. 2017) (listing various formulations used by circuit courts to apply *Kiobel II*).

122 *Kiobel II*, 569 U.S. at 125.

This decision represented a major shift for ATS litigation. Numerous cases had been decided based on conduct far removed from the borders of the United States, including *Filartiga* itself, which involved allegations of torture that occurred entirely in Paraguay.[123] Moreover, multiple Courts of Appeals had previously outright rejected the application of the presumption against extraterritoriality to the ATS.[124] Thus, the new standard made it much harder for plaintiffs to bring cases.[125]

C. *Jesner* ends ATS Litigation against Foreign Corporations

Five years after *Kiobel II*, the Supreme Court dealt with the ATS again in *Jesner v. Arab Bank, PLC*.[126] The petitioners, most of whom were foreign nationals, filed ATS lawsuits against Arab Bank claiming that they or their family were injured by terrorist attacks and that Arab Bank had used its New York branch to process transactions that benefited terrorists.[127]

The Supreme Court, surprising some,[128] decided this case by concluding that "foreign corporations may not be defendants in suits brought under the ATS" without further action from Congress, basing this conclusion on two arguments grounded in theories of judicial restraint.[129]

First, ATS litigation against foreign corporations necessarily implicates major foreign-relations concerns. The Court noted that "[t]he principal objective of the statute [ATS], when first enacted, was to avoid foreign entanglements" caused by a lack of a federal forum for injured foreign citizens.[130] However, this and other ATS litigation were causing the exact opposite problem; "[p]etitioners

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123 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980); *see also In re* Est. of Ferdinand Marcos, Hum. Rts. Litig., 25 F.3d 1467, 1469 (9th Cir. 1994) (involving arrests, torture, and executions that occurred entirely within the Philippines).

124 *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 747 (9th Cir. 2011) (en banc), *vacated on other grounds*, 569 U.S. 945 (2013) ("We therefore conclude that the ATS is not limited to conduct occurring within the United States . . . ."); Doe v. Exxon Mobil Corp., 654 F.3d 11, 20 (D.C. Cir. 2011) ("[W]e hold that there is no extraterritoriality bar . . . ."), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).

125 Rachel Chambers & Gerlinde Berger-Walliser, *The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison*, 58 AM. BUS. L.J. 579, 587–88 (2021).

126 138 S. Ct. 1386, 1386 (2018).

127 *Id.* at 1394.

128 Milena Sterio, *Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act*, 50 CASE W. RES. J. INT'L L. 127, 143 (2018) ("[I]t is this author's opinion that the Court will likely side with the plaintiffs [in *Jesner*], but that it will strictly limit corporate liability . . . .").

129 *Id.* at 1403, 1407.

130 *Id.* at 1397.

are foreign nationals seeking hundreds of millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists," with the only alleged major connection to the United States being the aforementioned banking transactions.[131] The lawsuit against Arab Bank had produced diplomatic problems with Jordan for some thirteen years, and various other foreign sovereigns had also registered their displeasure with ATS litigation.[132] As the Court observed "These are the very foreign-relations tensions the First Congress sought to avoid."[133] Moreover, any involvement of the judicial system in international decisions and disputes should be avoided for separation-of-powers concerns.[134] "The political branches, not the Judiciary, have the responsibility and . . . capacity to weigh-foreign policy concerns."[135]

The other reason for barring ATS litigation against foreign corporations was the fact that the Court has a "general reluctance to extend judicially created private rights of action."[136] This hesitation "extends to the question whether courts should exercise the judicial authority to mandate a rule that imposes liability upon on artificial entities like corporations."[137] In general, the Court said, the legislative branch is better suited to determine whether new forms of legal liability would be appropriate.[138] This line of logic bears directly on whether domestic corporations can be found liable, since the Court's argument would apply to domestic corporations just as easily as it does to foreign corporations. The ATS makes no distinction between the two in its text, and the Court itself is clearly discussing "artificial entities like corporations" in general.

Various additional arguments against general corporate liability under the ATS were made by Justice Anthony Kennedy in an opinion joined by two other justices. These include the fact that extending international law to individuals does not imply that artificial entities are similarly covered; the charters of international criminal tribunals often exclude corporations; the TVPA, a statutory analogy to the ATS, restricts liability to individuals, excluding corporations; it has not been shown that corporate liability is

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131 *Id.* at 1406.
132 *Id.* at 1406–07.
133 *Id.*
134 *Id.* at 1403.
135 *Id.*
136 *Id.* at 1402.
137 *Id.* at 1402–03.
138 *Id.* at 1402.

needed to serve the goals of the ATS; other remedies for plaintiffs are available, including suits against individual corporate employees; and Congress might think that limiting liability to instances where management was actively complicit would be more advisable.[139] While these arguments do not have binding authority, they provide additional evidence that domestic corporate liability appeared to seriously be at risk in the wake of *Jesner*.

As a result, even though the Court did not directly analyze domestic corporations in *Jesner*, some did predict that foreclosing domestic corporate liability would be the next step for a future Court.[140] Indeed, Justice Alito directly questioned the need for allowing such liability in a footnote to his concurrence.[141] As it turns out, the exact opposite happened when the Supreme Court had its next bite at the ATS apple.

D. The ATS Door Sways Erratically in *Nestlé*

The most recent Supreme Court decision dealing with the ATS (and the one that occasioned this Comment) is *Nestlé USA, Inc. v. Doe*.[142] Six individuals from Mali claimed that they had been trafficked into the Ivory Coast and used as slave labor to harvest cocoa.[143] Defendants Nestlé USA and Cargill bought cocoa from farms in the Ivory Coast and provided technical and financial resources.[144] The plaintiffs argued that the defendants aided and abetted child slavery, and that even though both the provided resources and their injuries occurred outside the United States, they were able to bring suit "because petitioners allegedly made all major operational decisions from within the United States."[145] On appeal, the Ninth Circuit had relied on an earlier precedent to affirm that corporate liability under the ATS was possible (albeit with liability for foreign corporations barred after *Jesner*).[146]

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[139] *Id.* at 1400–01, 1403, 1405–06, 1408.

[140] *Alien Tort Statute—Domestic Corporate Liability—Ninth Circuit Denies Rehearing En Banc of Case Permitting Domestic Corporate Liability Claim*, 133 HARV. L. REV. 2643, 2647 (2020).

[141] *Jesner*, 138 S. Ct. at 1410 n.* (Alito, J., concurring).

[142] 141 S. Ct. 1931, 1931 (2021).

[143] *Id.* at 1935.

[144] *Id.*

[145] *Id.*

[146] Doe I v. Nestlé USA, Inc., 766 F.3d 1013, 1021 (9th Cir. 2014) (citing Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011), *vacated on other grounds*, 569 U.S. 945 (2013)) (reaffirming "the corporate liability analysis reached by the en banc panel of our circuit in *Sarei v. Rio Tinto*," which had "rejected the defendants' argument that corporations can never be sued under the ATS"), *rev'd on other grounds sub nom.* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

This argument was based on the aforementioned footnote in *Sosa*, with the Ninth Circuit stating that "*Sosa* expressly frames the relevant international-law inquiry to be the scope of liability of private actors for a violation of the 'given norm,' i.e. an international-law inquiry specific to each cause of action asserted," including for corporate liability.[147]

One might think that this case would the opportunity for the Supreme Court to resolve the issue of ATS domestic corporate liability by either rejecting or accepting the *Sosa*-based formulation offered by the Ninth Circuit. However, the Supreme Court again did not reach this question. Instead, Justice Clarence Thomas, writing on behalf of eight justices, held that the allegations of "general corporate activity" of the defendants within the United States were not sufficient to support jurisdiction under the ATS.[148] As part of this holding, the Court recast the extraterritoriality analysis from *Kiobel II*, relying on the two-part analysis from *RJR Nabisco, Inc. v. European Community*.[149] Under step one of that decision, one presumes that a statute applies solely domestically, then determines whether the statute clearly and affirmatively rebuts this presumption.[150] *Nestlé* concluded that *Kiobel II* had resolved this step by holding that the ATS does not rebut the presumption.[151] Under step two, when the statute does not apply extraterritorially plaintiffs must show that "the conduct relevant to the statute's focus occurred in the United States;" if so, the statute can be applied domestically even if other conduct occurred abroad.[152] Thus, general corporate activity is not relevant to the focus of the statute.

Beyond these holdings, there is a mess of partial concurrences and dissents.[153] The Court could not agree on how to interpret the scope of the ATS; three justices wanted to sharply limit its applicability and three others wanted to maintain the *Sosa* interpretation.[154]

However, a total of five justices expressed a belief that domestic corporations are not immune from lawsuits under the

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147 Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.20 (2004)), *vacated on other grounds*, 569 U.S. 945 (2013).

148 *Nestlé*, 141 S. Ct. at 1937.

149 579 U.S. 325, 337 (2016).

150 *Nestlé*, 141 S. Ct. at 1936 (quoting *Nabisco*, 579 U.S. at 337).

151 *Id.* (citing *Kiobel II*, 569 U.S. 108, 124 (2013)).

152 *Nestlé*, 141 S. Ct. at 1936 (quoting *Nabisco*, 579 U.S. at 337).

153 *Id.* at 1931.

154 *Compare Nestlé*, 141 S. Ct. at 1939 (Thomas, J., concurring), *with Nestlé*, 141 S. Ct. at 1947 (Sotomayor, J., concurring).

ATS.[155] In his concurrence, Justice Neil Gorsuch stated that "[t]he notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding."[156] Similarly, Justice Alito, while dissenting, stated that "if a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation."[157] And, in a footnote to her concurrence (which was joined by Justices Stephen Breyer and Elena Kagan), Justice Sonia Sotomayor stated that she agreed with Justice Gorsuch that "there is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons."[158]

While this messy result provides a guidepost for where the current Court might end up in the future, it is unfortunate that *Nestlé* did not directly answer the question of whether a domestic corporation could be held liable under the ATS, prolonging the current disagreement among the courts of appeal. The Second Circuit continues to steadfastly maintain that domestic corporate liability is impossible, despite the disagreement of every other circuit court to have made a ruling on this question.[159]

V. SHOULD DOMESTIC CORPORATIONS BE HELD LIABLE UNDER THE ATS?

A. Supreme Court Precedent

The question of whether domestic corporations should be held liable under the ATS has been only passingly addressed in binding Supreme Court precedent. *Sosa*'s twentieth footnote mentioned that a "consideration is whether international law extends the scope of liability for a violation of a given norm to the

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155 Green & McKenzie, *supra* note 9.

156 *Nestlé*, 141 S. Ct. at 1940 (Gorsuch, J., concurring).

157 *Id.* at 1950 (Alito, J., dissenting).

158 *Id.* at 1947 n.4 (Sotomayor, J., concurring).

159 *Compare* Doe I v. Nestlé USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014) (allowing for corporate liability because "there is no categorical rule of corporate immunity or liability"), *rev'd on other grounds*, 141 S. Ct. 1931 (2021), Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011) ("[C]orporate liability is possible under the Alien Tort Statute . . ."), and Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) (observing that the ATS "grants jurisdiction from complaints of torture against corporate defendants"), *with Kiobel I*, 621 F.3d 111, 149 (2d Cir. 2010) ("For now, and for the foreseeable future, the Alien Tort Statute does not provide subject matter jurisdiction over claims against corporations."), *and In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 157 (2d Cir. 2015) (declining to overrule *Kiobel I* on domestic corporate liability despite the result in *Kiobel II*), *aff'd sub nom*. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[160] While this suggests that domestic corporate liability is possible depending on the norm in question, later cases dealing with the ATS have not seen fit to build on this implication. Moreover, *Jesner* offered some reasoning in the context of foreign corporations that would seem to equally apply to domestic corporations.[161] Finally, *Nestlé* saw a collection of five justices express support for domestic corporate ATS liability in dicta.[162]

It is difficult to shape these scatterings into a coherent whole. At best, one could say that *Sosa* suggests that domestic corporate liability is possible and offers a framework for determining whether it exists, *Jesner* suggests that domestic corporate liability is impossible, and *Nestlé* suggests it is possible, but without offering a coherent framework or explanation. Therefore, it seems advisable to look at other potential sources of guidance before attempting to answer this question.

B. The Text of the Alien Tort Statute

The modern version of the ATS, as previously mentioned, simply says that 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."[163] While the statute clearly indicates who can bring a suit under the ATS (an alien), it contains nothing bearing on the identity of potential defendants.

However, the text of the ATS can be helpful when compared with the Supreme Court's analysis of the language of the TVPA. In *Palestinian Authority,* the Supreme Court concluded that the language of that statute, which refers to "individuals," forecloses TVPA lawsuits from being brought against corporations.[164] This conclusion was based solely on the use of the word "individual," and by analogy, the lack of a similarly restricting word in the ATS means that the text itself should not be interpreted to prevent corporate liability. The Supreme Court has said "[w]e do not start from the premise that this language is imprecise. Instead, we assume that in drafting . . . legislation, Congress said what it

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160 Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.20 (2004) (emphasis added).

161 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018).

162 *See supra* notes 156–58.

163 28 U.S.C. § 1350.

164 Mohamad v. Palestinian Auth., 566 U.S. 449, 456 (2012).

meant."[165] When Congress included no words indicating any restrictions on the class of defendants liable under ATS, the Court should trust that there are no such restrictions. And "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and . . . limited the statute to the ones set forth."[166] The lack of any exceptions (such as one, for instance, saying that ATS suits can be brought against anyone except corporations) should therefore be a very strong indication that the Supreme Court should not go beyond what Congress intended.

C. Legislative Intent of the Alien Tort Statute

The utility of legislative intent has been heavily criticized,[167] but this inquiry does shed some measure of light on the ATS. Discerning the legislative intent in the ATS is difficult due to a paucity of materials; as previously noted, there is no significant mention of the ATS in the records of congressional debates or the correspondence of the drafting senators.[168] Turning to historical context, the incidents and concerns that motivated the passage of the ATS have already been discussed.[169] At the same time, the status and position of corporations during the post-revolutionary period when the ATS was enacted have yet to be investigated.

The corporate structure existed in a variety of forms in the immediate post-revolutionary era.[170] One scholar counted 317 corporate charters granted by the states in the eighteenth century alone.[171] Before the American Revolution, Blackstone described how "[a]fter a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities," including "[t]o sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may."[172]

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165 United States v. LaBonte, 520 U.S. 751, 757 (1997).

166 United States v. Johnson, 529 U.S. 53, 58 (2000).

167 *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 32 (Amy Gutmann ed., 1997) (arguing that "with respect to 99.99 percent of the issues of construction reaching the courts, there is no legislative intent").

168 Casto, *supra* note 39, at 495; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004).

169 *See supra* Part III.A.

170 Shaw Livermore, *Unlimited Liability in Early American Corporations*, 43 J. POL. ECON. 674 (1935).

171 JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 26 (1917).

172 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 476 (1753).

Early American cases make it even clearer that litigation involving corporations was not unusual; the Supreme Court observed in 1858 that "[a]t a very early period, it was decided . . . in the United States, that actions might be maintained against corporations for torts."[173] In 1818, the Supreme Court of Pennsylvania similarly noted that "from the earliest times to the present, corporations have been held liable for torts."[174] The original text of the ATS plainly and clearly states that "*all causes* where an alien sues for a tort" were within the jurisdiction of the district courts.[175] In a time and place where corporations were both common and liable for tort lawsuits, it seems virtually certain that the original understanding of the ATS would have applied it to corporations just as easily as it was applied to individuals.[176] Had a different understanding been present at the time, it almost certainly would have been mentioned in the legislative records or the opinions of contemporary judges. Moreover, some have pointed out that "there is no reason to believe that Congress wanted to avoid foreign relations problems created by individuals but not by corporations."[177]

However, one must be cautious about putting too much weight on this history. The modern scope of the ATS has been so heavily modified via Supreme Court jurisprudence that it is questionable how much interpretive value the original legislative intent still possesses. Today, for example, a foreign corporation cannot be sued under the ATS,[178] nor does "mere corporate presence" suffice to support an ATS lawsuit.[179] Neither of these requirements or anything remotely close to them appears in the jurisprudence, correspondence, or writings contemporary with the ATS when it was first promulgated. In this sort of world, the original legislative intent to apply the ATS to corporations ought to be considered less persuasive.

D. The Jurisprudence of the Courts of Appeal

Most of the courts of appeals to rule on this question (five out of six) have concluded that domestic corporations can be held

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[173] Phila., W. & B.R. Co. v. Quigley, 62 U.S. 202, 210 (1858).

[174] Chestnut Hill & Springhouse Tpk. Co. v. Rutter, 1818 WL 2109, at *7 (Pa. 1818).

[175] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77.

[176] *See* Moxon v. The Fanny, 17 F. Cas. 942, 948 (D. Pa. 1793); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795).

[177] Sterio, *supra* note 127, at 132; *see also* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1942 (2021) (Gorsuch, J., concurring).

[178] *See* Jesner v. Arab Bank, *PLC*, 138 S. Ct. 1386, 1408 (2018).

[179] *See Kiobel II*, 569 U.S. 108, 125 (2013).

liable under the ATS. Of those finding domestic liability, two of them, those authored by the Fifth and the Eleventh Circuits, preceded *Sosa* and therefore are only marginally helpful.[180] Since *Sosa*, a clear majority of circuit courts to have ruled on the question of domestic corporate liability have found that it exists, although they take different paths to reach the same conclusion. There is one important exception—the Second Circuit. This Comment will examine each of the post-*Sosa* cases chronologically since they contain a great deal of interplay.

1. The Eleventh Circuit Focuses on the Text

In 2008, the Eleventh Circuit observed in *Romero v. Drummond Co.* that the ATS "provides no express exception for corporations" and that it "grants jurisdiction from complaints against corporate defendants."[181] This finding was based on two arguments. First, paralleling the discussion above, "[t]he text of the Alien Tort Statute provides no express exception for corporations."[182] And secondly, a previous circuit precedent had assumed without discussion that the ATS could apply to corporations.[183]

2. The Second Circuit Rejects Domestic Corporate Liability in *Kiobel I*

In 2010, however, the Second Circuit rejected domestic corporate liability under the ATS. Despite earlier circuit precedent holding that ATS jurisdiction over multinational corporations was permissible,[184] the Second Circuit charted a new course in *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), the predecessor to the previously-discussed Supreme Court case of the same name.[185] The court highlighted the footnote from *Sosa* which stated that "[a] related consideration is whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a

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[180] *See* Herero People's Reparations Corp. v. Deutsche Bank*, A.G.*, 370 F.3d 1192, 1195 (D.C. Cir. 2004) (finding that the "complaint in this case also stated an arguable claim under the Alien Tort Act" where defendants were corporations); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) (assuming ATS applies to corporations).

[181] 552 F.3d 1303, 1315 (11th Cir. 2008).

[182] *Id.* at 1315 (citing 28 U.S.C. § 1350).

[183] *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005).

[184] *See* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174 (2d Cir. 2009) (citing Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007) (per curiam)) (explaining that the Second Circuit had "held that the ATS conferred jurisdiction over multinational corporations" that helped maintain apartheid).

[185] 621 F.3d 111 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013).

corporation or individual," [186] taking this to mean that it had to look to international law to determine whether corporations could be held liable for violations of the laws of nations. After surveying various authorities, the Second Circuit concluded that corporate liability "is not recognized as a 'specific, universal, and obligatory' norm" under *Sosa*.[187] In the court's view, the charters and procedures of international tribunals, the text of international treaties, and the works of publicists all demonstrated a lack of acceptance of corporate liability as an international norm.[188] That conclusion was reaffirmed twice by the Second Circuit in the years after *Kiobel II*,[189] and it seems unlikely that the results of *Jesner* or *Nestlé* would change this result. The Supreme Court's *Jesner* arguments with regards to foreign corporate liability that could easily be applied to domestic corporations might even make the Second Circuit feel more secure in its conclusions.[190] Indeed, this conclusion is buttressed by a recent decision from the District Court for the District of Columbia which declined to recognize ATS domestic corporate liability under *Jesner*.[191]

3. The Ninth Circuit Focuses on the Text and Rejects *Kiobel I*

The Ninth Circuit first recognized corporate liability in the 2011 case *Sarei v. Rio Tinto, PLC*.[192] The court acknowledged the Second Circuit's decision in *Kiobel I*, but rejected both its analysis and its conclusion.[193] The defendant in *Sarei* had argued against corporate liability by looking "principally to treaties establishing international tribunals for criminal trials . . . which do not explicitly provide for corporate liability."[194] However, the Ninth Circuit

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[186] *Id.* at 127 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.20 (2004) (emphasis added)).

[187] *Id.* at 145.

[188] *Id.* at 131–45.

[189] *See In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 151 (2d Cir. 2015) ("We conclude that *Kiobel I* is and remains the law of this Circuit, notwithstanding the Supreme Court's decision in *Kiobel II* affirming this Court's judgment on other grounds."), *aff'd sub nom.* Jesner v. Arab Bank, PLC *on other grounds*, 138 S. Ct. 1386 (2018); Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 219 (2d Cir. 2016) ("In *Kiobel I*, we established that the law of nations . . . immunizes corporations from liability . . . . To the extent Plaintiffs submit that *Kiobel I* was wrongly decided . . . we are not free to consider that argument.").

[190] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018).

[191] *See Exxon Mobil Corp.*, 391 F. Supp. 3d at 85–93 (D.D.C. 2019).

[192] 671 F.3d 736, 747–48 (9th Cir. 2011).

[193] *Id.*

[194] *Id.* at 747

instead concluded that "[t]he appropriate inquiry . . . is to look at the ATS itself and to the international law it incorporates."[195] Comparing the text of the ATS to that of the TVPA, which the Ninth Circuit had previously found to "limit liability . . . to individuals,"[196] the court followed *Romero* by finding that "[t]he ATS contains no such language and has no such legislative history to suggest that corporate liability was excluded."[197] However, while the *Sarei* court explicitly rejected the *Kiobel I* conclusion that "the statute itself is a complete bar to corporate liability," it reached a very similar result in its analysis of footnote twenty of *Sosa*, stating it requires "an international-law inquiry specific to each cause of action asserted" and that "[t]he proper inquiry, therefore, should consider separately each violation of international law alleged and which actors may violate it."[198] The *Sarei* court nevertheless reversed the dismissal of genocide and war crimes claims against the defendant corporation, finding that the international norms the claims were based on were "'universal' or applicable to 'all actors,' and, consequently, applicable to corporations."[199] Thus, the Ninth Circuit found that some norms were so universally accepted that the identity of the defendant did not matter.

The Ninth Circuit reaffirmed this finding after *Kiobel II*, observing that "for each ATS claim asserted by the plaintiffs, a court should look to international law and determine whether corporations are subject to the norms underlying that claim,"[200] and reaffirmed it again only with respect to domestic corporations after *Jesner* ended foreign corporate liability.[201]

4. The Seventh Circuit Rejects *Kiobel I* and Embraces Domestic Corporate Liability

The Seventh Circuit observed in *Flomo v. Firestone Natural Rubber Co.* (also decided in 2011) that "corporate liability is possible under the Alien Tort Act" in a case involving a domestic

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195 *Id.*

196 *Id.* at 747–48 (citing Bowoto v. Chevron, 621 F.3d 1116 (9th Cir. 2010)).

197 *Id.*

198 *Id.* at 748.

199 Doe I v. Nestlé USA, Inc., 766 F.3d 1013, 1021 (9th Cir. 2014) (citing *Sarei*, 671 F.3d at 760, 765), *rev'd on other grounds*, 141 S. Ct. 1931 (2021).

200 *Id.* at 1022.

201 Doe v. Nestlé, *S.A.*, 906 F.3d 1120, 1124 (9th Cir. 2018) ("But *Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestlé I*'s holding as applied to domestic corporations."), *opinion amended and superseded on denial of reh'g*, 929 F.3d 623 (9th Cir. 2019), *rev'd and remanded on other grounds sub nom.* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

corporation.[202] Like the Ninth Circuit, it based its argument partly on an outright rejection of the logic of *Kiobel I*, which it attempted to refute with a variety of arguments.[203] The Seventh Circuit, unlike the Second Circuit, felt that certain international tribunals demonstrated that corporations have been punished for violations of customary international law.[204] Moreover, even if no corporation had ever been found liable for such a violation, "[t]here is always a first time for litigation to enforce a norm;" in other words, the lack of examples is not itself evidence of a norm.[205] The court also observed that "corporate tort liability is common around the world," implying that it has attained the level of international acceptance required for a norm under *Sosa*.[206]

In *Flomo*, the Seventh Circuit also made a very interesting distinction between the *substance* of the law and the *means of enforcing* the law, stating that "[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them."[207] Therefore, while the violations themselves are determined by reference to individual law, it would be up to the US court system to determine how the violations are punished and whether corporations themselves or their employees would be found liable.[208] If a plaintiff had to show that civil liability for a violation of international law was itself a norm, "no claims under the Alien Tort Statute could ever be successful, even claims against individuals; only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law.[209] [210]

E. Conclusion

Ultimately, domestic corporations can properly be held liable under the ATS. This conclusion is based first on the ATS itself; as the Eleventh and Ninth Circuits noted,[211] nothing in the text limits the object of an ATS lawsuit. While the possible plaintiffs are

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[202] 643 F.3d 1013, 1021 (7th Cir. 2011).

[203] *Id.* at 1017–21.

[204] *Id.* at 1017.

[205] *Id.*

[206] *Id.* at 1019.

[207] *Id.* at 1019–21.

[208] *Id.*

[209] *Id.* at 1019.

[210] As a side note, the court observed that *in rem* actions against pirate ships give an example of a nonliving entity being held liable for violations of international law. *Id.* at 1021.

[211] Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Sarei v. Rio Tinto, *PLC*, 671 F.3d 736, 747–48 (9th Cir. 2011).

limited to aliens and the basis of actions is limited to violations of the law of nations and US treaties, the ATS does not speak to either potential defendants or possible remedies.[212] Without textual language to stand on like the use of "individual" in the TVPA,[213] preventing ATS lawsuits from being brought against domestic corporations would be an extra-textual and unnecessary limit on the scope of the statute imposed via judicial fiat and nothing more.

In addition, the legislative history and historical context clearly demonstrate that corporations were not only common during the period when the ATS was promulgated but also able to be sued in court.[214] The members of the First Congress who passed the ATS were almost certainly aware of this practice, but they exercised their legislative powers granted by the Constitution to not limit the targets of an ATS lawsuit. ATS lawsuits were also brought against defendants analogous to corporations soon after the ATS was passed.[215]

A clear majority of the Courts of Appeal have found that the ATS allows domestic corporate liability. The arguments offered by the Seventh Circuit are additionally particularly persuasive. If the sources of international law must be interrogated to determine whether a corporation can be held liable for certain violations of international law, why should international law not also determine the damages? Moreover, sheer numbers make it far less likely that a corporation has been found to have violated international law; there are far more individuals in the world than corporations. And, as the Seventh Circuit observed, a lack of precedent should not be taken to mean that a corporation cannot be held liable.[216]

While the arguments the Supreme Court used to foreclose foreign corporate liability in *Jesner* might seem to complicate this situation, neither applies here. For one, there are obviously no foreign policy concerns of the type that the Court worried about in suits against domestic corporations.[217] While the validity of the Court's "general reluctance to extend judicially created private rights of action"[218] must be acknowledged, no extending is

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[212] 28 U.S.C. § 1350.

[213] Mohamad v. Palestinian Auth., 566 U.S. 449, 456 (2012).

[214] *See supra* Part V.C.

[215] *See* Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (*in rem* action against French-commissioned privateer).

[216] Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1017 (7th Cir. 2011).

[217] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018).

[218] *Id.* at 1402.

occurring here; domestic corporate liability has *always* been possible under the ATS. Domestic corporations were assumed to be a proper target of ATS lawsuits in the 1960s,[219] 1970s,[220] the 2000s,[221] and the 2010s,[222] and similarly artificial entities were held liable in the period directly after the passage of the ATS.[223] If the Supreme Court were to reach the conclusion that domestic corporate liability under the ATS is possible, it would simply be a confirmation of what has been implicitly or explicitly accepted by most courts that have dealt with the ATS.

There is a total lack of sources distinguishing between corporate and individual liability prior to *Sosa*'s footnote twenty,[224] which is the seed that led to *Kiobel I*.[225] This footnote is the biggest potential stumbling block to a finding that domestic corporate liability is possible under the ATS; it implies that one must look to international law in order to determine whether a corporation can be held liable.[226] While the Ninth Circuit avoided this problem by finding that certain norms applied to all actors, I would prefer to simply not depend on *Sosa*'s footnote twenty whatsoever. It brings in an unnecessarily complicated analysis to determine whether "international law extends the scope of liability for a violation of a given norm to the perpetrator being sued,"[227] a test not required by either precedent or the text of the statute. The footnote cites a pair of cases, but they discuss whether or not certain conduct has been accepted as a violation of international law, not whether a *certain category of defendant* has been accepted as entities that can be held liable under international law.[228] The relationship of these cases to the question of defendant is quite unclear, as is the

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219 Valanga v. Metro. Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966) (lawsuit against domestic insurance company, dismissed for other reasons).

220 Abiodun v. Martin Oil Serv., *Inc.*, 475 F.2d 142, 144 (7th Cir. 1973) (lawsuit against Illinois corporation, dismissed on motion for summary judgment); IIT v. Vencap, Ltd., 519 F.2d 1005, 1008, 1009 n.13 (2d Cir. 1975) (suit against three domestic corporations), *abrogated on other grounds by* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010).

221 Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008) (case decided against foreign corporation, which means that domestic corporations could also be liable).

222 Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1021 (9th Cir. 2014).

223 *See* The Vrow Christina Magdalena, 13 F. Cas. 356 (D.S.C. 1794), *aff'd sub nom.* Talbot v. Jansen, 3 U.S. 133 (1795); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793).

224 Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.20 (2004).

225 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 127 (2d Cir. 2010) (emphasis added) (quoting *Sosa*, 542 U.S. at 733 n.20 (2004)), *aff'd on other grounds*, 569 U.S. 108 (2013).

226 *Sosa*, 542 U.S. at 733 n.20.

227 *Id.*

228 *Id.*

reason why this "rule" needed to be added in the first place. Moreover, the Supreme Court itself seems to have placed little weight on this footnote. It goes entirely unmentioned in *Kiobel II*[229] and is briefly mentioned twice in *Jesner*[230] even though both of those cases involved ATS lawsuits against corporations. Neither the majority opinion nor any of the five justices in *Nestlé* who supported ATS domestic corporate liability bring it up at all.[231] The lower courts have attributed much more significance to it than the Supreme Court thus far has.

I acknowledge that the vast majority of my logic could be extended to foreign corporations as well.[232] However, the foreign-policy concerns in that context would require a level of analysis that places that issue outside the scope of this Comment.[233] Moreover, the Supreme Court ruled on foreign corporate liability relatively recently[234] while the question of domestic corporate liability remains open.

VI. WHAT CONDUCT SUFFICES FOR AN ATS LAWSUIT?

The Supreme Court cases described above can be combined into a rough framework to determine whether alleged conduct supports a lawsuit under the ATS.

The foundation was created in *Kiobel II*, where the Court said that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[235] The Court cited to *Morrison* to demonstrate, looking to the "focus" of congressional concern in the '34 Act and concluding that it was on "purchases and sales of securities in the United States," thus the presumption being displaced.[236] The Court went on to note in *Kiobel II* that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices" to defeat the presumption.[237]

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229 *Kiobel II*, 569 U.S. 108 (2013).

230 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399–1400 (2018).

231 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

232 For instance, the text and legislative history contain nothing that would indicate a bar to suits against foreign corporations.

233 *See Jesner*, 138 S. Ct. at 1403, 1406–07 (2018).

234 *Id.*

235 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

236 Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 266–67 (2010).

237 *Kiobel II*, 569 U.S. at 125.

Nestlé then modified the extraterritoriality analysis from *Kiobel II* using the two-part analysis from *RJR Nabsico*.[238] Because the ATS does not rebut the presumption against extraterritoriality, plaintiffs must show that "the conduct relevant to the statute's focus occurred in the United States." [239] If so, the statute can be applied domestically even if other conduct occurred abroad.[240]

Thus, for a domestic corporation to be held liable under the ATS, plaintiffs must show that the conduct relevant to the focus of the statute occurred in the US, and this conduct cannot be either "mere corporate presence" or "general corporate activity" like decision-making.[241] However, the Supreme Court has never defined the focus of the ATS. [242]

A. The Focus of the Alien Tort Statute

Kiobel II created a good deal of confusion around the extraterritoriality analysis for ATS claims. While it stated that claims that "touch and concern the territory of the United States . . . must do so with sufficient force to displace the presumption against extraterritorial application," it also cited to *Morrison*, which uses an inquiry looking to the "focus" of statutes.[243] It was unclear how these two cases interacted with each other, and a wide range of interpretations arose in the courts of appeal.[244]

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[238] 579 U.S. 325, 337 (2016).

[239] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021) (quoting *Nabisco*, 579 U.S. at 337).

[240] *Id.*

[241] *Kiobel II*, 569 U.S. at 125; *Nestlé*, 141 S. Ct. at 1937.

[242] Green and McKenzie, *supra* note 9. The Supreme Court has also not specified the *sorts* of conduct that would suffice, but that topic is itself quite broad and it is beyond the boundaries of this Comment. It also seems to be an open question whether the original offenses that the ATS applied to (offenses against ambassadors, violations of safe conduct, and piracy, *see* Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004)), would still suffice.

[243] *Kiobel II*, 569 U.S. at 124–25 (citing Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 266–73 (2010)).

[244] *See* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1028 (9th Cir. 2014) (holding that "the opinion in *Kiobel II* did not incorporate *Morrison* 's focus test" because it "chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard" and observing that "since the focus test turns on discerning Congress's intent when passing a statute, it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms"); Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 197 (5th Cir. 2017) (following *Morrison* to "ask what the ' "focus" of congressional concern' is with the ATS"); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527 (4th Cir. 2014) (ignoring *Morrison* and holding that "[t]he 'touch and concern' language set forth in the majority opinion [in *Kiobel II*] contemplates that courts will apply a fact-based analysis to determine whether particular ATS claims displace the presumption against extraterritorial application"); Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013) (focusing solely on the "touch and concern" language of *Kiobel II*); Mastafa v. Chevron Corp., 770 F.3d 170, 195 (2d Cir. 2014) (combining the "focus" and "touch and concern"

However, *Nestlé* resolved much of the confusion in this area by explicitly stating that "where the statute, as here [with the ATS], does not apply extraterritorially, plaintiffs must establish that the 'conduct relevant to the statute's focus occurred in the United States.' "[245] The "touch and concern" language of *Kiobel II* goes entirely unmentioned; it can therefore be assumed that the *Morrison* analysis is the proper way to perform an extraterritoriality analysis under the ATS.[246] The Court went on to note a disagreement between the parties on how to define the focus of the ATS, with Nestlé and other petitioners arguing that "'the conduct relevant to the [ATS's] focus' is the conduct that directly caused the injury" (thereby foreclosing any claims made under an aiding-and-abetting theory) while respondents contend that the ATS's focus "is conduct that violates international law."[247] However, the Court provided no clarification on this question, ending its analysis without resolving the disagreement.[248] As a result, other sources are required to define the focus of the ATS.

1. Supreme Court Precedent

Of the previous Supreme Court cases, *Sosa* speaks most clearly to the overall purpose and aims of the ATS. Those who drafted it had in mind the "sphere in which . . . rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships," which consisted of "narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs."[249] As mentioned, these violations were restricted to "offenses against ambassadors, . . . violations of safe conduct . . . and individual actions arising out of prize captures and piracy."[250] *Jesner* adds that "[t]he principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one

inquiries into a single analysis); Doe v. Drummond Co., 782 F.3d 576, 590 (11th Cir. 2015) (citing Baloco v. Drummond Co., 767 F.3d 1229, 1237 (11th Cir. 2014)) (noting that *Baloco*'s "dispositive analysis" had "amalgamate[d] *Kiobel*'s standards with *Morrison*'s focus test, considering whether 'the claim' and 'relevant conduct' are sufficiently 'focused' in the United States to warrant displacement and permit jurisdiction").

[245] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021) (citing RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016)).

[246] *Id.* at 1936.

[247] *Id.*

[248] *Id.* at 1937.

[249] Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).

[250] *Id.* at 720.

might cause another nation to hold the United States responsible for an injury to a foreign citizen."[251] Combining these characterizations together, one could say that the focus of the ATS is on conduct that, like crimes against ambassadors, violations of safe conduct, and capture or piracy actions, has a judicial remedy but threatens foreign entanglements if no forum is provided.

2. Justice Alito's Concurrence in *Kiobel II*

Near the end of the *Kiobel II* opinion, the Court briefly notes that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required."[252] This passage directly follows a citation to *Morrison*, implying that additional statutory specificity would be required for mere domestic corporate presence to fall under the focus (as defined by *Morrison*) of the ATS.[253]

While lacking precedential value, Justice Alito's concurrence in *Kiobel* II sheds additional light on this passage, stating that "only conduct that satisfies *Sosa* 's requirements of definiteness and acceptance among civilized nations can be said to have been 'the "focus" of congressional concern,' when Congress enacted the ATS."[254] Therefore, a claim brought under the ATS will be barred by the presumption against extraterritoriality "unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa* 's requirements of definiteness and acceptance among civilized nations."[255] In other words, the focus of the ATS is a violation of "a norm of international character accepted by the civilized world and defined with . . . specificity."[256] Under *Morrison*, conduct qualifying as the "focus" of a statute must occur domestically to defeat the presumption against extraterritoriality.[257] Because "mere corporate presence" does not qualify as a violation of an international norm, the presumption applies, blocking any claims that do not allege additional domestic conflict.[258] To put it even more shortly, under Alito's interpretation, ATS claims can

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[251] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018).

[252] *Kiobel II*., 569 U.S. at 125.

[253] *Id.*

[254] *Id.* at 126–27 (Alito, J., concurring) (citation omitted) (quoting Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 266 (2010)).

[255] *Id.* at 127 (Alito, J., concurring).

[256] Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

[257] Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 266–67 (2010).

[258] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125 (2013).

be brought only when an alleged violation of international law defined with specificity has occurred within the United States.[259]

3. The Jurisprudence of the Courts of Appeals

While not all of the Courts of Appeals have analyzed the focus inquiry of *Morrison* in relation to the ATS, those that have done so have created definitions that fit with those suggested above. The Second Circuit defined the focus as "conduct alleged to violate the law of nations (or alleged to aid and abet the violation of the law of nations), and where that conduct occurred."[260] The Fifth Circuit stated the focus is "conduct that violates international law, which the ATS 'seeks to "regulate" ' by giving federal courts jurisdiction over such claims."[261] The Eleventh Circuit has also cited the Fifth Circuit's definition with apparent approval.[262] Finally, the Ninth Circuit limited itself to the text by defining the "ATS's focus" as being "tort[s] . . . committed in violation of the law of nations."[263]

4. Conclusion

Previous Supreme Court cases, a helpful Supreme Court concurrence, and the rulings of the Courts of Appeals all point in the same direction: that the focus of the ATS is violations of the law of nations. It is likely always implicit in these definitions that such violations of the law of nations must be "defined with a specificity comparable to the features of the 18th-century paradigms" under *Sosa*.[264] And, after *Jesner*, conduct must be domestic to fall under the focus of the ATS.[265] But should this be the case?

B. Restoring the Jurisdiction of the ATS

This Comment also seeks to establish that the Supreme Court should revise its precedent to allow ATS lawsuits based on

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[259] Or, as Alito himself put it, "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa* 's requirements of definiteness and acceptance among civilized nations." *Kiobel II*, 569 U.S. at 127 (Alito, J. concurring).

[260] Mastafa v. Chevron Corp., 770 F.3d 170, 195 (2d Cir. 2014).

[261] Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 197 (5th Cir. 2017).

[262] Doe v. Drummond Co., 782 F.3d 576, 590 n.21 (11th Cir. 2015).

[263] Doe v. Nestle, S.A., 906 F.3d 1120, 1125 (9th Cir. 2018) (citing 28 U.S.C. § 1350), *opinion amended and superseded on denial of reh'g*, 929 F.3d 623 (9th Cir. 2019), *rev'd and remanded sub nom.* Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 210 L. Ed. 2d 207 (2021).

[264] Sosa v. Alvarez-Machain, 542 U.S. 602, 725 (2004).

[265] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403, 1407 (2018).

conduct that occurred outside the jurisdiction of any nation (and which, implicitly, violates international norms defined with a specific comparable to those in *Sosa*). This would accord with both the original understanding of the ATS and Supreme Court interpretations of the ATS's purpose.

The Supreme Court has itself stated that when Congress originally enacted the ATS, "individual actions arising out of prize captures and piracy may well have also been contemplated,"[266] and piracy is perhaps the prototypical example of conduct that violates international norms outside any national jurisdiction.[267]

Moreover, unlike cases involving conduct in foreign nations, actions that occur outside the jurisdiction of any nation do not always implicate the foreign relations concerns that worried the Court in *Jesner*.[268] Nor would the Supreme Court recognizing this area of ATS jurisdiction implicate its "general reluctance to extend judicially created private rights of action;"[269] the Court's own precedent recognizes that the ATS was created in part to deal with actions against pirates,[270] so recognizing that the ATS allows jurisdiction in such instances would simply be restoring what was originally intended.

Kiobel II supports this proposition directly, with the Court stating that "[a]pplying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences" and that "[p]irates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction."[271] Therefore, any other instances in which applying the ATS does not intrude onto the dominion of a foreign sovereign could avoid these same concerns and establish jurisdiction, even without a domestic connection. As the Court said, "pirates may well be a category unto themselves,"[272] and that category (which might also

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266 *Sosa*, 542 U.S. at 720.

267 *See, e.g.*, Pragya Singh & Shashwat Singh, *Stemming the Tide of Crime: Navigating the Piracy Regime on International Waters*, 31 U.S.F. MAR. L.J. 19, 28 (2019) ("It is common knowledge that the occurrence of *terra nullius* (no man's land) is more frequent on sea and almost negligible on land. This implies that there are jurisdictional concerns over crimes on sea, since no particular state can claim exclusive jurisdiction, rendering the crimes on sea more vulnerable and delicate . . . .").

268 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397–1407 (2018).

269 *Id.* at 1402.

270 *Sosa*, 542 U.S. at 720.

271 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 121 (2013).

272 *Id.*

contain other types of actors) is one over which ATS jurisdiction ought to be possible.

VII. CONCLUSION

In 1789, the members of the First Congress exercised the powers granted to them by the Constitution by allowing aliens to bring lawsuits in US courts for violations of international law.[273] Since that time, the clarity of the Alien Tort Statute has been repeatedly diluted by the Supreme Court. In recent years, partly based on Supreme Court precedent, a circuit split has developed with the Second Circuit refusing to recognize any form of corporate liability under the ATS. The history, text, and a survey of other lower courts reveal that this is plainly incorrect. Even if the Supreme Court disagrees with the structure of the ATS, it should respect a proper exercise of legislative power and find that domestic corporate liability is permissible, reversing its historical practice of limiting the scope of the ATS.

While this might be unwelcome news to domestic corporations, this conclusion is unavoidable. Domestic corporations should be on notice that conduct that violates specific international norms within the United States can be the basis for alien-brought tort suits, no matter what part of the country they happen to be in. The intention of Congress, as expressed in the ATS, is clear, and it should be given force. Given that five votes in *Nestlé* agreed that domestic corporations could be held liable under the ATS, this should hopefully occur the next time the Supreme Court has opportunity to analyze this question.

The Supreme Court should settle another area of confusion by clarifying the "focus" of the Alien Tort Statute. The text, lower court opinions, and this Comment's analysis all agree that this should properly be specifically defined violations of international law occurring on American soil or in areas beyond the jurisdiction of any nation. While such a conclusion is not as clearly foreshadowed by the Supreme Court's jurisprudence, this Comment looks forward to the time when the proper interpretation of ATS jurisdiction has been embraced by the highest court in the land.[274]

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[273] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77.

[274] Perhaps a future scholar will target some of the remaining questions in this space, like whether aiding and abetting suits should be allowed under the ATS, what varieties of conduct in the United States can break a specific international norm, and whether *Jesner* should be revisited in light of the analysis contained within this Comment.