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THE ALIEN TORT STATUTE: HOLDING U.S. CORPORATIONS ACCOUNTABLE

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I. INTRODUCTION

The Alien Tort Statute (ATS) is a concise statute that has caused a great deal of controversy and discussion among scholars and judges for many years. In its entirety, the ATS states that "[t]he district court 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."[2]

After its formation in 1789, the ATS remained dormant for nearly two centuries until a 1980 landmark case, *Filartiga v. Pena Irala,* revived the Act and opened the floodgates to litigation of ATS claims.[3] In the years that followed the *Filartiga* decision, federal courts grappled with defining the scope of the ATS.[4] The courts narrowed the scope of the ATS in a string of cases following *Filartiga* by answering questions such as where the alleged violations must take place and who may or may not be a defendant in an ATS claim.[5] In the most recent Supreme Court case involving the ATS, *Jesner v. Arab Bank, PLC,* the Court addressed whether or not foreign corporations could be

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[2] 28 U.S.C.§ 1350 (2018).
[3] STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44947, THE ALIEN TORT STATUTE (ATS): A PRIMER 6 (2018).
[4] *Id.*
[5] *Id.*

defendants in an ATS claim.[6] The plurality opinion held that foreign corporations could not be held liable.[7] The question that still remains, however, is whether or not domestic corporations may be held liable.

This note will first take a look at the legislative history behind the ATS. Second, this note will discuss the landmark decisions that followed *Filartiga*, the theories behind them, and how these decisions continued to shape the scope of the ATS. This note will then analyze why the federal courts should not exclude U.S. corporations from liability under the ATS by first looking at arguments in favor of excluding corporate liability that focus on past international criminal tribunals. While some courts favor looking into past practices regarding corporate liability, the Supreme Court is not meant to be static and should look to contemporary normative practices in determining the appropriateness of corporate liability. Finally, this note will revisit the original purpose of the ATS and explain why foreclosing corporate liability would be in contravention to that purpose.

II. LEGISLATIVE HISTORY OF THE ATS

Unlike many other statutes, the legislative history of the ATS does not provide concrete evidence of the statute's purpose.[8] According to the Supreme Court in *Jesner*, the ATS was enacted to "promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of a remedy might prove foreign nations to hold the United States accountable."[9] At the time of its enactment in 1789, there was no avenue for foreign nationals to seek redress for violations of international law.[10] As a new, young, sovereign nation, the national government was dependent on state governments to comply with the

[6] *See generally* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).
[7] *Id.*
[8] Anne Lowe, *Customary International Law and International Human Rights Law: A Proposal for the Expansion of the Alien Tort Statute*, 23 IND. INT'L & COMPL. L. REV. 523 (2013).
[9] *Jesner*, 138 S. Ct. at 1406.
[10] MULLIGAN, *supra* note 2, at 3.

nation's commitments under international law.[11] However, states often ignored their obligation.[12] The absence of redress to foreign nationals caused substantial foreign relation issues.[13] This issue was notably illustrated in the 1780s when a French diplomat was assaulted on a street in Philadelphia.[14] The Pennsylvania court sentenced the offender to two years in prison but refused to deliver him to French officials.[15] Congress directed the Secretary of Foreign Affairs to apologize to the diplomat for its limited ability to provide redress at the federal level.[16]

Soon thereafter, the Framers addressed these matters in Article III of the Constitution by extending the federal judicial powers to "all cases affecting ambassadors, other public ministers and consuls," and "to controversies . . . between a state, or the citizens thereof, and foreign states, citizens, or subjects."[17] The First Congress then implemented these provisions in the Judiciary Act of 1789, which authorized federal jurisdiction for lawsuits between aliens and U.S. citizens.[18] Today, these provisions are known as the Alien Tort Statute (ATS) and are codified at 28 U.S.C. § 1350.[19]

The ATS allows the district court to exercise jurisdiction over cases satisfying four elements: (1) civil action (2) brought by an alien (3) for a tort (4) committed in violation of the law of nations.[20] Each element carries significance.[21] The first element addresses the fact that ATS provides relief for civil, rather than criminal claims.[22] This means the district court cannot impose criminal liability on

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[11] *Id.* at 1; The Confederation Congress passed a resolution that simply recommended states formulate judicial tribunals to hear civil and criminal violations of the law of nations. *Id.* Connecticut was the only state to heed the recommendation, passing legislation that penalized violations of the law of nations. *Id.*
[12] STEPHEN P. MULLIGAN, CONG. RES. SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE (2018). "For example, states refused to remove legal impediments on British citizens' efforts to collect pre-Revolutionary War debts as required by the 1783 Treaty of Peace with Great Britain." *Id.*
[13] *Jesner*, 138 S. Ct. at 1397.
[14] MULLIGAN, *supra* note 2, at 4.
[15] *Id.*
[16] *Id.* at 4-5.
[17] *Jesner*, 138 S. Ct. at 1396.
[18] *Id.*; Judiciary Act 1789 § 11.
[19] *Jesner*, 138 S. Ct. at 1396; 28 U.S.C. § 1350 (1948).
[20] MULLIGAN, *supra* note 2, at 1.
[21] *Id.*
[22] *Id.*

defendants under the ATS, even if the allegations include activity that would constitute a breach of domestic or international criminal law.[23]

The second crucial and distinctive element is that the plaintiff in the case must be an alien (i.e., a non-U.S. national).[24] While the ATS does not grant U.S. jurisdiction for cases brought by U.S. nationals alleging violations of international law, other statutes may allow those claims.[25] Similar to the first element, the third element recognizes that these claims will classify as a tort.[26] A tort is "[a] private or civil wrong or injury, including action for bad faith breach of contract, for which the court will provide a remedy in the form of an action for damages."[27]

Finally, the district court may exercise jurisdiction if the alleged wrong is in violation of the law of nations or a United States treaty.[28] If the plaintiff does not allege claims which violate an international treaty, the court must determine if the alleged claims violate "the law of nations."[29] The ATS does not define what constitutes a tort in violation of "the law of nations."[30] However, it is generally accepted that such a tort is a violation of "customary international law" that is derived from "a general and consistent practice of States" which they follow out of a sense of legal obligation.[31]

While the elements are seemingly explicit, there are certain issues which arise in ATS that were left open to the court's interpretation. For example, in addition to failing to provide an explanation for a "tort in violation of the law of nations," the ATS does not elaborate on who can

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] HENRY CAMPBELL BLACK ET AL., BLACK'S LAW DICTIONARY, 1489 (St. Paul Minn. West Publishing Co. eds., 6th ed. 1990).
[28] 28 U.S.C. § 1350.
[29] Lowe, *supra* note 7 at 527.
[30] 28 U.S.C. § 1350.
[31] *See Alien Tort Statute*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/alien_tort_statute (last visited April 10, 2020) (When analyzing if an alleged claim violates international law, the court will look to see if the claim implicates a legal norm which is "specific, universal, and obligatory."); Lowe, *supra* note 7 at 527.

qualify as a defendant in an ATS claim.[32] More specifically, the statute does not identify the nationality of the defendant, only the plaintiff.[33] Also, the ATS did not specify the location that the alleged violations needed to take place in order for the court to exercise proper jurisdiction.[34] As one can imagine, the ambiguity of the ATS forced federal courts to grapple with a variety of issues which would, over a long period of time, define and narrow the scope of the ATS.[35]

III. EVOLUTION OF THE ATS

After its enactment, the ATS entered into a long period of dormancy.[36] In the 190 years that followed its enactment, the ATS was rarely successfully invoked in any claims.[37] It is surmised that the ATS remained dormant for so long because people believed that it was restricted to a very narrow set of circumstances, such as claims by foreign ambassadors that had been assaulted in the United States.[38] In one of the very few reported ATS cases during this period of dormancy, the court described the statute as "an old but little used section [that] is a kind of a legal Lohengrin . . . no one seems to know from whence it came."[39]

A. Revival of the ATS

The ATS' anonymity quickly faded after the 1980 landmark case, *Filartiga v. Pena-Irala*.[40] In that case, the plaintiff, a Paraguayan citizen, brought a claim under the ATS against the former

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[32] Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 447 (2011).
[33] *Id.* (In its early years of use, the courts interpreted the ATS to allow foreign citizens to sue other foreign citizens However, as this note will further explain, the courts began adopting a more restrictive approach overtime.)
[34] *Id.* at 450.
[35] *Id.* at 448.
[36] MULLIGAN, *supra* note 2, at 5.
[37] *Id.* The first reported case, Bolchos v. Darrel, 3 F. Cas. 810, (No. 1,607) (D.S.C. 1795), involved a French captain trying to recover a shipment of slaves and Spanish prize vessel that he had captured. The second, Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), involved the use of forged passports of an international child custody dispute and was brought 150 years after the first reported case.
[38] Rich Stamp, *U.S. Supreme Court Continues to Nibble Away at Alien Tort Statute's Sweep*, FORBES (Apr. 25, 2018, 10:31 AM), https://www.forbes.com/sites/wlf/2018/04/25/u-s-supreme-court-continues-to-nibble-away-at-alien-tort-statutes-sweep/#63cf6820d9fe.
[39] MULLIGAN, *supra* note 2, at 6 (Noting a reference to a Germanic tale which involved a knight that appears in a boat drawn by swans to aid a noblewoman in distress, yet refuses to disclose his origins.).
[40] Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

Inspector General of Asuncion, Paraguay.[41] The plaintiff alleged that the defendant, Americo Norberto Peña-Irala, kidnapped, tortured, and killed the plaintiff's relative in Paraguay, in retaliation for their family's support of a political opposition party.[42] Peña, also a Paraguayan citizen, was found to be living in New York City under an expired visa years after the alleged incident.[43] The plaintiff contended that the actions taken against her relative constituted a crime that violated the law of nations, and therefore, qualified as a claim under the ATS.[44]

The district court initially dismissed the case on the basis that the law of nations, which qualified a claim under the ATS, did not include modern provisions in international law, specifically those which govern how a nation (Paraguay) treats its own citizens.[45] The Second Circuit remanded the case back to the district court, and refuted this finding by holding that:

> "[in] light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), … 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."[46]

The Second Circuit concluded that federal jurisdiction was proper for this case, stating, "it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[47] The court reasoned that it "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 this finding was "a small but

[41] *Id.* at 878.
[42] *Id.* The initial compliant sought punitive and compensatory damages for $10,000,000.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*at 887.

important step in the fulfillment of the ageless dream to free all people from brutal violence."[48] Finally, the court went on to find verdict for the plaintiff and granted her $10,000,000 in damages.[49]

This case revitalized the ATS and gave rise to an abundance of diverse litigation that quickly began defining the scope of this little-known law.[50] *Filartiga* effectively made the ATS a vehicle for foreign plaintiffs to seek redress in U.S. courts for human right violations, even if the alleged actions did not take place in the United States.[51] In the two decades that followed *Filartiga*, there was a rise in claims which imposed civil liability on those responsible for human rights violations.[52] The cases that followed even expanded the scope of the ATS by broadening the category of defendants that could be found liable.[53] A series of cases were brought against defendants who not only committed the alleged acts, but also those who knew, or should have known, and failed to stop the violations.[54]

Not only was the class of defendants expanded, but the courts also began to set precedent for which violations of customary international law were actionable.[55] The court in *Forti v. Suarez-Mason* relied on Articles 3, 5, and 9 of the Universal Declaration of Human Rights as evidence of customary international law.[56] During this rise of ATS claims, activists also began suing U.S. corporations for a variety of overseas activities including, operating facilities that allegedly polluted

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[48] *Id.* at 890.
[49] *Filártiga v. Peña-Irala*, CENTER FOR CONSTITUTIONAL RIGHTS, https://ccrjustice.org/home/what-we-do/our-cases/filrtiga-v-pe-irala (last visited Feb. 10, 2020); due to the lack of resources, Dolly Filártiga was not able to collect her reward.
[50] MULLIGAN, *supra* note 2 at 6.
[51] *Id.*
[52] Peter Danchin, *Human Rights Cases Post Filártiga*, COLUMBIA CENTER FOR NEW MEDIA TEACHING AND LEARNING, http://ccnmtl.columbia.edu/projects/mmt/udhr/article_5/cases_7.html (last visited April 10, 2020).
[53] *Id.*
[54] *See id.* ("A series of cases were brought against General Guillermo Suarez-Mason, an Argentine General in charge of the military district of Buenos Aires and responsible for the torture, murder and disappearances of hundreds of Argentinian citizens during the 'dirty war.' He, like the defendant in Filártiga, had come into the United States where he was served with legal process. The suits resulted in over $80 million in judgments and expanded the Filártiga holding to a commanding officer and not just the torturer.").
[55] *Id.*
[56] *See id.* ("[T]he court found that prolonged arbitrary detention constituted a violation of customary international law and met the ATCA requirements.").

the environment, administering medications without providing informed consent, and giving financial support to oppressive countries.[57]

B. Tel-Oren: An ideological split

It did not take long before courts began to identify certain limitations of its jurisdiction over ATS claims, which the *Filartiga* opinion failed to address.[58] One prominent case that halted the flood of ATS claims entering federal court system was *Tel-Oren v. Libyan-Arab Republic.*[59] In *Tel-Oren*, the plaintiffs were a group of mostly Israeli nationals who were either survivors or representatives of individuals killed by an armed attack on a civilian Israeli bus in 1978.[60] The plaintiffs brought an ATS claim against the Palestinian Liberation Organization and others who allegedly orchestrated the attack.[61] The district court dismissed the case for lack of subject matter jurisdiction and a three-judge panel of the D.C. circuit unanimously agreed to dismiss the case; however, each judge provided his own rationale for the decision.[62] The critical issue on appeal was whether or not the plaintiffs alleged sufficient facts to meet jurisdictional elements.[63]

In his opinion, Judge Edwards stated his decision to dismiss the case hinged on an important distinction between *Tel-Oren* and *Filartiga*—the identity of the defendants.[64] He stated, "I do not believe the law of nations imposes the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law… I am therefore not prepared to extend Filartiga's construction of section 1350 to encompass this case."[65] He further contended

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[57] Rich Samp, *U.S. Supreme Court Continues to Nibble Away At Alien Tort Statute's Sweep*, FORBES (Apr. 25, 2018), https://www.forbes.com/sites/wlf/2018/04/25/u-s-supreme-court-continues-to-nibble-away-at-alien-tort-statutes-sweep/#63cf6820d9fe.
[58] MULLIGAN, *supra* note 2, at 19.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] Hanoch Tel-Oren v. Libyan Arab Republic, 726 F. 2d. 774 (D.C. Cir. 1984).
[64] *Id.*
[65] *Id.*

that the ATS itself provides a right of action, not subject to a mandatory grant of a right to sue.[66] He argued, that, because the law of nations allowed each member state to meet their international obligations as they please, the law of nations was never perceived to define the civil actions that are available to each member of the community and nations have, by consensus, left that determination to municipal laws.[67] Further, given the variety of legal systems that exist across nations, a consensus on the technical accoutrements would be nearly impossible to reach.[68] Requiring an accord on international right to sue, when the law of nations actually leaves this decision to individual nations, would effectively nullify the "law of nations" portion of the ATS.[69] Judge Edwards concurred in the decision to dismiss the case because he reasoned the case lacked official state action and the claim for terrorism was not sufficiently recognized as international law.[70] However, he maintained his position that the ATS creates a cause of action.[71]

This argument drew a stark contrast between the opinions of Judge Edward's opinion and Judge Bork's. Bork's rationale to dismiss the claim rested on an entirely different set of reasons.[72] Judge Bork stated that the ATS requires plaintiffs allege a right to sue granted by the law of nations.[73] He staunchly opposed the idea that the ATS itself created a cause of action for damages and argued that it was only a jurisdictional statute.[74] According to Judge Bork, the question of whether or not a statute implies a cause of action "is guided by general principles that apply whenever a court of the United States is asked to act in a field in which its judgment would

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[66] *Id.* at 778.
[67] *Id.*
[68] *Id.*
[69] *Id.*; Judge Edwards employs a canon of principle of statutory construction that a statute should not be construed so as to render any part of it inoperative or superfluous, void or insignificant. *Id.*
[70] *Id.*
[71] MULLIGAN, *supra* note 2 at 7.
[72] *Id.*
[73] *Libyan Arab Republic*, 726 F.2d at 774.
[74] MULLIGAN, *supra* note 2 at 7.

necessarily affect the foreign policy interests of the nation."[75] Not requiring the plaintiff to seek a grant right to sue would violate the separation of powers and give judges, rather than congress, the right to create causes of action that would affect U.S. foreign relations.[76]

C. Torture Victim Protection Act

While *Tel-Oren* did not produce a majority opinion[77] and failed to answer the issue of whether the ATS creates a cause of action, the case was nonetheless significant because the doctrinal split and uncertainty led Congress to enact the Torture Victim Protection Act of 1991 (TVPA).[78] TVPA established a civil cause of action against any "individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another to torture or extrajudicial killing.[79] There are important distinctions between the ATS and the TVPA.[80]

First, the ATS only mentions the jurisdiction of the federal courts, while the TVPA explicitly creates a civil cause of action against torture and extrajudicial killings.[81] Second, the ATS limits potential plaintiffs to aliens and the TVPA makes no such limitation.[82] The TVPA states that a civil action can be brought by and against "any individual,"[83] which is an important distinction, as it forecloses the possibility of corporate liability for such crimes. In the early years of the TVPA,

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[75] *Libyan Arab Republic*, 726 F.2d at 801. Bork references an earlier case, *Davis v. Passman,* 442 U.S. 228 (1979), in which the court points out that there is a distinction between the inquiry of whether a litigant has a statutory right to enforce a cause of action verses whether that right is constitutionally protected by the cause of action. *Id.*

[76] *Id.* at 803 (citing Oetjen v. Central Leather Co.*,* where Judge Bork reiterates that "the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative -- 'the political ' -- Departments.").

[77] *Id.* (discussing how Judge Robb joined neither Judge Bork nor Judge Edwards on their opinions, but rather dismissed the case on the grounds that it involves a political question and is therefore, nonjusticiable).

[78] Bellia, *supra* note 31 at 461.

[79] Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1992).

[80] MULLIGAN, *supra* note 2 at 8.

[81] 28 U.S.C. § 1350; Brief for the United States Amicus Curie at 16, Republic of Sudan v. Opati*,* No. 17-268 (U.S. App. D.C. filed Aug. 28, 2014).

[82] MULLIGAN, *supra* note 2 at 8; Brief for the United States Amicus Curie at 16, *Republic of Sudan v. Opati,* No. 17-268 (U.S. App. D.C. filed Aug. 28, 2014).

[83] 28 U.S.C. § 1350.

courts interpreted the text to mean that Congress intended to further extend the right to a cause of action established in *Filartiga* to plaintiffs who are U.S. citizens.[84]

In addition, the TVPA requires that the defendant to have been acting under the color of the law during the course of the alleged torture or killing.[85] While this requirement is absent from the text of the ATS, it answers the point made by Judge Edwards in his *Tel-Oren* opinion.[86] Under Judge Edward's theory of interpreting the ATS, one may argue that this requirement having been explicitly stated in the text of the TVPA, significantly lessens the need for the ATS all together.

Finally, the TVPA requires that plaintiffs exhaust all "adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[87] This means that the court can decline to exercise jurisdiction on a TVPA claim if the defendant can show that the plaintiff did not exhaust his or her local remedies.[88] Also, this provision minimizes the chances that the federal courts will offend state sovereignty.[89]

Despite their differences, the relationship between the TVPA and the ATS remains unclear. Some critics of the TVPA argue that it renders the ATS obsolete because no one would risk bringing an ATS claim when the more precise TVPA is available.[90] Some courts on the other hand, reasoned that the TVPA supplements the ATS because plaintiffs can choose under which statute to bring the claim.[91] In fact, there is legislative history of the TVPA which supports the notion that it was intended to provide an "unambiguous basis for a cause of action that [had] successfully been

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[84] Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995), *cert.denied*, 518 U.S. 1005 (1996).
[85] 28 U.S.C. § 1350.
[86] *See* Hanoch Tel-Oren v. Libyan Arab Republic, 726 F.2d at 791, 820 (arguing that the facts of *Tel-Oren* were distinguishable from *Filartiga* because the defendants were not state officials).
[87] 28 U.S.C. § 1350.
[88] *Id.*
[89] Jennifer Correale, *The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture?*, 6 PACE INT'L. L. REV. 197, 214 (1994) (mentioning that the treaty, to which the U.S. is a party, states that the Committee will not consider communications from an individual unless they have exhausted domestic remedies).
[90] *Id.* at 216; MULLIGAN, *supra* note 2, at 9.
[91] MULLIGAN, *supra* note 2, at 9.

maintained under [the ATS]."[92] One could argue that this evidence of congressional intent answers Judge Bork's concern that Congress ought to be the branch that approves of giving litigants a cause of action in cases that could potentially effect foreign relations. Regardless of how the two statutes interact, the TVPA serves as an example of Congress providing an express cause of action for certain claims that litigants had argued were actionable under the ATS as torts in violation of the law of nations.[93]

D. Establishing a Cause of Action

The next notable landmark case for the ATS was *Sosa v. Alvarez-Machain*. This decision came about twenty years after *Tel-Oren* and answered the question of whether the ATS created a cause of action or was merely a jurisdictional statute.[94]

Sosa involved a Mexican doctor who had allegedly participated in the brutal torture and killing of a Drug Enforcement Agency (DEA) officer.[95] After the Mexican government denied the DEA's request to extradite Sosa, the DEA hired Mexican nationals to apprehend him and bring him to America for trial. Sosa's criminal charges were eventually dismissed by the district court for a lack of evidence.[96] However, after his chargers were dismissed, Sosa filed an ATS claim against the Mexican nationals responsible for his apprehension.[97] The case eventually reached the Supreme Court, where the Court finally decided on the issue of whether the ATS creates a cause of action.

The court in *Sosa* held that the ATS was merely a jurisdictional law and did not create its own cause of action.[98] Much of the rationale of this case mirrored that of Judge Bork's opinion in *Tel-Oren*. Among other things, the court reasoned that because "ATS was placed in § 9 of the

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[92] Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383, 1408 (2008).
[93] *Id.*
[94] Sosa v. Alvarez Machain et al., 542 U.S. 692 (2004).
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 692.

Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature."[99] However, the court did not find that the ATS was meant to be stillborn, meaning "there could be no claim for relief without a further statute expressly authorizing adoption of causes of action."[100] Rather, the courts found that while the ATS was jurisdictional in nature, Congress enacted it expecting the federal courts to be able to recognize a "narrow set" of causes of action as a form of judicially developed common law.[101]

The court did not do away with the ATS nor leave it limited to the state of the "law of nations" in the 18th century.[102] Rather, it set out a framework which defined when exactly the ATS could create its own cause of action.[103] Under *Sosa,* the court could recognize common law violations of the "present day law of nations," but only for those claims that "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms."[104]

Since *Sosa* was decided, courts have viewed it as setting up a two-step framework to decide if the claim presented had a cause of action under the ATS.[105] First, the court must determine if the claim presented deals with a violation of international law that is "specific, universal and obligatory."[106] Second, the plaintiff would need to establish that allowing the case to proceed would be an appropriate use of the court's jurisdiction.[107] This second prong can be answered by analyzing whether "caution requires the political branch to grant specific authority" over the

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[99] *Id.* at 713.
[100] *Id.* at 714.
[101] MULLIGAN, *supra* note 2, at 10; (this latter opinion was argued in an Amici brief written by professors of both legal history and federal jurisdiction; the professors argued that "federal courts could entertain claims once the jurisdictional grant was on.").
[102] *Sosa*, 542 U.S. at 712.
[103] MULLIGAN, *supra* note 2, at 11.
[104] *Sosa*, 542 U.S. at 725.
[105] *Jesner*, 138 S. Ct. at 1409.
[106] *Id.* at 1399.
[107] *Sosa*, 542 U.S. at 738.

matter.[108] Applying this framework to the facts of *Sosa*, the court dismissed Sosa's claim because it did not satisfy the first prong of the framework.[109]

The result from *Sosa* was important to the evolution of the ATS because it established that though the ATS is a jurisdictional statute, courts still have the authority to use their discretion to decide whether the claim presents a violation of customary international law. Finally, *Sosa* created a framework which would act as a gate-keeper for future ATS claims.[110]

E. Extraterritoriality

Kiobel v. Royal Dutch Petroleum was a 2013 case that answered the question of extraterritorial application of the ATS.[111] The plaintiffs in *Kiobel* were Nigerian nationals bringing claims against a foreign corporation, who they alleged aided and abetted the Nigerian government to violate the law of nations.[112]

Before making its way to the Supreme Court, *Kiobel* was decided before the Second Circuit Court of Appeals on the issue of whether or not corporations should face liability under the ATS.[113] The circuit court held that the ATS was meant to apply to natural persons, not including a corporate entity.[114] The court's reasoning relied on the fact that since the Nuremberg trials, international law tribunals have focused on individual liability rather than abstract entities.[115]

While the case was first granted certiorari on the issue of whether or not corporations could be held liable to an ATS claim, the Supreme Court decided to determine the issue of whether the ATS allows federal courts to hear cases for violations occurring outside the United States.[116] Relying on the presumption against extraterritoriality, the court found that unless congress gave

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[108] *Jesner*, 138 S. Ct. at 1399.
[109] *Sosa*, 542 U.S. at 738.
[110] MULLIGAN, *supra* note 2, at 12.
[111] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).
[112] *Id.* at 1662.
[113] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148-49 (2d Cir. 2010).
[114] *Id.*
[115] *Id.* at 136-37.
[116] *Kiobel*, 133 S. Ct. at 1664 .

"clear indication of an extraterritorial application," the federal court should assume the statue only applies domestically.[117] The *Kiobel* court, however, suggested that the presumption may be displaced if the claims "touch and concern" the United States.[118]

F. Closing the Court Doors to Foreign Corporations

Finally, the most recent Supreme Court decision, *Jesner v. Arab Bank, PLC*, the court further narrowed the scope of the ATS.[119] In *Jesner,* defendant foreign bank officials allegedly transferred funds for a terrorist group in the Middle East, which enabled criminal acts of terrorism that the plaintiffs claimed violated the law of nations and entitled them to compensation.[120] In the portion of his opinion the majority of the justices joined, Justice Kennedy concluded that foreign corporations are not subject to liability under the ATS.[121] This portion of his opinion also purported that the courts ought not to recognize new causes of action under the ATS.[122]

Much of Justice Kennedy's argument ran parallel to Judge Cabranes' in the *Kiobel* Second Circuit opinion. The court in both cases referenced a footnote from *Sosa*[123] and analyzed whether corporate liability fit into the norms of international law. Among other arguments, the court reasoned that because early international criminal tribunals, such as the Nuremberg Trials, left liability exclusively to natural persons, it followed that corporate liability should not be recognized

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[117] *Id.* "…[T]he events giving rise to the ATS—including the Marbois and Van Berckel incidents—demonstrate that the statute was designed to avoid the same types of 'diplomatic strife' and foreign relations friction that the presumption of extraterritoriality is intended to guard against." MULLIGAN, *supra* note 2, at 12.

[118] *Kiobel*, 133 S. Ct. at 1669. The court did not provide any framework of how to determine if a claim "touch[es] and concern[s]" the United States. *Id.* In fact, recent circuit decisions since *Kiobel* have each approached the touch and concern question in different ways. *See* MULLIGAN, *supra* note 2, at 14-15.

[119] *See generally* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018). *Jesner* involves a class of plaintiffs suing a middle eastern financial institution for aiding and financing terrorist organizations responsible for attacks. *Id.* at 1394-95.

[120] *Jesner* was granted certiorari by the Supreme Court prior to the decision in *Kiobel*, which was decided on the issue of extraterritoriality. However, the plaintiffs in *Jesner* were also arguing that it touched and concerned the U.S. since the defendants were using New York bank branch in the course of alleged conduct. *Id.*

[121] *See Jesner*, 138 S.Ct. at 1402 (2018).

[122] *Id.* at 1403.

[123] *See id.* at 1399-1400 (2018). "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." *Id.*

as a part of international law; thus, claims which held corporations as defendants would not satisfy the first prong of *Sosa*.[124]

The court also reasoned that Congress' decision to limit the TVPA cause of action against "individuals," illustrates "that significant foreign policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS" and "it would be inconsistent with that balance to create a remedy broader than the one created by Congress."[125]

As mentioned before, even though the court left the door open to the issue of domestic corporate liability, much of the argument for restricting foreign corporate liability matched the circuit court in *Kiobel*.[126] It seems the court, however, was weary to not rely entirely on arguments based on the history of international tribunals, as it used the arguments against extraterritoriality to support its decision.[127] This begs the question of why the court did not simply do away with corporate liability as a whole if it seems to have agreed with the *Kiobel* second circuit argument. Considering that *Jesner* was granted certiorari before *Kiobel* was decided on the presumption against extraterritoriality,[128] it is plausible that the court purposefully decided *Kiobel* on an issue other than corporate liability, so that it could address that issue strictly for foreign defendants, as it did in *Jesner*.

IV. ANALYSIS

While it may seem that the ATS has become so limited as to question its viability, there are important reasons as to why the courts can and should continue to have jurisdiction over ATS claims where domestic corporations are defendants. First, there is no normative distinction between natural and juridical actors that should completely foreclose corporate liability in claims

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[124] *Id.*
[125] *Id.* at 1404.
[126] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).
[127] *See Jesner*, 138 S.Ct. at 1407 (2018).
[128] MULLIGAN, *supra* note 2, at 12.

involving international law violations. Instead of focusing on normative contemporary trends of corporate liability for international law violations, courts have been quick to give undeserving weight to the international criminal tribunals of the past. Finally, the First Congress' intent in enacting the ATS was to harmonize international relations between other countries and the United States. Foreclosing corporate liability would frustrate this objective for many reasons.

A. No normative distinction between natural and juridical actors

The dispute regarding corporate liability centers around a footnote in *Sosa*.[129] While formulating the now accepted standard that international laws must be sufficiently definite to support a cause of action, the court noted the following:

> '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.'[130]

In other words, when deciding if an international norm is being violated, it is important for the court to analyze whether liability of the violated norm at issue expands to the particular defendant.

Those who view corporate liability as a foreign theory in the context of international law, interpret this footnote to show that U.S. courts anticipated and accepted a distinction between individual and corporate defendants.[131] In the Second Circuit's decision in *Kiobel*, Judge Cabranes uses this footnote to support the notion that corporate liability should be foreclosed because there is no specific, universal, or obligatory norm that recognizes corporate liability.[132] The plurality in *Jesner*

[129] *See Jesner*, 138 S.Ct. at 1399 (2018).
[130] *Id.* at 1421.
[131] *Id.* at 1422.
[132] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 128-30 (2d Cir. 2010).

erroneously accepted this interpretation to bolster its decision to foreclose foreign corporations from liability under ATS.[133]

The footnote's mention of considering whether the scope of liability extends to the particular defendants, was not intended to create a divide between the two types of defendants.[134] On the contrary, this footnote shows that the court in *Sosa* was correctly grouping both individual and corporate defendants together under the category of private actors.[135]

Looking back at the two succeeding cases and parentheticals following the footnote makes it obvious that the relevant distinction is between private and state actors. Once again, in *Tel-Oren*, the defendants were not specific individuals, but rather a larger entity (PLO) accused of heinous acts of violence.[136] Judge Edwards, in his concurring opinion, found that the plaintiffs were unable to prove a cause of action because the defendants were private rather than state actors.[137] Judge Edwards reached this decision by considering the scope of the relevant international law, which in this case was the Draft Convention on the Elimination of Torture, to decide that scope of liability of laws against torture did not expand to private actors.[138] The fact that the PLO was not a natural individual, but rather a larger entity, was not determinative of its liability.[139] Furthermore, in *Kadic v. Karadžić*, the court held that regardless of being a private actor, the defendant could still be liable for genocide because "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[140]

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[133] *Jesner*, 138 S. Ct. at 1399-1401.
[134] *Id.* at 1422-23 (Sotomayor, J., dissenting).
[135] *Id.*
[136] Hanoch Tel-Oren v. Libyan Arab Republic, 726 F. 2d. 774, 776 (D.C. Cir. 1984).
[137] *Id.*
[138] *Id.* at 795; Judge Edwards recites the definition of torture from the Draft Convention on the Elimination of Torture to conclude that torture was limited to actions "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Id.*
[139] *Id.*
[140] *See* Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).

These two cases demonstrate that the purpose of the *Sosa* footnote was not to distinguish between corporate or individual actors, but rather to guide future courts to referencing specific sources of international law and determine if liability of that law applies to state, private actors, or both. If courts in the future wish to decide that corporate liability is not within the scope of a particular international law, they should have to make a showing of a normative rule which excludes such corporate liability of that particular norm.

B. Do international criminal tribunals really tell us much?

Both the plurality in *Jesner* and the majority in *Kiobel*'s Second Circuit opinion give undeserving weight to the fact that charters of past international criminal tribunals did not grant jurisdiction over corporate entities.[141] These arguments purport that this exclusion acts as proof that international law does not recognize corporate liability.[142] Looking more closely at criminal tribunals of that past, however, proves that the issue of corporate liability is more fact sensitive and less normative.

The Rome Statute, which chartered the International Criminal Court (ICC), limits the ICC's exercise jurisdiction over natural persons.[143] The *Jesner* plurality mischaracterizes this exclusion as a "conscious decision to limit the authority of these international law tribunals" and furthermore, uses it to purport there is no recognized norm for corporate liability.[144] The reality is that this decision was reached because there was too little time to fully consider the proposal of corporate liability.[145] At the time of its enactment, many parties to the Rome Statute did not recognize corporate liability to criminal law, "as opposed to civil tort liability, which has long been universal."[146] This would have disrupted the principal of complementarity under the Rome Statute, a theory "dependent on

[141] *See generally* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); *See generally* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 128-30 (2d Cir. 2010).
[142] *See Jesner*, 138 S. Ct. 1386 (2018).
[143] Rome Statute of the International Criminal Court at Art. 25.
[144] *See Jesner*, 138 S. Ct. 1386 (2018).
[145] *See* David Scheffer, *Corporate Liability under the Rome Statute,* 57 HARV. INT'L L. REV. 35, 38 (2016).
[146] *Id.* at 38.

compatible criminal law in state party jurisdictions."[147] However, the global landscape regarding corporate liability has since changed, as many states party to the Rome Statute have embraced the idea.[148]

Another international tribunal frequently noted for setting the precedent against corporate liability is the International Military Tribunal (IMT),[149] which set the stage for the Nuremberg proceedings.[150] However, the reasons for rejecting corporate liability during the Nuremberg proceedings were not because of any legal determination that corporate liability was impermissible under international law.[151] Rather, the reasons for rejecting corporate liability at that time stemmed from pragmatic reasons such as, the Allies recognition of Germany's need to rebuild its economy and the shifting political winds of Europe at that time.[152] Furthermore, the Allies held corporate entities associated with the atrocities committed by the Nazi party accountable in ways other than formal prosecution, such as forcing dissolution, fines and the exaction of reparations.[153] Because corporations were being held accountable by other means, it was only logical to focus scarce judicial resources on the individual offenders.[154] Nonetheless, the IMT made it clear that corporations were capable of violating international law even if they did not formally face criminal liability through the Nuremberg proceedings.[155]

Finally, the law of nations was not intended to be static.[156] As Justice Story noted in *United States v. The La Jeune Eugenie*:

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147 *Id.*
148 *Id.*
149 *See generally Jesner,* 138 S. Ct. 1386 (2018).
150 U.N.*, Charter of the International Military Tribunal*, (Aug. 8, 1945), https://avalon.law.yale.edu/imt/imtconst.asp.
151 *Beth Van Schaak, Symposium: The lessons of Nuremberg*, SCOTUSBLOG (July 25, 2017), https://www.scotusblog.com/2017/07/symposium-lessons-nuremberg/.
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.*

> What, therefore, the law of nations is . . . may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations.[157]

While it may have been a practice at one time for a very specific circumstances to not enforce liability for violations of international law against corporations, it does not follow that this must be the practice at all times thereafter. Surely there are numerous examples of changes and modifications that were made in international law as norms changed over time. As one can see, looking back at past international tribunals does not reveal that much about how courts should proceed on the issue of corporate liability.

C. Normative Enforcement Mechanisms

While the court in *Sosa* determined that customary law is a key component in determining whether an alleged violation meets the requirements of an ATS claim, it is not necessarily vital to determine the enforcement mechanism used by the district court.[158] According to Justice Sotomayor, this is illustrated in the text of the ATS itself.[159] The statute states: "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."[160] Justice Sotomayor points out that the "law of nations" modifies the violation in question, and not the civil action.[161] Therefore, the statute only requires that the conduct be one that is universally recognized under international law, "not that the civil action be of a type that the international community specifically and universally practices and endorses."[162]

This statutory argument is further supported by analyzing how enforcement of international law operates in practice. Countries form international laws by entering into binding and enforceable

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[157] United States v. La Jeune Eugenie, 26 F. Cas. 832 (1822).
[158] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).
[159] *Id.* at 1390.
[160] 28 U.S.C. § 1350.
[161] *Jesner*, 138 S. Ct. at 1420-37.
[162] *Id.*

agreements with each other to benefit their citizens and promote peace.[163] It is entirely up to each country's government, however, to apply that law and maintain their agreements.[164] Therefore, it is important to remember that neither the United States, nor any other country party to an agreement, is bound to enforce a violation against the law of nations in one particular way.[165]

1. United States Practice

First, it is notable to consider the current trends of corporate liability within the United States with respect to international law. These trends reveal an exercise of judgment on a norm-by-norm basis that the courts should follow when considering corporate liability for law of nations violations.[166] For example, the Antiterrorism Act of 1990 (ATA) expressly includes corporate liability.[167] The law states that a national of the United States may recover damages for injuries arising out of acts of international terrorism and that "liability may be asserted as to any person who aids and abets…an act of international terrorism."[168] The law does not limit "person" to individuals, but rather "any individual or entity capable of holding a legal or beneficial interest in property."[169] While congress initially enacted this law in the early 1990s to prohibit funding to the Palestine Liberation Organization, U.S. corporations continue to face liability under the ATA.[170] As previously mentioned, congress foreclosed corporate liability in the TVPA, limiting the class of defendants to "individuals."[171] The distinction in these two laws displays that congress uses its

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[163] *What is International Law?*, LEGAL CAREER PATH, https://legalcareerpath.com/international-law/ (last visited Feb. 15, 2020).
[164] *Id.*
[165] *Id.*
[166] *Jesner*, 138 S. Ct. at 1420-37.
[167] 28 U.S.C. § 1350.
[168] *Id.*
[169] *Id.*
[170] *U.S. Firms Continue to Face Liability for Terrorist Attacks under the Antiterrorism Act*, CALDWALDER (Aug. 29, 2018), https://www.cadwalader.com/resources/clients-friends-memos/us-firms-continue-to-face-liability-for-terrorist-attacks-under-the-antiterrorism-act#_ftn5.
[171] 28 U.S.C. § 1350.

discretion in deciding whether corporate liability is appropriate, and the courts should follow this trend by not foreclosing corporate liability for ATS claims.

2. International Practice

While some would prefer to look to the past criminal tribunals to determine whether civil corporate liability is an international norm, it is more logical to consider contemporary domestic practices of other nations. Observing the norms of today will reveal that liability against corporate entities is becoming more normative across other countries.

A survey focusing on the domestic policies of sixteen different countries took on the task, among others, of determining the liability status of corporations breaching international criminal and humanitarian law.[172] The findings revealed that most of the surveyed countries permit legal persons to prosecuted for criminal offenses.[173] For example, in Indonesia, a country that did not historically prosecute corporations, the government pursued prosecution of a multinational corporation for allegedly violating environmental laws.[174]

The survey also noted that nine of the sixteen countries have fully incorporated the Rome Statute's three crimes: genocide, crimes against humanity, and war crimes.[175] This means that the wording of the domestic legislation, mirrors that of the Rome Statute.[176] This is significant because the domestic adaptation essentially eliminates the foreclosure of corporate liability, since most of these countries pursue corporate liability against such crimes.[177] While the countries may vary in the method in which they implement such a policy, the point remains that other countries continue to

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[172] ANITA RAMASASTRY & ROBERT C. THOMPSON, COMMERCE, CRIME AND CONFLICT: LEGAL REMEDIES FOR PRIVATE SECTOR LIABILITY FOR GRAVE BREACHES OF INTERNATIONAL LAW (FAFO Institute of Applied International Studies 2006) (surveying countries including Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, Ukraine, the United Kingdom and the United States.).
[173] *Id.* at 13. One way the countries' corporate liability practices varied was in their methods of attributing actions of responsible employees to the company for the purposes of criminal intent. *Id.*
[174] *Id.* at 16.
[175] *Id.* at 15.
[176] *Id.*
[177] *Id.* at 13-14.

recognize corporate liability in the way they enforce international law.[178] Thus, while the U.S. courts are free to enforce international laws the way they see fit, they can do so with the confidence that such practice is increasingly normative and universal.

D. Revisiting the original purpose of the ATS

In order to fulfill the original purpose of the ATS, it is necessary for courts to maintain that U.S. corporations can still face liability against ATS claims. While the court in *Jesner* foreclosed foreign corporations from ATS liability, the possibility of holding a U.S. corporation liable for an ATS claim remains open and should remain that way to meet the purpose of the statute. As mentioned earlier, the original purpose of the ATS was to harmonize relations between the United States and other nations.[179] This objective remains relevant and necessary.

The Supreme Court displayed the importance of keeping good relations with other nations in the *Kiobel* decision.[180] Recall that the court held that the presumption against extraterritoriality applies to ATS claims and in order to be successful, claims must touch and concern the United States with sufficient force in order to displace this presumption.[181] While the rationale behind this canon of construction is primarily that Congress legislates laws to apply domestically, this presumption also insulates the United States clashes with foreign laws.[182] Therefore, the Supreme Court should continue to be mindful, as it has in the past, of harmonizing relations with other countries and allowing for corporations to be subject to liability under the ATS.

Looking back at the original intent of the First Congress in enacting the ATS will also reveal why U.S. corporate liability is important to meet the objective of the ATS. At the time of the ATS

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[178] *Id.*
[179] *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).
[180] *See e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).
[181] *Id.* at 124-25.
[182] *Id.* at 115.

enactment, congress was concerned with U.S. nationals offending foreign diplomats.[183] Concerned that the U.S. was unable to provide redress for possible offenses to foreign nationals, Congress created the ATS.[184] While one of the main instances that sparked Congress to act involved an individual person, Congress also did not intend the Supreme Court to be static. Therefore, if U.S. based corporations are causing strife with other countries and violating the law of nations, the Supreme Court ought to continue to recognize corporations as defendants in ATS claims and provide redress to foreign nationals. Doing otherwise and allowing corporate violators to hide behind a corporate veil would do the very opposite of harmonizing relations with other nations. Foreclosing corporate liability could also potentially send a message to other countries that the United States is complacent to human rights violations committed by wealthy corporations against foreign nationals.

Furthermore, rather than only holding an individual employee liable, the courts should hold corporations liable, as it is the only way to "impose accountability for the institution-wide disregard for human rights."[185] Additionally, making larger corporations liable for harm is important for potential plaintiffs because often times it is the larger entities, rather than individual actors, who have the capability to compensate successful plaintiffs.[186]

Looking back at the text of the ATS, it is clear that Congress explicitly limited the class of plaintiffs to individuals, and did not limit the class of defendants who such claims could be brought against. Thus, if the First Congress intended to limit the class of defendants to individual persons, they could have easily done so. Courts ought to take this language as being intentional, leaving room for different possible defendants in the future.

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[183] MULLIGAN, *supra* note 2, at 3.
[184] *Id.*
[185] Jesner v. Arab Bank, PLC, No. 16-499, slip op. at 30 (2nd Cir. Apr. 24, 2018).
[186] *Id.*

Some courts are recognizing the need for holding corporations liable to ATS claims. Recently, the Ninth Circuit reversed a previous dismissal of an ATS claim against Nestle for allegedly approving the use of child slaves on Ivory Coast plantations.[187] The allegations stated that child slaves were kidnapped, starved and beaten with tree branches.[188] While the panel ordered that the plaintiffs drop the defendants' foreign parent companies in light of the *Jesner* decision, it noted that there was conduct that occurred in the United States making the claims actionable against the domestic corporation.[189] For example, employees routinely inspected plantations and reported back to Nestle headquarters in the United States, where financing decisions were made.[190] In conclusion, considering how vast U.S. corporate presence is across the world and that the original purpose of the ATS was to harmonize relations with other nations, courts ought to hold U.S. corporations liable for violations of the law of nations.

V. CONCLUSION

As one can see, despite short and concise law, the ATS has presented interpretive issues for the Supreme Court over the past few decades. Over time, the Supreme Court has continued to narrow the scope of the ATS in various ways. Beginning with the first landmark case, *Filartiga,* and ending with the most recent case, *Jesner*, the reach of the ATS has changed dramatically. Courts will continue to face challenging questions regarding the reach of this law as new defendants are brought before the court. Rather than focusing so much on criminal tribunals of the past and misunderstood enforcement norms, the courts should focus on the contemporary normative practices which would

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[187] Helen Christophi, *Ninth Circuit Revives Child Slave Labor Case Against Candy Makers*, COURTHOUSE NEWS SERVICE (Oct. 23, 2018), https://www.courthousenews.com/ninth-circuit-revives-child-slave-labor-case-against-candy-makers/. The case against Nestle was originally dismissed in 2010 by U.S. District Court Judge Steven Wilson, who reasoned that a corporation could not be sued under ATS. *Id.* After the Ninth Circuit held that corporations could be liable, Judge Wilson again dismissed the case on the grounds that there was not sufficient domestic conduct for an ATS claim. *Id.* In October 2018, the claim was reviewed by a Ninth Circuit panel, who held that the claims could be adjudicated in the United States. *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.*

direct them to enforcing corporate liability against violations of international law. The U.S. district courts should continue to allow U.S. corporations to face liability against ATS claims rather than provide a safe haven for human rights violators simply because they hide behind a corporate veil.