COMMENT

RESTRAINING THE HEARTLESS: EROSION OF CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE AND THE PATH FORWARD FOR VICTIMS SEEKING REDRESS

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The Alien Tort Statute ("ATS") is a U.S. federal law dating back to 1789 that allows non-U.S. citizens to file civil lawsuits in federal courts against individuals or entities for alleged international law violations. While originally interpreted to address piracy and the safeguarding of foreign diplomats, the ATS gained new relevance in the late twentieth century when it was used to hold individuals and corporations accountable for human rights abuses committed abroad, making it a critical tool in seeking justice for human rights violations.

This Comment argues that there is no longer a realistic federal forum for ATS suits against foreign or domestic corporations. Through a series of decisions, the Supreme Court has effectively precluded federal courts from hearing suits against corporations under the ATS. Furthermore, the failure to provide a federal forum for civil tort claims against corporations for violations of international law under the ATS is a departure from precedent and the United States' international and domestic legal obligations. Given the status of ATS claims against corporations in federal court, this Comment concludes that state courts are the most viable and necessary forum for tort suits against corporations for violations of international law.

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—Martin Luther King, Jr.[1]

INTRODUCTION

In many ways, "the world is more interconnected than ever" before.[2] Despite a global pandemic alienating us from one another,[3] tensions

1. MARTIN LUTHER KING, JR., STRENGTH TO LOVE 28 (Harper & Row ed. 1963) (Pocket Book ed. 1st prtg. 1964).

2. *See* Ian Bremmer, *Globalization Isn't Dead: The World Is More Fragmented, but Interdependence Still Rules*, FOREIGN AFFS. (Oct. 25, 2022), https://www.foreignaffairs.com/world/globalization-isnt-dead [https://perma.cc/8AN8-5EGZ] (detailing how the global community remains interconnected despite fragmentation caused by economic and political turmoil around the globe).

3. *See, e.g.*, Collen Walsh, *Young Adults Hardest Hit by Loneliness During Pandemic*, HARV. GAZETTE (Feb. 17, 2021), https://news.harvard.edu/gazette/story/2021/02/

in Eastern Europe turning to war,[4] and the simmering effects of climate change threatening how we live,[5] the world remains connected globally through the complex economic and political structures we have come to rely on.[6] Bilateral trade between the United States and China has continued to grow exponentially, and direct investments from Western corporations in China remain at record high levels.[7] While Russia's war in Ukraine has led thousands of corporations to curtail operations in Russia, many U.S. corporations continue business in Russia "undeterred."[8] When this interconnectedness leads a corporation to open its doors abroad, it avails itself of the benefits of conducting business wherever that may be.[9]

In some cases, this means decreased competition and favorable exchange rates.[10] In others, it means exploiting weak regulatory systems at the expense of international human rights standards.[11] The United Nations (U.N.) Office of the High Commissioner for Human

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young-adults-teens-loneliness-mental-health-coronavirus-covid-pandemic [https:// perma.cc/8QUA-XC8E] (citing research finding that Americans reported feeling lonelier than they did prior to the Covid-19 pandemic).

4. *See, e.g.*, Becky Sullivan, *Russia's at War with Ukraine. Here's How We Got Here*, NPR, https://www.npr.org/2022/02/12/1080205477/history-ukraine-russia [https://perma.cc/4YFF-8FVS] (Feb. 24, 2022, 9:27 AM) (detailing the general events leading up to and resulting from Russia's invasion of Ukraine).

5. *See* Press Release, Off. of the High Comm'r for Hum. Rts., Climate Change the Greatest Threat the World Has Ever Faced, UN Expert Warns (Oct. 21, 2022), https://www.ohchr.org/en/press-releases/2022/10/climate-change-greatest-threat-world-has-ever-faced-un-expert-warns [https://perma.cc/GGQ7-ET8W] (explaining how climate change is a "pervasive threat" to the environment and vulnerable communities).

6. *See* Bremmer, *supra* note 2 (detailing the political and economic structures that are upholding the "global economic order").

7. *Id.*

8. *See* Jeffrey Sonnenfeld, *Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain*, YALE SCH. MGMT. (Jan. 28, 2023), https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain [https://perma.cc/8W39-WSJQ] (tracking companies continuing to operate in Russia since Russia's 2022 invasion of Ukraine).

9. *See* Bruna Martinuzzi, *What Are the Advantages of International Trade?*, AM. EXPRESS (Apr. 24, 2023), https://www.americanexpress.com/en-us/business/trends-and-insights/articles/advantages-international-trade [https://perma.cc/5XU5-WB6G] (describing the various advantages of international trade).

10. *Id.*

11. *See Corporations*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/corporate-accountability [https://perma.cc/HZ4T-VNKM] (detailing the effects of corporate activity on human rights).

Rights (OHCHR) notes: "[T]he actions of [corporations], just like the actions of other non-State actors, can affect the enjoyment of human rights by others . . . . Indeed, experience shows that [corporations] can and do infringe human rights . . . ."[12] From the use of forced labor in the Ivory Coast[13] to aiding and abetting the illegal detention and torture of political dissidents in China,[14] corporations benefit from—and often directly engage in—violations of international law.[15]

For over 200 years, a one-sentence statute has given some victims of corporate wrongdoing the ability to restrain corporate activity that violates international law by holding corporations civilly accountable through the Alien Tort Statute ("ATS").[16] The ATS has provided a unique avenue for victims to seek redress and compensation against corporations by granting federal courts original jurisdiction over civil actions brought by aliens[17] for a tort in violation of "the law of nations

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12. U.N. Off. of the High Comm'r for Hum. Rts. [OHCHR], *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, U.N. Doc. HR/PUB/12/02, at 10–11 (2012) [hereinafter *Corporate Responsibility to Respect Human Rights*].

13. *See generally* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935 (2021) (accusing Nestlé USA of aiding and abetting the use of forced labor and child slavery in the Ivory Coast).

14. *See* Wang Xiaoning v. Yahoo!, Inc., No. C 07-2151 CW, 2007 WL 9812491, at *1 (N.D. Cal. Oct. 31, 2007) (alleging that Yahoo aided and abetted the plaintiffs' arbitrary arrest and torture in China).

15. *See* William S. Dodge & Oona A. Hathaway, *Answering the Supreme Court's Call for Guidance on the Alien Tort Statute*, JUST SEC. (June 3, 2022), https://www.justsecurity.org/81730/answering-the-supreme-courts-call-for-guidance-on-the-alien-tort-statute [https://perma.cc/EV9G-NQQ9] (describing various instances where corporations have avoided accountability for alleged violations of international law brought under the ATS); Alien Tort Statute Clarification Act, S. 4155, 117th Cong. (as introduced by S. Comm. on the Judiciary, May 5, 2022) ("When corporations commit or aid and abet human rights violations directly and through their supply chains, they should be held accountable. Failing to do so erodes the foreign policy interests of the United States and the priorities of Congress.").

16. 28 U.S.C. § 1350; *see also* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER 1–2 (2022) (introducing the ATS as a legal tool). The ATS was originally passed as part of the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77.

17. An "alien" is defined as "any person" who is "not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Use of the word "alien" to describe a person not from the United States has a problematic history and is considered by many to be a dehumanizing term. *See* Adrian Florido, *Tracing the Shifting Meaning of 'Alien*,' NPR (Aug. 22, 2015, 12:03PM), https://www.npr.org/sections/codeswitch/2015/08/22/432774244/tracing-the-shifting-meaning-of-alien [https://perma.cc/LW58-9XML]

or a treaty of the United States."[18] Following the rise of ATS claims beginning in the 1980s,[19] federal courts have varied widely in interpreting the scope of the statute, disputing what conduct constitutes a violation of "the law of nations,"[20] whether the ATS grants extraterritorial jurisdiction,[21] and who may be named a defendant in ATS suits.[22] The Supreme Court has, in turn, answered those questions in the narrowest way possible, constricting beyond recognition the scope of the ATS as applied to foreign and domestic corporations.[23]

Today, the saga of human rights litigation under the ATS continues. Inconsistent interpretation reigns supreme,[24] and the risk of yet again placing the ATS before the Supreme Court looms large. Recently, a

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(tracing the history of the term "alien"). This Comment, wherever possible, will refer to "aliens" as non-citizens. However, when quoting the language of the ATS directly, use of the word alien will be necessary.

18. 28 U.S.C. § 1350. While the language of the ATS uses the term "law of nations," this Comment will use the term "international law." *See* 28 U.S.C. § 1350. These terms are synonymous, the latter simply being a more modern term. *See, e.g.*, Bradford R. Clark & Anthony J. Bellia Jr., *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 731 n.1 (2012) (explaining that "customary international law" is a more commonly used phrase than "law of nations").

19. *See* MULLIGAN, *supra* note 16, at 6 (stating that "the ATS sprang into judicial and academic prominence in 1980"); *see also supra* note 16 and accompanying text (introducing the ATS).

20. *Compare* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (limiting claims plaintiffs may bring under federal common law for violations of international law), *with* Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1153–54, 1157 (E.D. Cal. 2004) (taking a more expansive approach in recognizing modern violations of international law under *Sosa v. Alvarez-Machain*, finding that claims of extrajudicial killing and crimes against humanity were proper under the ATS).

21. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) (ruling that the ATS does not apply extraterritorially). *But see* Flomo v. Firestone Nat. Rubber Co., L.L.C., 643 F.3d 1013, 1025 (7th Cir. 2011) (noting that without extraterritorial application, the ATS would be "superfluous").

22. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018) (holding that foreign corporations should not be held liable under the ATS). *But see in re* XE Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 584, 588 (E.D. Va. 2009) (finding that ATS claims are cognizable against private actors, like corporations).

23. *See infra* Section II.A (demonstrating how the Supreme Court has limited claims under the ATS to the statute's historical scope).

24. *See More Confusing Precedent on Corporate Accountability for Human Rights Violations?*, EARTHRIGHTS INT'L (Jan. 20, 2016), https://earthrights.org/blog/more-confusing-precedent-on-corporate-accountability-for-human-rights-violations [https://perma.cc/V3UB-5YTS] (noting inconsistent interpretation of Supreme Court precedent on the ATS from the D.C. Circuit, Second Circuit, Fourth Circuit, and Eleventh Circuit).

divided Ninth Circuit ruled that certain ATS claims may proceed against Cisco Systems, Inc., a U.S. corporation, for the corporation's role in providing a security system that allegedly facilitated the Chinese Communist Party's surveillance, detention, and torture of Falun Gong practitioners in China.[25] While some judges may be willing to dodge and weave through the various hurdles set by the Supreme Court,[26] the Ninth Circuit's decision comes at a time of heightened hesitancy[27] and emphasizes the need for plaintiffs to consider the potential impact of their claims on ATS jurisprudence as a whole.[28]

This Comment argues that there is no longer a realistic federal forum for ATS suits against foreign or domestic corporations. Part I provides background on the ATS and relevant legal principles. Part II analyzes whether there is a realistic federal forum for ATS suits against corporations and argues that the Supreme Court has effectively precluded federal courts from hearing suits against corporations under the ATS. Part II will additionally discuss why the failure to provide a federal forum for civil tort claims against corporations for violations of international law under the ATS is a departure from precedent and international and domestic obligations. Part II then argues that, given the status of the ATS in federal courts, state courts are the necessary forum for tort suits against corporations for violations of international law. Part III considers the advantages and disadvantages for victims seeking to hold corporations civilly accountable for violations

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25. Doe I v. Cisco Sys., Inc., 73 F.4th 700, 708–09 (9th Cir. 2023). In her partial dissent, Judge Christen argued for the dismissal of all the Plaintiffs' ATS claims. *Id.* at 747–48 (Christen, J., concurring in part and dissenting in part). In contrast to the Ninth Circuit majority opinion, the Eleventh Circuit has ruled against similar claims targeting Chiquita, another U.S. corporation. See *infra* Section I.A for a discussion of the Eleventh Circuit decision.

26. *See supra* note 23 and accompanying text.

27. *See* Akshay Dhekane and Basant Vijay Sagar, *Another SCOTUS Decision: Limiting Applicability of Alien Tort Statute?*, HUM. RIGHTS BLOG (Aug. 7, 2021), https://casihrrgnul.wordpress.com/2021/08/07/another-scotus-decision-limiting-applicability-of-alien-tort-statute [https://perma.cc/E4C5-6EKE] (noting a "general hesitancy" among federal courts to decide ATS cases against corporations following the Supreme Court's decisions in *Sosa*, *Kiobel*, and *Jesner*); 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://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality [https://perma.cc/8752-R74W] (describing a feeling of general futility towards ATS claims against corporations following the Supreme Court's decision in *Nestlé*).

28. *See infra* Section II.A (discussing the potential constraints on continued ATS litigation in federal courts).

of international law in state rather than federal courts. Part III is followed by a brief conclusion summarizing why state courts are the most viable, and necessary, forum for tort suits against corporations for violations of international law.

I. BACKGROUND

The ATS is somewhat of a legal anomaly. In the words of one federal judge, the ATS is an "old but little used section [that] is a kind of legal Lohengrin . . . no one seems to know [from] whence it came."[29] A review of where exactly the ATS came from, and how federal courts have interpreted the statute and the law surrounding it, is necessary. The following Sections provide a condensed review of the history of the ATS and related legal principles; a discussion of corporate liability under domestic and international law; and an introduction to the use of state tort claims for violations of international law.

A. A Brief History of the ATS and International Law

First enacted in the Judiciary Act of 1789,[30] the ATS grants federal courts original jurisdiction over civil actions brought by a non-citizen for a tort in violation of "the law of nations or a treaty of the United States."[31] Generally, scholars believe that the ATS has its roots in early efforts to give the federal government more power over foreign affairs by granting federal courts jurisdiction to hear disputes over the treatment of non-citizens in the United States.[32] Scholars largely agree that the intent behind enacting the ATS draws its origins from a seemingly innocuous incident early in America's history: the "Marbois Incident."[33] In the 1780s, French diplomat François Barbé-Marbois was assaulted by another French citizen in Philadelphia, and the only court

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29. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). The term "Lohengrin" refers to a story about a knight by that name who "refuses to disclose his origins." MULLIGAN, *supra* note 16, at 6.

30. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77; MULLIGAN, *supra* note 16, at 1.

31. 28 U.S.C. § 1350.

32. MULLIGAN, *supra* note 16, at 3; *see also* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 72 (1985) (finding that the drafters of the ATS intended for the statute to make federal courts more accessible to claims by non-citizens for violations of international law where the federal government would not otherwise have jurisdiction).

33. *See, e.g.*, MULLIGAN, *supra* note 16, at 4–5 (detailing the historical and legislative origins of the ATS).

available to Marbois to sue was the Pennsylvania state court.[34] The inability of the U.S. government to provide a federal judicial remedy to the French diplomat was cause for major concern.[35] After all, assaulting an ambassador was considered a serious violation of international law, and States were obliged to provide redress for the conduct of even private individuals who violated those rights.[36] Scholars have argued that the First Congress must have understood the ATS as a solution to the sort of situation—a tort, in violation of the law of nations, brought by a non-citizen (and, notably, against a non-citizen)—presented by the Marbois Incident.[37] There has been, however, significant scholarly debate about how broad the drafters of the ATS intended its scope to be.[38]

Whatever its origin, the ATS was rarely used until the 1980s, when the U.S. Court of Appeals for the Second Circuit decided *Filartiga v. Pena-Irala*.[39] Plaintiffs, citizens of Paraguay, alleged that their son was kidnapped and tortured to death by another Paraguayan citizen acting as the Inspector General of Police, in Paraguay.[40] The Plaintiffs brought suit under the ATS, arguing that numerous international agreements[41] and the general practice of States demonstrated that torture by a State official was a violation of international law, and thus

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34. *Id.*

35. *Id.*

36. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004) ("An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war."); MULLIGAN, *supra* note 16, at 4 (detailing the obligation the United States had under international law when the ATS was written to provide redress for private conduct in violation of international law).

37. William S. Dodge, *The Original Meaning of the Alien Tort Statute*, JUST SEC. (Oct. 26, 2017), https://www.justsecurity.org/46352/original-meaning-alien-tort-statute [https://perma.cc/3YAA-EJLD].

38. *See, e.g.*, *id.* (arguing against Justice Gorsuch's narrow interpretation of the original intent and scope of the ATS by pointing to the ATS' history and its plain language). On the history of the ATS, Dodge points to the Marbois incident, a dispute between two foreign nationals, to show that the ATS should not be, and has never been, limited to U.S. defendants. *Id.* On the issue of the statute's plain language, Dodge points out that the statute limits potential plaintiffs, but not defendants, which impliedly expresses Congress' desire that the ATS apply to foreign defendants. *Id.*

39. 630 F.2d 876 (2d Cir. 1980).

40. *Id.* at 878.

41. *Id.* at 879 (citing to the U.N. Charter, the Universal Declaration on Human Rights, and the U.N. Declaration Against Torture, among others).

the ATS granted jurisdiction.[42] The court agreed, noting that much had changed in the realm of international law between the enactment of the ATS and the *Filartiga* decision.[43] For example, when the ATS was written, three historical torts would have likely been considered a violation of international law: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[44] The court in *Filartiga*, however, found that courts considering ATS claims "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[45] For this assertion, the court in *Filartiga* cited a landmark Supreme Court decision concerning the interpretation of international law: *Paquete Habana*.[46] In *Paquete Habana*, the Supreme Court found that where there is no treaty or controlling decision demonstrating an applicable international legal principle, courts may look to the "customs and usages of civilized nations" to recognize new, modern principles of international law.[47] The Court's decision in *Paquete Habana* thus embraced the principle of customary international law[48] as applicable by federal courts.[49] Relying on this principle, the court in *Filartiga* found that the Plaintiffs' claim that their son was tortured to death in Paraguay violated a

42. *Id.* at 878–80.

43. *See id.* at 881 (noting that principles of international law ripen through the "general assent of civilized nations," and thus have evolved since 1789, when the ATS was written).

44. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004). "Safe conduct" refers to the right of people to move freely, particularly through occupied areas. JAMES KRASKA, SAFE CONDUCT AND SAFE PASSAGE (2009), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e396 [https://perma.cc/EC4C-PLWE].

45. *Filartiga*, 630 F.2d at 881.

46. 175 U.S. 677 (1900); *see Filartiga*, 630 F.2d at 880–81 (stating that "[*Paquete*] *Habana* is particularly instructive for present purposes" for applying modern customs to an older tradition).

47. *Paquete Habana*, 175 U.S. at 700.

48. Customary international law is a source of international law that derives from States engaging in certain practices out of "a sense of legal obligation." Legal Info. Inst., *Customary International Law*, CORNELL L. SCH., https://www.law.cornell.edu/wex/customary_international_law [https://perma.cc/2ZEU-D7SK] (last modified July 2022).

49. *See Paquete Habana*, 175 U.S. at 708 (finding that the prohibition of capturing fishing vessels as a prize of war to be a violation of customary international law that U.S. federal courts must recognize and enforce).

modern, universally accepted norm of international law for which the ATS granted jurisdiction.[50]

Finding that the ATS covered claims for modern violations of international law led to a dramatic increase in ATS litigation.[51] With this resurgence came several new issues that lower courts were left to interpret. Initially, courts began to split on whether the ATS was a cause of action on its own or merely a jurisdictional statute.[52] This issue was left open for nearly twenty years until the Supreme Court decided *Sosa v. Alvarez-Machain*.[53] In *Sosa*, the Plaintiff, a Mexican national, claimed that he was arbitrarily arrested and detained by another Mexican national in Mexico.[54] The Plaintiff cited several international agreements demonstrating that his arbitrary arrest violated modern international law, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[55] The Plaintiff additionally advanced the following definition of arbitrary detention, sourced from a variety of reputable domestic and international authorities: "officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances."[56]

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50. *Filartiga*, 630 F.2d at 884. In finding that prohibiting torture was a modern norm of customary international law, the court in *Filartiga* cited several international and domestic sources, including but not limited to the U.N. Charter, the Universal Declaration of Human Rights, the U.N. Declaration Against Torture, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and U.S. Department of State Country Reports. *Id.* at 879–85.

51. MULLIGAN, *supra* note 16, at 7.

52. *Compare* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that the ATS is purely jurisdictional and that plaintiffs must establish an independent cause of action), *with* Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995) (finding that the ATS is both a jurisdictional grant and a private right of action).

53. 542 U.S. 692 (2004).

54. *Id.* at 698–99.

55. *Id.* at 734. The latter of which the United States had ratified, without reservation, at the time of the Court's decision in *Sosa*. *See Treaty Ratification*, AM. C.L. UNION, https://www.aclu.org/issues/human-rights/treaty-ratification [https:// perma.cc/6HUL-JNM6] (listing the International Covenant on Civil and Political Rights as one of the few international treaties on human rights that the United States has ratified in full).

56. *Sosa*, 542 U.S. at 736, 736 n.27 (citing to national constitutions, judgments from the International Court of Justice, and federal court decisions to support the claim that the alleged conduct violated customary international law).

As an initial matter, the *Sosa* Court found that the "ATS [was] a [purely] jurisdictional statute creating no new causes of action."[57] The Court went on to caution lower courts against recognizing new federal common law causes of action for violations of international law under the ATS, stating that if a claim is alleging a modern violation of international law, the claim must be "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized."[58] Based on those requirements, the Court found that the Plaintiffs' claims failed, deciding that, as alleged, the facts of the case did not amount to a violation of modern international legal principles.[59] By displaying and directing lower courts to exercise judicial restraint[60] in recognizing federal common law claims for violations of international law outside of those that existed in 1789,[61] the Court's analysis in *Sosa* led to the beginning of an increasingly narrow interpretation of the ATS and the scope of international law violations it covers.[62]

By the time the Supreme Court was next called on to interpret the ATS, two new issues presented themselves: (1) whether the ATS permitted federal courts to hear claims involving extraterritorial[63]

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57. *Id.* at 724.

58. *Id.* at 725 (referring to claims such as violations of safe conducts, infringements of the rights of ambassadors, and piracy).

59. *Id.* While the Court did not rule outright that a claim of arbitrary detention is not a violation of modern international law, the Court did rule on what amounts to a technicality, arguing that the length and manner with which the plaintiff was arbitrarily detained was not severe enough to warrant a federal remedy. *See id.* at 738 (finding that the alleged illegal detention of less than a day was not enough to constitute a violation of modern customary international law).

60. *See id.* at 725, 729 (directing lower courts to exercise judicial caution in considering claims under the ATS, noting that the door to ATS claims was "still ajar subject to vigilant doorkeeping").

61. *See id.* at 715, 724 ("[V]iolation of safe conducts, infringement of the rights of ambassadors, and piracy.").

62. *See, e.g.*, Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1190 (11th Cir. 2014), *cert. denied*, 575 U.S. 962 (2015) (finding, in part, that allegations against a U.S. corporation were not permissible under the ATS given the restrictions announced in *Sosa*).

63. Defined as "existing or taking place outside the territorial limits of a jurisdiction." *Extraterritorial*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/extraterritorial [https://perma.cc/7PUL-J357].

violations of international law;[64] and (2) whether the ATS permitted suits against corporations.[65] In *Kiobel v. Royal Dutch Petroleum Co.*,[66] the Supreme Court addressed the former issue.[67] Several Nigeran nationals filed suit against various Dutch, British, and Nigerian corporations for allegedly aiding and abetting human rights abuses committed in Nigeria.[68] The Court found that the ATS was subject to the "presumption against extraterritoriality," excluding conduct that occurs entirely outside of the United States from the ATS' jurisdiction.[69] The presumption against extraterritoriality is a canon of construction that originated as an application of the *Charming Betsy* rule, which provided that statutes should be construed in a way that avoids violations of international law.[70] The Supreme Court has considered the *Charming Betsy* rule and how to best apply the presumption against extraterritoriality in a number of cases, most notably in *Morrison v. National Australia Bank Ltd.*[71] In *Morrison*, the Court ruled that unless a statute clearly evidences extraterritorial application, courts should presume that it is not intended to apply to any claims arising outside of the United States.[72] However, the *Morrison* Court noted that claims of extraterritorial violations could evade the presumption against extraterritoriality where the conduct that was the focus of congressional concern under the relevant statute occurred in the United States.[73]

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64. *See* Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124–25 (2013) (holding that the ATS does not cover extraterritorial violations of international law).

65. *See generally* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1393 (2018) (considering the liability of foreign corporations under the ATS); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935 (2021) (considering the liability of an American corporation under the ATS).

66. 569 U.S. 108 (2013).

67. *See id.* at 114. The Court in *Kiobel* was additionally called on to decide whether a corporation could be held liable under the ATS but chose to instead decide the case based solely on the extraterritorial nature of the conduct. *Id.*

68. *Id.* at 111–13.

69. *Id.* at 124–25.

70. *See* Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) (holding that acts of Congress should never be "construed to violate the law of nations if any other possible construction remains").

71. 561 U.S. 247 (2010).

72. *Id.* at 255 ("When a statute gives no clear indication of an extraterritorial application, it has none.").

73. *See id.* at 266–67 (dismissing the petitioners argument that the presumption against extraterritoriality should not apply given that part of alleged misconduct

In *Kiobel*, the Court found that the ATS did not clearly evidence congressional intent to cover extraterritorial violations of international law, looking primarily to the plain language and history of the statute.[74] Given that all of the violations the Plaintiffs alleged against the Nigerian corporation occurred outside of the United States, the Court found that the presumption against extraterritoriality barred the Plaintiffs' claims.[75] In the second to last sentence of the *Kiobel* opinion, the Court suggested that the presumption against extraterritoriality for ATS claims may be overcome if the alleged conduct "touch[ed] and concern[ed]" the United States, but elaborated no further on what was required for conduct to meet this standard for future claims.[76]

Courts have interpreted the *Kiobel* standard narrowly. In *Cardona v. Chiquita Brands International, Inc.*,[77] the Eleventh Circuit considered whether the presumption against extraterritoriality and the *Kiobel* "touch and concern" test barred the Plaintiffs' claims against Chiquita for allegedly aiding and abetting torture in Colombia.[78] While the majority found in the affirmative, the dissenting opinion argued that since the alleged misconduct was carried out by U.S. nationals at Chiquita's U.S. headquarters, it sufficiently "touch[ed] and concern[ed]" the United States.[79] The Plaintiffs alleged that Chiquita employees approved and concealed payments to Colombian terrorist organizations from the corporation's U.S. headquarters.[80] The majority, however,

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occurred in the United States, noting that that the presumption against extraterritoriality "would be a craven watchdog" if it failed to apply whenever some domestic activity is alleged in addition to extraterritorial conduct); *see also Kiobel*, 569 U.S. at 126 (Alito, J., concurring) (explaining the *Morrison* Court's "focus" test (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 255 (1991))). In a later case, the Supreme Court announced a clearer two-part test for applying the presumption against extraterritoriality, citing its rulings in *Morrison* and *Kiobel*. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335–36 (2016). First, courts must look at whether the statute has a clear geographic scope. *Id.* at 336. Second, if there is not a clear geographic scope, courts must look to the "focus" of the statute to determine whether it applies extraterritorially. *Id.*

74. *Kiobel*, 569 U.S. at 117–19, 124.

75. *Id.* at 124–25.

76. *Id.* Nor did the Court elaborate further as to how the "touch and concern" test compares to the *Morrison* "focus" test. *See id.* (addressing extraterritoriality and the "touch and concern" test without comparing it to the *Morrison* test).

77. 760 F.3d 1185 (11th Cir. 2014).

78. *Id.* at 1188–91.

79. *Id.* at 1192 (Martin, J., dissenting).

80. *Id.*

found that those domestic connections were not enough to overcome the *Kiobel* bar.[81]

The additional issue lurking behind the Supreme Court's decision in *Kiobel* was whether a corporation could even be a defendant in ATS suits.[82] Five years after *Kiobel*, the Supreme Court directly addressed whether a foreign corporation could be held liable under the ATS in *Jesner v. Arab Bank, PLC*.[83] The Plaintiffs in *Jesner* were a large group of individuals who alleged that they, or others, were injured or killed by terrorist organizations.[84] The Plaintiffs claimed that Arab Bank, through its New York City branch, financed the terrorist groups that caused their harm via electronic bank transfers.[85] In a plurality decision relying primarily on *Sosa*'s reluctance towards courts creating new causes of action for modern violations of international law,[86] the *Jesner* Court narrowly concluded it was not "prudent" or "necessary" to recognize foreign corporate liability under the ATS, skirting the broader question of whether or not corporate liability is a modern norm of customary international law.[87] Emphasizing its restrained approach, the Court noted that the Legislative and Executive branches would be better suited to decide matters such as foreign corporate liability given the issue's potential effects on foreign policy.[88] However, the *Jesner* decision was made in light of notable objections, including from the U.S. Solicitor General and members of Congress, urging in favor of foreign corporate liability.[89]

Further, at the time the Court decided *Jesner* on certiorari from the Second Circuit, it was the only circuit in the United States that had the opportunity to consider the issue and hold that corporate liability is

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81. *Id.* at 1191 (majority opinion).

82. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 114 (2013).

83. 138 S. Ct. 1386, 1407 (2018) (plurality opinion) (holding that foreign corporations cannot be defendants in ATS suits).

84. *Id.* at 1393.

85. *Id.*

86. *Id.* at 1402.

87. *See id.* ("[T]he Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations.").

88. *See id.* at 1407 ("With the ATS, the First Congress provided a federal remedy for a narrow category of international-law violations committed by individuals. Whether, more than two centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make.").

89. *Id.* at 1432 (Sotomayor, J., dissenting).

barred under the ATS.[90] In fact, many courts had found in the affirmative.[91] For example, the Plaintiffs in *Al Shimari v. CACI Premier Technology, Inc.*[92] filed suit against a corporation under the ATS for torture that had allegedly occurred outside of the United States. The Fourth Circuit found that the Plaintiffs' claims properly "touch[ed] and concern[ed]" the United States under *Kiobel*, given the business was incorporated in the United States and a contract that supposedly led to the alleged international law violations was executed in the United States.[93] Notably, the circuit court argued that failing to hold corporations accountable would not result in any unwarranted interference in foreign policy because the political branches have repeatedly disavowed acts of torture regardless of the offender's nationality.[94]

Three years after *Jesner*, the Court decided *Nestlé USA, Inc. v. Doe*.[95] The Plaintiffs in *Nestlé* alleged that Nestlé USA made certain decisions from their U.S. offices that aided and abetted child slavery, human trafficking, and forced labor at a cocoa plantation in the Ivory Coast.[96] In another plurality decision, the Court in *Nestlé* found that allegations against a U.S. corporation for aiding and abetting conduct in violation of international law that occurred outside of the United States were not a viable claim under the ATS.[97] Combining *Kiobel*'s presumption against extraterritoriality[98] and *Sosa*'s limit on the types of international law claims that may be brought under the ATS,[99] the Court found that the alleged degree of corporate activity was not enough to draw a "sufficient connection" between the violations of international law that

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90. MULLIGAN, *supra* note 16, at 18.

91. *See, e.g.*, Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520 (4th Cir. 2014) (finding that *Kiobel* did not foreclose corporate liability under the ATS).

92. *Id.*

93. *Id.* at 530–31.

94. *Id.* at 530. This notion also theoretically extends to corporations. *See infra* text accompanying notes 124–33.

95. 141 S. Ct. 1931 (2021).

96. *Id.* at 1935.

97. *See id.* at 1935–36 (finding that the plaintiffs' claims sought an impermissible extraterritorial application of the ATS to a domestic corporation).

98. *Id.* at 1935–37; *see* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013) (discussing a stringent formulation of the presumption against extraterritoriality).

99. *Nestlé*, 141 S. Ct. at 1938 (plurality opinion); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (articulating the ATS has very limited applicability to violations of international law).

occurred outside of the United States and the corporation's domestic conduct.[100] While the Court did not define what connections to the United States would be sufficient to overcome the presumption against extraterritoriality, the Court did suggest that "general corporate activity" is not enough.[101] In so finding, the Court emphasized its ruling in *Kiobel*, in which the Court noted that pleading facts amounting to "mere corporate presence" in the United States is not sufficient to support an ATS claim where extraterritorial conduct is at issue.[102] In *Nestlé*, "general corporate activity" included not only operational decisions made in the United States relating to the alleged international law violations, but evidence that Nestlé USA directly provided advice and resources to the cocoa plantation for exclusive purchasing rights.[103] Further, three Justices joined Part III of the *Nestlé* opinion, calling for federal courts not to recognize private rights of action under the ATS beyond the three historical tort violations of international law identified in *Sosa*.[104]

The importance of the ATS and civil tort claims as a tool for victims like those in *Sosa*, *Jesner*, *Kiobel*, and *Nestlé* is significant considering the relatively few legal alternatives. Generally, international law does not create a private cause of action to remedy violations of the rights it creates.[105] Instead, international law demands a domestic remedy that protects internationally guaranteed rights and standards,[106] a theory that has persisted since the founding of the United States.[107] In this way, international law becomes incorporated into domestic law.[108]

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100. *Nestlé*, 141 S. Ct. at 1937.

101. *Id.*

102. *Id.* (quoting *Kiobel*, 569 U.S. at 125 (2013)).

103. *Id.* at 1935.

104. *Id.* at 1937 (plurality opinion) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)).

105. Brief for EarthRights International as Amici Curiae Supporting Petitioners at 16, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499) [hereinafter Amicus Brief].

106. *Id.*

107. *See* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1193 (11th Cir. 2014) (Martin, J., dissenting) ("[W]here the individuals of any state violate [international] law, it is then the interest as well as duty of the government under which they live, to [uphold those laws]." (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769))).

108. *See e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 (2d Cir. 2000) ("[T]he law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law.").

The availability of a tort option against corporations for victims of human rights violations in the United States is an extremely unique and powerful example of such domestic remedies.[109] The aims of tort law, compensation and deterrence, are fundamental to guaranteeing that victims of human rights abuses receive actual, rather than theoretical or performative, redress.[110] For example, one analysis has shown that out of thirty-three settlements from ATS cases that were millions of dollars, half of the suits were against corporations.[111] Moreover, in terms of providing a broad domestic remedy in tort for victims in the United States, the ATS stands alone.[112] The closest domestic remedy to the ATS is the Torture Victim Protection Act (TVPA),[113] passed by Congress in 1991 to explicitly impose civil liability for anyone "who, under actual or apparent authority, or under color of law, of any foreign nation . . . subjects an[y] individual to torture . . . [or] extrajudicial killing."[114] While the TVPA does provide a direct cause of action for victims of torture or extrajudicial killing, it does not cover the full scope of international law violations covered by the ATS.[115] For example, it does not cover claims for forced labor or arbitrary detention, nor does it apply to corporations.[116] The

109. *See* Alien Tort Statute Clarification Act, S. 4155, 117th Cong. § 2(6) (as introduced by S. Comm. on the Judiciary, May 5, 2022) ("In many countries where human rights abuses occur, victims are unable to obtain justice because of ongoing conflicts and violence, corruption, and inadequate rule of law. In many such cases, a suit under the Alien Tort Statute is the only option for redress and accountability.").

110. Amicus Brief, *supra* note 105, at 24.

111. Christopher Ewell & Oona A. Hathaway, *Why We Need the Alien Tort Statute Clarification Act Now*, JUST SEC. (Oct. 27, 2022), https://www.justsecurity.org/83732/why-we-need-the-alien-tort-statute-clarification-act-now [https://perma.cc/NV5D-4NYZ].

112. *See* Alien Tort Statute Clarification Act, S. 4155, 117th Cong. § 2(6) (as introduced by S. Comm. on the Judiciary, May 5, 2022) (remarking that the ATS is a truly unique legal tool for victims of human rights abuses).

113. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

114. *Id.* § 2(a).

115. *See id.* (limiting claims to conduct amounting to torture or extrajudicial killing); MULLIGAN, *supra* note 16, at 9 (noting that the ATS refers only to the jurisdiction of federal courts to hear claims for tort violations of international law while the TVPA enumerates a specific cause of action).

116. *See* Torture Victim Protection Act of 1991 § 2 (limiting claims to conduct amounting to torture or extrajudicial killing); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1404 (2018) ("The key feature of the TVPA for this case is that it limits liability to 'individuals,' which, the Court has held, unambiguously limits liability to natural persons.").

Trafficking Victims Protection Act of 2000[117] gives a private right of action to sue corporations, but is similarly limited, only applying to victims of trafficking.[118] Lastly, the Alien Tort Statute Clarification Act[119] introduced recently by Senators Dick Durbin and Sherrod Brown would, if passed, overcome the bar posed by *Kiobel* by authorizing the extraterritorial application of the ATS.[120] However, this Act would not fully address the issues presented by *Jesner* and *Nestlé*.[121] For example, it does not explicitly address the ability of plaintiffs to hold foreign corporations accountable, nor does it address the fact that a growing number of courts are choosing to recognize only the three historical tort violations of international law identified in *Sosa*.[122]

B. Corporate Liability at Home and Abroad for Violations of International Law

Instrumental to the discussion surrounding the ATS and its applicability to corporations is the history of corporate liability itself. In the United States, "[c]orporate legal personhood is a bedrock

117. Pub. L. No. 106-386, 114 Stat. 1466 (2000).

118. *See e.g.*, Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring the TVPA as a Promising Tool for Corporate Accountability*, 6 COLUM. HUM. RTS. L. REV. ONLINE 1, 24 (2021) (discussing the various provisions on corporate liability in the Trafficking Victims Protection Act).

119. Alien Tort Statute Clarification Act, S. 4155, 117th Cong. (as introduced by S. Comm. on the Judiciary, May 5, 2022).

120. *Id.* § 3(b)(1).

121. *See Jesner*, 138 S. Ct. at 1402–08 (declining to "extend ATS liability to foreign corporations"); Nestlé USA, Inc. v. Doe I, 141 S. Ct. 1931, 1935–37, 1940 (2021) (holding the extraterritorial application of the ATS impermissible and noting that any extension of liability under the ATS "for torts beyond the three historical torts" is Congress' decision).

122. Alien Tort Statute Clarification Act, S. 4155, 117th Cong. (as introduced by S. Comm. on the Judiciary, May 5, 2022). The Alien Tort Statute Clarification Act proposes extraterritorial application of the ATS only for defendants who are nationals of the United States or present in the United States. *Id.* § 3(b). Therefore, claims against foreign corporations would still be precluded under *Jesner*. *See Jesner*, 138 S. Ct. at 1408 (holding that foreign corporations are not liable under ATS). Further, the statute does not create any new direct cause of action under the ATS. § 3(b). This means that courts are still free to interpret claims for violations of modern international law narrowly under *Sosa*. *See* Sosa v. Alvarez-Machain, 542 U.S 692, 725 (2004) (holding that federal courts must find claims under ATS to "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court] ha[s] recognized"). For a discussion on the benefits and pitfalls of the proposed legislation, see Ewell & Hathaway, *supra* note 111.

tenant of [the] law."[123] Beyond the First Amendment rights famously guaranteed to corporations in *Citizens United v. Federal Election Commission*,[124] corporations can be held criminally and civilly liable, enter contracts, and buy property.[125] Every U.S. state imposes tort liability on corporations,[126] and corporate liability is a well-recognized principle of federal common law.[127] The idea that corporations have a legal personhood is not unique to the United States—it is a principle observed across most, if not all, legal systems, including the system of international law.[128] For example, the principal judicial body of the U.N., the International Court of Justice (ICJ), has on several occasions recognized the ability of corporations to be held accountable for violations of international law, reasoning that because corporations enjoy the benefits and consequences of legal personhood for violations of domestic law, the same should be true for when corporations violate the gravest of rights, like those guaranteed by international law.[129]

The U.N. has independently stressed the importance of corporate liability for violations of international law, specifically for violations of human rights. The U.N.'s Guiding Principles on Business and Human Rights notes:

> The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.[130]

International bodies like the U.N. are not alone in recognizing the principle that corporations can (and should) be held responsible for

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123. Richard Herz, *Symposium: It's Just a Tort Case*, SCOTUSBLOG (July 27, 2017, 2:24 PM), https://www.scotusblog.com/2017/07/symposium-just-tort-case [https://perma.cc/33CF-CK7P].

124. 558 U.S. 310, 371 (2010) (holding that corporations have a First Amendment right to engage in political speech).

125. Ciara Torres-Spelliscy, *The History of Corporate Personhood*, BRENNAN CTR. FOR JUST. (Apr. 8, 2014), https://www.brennancenter.org/our-work/analysis-opinion/history-corporate-personhood [https://perma.cc/87GT-3LLM].

126. Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 18 (2013).

127. Amicus Brief, *supra* note 105, at 21.

128. *Id.* at 26.

129. *Id.* at 22–23.

130. U.N. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, at 13, U.N. Doc. HR/PUB/11/04 (2011).

human rights violations. Individual States have, in various ways, decided to exercise jurisdiction over extraterritorial violations of international law committed by corporations.[131] For example, in 2021, the U.K. Supreme Court permitted a group of Nigerian Plaintiffs to proceed against a U.K.-based corporation for actions of their Nigerian subsidiary regarding human rights abuses in Nigeria,[132] indicating a growing global trend of holding companies liable for extraterritorial violations of international law. Further, the Restatement (Third) on Foreign Relations Law recognizes corporate liability for violations of international law, noting that corporations are frequently held accountable under international economic law.[133] Despite the historical roots and growing prevalence of corporate liability for violations of international law, some legal scholars have expressed displeasure with the practice.[134] For instance, in *Jesner*, Justice Kennedy asserted that "allowing plaintiffs to sue foreign corporations [for violations of international law] could establish a precedent that discourages American corporations from investing abroad."[135]

C. The ATS and State Tort Claims

Looking beyond the ATS reveals an alternative path for victims of human rights abuses that seek to hold corporations accountable for violations of international law in tort. State courts and state tort claims provide an additional forum for victims outside the restrictions of federal courts.[136] For example, plaintiffs claiming they were tortured in violation of international law under the ATS would claim in state court that they were assaulted and battered under applicable state tort

131. Ewell & Hathaway, *supra* note 111.

132. Okpabi v. Royal Dutch Shell PLC [2021] UKSC 3, [33]-[34], [153]-[59].

133. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. 2, intro. note (AM. L. INST. 1987).

134. *See e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405–06 (2018) (plurality opinion) (discussing potentially harmful implications of corporate liability under the ATS for U.S. corporations).

135. *Id.* at 1406.

136. Including a state law tort claim as part of a plaintiffs' ATS claim is common practice. Hoffman & Stephens, *supra* note 126, at 15; *see also* Alicia Pitts, *Avoiding the Alien Tort Statute: A Call for Uniformity in State Court Human Rights Litigation*, 71 SMU L. REV. 1209, 1223 (2018) (analyzing two recent state court ATS-style claims and finding that the state law claims "surpassed every federal ATS hurdle solely due to their choice of forum").

laws.[137] In one example, *Carijano v. Occidental Petroleum Corp.*,[138] members of an indigenous group sued Occidental and its subsidiary for state "toxic tort" claims, such as nuisance, resulting from environmental damage occurring in Peru rather than claiming a violation of international law under the ATS.[139] The case was eventually mutually settled.[140] In another case, *Doe I v. Unocal Corp.*,[141] a group of Plaintiffs sued Unocal, a California corporation, under various federal and state law claims in federal court.[142] While the initial ATS claims were dismissed,[143] the Plaintiffs re-filed their state law tort claims in state court, which proceeded despite repeated attempts from Unocal to get the claims dismissed.[144] Shortly before going to trial on the state law tort claims, Unocal settled with the Plaintiffs, ending litigation in both federal and state court.[145] In both instances, the Plaintiffs' state law tort claims were able to proceed where significant obstacles to any federal ATS claims remained.

State courts have the additional advantage of being courts of general jurisdiction, meaning they can hear a wide variety of tort claims, including those that occur extraterritorially.[146] Under the transitory tort doctrine, lawsuits may be brought in U.S. state courts against defendants subject to

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137. For almost any violation of international law that you could claim under the ATS, there is a corresponding state law tort claim. Hoffman & Stephens, *supra* note 126, at 15.

138. 643 F.3d 1216 (9th Cir. 2011).

139. *See id.* at 1223–24 (detailing the Plaintiffs' claims against Occidental).

140. Press Release, EarthRights Int'l, Peruvian Indigenous Communities Pleased with Settlement of Pollution Lawsuit Against Occidental Petroleum (Mar. 5, 2015), https://earthrights.org/wp-content/uploads/oxy_press_release.pdf [https://perma.cc/7NQH-9RSF].

141. 963 F. Supp. 880 (C.D. Cal. 1997).

142. *Id.* at 883–84.

143. Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000). This decision was later reversed by the 9th Circuit. *See* Doe I v. Unocal Corp., 395 F.3d 932, 962–63 (9th Cir. 2002) (reversing the district courts summary judgement grant in favor of Unocal on the ATS claims for forced labor, murder, and rape, but not for torture).

144. *See, e.g.*, Doe I v. Unocal Corp., No. BC237679, 2002 WL 33944505 (Cal. App. Dep't Super. Ct. June 10, 2002) (denying a motion for summary judgement from Unocal).

145. Press Release, Ctr. for Const. Rts., Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers (Oct. 23, 2007), https://ccrjustice.org/home/press-center/press-releases/historic-advance-universal-human-rights-unocal-compensate-burmese [https://perma.cc/EA5C-U6BH].

146. Marco Simons, *What Does the* Kiobel *Decision Mean for ERI's Cases?*, EARTHRIGHTS INT'L (Apr. 19, 2013), https://earthrights.org/blog/what-does-the-kiobel-decision-mean-for-eris-cases [https://perma.cc/3T4K-TKT5].

the U.S. court's jurisdiction (including corporations) no matter where the injuries occurred.[147] Some U.S. states have intentionally made themselves more amenable to victims of human rights abuses seeking to sue in state court by expanding the traditional definition of certain torts (including assault, battery, and wrongful death) where the plaintiffs can prove that the tortious conduct constituted torture, genocide, war crimes, or crimes against humanity.[148]

In many ways, state courts and state law tort claims are an excellent alternative to federal courts and the ATS for victims of human rights abuses seeking to hold corporations accountable.[149] While many of the issues surrounding the ATS and its use and relevance in federal and state courts are complex, a review of the Supreme Court's jurisprudence on the ATS unequivocally demonstrates an increasing hostility towards recognizing claims under the ATS against corporations.[150]

II. ANALYSIS

It is imperative that we treat international human rights as not just an aspirational concept, but a legal reality.
—Dick Durbin, U.S. Senator from Illinois[151]

When discussing practical ways to protect human rights domestically

147. *Id.*

148. *See* CAL. CIV. PROC. CODE § 354.8 (West 2023) (expanding actions for assault and battery where the conduct constituting the assault or battery would also constitute acts of torture, genocide, war crimes, extrajudicial killing, or crimes against humanity); Fernando C. Saldivar, *An Oasis in the Human Rights Litigation Desert? A Roadmap to Using California Code of Civil Procedure Section 354.8 as a Means of Breaking out of the Alien Tort Statute Straitjacket*, 51 COLUM. HUM. RTS. L. REV. 507, 508 (2020) (discussing how the California legislature has implicitly provided an alternative to the ATS in state courts for victims of human rights abuses by expanding causes of action in tort for violations of international law).

149. *See infra* Section II.D (discussing the practice of bringing tort claims for violations of international law against corporations in state courts).

150. *See infra* Section II.A (discussing the limitations the Supreme Court has placed on bringing suits against corporations under the ATS, effectively precluding these types of suits in federal courts).

151. Press Release, Dick Durbin, Chair, Senate Judiciary Committee, Durbin, Brown Introduce Legislation to Clarify Critical Tool for Holding Human Rights Violators Accountable (May 05, 2022), https://www.durbin.senate.gov/newsroom/press-releases/durbin-brown-introduce-legislation-to-clarify-critical-tool-for-holding-human-rights-violators-accountable [https://perma.cc/CPL8-YCN4].

and abroad, corporate responsibility and liability must be a part of the equation. Corporations interact with and impact international law in a myriad of ways, and, subsequently, must be held to the same international standards and accountability mechanisms as individuals.[152] Given that international law does not generally impose direct legal obligations or provide redressability mechanisms, it is imperative that States do so in their domestic law.[153] And for over 200 years, the ATS has provided some victims of human rights abuses in the United States with a one-of-a-kind tool to hold corporations civilly accountable.[154] Today, courts are effectively precluded from hearing suits against corporations under the ATS following the Supreme Court's recent decisions in *Jesner* and *Nestlé*.[155] Failure to provide a federal forum for ATS suits against corporations contravenes the original intent of the ATS and international obligations, federal common law, and the history of corporate liability and tort law in the United States. The following Sections illustrate the gradual decline of a federal forum for ATS suits against corporations, discuss how the diminishing of corporate liability under the ATS contradicts both domestic and international legal obligations, and present an argument for the suitability of state courts as the primary forum for ATS suits against foreign and domestic corporations.

A. Federal Courts: Closed for Business

The initial hurdle faced by plaintiffs claiming violations of international law under the ATS against corporations is the limitations *Sosa* placed on the types of violations covered by the ATS. According to *Sosa*, plaintiffs must allege a "specific, universal, and obligatory" legal norm,[156] which courts have interpreted as an increasingly narrow set of

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152. *See supra* Introduction (discussing how corporations may benefit from engaging in activities extraterritorially that violate international human rights law).

153. *See Corporate Responsibility to Respect Human Rights*, *supra* note 12, at 10–11 ("[States] obligation to protect human rights requires them to protect individuals and groups against human rights abuses, including by business enterprises. Their obligation to fulfil human rights means that States must take positive action to facilitate the enjoyment of basic human rights.").

154. *See supra* Part I (providing a history of the ATS, corporate liability internationally and domestically, and ATS claims in state courts).

155. *See infra* Section II.A (detailing how recent Supreme Court decisions have narrowed the set of claims available to plaintiffs).

156. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (quoting *in re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

claims.[157] In addition, the Court hesitated to accept claims under the ATS outside of the three historical torts that would have been considered violations of international law in the eighteenth century,[158] calling for courts to engage in "vigilant doorkeeping"[159] and "judicial caution."[160] Under this rigid standard, the Court declined to find that the Plaintiff's claim in *Sosa* of arbitrary arrest and detention was a specific, universal, or obligatory legal norm adequately defined in modern international law, giving particular credence to the length of the alleged detention.[161]

In addition to the initial *Sosa* hurdle, the alleged conduct cannot have occurred extraterritorially unless some of that conduct "touch[es] and concern[s]" the United States—an unclear and, again, narrowly interpreted test.[162] When the Court decided *Kiobel*, some legal scholars viewed the holding to be the most significant hurdle that victims seeking to use the ATS would face.[163] It also was cause for

157. *See generally id.* at 738 (finding that the Plaintiffs' claim of arbitrary arrest and detention was not adequately defined in modern international law); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) (finding that extraterritorial violations of international law are not covered by the ATS); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018) (precluding claims against foreign corporations under the ATS); Nestlé USA, Inc v. Doe, 141 S. Ct. 1931, 1939 (2021) (plurality opinion) (expressing hesitation in recognizing any violations of international law under the ATS beyond the three historical torts recognized in *Sosa*).

158. *Sosa*, 542 U.S. at 724–25.

159. *Id.* at 729.

160. *Id.* at 725.

161. *Id.* at 738. It is worth noting that the U.N. Universal Declaration of Human Rights provides that "[n]o one shall be subjected to arbitrary arrest, detention, or exile." G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. IX (Dec. 10, 1948). The International Covenant on Civil and Political Rights, to which the United States is a party, protects against the same broadly defined right. *See* G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. IX, § 1 (Dec. 16, 1966) ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."). Neither, notably, include any temporal qualifiers.

162. MULLIGAN, *supra* note 16, at 14–15; *see, e.g.*, Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1187–89 (11th Cir. 2014) (dismissing the Plaintiffs' claims against Chiquita for torture, personal injury, and death under the ATS following the *Kiobel* presumption against extraterritoriality).

163. Gwynne L. Skinner, *Beyond* Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUM. RTS. L. REV. 158, 196 (2014) (calling *Kiobel* "[a]rguably the largest barrier that victims of transnational human rights abuses . . . face in the United States").

significant debate between the Circuit Courts, with disagreements centering on what the *Kiobel* decision meant for ATS claims involving extraterritorial conduct with connections to the United States.[164] An illuminating example of the limiting effect of the *Kiobel* decision and its "touch and concern" test is the Eleventh Circuit's decision in *Cardona v. Chiquita Brands International, Inc.*[165] In *Cardona*, a group of Colombian citizens alleged that Chiquita, an American corporation, tortured them in coordination with paramilitary forces in Colombia.[166] Not only did the Eleventh Circuit find that the presumption against extraterritoriality fatally applied to the Plaintiffs' claims, but it additionally noted that under *Sosa*, courts should otherwise be extremely cautious when choosing to recognize new claims for violations of international law under the ATS.[167]

In *Cardona*, dissenting Judge Martin pointedly argued that "failing to enforce the ATS under these circumstances . . . disarm[s] innocents against American corporations that engage in human rights violations abroad."[168] Judge Martin pointed out two distinct issues demonstrating why Chiquita should have been held liable.[169] First, Judge Martin argued that the Plaintiffs' claims "touch[ed] and concern[ed]" the United States, given that, at its simplest, Plaintiffs alleged violations of international law by American citizens at Chiquita's U.S. headquarters.[170] Second, Judge Martin noted that the Plaintiffs explicitly alleged violations of international law occurring on U.S. soil—that Chiquita corporate officials approved payments to the paramilitary organizations from the United States.[171] Judge Martin's analysis reveals that, fundamentally, *Cardona* concerns a group of non-citizens bringing suit under the ATS for a violation of international law, in relevant part committed by a U.S. corporation and its officers while on U.S. soil, and yet the Plaintiffs were denied jurisdiction under the ATS.[172] Foreclosing the ATS from applying to extraterritorial violations of international law of this type is contrary to

164. MULLIGAN, *supra* note 16, at 15 (2018).
165. 760 F.3d 1185 (11th Cir. 2014).
166. *Id.* at 1187.
167. *Id.* at 1190–91 ("*Sosa* counsels against recognizing a tort not previously recognized as within ATS jurisdiction.").
168. *Id.* at 1195 (Martin, J., dissenting).
169. *Id.* at 1192, 1194.
170. *Id.* at 1192.
171. *Id.* at 1194.
172. *Id.* at 1192.

basic logic.[173] International law is fundamentally extraterritorial, and enforcing it requires U.S. courts to consider, in part, conduct that occurs outside of the United States.[174] For example, piracy, one of the three historical torts recognized as a violation of international law in 1789, almost always involves conduct outside of the territory of the United States.[175] However, given how courts have interpreted the *Kiobel* presumption against extraterritoriality, any such consideration of extraterritorial conduct is almost an immediate bar to ATS claims.[176]

If *Kiobel* and its progeny were not the "nail in the coffin"[177] of ATS claims against corporations, then *Jesner* and *Nestlé* were. Under *Jesner*, foreign corporations are not subject to liability under the ATS.[178] In her dissent in *Jesner*, Justice Sotomayor cogently argued that nothing about the corporate form justifies completely immunizing foreign corporations from liability under all ATS suits.[179] Indeed, there are many arguments to the contrary, with every circuit court considering the issue before the Second Circuit finding that corporations may be held liable under the ATS.[180] While the *Jesner* plurality argued that foreign corporate liability was a decision best left to the other branches of government, the U.S. Solicitor General and several members of Congress urged the Court to permit foreign corporate liability.[181] Deciding against an almost unanimous consensus among the circuit courts and explicit direction from the other branches of government, the *Jesner* Court doubled down on its fear that permitting foreign

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173. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 129–32 (2013) (Breyer, J., concurring) (arguing that application of the presumption against extraterritoriality to ATS claims contradicts fundamental principles of international law and the original intent of the ATS).

174. *See id.* (noting that the ATS was designed in part to grant jurisdiction to federal courts to hear foreign matters, and that other violations of international law that are well defined and accepted, such as piracy, usually if not always occur extraterritorially).

175. *Id.* at 129–30.

176. *See, e.g.*, Nestlé USA, Inc v. Doe, 141 S. Ct. 1931, 1937 (2021) (holding that Nestlé's extensive corporate activity in the United States related to the extraterritorial violations was not enough to overcome the presumption against extraterritoriality).

177. Keith Slack & Alison Kiehl Friedman, *Time to Act: How the Biden Administration and Congress Could Tackle Corporate Human Rights Abuse*, BUS. & HUM. RTS. CTR. (Dec. 8, 2020), https://www.business-humanrights.org/fr/blog/time-to-act-how-the-biden-administration-and-congress-could-tackle-corporate-human-rights-abuse [https://perma.cc/3WXK-DTZK].

178. Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1407 (2018).

179. *Id.* at 1419 (Sotomayor, J., dissenting).

180. MULLIGAN, *supra* note 16, at 18.

181. *Jesner*, 138 S. Ct. at 1431–32 (Sotomayor, J., dissenting).

corporate liability would lead to foreign policy concerns.[182] However, as noted by Justice Sotomayor, the reasoning as to why the foreign corporate form uniquely raises a foreign policy concern, no matter the alleged conduct, is not particularly clear.[183]

Further, in *Nestlé*, the Court effectively decided that U.S. corporations may commit violations of international law abroad with impunity, so long as their conduct in the United States related to the extraterritorial violations amounts to no more than "general corporate activity."[184] In a now familiar fact pattern, the Plaintiffs in *Nestlé* alleged that Nestlé USA made major operational decisions in the United States, where Nestlé USA is headquartered,[185] to aid and abet child slavery, human trafficking, and forced labor at a cocoa plantation in the Ivory Coast.[186] While the Plaintiffs were able to demonstrate that Nestlé USA made key operational decisions regarding the Ivory Coast plantation in the United States, the Court found that such conduct amounted to merely a "corporate presence" in the United States related to the alleged misconduct.[187] Following the *Nestlé* decision, U.S. corporations can evade tort liability even when they, or their foreign partners, violate international law, so long as their conduct in the United States related to the extraterritorial violation is no more than "general corporate activity."[188] For Nestlé USA, general corporate activity included not only key operational decisions, but technical and financial resources paid directly to the plantation from the United States.[189] Lastly, it was yet again suggested by the *Nestlé* Court that an alleged violation under

182. *Id.* at 1405–06 (plurality opinion) (noting that imposing liability for foreign corporations under the ATS could lead to an influx of claims against U.S. corporations abroad).

183. *Id.* at 1429 (Sotomayor, J., dissenting).

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

185. *Id.* at 1935.

186. *Id.*

187. *Id.* at 1937 (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125 (2013)).

188. *See id.* at 1937 (finding that operational decisions made at Nestlé's U.S. headquarters that directly contributed to the alleged forced labor in the Ivory Coast did not establish enough of a domestic connection to the United States under the presumption against extraterritoriality, even where the claim against the corporation was explicitly for aiding and abetting the forced labor).

189. *Id.* at 1935.

the ATS must fall into the limited historical subsections of tort law identified in *Sosa*.[190]

Over ten years ago, an ATS suit was filed against Cisco Systems, Inc., for the corporations alleged contributions to a security system that facilitated the Chinese government's ability to surveil, detain, and torture Falun Gong practitioners in China.[191] After a decade's worth of dismissals and appeals, a divided Ninth Circuit recently ruled that several of the Plaintiffs' ATS claims against Cisco could proceed and remanded the case back to the district court.[192] While the Ninth Circuit's continued willingness to jump through the various legal hoops the Supreme Court has placed in the ATS' way may provide the *Cisco* Plaintiffs with a glimmer of hope, it does not alter the broader argument that federal courts are no longer a consistently viable forum for such lawsuits.[193] In addition to the lengthy litigation and ongoing interpretive uncertainty the *Cisco* Plaintiffs will face,[194] their claims will eventually be placed at risk of Supreme Court review.[195] The Supreme Court, as discussed, has been actively narrowing the scope of the ATS as applied to corporations,[196] and cases like *Cisco* are likely to attract

190. *Id.* at 1937 (plurality opinion) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)).

191. Doe I v. Cisco Sys., Inc., 73 F.4th 700, 708–09 (9th Cir. 2023).

192. *Id.* at 746. Some scholars have argued that the decision breathes new life into ATS litigation. William S. Dodge, *Ninth Circuit Allows Human Rights Claims Against Cisco to Proceed*, TRANSNATIONAL LITIG. BLOG (July 19, 2023), https://tlblog.org/ninth-circuit-allows-human-rights-claims-against-cisco-to-proceed [https://perma.cc/2H4V-M67N].

193. Ellen Nohle, Chris Ewell & Oona A. Hathaway, *Has the Alien Tort Statute Made a Difference?*, TRANSNATIONAL LITIG. BLOG (Aug. 1, 2023), https://tlblog.org/has-the-alien-tort-statute-made-a-difference [https://perma.cc/2AUP-2DD4] (discussing the continued usefulness of the ATS as a legal tool for survivors of human rights abuses).

194. *Cisco*, 73 F.4th at 746 (remanding the Plaintiffs' ATS claims against Cisco, noting that the lower court will need to determine whether the Plaintiffs' alleged violations of international law meet the requirements outlined in *Sosa*).

195. Rich Samp, *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 [https://perma.cc/A9CB-BCEZ] (discussing the gap left open by *Jesner* regarding domestic corporate liability under the ATS, noting that the issue is primed to go before the Supreme Court).

196. See *infra* Section II.A for a review of how the Supreme Court has continually narrowed the scope of the ATS.

the attention of the conservative members of the Court who have long attempted to rid the ATS of any substantial modern-day relevance.[197]

In review, a plaintiff wishing to hold a U.S. corporation[198] accountable must allege a specific and universal violation of international law[199] that either occurred in the territory of the United States or touched and concerned the United States.[200] When considering whether the alleged conduct touched or concerned the United States, plaintiffs must ensure that they can demonstrate that the U.S. corporation had more than a "mere corporate presence"[201] in the United States, which courts have interpreted as including nearly every aspect of corporate activity.[202] Even if that perfect plaintiff comes along, courts may still dismiss the complaint following *Sosa*'s cry for judicial restraint.[203] Like any process,

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197. *See, e.g.*, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021) (plurality opinion) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)) (advocating for federal courts not to recognize private rights of action under the ATS beyond the three historical tort violations of international law identified in *Sosa*); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018) (holding that foreign corporations should not be held liable under the ATS); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) (ruling that the ATS does not apply extraterritorially).

198. *See Jesner*, 138 S. Ct. at 1407 (holding that suits against foreign corporations are not permitted under the ATS).

199. *See Sosa*, 542 U.S. at 725 (limiting modern claims of violations of international law under the ATS).

200. *See Kiobel*, 569 U.S. at 124–25 (finding that the presumption against extraterritoriality applies to ATS claims).

201. *Nestlé USA, Inc.*, 141 S. Ct. at 1937 (quoting *Kiobel*, 569 U.S. at 125).

202. *See, e.g.*, *id.* (finding that key operational decision making in the United States constituted only general corporate activity related to the alleged violations); Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1189, 1194 (11th Cir. 2014) (finding that the Plaintiffs' claims that corporate officers for Chiquita, an organization incorporated and headquartered in the United States, approved and concealed payments to a terrorist organization in Colombia from the United States did not sufficiently "touch and concern" the United States under *Kiobel*).

203. *See Sosa*, 542 U.S. at 725, 729 (directing courts to exercise judicial caution in considering claims under the ATS). Further, the current Supreme Court has been described as the most "business-friendly" court in recent history, and with a cemented conservative majority, the Courts hostility towards claims under the ATS against corporations is likely here to stay. *See* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 HARV. L. REV. 2009, 2013 (2019) (reviewing ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018)) (discussing the pro-business rhetoric of the current Supreme Court); Nina Totenberg, *The Supreme Court is the Most Conservative in 90 years*, NPR (July 5, 2022, 7:04 AM), https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative [https://perma.cc/GK7Y-RLU8] (describing the current Supreme Court as overwhelmingly conservative and "unusually aggressive").

the opportunity for ideal conditions to manifest is ever-present. However, it is essential to recognize that relying on such a restricted approach is not a viable means of addressing human rights violations committed by corporations under the ATS. Given the above, federal courts are effectively precluded from hearing suits against corporations under the ATS.

B. A Champion of Universal Human Rights?[204] How the Erosion of Corporate Liability Contravenes Domestic and International Legal Obligations

The state of the law regarding the ATS and corporations in federal court is contrary to the original intent of the ATS and international obligations, federal common law, and the history of corporate liability and tort law in the United States. The original intent of the ATS was to make federal courts more accessible to foreigners to bring tort claims for violations of international law and to give foreign claimants, who could sue persons or corporations in state courts, an avenue to sue at the federal level to avoid any conflicts that could arise out of varying interpretations of the law.[205] Failure to hold corporations accountable in the modern day fails to avoid the precise international strife the framers of the ATS sought to avoid.[206] As discussed, a key motivating factor behind the ATS was to ensure that federal courts would be the forum for issues regarding international law.[207] And yet, today, federal courts are effectively precluded from hearing ATS claims against corporations that engage in and violate international law in numerous and pervasive ways.[208] This practice not only contravenes the original intent of the ATS, but is further unsupported by the plain language of the statute, which suggests that the framers of the ATS did not intend

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204. Alien Tort Statute Clarification Act, S. 4155, 117th Cong. § 2 (2022) ("Since its founding, the United States has been a proponent of international law and a champion of universal human rights.").

205. Amicus Brief, *supra* note 105, at 15.

206. *See* Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1435 (2018) (Sotomayor, J., dissenting) ("Would the diplomatic strife that followed [the Marbois incident] really have been any less charged if a corporation had sent its agent to accost [Marbois]?").

207. MULLIGAN, *supra* note 16, at 4–6.

208. *See supra* Introduction (exploring how federal courts have had differing interpretations of the ATS since the 1980s, particularly regarding what actions qualify as violations of international law, extraterritorial jurisdiction under the ATS, and who can be sued under it, with the Supreme Court significantly limiting its application, especially in cases involving foreign and domestic corporations).

to preclude corporate liability.[209] The statute identifies who may be a plaintiff—an alien—but leaves open the category of who, or what, may be a defendant.[210] As Justice Sotomayor noted in *Jesner*, where a statute explicitly states who may be named a plaintiff, but fails to explicitly state who may be named a defendant, courts should assume that the omission was intentional rather than inadvertent.[211] Therefore, if the ATS does not qualify who may be named a defendant to natural persons, Congress intentionally left the door open to corporate liability.

Before the Court's decisions in *Jesner* and *Nestlé*, the ATS was a pathway for non-citizens to hold corporations accountable for the world's most egregious offenses committed by corporations at home and abroad.[212] In 1769, William Blackstone wrote that States had the duty to enforce and uphold international law.[213] In 1789, the United States recognized that duty by giving federal courts jurisdiction to hear tort claims by non-citizens in the United States who claimed a violation of international law.[214] Today, corporations are recognized "persons" under international law and are frequently held accountable like individuals for violations in other areas of international law.[215] There is, therefore, no sound reason in international law to uniquely immunize the corporate form from accountability for violations of international law under the ATS.[216] Instead, in many areas of the law, the United States has explicitly chosen to treat corporations as if they

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209. *Jesner*, 138 S. Ct. at 1426 (2018) (Sotomayor, J., dissenting); *see also* Dodge, *supra* note 37 (reviewing the text of the ATS to find that the framers of the statute did not intend for it to apply only against U.S. defendants).

210. *See* 28 U.S.C. § 1350 (granting jurisdiction for claims brought only by non-citizens).

211. *Jesner*, 138 S. Ct. at 1426 (Sotomayor, J., dissenting).

212. *See, e.g.*, Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014) (finding that the Plaintiffs' claims against an American corporation for torture at the Abu Ghraib prison in Iraq could proceed under the ATS).

213. *See* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1193 (11th Cir. 2014) (Martin, J., dissenting) (quoting William Blackstone, Commentaries on the Laws of England 68 (1769)).

214. 28 U.S.C. § 1350.

215. Restatement (Third) of Foreign Relations Law, pt. 2, intro. note (Am. L. Inst. 1987).

216. *See, e.g.*, *Jesner*, 138 S. Ct. at 1420–22 (2018) (Sotomayor, J., dissenting) (discussing how international law has historically imposed obligations onto both states and private actors to prohibit violations of human rights, including extraterritorial conduct).

were individual persons.[217] Therefore, if States have a responsibility under international law to protect even the extraterritorial violative conduct of individuals,[218] it follows that the United States has a duty to hold corporations liable for their violative conduct, no matter where it occurs.

While these sources of international law do not specifically suggest that States have an affirmative duty to impose civil tort liability for violations of international law, they also do not preclude it.[219] International bodies, tribunals, and agreements have all recognized some form of corporate liability for violations of international law.[220] These international principles demonstrate that international law recognizes corporate liability and that that liability is up to States to enforce.[221] Contrary to the above principles, the U.S. Supreme Court has chosen to uniquely immunize corporations from suit under the ATS, allowing them to "travel to foreign shores and commit violations of the law of nations with impunity."[222]

Effectively precluding suits against corporations under the ATS is additionally a departure from federal common law, which has provided for corporate liability since the founding of the United States.[223] Under the doctrine of corporate personhood, corporations can be subject to lawsuits, hold property, or execute contracts and are protected by certain constitutional provisions, such as the First Amendment, just like individual persons.[224] Because *Sosa* held that the ATS is a purely jurisdictional statute, plaintiffs must allege a separately

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217. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010) (holding that corporations have a First Amendment right to engage in political speech like individual persons).

218. *See Cardona*, 760 F.3d at 1193 (Martin, J., dissenting) ("[W]here the individuals of any state violate [international law], it is then the interest as well as duty of the government under which they live, to [uphold those laws]." (quoting William Blackstone, Commentaries on the Laws of England 68 (1769))).

219. *Jesner*, 138 S. Ct. at 1425.

220. *Id.* at 1423–26 (citing decisions from U.S. Military Tribunals, International Criminal Tribunals, and various international agreements, all supporting the conclusion that international law embraces the idea of corporate liability).

221. *Id.* at 1420, 1425 (Sotomayor, J., dissenting).

222. *Cardona*, 760 F.3d at 1193 (Martin, J., dissenting).

223. Herz, *supra* note 123.

224. Bowie, *supra* note 203 (reviewing ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018)); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010).

recognized cause of action under federal common law.[225] Essentially, the question of whether conduct is considered a violation of international law is governed by international law and, once recognized, would become a recognized violation under federal common law, while already established federal common law principles govern the question of liability for an alleged violation.[226] Thus, while *Sosa* directed courts to be restrained when recognizing new federal common law claims for violations of international law, the issue of corporate liability is an ancillary federal common law question.[227] Under federal common law principles, corporations may be held liable in tort.[228] Failing entirely to hold foreign corporations accountable and making it nearly impossible to hold domestic corporations accountable under the ATS disregards that principle and demeans the ability of the United States to uphold international law by uniquely immunizing corporate "persons" even in situations "where all other persons" would be subject to liability.[229]

Foreclosing federal courts to ATS claims against corporations not only contravenes federal common law, but also the history of corporate liability and tort law in the United States. First, the nature of the ATS supports corporate liability.[230] Giving plaintiffs the ability to sue "in tort" grants them the rights associated with tort law, and, as noted, corporations have historically been held liable in tort.[231] When the framers of the ATS created a tort right, it is presumed that they created that right in full consideration of the history of tort law and the associated rules.[232] Second, while a few modern domestic and international remedies are available to victims of international law

225. Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004); Amicus Brief, *supra* note 105, at 5 ("Whether a defendant is liable for abetting a violation of a universally recognized human right is not part of the threshold jurisdictional question of whether the plaintiff has suffered a violation of that right. Instead, it is a liability question and accordingly is one of federal common law."). Any other debates or intricacies surrounding the application of federal common law to ATS claims in federal court are beyond the scope of this Comment.

226. *Jesner*, 138 S. Ct. at 1436 (Sotomayor, J., dissenting).

227. *Id.* at 1420.

228. *Id.* at 1425.

229. Amicus Brief, *supra* note 105, at 4–5.

230. *See Jesner*, 138 S. Ct. at 1420–26 (Sotomayor, J., dissenting) (arguing that the plain text and history of the ATS support corporate liability).

231. *Id.*

232. *Id.* at 1426 (quoting Meyer v. Holley, 537 U.S. 280, 285 (2003)).

violations,[233] none offer the same protection as tort law, and true redressability for victims cannot be secured without holding corporations accountable.[234] The famous saying that "[y]ou can't get blood from a turnip" is true.[235] The ability to hold major corporations, who hold a significant amount of the world's wealth, accountable is a vital tool to provide adequate compensation to victims of human rights violations.[236] When a corporation engages in violative behavior, it is the corporation that profits, and it is the corporation that should be held accountable for damages to the individuals it harms.[237]

C. Policy Considerations

Numerous policy considerations additionally emphasize the need for corporate tort liability for violations of international law. Primarily, not immunizing corporations from suits under the ATS is essential to deterring bad business behavior.[238] Without safeguards, it can be in a corporation's best fiscal interest to violate international law given the potential profits, such as the discounted cocoa in *Nestlé*, and the limited consequences.[239] While Justice Kennedy fears the ATS would discourage corporate investment abroad,[240] the real fear should be that the United States is incentivizing corporations that violate international law and penalizing those that comply, making the United States a safe harbor for corporations that violate international law as a matter of corporate policy or engage in business with organizations that commit violations

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233. Additional pathways could include claims under the TVPA or the War Crimes Bill. These options are extremely limited. *Supra* Section I.A.

234. *See* Amicus Brief, *supra* note 105, at 24 (arguing that corporate liability is essential to effectuating the protection the ATS was designed to give to victims of atrocity crimes).

235. *Are You Really Sure You Want to Do This?—8 Questions for You and Your Attorney Before You Start a Lawsuit*, L. FIRM CAROLINAS (Feb. 6, 2014), http://lawfirmcarolinas.com/blog/8-questions-attorney-start-lawsuit [https://perma.cc/X6AC-K9NY] (discussing the aphorism "[y]ou can't get blood from a turnip" and noting that "[a][j]udgment is just a piece of paper . . . . [It] is really worth nothing if the losing side doesn't have any assets").

236. *See* Ewell & Hathaway, *supra* note 111 (finding that out of thirty-three ATS settlements, numerous of which were millions of dollars, over half of the suits were against corporations).

237. *See* Dodge & Hathaway, *supra* note 15 (noting that some corporations may purposefully violate international law where it may fiscally benefit them, and that holding those corporations accountable is essential to a fair and free market).

238. *Id.*

239. *Id.*

240. Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1406 (2018) (plurality opinion).

of international law elsewhere in the global supply chain.[241] As to practicality, history has shown that tort litigation against corporations for human rights abuses can be the effective remedy it claims to be.[242] As previously mentioned, one analysis has shown that out of thirty-three ATS settlements that were in the millions of dollars, half of the suits were against corporations.[243]

Allowing a corporation to take advantage of corporate personhood without holding them accountable for violations of international law and fundamental human rights is contrary to the original intent of the ATS and international obligations, federal common law, and the history of corporate liability and tort law. Given the newly limited application of the ATS, state courts are the necessary forum for tort suits against corporations for violations of international law.

D. State Courts: A Forum for Corporate Liability

State courts are now the most viable forum for tort claims against corporations for violations of international law. The United States has an obligation to provide victims of human rights abuses the redressability the framers of the ATS contemplated and to hold corporations accountable for their conduct at home and abroad.[244] Without a viable forum for ATS suits against corporations at the federal level, plaintiffs should turn their efforts away from the ATS and federal courts to state tort claims.

Including state law tort claims as part of ATS claims is common practice.[245] Crucially, these claims can proceed separately at the state level regardless of whether or not the federal ATS claims are dismissed or precluded.[246] Under the transitory tort doctrine, ATS-style claims against corporations brought via a state forum can escape many

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241. Press Release, Dick Durbin, *supra* note 151 ("For decades, corporations have closed down production in Ohio and outsourced to the lowest global bidder. And these corporations would have you believe they are not liable on civil grounds for [violations of international law abroad] . . . after arguing at the Supreme Court for a contrived loophole."); *see also Jesner*, 138 S. Ct. at 1435 (Sotomayor, J., dissenting) (arguing that immunizing corporations for intentional and explicit violations of international law will lead to adverse foreign policy outcomes for the United States).

242. Ewell & Hathaway, *supra* note 111.

243. *Id.*

244. *See supra* Section II.B (discussing how barring ATS claims from federal courts is contrary to federal common law as well as the United States' history of corporate liability and tort law).

245. Hoffman & Stephens, *supra* note 126, at 15.

246. *Id.* at 16.

hurdles the Supreme Court has placed in the way of hopeful ATS plaintiffs.[247] For example, if a state court has personal jurisdiction, it can hear claims arising out of a wide variety of human rights violations that are broader in scope than the ATS.[248] For example, it may hear tort claims for wrongful death, assault, battery, aiding and abetting, or false imprisonment, all of which are not covered by the TVPA and most of which the Supreme Court has expressed skepticism towards accepting as a viable cause of action under the ATS.[249] Every state recognizes corporate liability in tort,[250] and state court claims are not generally subject to a presumption against extraterritorial application.[251] While, by one estimate, twenty U.S. states apply a presumption of extraterritoriality, many do not, and research has shown that where states do apply a presumption against extraterritoriality, they do not apply it to common law claims like torts.[252]

In practice, state court tort claims for violations of international law against corporations have not only survived judicial review but have been successful for plaintiffs. In *Carijano v. Occidental Petroleum Corp.*,[253] members of an indigenous group in Peru sued Occidental Petroleum Corporation and its Peruvian subsidiary for state "toxic tort" claims resulting from environmental contamination of rainforest lands and rivers.[254] The case survived a *forum non conveniens* motion by Occidental to litigate in Peru, with the Ninth Circuit ruling that California was a

247. *See* Alicia Pitts, *Avoiding the Alien Tort Statute: A Call for Uniformity in State Court Human Rights Litigation*, 71 SMU L. REV. 1209, 1222 (2018) ("Re-characterizing international law violations as 'battery,' 'intentional infliction of emotional distress,' or 'fraud' lowers pleading standards, frees litigants from limits on extraterritorial conduct, and eludes the corporate liability question.").

248. Hoffman & Stephens, *supra* note 126, at 11.

249. *See id.* (describing the ability of state courts to hear a wide variety of tort claims for violations of international law); Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (suggesting that ATS claims should be limited to offenses against ambassadors, violations of safe conduct, and piracy); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73 (1992) (providing a limited cause of action for claims against individuals for torture and extrajudicial killing).

250. Hoffman & Stephens, *supra* note 126, at 18.

251. William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 UC DAVIS L. REV. 1389, 1403 (2020).

252. *Id.*

253. 643 F.3d 1216 (9th Cir. 2011).

254. *Id.* at 1223.

proper forum.[255] In 2015, the case was mutually settled.[256] Post-*Kiobel* had the *Carijano* Plaintiffs filed ATS claims against Occidental, they almost certainly would have been dismissed, given that any alleged violation of international law would have occurred extraterritorially in Peru. In *Doe I. v. Unocal Corp.*,[257] the Plaintiff's initial federal court ATS claims against the California corporation were dismissed.[258] The Plaintiffs re-filed tort claims in California state court against Unocal, which survived both a motion to dismiss and a motion for summary judgment from Unocal.[259] Prior to trial for the state law claims, Unocal settled with the Plaintiffs in a historic win for human rights victims.[260] As the only remaining viable forum for victims who hope to sue corporations in tort for violations of international law, state courts and state tort claims are a powerful path forward for victims seeking redress.

III. RECOMMENDATIONS AND CONSIDERATIONS

As the law stands, there is no realistic federal forum for ATS suits against foreign or domestic corporations.[261] Therefore, state courts are the necessary and proper forum for civil tort claims for violations of international law committed by corporations.[262] Much of the substantive rules and procedures of litigating in state courts are beyond the scope of this paper. However, it is important to flag such a strategy's potential advantages and disadvantages.

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255. *See id.* at 1236 (balancing public and private factors, the court found that the District Court abused its discretion in granting Occidental's *forum non conveniens* motion).

256. Press Release, EarthRights Int'l, *supra* note 140.

257. 963 F. Supp. 880 (C.D. Cal. 1997).

258. Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000). This decision was later reversed in part by the 9th Circuit. *See* Doe I v. Unocal Corp., 395 F.3d 932, 962–63 (9th Cir. 2002) (reversing the district court's summary judgement grant in favor of Unocal on the ATS claims for forced labor, murder, and rape).

259. *See, e.g.*, Doe I v. Unocal Corp., No. BC237679, 2002 WL 33944505, at *1 (Cal. App. Dep't Super. Ct. June 10, 2002) (denying a motion for summary judgement from Unocal).

260. Press Release, Center for Constitutional Rights, *supra* note 145.

261. *See supra* Section II.A (discussing how federal courts have been largely precluded from hearing ATS suits against corporations).

262. *See supra* Section II.D (exploring why state courts are the most viable forum for tort claims against corporations for violations of international law).

A. Labeling Violations of International Law as "Ordinary" Torts

There are some who argue, not without merit, that the violations of international law that plaintiffs under the ATS have traditionally suffered are too serious to be labeled as "garden-variety" or "ordinary" torts.[263] Discomfort with labeling torture as assault and battery or genocide as wrongful death is understandable. Violations of international law often involve the gravest of crimes, which deserve the highest degree of judicial and legislative attention.[264] While the federal government has failed to provide an adequate civil forum for plaintiffs to seek redress for broad violations of international law committed by corporations, victims have a very real alternative path in state courts to seek redress and compensation for their suffering.[265] Although the state court claim may be for an ordinary tort, plaintiffs will still have the opportunity to describe the alleged conduct with specificity, which is essential to setting a legal record of the violations.[266] While the label of the claim may change, the ability of the plaintiffs to seek various forms of redress, including but not limited to compensation, can be as empowering in state court as it is in federal.[267]

B. Pleading and Statutes of Limitations

While each state has its own pleading requirements, which can be confusing for plaintiffs to navigate, they "are likely to be less demanding than [federal standards]."[268] Additionally, while state statutes of limitations are often much shorter than the federal ten-year statute applicable to ATS claims,[269] states can move to extend the statute of limitations for ATS-style state tort law claims to make themselves more amenable to victims.[270]

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263. Hoffman & Stephens, *supra* note 126, at 21.

264. *Id.*

265. *See* Marco Simons, *supra* note 146 (reviewing the impact of the *Kiobel* decision on several ATS cases and discussing how ATS-style claims can continue in state courts).

266. *See* Hoffman & Stephens, *supra* note 126, at 21 (describing how plaintiffs bringing "ordinary" tort claims in state court will still be able to introduce and rely on international sources that convey the seriousness of the alleged conduct).

267. *See id.* (addressing concerns that state courts are an inadequate forum for ATS-style litigation).

268. *Id.* at 18.

269. *Id.* at 19.

270. *See* CAL. CIV. PROC. CODE § 354.8 (West 2023), which extended the statute of limitations from two years to ten years for tort claims amounting to violations of international law.

C. Choice of Law[271]

Generally, the law of the foreign country where a violation occurred will apply for personal injury cases in state courts.[272] There are several ways to get around this result if the foreign state laws are unfavorable. For example, if the corporate party is headquartered in the forum state, plaintiffs can convincingly argue that the forum state tort law should apply.[273] The same goes for any damage analysis that may be done following a judgment.[274] If plaintiffs can connect any of the tortious conduct to a corporation's activity in the forum state, state courts may be more likely to apply forum state damages rules as a form of deterrence.[275]

D. Forum Non Conveniens

The *forum non conveniens* doctrine poses a significant risk to ATS-style state court claims.[276] The *forum non conveniens* doctrine permits a court to decline jurisdiction where the court believes the action should be litigated in another forum.[277] Courts may invoke *forum non conveniens sua sponte*, but most typically, the defendant will motion for the case to be removed to a more appropriate forum.[278] Generally, courts use a two-step test to determine whether to grant a *forum non conveniens* motion.[279] First, the court must determine if an adequate forum exists.[280] If an adequate alternative forum does exist, the court balances public and private interests in litigating the issue elsewhere.[281] Because ATS cases typically involve a foreign plaintiff and concern issues of international law, the likelihood that the case is dismissed under this

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271. Choice of law issues, including whether state courts would apply the law of the foreign State, are largely beyond the scope of this Comment. However, it is worth noting that applying foreign States law is not entirely detrimental to state law claims. Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 50 (2013).

272. *Id.*

273. *Id.*

274. *Id.* at 52–53.

275. *Id.* at 53.

276. *Id.* at 59.

277. Forum Non Conveniens, LEGAL INFO. INST., https://www.law.cornell.edu/wex/forum_non_conveniens [https://perma.cc/RF9B-NHXU].

278. *Id.*

279. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 100 (2d Cir. 2000).

280. *Id.*

281. *Id.*

doctrine is high.[282] One protection is the requirement that the defendant prove that there is an adequate alternative forum.[283] For many human rights issues like those presented by ATS-style state tort claims, returning to and litigating in the foreign country where the abuses occurred is not an option many courts will accept, given the risks.[284]

Further, courts are to consider policy interests as part of the balancing test.[285] In *Wiwa v. Royal Dutch Petroleum Co.*,[286] a federal ATS and TVPA case, the Court of Appeals for the Second Circuit refused to grant the defendants *forum non conveniens* motion to remove the case to a U.K. court.[287] The court found that the United States had an express interest in providing a forum for the Plaintiffs' claims, balancing factors such as the difficulty victims of human rights abuses face when bringing claims against their abusers in the State where the abuses occurred and the time-consuming and invasive nature of litigation.[288] Similarly, a state court considering a *forum non conveniens* motion for an ATS-style state tort claim against a corporation may very well rule that the state has an interest in providing an adequate forum for the adjudication of international law violations against the corporation, particularly where the corporation in question is incorporated in the state or does business in the state.

CONCLUSION

The ATS, a one-of-a-kind legal tool for victims of human rights abuses, is no longer realistically applicable against corporations in federal court.[289] Globalization has resulted in unprecedented and widespread impacts from corporate activity; while some impacts have

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282. *See* Borchers, *supra* note 271.

283. *Id.* at 60.

284. *Id.* at 59–60. While litigating in a foreign State may pose risks, it may prove favorable to plaintiffs and work to dissuade corporations from filing *forum non conveniens* motions. For example, in Aguinda v. Texaco, Inc., 303 F.3d 470, 476–80 (2d Cir. 2002), Texaco won their *forum non conveniens* motion in an ATS case. The case was removed to Ecuador, where a Judge ordered Chevron to pay $8.6 billion for damages and costs related to the environmental damage at issue. Hoffman & Stephens, *supra* note 126, at 17–18 n.49.

285. *Wiwa*, 226 F.3d at 100.

286. 226 F.3d 88 (2d Cir. 2000).

287. *Id.* at 91–92.

288. *Id.* at 108.

289. *See supra* Section II.A (discussing the barriers to bringing an ATS claim against a corporation in federal court).

been positive, corporations in the United States and abroad commit serious violations of international law, exploiting individuals, communities, and the climate.[290]

A review of Supreme Court jurisprudence on the ATS reveals the Court's ongoing efforts to limit the scope of the ATS, particularly as applied to corporations.[291] While ideal circumstances can occasionally emerge, such as the circumstances raised in *Doe I v. Cisco Systems, Inc.*,[292] it is crucial to understand that relying solely on an approach that demands not only highly specific facts, but the willingness of a Judge to buck Supreme Court precedent (potentially placing the ATS at risk of Supreme Court review yet again), is not a sufficient mechanism for addressing corporate violations of international law under the ATS. The United States has a responsibility to uphold international law; a responsibility understood when the ATS was signed into law in 1789.[293] Today, the United States is falling short when it comes to the ATS and corporations.[294] The failure to provide a viable federal forum for civil tort claims against corporations for violations of international law demonstrates a significant departure from the original intent of the ATS and international obligations, federal common law, and the history of corporate liability and tort law in the United States.[295] The ability to sue corporations in tort for violations of international law is an essential way for victims to seek redress and compensation, and there is no realistic federal substitute.[296] Considering the foregoing, state courts are the most viable and necessary forum for tort suits against corporations for violations of international law.

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290. *See Corporations*, *supra* note 11 (detailing the various ways in which corporations impact human rights).

291. *See supra* Section II.A (reviewing Supreme Court precedent on the ATS and corporate liability).

292. 73 F.4th 700 (9th Cir. 2023).

293. *See supra* Section II.B (outlining the domestic and international legal principles in place in 1789).

294. *See supra* Section II.A (discussing the many hurdles that make bringing an ATS claim in federal court extremely difficult).

295. *See supra* Part II (discussing how the Supreme Court, against precedent, has effectively precluded ATS suits against corporations in federal courts).

296. *See supra* Section I.A (discussing the background of ATS).