MAY THE FOURTH BE WITH YOU: CHARTING THE FUTURE OF CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE AFTER *JESNER V. ARAB BANK*

Benjamin Estes*

The Alien Tort Statute (the "ATS") has been the subject of much curiosity ever since it became a conduit for human rights lawsuits nearly 40 years ago. Many of these lawsuits have been directed at corporate defendants, with businesses around the world accused of conscience-shocking behavior. However, the Supreme Court has in recent years restricted the scope of corporate ATS liability. In 2013, the Court held in Kiobel that the presumption against extraterritoriality applies to the ATS, and in 2018, it held in Jesner that foreign corporations cannot be sued under the ATS. In the wake of these developments, observers have questioned whether the statute's vitality is reaching its end.

This Note charts the path forward for the ATS. After tracing the development of the statute from its murky Founding origins to its modern incarnation as a powerful litigation tool, the Note examines how several circuits have analyzed the issues of corporate liability and the presumption against extraterritoriality under the ATS. The Note ultimately argues that the Fourth Circuit's approach provides the best regime for the ATS in light of Jesner and the other considerations that have long informed ATS cases.

* J.D. Candidate 2020, Columbia Law School; B.A. 2013, University of Michigan. My deepest thanks to Professor George Bermann for his indispensable guidance and feedback and Professor Robert Smit for sharing his insight during the topic formulation process. Finally, many thanks to the editorial board and staff of the *Columbia Business Law Review* for their diligent work in preparing this Note for publication.

I. INTRODUCTION

The prospect of lawsuits against companies resulting from their business operations is hardly a novel development. But in recent years, a class of disputes has arisen in response to international business activities that truly shock the conscience. To illustrate: In Indonesia, a prominent oil and gas giant allegedly aided the Indonesian military in murdering and torturing local villagers in order to protect the

company's natural gas extraction and processing facility;[1] in Colombia, a supranational coal company allegedly used a local paramilitary organization to carry out extrajudicial killings, war crimes, and crimes against humanity in order to protect its local mining operation;[2] and in Iraq, a military contractor allegedly helped torture Iraqi prisoners as part of the globally condemned Abu Ghraib prison scandal.[3]

These are just several examples of lawsuits that have proceeded under the Alien Tort Statute (the "ATS")[4] against corporations. Once dormant for close to 200 years, the ATS (also referred to as the Alien Tort Claims Act) has been reinvigorated in the modern era. Foreign victims of egregious human rights abuses committed abroad[5] have invoked the statute in order to sue the perpetrators of said abuses in U.S. federal courts. Like the suits referenced above, many of the most high-profile of these cases involve corporate defendants. The prospect of businesses engaging in the type of appalling behavior that the ATS contemplates attracts significant public attention, as does the controversial fact that some cases have involved a foreign plaintiff suing a foreign corporation over extraterritorial conduct. These developments render the ATS an intriguing subject. This is especially true because the ATS stands at the intersection of business and human rights, a rapidly growing legal field of study.[6]

However, the last decade has seen significant pushback on the idea that corporations are liable under the ATS. First, the

1 Doe v. Exxon Mobil Corp., 654 F.3d 11, 14–15 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

2 Romero v. Drummond Co., 552 F.3d 1303, 1308–09 (11th Cir. 2008).

3 Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520 (4th Cir. 2014).

4 Alien Tort Statute, 28 U.S.C. § 1350 (2012).

5 While the ATS does not require that the underlying tort be committed abroad, it appears that there has been no modern ATS case involving only domestic tortious conduct. *See* Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After* Kiobel, MICH. B. J., Nov. 2013, at 45 (2013) (describing two classes of modern ATS cases, both of which involve at least some extraterritorial conduct).

6 *See* Jena Martin, *Business and Human Rights: What's the Board Got to Do with It?*, 2013 U. ILL. L. REV. 959, 977 (2013).

Second Circuit held in *Kiobel v. Royal Dutch Petroleum Co.* that corporations cannot be sued under the ATS.[7] The Supreme Court's grant of certiorari for that case was supposed to decide whether corporations categorically were or were not liable under the ATS, but the Court instead held that the presumption against extraterritoriality applies to the ATS.[8] This led several circuits to constrain the conditions under which plaintiffs could sue corporations. Then, in 2018, the Supreme Court again took up the issue of corporate ATS liability in *Jesner v. Arab Bank, PLC*, only to again avoid making a categorical ruling on general corporate liability. Instead, the Court held that foreign corporations were not liable under the ATS.[9] While *Jesner* implicitly recognized that U.S. corporations could continue to be sued in those circuits that recognize corporate liability, the overall effect of these holdings has been to significantly narrow the scope of corporate liability. With circuits differing on the issues of corporate liability and the conditions necessary to rebut the presumption against extraterritoriality as applied to corporations, the present and future of U.S. corporations' ATS liability is uncertain.

This Note argues that U.S. corporations should be recognized as liable under the ATS and that the Fourth Circuit offers the most appropriate analytical framework to evaluate corporate ATS liability going forward. The Fourth Circuit's approach best addresses the ATS's presumption against exterritoriality and the concerns voiced by *Jesner* while simultaneously holding U.S. corporations accountable for their complicity in inflicting human rights abuses. Given

7 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010), *aff'd,* 569 U.S. 108 (2013).

8 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013). The presumption against extraterritoriality is a canon of statutory construction whereby it is assumed that federal legislation does not reach extraterritorial conduct, unless it is clear that Congress intended otherwise. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010).

9 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018) (reasoning that foreign corporations being ATS defendants implicates unacceptable foreign relations problems for courts).

the prevalence of ATS cases involving corporate defendants, this accountability fulfills a vital need. Part II traces the history of the ATS, from its origins in the late 18th century to the modern proliferation of lawsuits filed against corporations for human rights abuses, focusing most heavily on the Supreme Court's decisions in *Kiobel* and *Jesner*. Part III examines the approaches that the Second Circuit, the Fourth Circuit, the Ninth Circuit, the Eleventh Circuit, and the D.C. Circuit have taken to address the issues of corporate ATS liability and the conditions necessary to rebut the presumption against extraterritoriality. While the circuits' decisions predate the Supreme Court's *Jesner* decision, and some even predate the Court's *Kiobel* opinion, their analyses remain salient for addressing U.S. corporate liability. Additionally, it is necessary to consider both corporate liability generally and the somewhat distinct issue of the presumption against extraterritoriality because the two issues are now linked under the ATS after *Kiobel* and *Jesner*. Part IV explains why U.S. corporations should continue to be liable under the ATS despite the judicial caution urged by *Kiobel* and *Jesner*, and why the Supreme Court should adopt the Fourth Circuit's approach. Part V offers brief concluding thoughts on the future of the ATS.

II. BACKGROUND AND HISTORY OF THE ATS

A. The ATS's Enactment and Dormancy

The ATS was originally enacted as part of the Judiciary Act of 1789.[10] It currently reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[11] Because of a dearth of contemporaneous sources explaining the provision's purposes, and because the statute was rarely invoked until the modern

[10] Judiciary Act of 1789 § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2012)).

[11] Alien Tort Statute, 28 U.S.C. § 1350 (2012).

era, there is no definitive account of what motivated the First Congress to pass the statute and what offenses it contemplated. This has rendered the ATS an "an oft-discussed but little understood" law.[12] However, history does provide some clues. The statute's enactment came in the wake of the Articles of Confederation era, a time that saw a rise in international tensions between the burgeoning United States and foreign powers, particularly Great Britain.[13] These tensions were largely a result of the failure of states to provide appropriate redress for violations of the law of nations committed by them and their citizens against the citizens of foreign powers.[14]

Under the law of nations as it existed at that time, a nation-state had an affirmative obligation to provide redress for certain harms that its citizens inflicted on citizens of another nation-state.[15] If the state failed to provide redress, it became responsible for those harms, and the state which the victim belonged to could have just cause for reprisals, possibly including war.[16] Critically, the mere intentional infliction of injury upon another's person or property sufficed to violate the law of nations.[17] This meant that the Articles-era United States could have been deemed responsible every time one of its states refused to provide redress for an intentional tort, or any other law of nations violation, suffered by an alien. Again, states were indeed inflaming international tensions in this way.[18] For a young nation coming off an expensive war for independence, this threat compounded the nation's precarious

12 Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 831 (2006).

13 Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 466 (2011).

14 *Id.*

15 STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44947, THE ALIEN TORT STATUTE (ATS): A PRIMER 4 (2018), https://crsreports.congress.gov/product/pdf/R/R44947 [https://perma.cc/E584-X8U8].

16 Bellia Jr. & Clark, *supra* note 13, at 476.

17 *Id.* at 448.

18 *Id.* at 466.

position.[19] However, allowing for a civil tort remedy was an accepted means of providing redress for these violations,[20] meaning that the United States could discharge its law of nations obligations and avoid opening itself to foreign retaliation by creating such a remedy.

In light of these circumstances, it is natural that the First Congress would want to include such a civil tort provision in the Judiciary Act of 1789, which created the federal judiciary. As such, "the ATS is best understood as a self-executing, fail-safe measure that enabled the United States to avoid responsibility for law of nations violations by permitting aliens to sue US [sic] citizens for intentional torts in federal court."[21] The ATS filled a critical gap in the Judiciary Act. Without it, the Act permitted aliens to sue U.S. citizens in federal court only if the amount in controversy exceeded $500.[22] Since most intentional tort claims did not meet this requirement, many intentional torts committed by U.S. citizens[23] against aliens would potentially go unredressed if the ATS did not exist, meaning the United States would potentially be responsible for many law of nations violations. The ATS meant to ensure that this would not be the case.[24]

---

19 *See id.* at 501–07 (describing states' insufficient attempts to provide redress for violations of foreign citizens' rights inflicted by their citizens and contemporaneous observers' concerns about the possible repercussions of the inadequacy of these attempts).

20 *See id.* at 483.

21 *Id.* at 454.

22 Judiciary Act of 1789 § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332 (2012)).

23 As indicated *supra*, at the time of its adoption, the ATS likely contemplated only defendants that were U.S. nationals, since a nation could not be deemed responsible for the acts of non-nationals. Yet in the ATS's modern application, many suits have involved non-U.S. defendants, and the disconnect between that fact and the ATS's original understanding is a significant reason for the controversy surrounding the statute's use. But this also means, as discussed *infra*, that the ATS's original understanding does comport with U.S. corporations being liable under the statute going forward.

24 Bellia Jr. & Clark, *supra* note 13, at 450.

Despite the vital role it played, the ATS was rarely invoked between 1789 and 1980. District courts upheld jurisdiction under the ATS only twice in that period,[25] and rejected jurisdiction under it on about a dozen occasions.[26] In other words, the statute was "essentially dormant" for nearly two hundred years.[27] This is not altogether surprising given several factors that limited the applicability of the ATS: first, while the ATS as originally understood likely did cover intentional torts committed abroad by U.S. citizens against aliens, in the initial period after the ATS's enactment it would have been exceedingly difficult for an alien in such a situation to sue in U.S. federal court due to the difficulty of travel at that time; second, aliens who suffered harm in the United States often simply left the country instead of pursuing civil remedies; and third, tensions between the United States and Great Britain soon dissipated, meaning British aliens were far less likely to be victims of intentional torts, especially since loyalists were increasingly likely to assimilate into U.S. citizenship.[28] These developments served to remove a large category of possible plaintiffs from ATS suits.[29]

While the lack of ATS cases means that courts never addressed the possibility of corporate liability, there is reason to believe that corporations were indeed liable under the ATS from its beginning. First, the text of the statute, while expressly specifying what type of plaintiff could sue under it, did not distinguish among possible defendants.[30] Second, the legal status of corporations in the late 18th century supports this proposition. Indeed, in a recent decision a D.C. Circuit panel noted that:

---

25 Alicia Pitts, Comment, *Avoiding the Alien Tort Statute: A Call for Uniformity in State Court Human Rights Litigation,* 71 SMU L. REV. 1209, 1212 (2018) (citing the discussion of the ATS' history in Bolchos v. Darrel, 3. F.Cas 810 (D.S.C. 1795) (No. 1607)).

26 Lee, *supra* note 12, at 832–33 n.6.

27 *Id.* at 832.

28 Bellia Jr. & Clark, *supra* note 13, at 525.

29 *Id.*

30 Judiciary Act of 1789 § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2012)).

> [B]y 1789 corporate liability in tort was an accepted principle of tort law in the United States . . . . Thus it appears that the law in 1789 on corporate liability was the same as it is today: 'The general rule of substantive law is that corporations, like individuals, are liable for their torts.[31]

Under the law of nations, states were responsible for the violations of their private citizens,[32] and this historical context gives reason to believe that their responsibility extended to their corporate citizens.

B. The ATS's Reawakening

After the ATS had lain dormant for nearly 200 years, the Second Circuit Court of Appeals resuscitated the statute in 1980 with its decision in *Filartiga v. Pena-Irala*. There, Paraguayan citizens Joel and Dolly Filartiga sued Americo Norberto Pena-Irala, also a Paraguayan citizen, for wrongful death, alleging that Pena-Irala had tortured their family member to death in Paraguay when Pena-Irala was serving as a local police official.[33] The court held there that state-sponsored torture violated a newly-recognized norm of international human rights law and it thus constituted a violation of the law of nations under the ATS.[34] This finding allowed the court to exercise jurisdiction over the Filartigas' claims.

The court made clear that it had to examine international law based on how it had evolved, and not how it existed at the time of the ATS's enactment.[35] In order for an international law norm to become binding among all nations, the norm must

---

31 Doe v. Exxon Mobil Corp., 654 F.3d 11, 47–48 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (citing White v. Cent. Dispensary & Emergency Hosp., 99 F.2d 355, 358 (D.C. Cir. 1938)) (internal quotation marks omitted).

32 Bellia Jr. & Clark, *supra* note 13, at 478.

33 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). The dispute can be categorized as "foreign-cubed," meaning it involved a foreign plaintiff(s), a foreign defendant, and conduct occurring in a foreign country.

34 *Id.* at 880.

35 *Id.* at 881.

command the "general assent of civilized nations."[36] Torture had gained this status in the court's view because it found that international agreements evinced a "universal condemnation" of the practice.[37] Interestingly, in closing its opinion, the court referred to the most infamous law of nations violators known in the late 18th century, declaring that "the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind."[38] This one sentence well illustrates the leap from the cloudy origins of the ATS to its sudden invocation as a tool for fighting human rights abuses in U.S. federal courts.

The Second Circuit's decision in *Filartiga* spawned a wave of litigation.[39] Increasingly, beginning in the mid-1990s, corporations became the focus of this litigation.[40] Human rights advocates sued multinationals for their alleged complicity in abuses committed abroad as a result of businesses' joint projects with host governments.[41] Naturally, corporations pushed back against this development, arguing that plaintiffs should not be allowed to use the ATS to assert jurisdiction over corporations and hold them liable for abuses occurring abroad.[42]

---

36 *Id.* at 881.

37 *Id.* at 880.

38 *Id.* at 890.

39 Joel Slawotsky, *Are Financial Institutions Liable for Financial Crime Under the Alien Tort Statute?*, 15 U. PA. J. BUS. L. 957, 981 (2013).

40 Fox & Goze, *supra* note 5, at 45.

41 Lee, *supra* note 12, at 841.

42 Martin, *supra* note 6, at 961. Businesses have mainly utilized the arguments that international law should control the question of corporate liability (as it stands, corporate liability is not sufficiently recognized in international law) and that the ATS should not reach extraterritorial conduct. For a discussion of the former, see generally Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013); for a discussion of the latter, see generally Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

C. The Supreme Court and the ATS

The Supreme Court finally weighed in on the ATS, albeit not on the issue of corporate liability, in *Sosa v. Alvarez-Machain*. Disparate liability regimes developed in the wake of this ruling, reflecting its status as "not a model of clarity."[43] Nevertheless, the Court advanced several key principles regarding the ATS.

First, the Court held that the ATS is purely a jurisdictional statute and does not create any new causes of action.[44] At the same time, the Court recognized that the First Congress did not intend the ATS to be a dead letter, and it enacted the statute with the understanding that causes of action would be derived from the common law for "the modest number of international law violations" that could have resulted in personal liability in the late 18th century.[45] Second, the Court "found no basis to suspect Congress had any examples [of torts] in mind" other than a narrow set identified by William Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy.[46] As such, courts were to continue exercising jurisdiction under the ATS, but only when claims involved an alleged violation that rested on an international law norm "accepted by the civilized world and defined with a specificity comparable to the features of"[47] the three aforementioned torts.[48] Finally, the Court expressly

43 Bellia, Jr. & Clark, *supra* note 13, at 458.

44 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

45 *Id.*

46 *Id.*

47 *Id.* at 725. While the Court did not provide precise guidance for how to determine whether a norm had become sufficiently accepted and specifically defined, it did indicate that, in conducting such an examination, courts should consult treaties, international agreements, nations' practices and customs, and the works of scholars and commentators (insofar as they explain the present state of international law). *Id.* at 733–34 (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).

48 *Id.* at 734. As discussed *supra*, there is evidence to suggest that the First Congress had a far wider range of law of nations violations in mind when it passed the ATS, since any intentional tort to the person or property of an alien would amount to such a violation and render the United States

instructed lower courts to be cautious in recognizing ATS claims for the following reasons: the conception of the common law had changed drastically since 1789, in a way that called for judges to be restrained in their discretionary power; the federal "general" common law no longer existed; the legislature was better equipped to create private rights of action than courts; the possibility of adverse foreign policy and foreign relations consequences; and the lack of a congressional mandate to define new law of nations violations.[49]

The *Sosa* Court's brief reference to corporate liability became particularly controversial. In footnote 20 of the decision, the Court stated that, in determining whether an international law norm had become sufficiently accepted so as to support ATS jurisdiction, "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, *if the defendant is a private actor such as a corporation or individual*."[50] This footnote spawned two widely variant interpretations. Under one interpretation, the court was distinguishing between international law offenses that require state action and those that do not, implying that any private actor in the latter group, including a corporation, would be capable of committing an offense. Under the other interpretation, the court was distinguishing between corporations and individuals in the larger category of private actors. Under this reading, certain offenses could not be committed by corporations under international law and it is up to courts to determine that issue for any given offense.[51] In other words, under the former interpretation, corporations are cognizable offenders of any norm that does not require state action. Under the latter interpretation, corporations might not be cognizable offenders of a norm that does not require

responsible for it unless the country provided redress. Bellia, Jr. & Clark, *supra* note 13, at 517–518. *But see* Lee, *supra* note 12, at 836 (arguing that the ATS was enacted to cover only violations of safe conducts, and not to redress piracy or infringements of ambassadorial rights).

49 *Sosa*, 542 U.S. at 725–28.

50 *Id.* at 732 n.20 (emphasis added).

51 *See* discussion *infra* Section II.D.

state action even if private individuals are cognizable offenders.

In the years before *Sosa*, courts recognized multiple modern-day international law violations to be actionable under the ATS, including genocide, slave trading, slavery, forced labor, war crimes, and torture.[52] Of these, only torture required state action on the part of the defendant in order to be actionable.[53] In 2013, thirty-three years after *Filartiga* and nine years after *Sosa*, the Supreme Court finally took on the issue of corporate ATS liability.

D. The ATS and Corporations: A Narrowing of the Scope of Liability

1. *Kiobel v. Royal Dutch Petroleum Co.*

In *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel I*"), the Second Circuit held that corporations categorically cannot be liable under the ATS.[54] This created a circuit split, as every other circuit court of appeals that had considered the issue had, explicitly or implicitly, ruled that corporations could be held liable under the ATS.[55] The Supreme Court granted certiorari in response to *Kiobel I* to answer the question of whether corporations could be liable under the ATS ("*Kiobel II*"),[56] providing hope that the Court would resolve the circuit split. However, after oral argument, the Court instructed the

---

[52] ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 253 (2006).

[53] *Id.* Torture could also be actionable in the absence of state action if it was committed in pursuit of genocide or war crimes. *Id.* Congress spoke directly to the point of torture in its enactment of the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). This led to questions about whether torture remained actionable under the ATS or if the TVPA preempted any such claims, but the TVPA's legislative history supports the proposition that Congress intended it to supplement the ATS. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 138 (2013).

[54] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013).

[55] MULLIGAN, *supra* note 15, at 18.

[56] *Kiobel*, 569 U.S. at 114.

parties to brief the question of "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[57] Ultimately, the Court ruled on the basis of that question, holding that the presumption against extraterritoriality applies to ATS claims and that nothing in the ATS rebuts this presumption.[58]

The presumption against extraterritoriality is a canon of construction whereby it is assumed that federal legislation only applies domestically and does not reach extraterritorial conduct, unless it is clear that Congress intended otherwise.[59] In the words of the Supreme Court, the canon demands that if a statute "gives no clear indication of an extraterritorial application, it has none."[60] While the underlying principle has long existed,[61] the Supreme Court has invoked the canon with increasing frequency over the past thirty years.[62] As applied

57 *Id.* (alteration in original).

58 *Id.* at 124.

59 Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010).

60 *Id.*

61 American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) ("[Various] considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.").

62 Note, *Clarifying* Kiobel*'s "Touch and Concern" Test*, 130 HARV. L. REV. 1902, 1906 (2017). Relatedly, the Court has increasingly limited the extraterritorial application of U.S. federal law through a series of cases over the past 15 years, which includes *Kiobel II*. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164–65 (2004) (holding that U.S. antitrust law does not apply to foreign price-fixing activity where foreign injuries are independent of any domestic injuries); *Morrison*, 561 U.S. at 266–67 (rejecting extraterritorial application of a federal securities statute because the statute's "focus" centered on domestic conduct); RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2101 (2016) (introducing two-prong test for allowing application of U.S. law when foreign conduct is involved). *Morrison* has led to courts in some contexts applying a "focus" test in deciding whether extraterritorial application of U.S. law is proper by examining whether a statute's "focus" is on exterritorial conduct or domestic conduct. *See*, *e.g.*, Doe v. Nestle, S.A., 906 F.3d 1120, 1125 (9th Cir. 2018).

by the Court in *Kiobel II*, the presumption meant that, in order for plaintiffs to successfully obtain jurisdiction under the ATS, they would have to show that their claims touched and concerned the territory of the United States with sufficient force to displace the presumption,[63] thereby announcing the new "touch and concern" test in the ATS context.[64] As far as corporate liability, the only principle the *Kiobel II* Court announced was "that "mere corporate presence" does not suffice to rebut the presumption.[65]

In holding that the presumption against extraterritoriality applies to the ATS, the majority based its reasoning on the original understanding of the ATS and the way in which the Court had previously interpreted that understanding in *Sosa*.[66] As the *Sosa* court had focused on the three contemporaneous law of nations violations identified by Blackstone, the *Kiobel II* Court also relied heavily on those violations, finding that they contemplated conduct occurring solely in the United States.[67] Although piracy, one of Blackstone's identified violations, involved conduct occurring outside of the United States, pirates "were fair game wherever found," meaning that exercising jurisdiction over piracy-related claims did not raise much potential for foreign relations conflicts.[68] Finally, the Court pointed out that the First Congress enacted the ATS with a view to reducing conflicts with foreign powers. The majority opined that extraterritorial application of the ATS would have the opposite effect, since it would potentially infringe on other nations' sovereignty and cause other nations to react by haling

63 *Kiobel*, 569 U.S. at 124–25.

64 The Court did not provide guidance for how courts should apply the "touch and concern" test in future cases, which left courts to develop their own methodologies, as discussed *infra* Part III.

65 *Kiobel*, 569 U.S. at 125.

66 *Id.* at 116–17 (discussing Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)).

67 *Id.*

68 *Id.* at 119–22.

U.S. citizens into their courts for violations occurring in the United States.[69]

Given the facts before it, the Court affirmed the Second Circuit's dismissal of the plaintiffs' claims in finding that the claims did not touch and concern the United States with sufficient force to displace the presumption and warrant jurisdiction.[70] None of the parties in the case were U.S. nationals. The plaintiffs were Nigerian nationals and had sued a Dutch holding company, an English holding company, and their joint subsidiary, a Nigerian corporation involved in oil production in Nigeria. The defendants allegedly aided and abetted the Nigerian military and police forces in their commission of extrajudicial killings, crimes against humanity, and torture, among other law of nations violations, in response to local residents protesting the environmental effects of the Nigerian subsidiary's oil activities.[71] All alleged conduct occurred outside the United States, and the defendants' only connection to the United States was their listing on the New York Stock Exchange and their maintaining an affiliated office in New York whose sole purpose was to explain the defendants' business to investors.[72] In these circumstances, the presumption against extraterritoriality prevented the exercise of ATS jurisdiction.

Justice Breyer wrote a concurring opinion in which he stated that, guided by international law principles, he would have courts exercise ATS jurisdiction when (1) the alleged law of nations violation occurred in the United States, (2) the defendant was a U.S. national, or (3) the alleged conduct "substantially and adversely" affected an important U.S. interest, including an interest "in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind."[73] However, Justice Breyer

69 *Id.* at 124.

70 *Id.* at 124–25.

71 *Id.* at 111–14.

72 *Id.* at 139–40 (Breyer, J., concurring).

73 *Id.* at 127.

concurred in the judgment because the facts of the case met none of those three conditions.[74]

While *Kiobel II* announced a novel standard for courts in evaluating ATS claims, the Court offered no real guidance as to how to conduct the new "touch and concern" test, and it only addressed corporate liability by stating that corporate presence alone is not enough to rebut the presumption against extraterritoriality. This led to district courts and courts of appeals applying the touch and concern test in myriad ways in the ensuing years.[75] The issue of corporate liability also remained unsettled, though by refusing to rule on the issue, the Court implicitly indicated that, at least for the time being, corporations could be liable under the ATS (except in the Second Circuit).

2. *Jesner v. Arab Bank, PLC*

The Court once again granted certiorari on the issue of corporate liability under the ATS only five years later in *Jesner*. There, the plaintiffs alleged that the defendant bank maintained accounts in the Middle East for terrorists and helped to compensate the family members of suicide bombers, thus aiding and abetting the injuries, killings, and captures inflicted by terrorists on the plaintiffs.[76] As far as a nexus to the United States, the plaintiffs alleged that the defendant used its New York branch to clear dollar-denominated transactions that benefited terrorists, and that the defendant also used that branch to transfer funds from a Texas-based charity to the accounts of terrorist-affiliated charities in the Middle East.[77]

Writing for a 5–4 plurality, Justice Kennedy framed the issue as "whether common-law liability under the ATS

---

74 *Id.* at 139–40.

75 Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from* Kiobel*'s "Touch and Concern" Test*, 66 HASTINGS L.J. 443, 455–56 (2015).

76 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1394 (2018).

77 *Id.* at 1394–95.

extends to a *foreign* corporate defendant",[78] rather than addressing the issue of corporate liability generally. Justice Kennedy characterized *Sosa* as mandating a two-question test: (1) whether the allegedly-violated international law norm is sufficiently "specific, universal, and obligatory," and (2) whether judicial caution mandates dismissal in the absence of authorization by the political branches.[79] The second question ultimately proved determinative, as the Court held that foreign corporations could not be defendants under the ATS due to foreign policy concerns.[80] The plurality echoed the concern of *Kiobel II* that holding otherwise could result in other nations haling U.S. corporations into their courts for law of nations violations. It stated that "the cautionary language of *Sosa* would be little more than empty rhetoric" if foreign corporations faced ATS liability.[81] Under this view, imposing ATS liability on foreign corporations could result in significant international friction with the corporations' home nations, reinforcing the need for courts to defer to the political branches in the area of foreign relations, since that is traditionally not the judiciary's province.[82]

Justice Kennedy reached the second *Sosa* question because there was "sufficient doubt" on the first question to merit doing so, but in his discussion of the first question, he seemed to indicate that he sided with *Kiobel I* (though this part of the opinion did not carry a majority of the Court).[83] In *Kiobel I*, writing for the Second Circuit, Judge Cabranes interpreted international law and *Sosa*'s footnote 20 to mean that corporate ATS liability could only exist if corporate liability for human rights violations was itself a universally recognized norm of international law.[84] Justice Kennedy did not decide

78 *Id.* at 1398 (emphasis added).

79 *Id.* at 1399 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)) (internal quotation marks omitted).

80 *Id.* at 1407.

81 *Id.* at 1405–07.

82 *Id.* at 1406.

83 *Id.* at 1399–1402.

84 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010), *aff'd,* 569 U.S. 108 (2013).

the issue, and he acknowledged the "considerable force and weight" behind the position taken by Judge Leval's concurrence in *Kiobel I*. There, Judge Leval argued that international law only governed the substance of its violations and left the questions of remedies and enforcement—including whether corporations could be liable for said violations—to nations themselves.[85] However, Justice Kennedy went on to rely heavily on the same arguments and sources that Judge Cabranes used in *Kiobel I*.[86] Justice Kennedy even expressly stated that "[i]t does not follow . . . that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities."[87]

It seems, then, that Justice Kennedy believed that in order for corporate liability to exist under the ATS, that liability, and not just the underlying substantive offense, must represent a universally accepted international law norm. Since that is currently not the case, corporations should not be liable under the ATS, in Justice Kennedy's view.[88] In a forceful dissent, Justice Sotomayor adopted a similar position to Judge Leval's, arguing that the plurality "fundamentally misconceive[d] how international law works" and thus incorrectly analyzed the first *Sosa* question, since international consensus was only required for the relevant substantive conduct and not the "mechanisms of enforcement."[89] In responding to the plurality's deference to the political branches in light of foreign policy concerns, Justice Sotomayor pointed to the Executive Branch's submission of briefs arguing in favor of corporate liability in the present case and *Kiobel II*, as well as Congress's failure to

85 *Jesner*, 138 S. Ct. at 1396 (discussing Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010)).

86 *Id.* at 1400–02.

87 *Id.* at 1400.

88 While it is unclear if corporate liability has attained the status of a universally accepted international law norm, there is a growing movement toward recognizing corporate liability on an international level, at least as it regards human rights violations. *See* discussion *infra* Section IV.A.

89 *Jesner*, 138 S. Ct. at 1419–20 (Sotomayor, J., dissenting).

amend the ATS despite scores of corporations being sued under it since *Filartiga*.[90] In closing, Justice Sotomayor referenced the ATS's original purpose, stating that the Court's decision "undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose."[91]

After *Jesner*, foreign corporations can no longer be sued under the ATS, removing "foreign-cubed" cases[92] from the statute's ambit. This led some observers to wonder whether the ATS would still be a viable tool going forward for victims of human rights abuses suffered at the hands of corporations.[93] But the Supreme Court still has not affirmatively stated whether U.S. corporations are or are not liable under the ATS. Nor has the Court addressed how lower courts should conduct the "touch and concern" test for rebutting the presumption against extraterritoriality, whether for corporate defendants or non-corporate defendants. The circuits have reacted to these issues in various ways. The most notable examples are discussed below.

III. CIRCUIT APPROACHES TO ATS CORPORATE LIABILITY AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

Five circuits have developed noteworthy jurisprudence surrounding the ATS, corporate liability, and the presumption against extraterritoriality. Their approaches to these jurisdictional issues range from the most restrictive (Second Circuit) to the least restrictive (Fourth Circuit). In the Second Circuit, corporations are categorially not liable under the

90 *Id.* at 1431–32.

91 *Id.* at 1437.

92 Recall the definition of a "foreign-cubed" case in n.33. While the term was originally defined in a securities context, ATS cases provide an apt analogy. *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 283 n.11 (2010) (Breyer, J., concurring). Of course, since ATS plaintiffs must be aliens, there will always be at least one "f" in ATS cases.

93 *See*, *e.g.*, Samuel Moyn, *Time to Pivot? Thoughts on* Jesner v. Arab Bank, LAWFARE INST. (Apr. 25, 2018), https://www.lawfareblog.com/time-pivot-thoughts-jesner-v-arab-bank [https://perma.cc/C5JL-9978].

ATS, and for a plaintiff to rebut the presumption in a suit against a natural person, the alleged law of nations violation must have occurred on U.S. soil.[94] Conversely, corporations can be liable under the ATS in the other circuits. In the Fourth Circuit, there has been little analysis regarding corporate liability, and courts have employed a relatively flexible, fact-based analysis for rebutting the presumption.[95] The Ninth Circuit has adopted a unique, offense-by-offense methodology for corporate liability and a semi-restrictive approach for rebutting the presumption, whereby at least some of the conduct relevant to a claim must have occurred in the United States.[96] The Eleventh Circuit has also taken a semi-restrictive approach for the presumption, which involves a two-part "U.S. focus" and conduct analysis, albeit with a greater emphasis on the latter.[97] In the D.C. Circuit, corporations have been held categorically liable under the ATS. While the circuit's jurisprudence surrounding the presumption remains somewhat unclear, it seems to be less restrictive than most of the other circuits.[98] However, a recent district court decision has clouded these issues.[99] Thus, it appears so far that *Jesner* has not significantly affected any circuit's ATS regime as applied to U.S. corporate defendants. Each circuit's approach is examined in greater detail below.

A. Second Circuit: Categorically Against Corporate Liability

The Second Circuit is the lone circuit to hold that corporations are categorically not liable under the ATS. The Second Circuit Court of Appeals adopted this position in *Kiobel I* in 2010.[100] Judge Cabranes, writing for the majority,

94 *See* discussion *infra* Section III.A.

95 *See* discussion *infra* Section III.B.

96 *See* discussion *infra* Section III.C.

97 *See* discussion *infra* Section III.D.

98 *See* discussion *infra* Section III.E.

99 Doe v. Exxon Mobil Corp., 391 F. Supp. 3d 76, 84–85 (D.D.C. 2019).

100 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148–49 (2d Cir. 2010), *aff'd,* 569 U.S. 108 (2013).

largely based his decision on his interpretation of footnote 20 in the *Sosa* decision.[101] In his view, in order for corporations to be liable under the ATS, international law must recognize corporate liability.[102] In other words, the availability of general corporate liability has to represent a specific, universal, and obligatory norm.[103] If corporate liability for violations of international law has not attained near complete acceptance among civilized nations, corporations could not face ATS liability.

Judge Cabranes indeed concluded that corporate liability had "not attained a discernible, much less universal, acceptance" internationally after surveying a number of international tribunals, treaties, and scholarly works, such as the jurisdiction of the Nuremberg Tribunals and the International Criminal Court.[104] Judge Cabranes also carefully pointed out that the fact that a norm existing in the domestic law of nearly all nations was not dispositive. That is, to be part of customary international law, the norm had to be one of true international concern.[105] Finally, while Judge Cabranes acknowledged that international law allows

101 *Id.* at 128 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)). Footnote 20 itself reads that "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

102 *Kiobel*, 621 F.3d at 128–29.

103 *Id.* at 131 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004)) (internal quotation marks omitted).

104 *See id.* at 132–45. The Nuremberg Tribunals had jurisdiction only over natural persons, even though corporations were implicated in wrongdoing in connection with the Nazi regime. *Id.* at 133–34. For a discussion of why Judge Cabranes's evaluation of what the Nuremberg Tribunals stand for in international law jurisprudence may be incorrect, see Jonathan Kolieb, *Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law*, 32 AM. U. INT'L L. REV. 569, 578–80 (2017). More recently, the International Criminal Court, whose charter was passed in 1998, was also granted jurisdiction only over natural persons, and a proposal to include jurisdiction over corporations was expressly rejected. *Kiobel*, 621 F.3d at 136–37.

105 *Kiobel*, 621 F.3d at 118.

individual states to determine remedies for violations, he emphasized that the question of liability for a class of defendants—here, corporations—is not a remedial question.[106]

In a concurring opinion, Judge Leval sharply disagreed with the majority on nearly all fronts. Most importantly, he interpreted *Sosa*'s footnote 20 differently than Judge Cabranes.[107] In his view, rather than drawing a distinction between individuals and corporations, the footnote drew a distinction between state actors and private actors.[108] In examining a certain offense, courts had to determine if it was one that international law would apply only against states, or against both states and private actors. If the latter was true, then individuals *and* corporations would be liable; the two categories of private defendant would be treated the same under the ATS, not differently.[109] Further, Judge Leval stated that "international law "takes no position" on whether civil liability should exist for violations of its norms and leaves that question up to the domestic law of individual states. For its part, the United States spoke on that question by enacting the ATS, and since corporations are liable for tort generally under U.S. domestic law, they should be similarly liable under the ATS.[110]

Judge Leval further attacked the majority's argument by discussing the relation of corporate liability to the liability of natural persons. The majority's reasoning implied that international law needs to recognize human rights civil liability for natural persons as a universally accepted norm in order for natural persons to be liable under the ATS. Although no such universally accepted norm then existed, Second Circuit precedent nevertheless expressly recognized ATS

106 *Id.* at 147–48.

107 Judge Leval agreed that the complaint should be dismissed, but only because it failed to satisfy the pleading standard for aiding and abetting liability. *Id.* at 188 (Leval, J., concurring).

108 *Id.* at 165.

109 *Id.*

110 *Id.* at 152.

liability for natural persons.[111] Judge Leval also criticized the majority's examination of international criminal tribunals. Judge Leval argued that such criminal tribunals did not cover corporations because imposing criminal liability on corporations, which are "fictitious juridical entit[ies]," could not serve the punitive objectives of criminal punishment, whereas imposing civil liability on corporations did serve the objectives of civil liability.[112] For this reason, criminal tribunals' lack of criminal prosecution said nothing about the potential for corporations' civil liability.[113] Judge Leval's overall position is summed up thusly:

> Because the law of nations leaves each nation free to determine for itself whether to impose civil liability for such violations of the norms of the law of nations, and because the United States by enacting the ATS has opted for civil tort liability, U.S. courts, as a matter of U.S. law, entertain suits for compensatory damages under the ATS for violations of the law of nations. The ATS confers jurisdiction by virtue of the defendant's violation of the law of nations. Damages are properly awarded under the ATS not because any rule of international law imposes damages, but because the United States has exercised the option left to it by international law to allow civil suits. Nothing in international law bars such an award . . . .[114]

The Second Circuit has indicated that it is open to rethinking its position on corporate liability, due to its status as the only circuit that forecloses corporate liability, and *Kiobel II*'s implicit acknowledgement that corporations could be liable under the ATS. In *In re Arab Bank, PLC Alien Tort Statute Litigation*, the precursor to *Jesner*, the Second Circuit acknowledged that its decision in *Kiobel I* holding both foreign

111 *Id.* at 152–53.

112 *Id.* at 152, 170.

113 *Id.* at 170–72.

114 *Id.* at 183–84.

and U.S. corporations immune from ATS suits "now appears to swim alone against the tide."[115]

In addition to foreclosing corporate liability, the Second Circuit has taken a restrictive approach to displacing the presumption against extraterritoriality as applied to the ATS. This was first seen in *Mastafa v. Chevron Corp.*[116] There, the plaintiffs accused defendants Chevron and BNP Paribas of aiding and abetting the torture of Iraqi citizens under Saddam Hussein's regime by knowingly helping to provide illicit payments to Iraq in exchange for oil.[117] Writing for the majority, Judge Cabranes emphasized that a court's inquiry must concentrate on the defendant's relevant conduct, which translates to an evaluation of the sufficiency of a case's "domestic contacts."[118] The court took guidance from *Morrison*[119] in reaching this point, finding that the ATS's "focus" is on conduct and the location of that conduct.[120]

Critically, in the court's view, the only relevant conduct was that which actually constituted, or aided and abetted, a law of nations violation.[121] In other words, the only way to overcome the presumption against extraterritoriality is if a law of nations violation occurred on U.S. soil. The court also held that a defendant's U.S. citizenship is completely irrelevant to the touch-and-concern inquiry.[122] The majority framed the touch-and-concern inquiry as the first part of a two-part test for displacing the presumption, with the second

115 *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 151 (2d Cir. 2015), *aff'd sub nom.* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

116 The court took this opportunity to interpret *Kiobel II* and the presumption against extraterritoriality even though it could not exercise subject matter jurisdiction in the case, since the ATS defendants were corporations. Mastafa v. Chevron Corp., 770 F.3d 170, 178–79 (2d Cir. 2014).

117 *Id.* at 174–76.

118 *Id.* at 182.

119 *See supra* note 62 and a longer discussion of *Morrison infra* Section III.C.

120 *Mastafa*, 770 F.3d at 185.

121 *Id.*

122 *Id.* at 188.

part being an early evaluation of the merits to determine whether a plaintiff had sufficiently pled a true law of nations violation.[123]

In the case at hand, the court ruled that the complaint failed to rebut the presumption against extraterritoriality.[124] Although the complaint facially appeared to sufficiently "touch and concern" the United States, the alleged conduct did not itself constitute either intentional or knowing aiding and abetting of a law of nations violation, thus failing the second prong of the test.[125] The fact that two corporations—one being a U.S. corporation—undertaking domestic activities to knowingly aid a foreign regime's alleged torture did not rebut the presumption illustrates the restrictiveness of the Second Circuit's approach to granting ATS jurisdiction.[126]

B. Fourth Circuit: A Flexible, Fact-Based Approach

The Fourth Circuit has taken a simple approach to corporate liability, and the most liberal approach to the presumption against extraterritoriality. The Fourth Circuit Court of Appeals addressed these issues in *Al Shimari v. CACI Premier Technology, Inc.*, in which victims of alleged abuse from the Abu Ghraib prison incident sued a U.S. military contractor for torture, war crimes, and cruel, inhuman, or degrading treatment, specifically alleging actionable behavior by corporate management in the United States and by employees in Iraq.[127]

123 *Id.* at 186.

124 *Id.* at 192.

125 *Id.* at 192–94. Chevron and BNP allegedly helped fund the torture of the plaintiffs through domestic purchases and financing transactions (Chevron) and domestic payments and financing arrangements (BNP). *Id.* at 191.

126 The Second Circuit Court of Appeals has not yet addressed *Jesner*.

127 Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 521–22 (4th Cir. 2014). The plaintiffs alleged that the defendant's managers ignored reports of abuse at Abu Ghraib and attempted to cover it up, that the defendant's site manager reviewed reports raising potential abuse, that said manager had daily contact with the corporation in the United States and sent weekly reports to the executive team in the United States, and that the

By hearing the case, the court implicitly recognized that corporations could be liable under the ATS. The only published discussion of corporate liability in the litigation came on remand three years later, when the District Court for the Eastern District of Virginia simply mentioned in a footnote that it had decided in an earlier ruling that corporations were subject to ATS liability.[128] The Court of Appeals, however, addressed the presumption against extraterritoriality and the touch-and-concern test at length in its decision. The court framed the inquiry as requiring a fact-based analysis to determine whether a plaintiff's claim as a whole touched and concerned the United States with sufficient force to displace the presumption, pointing to the Supreme Court's specific use of the term "claim," and not merely "conduct," in *Kiobel II*.[129] This would include an examination of "all the facts" associated with a claim, "including the parties' identities and their relationship to the causes of action."[130] The key consequence of this principle is that the court's inquiry goes beyond mere tortious conduct. In other words, the conduct constituting a law of nations violation need not occur in the United States for the presumption to be displaced, as long as there were sufficient connections among the defendant, the alleged violations, and the United States. This represents a sharp departure from the other circuits.

The defendant claimed that the ATS, under *Kiobel II*, did not cover cases where the alleged tortious conduct occurred abroad, but the court expressly rejected this argument.[131] The court reasoned that *Kiobel II* could not stand for that proposition because the concurrence written by Justice Alito took that very position and the majority expressly did not

defendant's vice president traveled regularly to Iraq and knew about the company's operations at Abu Ghraib. *Id.* at 522.

128 Al Shimari v. CACI Premier Tech., Inc., 263 F. Supp. 3d 595, 599 n.4 (E.D. Va. 2017).

129 *Al Shimari*, 758 F.3d at 527 (discussing Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013)).

130 *Id.*

131 *Id.* at 528.

adopt it.[132] Instead, a close examination of all the facts associated with a claim could still reveal sufficient connections with the United States to rebut the presumption against extraterritoriality, even if the law of nations violation occurred extraterritorially. In the Fourth Circuit Court of Appeals' view, "mechanically applying the presumption . . . would not advance the purposes of the presumption[,]" which include allowing the extraterritorial application of U.S. law in those cases where doing so is appropriate.[133] In articulating its holistic standard for rebutting the presumption, the court also downplayed any potential negative foreign policy consequences. It pointed out that all defendants in the present case were U.S. citizens, so the court would not have to hale foreign nationals into the United States.[134] It also noted that it was not interfering in foreign policy because the political branches had made clear that the United States did not tolerate torture.[135]

In *Al Shimari*, the court ruled that the presumption against extraterritoriality was displaced, and the court thus had subject matter jurisdiction under the ATS.[136] In the court's view, the following facts served to touch and concern the United States with sufficient force: the defendant corporation and its employees were U.S. citizens; the defendant's contract with the U.S. government was executed in the United States and required the defendant's employees to procure security clearances from the U.S. government; the defendant's U.S.-based managers allegedly tacitly approved, attempted to cover up, and implicitly encouraged the torture of the plaintiffs; and Congress had made clear its intention to hold U.S. citizens accountable for torture committed abroad.[137] While the court did not decide what type or number of domestic connections would be sufficient going forward, its analysis shows that the Fourth Circuit has adopted a flexible,

132 *Id.* at 527–28.

133 *Id.* at 529.

134 *Id.* at 530.

135 *Id.*

136 *Id.* at 530–31.

137 *Id.*

fact-based, and thus a relatively liberal regime for displacing the presumption against extraterritoriality under the ATS.

Early indications are that *Jesner* will not alter that regime. After *Jesner*, the District Court for the Eastern District of Virginia rejected the *Al Shimari* defendants' argument that allowing the litigation to proceed would result in improper judicial interference in foreign policy.[138] It relied on the Fourth Circuit's reasoning in its 2014 decision referenced above and stated that the plaintiffs' suit was consistent with the ATS's purpose of providing "a federal forum for tort suits by aliens against Americans for international law violations."[139] The court explicitly distinguished *Jesner*, reasoning that the Court's concerns there stemmed from the fact that the defendant was a foreign corporation, which is not the case in *Al Shimari*.[140] The District Court could have read *Jesner* as requiring caution before exercising ATS jurisdiction in general. Instead it chose a narrow reading largely cabining *Jesner*'s analysis to foreign corporate defendants, potentially signaling that it will take another adverse Supreme Court decision for the Fourth Circuit to modify its approach, even as other circuits may come to see *Jesner* differently. This all leaves no reason to believe that the Fourth Circuit's flexible ATS regime for U.S. corporations will be affected by *Jesner*.

C. Ninth Circuit: A Semi-Restrictive Conduct-Based Approach

The Ninth Circuit has taken a unique approach to corporate liability and a semi-restrictive approach to displacing the presumption against extraterritoriality. Regarding the former, the Ninth Circuit Court of Appeals adopted a norm-by-norm approach in *Sarei v. Rio Tinto, PLC*. Under this view, for each substantive offense raised under the ATS, a court must examine international law to determine whether that law can hold corporations liable for the specific

138 Al Shimari v. CACI Premier Tech., Inc., 320 F. Supp. 3d 781, 785–86 (E.D. Va. 2018).

139 *Id.* at 785, 787.

140 *Id.* at 787–88.

offense.[141] The court based its analysis on its interpretation of *Sosa's* footnote 20, and it effectively represents a middle approach between Judge Cabranes's position and Judge Leval's position in *Kiobel I*. The Ninth Circuit identified three distinct categories of would-be violators: state actors, private individuals, and private groups. Theoretically, there are law of nations violations under which state actors and private individuals can be liable, but corporations cannot. The court pointed out, though, that there are also substantive international law norms that are "universal and absolute[,]" meaning they apply to all actors, including corporations.[142] The court also stated that international precedent enforcing a norm against corporations need not exist for corporations to be liable for that norm under the ATS,[143] thus refuting Judge Cabranes's reasoning in *Kiobel I*.

The Ninth Circuit Court of Appeals reaffirmed these principles in *Doe I v. Nestle USA, Inc.* ("*Nestle I*"), which was decided after *Kiobel II*. [144] In that case, the court clarified its view of the sources of law that control the issue: international law controls the nature and scope of the substantive norm underlying a plaintiff's claim, while domestic law controls specific questions relating to recovery from a corporate defendant.[145] Applying its approach to the norms at issue in these two cases, the court ruled that corporations were liable under the ATS for genocide, war crimes,[146] and slavery.[147] Regarding the first two, the court found that the applicability of the norms of genocide and war crimes turns on the identity of victims, meaning all types of perpetrators are cognizable

141 Sarei v. Rio Tinto, PLC, 671 F.3d 736, 747–48 (9th Cir. 2011), *judgment vacated*, 569 U.S. 945 (2013).

142 *Id.* at 759–60.

143 *Id.* at 760–61.

144 Doe I v. Nestle USA, Inc. (*Nestle I*), 766 F.3d 1013, 1022 (9th Cir. 2014).

145 *Id.*

146 *Sarei*, 671 F.3d at 760, 765.

147 *Nestle I*, 766 F.3d at 1022.

defendants.[148] Regarding the latter, the court found that the norm behind the prohibition of slavery applies both to state and private actors, and that no rule in international law exempts corporations from liability.[149] While the Ninth Circuit has left open the possibility that a norm could apply to private individuals but not corporations, these examples illustrate that this is unlikely to ever occur, since international law generally has no principles expressly exempting corporations from being cognizable perpetrators of heinous offenses.

The *Nestle I* court also briefly touched on the presumption against extraterritoriality, including the relevance of the *Morrison* test to the touch-and-concern test. In *Morrison*, the Court employed a two-step "focus" test to assess the presumption against extraterritoriality as applied to Section 10(b) of the Securities Exchange Act.[150] The first step asks whether there is an indication that a statute is meant to apply extraterritorially.[151] If there is no such indication, the second step asks what the "focus of congressional concern" is for a statute and whether that focus is on domestic or extraterritorial conduct.[152] In the *Nestle I* court's view, the *Morrison* "focus" test" was at most "informative precedent" for determining how to carry out the *Kiobel II* touch-and-concern test.[153] The Ninth Circuit Court of Appeals addressed the presumption and ATS at more length in *Mujica v. AirScan Inc.* There, the court seemed to adopt a position somewhere between the Second Circuit and Fourth Circuit. While the court did not state that a law of nations violation needs to occur in the United States to satisfy the touch-and-concern test, it did indicate that at least "some of the conduct relevant

148 *Sarei*, 671 F.3d at 764–765 (noting that Genocide Convention and Common Article III to the Geneva Conventions focus "on the specific identity of the victims rather than the identity of the perpetrators").

149 *Nestle I*, 766 F.3d at 1022.

150 Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 265–70 (2010).

151 *Id.* at 260–61.

152 *Id.* at 266 (quoting Equal Emp. Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244 (1991)) (internal quotation marks omitted).

153 *Nestle I*, 766 F.3d at 1028.

to [the plaintiffs'] claims" does need to occur in the United States."[154] The court also implied that a direct connection between the U.S. conduct and the violations that occurred abroad is necessary.[155]

However, the Ninth Circuit changed course later in the Nestle litigation in *Doe v. Nestle, S.A.* ("*Nestle II*") and decided that the *Morrison* focus test did apply to ATS claims, thereby abrogating the touch-and-concern test.[156] It did so as a result of *RJR Nabisco, Inc. v. European Community*. There, the Court applied the *Morrison* focus test to the Racketeer Influenced and Corrupt Organizations Act and stated that *Kiobel II* also required a two-step framework for analyzing extraterritoriality.[157] The *Nestle II* court took this to mean that it should analyze ATS claims using the *Morrison* focus test going forward. It then described how *Kiobel II* had already answered the first step of the focus test, since the Supreme Court there found that nothing in the ATS rebutted the presumption against extraterritoriality.[158] Next, the *Nestle II* court interpreted the focus-of-the-statute step as asking if there was any domestic conduct relevant to the plaintiffs' ATS claims.[159] The court found that the defendants' funding of child slavery practices in the Ivory Coast, combined with their practice of sending employees from their U.S. headquarters to the Ivory Coast to inspect operations and report back, was sufficiently "relevant to the ATS's focus" to satisfy the *Morrison* test.[160]

Despite employing a different test, the court's approach in *Nestle II* was not ultimately dissimilar from *Mujica*, meaning the Ninth Circuit remains somewhere between the Second Circuit and Fourth Circuit in terms of restrictiveness. In *Mujica*, the victims of a bombing raid in Colombia accused the

154 Mujica v. AirScan Inc., 771 F.3d 580, 595 (9th Cir. 2014).

155 *Id.* at 592 n.6.

156 Doe v. Nestle, S.A. (*Nestle II*), 906 F.3d 1120, 1125 (9th Cir. 2018).

157 RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090, 2101 (2016).

158 *Nestle II*, 906 F.3d at 1125.

159 *Id.* at 1125–26.

160 *Id.* at 1126.

defendant oil company and defendant security company, both of which were U.S. corporations, of helping the Colombian military to carry out the raid in order to protect the oil company's Colombian pipeline.[161] There were no allegations of U.S. conduct other than the plaintiffs' speculation that the defendants concluded a contract in the United States.[162] This minimal alleged U.S. conduct failed to displace the presumption against extraterritoriality.[163] In the court's analysis, the plaintiffs' allegations that the oil company allowed the security company and Colombian military to use its facility to plan the raid, that several of the security company's employees piloted one of the planes that participated in the raid, and that the security company helped the Colombian military plan the raid were insufficient to displace the presumption.[164] In both cases, the Ninth Circuit placed a greater emphasis on conduct than in the Fourth Circuit, where the court relied on the more tangential facts underlying a plaintiff's claim. Under the Fourth Circuit's more general claim-based approach, the uncredited actions in *Mujica* could be considered as part of the calculus for displacing the presumption. That they were irrelevant here illustrates the more restrictive nature of the Ninth Circuit's conduct-based approach.[165]

D. Eleventh Circuit: A Restrictive, Conduct-Based Approach

Like the Fourth Circuit, the Eleventh Circuit has recognized corporate liability without much analysis, whereas its semi-restrictive approach to displacing the presumption against extraterritoriality approximates the Ninth Circuit's

161 Mujica v. AirScan Inc., 771 F.3d 580, 584–85 (9th Cir. 2014).

162 *Id.* at 592.

163 *Id.*

164 *Id.* at 585, 592.

165 It appears that *Jesner* will not affect the Ninth Circuit's approach to ATS liability for U.S. corporations. In *Nestle II*, which was decided after *Jesner*, the court expressly stated that *Jesner*'s holding was limited to foreign corporations and it thereby affirmed its holding in *Nestle I* as applied to U.S. corporations. *Nestle II*, 906 F.3d at 1124.

approach. Regarding corporate liability, the Eleventh Circuit Court of Appeals granted jurisdiction under the ATS for a torture claim against a corporate defendant in 2005 without elaborating on the issue.[166]

The Eleventh Circuit developed its test for the presumption against extraterritoriality as applied to the ATS in *Doe v. Drummond Co., Inc.* There, the plaintiffs—Colombian victims of alleged extrajudicial killings, war crimes, and crimes against humanity carried out by a Colombian paramilitary group—sued a U.S. coal mining company, its subsidiary, and several corporate officers. The plaintiffs alleged that the defendants orchestrated the paramilitary's actions in order to protect their mining operations in Colombia.[167] The court announced a "fact-intensive" standard for analyzing the ATS's presumption: "[d]isplacement of the presumption will be warranted if the claims have a U.S. focus and adequate relevant conduct occurs within the United States."[168] The court elaborated by pointing to the importance of locating the conduct that "directly or secondarily" resulted in international law violations.[169] It also required the allegations to meet a "minimum factual predicate" to warrant exterritorial application of the ATS.[170]

The Eleventh Circuit noted that both a defendant's U.S. citizenship and the "U.S. interests" triggered by a plaintiff's claim (here, the defendants allegedly funding and retaining a U.S.-designated terrorist organization) were relevant to the "U.S. focus" part of the standard, but also that neither factor was sufficient, even in combination, to rebut the

166 *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1254 (11th Cir. 2005). On the basis of that case, when the defendant in *Romero v. Drummond* argued several years later that corporations should not be liable under the ATS, the court simply stated that it was bound by its precedent. Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

167 Doe v. Drummond Co., 782 F.3d 576, 579–80 (11th Cir. 2015).

168 *Id.* at 592.

169 *Id.*

170 *Id.* at 593 (quoting Baloco v. Drummond Co., 767 F.3d 1229 (11th Cir. 2014)) (internal quotation marks omitted).

presumption.[171] This reveals that while the standard does not on its face appear to privilege the "adequate relevant conduct" prong, in reality, that prong requires more than the "U.S. focus" prong.[172] To wit, the court labeled the U.S. conduct inquiry "key" and intimated that it represents a stricter test.[173]

The court appeared to soften that stance elsewhere in its opinion, stating that the conduct factor was "weighty but not dispositive"[174] and holding that the place of mere "decision-making" could factor into the conduct inquiry.[175] However, the court's analysis and decision reinforce the idea that the conduct inquiry represents a high bar. It seemed to imply that the inquiry called for a balancing test, not a sufficiency test. While acknowledging that the defendants made key decisions in the United States, this fact did not "outweigh" the alleged extraterritorial conduct, including the actual funding of the paramilitary group and the planning of the operation.[176] Notably, the court acknowledged one such decision: that the defendant's president "agreed to" the plan to murder the victims of the operation.[177] However, the court stated that "mere consent" to international law violations did not suffice as conduct to displace the presumption because it was not "directed at" the international law violations.[178]

The court's opinion is largely unclear regarding what will suffice to displace the presumption going forward, but it does indicate that plaintiffs will face a high bar. If the inquiry indeed involves a balancing of U.S. conduct and extraterritorial conduct, few claims are likely to succeed, given that even in ATS cases where significant U.S. conduct is alleged, there is likely to be even greater extraterritorial

171 *Id.* at 595–97.

172 *Id.* at 592.

173 *Id.* at 597.

174 *Id.* at 593 n.24.

175 *Id.* at 597.

176 *Id.* at 598.

177 *Id.* at 599.

178 *Id.* at 599–600.

conduct alleged.[179] Even if there is no balancing, the Eleventh Circuit's approach still appears restrictive. While the "U.S. focus" portion of the circuit's standard aligns with the more lenient Fourth Circuit approach, the primacy of the "conduct" portion indicates that the Eleventh Circuit is, in practice, aligned with the less forgiving Ninth Circuit approach. In fact, the Eleventh Circuit's approach appears even more restrictive, considering that, unlike *Mujica*, there was cognizable U.S. conduct in *Drummond* and the court still deemed it insufficient.[180] However, this is still less restrictive than the Second Circuit, which requires the actual law of nations violation to occur in the United States.[181]

E. D.C. Circuit: Hinting at a Semi-Permissive Approach

The D.C. Circuit has held that corporations are categorically liable under the ATS, whereas its approach to the presumption against extraterritoriality is not entirely clear but seems more liberal than restrictive. The D.C. Circuit ruled on the former issue in *Doe v. Exxon Mobil Corp.* ("*Exxon I*"), where the court's analysis of corporate liability tracks that of Judge Leval in *Kiobel I*. The court drew a distinction between the substantive norms that support causes of action under the ATS and the remedies for violation of those norms. It explained that courts must refer to federal common law, which supports corporate liability, for remedial questions, because such questions are outside the scope of customary international law.[182] The court also looked to the context of the

179 *See* Fox & Goze, *supra* note 5, at 45 (describing the two classes of modern ATS cases, both of which impliedly involve significant extraterritorial conduct).

180 *See Doe*, 782 F.3d at 597–98; Mujica v. AirScan Inc., 771 F.3d 580, 592 (9th Cir. 2014) ("The allegations that form the basis of Plaintiffs' claims exclusively concern conduct that occurred in Colombia.").

181 As in the Second Circuit, the Eleventh Circuit Court of Appeals has not yet addressed *Jesner*.

182 Doe v. Exxon Mobil Corp., 654 F.3d 11, 41–42 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013). While the D.C. Circuit Court of Appeals later vacated this judgment, the opinion remains relevant as the only occasion on which the court has analyzed corporate liability.

ATS's enactment. Congress passed the ATS to help the United States avoid foreign entanglements resulting from aliens lacking a remedy for torts committed against them by U.S. citizens. It would not make sense for Congress to risk any entanglements by keeping corporations immune from such suits, especially since corporate liability was a recognized principle in tort law at that time.[183]

Regarding the presumption against extraterritoriality, the District Court for the District of Columbia addressed it in the same litigation on remand three years later ("*Exxon II*"). Although the court's discussion cannot be considered authoritative since the Court of Appeals has not endorsed it, it stands as the only example to date of this circuit taking on the issue. The case involved allegations made by Indonesian nationals that Indonesian soldiers, hired by the four defendant corporations to protect their natural gas field, inflicted severe injuries on the plaintiffs, some of which resulted in deaths. The plaintiffs accused the defendants, several of which were U.S. corporations, of providing material support to the soldiers.[184] The court examined how the Second Circuit, Fourth Circuit, and Eleventh Circuit had handled the presumption and the touch-and-concern test and ultimately concluded based on those examples that a defendant's U.S. citizenship alone could not displace the presumption but that the presumption could be displaced if plaintiffs alleged sufficient U.S.-based conduct.[185]

The court was clear that if the conduct itself constituted a law of nations violation, that would suffice to displace the

183 *See id.* at 43–47 (discussing the legislative history behind the ATS). Perhaps because the *Exxon I* defendant relied on *Kiobel I*, much of the *Exxon I* court's reasoning paralleled that of Judge Leval in *Kiobel I*, as did the *Exxon I* court's conclusion. The court explained that *Kiobel I* incorrectly concluded that international law did not recognize corporate liability for international law violations, that U.S. domestic law controlled the issue, and that, adhering to federal common law principles, corporations were categorically liable under the ATS. *Id.* at 50–51, 57.

184 Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 83–84 (D.D.C. 2014).

185 *Id.* at 95–96.

presumption.[186] However, it did not shed much light on what conduct below that marker would suffice. Despite this, the court's evaluation of certain conduct in the decision may be instructive. The plaintiffs alleged that one of the defendants provided material and monetary support to the Indonesian security force, but it was unclear if that support came from the United States.[187] The opinion seems to imply that, if said support did come from the United States, this could weigh toward displacing the presumption.[188] This would potentially align the D.C. Circuit with the Ninth Circuit, which requires some relevant U.S. conduct under *Mujica* and *Nestle II*.[189]

186 *Id.* at 95 (stating that "when plaintiffs allege U.S. based conduct itself constituting a violation of the ATS, the presumption against extraterritoriality is no obstacle to consideration of ATS claims").

187 *Id.* at 96.

188 *See id*. The court specifically identified this conduct, stated that the plaintiffs neglected to say whether it occurred in the United States, and then decided to allow the plaintiffs to amend their complaint. It follows from this that the conduct could be relevant to the presumption analysis if it indeed occurred in the United States.

189 Like in the Ninth Circuit, it appears that *Jesner* will not affect the D.C. Circuit Court of Appeals' approach to ATS liability for U.S. corporations, though this is less clear than in the Ninth Circuit. In *Kaplan v. Central Bank of the Republic of Iran*, the D.C. Circuit Court of Appeals specifically and repeatedly referred to *Jesner* as addressing only foreign corporate liability, albeit while discussing an ancillary issue. Kaplan v. Cent. Bank of the Islamic Republic of Iran, 896 F.3d 501, 515–16 (D.C. Cir. 2018). However, a recent D.C. District Court decision in the *Exxon* litigation has clouded the picture. Despite the Court of Appeals' assertion that *Jesner* addressed only foreign corporate liability, the District Court concluded that it was appropriate to re-examine the defendant U.S. corporation's ATS liability because of *Jesner*. Doe v. Exxon Mobil Corp., 391 F. Supp. 3d 76, 84–85 (D.D.C. 2019). The court analyzed the defendant's liability using two separate lines of inquiry, without stating which line was determinative: one based on the portion of *Jesner* that received five votes, and one based on the *Jesner* plurality's approach. *Id.* at 85. Under the first line of inquiry, the court declined to recognize U.S. corporate liability because the present case had caused significant diplomatic strife, as evidenced by various filings from the Executive Branch and Indonesia. *Id.* at 85–87. Under the second line of inquiry, the court examined the two-part test that *Sosa* ostensibly mandated. At the first step, the court found that corporations could not be liable under the ATS because corporate liability is not a specific, universal, and obligatory norm of international law. *Id.* at 87–91. At the second step,

The above discussion illustrates the circuits' varying approaches to corporate liability under the ATS and the requirements for rebutting the presumption against extraterritoriality as applied to the ATS. It also reveals that, among those circuits that have addressed *Jesner*, courts are largely hewing to *Jesner*'s narrow holding that foreign corporations are not liable under the ATS and are not using *Jesner* as a reason to alter their approaches to U.S. corporations. Going forward, this development indicates that the circuits will likely still be using the analytical regimes described above in ATS cases involving U.S. corporate defendants.

IV. THE SUPREME COURT SHOULD ADOPT THE FOURTH CIRCUIT'S REGIME FOR CORPORATE ATS LIABILITY

The Fourth Circuit's approach to U.S. corporate liability and the presumption against extraterritoriality under the ATS should be adopted by the Supreme Court. Legal considerations, policy considerations, and foreign relations considerations all argue for the widest possible application of the ATS to corporations. In this light, the Fourth Circuit's approach is ideal because it involves the most liberal and flexible regime[190] for deciding when claims against U.S. corporations should overcome the presumption, while simultaneously allowing for sufficient safeguards to prevent the ATS's overapplication.[191] Unlike the other circuits, the

the court found that allowing the case to proceed would not be a proper exercise of judicial discretion due to foreign policy and separation of powers concerns. *Id.* at 91–93. Should the D.C. Circuit Court of Appeals adopt either of these approaches, the circuit's ATS regime would become much more restrictive, especially if it adopts the second line of inquiry.

190 *See* Note, *supra* note 62, at 1919.

191 Some have argued for an even more forgiving regime for corporate ATS liability. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 127 (2013) (Breyer, J., concurring) (arguing for ATS jurisdiction when the alleged tort occurs on U.S. soil, the defendant is a U.S. national, or the defendant's conduct substantially and adversely affects an important U.S.

Fourth Circuit's regime calls for examining a plaintiff's claim in its entirety and does not require a certain amount or type of U.S. conduct. This framework is successful because it sets a realistic bar for plaintiffs to meet the touch-and-concern requirement, ensuring that the presumption remains merely a "presumption," and not a tool that courts and corporations use to mechanically dismiss claims involving allegations of heinous conduct. Yet the framework also provides sufficient flexibility for courts to dismiss claims that should not rebut the presumption.

Holding U.S. corporations liable in general comports with both the original understanding of the ATS,[192] which the Supreme Court and federal courts have relied on in their ATS jurisprudence,[193] and the modern conception of international law.[194] If federal common law provides the rule of decision, U.S. corporate liability under the ATS clearly should exist, and even if customary international law provides the rule of decision, U.S. corporate liability still may be appropriate given the strong argument that international law now recognizes corporate liability for human rights violations. [195] Adopting the most flexible regime possible for corporate ATS liability will ensure the continued propagation of the important message that the United States will hold its businesses accountable for their egregious conduct and will provide victims of any abuses the opportunity to receive justice and compensation. Doing so could even have positive

interest); Doyle, *supra* note 75, at 468 (proposing test where defendant's U.S. nationality would be sufficient to displace the presumption against extraterritoriality).

192 Bellia Jr. & Clark, *supra* note 13, at 476–77 (discussing leading 18th-century treatise and explaining how states were obligated to provide redress for harms their nationals committed against foreign citizens); Doe v. Exxon Mobil Corp., 654 F.3d 11, 45–47 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (explaining how corporate liability was a recognized principle of tort law at time of ATS's enactment).

193 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 718–25 (2004).

194 *See* CLAPHAM, *supra* note 52, at 195–96; Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. U. J. INT'L HUM. RTS. 264–66 (2008).

195 *See* CLAPHAM, *supra* note 52, at 251.

effects on the U.S. business community in terms of encouraging more robust oversight.[196] Finally, using the Fourth Circuit's regime for U.S. corporate liability and the presumption will not result in foreign entanglements or the judiciary's improper involvement in foreign affairs. In fact, the U.S. judiciary's *failure* to exercise jurisdiction over U.S. corporations under the ATS could cause strife with foreign countries. This is the opposite of what Congress intended in passing the statute.[197] Examining how corporate liability for human rights abuses is being handled elsewhere in the world bolsters this last point.

A. Corporate Liability is Appropriate Given the Relevant Legal Considerations

The inquiry into corporate liability under the ATS has largely been defined by the differing opinions written by Judge Cabranes (arguing against corporate liability because customary international law controlled the issue) and Judge Leval (arguing for corporate liability because U.S. domestic law controlled the issue) in *Kiobel I*.[198] Justice Kennedy confirmed as much, without settling the issue, in his plurality opinion in *Jesner*.[199] While it would be desirable for the Supreme Court to rule definitively on the issue, in reality, either viewpoint leads to the conclusion that U.S. corporations should be liable under the ATS. There is strong support for Judge Leval's position that customary international law leaves the question of corporate liability to U.S. domestic law because it is a matter of remedy or enforcement. Customary international law generally does not establish ways for redress of international law violations.[200] Instead, the law of nations and customary international law leave most remedial

196 *See* Martin, *supra* note 6, at 991–92.

197 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018) (discussing the legislative history of the ATS).

198 See discussion *supra* Section III.A.

199 See discussion *supra* Section II.D.2.

200 Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 297–98 (2009).

issues, including whether corporate liability is available, to the discretion of individual states.[201] The Supreme Court appeared to agree in *Sosa*, confirming that federal courts can create private liability, *as a matter of federal common law*.[202] It follows that federal courts must refer to U.S. domestic law to answer the question of whether corporations are liable under the ATS, and federal common law clearly recognizes corporate liability.[203]

However, even if customary international law governs corporate liability, there is strong reason to find that Judge Cabranes's analysis was faulty and that international practice does support corporate liability. Judge Cabranes looked to sources such as international tribunals and international treaties in determining that corporations were not subjects of international law and that there was no international law norm of corporate liability.[204] For example, he pointed to the lack of corporate liability at the post-World War II Nuremberg trials, and the lack of corporate liability in the Rome Statute establishing the International Criminal Court.[205] Nuremberg, though, is better read as representing a step toward corporate liability. The trials represented an expansion of liability for human rights abuses from nations to private actors generally, and corporations there were still implicated in wrongdoing, leading to punishment such as the dissolution of I.G. Farben and criminal liability for the employees of implicated corporations.[206] These developments illustrate the shift in the international community toward recognizing corporate responsibility for wrongdoing and reveal that the shift began a significant time ago.[207] Thus, citing the Nuremberg trials to

201 Doe v. Exxon Mobil Corp., 654 F.3d 11, 41–42 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

202 Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004) (emphasis added).

203 *Doe*, 654 F.3d at 57.

204 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 132–41, 145 (2d Cir. 2010), *aff'd,* 569 U.S. 108 (2013).

205 *Id.* at 133–37.

206 Kolieb, *supra* note 104, at 588–594.

207 *Id.* at 592.

immunize corporations from international liability goes against what the trials stand for in the evolution of international practice.[208] Regarding the Rome Statute, while a proposal to include corporate liability was rejected, this was not due to "insuperable objections of principle," but rather because of "technical complexities" and "time constraints . . . ."[209] Several countries, in fact, have allowed for corporate liability in incorporating the Rome Statute into their domestic law, including Australia, Canada, and France.[210] This weighs against the Rome Statute serving as evidence that corporate liability is not recognized internationally.

All told, there is a growing sense internationally that corporations *are* subjects of international law, with attendant obligations.[211] This is especially the case when it comes to human rights compliance.[212] There are many examples of treaties today that demand action against corporations (and that leave actual enforcement against corporations to signatory states, which essentially mimics the ATS regime).[213] This leads to the conclusion that:

> [T]here is certainly room today to reverse the assumption that corporations have absolutely no liability under general international law. Although the jurisdictional possibilities are limited under existing international tribunals, where national law allows for claims based on violations of international law, it is becoming clear that international law obligates non-state actors.[214]

The last part of the above passage describes the operation of the U.S. ATS regime. Additionally, even in the absence of a specific provision in a human rights treaty, international law

208 *Id.* at 595.

209 Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law, in* NON-STATE ACTORS AND HUMAN RIGHTS 227, 232 (Philip Alston ed., 2005).

210 Kolieb, *supra* note 104, at 600.

211 CLAPHAM, *supra* note 52, at 195.

212 Wouters & Chanet, *supra* note 194, at 264–66.

213 *See* CLAPHAM, *supra* note 52, at 247–51.

214 *Id.* at 251.

effectively imposes obligations on corporations through the obligations imposed on states that fail to redress their corporations' violations.[215] The broadest view of this would extend states' obligations to regulating their corporations' activity wherever it takes place, including extraterritorially.[216] This all points to a conclusion that corporate liability has indeed ripened into a norm of customary international law, or at the very least that customary international law recognizes corporate liability much more than Judge Cabranes indicated in *Kiobel I*. Even under his analytical framework, there is a strong argument today for U.S. corporate liability for law of nations violations.

Thus, whether one views federal common law or customary international law as supplying the rule of decision for corporate liability, the outcome is the same: it is appropriate to hold U.S. corporations liable under the ATS, as the Fourth Circuit does. Further, the Fourth Circuit's liberal regime for displacing the presumption against extraterritoriality best captures the scope of the ATS as it was originally understood. Modern ATS jurisprudence pre-*Jesner* was overbroad in allowing claims against foreign defendants, including foreign corporations, because the ATS was intended to redress only harms caused by U.S. citizens or nationals.[217] Meanwhile, the jurisprudence was underinclusive in *Sosa*'s limiting of substantive claims to universally accepted international law norms, because the ATS was intended to cover any intentional tort committed by a private U.S. citizen against an alien.[218] The overbroadness concern is irrelevant to U.S. corporate liability, and adopting the most forgiving regime for displacing the presumption helps counteract the narrowing of ATS liability that has occurred in modern times. Of all the circuits, the Fourth Circuit's approach is as close as possible to the original understanding of the ATS. This is critical, since

215 De Schutter, *supra* note 209, at 234–35. While this does not constitute direct corporate liability, it is still evidence of international law's increasing recognition that corporate wrongdoing merits civil redress.

216 *Id.* at 235.

217 Bellia, Jr. & Clark, *supra* note 13, at 454.

218 *Id.* at 542–43.

modern courts have sought to analyze the ATS through its original understanding. In total, then, applying the Fourth Circuit's ATS regime to U.S. corporations is fully compatible with the legal principles already established by ATS jurisprudence.

B. The Fourth Circuit's ATS Regime Best Accommodates All Stakeholders

Adopting the Fourth Circuit's flexible regime for displacing the presumption against extraterritoriality and holding U.S. corporations liable under the ATS will best address the interests of businesses, plaintiffs, and others affected by possible ATS cases. Naturally, imposing the regime that is strictest on ATS defendants raises concerns about harmful effects on U.S. businesses. It may be argued, too, that U.S. businesses could be discouraged from investing or operating in other countries if they can face potentially greater liability for their actions abroad. However, imposing such a regime should only discourage the type of heinous, unconscionable behavior that gives rise to ATS claims. If some U.S. businesses feel that they cannot aid a country's economy without de facto immunity from human rights liability, the law should serve to discourage such businesses. Society would be better off forgoing their investment if it also means forgoing their participation in the commission of universally condemned crimes.

The Fourth Circuit's flexible regime also comports with the current climate surrounding corporations and human rights: Businesses are expected to respect human rights, even in the absence of government regulation,[219] meaning allowing for the widest possible ATS liability is not necessarily out of sync with their existing social and legal burdens. The business lobby itself has begun to acknowledge that corporations must be accountable for abuses that occur in developing countries,[220] which is where most modern ATS claims against corporations

219 Martin, *supra* note 6, at 991 (internal quotation marks omitted).

220 *Id.* at 961.

are derived.[221] This is at least partly evidenced by businesses voluntarily agreeing to road-test the United Nations' Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights when they were first adopted in 2003.[222]

As corporations increasingly profess their commitment to protecting human rights, they are increasingly unable to explain away abuses that they commit due to their failure to monitor their own operations.[223] It follows that imposition of ATS liability, even in the most plaintiff-friendly form, is increasingly justifiable. Finally, greater scrutiny of corporations' human rights practices could also prove beneficial for corporations themselves. Corporate human rights abuses often trigger significant backlash from the public, which could lead shareholders and investors to withdraw from the offending organizations.[224] Greater ATS liability, and its potential deterrent effect on corporate misbehavior, could lead to a reduction in human rights abuses, thereby preventing shareholder and investor departures.

In terms of legal certainty, because all circuits except the Second Circuit have recognized corporate ATS liability, U.S. corporations are already on notice that they are subject to liability for their human rights-related behavior.[225] Even so, U.S. corporations continue to enjoy meaningful liability safeguards. First, even with the ATS's expansion in the modern era, only a limited number of substantive offenses remain actionable under the statute.[226] Second, businesses

221 *See* Fox & Goze, *supra* note 5, at 45 (generally describing modern ATS claims against corporations as involving business activities in developing countries).

222 David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 907 (2003).

223 Martin, *supra* note 6, at 998.

224 *Id.* at 963–64; *see also* Wouters & Chanet, *supra* note 194, at 269.

225 Even were this not the case, the offenses cognizable under the ATS are so egregious that corporations should not need such notice in order to refrain from unconscionable behavior.

226 CLAPHAM, *supra* note 52, at 253.

remain protected by the common law doctrine of *forum non conveniens*. By invoking *forum non conveniens*, a federal court may dismiss a suit at its discretion if an adequate alternative forum is available and the balance of relevant private and public interests favors dismissal.[227] Given the significant amount of extraterritorial conduct that ATS cases involve and the possible availability of fora where said conduct occurs, *forum non conveniens* would seem to be a very meaningful safeguard for ATS defendants.[228] Third, as the Supreme Court did in *Jesner*, any federal court would be able to dismiss a case if it happened to implicate serious foreign relations concerns. Lastly, of course, there is the presumption against extraterritoriality. While the Fourth Circuit's regime is the most liberal of the circuits when it comes to displacing the presumption, it still carries plenty of flexibility to decline jurisdiction whenever a claim does not sufficiently touch and concern the United States. With all these safeguards in place, there should be no concern that adopting the Fourth Circuit's ATS regime will unduly burden U.S. businesses.

Incorporating the most liberal possible ATS regime will also ensure that victims of human rights abuses committed by U.S. corporations have access to meaningful civil recourse. The ATS has developed into a notable tool for providing redress for human rights abuses, and alien plaintiffs should continue to be able to rely on it. The ATS is often the only avenue available for alien plaintiffs due to the inadequacy of their own countries' legal systems, or local authorities' failure to penalize U.S. corporations over fears of losing much-needed investment.[229] Plaintiffs also cannot rely on corporate self-governance alone for protection from human rights abuses. Not all corporations will sufficiently modify their behavior to prevent abuses because it is not necessarily profitable to do

227 Restatement (Fourth) of Foreign Relations Law § 424 (2018); *see also* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

228 *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 139 (2013) (Breyer, J., concurring) (discussing a preferred jurisdictional understanding of the ATS which would rely on courts to invoke *forum non conveniens* to decline jurisdiction when appropriate).

229 CLAPHAM, *supra* note 52, at 238.

so,[230] and the corporate social responsibility movement, which encourages businesses to adopt socially conscious practices, is not a proper solution because it is entirely voluntary.[231] It also does not appear that state courts would provide sufficient relief as an alternative option. [232] Nor would it be sufficient for plaintiffs to sue officers, directors, or employees of U.S. corporations in their individual capacities, as the offenses cognizable under the ATS—e.g., genocide, war crimes, and crimes against humanity—necessarily contemplate collective action.[233]

Overall, the ATS's history and *Jesner* reinforce the need for a significant accountability mechanism.[234] Beyond that, they reinforce the need for a flexible, federal, legal framework holding corporations as a whole, and not their individual agents, liable. The ATS, and the Fourth Circuit's regime specifically, meets this standard without unduly harming U.S. businesses.

C. Adopting the Fourth Circuit's Regime Will Not Inflame Foreign Tensions

In *Jesner*, the Supreme Court based its ruling that foreign corporations could not be liable under the ATS on the principle that judicial caution mandates abstention from hearing cases that raise foreign policy problems.[235] However, imposing ATS liability on U.S. corporations will not cause the foreign relations issues that are associated with imposing liability on foreign corporations or persons. It is generally understood that nations have prescriptive jurisdiction over their nationals' activities whether they occur within national

230 Wouters & Chanet, *supra* note 194, at 281 ("[I]t has not been proven that corporate responsibility will generally make a company more profitable. Thus . . . an appropriate regulatory framework is needed.").

231 Joe Lodico, Note, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute*, 30 J. L. & COM. 117, 133 (2012).

232 Doyle, *supra* note 75, at 453–54.

233 Kolieb, *supra* note 104, at 575.

234 Over 250 firms have been implicated in egregious conduct as part of ATS suits. Doyle, *supra* note 75, at 450–51.

235 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405–07 (2018).

territory or outside it.[236] In the modern era, such jurisdiction includes a nation's corporations.[237] This comports with the obligations imposed on nations that fail to redress their corporations' violations: the broadest view in international law today holds that said obligations encompass regulating corporations' activities *wherever* they take place.[238] The European Commission has agreed with the above jurisdictional stance, supporting the United States' ability to establish ATS jurisdiction for all torts in violation of the law of nations when a U.S. national is a defendant.[239] This indicates that other nations will not protest the United States' decision to establish jurisdiction over U.S. corporations under the ATS in the same way that they could protest the United States establishing jurisdiction over their corporations. Haling U.S. businesses into U.S. courts should thus represent an uncontroversial practice and a far cry from haling foreign businesses into U.S. courts, even when extraterritorial conduct is involved. With ATS liability extending only to U.S. corporations, other countries are unlikely to retaliate against ATS litigation by attempting to bring U.S. parties into their courts, thereby allaying a specific concern that Justice Kennedy pointed to in *Jesner* as cautioning against corporate liability.[240]

There is also no reason to believe that the political branches, to which the judiciary is expected to defer when cases could raise sensitive foreign relations concerns, would take issue with federal courts continuing to exercise ATS jurisdiction over U.S. corporations. Congress expressly contemplated international issues in enacting the ATS, as the

236 Restatement (Third) of Foreign Relations Law § 402 (1987). This also comports with the original understanding of the ATS. Under the law of nations, a nation-state was responsible for the harms of its citizens no matter where the harm occurred. Bellia Jr. & Clark, *supra* note 13, at 473.

237 Ramsey, *supra* note 200, at 292–93.

238 De Schutter, *supra* note 209, at 233–35 (emphasis added).

239 Brief for the European Commission as Amicus Curiae Supporting Neither Party, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03–339), 2004 WL 177036 at *6.

240 *Jesner*, 138 S. Ct. at 1405–07.

statute implicates the law of nations and requires alien plaintiffs.[241] That the political branches have chosen not to amend the ATS in any meaningful way since 1789, despite the many ATS cases that involved foreign defendants and foreign conduct, signals their tacit approval of the previous ATS regime, at the very least. Given that, the branches have scant reason to disapprove of courts continuing to hold U.S. corporations liable. As evidence of this, the Executive Branch, under two different administrations of differing party affiliation, expressed its support for corporate liability in both *Kiobel II* and *Jesner*.[242] In any event, under *Sosa*, the extent of courts' deference to the political branches over foreign relations implications should be determined on a case-by-case basis.[243] Thus, even under the Fourth Circuit's liberal regime, courts can continue to expressly recognize U.S. corporate liability while retaining the option to defer to the political branches and dismiss a case when doing so is warranted.

The argument for declining to exercise ATS jurisdiction because of a desire to avoid foreign entanglements falls flat when the category of corporate defendants is limited to U.S. corporations. If anything, *failing* to hold U.S. corporations liable going forward could cause tensions with foreign countries where U.S. businesses operate. It is easy to imagine a country becoming upset because a U.S. corporation inflicted serious human rights abuses on its nationals but a U.S. federal court then refused to hear a subsequent ATS suit against the corporation.[244] This would be a perverse result under the ATS, given that its legislative purpose was to help avoid strife between the United States and foreign powers.[245] Even if such scenarios do not occur, the larger point is that the

241 Judiciary Act of 1789 § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2012)).

242 *Jesner*, 138 S. Ct. at 1431 (Sotomayor, J., dissenting).

243 CLAPHAM, *supra* note 52, at 445.

244 Abdullahi v. Pfizer, Inc., 562 F.3d 163, 187 (2d Cir. 2009) (finding that U.S. corporate defendant conducting human experimentation abroad without obtaining consent had the potential to cause "substantial anti-American animus and hostility").

245 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115–17 (2013).

converse—foreign countries becoming upset because a court *does* exercise ATS jurisdiction—is not a serious concern when U.S. corporations are defendants. As long as the ATS retains the force of law, then, it would be inappropriate for courts to foreclose ATS jurisdiction over U.S. corporations due to foreign policy concerns.

An examination of how certain parts of the international community are viewing the intersection of business and human rights further illustrates that foreign countries are unlikely to protest a relaxed ATS regime focused only on U.S. corporations. The United Nations, advised by Professor John Ruggie, has issued Guiding Principles on Business and Human Rights, which "have received widespread commendation and acceptance by stakeholders, including national governments, civil society, and businesses themselves."[246] Additionally, while the EU has not yet passed similar legislation, the European Parliament has long envisioned a regulatory mechanism for corporate social responsibility that imposes civil liability on corporations domiciled in the EU;[247] in other words, a system analogous to U.S. corporations being liable under the ATS. But even without such a mechanism, the EU's general jurisdiction rules themselves seem to allow for ATS-like suits. Under the Brussels I Regulation, EU Member State courts have jurisdiction to hear civil claims against EU-based corporations even when the plaintiff is not domiciled in the EU and the injuries occurred outside the EU.[248] In fact, this jurisdictional regime is more plaintiff-friendly than the ATS in multiple

246 Doyle, *supra* note 75, at 449.

247 Wouters & Chanet, *supra* note 194, at 302.

248 *See* Case C-412/98, Grp. Josi Reinsurance Co. SA v. Universal Gen. Ins. Co. (UGIC), 2000 E.C.R. I-5925 (ruling that Brussels I Regulation's mandatory jurisdictional rules applied when a defendant has a domicile or seat in a member state and the plaintiff is domiciled in a non-member state); *see also* Case C-281/02, Andrew Owusu v. N.B. Jackson, 2005 E.C.R. I-1383 (ruling that *forum non conveniens* will not bar adjudication under Brussels I Regulation). While these cases did not address corporate defendants specifically, their rulings still apply to such defendants. For further analysis, see Wouters & Chanet, *supra* note 194, at 294–303.

ways.[249] Finally, in a different context, some governments are now linking companies' export credit guarantees to the potential human rights impacts of a company's specific project.[250] While it cannot be said that the rest of the world is rushing to enact corporate liability regimes similar to the ATS, the growing international trend toward nations holding corporations accountable for human rights abuses nevertheless indicates that the global community would take no issue with U.S. courts imposing ATS liability on U.S. corporations. Adopting the Fourth Circuit's flexible, fact-based ATS framework would re-align the United States with the global trend, with nary a hint of the foreign policy concerns central to *Jesner*.

V. CONCLUSION

The ATS has had a rollercoaster of an existence. From serving a critical function for a young, vulnerable nation, to disappearing into irrelevance, to being revived with an entirely modern sheen, to now being slowly pushed aside again, the statute has been defined by instability more than anything else. The Supreme Court did little to curb this in *Jesner*. While the Court provided certainty in terms of removing foreign corporations from the ATS's ambit, the ruling only raised more uncertainty about the ATS's viability going forward.

While some would welcome the ATS receding into the background again, the reality that the law has served a momentous function for scores of plaintiffs cannot be brushed aside. Victims of the most unimaginable horrors that human society is capable of inflicting have been able to achieve some sense of justice through the ATS. The importance of that cannot be overstated, and unless or until the statute is amended or repealed, courts should feel duty-bound to maintain its vitality, especially when it comes to corporations, which are the most significant type of ATS defendant today.

249 Wouters & Chanet, *supra* note 194, at 301–02.

250 CLAPHAM, *supra* note 52, at 197.

To that end, adopting the Fourth Circuit's flexible, all-encompassing test for overcoming the presumption against extraterritoriality as it regards U.S. corporate defendants is the best way forward for the Supreme Court in its ATS jurisprudence. The near-unanimity among the circuits as to whether corporations can be liable under the statute should essentially settle that issue, but even the Second Circuit's analytical lens now supports corporate ATS liability. Additionally, applying the most liberal possible regime for U.S. corporate liability best comports with the ATS's original understanding, which envisioned a far wider range of actionable conduct than is currently recognized under the ATS. The Fourth Circuit approach does no damage to the presumption against extraterritoriality, which, despite how other circuits have interpreted *Kiobel II*, does not require a significant amount of U.S. conduct in order to be displaced under the touch-and-concern test. Further, the approach is hardly unfair to businesses, which are already expected to respect human rights and which still have many built-in advantages in ATS suits, and it simultaneously provides the best avenue to justice and compensation for plaintiffs injured by egregious U.S. corporate misconduct. Most importantly given *Jesner*, holding U.S. corporations liable under the Fourth Circuit's approach fails to raise foreign relations issues of any legitimate magnitude.

Congress enacted the ATS with an eye toward stable international relations and commerce, and it will continue to be defined by those concerns, with U.S. corporations now at the forefront. While uncertainty, as ever, shrouds the statute in the wake of *Jesner*, the Fourth Circuit has charted an ideal path for the ATS's future.