

Post-*Jesner* Climate Change Lawsuits Under the Alien Tort Statute

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INTRODUCTION

A New Yorker cartoon once depicted an elderly fortune teller sitting opposite her customer, staring into a crystal ball. After a lengthy pause, the fortune teller says, “I am terribly sorry, but you have no future.”

Climate change is as vexing a problem as ever. It may, for good reason, lead to similar feelings of hopelessness and despair over the viability of our planet as we know it. Around the world, plaintiffs are taking steps to fight climate change through lawsuits against both governments and corporate entities, among other steps. At times, such lawsuits may seem somewhat tenuous, but litigation spurs progress. Actions to stem the dangers of climate change need to be taken on many fronts and in many stages without deterrence from the enormity of the task. This article analyzes whether the 1789 Alien Tort Statute (“ATS”)¹ is a realistic mechanism to provide redress for climate change-related international human rights violations and related violations of international environmental law by American corporations, which have continued their climate-changing activities in the United States and elsewhere decades after becoming aware of their inherent danger.²

In recent years, corporations have become “‘tier-one’ target defendants and the economic focus of ATS litigation.”³ Plaintiffs

1. 28 U.S.C. § 1350 (1948).

2. For example, in a 1981 paper written for Exxon’s head of research, a company scientist estimated that global temperatures will increase by 3 degrees Celsius with the doubling of carbon dioxide emissions in the atmosphere, which could cause catastrophic impacts as early as the first half of the 21st century. Uclia Wang, *What Oil Companies Knew About Climate Change and When: A Timeline*, CLIMATE LIABILITY NEWS (Apr. 5, 2018), <https://www.climateliabilitynews.org/2018/04/05/climate-change-oil-companies-knew-shell-exxon/> [https://perma.cc/R4HU-YUSU]. In 1988, Shell prepared an internal report called “The Greenhouse Effect” analyzing the impacts of climate change, noting that the burning of fossil fuels was driving climate change, and quantifying that carbon emissions from its own products (oil, gas, and coal) made up 4 percent of global emissions in 1984. *Id.* In a 1989 move to coordinate a public response to the growing attention on climate change, a group of big businesses, including Exxon, BP and Shell, formed the Global Climate Coalition intended to cast doubt on climate science and lobby against efforts to reduce greenhouse gas emissions. *Id.* See also Suzanne Goldenberg, *Exxon Knew of Climate Change in 1981, Email Says—But It Funded Deniers for 27 More Years*, GUARDIAN (July 8, 2015), <https://www.theguardian.com/environment/2015/jul/08/exxon-climate-change-1981-climate-denier-funding> [https://perma.cc/ZYQ5-EU77].

3. Joel Slawotsky, *Corporate Liability in Alien Tort Litigation*, 1 VA. J. INT’L L. ONLINE 27, 27 (2011).

will likely bring more litigation against corporations under the ATS. As this trend continues, climate change is poised to become a key issue in the ATS context as well. However, not all violations of international law including human rights law are cognizable under the ATS. The corporation's misconduct must exhibit a particularly identifiable and strong transnational dimension and be sufficiently egregious.⁴ However, activities that alter our global climate and threaten our very health and survival are nothing if not egregious international wrongdoings. This is especially so given the severity of the problem and, in particular, the long-standing corporate knowledge thereof. Such conduct is precisely the type of tort for which the ATS was created centuries ago. Modernly, the ATS has come alive again and is well-suited for claims for compensation for climate change damages where regulations or other laws do not prevent such damages or compensate injured parties therefor.

In recent decades, several human rights claims have been brought in federal court under the ATS, which gives federal courts jurisdiction to hear claims filed by non-U.S. citizens for torts committed in violation of international law, including those related to human rights. However, the U.S. Supreme Court has, so far, never ruled in favor of a plaintiff in an ATS-based suit, and American courts generally display some hostility towards suits for corporate activities under the ATS. Moreover, the Supreme Court foreclosed suits against *foreign* corporations in its 2018 decision *Jesner v. Arab Bank*,⁵ continuing a corporate-supportive and anti-plaintiff trend. Still, the law may support a finding for plaintiffs suing for climate-related damages under the ATS.

A corporation's share of the climate problem is, with modern scientific knowledge, attributable. Whether the judiciary is willing to hold American corporations liable for climate damages is another issue, but the possibility has not been foreclosed. With increasing knowledge of the extreme dangers of climate change and the intensifying climate litigation in the U.S. and abroad, there might still be a glimmer of hope that American courts will, as foreign courts increasingly do, see the soundness of judicial findings prompting regulatory action or, in the case of the ATS, at least financial liability. Some federal circuit courts seem more amenable to arguments for human rights violations under the ATS

4. *Id.* at 28.

5. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

than others. Of course, the United States Supreme Court will be the ultimate arbiter of whether a suit may lie against American corporations for climate change-related human rights violations.

This Article first explains the creation and history of the ATS relevant to the context of international environmental law and human rights. Next, this Article analyzes the highly fragmented and somewhat confusing holding of the 2018 case *Jesner v. Arab Bank*, which closed the door to ATS litigation against foreign, but not domestic, corporations. Post-*Jesner* cases explain that domestic conduct relevant to plaintiffs' claims under the ATS can still lead to a permissible application of the ATS even if some conduct occurred abroad. Thus, if American companies extracting, using, distributing, or promoting fossil fuels or services (in short, "energy companies") violate established human rights or principles of international environmental law in the United States or elsewhere, a lawsuit may be brought against them in U.S. courts. Third, this Article analyzes the significant hurdles to be cleared in any potential ATS-based climate change litigation in the United States. Finally, this Article will briefly look to other potential venues for relief.

This Article concludes that ATS litigation remains an option worth pursuing in the legal fight against climate change, as the ATS is a vehicle originally geared towards tort compensation where U.S. national interests would be affected if the aggrieved parties received no compensation. Indeed, any lawsuit or action that, if nothing else, helps call attention to and eventually mitigate climate change is highly warranted. Ultimately, however, an ATS-based suit against American corporations for climate-change damages may be unlikely to succeed under the current Supreme Court composition.

I. THE ALIEN TORT STATUTE: HISTORY AND PURPOSE

In the early history of the United States, the national government depended on state governments to ensure compliance with the nation's commitments under international law.⁶ In some cases, however, the states refused to do so.⁷ For example, when a French ambassador was assaulted on a public street in Philadelphia, all the

6. STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE I (2018).

7. *Id.*

national government could do was apologize and explain that only Pennsylvania officials had the authority to prosecute the offender.⁸ At the same time, international law during the Founding Era placed an affirmative obligation on the national government to redress certain violations of international legal rights.⁹ The Framers were concerned that the state governments did not fully comprehend the legal duties that arose from the young nation's new position as a sovereign entity.¹⁰ In those days, the “law of nations”—which is now more commonly known as international law—was not a well-developed concept.

In his Fourth Commentary on the Laws of England, Sir William Blackstone discussed three main issues of concern for international law:¹¹ violations of safe conducts (now falling under maritime and admiralty law), infringement of the rights of ambassadors, and piracy.¹² The latter was of particular concern to nation states because of the threat that piracy presented to trade among nations and the large amounts of money that nations invested in vulnerable vessels.¹³ “Pirates were deemed ‘*hostis humani generis*’—the enemy of all mankind.”¹⁴ Even in the modern ATS context, references are often made to Blackstone's three primary offenses, although ATS suits now reach much further than just those three.

In 1789, the First United States Congress enacted the Alien Tort Statute, which—then and now—simply 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.”¹⁵ The principal objective behind the adoption of the ATS was to “promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of a such remedy might provoke foreign nations to hold the United States accountable.”¹⁶ The ATS was to “serve as a jurisdictional bridge for non-U.S.

8. *Id.* at 1–2.

9. *Id.*

10. *Id.*

11. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *66–67.

12. *Id.* at *68.

13. Pierre N. Leval, *Beyond Kiobel: The Future of Human Rights Litigation in US Courts*, 19 UCLA J. INT'L L. & FOREIGN AFF. 1, 2 (2015).

14. *Id.*

15. 28 U.S.C. § 1350 (1948).

16. *Jesner*, 138 S. Ct. at 1406.

citizens to bring a cause of action against those residing in the U.S. who violated various aspects of international law.”¹⁷

For most of its history, the law of nations “did not involve matters of human rights or issues of a sovereign’s treatment of its own citizens.”¹⁸ “It dealt primarily with matters of relations among nations.”¹⁹ However, the ATS has widely come to be accepted as providing for jurisdiction over matters implicating human rights.²⁰ While this use of the Statute cannot be deduced from its language, it has typically not been disputed in subsequent ATS litigation.²¹

II. THE ATS COMES ALIVE

For nearly two hundred years, the ATS was almost never employed.²² This changed in 1980, when the statute reappeared in the landmark case *Filártiga v. Peña-Irala*, where a federal court held, for the first time, that the ATS provides jurisdiction over claims for alleged violations of international human rights law.²³ The human rights violation at issue was torture. In reaching its decision, the Second Circuit Court of Appeals noted that:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. . . . In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.²⁴

17. Candra Connelly, *The Alien Tort Statute: “An Avant-Garde Tool for Human Rights” or a Camouflaged Curse?*, 87 U. CIN. L. REV. 203, 204 (2018).

18. Leval, *supra* note 13, at 2.

19. *Id.*

20. Connelly, *supra* note 17, at 204.

21. *Id.*

22. Leval, *supra* note 13, at 3.

23. *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d. Cir. 1980).

24. *Id.* (emphasis added).

Filártiga gave rise to a series of cases developing civil liability under the ATS.

Sosa v. Alvarez-Machain represents the next major ATS case.²⁵ In *Sosa*, the U.S. Supreme Court held that although the statute is in its terms only jurisdictional, it still provides a limited, implicit sanction to hear a “narrow set” of claims that are “based on the present-day law of nations,” yet can be “defined with a specificity comparable to the features of the 18th-century paradigms” recognized by the Court in previous cases.²⁶ The Court pointed out that the narrow set of violations of international law were those that could have “serious consequences in international affairs.”²⁷ The Court also noted that the drafters of the ATS would have intended any such cause of action to come from the common law.²⁸

Jesner subsequently interpreted *Sosa* to stand for the proposition that “[a]lthough international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violations to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems.”²⁹ In other words, subsequent courts have seen *Sosa*’s requirement of a generally accepted and specifically defined norm of international law as referring to norms of “substantive conduct,” not “forms of liability.”³⁰ Limits on jurisdiction are not limits on substantive law, and nothing in international law suggests that a corporation may not violate it.³¹ The underlying offense in *Sosa*—a single, illegal arrest of less than one day—was held to have “violate[d] no norm of customary international law so well defined as to support the creation of a federal remedy” under the ATS.³²

An important facet of *Sosa* was the hostility it manifested towards ATS litigation in general. For example, the Court noted that it has “no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications

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

26. *Id.* at 715, 725–26.

27. *Id.* at 715.

28. *Id.* at 712.

29. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1420 (2018) (Sotomayor, J., dissenting).

30. *Id.*

31. *Id.*

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

of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”³³ Further, the Court argued for “great caution in adapting the law of nations to private rights.”³⁴ With regard to further independent judicial recognition of actionable international norms, the Court noted that “the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”³⁵

The *Sosa* Court opened the door to an argument that international law does not extend liability for human rights violations to corporations via its infamous footnote 20, in which it considered, without answering the question, “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.”³⁶ Some legal experts have interpreted this to mean that the international law relied upon in any given case must *itself* be specifically addressed to corporate defendants.³⁷ This appears to be a strained reading of the footnote. Others claim more persuasively that the footnote simply makes a distinction between private actors and state actors given that some international law norms require a showing of state action as an element of the alleged violation.³⁸ In and of itself, the footnote does not mean that there are different classes of private actors—such as corporations—that may not be sued under the ATS. The question of which private actors may be subject to tort liability should be resolved according to standard domestic tort principles. “[W]hile international law addresses the *substantive* standards of conduct [under the ATS], it leaves the *procedural* modes of enforcement to individual states.”³⁹

The issue of potential corporate liability arose again in *Kiobel v. Royal Dutch Petroleum*, where the trial court held that the ATS does not confer jurisdiction over suits against corporations.⁴⁰ Plaintiffs, Nigerian nationals residing in United States, sued Dutch, British,

33. *Id.* at 728.

34. *Id.*

35. *Id.* at 729.

36. *Id.* at 732 n.20.

37. Beth Van Schaack, *The Inconsequential Choice of Law Question Posed by Jesner v. Arab Bank*, 24 ILSAJ. INT'L & COMP. L. 359, 361 (2018).

38. *Id.* at 362.

39. *Id.* (emphasis added).

40. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 147–48 (2d. Cir. 2010).

and Nigerian corporations under the ATS claiming that these corporations, which were engaged in oil exploration and production in Nigeria, had aided and abetted the Nigerian government in committing human rights abuses in violation of the law of nations.⁴¹ The Second Circuit noted that *international law* determines whether a court has jurisdiction over ATS claims against a particular class of defendant, such as corporations.⁴² It reiterated the rule that to attain the status of a rule of customary international law, a norm must be “specific, universal, and obligatory.”⁴³ The court held that because the concept of corporate liability for violations of customary international law has not ripened into a universally accepted norm of international law, and because no corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights, the ATS does not confer jurisdiction over suits against corporations at all.⁴⁴

Plaintiffs appealed the decision to the Supreme Court (“*Kiobel II*”), which did not squarely address the issue of corporate liability. The Court held that because all the relevant conduct took place outside the United States, the claims did not sufficiently “touch and concern” the territory of the United States, a new requirement imposed by the Court regarding ATS claims.⁴⁵ Even when claims do “touch and concern,” they “must do so with sufficient force to displace the presumption against extraterritorial application,” a canon of statutory interpretation which provides that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”⁴⁶ “The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”⁴⁷ In other words, there is a “presumption that United States law governs domestically but does not rule the world.”⁴⁸ In this context, the argument had not been whether petitioners had stated a proper claim under the

41. *Id.* at 123.

42. *Id.* at 127.

43. *Id.* at 121.

44. *Id.* at 137, 147–48.

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

46. *Id.* at 125, 115.

47. *Id.* at 116.

48. *Id.* at 115.

ATS, but rather whether a claim under the ATS may reach conduct occurring in the territory of a foreign sovereign.⁴⁹ The Court concluded that “the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.”⁵⁰ The case barred relief for violations of the law of nations occurring *wholly* outside the United States.⁵¹

Kiobel II also shows hostility towards ATS litigation, at least by four justices, although this was in the context of conduct that happened exclusively *outside* the United States. The outcome may have been different if the relevant conduct took place *inside* the United States where palpable U.S. interests and activities would have been at issue, and at least one member of the *Kiobel II* majority—Justice Kennedy—would have approved the exercise of jurisdiction in such cases.⁵² Indeed, the many U.S.-based activities known to exacerbate climate change clearly have such relevance to not only U.S. interests, but also foreign interests. In such cases, a court may approve of the exercise of jurisdiction under ATS. This jurisdiction would *not* impose standards of domestic conduct devised by Congress on the rest of the world, which is the fear behind the presumption against extraterritoriality in U.S. law and foreign relations and often cited by the Supreme Court in the climate litigation context. Instead, the standards would be of human rights conduct “adopted by the community of nations with the intent that they apply throughout the world. They are based on the proposition that anyone, anywhere, who violates those standards is the enemy of all mankind.”⁵³

Of course, no court would call a lawfully operating company an “enemy of all mankind,” so if a plaintiff wished to make a reference to that phrase, which has recently only referenced torturers, the plaintiff would need to reframe that argument in a way that emphasizes the effects of the corporate action and does not point so harshly at the corporation itself. Climate change has extremely harsh, even deadly, consequences for many people, but corporations are not deliberately “torturing” anyone. Corporate defendants will argue that they are simply continuing to sell

49. *Id.*

50. *Id.* at 124.

51. *Id.*

52. Leval, *supra* note 13, at 14.

53. *Id.*

products and services for which there is demand and a legitimate market. *Jesner*, however, explained that “[i]nternational human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery, that make their perpetrators ‘enem[ies] of all mankind.’”⁵⁴ A differentiation between the actors and their actions may convert the “enemy of all mankind” argument from an implausible stretch to a viable argument. In doing so, plaintiffs would demonstrate that where the global community still views torturers and perpetrators of genocide as going far beyond acceptable norms of behavior, so do corporations that continue activities that a few steps further down the chain of events *still* lead to physically and mentally severe consequences, albeit not in face-to-face situations. The latter should not be dispositive where the effects are extremely serious. The law develops. The ATS has developed from the original three Blackstone offenses and, rightly, keeps developing. Perhaps most importantly, climate change is indeed an issue of not only American, but also “universal concern.”⁵⁵

Justice Breyer, in his concurrence joined by Justices Ginsberg, Sotomayor, and Kagan, set forth some types of factual circumstances that might justify the exercise of jurisdiction under the ATS. He would find jurisdiction where:

(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.⁵⁶

This concurrence is important given the fractured nature of the *Jesner* holding analyzed below. With two new Justices on the Court and speculation that Justice Roberts may become a “swing Justice,” the issue of corporate liability is surfacing. This concurrence, for example, does not seem to foreclose liability against American companies. Only because the particular parties and relevant conduct lacked sufficient ties to the United States for the ATS to

54. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1401–02 (2018) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

55. *Kiobel*, 569 U.S. at 109.

56. *Id.* at 127.

provide jurisdiction did all justices agree on affirming the dismissal of the entire complaint.⁵⁷

Since *Kiobel*, the Ninth Circuit has eschewed the Supreme Court's hesitation in finding corporate liability under the ATS.⁵⁸ Even the Second Circuit—home of *Kiobel II*—has begrudgingly started moving towards recognition of human rights abuses by corporations and other legal entities under the ATS, thus creating an intra-circuit split.⁵⁹

In sum, the recent pre-*Jesner* cases demonstrate that if corporations commit a narrow and specific set of wrongdoings that present serious consequences both domestically and abroad, as well as to international affairs, U.S. courts may have jurisdiction. However, if the effects of the alleged wrongdoings are *only* felt overseas, U.S. courts will not have jurisdiction, even if the wrongdoer is an American company. A clear nexus must be present between the complained-of action and corporate presence or activities in the United States. Supreme Court Justices have displayed some hostility towards ATS-based suits, seemingly due to concerns about the separation of powers and the United States' role in foreign relations and comity. Courts have insisted that any suit must relate to an issue of universal concern and should ensure that the United States does not become a safe harbor for torturers and similar tortfeasors, or to activities that are comparable to those performed by, in early judicial language, "common enemies of mankind."⁶⁰ *Jesner* addressed the issue of whether corporations may be sued under the ATS or whether an actual person must be joined as defendant. This seminal case will be analyzed next.

III. *JESNER* ANSWERS THE FOREIGN CORPORATE LIABILITY ISSUE

The issue of whether corporations may be sued under the ATS came up squarely in *Jesner v. Arab Bank, PLC*.⁶¹ The Court's holding was splintered and somewhat perplexing. It was, to a large extent,

57. *Id.* at 108.

58. Rich Samp, *U.S. Supreme Court Continues to Nibble Away at Alien Tort Statute's Sweep*, FORBES (Apr. 25, 2018), <https://www.forbes.com/sites/wlf/2018/04/25/u-s-supreme-court-continues-to-nibble-away-at-alien-tort-statutes-sweep/#364e6f9dd9fe> [https://perma.cc/TJ8N-R9KP].

59. Van Schaack, *supra* note 37, at 359–60.

60. See BLACKSTONE, *supra* note 11, at *66–68.

61. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

a conversation between Justice Kennedy, who wrote the opinion, and Justice Sotomayor, who filed a strong dissent joined by Justices Breyer, Ginsburg, and Kagan. At minimum, the case stands for the proposition that foreign corporations may not be sued under the ATS in U.S. courts. While the case did not answer the question of whether *American* companies may be subject to such suit, it does show that suit may be brought for conduct that occurred on U.S. soil.

The *Jesner* plaintiffs, who were not U.S. citizens, alleged that they, or the persons on whose behalf they asserted claims, were injured or killed by terrorist acts committed in Israel, the West Bank, and Gaza, and that those acts were, in part, caused or facilitated by respondent Arab Bank, PLC, a Jordanian financial institution with a branch in New York.⁶² The victims sought to impose liability on the bank for the conduct of its human agents, including several high-ranking officials.⁶³ The victims claimed that Arab Bank had used its New York branch as a clearinghouse to finance terrorist attacks and benefit the families of foreign suicide bombers.⁶⁴ The Court assumed that individuals inflicting death or injury via terrorism committed crimes in violation of well-settled, fundamental precepts of international human rights law.⁶⁵ It also assumed that individuals who knowingly and purposefully facilitated banking transactions in order to aid or abet the alleged terrorist acts would themselves be committing crimes under international law.⁶⁶ Thus, the substantive aspect of ATS-based claims would be satisfied.

Although *Kiobel*'s "touch and concern" requirement was satisfied by Arab Bank's New York branch's active involvement in the case, the district court dismissed the suit for procedural reasons based on Second Circuit precedent holding that corporations may *never* be sued under the ATS.⁶⁷ The Second Circuit Court of Appeals affirmed this dismissal.⁶⁸ However, on appeal to the Supreme Court, the Court splintered on the issue of corporate liability. Justice Kennedy wrote a somewhat vague opinion, parts of which

62. *Id.* at 1388.

63. *Id.*

64. *Id.* at 1388, 1394.

65. *Id.* at 1394.

66. *Id.*

67. *Id.* at 1389.

68. *In re Arab Bank, PLC, Alien Tort Statute Litigation*, 808 F.3d 144 (2d Cir. 2015).

might be read to have entirely foreclosed corporate liability under the ATS, but Kennedy was only joined in those parts by Chief Justice Roberts and Justice Thomas.⁶⁹ Justices Alito and Gorsuch joined only the parts of the opinion that were limited to *foreign* corporations.⁷⁰ Justice Sotomayor dissented, with Justices Breyer, Ginsburg, and Kagan joining. Justice Sotomayor would have explicitly permitted ATS suits against *both* U.S.-based and foreign corporations.⁷¹ Thus, only three justices, two of whom are still on the Court, found corporate liability to be entirely foreclosed regardless of whether the corporation is American. Their arguments were as follows:

First, Chief Justice Roberts and Justices Kennedy and Thomas noted that under *Sosa*, corporate liability is “a question of international law” and the initial threshold question for suits under the ATS in American courts is whether a plaintiff can demonstrate that the alleged acts violate “a norm that is specific, universal, and obligatory.”⁷² The Court noted that it is difficult to satisfy this “high bar.”⁷³

Second, they found that after *Kiobel*, the key question remaining is whether a defendant corporation and the alleged actions of its employees had sufficient connections to the United States (the “touch and concern” test).⁷⁴

Third, the three justices noted that before a controlling norm can be identified and applied under international law, it must be determined whether allowing a case to proceed under the ATS in American courts “is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed.”⁷⁵

Finally, they determined that “the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”⁷⁶

69. *Jesner*, 138 S. Ct. at 1393.

70. *Id.*

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

72. *Id.* at 1400 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

73. *Id.*

74. *Id.* at 1398 (quoting *Kiobel v. Royal Dutch Petroleum, Co.*, 569 U.S. 108, 124 (2013)).

75. *Id.* at 1399 (quoting *Sosa*, 542 U.S. at 732–33).

76. *Id.* (quoting *Sosa*, 542 U.S. at 727).

In analyzing whether suit may lie under the ATS against corporations in American courts, Justice Kennedy's opinion unpersuasively analogized to irrelevant bodies of international law; jurisdictional provisions governing international criminal tribunals; a treaty on the financing of terrorism; and the Torture Victim Protection Act. The irrelevance and inappositeness of these bodies of law will be analyzed briefly below. His opinion further highlighted that the "political question doctrine" and foreign relations concerns are still key to ATS-based lawsuits in U.S. courts. First and foremost, however, the Court was concerned about American corporations being sued in foreign courts if foreign corporations could be hauled into U.S. courts. The Court thus closed the door to the latter, as this Article will analyze next.

A. Corporate Liability in General

The only parts of Justice Kennedy's opinion that commanded a majority of the Justices were those that invoked separation of powers concerns regarding the creation of new causes of action and concerns about foreign relations. Significantly, each of these parts was expressly limited to foreign corporations. The Court explicitly held that "foreign corporations may not be defendants in suits brought under the ATS."⁷⁷

Justice Gorsuch's fear of certain "practical consequences"⁷⁸ that would occur if the Court were to hold that *foreign* corporations may be sued in federal courts under the ATS, centers around whether American companies would be subject to similar suits abroad. Such a holding, said the Court:

[W]ould imply that other nations, also applying the law of nations, could hale our [corporations] into their courts for alleged violations of the law of nations. This judicially mandated doctrine, in turn, could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts, thereby hindering global investment in developing economies, where it is most needed.⁷⁹

This language garnered a vote from five of the nine Justices on the

77. *Id.* at 1407.

78. *Id.* at 1392 (Gorsuch, J., concurring) (quoting *Sosa*, 542 U.S. at 732–33).

79. *Id.* at 1405 (internal citation and quotation marks omitted).

Court. Thus, *Jesner* precluded suit against foreign corporations in American federal courts. Importantly, however, the *Jesner* opinion does not preclude suit against *American* corporations under the ATS.

Although the current Court may dislike the possibility of U.S. companies being sued abroad for alleged international law violations committed or with effects abroad, this concern is largely misplaced. American judges, lawyers, and other legal experts are concerned that American corporations facing suit in non-domestic fora may not be treated fairly. However, it is a fallacy to presume that simply because a court is not American it cannot be fair to an American defendant. Courts around the world strive to obtain justice. The argument that American corporations will not be met with justice overseas is largely unfounded, if not outright xenophobic. It is implausible that a majority of foreign courts would find American companies liable without good reason. And *if* American corporations were found liable for violations of international law, such as human rights violations allegedly committed by their “employees and subsidiaries around the world,”⁸⁰ the companies *should* be subject to liability if warranted. The Supreme Court’s attitude towards American corporate liability overseas seems overly protective of American corporations and disrespectful towards non-American courts. The Court indirectly seems to elevate the ability of corporations to invest in developing economies over ensuring corporate accountability to legal systems abroad. Taken to the extreme, that attitude could be read to indicate that monetary concerns outweigh human rights and other egregious international law violations. This simply cannot be what the Court meant. Thus, it must be the case that American corporations can be sued for violations of international norms under the ATS at least in American courts but not in foreign courts.

Justice Kennedy looked for “legislative guidance” before exercising what he saw as “innovative authority over substantive law.”⁸¹ The ATS *does* give legislative guidance in exercising judicial authority. By its very text, the Act allows for suit in federal courts for “any civil action” in relation to torts “committed in violation of

80. *Id.* at 1405.

81. *Id.* at 1403 (quoting *Sosa*, 542 U.S. at 726).

the law of nations or a treaty of the United States.”⁸² A fair reading of that language does not preclude courts from hearing cases whether created by convention or customary law; quite the opposite. The ATS calls for the American judiciary to exercise such authority in cases involving violations of international law. As Justice Sotomayor pointed out in her dissent, “[w]here Congress uses a term of art like tort, ‘it presumably knows and adopts the cluster of ideas that were attached to [the] borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.’”⁸³ Congress has had ample opportunity to revise the ATS for, quite literally, hundreds of years, yet has chosen not to do so. Thus, the ATS must be taken to stand for the proposition that corporations *can* be sued under it. In fact, “[c]orporations have long been held liable in tort under the federal common law. [I]’At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety.”⁸⁴ The presumption, then, must be that in providing for “tort” liability, the ATS also provides for corporate liability.

In her dissent, Justice Sotomayor noted that although some norms of human rights law distinguish between state and non-state actors, none appear to distinguish between natural and juridical persons.⁸⁵ Thus, corporations can, under relevant substantive law, be sued even without state co-defendants. Consequently, as the law currently stands, there simply is no binding U.S. law proscribing civil liability for acts committed by domestic corporations in violation of the ATS.⁸⁶

82. 28 U.S.C. § 1350 (1948).

83. See *Jesner*, 138 S. Ct. at 1425 (Sotomayor, J., dissenting) (quoting *Morissette v. United States*, 342 U.S. 246, 264 (1952)) (alteration in original).

84. *Id.* (quoting *Philadelphia, W. & B.R. Co. v. Quigley*, 62 U.S. 202, 210 (1859)) (internal citation omitted).

85. *Id.* at 1422 n.2, 1423.

86. *Id.* at 1425.

B. Inapposite References to Criminal Tribunals

Justice Kennedy referred to several bodies of law that are not relevant to ATS suits, making his opinion unpersuasive, and perhaps outright wrong. Indeed, a Supreme Court holding such as this that relies on inapposite law, produces only splintered opinions from which even the authoring Justice backtracks in part, and overly emphasizes concerns that counter the intent of the original ATS drafters, should be overturned.

For example, Justice Kennedy pointed to the fact that criminal tribunals such as those at Nuremberg, as well as the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, limit their jurisdiction to “natural persons” only.⁸⁷ This, said the Court, “counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law.”⁸⁸ This reasoning confuses the limits on the jurisdiction of specific individual criminal tribunals with the broader substantive content of international law norms in general.⁸⁹ First, it is typical for the instruments establishing criminal tribunals to limit their jurisdiction to particular offenses (genocide, for example), to offences occurring in certain geographical areas (such as Rwanda or the former Yugoslavia), and to particular defendants (for example, specific individuals).⁹⁰ Such deliberately narrow jurisdictional limitations do not apply to the much broader field of human rights law in general.⁹¹ Second, criminal tribunals have exercised enterprise liability starting with the Nuremberg Tribunal which declared certain Nazi organizations to be criminal during trials of individuals.⁹² The criminal tribunals for the former Yugoslavia, Rwanda, Sierra Leone, East Timor, and Cambodia have also

87. *Id.* at 1400–01.

88. *Id.* at 1401.

89. William S. Dodge, *Corporate Liability Under the US Alien Tort Statute: A Comment on Jesner v. Arab Bank, BUS. & HUM. RTS. J.*, Oct. 19, 2018, at 3.

90. *Id.*

91. Similarly, “[t]he provision in the Statute of the International Criminal Tribunal for the former Yugoslavia limiting its jurisdiction to ‘natural persons’ does not show that the prohibition against genocide is inapplicable to corporations any more than the provision limiting jurisdiction to violations ‘committed in the territory of the former Yugoslavia since 1991’ shows that the prohibition against genocide is inapplicable at other times and in other places.” *Id.* (citing Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 6, S.C. Res. 827 (May 25, 1993)).

92. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 501 (1992).

indicated that they consider legal persons, such as paramilitary organizations and business entities, to be capable of violating international law, albeit only in dicta.⁹³ Perhaps most importantly, although the International Criminal Court (“ICC”) only has jurisdiction over natural persons, this is not because of any legal notions precluding corporate liability.⁹⁴ It is only because the negotiations leading to the formation of the ICC did not include any *civil* liability; the purpose was only to create a *criminal* court which would mainly impose prison sentences as the primary form of punishment.⁹⁵ The process that led to the formation of the ICC and similar international criminal tribunals never considered international civil law liability against corporations.⁹⁶ Comparisons to international criminal tribunals and criminal law in general are thus inapposite in the ATS context. Criminal law is fundamentally different from civil tort law.⁹⁷

In Justice Sotomayor’s dissent, which was joined by three other Justices, she described the proper relationship between norms of international human rights law and the mechanisms created for their enforcement: “Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems.”⁹⁸ Justice Sotomayor pointed out that relying on limits applicable to international criminal tribunals “confuses the substance of international law with how it has been enforced in particular contexts.”⁹⁹ Indeed, because Justice Sotomayor’s discussion of corporate liability under customary international law won four votes while Justice Kennedy’s won just three, and because Justice Kennedy seemed to back away from his own observations on this issue, noting that “the Court need not resolve . . . whether international law imposes liability on corporations,”¹⁰⁰ the Court’s

93. Van Schaack, *supra* note 37, at 364 n.30.

94. *Id.* at 6.

95. *Id.*

96. *Id.*

97. Slawotsky, *supra* note 3, at 30.

98. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1420 (2018) (Sotomayor, J., dissenting).

99. *Id.* at 1422 n.2, 1423.

100. *Id.* at 1402.

mistaken approach to international *criminal* law in the corporate civil liability context is nothing more than dictum.¹⁰¹

Civil law gives much wider latitude than criminal provisions.¹⁰² For one, it applies indiscriminately to both natural and legal persons whereas criminal law often applies only to natural persons.¹⁰³ It also operates on lower standards of proof than criminal liability and offers an independent source of *financial* redress for victims where criminal law is mainly concerned with the moral and ethical wrongdoings.¹⁰⁴ These reasons all warrant in favor of civil liability against corporations which, modernly, are just as likely to commit torts as individuals. In short, because the ATS is, by its very wording, geared towards civil acts, criminal law concerns are largely irrelevant in this context.

C. Inapposite Terrorism Comparison

The Court also analyzed the issue of potential corporate jurisdiction by, first, analogizing to the Convention for the Suppression of the Financing of Terrorism (the “Convention”).¹⁰⁵ This law is inapposite in the ATS context as the ATS features separate jurisdictional and substantive requirements. Justice Kennedy’s reasoning is in error. For example, Justice Kennedy stated that nations “may fulfill their obligations under the Convention by adopting detailed regulatory regimes governing financial institutions” and noted that if that was done, the “Convention neither requires nor authorizes courts, without congressional authorization, to displace those detailed regulatory regimes by allowing common-law actions under the ATS. And nothing in the Convention’s text requires signatories to hold corporations liable in common-law tort actions raising claims under international law.”¹⁰⁶ This is a confusing, if not outright misleading, reference. The Convention itself, in Article 5, states that “[e]ach State Party . . . shall take the necessary measures to enable a *legal entity* located in its territory or organized under its laws to be *held liable* when a person responsible for the management

101. Dodge, *supra* note 89, at 3.

102. Slawotsky, *supra* note 3, at 38.

103. *Id.*

104. *Id.* at 38–39.

105. *Jesner*, 138 S. Ct. at 1401.

106. *Id.*

or control of that legal entity has, in that capacity, committed an offence” in violation of the Convention.¹⁰⁷ In Article 18, the Convention further requires member states to prohibit the illegal “activities of persons *and organizations* that knowingly encourage, instigate, organize or engage in the commission” of prohibited activities.¹⁰⁸ The Convention also provides that liability may be “criminal, civil, or administrative,” so long as the penalties, which can include monetary sanctions, are “effective, proportionate and dissuasive.”¹⁰⁹

More persuasively, Justice Sotomayor’s dissent argued that Justice Kennedy’s reference:

... misses the point. The significance of the Convention is that the international community agreed that financing terrorism is unacceptable conduct and that such conduct violates the Convention when undertaken by corporations. That the Convention leaves up to each state party how to impose liability on corporations, *e.g.*, via erecting a regulatory regime, providing for tort actions, or imposing criminal sanctions, is unremarkable, and simply reflects that international law sets out standards of conduct and leaves it to individual states to determine how best to enforce those standards.¹¹⁰

There is nothing in the Convention that prevents U.S. courts from holding corporations—domestic or foreign—liable for violations of *other* parts of international law, such as human rights law, under the ATS. If anything, the Convention can be read to *encourage* civil liability where organizations have knowingly participated in activities that are proscribed by international law such as, in the case of the Convention, a treaty. The Convention only provides that nations “may” fulfill their obligations by adopting detailed regulatory regimes. It does not state that nations via their judicial systems may *not* allow for corporations to be sued for civil violations where such detailed regulatory regimes do not exist. Doing so is simply another long-established method of seeking redress in cases where civil action is more effective than awaiting regulatory and nation-state action that may or may not be forthcoming.

107. International Convention for the Suppression of the Financing of Terrorism, art. 5, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, 2178 U.N.T.S. 229 (emphasis added).

108. *Id.* at art. 18 (emphasis added).

109. *Id.* at art. 5.

110. *Jesner*, 138 S. Ct. at 1424–25.

D. Irrelevance of the Torture Victim Protection Act

The Court also looked to the Torture Victim Protection Act (“TVPA”) for guidance on potential corporate liability. Justice Kennedy noted that the key feature of the TVPA “is that it limits liability to ‘individuals,’ which, the Court has held, unambiguously limits liability to natural persons. Congress’ decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case.”¹¹¹ This argument does not follow. The question of “individual” liability under one particular narrow Congressional provision does not dispose of the broader issue of corporate liability under the ATS, which by its own language is much broader. As Justice Sotomayor pointed out, the question is not “whether there exists a specific, universal, and obligatory norm of corporate liability under international law, the relevant inquiry in response to the question presented [in *Jesner*] is whether there is any reason—under either international law or our domestic law—to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS. . . . [I]nternational law provides no such reason.”¹¹²

E. The Political Question and Foreign Policy Concerns

Comparable to several lower courts in recent climate change cases,¹¹³ the *Jesner* Court also pointed to the political question doctrine and foreign affairs concerns when considering “the appropriate boundaries of judge-made causes of action.”¹¹⁴ This is even more important, stated Justice Kennedy, in the realm of international law, where “the general practice has been to look for legislative guidance before exercising innovative authority over

111. *Id.* at 1404 (citing *Mohamad v. Palestinian Authority*, 556 U.S. 448, 453–56 (2012)).

112. *Id.* at 1425 (Sotomayor, J., dissenting).

113. *See, e.g.*, *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (New York’s action against multinational companies seeking to recover for injuries due to rising sea levels allegedly caused by greenhouse gases from the fuels sold by these companies was barred by the presumption against extraterritoriality and foreign policy consequences.); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (Oakland’s claim for public nuisance against fossil fuel producers for the anticipated raise in sea level as a result of the burning of fuel was dismissed under the political question doctrine; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (City action against several greenhouse gas emission producers for public nuisance based on land erosion and displacement by the Clean Air Act and agency action authorized thereunder.)

114. *Jesner*, 138 S. Ct. at 1403.

substantive law.”¹¹⁵ Judicial caution “guards against our courts triggering . . . serious foreign policy consequences, and instead defers such decisions . . . to the political branches” who are in the “better position” to address such concerns.¹¹⁶ Urging “restraint” in applying the ATS to corporations, Justice Gorsuch further contended that the “practical consequences” that might follow “a decision to create a new ATS cause of action would likely involve questions of foreign affairs and national security—matters implicating the expertise and authority not of the Judiciary but of the political branches.”¹¹⁷ Thus, “[j]udicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.”¹¹⁸

As mentioned above, however, this language refers to foreign defendants only. Elsewhere, Justice Kennedy swept more broadly, noting that the Court’s caution about “judicially created private rights of action” extends to “whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations.”¹¹⁹ Such principles of judicial restraint apply with equal force regardless of corporate nationality.¹²⁰ The political question hurdle could prove difficult to bypass in future suits against corporations regarding international issues such as climate change.

On the other hand, neither the underlying events in *Jesner* nor the potential human rights violations stemming from climate change-related issues would give rise to “new” or “innovative” causes of action under the ATS. Since 1789, the Act has enabled courts to hear cases where private rights have been violated in ways that violate notions of international law as developed over time. As Justice Sotomayor argued, “modern ATS cases . . . are not being litigated against a blank slate.”¹²¹ Indeed, many ATS cases have been litigated over the years, especially recently. For example, *Sosa* specifically held that Congress authorized federal courts to

115. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004)).

116. *Id.* at 1390 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013)).

117. *Id.* at 1407.

118. *Id.* at 1408.

119. *Id.* at 1402–03.

120. Peter B. Rutledge & Michael Baker, *Alien Tort Cases Will Survive Supreme Court Trim, Write Commentators*, POPULAR MEDIA, 2018, at 290.

121. *Jesner*, 138 S. Ct. at 1427 (Sotomayor, J., dissenting).

recognize private causes of action for certain torts in violation of the law of nations so long as the underlying norms have no “less definite content and acceptance among civilized nations than the historical paradigms when § 1350 was enacted.”¹²² Many modern human rights and environmental law claims have sufficiently definite parameters under both domestic and international law to meet that standard.

Even if certain claims were seen to be innovative, this would not preclude courts from hearing them. Justice Sotomayor asserted, “it is natural to conclude that Congress intended the district courts to consider new claims under the law of nations as that law and our Nation’s treaty obligations continued to develop.”¹²³ Had Congress wanted to limit the ATS to only the three original Blackstone offenses, it could easily have done so. It did not. “Instead, it granted the federal courts jurisdiction over claims based on the law of nations, a body of law that Congress did not understand to be static.”¹²⁴ For example, as early as 1822 the Court stated that an understanding of what “the law of nations is . . . may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow . . . that because a principle was not deemed settled by the consent or practice of nations at one time, that at no subsequent period can that principle be considered as incorporated into the public code of nations.”¹²⁵ The ATS cannot reasonably be read to exclude definite, although expanded, civil causes of action that arise in an international context. No Supreme Court decision has held so; it is quite the opposite. Both the Supreme Court and lower federal courts have applied the ATS to many more instances of tortious conduct in international contexts than simply the three original offenses. Even *Jesner* itself does not stand for the proposition that no newer offenses may be heard under the ATS.

Justice Kennedy further noted in *Jesner* that “[o]ther considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent instructions from Congress to do so.”¹²⁶ One

122. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

123. *Jesner*, 138 S. Ct. at 1427 (Sotomayor, J., dissenting).

124. *Id.* (internal quotation marks omitted).

125. *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822).

126. *Jesner*, 138 S. Ct. at 1405.

such concern was that “[i]t has not been shown that corporate liability under the ATS is essential to serve the goals of the statute. As to the question of adequate remedies, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable . . . [a]nd plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS.”¹²⁷ However, the possibility that *other* venues for redress may exist in addition to the ATS does not mean that the ATS cannot be used to obtain such redress. The Supreme Court is known to avoid issues of law that it does not have to address in any given case. But where issues are appropriately framed, narrowly focused, and have not been resolved by lower courts, the Supreme Court must address them. This is still the case with corporate liability under the ATS for American corporations.

Similarly, even though it is true that individual corporate employees may be responsible for violations of international law, it is often neither practical nor desirable to bring suit against individual actors, especially in cases with greater monetary consequences. In such cases, individual tortfeasors may either be entirely judgment-proof or not be able to provide an appropriate financial remedy to offset what may well be extremely costly consequences of violations of international law, such as those in the context of climate change. Again, Congress has precisely provided for federal courts to hear lawsuits in cases where civil liability is highly relevant, although not necessarily the only or speediest way of resolving matters that are largely left unaddressed by other entities such as legislatures.

Technically, *Jesner* only stands for the proposition that foreign corporations may not be sued in federal courts under the ATS. Conversely, United States corporations—but not solely their foreign subsidiaries—may still be subject to suit under the ATS, except for in the Second Circuit which precluded such suit against any corporation in *Kiobel I*.¹²⁸ Even at that time, Judge Sack seemed to think that the Second Circuit was “swim[ming] alone against the tide” on the issue of corporate liability under the ATS.¹²⁹ Crucially, the ATS does not state that any class of defendants *cannot* be sued. It only states which class of plaintiffs *can* sue under the Act. These

127. *Id.*

128. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d. Cir. 2010).

129. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 151 (2d Cir. 2015).

may be individuals or, until the Court rules otherwise, domestic corporations.

ATS cases are, at bottom, tort cases. Valid arguments can be and are made that state and federal common law should govern the tort liability of corporations and other legal entities absent compelling reasons for departure.¹³⁰ There are no compelling reasons why, for example, U.S. fossil fuel production and distribution corporations should not be held civilly liable for the global climate change problems to which they contribute. These contributions may rightly be considered violations of customary international law and human rights, as analyzed below. The ATS was and is meant to impose liability for conduct violating international law in the United States where other methods of redress at the supranational stage are either not forthcoming or too complex to be realistic for private tort victims. This is the case with climate change.

IV. POST-*JESNER* CASES

After *Jesner*, the Ninth Circuit Court of Appeals held in *Doe v. Nestle* that the ATS is not extraterritorial.¹³¹ Of course, this makes sense from even a textual point of view, as the Act gives jurisdiction to American courts for a particular class of plaintiffs and for particular cases, but notably, it does not describe or proscribe certain conduct. Concerns about American federal judges potentially exercising any type of moral authority over non-American defendants is thus misplaced. Instead, the Ninth Circuit Court of Appeals held that courts must ask whether, in a given case, there is “any domestic conduct relevant to plaintiffs’ claims under the ATS.”¹³² “[I]f the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application *even if other conduct occurred abroad.*”¹³³ Conduct that is alleged to be either “a direct violation of the law of nations or . . . conduct that constitutes aiding and

130. Van Schaack, *supra* note 37, at 362–63.

131. *Doe v. Nestle*, 906 F.3d 1120, 1125 (9th Cir. 2018).

132. *Id.* (quoting *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 195 (5th Cir. 2017)).

133. *Id.* at 1125–26 (quoting *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016)) (emphasis in original).

abetting another's violation of the law of nations" can thus still be heard under the ATS,¹³⁴ even if the plaintiff is a corporation.

The *Doe v. Nestle* court cited several cases that provide examples of conduct that is sufficiently "specific and domestic" to be heard in an American court even though some of the conduct happened abroad.¹³⁵ For example, in *Mastafa v. Chevron Corp.*, the Second Circuit held that "Chevron's [Iraqi] oil purchases, financing of [Iraqi] oil purchases, and delivery of oil to another U.S. company all within the United States, as well as the use of a New York escrow account and New York-based 'financing arrangements' to systematically enable illicit payments to the Saddam Hussein regime that allegedly facilitated that regime's violations of the law of nations," constituted "specific domestic conduct."¹³⁶

In *Licci by Licci v. Lebanese Canadian Bank, SAL*, the Second Circuit held that a Canadian bank's "provision of wire transfers between Hezbollah accounts' through a United States bank constituted domestic conduct which rebutted the presumption against extraterritoriality."¹³⁷ The Canadian bank had made "numerous New York-based payments" and "financing arrangements conducted exclusively through a New York bank account."¹³⁸

In *Nestle* itself, the court found that overseas slave labor which defendants perpetuated from headquarters in the United States was both sufficiently "specific and domestic."¹³⁹ However, the court reversed and remanded the case allowing plaintiffs to amend their complaint to specify "whether the [] conduct that took place in the United States is attributable to the domestic corporations," warning that "discussing defendants as if they are a single bloc" is "a problematic approach that plaintiffs would do well to avoid."¹⁴⁰

In short, no current case stands for the proposition that American corporate defendants may not be held liable for conduct

134. *Id.* at 1125 (quoting *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014)) (emphasis removed).

135. *Id.* at 1126 (quoting *Mastafa*, 770 F.3d at 191).

136. *Id.* at 1126 (quoting *Mastafa*, 770 F.3d at 195).

137. *Id.* (quoting *Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 214–15, 219 (2d Cir. 2016)).

138. *Id.* (quoting *Licci by Licci*, 834 F.3d at 217) (internal quotation marks omitted).

139. *Id.* (quoting *Mastafa*, 770 F.3d at 191).

140. *Id.* at 1126–27.

that sufficiently touches and concerns the United States even though the effects of such conduct are also experienced abroad.

V. LITIGATION AGAINST UNITED STATES CORPORATIONS UNDER THE ATS FOR CLIMATE CHANGE-RELATED DAMAGES

Aliens attempting to sue United States corporations for injuries suffered because of climate change-related activities attributable to those corporations will have to run the gamut of legal hurdles. But this is true with every major lawsuit, and this effort may be well worth it to generate action against climate change. This section presents arguments and considerations relevant to an attempt to clear the main obstacles standing in the way of climate-based litigation.

A. ATS and Human Rights Violations

In framing a potential lawsuit against U.S. corporations, plaintiffs may be able to use existing human rights law as the underlying substantive law on which to base an ATS suit. Human rights violations already form the majority of suits against corporations under modern ATS application. Examples of such claims include child labor abuses on cocoa plantations in the Ivory Coast; pharmaceutical testing on children without informed consent in Nigeria; disclosure of a political dissident's e-mail records in China; and the provision of vehicles and spare parts to apartheid South Africa.¹⁴¹ In the United States, *Kiobel* addressed human rights claims that involved environmental destruction in Nigeria.¹⁴²

Corporations may, and should, be held civilly responsible for the actions taken by their foreign subsidiaries or for overseas effects stemming from decisions made in domestically domiciled and domestically operating corporations. Supporting this contention, one U.N. report notes that:

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to

141. Slawotsky, *supra* note 3, at 27–28.

142. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

prevent abuse abroad by business enterprises within their jurisdiction.¹⁴³

The ATS provides for just such jurisdiction for federal courts. Corporate climate-changing activities are also not “extraterritorial,” as American companies may be held liable for activities and decisions taken on U.S. soil. From *The Paquete Habana*¹⁴⁴ to *Kiobel* and the Restatement (Third) of Foreign Relations Law of the United States,¹⁴⁵ courts and legal experts have noted that “a state has jurisdiction to both define *and* prescribe punishment for certain offenses recognized by the community of nations as being of universal concern.”¹⁴⁶ Nothing in international law states just *how* steps to prevent human rights violations committed by a corporation may be taken. Accordingly, this could be via legislative, executive, or judicial action. The latter is taking place to an increasing extent both domestically and abroad. Under *Jesner*, suit may still lie against American corporations that have contributed significantly to climate change and continue do to so, despite decades-old knowledge of the dangers to humans and our natural environment.¹⁴⁷

Notably, modern human rights-related law was the legal basis of all recent ATS-based cases, from *Filartiga* to *Nestle*. The ATS simply requires customary international law—the modern-day phrase for what was previously known as the “law of nations”—to form the substantive cause of action. Since human rights law is an established body of customary international law, the potential argument that the United States has not ratified otherwise relevant human rights treaties or acceded to the jurisdiction of non-American human rights tribunals is thus warrantless in this context. Indeed, the ATS creates both jurisdictional and substantive bases for suit in American courts so long as climate change can be linked to established human rights—and it can.

143. Report of the Special Representative of the Secretary-General (John Ruggie) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, at 7, U.N. Doc. A/HRC/17/31 (Mar. 21, 2001).

144. This landmark case from 1900 stands for the proposition that “[i]nternational law is part of [the] law” of the United States and must be applied absent treaties or domestic law calling for the contrary. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

145. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (AM. LAW INST. 1987).

146. *Id.*

147. See *supra* note 2 and accompanying text.

The relationship between human rights and climate change has received increasing attention from and recognition by the U.N. Human Rights Council, U.N. “special procedures,” state governments, international bodies, including the Conference of the Parties to the U.N. Framework Convention on Climate Change, and international law experts.¹⁴⁸ The first intergovernmental statement to explicitly recognize that climate change has “clear and immediate implications for human rights, including the right to life,” was the 2007 Malé Declaration.¹⁴⁹ Since then, numerous official statements have been made documenting the connection between human rights and climate change. For example, twenty-seven special rapporteurs and other independent experts issued a joint letter in 2014 on the implications of climate change for human rights.¹⁵⁰ In part, this letter stated that “a safe, clean, healthy and sustainable environment is indispensable to the full enjoyment of human rights. . . . *There can no longer be any doubt that climate change interferes with the enjoyment of human rights recogni[z]ed and protected by international law.*”¹⁵¹ In 2014, all of the U.N. Human Rights Special Procedures Mandate Holders issued a joint statement on climate change and human rights. This statement noted that “climate change . . . poses great risks and threats to the environment, human health, accessibility, and inclusion, access to water, sanitation and food, security, and economic and social development. These impacts . . . interfere with the effective enjoyment of human rights.”¹⁵²

A 2019 report of the Special Rapporteur to the United Nations Human Rights Council stated that:

148. See David R. Boyd, Special Rapporteur on Human Rights and the Environment, Statement on the Human Rights Obligations Related to Climate Change, with a Particular Focus on the Right to Life (2018), <https://www.ohchr.org/Documents/Issues/Environment/FriendsIrishEnvironment25Oct2018.pdf> [<https://perma.cc/TE6Q-WG3X>].

149. *Id.* at 2.

150. *Id.* at 3.

151. *Id.* (quoting Letter from Special Procedures Mandate-Holders of the Human Rights Council, to the State Parties to the UN Framework Convention on Climate Change on the Occasion of the Meeting of the Ad Hoc Working Grp. on the Durban Platform for Enhanced Action in Bonn (Oct. 17, 2014), https://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf [<https://perma.cc/4CDS-EGMC>]) (emphasis added).

152. *Id.* (quoting *Statement of the United Nations Special Procedures Mandate Holders on the Occasion of the Human Rights Day Geneva*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER (Dec. 10, 2014), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E> [<https://perma.cc/Q8BB-2UL7>]).

[M]ore than 100 States ha[ve] recognized some form of a right to a healthy environment in, inter alia, international agreements, their constitutions, legislation or policies. . . . 124 States are parties to legally binding international treaties that explicitly include the right to a healthy environment. . . . [A]t least 155 States are legally obligated . . . to respect, protect, and fulfil the right to a healthy environment.¹⁵³

Although the United Nations has not yet provided global, intergovernmental recognition of the right to a healthy and sustainable environment, it is clear that the right exists at regional and national levels.¹⁵⁴

The human rights affected by climate change are, among potential others:

[T]he right to life, right to liberty and security, right to the integrity of the person, right to respect for family and private life and home, right to property, the rights of the child, the rights of the elderly, equality between women and men, environmental protection; and/or the unenumerated constitutional right to a reasonable environment; and/or will breach the unenumerated constitutional commitment to intergenerational solidarity and/or the unenumerated constitutional obligation to vigilantly and effectively protect the environment.¹⁵⁵

“In particular, climate change has a disproportionate effect on many disadvantaged, marginalized, excluded, and vulnerable individuals and groups, including those whose ways of life are inextricably linked to the environment.”¹⁵⁶

The right to life is probably the most significant human right affected by climate change. The Intergovernmental Panel on Climate Change’s 2014 Assessment Report projects, with high confidence, an increase in death and disease from heat waves, floods, storms, fires and droughts.¹⁵⁷ In 2018, the United Nations

153. Rep. of the Special Rapporteur of the Human Rights Council on the Issue of Human Rights Obligations Relating to the Enjoyment to a Safe, Clean, Healthy and Sustainable Environment, ¶¶ 6, 11, 16, U.N. DOC. A/HRC/40/55 (2019).

154. *Id.* ¶ 16.

155. Boyd, *supra* note 148, at 2.

156. *Id.* at 3–4.

157. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT 8 (Rajendra K. Pachauri & Leo Meyer eds., 2014), https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf [<https://perma.cc/5DEC-XQR9>].

Human Rights Committee noted that "... climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."¹⁵⁸

"Climate change will also affect the right to life through an increase in hunger and malnutrition and related disorders impacting [] child growth and development, cardiovascular disease and respiratory morbidity and mortality."¹⁵⁹ Climate change already has devastating effects on people and their enjoyment of the right to life, particularly in the developing world. "For example, an estimated 262 million people were affected by climate disasters annually from 2000 to 2004."¹⁶⁰ "Tropical cyclone hazards, affecting approximately 120 million people annually, killed an estimated 250,000 people from 1980 to 2000."¹⁶¹ Approximately 90% of all people "live in places where the air quality fails to meet the guidelines established by WHO."¹⁶²

As a starting point, plaintiffs may bring human rights lawsuits against both nation states and individual actors. Some lawsuits would require state action whereas others would not. International law is typically only violated when a party acts in cooperation with or under the authority of a foreign state.¹⁶³ However, "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."¹⁶⁴

Oft-recognized violations of international law that may give rise to an ATS claim when state action is involved include arbitrary detention, forced disappearance, arbitrary denationalization, torture, extrajudicial killing, racial discrimination, nonconsensual medical experimentation, and cruel, inhumane or degrading

158. Rep. of the Special Rapporteur of the Human Rights Council, *supra* note 153, ¶ 51.

159. Boyd, *supra* note 148, at 5.

160. *Id.*

161. *Id.*

162. Rep. of the Special Rapporteur of the Human Rights Council, *supra* note 153, ¶ 54.

163. See PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY AND ANALYSIS (2009).

164. Argon v. Che Ku, 277 F. Supp. 3d 1055, 1063 (D. Minn. 2017) (citing Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (filed under both the ATS and Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991, and settled). See also Rutledge & Baker, *supra* note 120.

treatment.¹⁶⁵ The latter generally includes acts that inflict mental or physical suffering, anguish, humiliation, fear and debasement where these actions do not rise to the level of torture or do not have the same purpose as torture.¹⁶⁶ Could one argue that climate change leads to a cruel, inhumane or degrading treatment of people around the world? The effects of climate change clearly lead to both physical and mental suffering, fear, and anguish for affected people. However, it might be more difficult to prove state action in possible suits against energy corporations in the United States. Then again, doing so might be possible if regulatory *inaction* is seen as authorizing the relevant corporations to continue their damaging activities on U.S. soil. An argument resembling just that was made in the *Trail Smelter* arbitration case and has since been incorporated into principles of international environmental law in the form of the no-harm principle.¹⁶⁷ A finding in favor of such an argument would require judicial good will towards climate change litigation, which is not yet broadly present in our federal judicial system. It may also require the addition of government defendants to the lawsuit, which would present its own hurdles.

Suits requiring no state action may then be more successful. Such suits traditionally address genocide, war crimes, slavery, and crimes against humanity.¹⁶⁸ Crimes against humanity involve a broad range of acts “when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.”¹⁶⁹ However, since it undoubtedly would require even more judicial progressivity and risk-willingness to group climate change-related activities with traditional crimes against humanity at the legal scale (although some specialists and popular media have, for good reason, started doing so),¹⁷⁰ other

165. Gerard Morales & Kate Hackett, *Human Rights Litigation Under the Alien Tort Statute*, PRAC. LITIG., May 2010, at 39, 41–42.

166. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 n.5 (AM. LAW INST. 1987).

167. See *Trail Smelter Arbitral Decision*, 35 AM. J. INT’L L. 684, 716 (1941).

168. Morales & Hackett, *supra* note 165, at 40.

169. Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 93.

170. See, e.g., John Sutter, *Planetary emergency: After 30 Years, Leaders Are Still Fighting About the Basic Truths of Climate Science*, CNN (Dec. 16, 2018, 3:40 PM), <https://www.cnn.com/2018/12/16/health/sutter-cop24-climate-talks/index.html> [<https://perma.cc/JAP9-WKXE>] (citing Jeffrey Sachs, Director of the Center for Sustainable Development at Columbia University in New York: “It’s nothing less than [‘climate crimes against humanity’] and that’s

ways of classifying climate change-related effects as human rights violations would have to be used in potential suits against corporations for such damages. Doing so is outside the scope of this article, but it should be noted that if an “attack” on humanity could be framed more broadly than in its traditional, armed-conflict sense, corporations could indeed be said to have “directed” many of their activities at consumers—civilians under human rights law—and have had knowledge about the effects of climate change stemming, in large part, from such activities, for decades.¹⁷¹ Such long-standing knowledge eventually brought tobacco companies to at least some justice, although in another legal context. The activities of energy companies were, in similarity with those of tobacco companies, also both widespread and systematic.

Climate change poses a major threat to humankind greater than many “traditional” risks.¹⁷² Climate change is “emerging as one of the biggest security threats, if not the biggest.”¹⁷³ The 2018 Global Risks Report ranks extreme weather events as the top of five events most likely to happen in the next ten years, a higher than cyber-attacks.¹⁷⁴ Whereas the same report ranks weapons of mass destruction as number one of five risks that will have the biggest impact in the next ten years, extreme weather events are number two.¹⁷⁵ Climate change is deadly at the global scale. It stands to reason that it poses a greater risk to humankind in general than traditional armed attacks, which are, after all, limited in range. The connection between traditional human rights risks and those posed by climate change can thus be made.

Framing the effects of climate change as violations of human rights under the ATS is, due to clear scientific data about climate

how history will record what the Trump administration is doing right now: These are crimes against humanity. . . . Many people are dying as a result of this. And it's not a sufficient defense to say, 'I don't believe it.'”).

171. See *supra* note 2 and accompanying text.

172. Brian Kahn, *Climate Change Is the World's Biggest Risk, in 3 Charts*, CLIMATE CENT. (Jan. 12, 2017), <https://www.climatecentral.org/news/climate-change-worlds-biggest-risk-charts-21050> [<https://perma.cc/L69E-QR2W>].

173. *Climate Change Poses Increasing Risks to Global Stability*, U.N. CLIMATE CHANGE (Feb. 21, 2017), <https://unfccc.int/news/climate-change-poses-increasing-risks-to-global-stability> [<https://perma.cc/89MS-JU6H>].

174. Alison Martin, *Climate and Tech Post the Biggest Risks to Our World in 2018*, WORLD ECON. F. (Jan. 17, 2018), <https://www.weforum.org/agenda/2018/01/the-biggest-risks-in-2018-will-be-environmental-and-technological/> [<https://perma.cc/9LJ6-29Y3>].

175. *Id.*

change and increasing legal recognition of the problem, becoming increasingly possible. Of course, more research should be conducted in this area before filing suit. For example, the connections to established human rights should be elucidated, just as plaintiffs should carefully examine recent directions in ATS suits. Climate change lawsuits based on the ATS would present some hurdles, but so do all complex and worthwhile lawsuits. Many of those suits help clear the path forward for legal resolutions that once would have been inconceivable.

What is clear is that the effects of climate change are in fact and under the law impacting human rights around the world. Courts are beginning to recognize that truth. For example, in *Urgenda Foundation v. Kingdom of the Netherlands*, the Dutch Court of Appeal based its ruling—that the Dutch government must reduce national greenhouse gas (“GHG”) emissions in a very short timeframe—on the legal duty to ensure the protection of life and family-life of citizens as enshrined in the European Convention of Human Rights.¹⁷⁶ In Pakistan, a farmer sued the national government for failure to carry out the 2012 National Climate Policy and Framework,¹⁷⁷ and in 2015, the Lahore High Court ruled that “climate change is a defining challenge of our time and has led to dramatic alterations in our planet’s climate system On a legal and constitutional plane this is a clarion call for the protection of fundamental rights of the citizens of Pakistan.”¹⁷⁸ The court cited the right to life and the right to human dignity, “constitutional principles of democracy, equality, social, economic and political justice[,] . . . the international principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity, and public trust doctrine.”¹⁷⁹ The court found that “the delay and lethargy of the

176. *State Must Achieve Higher Reduction in Greenhouse Gas Emissions in Short Term*, DE RECHTSPRAAK (Oct. 9, 2018), <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechthoven/Gerechtshof-Den-Haag/Nieuws/Paginas/State-must-achieve-higher-reduction-in-greenhouse-gas-emissions-in-short-term.aspx> [<https://perma.cc/X8UD-C9PU>].

177. Jessica Wentz, *Lahore High Court Orders Pakistan to Act on Climate Change*, SABIN CTR. FOR CLIMATE CHANGE L.: CLIMATE L. BLOG (Sept. 26, 2015), <http://blogs.law.columbia.edu/climatechange/2015/09/26/lahore-high-court-orders-pakistan-to-act-on-climate-change/> [<https://perma.cc/MS79-U9PT>].

178. *Id.* (quoting Leghari v. Federation of Pakistan, Lahore High Court, W.P. No. 25501/2015 (Sept. 4, 2015)).

179. *Id.* (quoting Leghari, W.P. No. 25501/2015).

State in implementing the Framework offend the fundamental rights of the citizens.”¹⁸⁰ The court then created a Climate Change Commission and appointed 21 members from key ministries, nongovernmental organizations, and universities to help ensure implementation of the climate laws.¹⁸¹ One may hope that American courts will soon follow suit in connecting climate change to human rights.

B. An Issue of Universal Concern

Although the ATS is predominantly procedural in nature, plaintiffs must be able to assert an underlying substantive violation of the law. As analyzed above, this must be a norm or rule of customary international law that is “specific, universal, and obligatory.”¹⁸² It must concern an issue that is of “universal concern.”¹⁸³ Although this may be seen as a high bar, “the door is still ajar”¹⁸⁴ to suits against domestic corporations and individuals under the ATS.

Climate change is a prime example of an issue of universal concern. It has become widely known and more broadly accepted that climate change already causes a slew of problems for people and nations around the world. These include the loss of property from floods, fires, and drought (such as homes washed away by tsunamis, out-of-control rivers, rising flood waters, or domestic animals dying from thirst and heat); human migration necessitated by heat, drought, and floods; lost income opportunities in areas growing more and more inhospitable or outright unsuitable for business; job losses; monetary losses; declining farm outputs; declining work productivity; mental health problems; and morbidity (e.g. dehydration, heat stroke, and heat exhaustion).¹⁸⁵ In addition to private costs, climate change will harm national economies significantly. For example, the U.S. National Climate Assessment has found, “[w]ith continued growth in emissions at historic rates, annual losses in some economic sectors are projected to reach hundreds of billions of dollars by the end of the century—

180. *Id.* (quoting *Leghari*, W.P. No. 25501/2015).

181. *Id.*

182. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 121 (2d. Cir. 2010).

183. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 109 (2013).

184. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

185. *Boyd*, *supra* note 148, at 5–6.

more than the current gross domestic product of many US states.”¹⁸⁶ “In worst-case scenarios, climate change could cost more than 10% of US gross domestic product by the end of the century and kill thousands of Americans.”¹⁸⁷

Since the adoption of the ATS, nations have been concerned about the effects of certain wrongdoings on trade among nations and monetary losses. In fact, nations appear even more concerned about international economic effects in today’s globally connected economy than centuries ago. Climate change has already caused billions of dollars in monetary damages around the world. These will increase and further affect international trade if action to mitigate climate change is not taken through various means, as unpopular and difficult as it may be to do, especially at the judicial level. However, even difficult things must be addressed at some point; that point has arrived when it comes to climate change. Although energy companies relying on fossil fuels may not, at first blush, be seen as *hostis humani generis*—enemies of all mankind—for purposes of international civil liability, science shows the extreme and imminent dangers of climate change. Climate change kills.¹⁸⁸ The sooner we as a global society come to that realization, the better. Of course, this is not to say that federal courts will declare fossil fuel or energy producing or consuming companies to be “enemies of mankind” any time soon.

Admittedly, this is overly provocative rhetoric. However, energy companies perpetuating climate change given the degree and accuracy of modern knowledge of the appurtenant dangers may well already be considered “enemies of mankind,” as they are certainly posing unwarranted risks to humankind.

Perhaps more likely, at least in the shorter term, courts will analogize climate change-related problems to the issues that have been addressed under the ATS beyond the original three Blackstone offenses. The *Sosa* Court, for example, recognized that the law of nations has expanded to encompass a “small nucleus of universally condemned” activities.¹⁸⁹ With legislative and political

186. John Sutter, *COP24 Climate Talks End in Agreement—Barely*, CNN (Dec. 16, 2018, 3:32 AM), <https://www.cnn.com/2018/12/15/health/cop24-climate-change-talks-agreement/index.html> [https://perma.cc/295H-SMCW].

187. *Id.*

188. Boyd, *supra* note 148, at 6.

189. Leval, *supra* note 13, at 16 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730–32 (2004)).

developments happening around the world, albeit not currently in the United States, the emission of greenhouse gases from various sources and for various purposes is increasingly recognized as an activity that must be eliminated as soon as possible. With the Paris Agreement to the United Nations Framework Convention on Climate Change (“UNFCCC”), 185 nations around the world agreed to limit the “global average temperature rise to well below 2°C above pre-industrial levels” and to pursue “efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”¹⁹⁰ To achieve this goal, nations “aim to reach global peaking of greenhouse gas emissions as soon as possible.”¹⁹¹ Further, nineteen countries have vowed to phase out the use of coal by 2030.¹⁹² Another coalition of nineteen countries has launched a campaign to reach carbon neutrality by 2050.¹⁹³ Countries around the world including China, India, and Britain, are racing to phase out gas and diesel cars.¹⁹⁴ In California, AB 40, asks the state Air Resources Board to come up with a “comprehensive strategy” by January 1, 2021 to ensure that all cars sold in the state are zero-emissions by 2040.¹⁹⁵

In fact, since the 1941 *Trail Smelter* arbitration case, it has been

[a] cornerstone rule of international environmental law [] that states are under an obligation not to cause harm to the environment of other states, or to the areas beyond national jurisdiction. The essence

190. Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2, Apr. 12, 2016, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016). See also *Paris Agreement—Status of Ratification*, U.N. CLIMATE CHANGE, <https://unfccc.int/process/the-paris-agreement/status-of-ratification> [<https://perma.cc/Z55F-6Y9X>] (last visited Mar. 5, 2019).

191. *What Is the Paris Agreement?*, U.N. CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> [<https://perma.cc/8GTE-X9KW>] (last visited Mar. 5, 2019).

192. Brad Plumer & Nadja Popovich, *19 Countries Vowed to Phase Out Coal. But They Don't Use Much Coal*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/interactive/2017/11/16/climate/alliance-phase-out-coal.html> [<https://perma.cc/GA6Q-YUZD>].

193. Claire Stam & Frédéric Simon, *19 Countries Team Up to Go Carbon Neutral*, CLIMATE HOME NEWS (Sept. 29, 2018, 9:39 AM), <https://www.climatechangenews.com/2018/09/28/19-countries-team-go-carbon-neutral/> [<https://perma.cc/ZEJ8-XGH4>].

194. Alanna Petroff, *These Countries Want to Ban Gas and Diesel Cars*, CNN (Sept. 11, 2017, 8:30 AM), <https://money.cnn.com/2017/09/11/autos/countries-banning-diesel-gas-cars/index.html> [<https://perma.cc/GZ98-NMSJ>].

195. J.D. Morris, *California Lawmaker Tries Again to Gradually Ban Gas Cars*, SFGATE (Dec. 3, 2018, 4:10 PM), <https://www.sfgate.com/business/article/California-lawmaker-tries-again-to-gradually-ban-13440452.php> [<https://perma.cc/RUN9-MREG>].

of this obligation, often referred to as the no-harm rule or the prohibition of transboundary environmental harm, is that states may not conduct *or permit* activities within their territories, or in common spaces, without regard to other states or for the protection of the global environment. The origins of the obligation lie in the old principle of international law that states are obliged not to inflict damage on, or violate the rights of other states, which is often expressed by reference to the *sic utere tuo ut alienum non laedas* principle (use your own property in such a way that you do not injure other people's).¹⁹⁶

Continuing to allow U.S. corporations to produce, use, and distribute fossil fuel products and services without tort penalty for the damages they cause in other nations violates this principle. A problem, however, is that the principle is sometimes seen as only that; a principle and thus, not a binding rule of law. More problematically in the ATS context, the “no-harm principle” governs the conduct of nation states, not individual corporations. Nonetheless, national action could be said to be the inaction that currently marks United States law and policy. At minimum, the no-harm principle provides a useful backdrop for the notion that nations may not allow activities to continue in their territories if these cause problems outside their territories. This is clearly the case with climate change.

Although the main actors contemplated by the Paris Agreement and other international accords are nation states, private entities have a recognized role to play as well. In fact, many private corporations—especially giant fossil fuel companies—have economies on par with or even exceeding those in nation states.¹⁹⁷ They enjoy many of the same privileges and rights as nation states do. Significant overlap between what was traditionally “private” and “government” functions exist, as will be analyzed further below.

196. MARTE JERVAN, THE PROHIBITION OF TRANSBOUNDARY ENVIRONMENTAL HARM. AN ANALYSIS OF THE CONTRIBUTION OF THE INTERNATIONAL COURT OF JUSTICE TO THE DEVELOPMENT OF THE NO-HARM RULE 1 (2014) (emphasis added).

197. Fernando Belinchón & Ruqayyah Moynihan, *25 Giant Companies that Are Bigger than Entire Countries*, BUS. INSIDER (July 25, 2018, 7:40 AM), <https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7> [<https://perma.cc/6BYE-UWE9>]. See also Duncan Green, *The World's Top 100 Economies: 31 Countries; 69 Corporations*, WORLD BANK: PEOPLE, SPACES, DELIBERATION BLOG (Sept. 20, 2016), <https://blogs.worldbank.org/publicsphere/world-s-top-100-economies-31-countries-69-corporations> [<https://perma.cc/JP9L-SM4A>].

With rights come responsibilities. Holding corporations liable for the foreseeable damage they cause is a basic principle of tort law. The “polluter pays” principle supports this.¹⁹⁸ Sophisticated corporations are aware of this principle and related financial risks. Liability for climate change damages should not and will not come as a surprise to them either. In fact, evidence shows that American energy companies such as Chevron and Exxon have been aware of the dangers of GHG emissions for decades.¹⁹⁹ As did “Big Tobacco,” energy companies concealed information about the dangers of their products from the general public, continuing a deceptive two-faced approach, presenting an innocent front to external parties while internally they were well aware of the severity of the problem. For example, a 2017 peer-reviewed Harvard study analyzing Exxon’s internal papers, public statements, and campaigns showed that the company misled the public about what it knew regarding the risk of climate change.²⁰⁰ The study concluded that Exxon emphasized doubts about the scientific evidence that blamed fossil fuel burning for global warming when communicating with the public while acknowledging the issue more forthrightly in internal communications.²⁰¹ Such deceptive conduct is precisely that for which tort law may grant compensation to victims.

Lawsuits have been filed directly against corporations in other nations, although with varying degrees of success. Such lawsuits support the argument that corporations should, in the United States, be held liable under the ATS for many of the same reasons as nation states should be forced to do *their* part to stem the problem. Anthropogenic climate change must be curbed. The parties contributing to it even long after becoming aware of its causes and effects must, under regular tort principles, be held liable for their actions just as nation states should not escape responsibility for their roles in creating the problem. Currently,

198. See Rio Declaration on Environment and Development, art. 16, U.N. Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (June 14, 1992).

199. Brenda Ekwurzel, *Yes, ExxonMobil and Chevron Are Still Distorting Climate Science*, UNION OF CONCERNED SCIENTISTS: BLOG (Oct. 23, 2018, 1:00 PM), <https://blog.ucsusa.org/brenda-ekwurzel/exxonmobil-chevron-distort-climate-science> [<https://perma.cc/KZ6A-B2YW>].

200. Wang, *supra* note 2.

201. *Id.*

both try to shirk their responsibilities in this arena. That simply cannot continue.

Courts around the world are increasingly receptive to the argument that judicial action is necessary to bring about the urgently needed action.²⁰² In turn, this receptiveness and the increasing number of favorable findings for climate plaintiffs could lend support to the notion that American corporations should also be held liable under the ATS for this issue of rapidly increasing universal concern. Of course, the problem will be to demonstrate that the idea of not causing climate change-related damages in other nations is “specific, universal, and obligatory”²⁰³ under ATS precedent. Nevertheless, the door is, after all, still “ajar”²⁰⁴ to suits under a narrow set of international norms that are of “universal concern.”²⁰⁵ No “universal concern,” it seems, can be clearer than the continuing contribution of nation states and corporations to anthropogenic climate change, as it will kill, exacerbate diseases, and cause a vast amount of damage to people globally.

Although international lawsuits do not create any precedent in American courts, the cases still demonstrate that future actions may be brought before the judiciary, whether against companies or governments. As mentioned, courts around the world are beginning to be more receptive to the argument that they can, and indeed ought to, act under their mandates instead of, as is still typical in the United States, referring to climate change as only a “political question.” It clearly is not *only* a political question. Although there have not been any major wins against fossil fuel

202. For example, in *Holland*, the Hague Court of Appeal upheld a judgment by a lower court holding that Dutch CO₂ emissions must be reduced by at least 25% compared to 1990 levels by the end of 2020. *Urgenda Foundation v. Kingdom of the Netherlands*, [2015] HAZA C/09/00456689. In *Juliana v. United States*, a group of youth and world-renowned climate scientist Dr. James Hansen acting as guardian for future generations filed suit against the federal government, claiming that the government’s affirmative actions in allowing activities that cause climate change have violated the youngest generation’s constitutional rights to life, liberty, and property just as the government has failed to protect essential natural resources in violation of the public trust doctrine. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016). This case is, however, awaiting final resolution pending a decision by the Ninth Circuit Court of Appeal after the district court certified the case for interlocutory appeal following an administrative order by the United States Supreme Court staying trial and all discovery. Order Staying Case, *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. Nov. 21, 2018), ECF No. 445.

203. *Doe v. Nestle*, 906 F.3d 1120, 1126 (9th Cir. 2018).

204. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

205. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 109 (2013).

companies thus far, there have been several successes in lawsuits against governments.²⁰⁶ Michael Burger, Executive Director of the Sabin Center for Climate Change Law at Columbia Law School, believes “[l]itigation has been absolutely essential in instigating action in the [United States] and elsewhere, and it will continue to be so.”²⁰⁷ This litigation may well take a human rights angle against private corporations, in addition to governments. This would precisely fall within the realm of the ATS.

C. Corporate Liability for Climate Change Damages

After *Jesner*, suit against American corporations may still be feasible, although the Supreme Court may, with its current composition, eventually close the door to such actions. Doing so would be unwarranted for the following reasons.

Perhaps most importantly, “tort law’s twin aims—compensation and deterrence—cannot be achieved without holding corporations liable.”²⁰⁸ “When an individual acts on behalf of an entity . . . it often is necessary to hold the entity accountable to provide an adequate remedy and to meaningfully deter future misdeeds. . . . [C]orporate liability is the only meaningful option to address the wrongdoing.”²⁰⁹ Even if it is possible to identify the individuals involved, “securing jurisdiction and collecting judgments against them would be even more difficult.”²¹⁰ It is simply not realistic to believe that a corporation’s agents can provide sufficient redress for the often very costly wrongdoings of the corporation. And because it is sometimes in a corporation’s interests to violate international law, a rule establishing liability for only a corporation’s agents would not deter abuse.²¹¹ Further, “the ability

206. Oliver Milman, *More People Heading to Court to Spur Action on Climate Change, Study Finds*, THE GUARDIAN (May 23, 2017, 1:49 PM), <https://www.theguardian.com/environment/2017/may/23/climate-change-government-court-cases-study> [<https://perma.cc/KS53-RKS8>].

207. *Id.*

208. Richard Herz, *Symposium: It’s Just a Tort Case*, SCOTUSBLOG (Jul. 27, 2017, 2:24 PM), <https://www.scotusblog.com/2017/07/symposium-just-tort-case/> [<https://perma.cc/EBL4-UCXA>].

209. Amy Howe, *An Introduction to the Alien Tort Statute and Corporate Liability: In Plain English*, SCOTUSBLOG (Jul. 24, 2017, 10:57 AM), <https://www.scotusblog.com/2017/07/introduction-alien-tort-statute-corporate-liability-plain-english/> [<https://perma.cc/22ZA-HT3H>] (internal quotation marks omitted).

210. *Id.* (internal quotation marks omitted).

211. Herz, *supra* note 208.

to sue a corporation is inherent in the notion of limited shareholder liability.”²¹² “To conclude that neither corporations nor their shareholders could be sued, the Supreme Court would have to find an affirmative rule of total corporate immunity.”²¹³ Neither federal common law nor international law creates any such immunity.²¹⁴ It seems that *Jesner* “wants the benefit of corporate personhood while evading the responsibilities. But it cannot pick and choose only the aspects of corporate personality that it likes.”²¹⁵

There is no reason to believe that the First United States Congress in creating the ATS would have wanted to hold individuals liable, such as for assaults on a diplomat, but not hold corporations liable for creating foreign-relations problems.²¹⁶ Corporations have rights under national and international law, and should thus have obligations too.²¹⁷ In fact, corporations have filed claims in the European Court of Human Rights for infringement on the *corporation’s* rights.²¹⁸ When corporations are invoking international law to their benefit, they should also be liable for their actions when warranted. “To vest corporations with rights . . . yet simultaneously exonerate them for tort damage created by violating international law makes little sense and may potentially encourage violations of international law.”²¹⁹

Traditionally, “legal rights and duties flowed only between sovereigns under international law.”²²⁰ This is no longer the case; the sharp line of demarcation between states and corporations no longer exists. Corporations are the major players of the twenty-first century.²²¹ In fact, they are “virtual states”²²² with as much, and sometimes more, monetary power and political might than entire nation states. For example, in 2017, Walmart earned more than Belgium; Visa earned more than Bosnia; Starbucks’ profits were higher than Trinidad and Tobago’s GDP; and Amazon’s revenues

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* (citing *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946))

216. Herz, *supra* note 208.

217. See Slawotsky, *supra* note 3, at 30.

218. *Id.* at 39.

219. *Id.* at 40.

220. *Id.*

221. *Id.* at 41–42.

222. *Id.* at 40 (citation omitted).

exceeded Kuwait's GDP.²²³ Since nothing in the law precludes corporations from liability for human rights violations, they should be ready to answer for such violations. Nation states are far from the only relevant actors.

Moreover, states also act in the private sphere:

Just as private economic entities may now cross borders to affect transactions that maximize their wealth, so states are now discovering that they may now do the same. Thus, the role of corporations as purely private actors [] is no longer in effect. Each distinct role has been replaced with a mixed role.²²⁴

This functional duality must mean that corporations should, to a larger extent than perhaps before, be ready to answer for functions and effects that previously were mainly attributed to state action or inaction.

Treaties addressing "certain international and transnational law violations also mandate the imposition of corporate liability and a range of penalties, reflecting the role business entities play in perpetrating and enabling these violations."²²⁵ "Examples include treaties devoted to combating transnational organized crime, human and other forms of trafficking, and bribery."²²⁶ For example, Article 5 of the International Convention for the Suppression of the Financing of Terrorism makes it clear that corporations can, and indeed must, be held liable for violations of international law: "Each State Party . . . shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person, responsible for the management or control of that legal entity has . . . committed an offense in violation of the convention."²²⁷ Together, these international instruments "attest to the fact that international law contains no categorical bar to the exercise of domestic jurisdiction over corporations when they commit violations of international law."²²⁸ Human rights and the no-harm

223. Belinchón & Moynihan, *supra* note 197.

224. Slawotsky, *supra* note 3, at 30.

225. Van Schaack, *supra* note 37, at 366.

226. *Id.*

227. International Convention for the Suppression of the Financing of Terrorism, *supra* note 107, at art. 5.

228. Van Schaack, *supra* note 37, at 367.

principle are established notions of international law. For obvious reasons, violations of these ought not to be ignored simply because they are committed by corporations; quite the opposite. With the vast amount of wealth and influence exercised by modern transnational companies, it would be overly protective to hold them immune from civil liability.

Nations can, as mentioned, choose how to react to both individual and corporate malfeasance, including imposing criminal *or* corporate liability; but nations must assume their individual responsibilities by bringing violators to justice and compensating victims appropriately. This can be done by the judiciary. It stands to reason that corporations should be held liable in order to signal limits to acceptable corporate behavior. Continuing with climate change-causing activities should lead to liability just as tobacco companies eventually had to pay the price for their damaging activities. In fact, “[c]orporations have long been held liable in tort under the federal common law.”²²⁹ “From the earliest times to the present, corporations have been held liable for torts.”²³⁰ This is as or more relevant now than when the ATS was enacted “to ensure a private damages remedy for incidents with the potential for serious diplomatic consequences.”²³¹ As will be explained below, climate change presents the risk of serious adverse consequences for the United States if it continues to refuse to act in this context. This refusal includes continually shielding corporations from liability for climate-altering activities and failing to enact relevant regulations.

Two key considerations remain. One is corporate attributability. A crucial aspect of potential corporate liability for human rights violations is to identify which potentially liable party is responsible for what culpable conduct.²³² It is key to *not* treat defendants as if they are a “single bloc.”²³³ Thus, suits against American energy companies for climate change-related problems must fairly and accurately identify the share of the overall problem that can be attributed to the particular defendants in the lawsuit. Doing so is entirely possible. For example, one study shows that more than a quarter of sea level rise and about half the warming from 1880 to

229. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1425 (2018) (Sotomayor, J., dissenting).

230. *Id.* (quoting *Chestnut Hill & Spring House Turnpike. Co. v. Rutter*, 4 Serg. & Rawle 6 (Pa. 1818)).

231. *Id.* at 1426. (quoting Brief for United States as Amicus Curiae, at 6).

232. *Doe v. Nestle*, 906 F.3d 1120, 1127 (9th Cir. 2018).

233. *Id.* at 1126.

2010 can be traced to just 90 corporations.²³⁴ The same study shows that nearly “two-thirds of historical GHG emissions came from the products and operations of just 90 companies—mostly fossil fuel producers, plus a few cement companies.”²³⁵ While some of the companies are huge—Chevron, Saudi Aramco, ExxonMobil, Gazprom—that particular study did not attribute more than approximately 1–3% of the rising tides or temperatures to each.²³⁶ However, possible redress for even a relatively “small” percentage of a highly costly problem may still be worth the litigation risk for people in areas with dramatic effects caused by such attributable action. It might also be possible to join a few defendants for a larger total award so long as traceability and causation principles are not violated under the recent case law mentioned above. Obtaining such an award might very well be worth the signaling effect that would be created by holding some companies civilly liable for the effects of climate change.

Finally, *Kiobel*'s “touch and concern” test must still be satisfied. Since *Jesner* now prohibits suits against foreign corporations under the ATS, plaintiffs must file suits against American companies. In doing so, the nexus tests would be satisfied. As for climate change, many American corporations have created, processed, marketed, sold, and used numerous fossil fuel products and services in the United States and beyond, thereby “touching and concerning” U.S. territory even though the effects of these activities are also felt abroad. Thus, in the context of the ATS, aliens may bring suit.

D. Political Question Doctrine

One of the greatest hurdles to be cleared in litigating against American energy companies for climate change-related damages is the political question doctrine. Under this doctrine, courts will refuse to hear cases if they consider the issue presented to be fundamentally political rather than having a predominantly legal nature.²³⁷ Several courts have recently refused to hear climate cases

234. Nicholas Kusnetz, *How 90 Big Companies Helped Fuel Climate Change: Study Breaks It Down*, INSIDE CLIMATE NEWS (Sept. 11, 2017), <https://insideclimatenews.org/news/09112017/climate-change-sea-level-rise-fossil-fuel-exxon-chevron-bp-study> [<https://perma.cc/8RSZ-J5UN>].

235. *Id.*

236. *Id.*

237. See e.g., Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441 (2004); *Political Question Doctrine*, LEGAL INFO. INST.,

because of the political question doctrine where plaintiffs sought damages caused by climate change even though such damages were attributable to the defending companies. Plaintiffs taking the position that energy companies should be held liable for at least part of the climate change problem will be frustrated by the judicial reluctance in holding corporations liable for their fair share. However, sound arguments exist that courts not only have authority to act, but that they indeed must do so.

For example, although *American Electric Power Co. v. Connecticut*²³⁸ confirmed the United States Environmental Protection Agency's ("EPA's") primacy as the regulator of GHGs, as initially established in *Massachusetts v. EPA*,²³⁹ and limited the possibility of claiming federal common law public nuisance for climate change litigation, both cases still stand for the proposition that courts can and do, when necessary, order other branches of government to take action. After all, this is precisely what happened in *Massachusetts v. EPA*.

Further, after *American Electric Power Co. v. Connecticut* foreclosed federal common law public nuisance torts for climate change damages, states instead brought *state* tort claims such as nuisance (public and private), negligence, trespass, failure to warn, and strict liability for failure to warn.²⁴⁰ These cases indicate the potential creativity in naming defendants and framing causes of action in the context of climate change. For instance, Rhode Island contends that the actions of defendant companies have violated its state Environmental Rights Act and impaired the state's public trust resources.²⁴¹ Although it is still too early to predict the final outcome of these cases, they have "generated a flurry of notable tactical maneuvers, precedent-setting innovations in case management, and important substantive rulings."²⁴² It will be exceedingly important to closely monitor these and similar cases in the near future for the rapid-fire development in American climate change litigation. In particular, these cases will help shed light on

https://www.law.cornell.edu/wex/political_question_doctrine [https://perma.cc/MDA9-PQQN] (last visited Mar. 27, 2019).

238. *Am. Elec. Power Co v. Connecticut*, 564 U.S. 410 (2011).

239. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

240. Tracy Hester, *Climate Tort Federalism*, 13 *FIU L. REV.* 79, 79, 81 (2018).

241. *Id.* at 81.

242. *Id.* at 81–82.

the intersection between judicial action and the political question doctrine in the specialized climate change context.

At a broader scale, the political question doctrine speaks to “whether the Constitution adopted the law of nations (or some subset of it) as the supreme law of the land. This fundamental question has profound implications for the proper role and status of customary international law in the U.S. federal [court] system.”²⁴³ If customary international law—and thus not *just* treaties—forms part of the “supreme law of the land” cited to in the United States Constitution,²⁴⁴ courts in fact have an affirmative duty to hear cases involving questions of customary international law. Experts adopting this view take the “modern position that the Constitution adopted the law of nations as supreme federal law and thus assigned primary responsibility to courts, rather than the political branches, to comply with the law of nations.”²⁴⁵ Under this view, “members of the founding generation understood the law of nations to form ‘part of the law of the land’ or ‘part of the law of the United States.’”²⁴⁶ Accordingly, issues of customary international law importance would fall on the judiciary and precisely *not* be political questions.

However, some criticism is levied at these experts for not presenting any evidence “that the founders understood the Constitution to adopt the law of nations as the ‘*supreme* Law of the Land,’ enforceable by courts not only in preference to contrary state law, but also in preference to contrary executive action and possibly even acts of Congress.”²⁴⁷ It is, of course, true that the text of the Supremacy Clause recognizes only three sources of law as “the supreme Law of the Land,” namely the “Constitution,” “Laws made in Pursuance thereof,” and “Treaties.”²⁴⁸ However, it is equally true that constitutional law has developed much over the centuries since the founding days of the nation. While the Constitution and its history form a good starting point for analyses

243. Anthony J. Bellia Jr. & Bradford R. Clark, *Why Federal Courts Apply the Law of Nations Even Though It Is Not the Supreme Law of the Land*, 106 GEO. L.J. 1915, 1916 (2018).

244. “[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” U.S. CONST. art. VI, cl. 2.

245. Bellia Jr. & Clark, *supra* note 243, at 1960.

246. *Id.* (citing David Golove & Daniel Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593, 1616–23 (2018)).

247. *Id.* (emphasis added).

248. U.S. CONST. art. VI, cl. 2.

of modern-day constitutional law, these are not and should not be the ending points for such discussions. Much can be said about whether customary international law is a source of the supreme law of the land in addition to treaties. It is outside the scope of this Article to analyze this further. Suffice it to say that the Constitution's allocation of certain powers to the political branches of the federal government has a clear bearing on the "power *or obligation* of federal courts to apply the law of nations."²⁴⁹ The textual view that the mere mention of "treaties" in the text of the Constitution means that other sources of international law cannot be seen as binding "law of the land" takes a dualist view of international and national law that this Article does not promote. Thus, although some courts may continue to reject suits for climate change-related causes of action under the political question doctrine, courts could, and arguably should, choose *not* to dismiss such lawsuits under the doctrine because, for other reasons, customary international law could legitimately be seen as the supreme law of the land. The judiciary is the branch of government that must address such issues.

E. Foreign Relations and Comity Concerns

Climate change is by its very nature not solely a domestic concern. As *Jesner* and other cases have demonstrated, courts may reject cases out of comity and foreign relations concerns where American judicial action is seen to pose a risk of adversely interfering with our nation's foreign interests and cooperation with other nations. In other words, the fear is taking judicial action where this may cause problems for the United States as a nation and our interests—corporate and otherwise—in relation to other nations. Most recently, *Jesner* showed that the judiciary is averse to creating risks for American interests if non-American organizations were to be held liable for human rights violations. Conversely, *not* taking action against *American* actors contributing severely to climate change may precisely lead to harm to U.S. public or private interests if liability arose under human rights law, customary international law, or torts. In other words, not providing a remedy for or attempting to halt the American contribution to global climate change in times when regulatory action is sorely missing

249. Bellia Jr. & Clark, *supra* note 243, at 1916 (emphasis added).

may, for very good reason, be seen to be an unwarranted way of sticking one's head in the sand when there is a very severe problem requiring action from many angles, including judicial ones.

Granted, other nations have also contributed much to climate change, but as demonstrated, many legislatures and courts outside the United States are displaying a greater willingness to reverse action and, in the case of courts, require legislatures to bring about the reduction of GHG emissions sooner than first proposed. If the U.S. continues to ignore the action required by both legislatures and courts, it could one day cause the precise problems for the United States that the ATS was originally geared towards avoiding. Thus, the interests of other nations would not be impinged by American federal (or state) courts ruling against climate change-contributing corporations; quite the opposite. American interests would eventually be furthered by such rulings, although American energy corporations will not, of course, currently admit to this.

Most other developed nations are taking action—both regulatory and judicial—against climate change. Courts in nations as diverse as Pakistan and the Netherlands are granting relief to plaintiffs in climate change-related cases. American courts should, for foreign relations and comity concerns, do the same. In fact, the “breadth of the ‘international comity abstention’ stands in tension with the Supreme Court’s rising recommitment to the federal judiciary’s obligation to exercise congressionally granted jurisdiction. . . . [L]oose applications of the ‘international comity abstention’ risk undermining not only the expressed preferences of Congress, but the interests of the states as well.”²⁵⁰

In short, foreign relations and comity concerns call for American government entities, including the judiciary, to take relevant and appropriate action against climate change as a universal problem. The mandate for doing so exists. Abdicating our responsibility in this context could lead to greater national problems than what are currently, and perhaps erroneously, seen as foreign relations considerations standing in the way of action.

250. Maggie Gardner, *Abstention at the Border*, 104 VA. L. REV. (forthcoming 2019), at 1.

VI. NON-ATS LITIGATION AVENUES

For those seeking to bring suit against corporations for their relevant share of climate change liability, litigation in federal court under the ATS is only one avenue. Others may well exist even after the rejection of some lawsuits under the political question and foreign relations doctrines, as discussed above.

For example, if climate change liability is seen as an issue of international law, claims for damages may be brought under the federal question doctrine in federal court under 28 U.S.C. § 1331. Perhaps, the “near-closing of the ATS door” for cases arising on foreign soil will lead some plaintiffs to test the proposition that federal question jurisdiction encompasses human rights and other violations arising on foreign soil.²⁵¹ And as mentioned above, climate change could equally well be said to have arisen not on foreign soil, but in large part on U.S. soil, as the United States historically is the greatest emitter of GHGs.

Could suits be seen as both civil and international law violations *outside* the ATS context? Maybe, but it is difficult to “hold out high hopes that the Supreme Court, at least as presently constituted, would see its way to accepting an asserted violation of the law of nations as both coming within the federal question jurisdiction and asserting a viable civil claim, unless perhaps in a case presenting a substantial US interest.”²⁵² However, climate change liability does present a substantial U.S. interest to both civil and government parties as analyzed above. But it is somewhat difficult to hope that courts—and especially the United States Supreme Court—will conduct an about-face and start hearing such cases instead of referring to them as mere political issues. *Juliana* and other cases will soon shed further light on this issue.

Another option might be to sue in state court. While federal courts are courts of limited jurisdiction, state courts enjoy general jurisdiction. A major function of the ATS was to provide jurisdiction to federal courts, but:

[State courts] have no need to rely on a special statute such as the ATS to have authority to hear a case. The state courts furthermore have broader jurisdiction to hear suits alleging violations of the Law of Nations than the federal courts enjoyed pre- *Kiobel* under the ATS.

251. Leval, *supra* note 13, at 16.

252. *Id.*

The ATS provided for that jurisdiction only in suits brought by aliens. This would not be true in state court.²⁵³

In state courts, American plaintiffs could thus bring suit for international law violations. Of course, in such cases, plaintiffs must still argue that contributions to climate change are a violation of international law, which may prove difficult.

The advantage of non-ATS-based suits in state court is that the United States Supreme Court would not have the final say as to the scope of the federal common law principle incorporating the law of nations.²⁵⁴ However, this reverts to the political question doctrine already used by several courts to reject hearing climate cases to begin with. There is no reason to think that state courts may not as readily do the same.

Plaintiffs may also file suit in state court under rules of *foreign* law. Much existing foreign law requires both private and public entities to observe new realities and national expectations regarding climate change-causing activities:

There is nothing unusual about a state court hearing a case where the liability of the defendant is predicated on foreign law. If a case is brought in contract or tort in the state court, based on a tort or contract in a foreign nation subject to that nation's laws, under the state's choice of law rules, *it will be the laws of the foreign nation that supply the basis for an award of relief.*²⁵⁵

The advantage of this latter approach is that there would be no foreign policy or political question concerns as these are American jurisprudential concerns not necessarily shared by other nations. In fact, courts in other nations are increasingly finding for plaintiffs in climate cases just as legislatures are taking much more action against climate change compared to the U.S. federal government. Such suits could also be framed in terms of the law and activities in foreign territory. It is questionable whether:

[I]f a state's highest court rules that customary international law is a part of that state's common law, in the same fashion as the Supreme Court concluded in *Sosa* that the federal common law encompasses

253. *Id.* at 17.

254. *Id.*

255. *Id.* (emphasis added).

the law of nations, [] the Supreme Court [would] have any legitimate say over a state court's adjudication of violations of the state's law in the territory of a foreign sovereign.²⁵⁶

"The dominant view among courts and commentators, however, treats human rights remedies as a foreign relations function committed to the federal government. If the federal government decides not to provide these remedies, then, this view holds, states must not provide them either."²⁵⁷ But "states may provide remedies for international human rights, much as they do for torts and civil rights. States provide law and courts for the redress of wrongs as a matter of course, particularly the types of torts that most human rights litigation addresses."²⁵⁸ Thus, since climate change has been recognized to present human rights problems, plaintiffs may bring suit in state court by carefully framing the issue under these and related guidelines.

Some legal experts question whether the rules of professional conduct for lawyers should be modernized to reflect issues surrounding the representation of clients in the fossil fuel industries. For example, "[t]he ethical rules for lawyers encourage zealous advocacy on behalf of clients, but do not incentivize lawyers to take steps that could minimize harm to the environment."²⁵⁹ This ought to be the case. Further ideas encompass the "liberalization of confidentiality rules to permit disclosures in the case of imminent environmental harm, an expansion of lawyers' counseling duties, a reconceptualization of third-party harm, an enlarged scope of supervisory responsibility, and a redefinition of pro bono service."²⁶⁰ Perhaps most importantly to this environmental law issue where standing is often difficult to obtain, "attorneys who aspire to represent nonhuman environmental interests, or who want to represent humans who would suffer future harm from climate change, often find that current law denies standing to such claimants. Perhaps an amendment to Rule 3.1 should clarify that arguments to extend standing in environmental cases are not frivolous, so long as the attorney is making a good-

256. *Id.*

257. Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 398 (2018).

258. *Id.*

259. Tom Lininger, *Green Ethics for Lawyers*, 57 B.C.L. REV. 61, 61 (2016).

260. *Id.*

faith argument.”²⁶¹ Others note that some corporations may have acted against their own Codes of Conduct and notions of Corporate Social Responsibility.²⁶² It is outside the scope of this Article to go in any depth with such issues, but it seems that the latter may be a particularly ineffective approach, as Codes of Conduct and Corporate Social Responsibility are largely if not wholly ineffective and not considered viable from a legal angle, albeit maybe so from a corporate marketing point of view.

Finally, some recommend creating a particularized international forum for climate change and related responsibilities.²⁶³ For example, the Nuremberg tribunals were only established after a watershed moment for piercing the veil of the state and holding individuals to account. Time may have come to hold corporations accountable for continued climate-altering activities in new fora, using new powers in these dire times for humanity and our natural surroundings.

CONCLUSION

As the effects of climate change become more and more pronounced, plaintiffs around the world will be increasingly likely to seek redress from responsible parties. Both government and corporate entities are to blame for their continued activities and nonaction in this context. Plaintiffs may bring suit under the ATS for the human rights-related effects of climate change or, as regulatory systems in other countries increasingly require the

261. *Id.* at 99. The ABA’s Model Rule 3.1 for Meritorious Claims and Contentions could be amended to read as follows (proposed amendment in italics):

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established. *A lawyer in an environmental proceeding does not violate this rule by asserting a claim on behalf of a nonhuman interest even though that interest presently lacks standing under the current procedural rules of the jurisdiction in which the lawyer asserts the claim, if the lawyer is arguing in good faith for modification of the standing rules.*

Id. at 98.

262. Lara Blecher, *Codes of Conduct: The Trojan Horse of International Human Rights Law?*, 38 COMP. LAB. L. & POL’Y J. 437 (2017).

263. Rebecca Hamilton, *Jesner v. Arab Bank*, 138 S. Ct. 1386. *United States Supreme Court*, April 24, 2018, 112 AM. J. INT’L L. 720, 726 (2018).

phasing out of fossil fuel usage, for customary international law violations.

Just as commentators wrongly predicted the demise of ATS litigation after *Sosa*, so too may *Jesner* and its commentary prematurely predict the ultimate demise of ATS litigation.²⁶⁴ Possible litigation venues remain after both *Sosa* and *Jesner*, although it does appear likely that with the current composition of the Supreme Court, it will be difficult to win on an argument for corporate liability for climate change. In *Jesner*, several members of the Supreme Court even suggested some receptiveness to reconsidering *Sosa* in a way that would likely go against the interests of ATS plaintiffs.²⁶⁵ For now, “the only certainty is that ATS litigation remains a ripe area for international human rights litigation.”²⁶⁶ However, human rights litigation must, as always, run a “hostile gauntlet”²⁶⁷ whether under the ATS or other legal mechanisms. The considerations that would have to be addressed are as follows.

First, *Jesner* demonstrates that plaintiffs must clear both significant procedural and substantive hurdles to bring suit under the ATS in federal courts. Procedurally, the presumption against extraterritoriality under *Kiobel* is rebuttable. Plaintiffs may rebut the presumption by demonstrating that since the ATS makes use of phrases such as “alien,” “the law of nations,” and “treaty of the United States,” extraterritoriality is not problematic. Congress has had ample opportunity to alter this language if it wished to prevent suit against conduct that had effects or took place abroad, but it has not done so. Extraterritoriality concerns regarding an Act that is precisely geared towards international aspects are exaggerated, if not misplaced. Further, *Jesner* did not foreclose action against American corporations, only foreign corporations. The fact that activities complained of also implicate non-American matters does not turn action under the ATS into a violation of the presumption against extraterritoriality.

The original purpose of the ATS was to serve as a jurisdictional bridge for non-U.S. citizens to bring a cause of action against parties residing in the United States who violated international law,

264. Rutledge & Baker, *supra* note 120.

265. *Id.*

266. *Id.*

267. Leval, *supra* note 13, at 18.

where the absence of a remedy might cause nations to hold the U.S. liable or otherwise harm U.S. interests. In other words, a clear purpose of the Act was to avoid serious, but governmentally ignored, consequences of culpable private conduct to national and international affairs. This is the case with continued climate-altering activities by American corporations in times when many other developed nations are curbing their climate-changing activities.

In the modern context, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interests. Although the U.S. Supreme Court called for great caution in adapting the law of nations to private rights in *Sosa*, the Court also noted that the door is still ajar, subject to vigilant doorkeeping. Issues heard under the ATS must be of universal concern. But climate change is, by definition, one such issue. Corporate climate-changing activities are virulent to life on the planet as we know it. *Jesner* showed that suit may lie against corporations for the conduct of its human agents, including high-ranking officials, so long as the case is brought against American corporations and not just their foreign subsidiaries. High-ranking officials of energy companies have known for decades just how dangerous fossil fuel usage is. Nonetheless, they hid, denied, and ignored these facts. This is the type of conduct that eventually brought tobacco companies to justice under, among others, tort law principles. Energy companies may come to face somewhat similar liability for their actions despite the current legality of fossil fuel usage and promotion seen from a national, regulatory point of view.

American courts have recently rejected hearing climate change-related suits under the political question doctrine and out of foreign policy concerns. However, courts have the legal mandate and obligation to hear human rights cases. Climate change is inextricably linked to human rights and is increasingly recognized as such. Whereas federal courts may, of course, choose to reject hearing climate change causes of action pled under the ATS under the political question or related doctrines, they also have the mandate to *not* reject them. The judicial fear is taking action where such action may cause problems for the United States and its interests abroad. But since many non-American government and

private organizations are rapidly increasing their action against climate change, the original fear behind the ATS—to avoid the *nation* suffering financial and reputational damage if *civil* actors are not brought to justice—may well soon become an issue in times when other nations are becoming impatient with the United States sticking its head in the sand when it comes to climate change. This inaction may affect U.S. international trade, as well as our reputation on the global stage, if we keep rejecting action against climate change at the federal level. This goes for the judiciary as well.

In short, the federal judiciary has the authority to hear violations of modern-day international law under the ATS. Climate change is an egregious issue of downright enormous universal concern, far worse than any of the activities that have so far been pled under the Act. Thus, private actors that continually contribute to climate change decades after discovering the dangers of such activities should be seen as violating human rights and other law. This is so even though Congress has made few attempts to address the threats of climate change legislatively. Regulations and tort liability are separate issues. The ATS provides a long-established method of providing redress to victims of human rights violations where civil action is the only feasible way of obtaining such relief and where national interests may be jeopardized. This is the case with climate change.

Climate change kills. This cannot be anything but a violation of the law of nations for which corporate entities may, and indeed should, be held liable to the extent that climate change can, with modern scientific knowledge, be attributed to them. Government entities around the world—including judiciaries—must take steps to not only compensate victims of climate change, but also signal to the broader community including corporate actors that we are on a dangerous path from which we simply must depart. The ATS may still be a vehicle for necessary change, although, in this context, the road travelled toward corporate liability would not be smooth.