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Abstract

The Alien Tort Statute (ATS), which provides U.S. courts with jurisdiction over violations of the law of nations, has been a crucial mechanism for obtaining redress for international human rights abuses. However, over the past four decades, the Supreme Court has continually chipped away at the jurisdictional reach of the statute. Most recently, in June 2021, the Supreme Court addressed the scope of the ATS in two consolidated cases: Nestlé USA, Inc. v. Doe and Cargill, Inc. v. Doe. Plaintiffs were former trafficked and enslaved children forced to work on cocoa forms in Ivory Coast under grueling conditions. Plaintiffs alleged that Defendants Nestlé and Cargill aided and abetted the plantations through the provision of financial and technical resources in violation of the ATS. However, the Court dismissed the complaint as an impermissible extraterritorial application of the statute, failing to resolve the issue of whether aiding and abetting an international law violation is a valid cause of action under the ATS. Several other questions regarding the defendants subject to suit and the viable causes of action under the statute also remain unanswered. It is therefore worth taking the time to reassess the scope of the ATS and determine which avenues are still available to plaintiffs seeking accountability for international injuries. This Note explores the contours of the current ATS framework and aims to evaluate which claims may plausibly still survive the full set of ATS precedent.

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INTRODUCTION

On June 17, 2021, in the highly anticipated case of *Nestlé USA, Inc. v. Doe*, the Supreme Court dismissed allegations that domestic corporations aided and abetted child slavery on cocoa farms abroad as an impermissible extraterritorial application of the Alien Tort Statute (ATS).[1] This was the fourth time the Court had defined and arguably narrowed the scope of the ATS in eighteen years. Presently codified as 28 U.S.C. § 1350, the ATS provides that "[t]he 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."[2] Despite the significant attention the ATS has received in the courts and in scholarship in recent decades, several questions regarding the ATS's jurisdictional reach remain unanswered. For instance, the Supreme Court has continually failed to resolve the issue of whether plaintiffs may sue corporate defendants under the ATS. However, in *Nestlé*, five justices expressed a consensus in support of corporate liability.[3] Accordingly, *Nestlé* may not be the cause for celebration that U.S. corporations were hoping for, and plaintiffs and human rights activists may still have opportunities to increase corporate accountability through the courts. Overall, while the ATS still stands, the Supreme Court's continual strikes to the scope of jurisdiction under the statute are significant. It is therefore worth taking the time to reassess the scope of the ATS and determine which avenues are still available to plaintiffs for obtaining redress for international injuries.

This Note explores the current framework of the ATS with the new addition of *Nestlé* and aims to evaluate which claims may plausibly still survive the full set of ATS precedent. Part I briefly addresses the history of the ATS and the evolution of case law up to *Nestlé*. Part II discusses *Nestlé* in greater depth to evaluate its addition to ATS precedent. Part II also sets forth a synthesized ATS framework. This framework is applied in Part III, which analyzes the causes of action a plaintiff can feasibly bring in federal courts under the ATS and the possible defendants a plaintiff can still potentially sue.

I. ORIGINS AND EVOLUTION OF THE ALIEN TORT STATUTE

The First Congress established the Alien Tort Statute as part of the Judiciary Act of 1789. The Act provided that the federal district courts "shall . . . have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[4] The ATS

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[1] 141 S. Ct. 1931 (2021).

[2] 28 U.S.C. § 1350.

[3] *Nestlé USA, Inc.*, 141 S. Ct. at 1941–42 (Gorsuch, J., concurring); *id.* at 1947, n.4 (Sotomayor, J., concurring in part and concurring in the judgment); *id.* at 1950 (Alito, J., dissenting).

[4] Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77; *see also* Sosa v. Alvarez-Machain,

was thus a jurisdictional statute enacted to "avoid foreign entanglements" by providing a forum for injured foreign citizens.[5]

Two historic episodes in the Founding era are said to have motivated the creation of the ATS. One incident involved the assault of the Secretary of the French Legion by a French adventurer in Philadelphia.[6] The second event concerned a New York constable's entry into the home of the Dutch Ambassador and arrest of a servant.[7] Accordingly, the ATS was a mechanism by which the United States could avoid international tensions and provide remedies for civil injuries to foreign citizens.[8] By establishing a jurisdictional basis for these kinds of issues, the ATS provided an important avenue for disputes between foreign parties. This is especially true given that diversity jurisdiction is not available for foreign-versus-foreign suits, and the modern federal question statute was not enacted until 1875.[9] When enacting the ATS, Congress likely contemplated three principal offenses that Blackstone deemed specific violations of the law of nations: (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy.[10]

Despite a long existence, the ATS had no practical presence in the federal courts for almost two centuries.[11] Prior to 1980, jurisdiction under the ATS had been upheld in only two cases.[12] However, the ATS was finally animated in the Second Circuit's decision *Filartiga v. Pena-Irala*.[13] In *Filartiga*, two Paraguayan plaintiffs brought suit against a former Paraguayan enforcement official for the torture and murder of the plaintiffs' relative in Asunción.[14] The court concluded that the suit was unquestionably brought "by an alien, for a tort only . . .in violation of the law of nations."[15] The Court reasoned that customary international law—the more contemporary term for the law of nations—prohibited torture, and thus the ATS provided a basis for the plaintiffs' claim.[16] *Filartiga* opened the door to international litigation in the U.S. courts in the following two decades.[17] At

542 U.S. 692, 712–13 (2004).

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

[6] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 120 (2013).

[7] *Id.*

[8] *See* Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795).

[9] 28 U.S.C. §§ 1331-1332.

[10] Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *68).

[11] Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002).

[12] Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (finding that interference with a Lebanese father's rights to custody over his child was a tort violating the law of nations); Bolchos v. Darrel, 3 F. Cas. 910 (D.S.C. 1795) (asserting jurisdiction over a case involving the seizure of property in violation of international law).

[13] 630 F.2d 876 (2d Cir. 1980).

[14] *Id.* at 878.

[15] *Id.* at 887.

[16] *Id.* at 888–89.

[17] Bradley, *supra* note 11, at 589.

the same time, courts and commentators expressed concerns about judicial interference in foreign relations.[18] However, ATS cases continued to appear in U.S. courts.

The Supreme Court finally took up the mantle of defining the jurisdictional scope of the ATS in *Sosa v. Alvarez-Machain*.[19] There, Alvarez-Machain, a Mexican doctor, sued U.S. Drug Enforcement agents and operatives for his kidnapping in the United States to face trial. [20] Alvarez-Machain was previously involved in the torture and murder of a U.S. Drug Enforcement Agency Official on Mexican soil.[21] As an initial matter, the Court recognized that ascertaining Congress's intent regarding the scope of the ATS had "proven elusive."[22] That said, the Court determined that the ATS is a jurisdictional statute that does not confer the "power to mold substantive law."[23] Ultimately, the Court concluded that Congress intended for the ATS to have immediate "practical effect."[24] Accordingly, the statute established jurisdiction over the common law causes of action consisting of "the modest number of international law violations with a potential for personal liability at the time," [25] in other words, Blackstone's three principal offenses.

Had Justice Souter stopped there, this may have been an end to the confusion surrounding the scope of the causes of action that may proceed under the ATS. However, the Court went on to reason that the federal courts may consider a further, limited set of causes of action.[26] Those claims must "rest on … norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized."[27] In sum, the Court determined that "the door [to recognition of new actionable international norms] is still ajar subject to vigilant doorkeeping."[28] Overall, the Court established a two-part framework for finding a claim actionable under the ATS. First, a court must determine that the international norm in question is "specific, universal, and obligatory."[29] Second, a court must find that permitting the claim to proceed

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[18] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (dismissing an ATS claim grounded in acts of terrorism).

[19] 542 U.S. 692 (2004).

[20] *Id.* at 697–99.

[21] *Id.*

[22] *Id.* at 719.

[23] *Id.* at 713.

[24] *Id.* at 724.

[25] *Id.*

[26] *Id.* at 725.

[27] *Id.*

[28] *Id.* at 729.

[29] *Id.* at 732 (citing In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

is a proper exercise of judicial discretion.[30] While there was a general expectation that *Sosa* would reduce ATS litigation efforts, a surge of ATS cases entered U.S. courts in subsequent years.[31]

Although the text of the ATS does not indicate any constraints on the kinds of defendants that may be sued, the Supreme Court has limited the scope of the ATS in this regard. In *Kiobel v. Royal Dutch Petroleum*, the Court indicated that ATS suits against foreign defendants are not viable when the conduct at issue occurs abroad.[32] However, the Court ultimately declined to address the Second Circuit's holding that the law of nations does not acknowledge corporate liability.[33] Ultimately, the Court returned to the issue of corporate liability in *Jesner v. Arab Bank*, where it considered whether foreign corporations can be named defendants.[34] The plaintiffs were 6,000 foreign nationals who alleged that Arab Bank, a Jordanian corporation, helped finance terrorist activity that killed or injured the plaintiffs' relatives.[35] In a 5-4 decision, the Court determined the language of the ATS did not indicate that foreign corporations could be named defendants in an ATS suit.[36] In a plurality portion of the central opinion, Justice Kennedy suggested that corporate liability overall did not meet *Sosa's* standard of resembling a specific, universal, and obligatory norm of international law.[37] However, only Chief Justice Roberts and Justice Thomas supported this skepticism.[38]

Finally, in *Kiobel*, the Supreme Court clarified that the presumption against extraterritoriality applies to the ATS.[39] The Court determined that neither the text nor legislative history of the ATS demonstrate that Congress intended for the statute to have extraterritorial application.[40] Writing for a majority, Chief Justice Roberts asserted that the ATS does not have extraterritorial effect unless the "claims touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application."[41] Applying this rule, the Court concluded that "mere corporate presence" at the time of any alleged human rights abuses does not sufficiently touch and concern the United States to find ATS

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30 *Id.* at 732–33; *see also Jesner*, 138 S. Ct. at 1399.

31 Oona A. Hathaway et al., *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1222–23 (2022).

32 569 U.S. 108, 124–25 (2013).

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

34 138 S. Ct. 1386, 1398 (2018).

35 *Id.* at 1394–95.

36 *Id.* at 1407.

37 *Id.* at 1406.

38 *Id.* at 1393.

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

40 *Id.*

41 *Id.*

jurisdiction.[42]

The Court in *Kiobel* did not explain the "touch and concern" test further, creating significant discourse in the lower courts and scholarship regarding the contours of this standard.[43] However, the Court subsequently established a two-step framework for analyzing the extraterritorial application of statutes such as the ATS in *RJR Nabisco v. European Community*.[44] First, a court must determine "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially."[45] If and only if the statute is not extraterritorial, a court moves on to step two, where it considers whether the "conduct relevant to the statute's focus occurred in the United States."[46] If the conduct relating to the "focus" of the statute took place in U.S. territory, the case constitutes a "permissible domestic application" irrespective of whether other action materialized abroad.[47] However, if the relevant conduct occurred in a foreign nation, the case involves an "impermissible extraterritorial application" of a statute even if other conduct transpired in the United States.[48]

Overall, the past two decades have significantly shaped the scope of ATS jurisdiction relative to the prior two centuries. However, several questions regarding the contours of the ATS framework remain unresolved.

II. NESTLÉ USA, INC. V. DOE AND THE CURRENT ALIEN TORT STATUTE FRAMEWORK

A. Nestlé USA, Inc. v. Doe

The Supreme Court's most recent assessment of, and most recent limitation on, the scope of the ATS came in June, 2021 when the Court released its decision in two consolidated cases: *Nestlé USA, Inc. v. Doe and Cargill, Inc v. Doe*.[49] Plaintiffs were six Malian nationals and former child slaves who were trafficked and forced to work on cocoa farms in Ivory Coast for grueling hours without pay.[50] Plaintiffs faced starvation and beatings and were terrified of the consequences of attempting to leave the farms.[51]

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[42] *Id.* at 125.

[43] *See, e.g.*, Note, *Clarifying* Kiobel's *"Touch and Concern" Test*, 130 HARV. L. REV. 1902 (2017); Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filartiga, 89 NOTRE DAME L. REV. 1695 (2014).

[44] 579 U.S. 325, 337 (2016).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] 141 S. Ct. 1931 (2021).

[50] Doe v. Nestlé, S.A., 906 F.3d 1120, 1122 (9th Cir. 2018).

[51] *Id.*

Defendants Nestlé and Cargill were U.S.-based companies that purchased cocoa from the farms that Plaintiffs were forced to work on.[52] Defendants provided resources—both financial and technical—to the farms in exchange for a favorable position for purchasing cocoa.[53] Plaintiffs sued Defendants under the ATS, alleging that Defendants' relationship with the cocoa farms and supply of resources to the farmers aided and abetted the forced child labor.[54]

Plaintiffs could have presumably sued under diversity jurisdiction since they met the foreign plaintiff, domestic defendant, and amount in controversy requirements under the alien diversity provision of 28 U.S.C. § 1332(a)(2).[55] However, were Plaintiffs to have pursued this avenue, the choice of law would have been different under the diversity statute. Based on location of the primary conduct, the governing laws feasibly could have been the laws of Ivory Coast. However, by pursuing an ATS claim, Plaintiffs could have potentially established a cause of action under the *Sosa* framework of the ATS, despite the ATS being jurisdictional in nature. Plaintiffs may have concluded a favorable result was more likely if they argued their claim constituted one of these federal causes of action.

Plaintiffs contended that Defendants "knew or should have known" about the child slavery and failed to assist in eliminating the practice despite having the bargaining power to do so.[56] Although the child slavery occurred entirely outside of the United States, Plaintiffs claimed they were entitled to sue in federal court under the ATS, reasoning that Defendants engaged in "all major operational decisions from within the United States."[57] Applying the two-step framework established in *RJR Nabisco*, the Ninth Circuit first acknowledged that, per *Kiobel*, "the 'presumption against extraterritoriality applies to claims under the ATS.'"[58] Turning to step two, the court acknowledged that "[e]very major operational decision regarding Nestlé's United States market [was] made in or approved in the United States."[59] Furthermore, the court determined that Plaintiffs' allegation that Defendants provided resources and "spending money" to farmers outside the scope of the ordinary business contract indicated Defendants "perpetuated [overseas slave labor] from headquarters in the United States."[60] Accordingly, in the view of the Ninth Circuit, the conduct was sufficiently specific and domestic to be considered "relevant to the ATS's focus."[61]

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52 *Nestlé*, 141 S. Ct. at 1935.
53 *Id.*
54 *Id.*
55 28 U.S.C. § 1332(a)(2).
56 *Nestlé,* 141 S. Ct. at 1935.
57 *Id.*
58 Doe v. Nestlé, S.A., 906 F.3d 1120, 1124–26 (9th Cir. 2018).
59 *Id.* at 1123.
60 *Id.* at 1126.
61 *Id.*

However, the Supreme Court, in an 8-1 decision written by Justice Thomas, reversed the Ninth Circuit's decision.[62] Justice Thomas's opinion consists of three Parts, with Parts I and II forming the majority opinion. Parts I and II address the issue of whether Plaintiffs sufficiently rebutted the presumption against extraterritorial application of the ATS.[63] Like the Ninth Circuit, Justice Thomas outlined the *RJR Nabisco* two-part framework and reaffirmed the finding in *Kiobel* that the ATS fails to "evince a 'clear indication of extraterritoriality.'"[64] However, the Court departed from the Ninth Circuit's finding that Defendants' major operational decisions in the United States perpetuating the child slavery were sufficient to assert domestic application of the ATS.[65] Applying step two of the *RJR Nabisco* framework, Justice Thomas emphasized that almost all of Defendants' conduct that Plaintiffs argued aided and abetted the slave labor occurred outside of the United States.[66] The Court concluded that operational decisions constituting general corporate activity cannot provide a sufficient link between the cause of action—"aiding and abetting forced labor overseas"—and the domestic conduct.[67] This determination thus goes further than the finding in *Kiobel* that mere corporate presence cannot support domestic application of the ATS.[68]

Despite an 8-1 consensus with respect to the issue of general corporate activity, *Nestlé* left several questions of significant interest to both corporate actors and human rights activists unanswered. First, the Court failed to resolve whether domestic corporations may be named defendants in ATS litigation. However, five justices expressed support for the conclusion that domestic corporations can be sued under the ATS in concurring opinions.[69] Justices Gorsuch and Alito determined that "[t]he notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding."[70] As a general rule, "the law places corporations and individuals on equal footing when it comes to assigning rights and duties," and the text of the ATS does not indicate any deviation from this rule.[71] In other words, "[c]orporate status does not justify special immunity."[72] Justice Sotomayor, with whom Justices Breyer and Kagan joined, agreed that corporations are not shielded from liability for customary

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62 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1933-34 (2021).

63 *Id.*

64 *Id.* at 1936.

65 *Id.* at 1936–37.

66 *Id.*

67 *Id.* at 1937.

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

69 *Nestlé,* 141 S. Ct. at 1941–42 (Gorsuch, J., concurring); *id.* at 1947, n.4 (Sotomayor, J., concurring in part and concurring in the judgment); *id.* at 1950 (Alito, J., dissenting).

70 *Id.* at 1940 (Gorsuch, J., concurring).

71 *Id.* at 1941.

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

international law violations.[73] Accordingly, while the Court did not establish any binding precedent, there appears to be majority support for the conclusion that domestic corporations can be named defendants.

Second, the Court failed to resolve the ideological divide of whether the ATS creates causes of action for violations of international law beyond Blackstone's three principal offenses: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[74] Put simply, the Court signaled a conflict over whether it should take affirmative steps to overrule *Sosa*. In Part III of his opinion, Justice Thomas recognized that, despite *Erie's* rejection of the concept of federal common law, *Sosa* indicated new causes of action for law of nations violations could arise.[75] However, Justice Thomas asserted that ATS case law supported the conclusion that the courts "should not recognize private rights of action for violations of international law beyond the three historical torts."[76] To hold otherwise, Justice Thomas emphasized, would inevitably pose foreign-policy concerns.[77] Moreover, Justice Thomas reasoned that only the political branches may create independent causes of action for violations of international law, as Congress did in enacting the Torture Victim Protection Act of 1991 (TVPA).[78] In a concurring opinion, Justice Gorsuch, joined by Justice Kavanaugh, went further in expressly asserting that the Court in *Sosa* "should not have cracked" the door to future causes of action.[79] While the Constitution authorizes Congress and the Executive to engage in conduct that impacts foreign relations, Justice Gorsuch determined that the Judiciary had no comparable role.[80] Justice Gorsuch thus concluded that the judicial branch has no right to create new causes of action under the ATS.[81]

However, Justice Sotomayor rejected Justice Thomas's "overrul[ing of *Sosa*] . . . in all but name."[82] Justice Sotomayor recognized that the international legal landscape has developed since the birth of the ATS to incorporate crimes against humanity as violations of customary international law.[83] Justice Sotomayor likened the modern-day slave traders, warlords, and torturers to eighteenth-century pirates in terms of their status as "enem[ies]

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[73] *Id.* at 1947 n.4 (Sotomayor, J., concurring in part and concurring in the judgment). *See also* Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1425–26 (2018) (Sotomayor, J., dissenting).

[74] *Nestlé*, 141 S. Ct. at 1937–39 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 694 (2004)).

[75] *Id.* at 1938.

[76] *Id.* at 1939.

[77] *Id.*

[78] *Id.* at 1937.

[79] *Id.* at 1943 (Gorsuch, J., concurring).

[80] *Id.*

[81] *Id.*

[82] *Id.* at 1944 (Sotomayor, J., concurring in part and concurring in the judgment).

[83] *Id.*

of all mankind."[84] Moreover, Justice Sotomayor determined that Justice Thomas's restrictive view of causes of action under the ATS conflicted with the First Congress's intent to provide redress for international law violations committed against foreign nationals.[85] Finally, Justice Sotomayor criticized Justice Thomas's concerns of interference with foreign policy as unfounded based on the text of the ATS, congressional conduct, and the general obligations of international law.[86]

Third, the Court did not resolve whether aiding and abetting international law violations is sufficient to create a cause of action under the ATS. The Court did not reach this issue because it determined that the general corporate decisions of Nestlé were not sufficiently connected to the focus of the ATS.[87] In its amicus brief, the Trump Administration argued that there is no presumption that a plaintiff may sue aiders and abettors when Congress authorizes suit against private defendants for violations of statutory norms.[88] In contrast, Plaintiffs argued that neither the text of the ATS nor the Court's precedent indicated that the ATS did not encompass aiding and abetting of international law violations.[89] The aiding and abetting of international law violations is realistically a more common allegation against domestic corporations involved in global trade. Therefore, this issue is likely of particular interest to corporate actors and human rights activists.

B. The ATS Synthesized Framework

As demonstrated in Part II, the Supreme Court has addressed the jurisdictional requirements of the ATS in a rather piecemeal fashion since establishing the general framework in *Sosa*. Accordingly, this subpart aims to create a synthesized framework of the ATS precedent as it stands.

As a primary matter, per the statutory language of the ATS, the plaintiff must be an alien.[90] Moreover, as established in *Nestlé*, the *RJR Nabisco* two-step test establishes the outer limits of the jurisdictional framework of the ATS.[91] However, the Supreme Court has expressly answered the question raised in step one of the test—whether the statute provides a clear, affirmative indication that it rebuts the presumption against extraterritoriality—in the negative.[92] Accordingly, this part of the test does not require further

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[84] *Id.*

[85] *Id.* at 1945–46.

[86] *Id.*

[87] *Id.* at 1937.

[88] Brief of the United States as Amicus Curiae Supporting Petitioners, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416 and No. 19-453) (citing Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994)).

[89] Brief of Respondents at 19-416, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416).

[90] 28 U.S.C. § 1350.

[91] RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2093–94 (2016).

[92] *Nestlé*, 141 S. Ct. at 1936 (citing Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108,

examination. Rather, the predominant aspect of analyzing an ATS claim presently centers on the second step of the test—determining whether the "conduct relevant to the statute's focus occurred in the United States."[93]

Given the brevity of the ATS, the statute's focus on providing redress for violations of the law of nations in the United States is relatively unambiguous.[94] Per *Sosa*, for an international legal norm to be actionable under the ATS, the norm must be specific, universal and obligatory in a manner comparable to the eighteenth-century paradigms contemplated at the time of the ATS's enactment.[95] If the norm does not meet this standard, that is the end of the matter. Moreover, even if the standard is met, *Sosa* requires a court to consider whether hearing the claim is a "proper exercise of judicial discretion" given the relevant practical consequences and foreign policy concerns.[96] In applying *RJR Nabisco*'s focus requirement, *Nestlé* indicates that the conduct at issue must have a strong domestic nexus to the United States to displace the presumption against extraterritoriality.[97] *RJR Nabisco* establishes that not all relevant conduct needs to occur on U.S. soil.[98] However, *Nestlé* indicates that the conduct that satisfies *Sosa*'s requirements of specificity, universality and obligation will need to occur in the United States, since that conduct constitutes the statute's "focus."[99] Finally, *Kiobel* and *Nestlé* establish that mere corporate presence and general corporate activity in the United States do not establish a sufficient connection to a law of nations violation.[100]

III. EVALUATING THE REMAINS OF THE ATS PRECEDENT

Having considered the doctrinal framework for assessing the jurisdictional reach of the ATS, this Part puts that framework into practice. This Part will first consider the kinds of defendants that may still be sued under the ATS. Subsequently, this Part will address the causes of action that remain viable under the contemporary framework of ATS precedent.

A. Named Defendants

The statutory language of the ATS does not expressly place limits on the kinds of persons that can be held liable for violations of the law of nations.

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124 (2013)).

93 *RJR Nabsico*, 136 S. Ct. at 2094.

94 28 U.S.C. § 1350.

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

96 Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1399 (2018) (citing *Sosa*, 542 U.S. at 732-33).

97 *Nestlé*, 141 S. Ct. at 1937.

98 136 S. Ct. at 2101.

99 *Id.*; *See also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 126-27 (2013) (Alito, J., concurring).

100 *Kiobel*, 569 U.S. at 125; *Nestlé*, 141 S. Ct. at 1937.

However, the majority portion of *Jesner* established that foreign corporations cannot be named defendants in lawsuits under the ATS.[101] Furthermore, per *Argentine Republic v. Amerada Hess Shipping Corporation*, the Foreign Sovereign Immunities Act (FSIA) governs suits against foreign states, irrespective of whether a claim involves violations of the law of nations.[102] The FSIA did not codify foreign official immunity, which remains a matter of federal common law.[103]

However, the Supreme Court is yet to expressly rule on whether foreign natural persons can be sued under the ATS. On the one hand, *Kiobel* effectively closed the door to "foreign cubed" cases—cases where a foreign plaintiff sues a foreign defendant for conduct taking place entirely outside of the United States.[104] However, circuit courts have held that foreign individuals can be sued for law of nations violations under the ATS. For instance, in *Kadic v. Karadžić*, the Second Circuit determined that certain international law violations can be committed by actors other than states.[105] Thus, the court held that the self-proclaimed president of a Bosnian-Serb militant organization could be sued under the ATS for planning a campaign of war crimes against ethnic groups in Bosnia-Herzegovina.[106]

However, there is strong opposition to this view. Notably, in a concurring opinion in *Jesner*, Justice Gorsuch asserted that federal courts should at minimum require a domestic defendant before considering an ATS claim.[107] Justice Gorsuch reasoned that the diversity-of-citizenship requirement under Article III of the Constitution calls for ATS suits between alien plaintiffs and U.S. defendants.[108] Justice Gorsuch utilized *Mossman v. Higginson* to establish that Section 11 of the Judiciary Act authorized circuit courts to hear "civil cases where 'an alien is a party.'"[109] There the Court determined that Section 11 must "refer only to cases 'where, indeed, an alien is one party, but a citizen is the other'" to be consistent with the diversity-of-jurisdiction clause.[110] Justice Gorsuch concluded that this reasoning should apply to the ATS.[111]

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[101] *Jesner*, 138 S. Ct. at 1403.

[102] 488 U.S. 428 (1989); *see also* 28 U.S.C. §§ 1330, 1602–11.

[103] *See* Samantar v. Yousuf, 560 U.S. 305, 319, 324 (2010) (noting that, although the text of the FSIA and congressional intent demonstrate that the statute does not provide immunity for officials acting on behalf of a foreign state, lawsuits against foreign officials "may still be barred by foreign sovereign immunity under the common law").

[104] *Kiobel*, 569 U.S. at 124–25.

[105] 70 F.3d 232 (2d Cir. 1995).

[106] *Id.*

[107] Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1414–19 (2018) (Gorsuch, J., concurring). Justice Thomas wrote separately to indicate his agreement with Justice Gorsuch on this matter. *Id.* at 1408 (Thomas, J., concurring).

[108] *Id.* at 1415; *see also* U.S. CONST. art. III, § 2.

[109] *Jesner*, 138 S. Ct. at 1415 (citing Mossman v. Higginson, 4 Dall. 12, 14 (1800)).

[110] *Id.* (quoting same).

[111] *Id.*

Moreover, Justice Gorsuch dismissed the notion that the ATS can rely on any bases of Article III jurisdiction other than the diversity clause.[112] Notably, he determined that the concept of the law of nations at the time of the Founding and the text of the Constitution do not support the conclusion that the law of nations is federal law.[113] Accordingly, an ATS claim concerning a violation of the law of nations may not "arise under" federal law for the purposes of jurisdiction under Article III.[114]

Finally, Justice Gorsuch made a structural argument regarding the 1789 Judiciary Act. While the neighboring provisions of the Act explicitly authorize courts to hear suits against foreign defendants, the text of the ATS is silent.[115] Accordingly, if Congress intended for the courts to permit claims against foreigners under the ATS, Justice Gorsuch argues, it would have made and should make that intent clear.

In contrast, in her dissent in *Jesner*, Justice Sotomayor emphasized that *Sosa*, which involved an ATS suit brought by a Mexican plaintiff against a Mexican defendant, did not preclude suits between aliens.[116] The Court in *Sosa* was unequivocally aware of this matter but nonetheless proceeded with the case.[117] This indicates that the Court did not have concerns regarding its authority to hear the case under Article III.[118] Finally, Justice Sotomayor reasoned that the United States at times has an interest in providing redress for law of nations violations committed by "today's pirates."[119] Justice Sotomayor pointed to several treaties that the United States has ratified to authorize punishment or extradition of foreign individuals to support that assertion.[120]

As stated above, while the ATS specifies the kind of plaintiff that can bring a suit, it does not make any reference to the necessary status of a defendant.[121] Accordingly, the text does not expressly support the preclusion of foreign defendants. Moreover, despite Justice Gorsuch's assertion that the law of nations cannot constitute federal law for purposes of "arising under" jurisdiction, whether customary international law constitutes federal law is far from resolved and subject to significant debate.[122] *Sosa* did not

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[112] *Id.* at 1416.

[113] *Id.*

[114] *Id.*

[115] *Id.* at 1417–18 (finding that Section 13 conferred authority to the federal courts to hear suits involving ambassadors, and that a clause contained in Section 9 alongside the ATS provided the district courts with "admiralty and maritime jurisdiction").

[116] *Id.* at 1428 (Sotomayor, J., dissenting).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *See* 28 U.S.C. § 1350.

[122] For arguments addressing whether the law of nations constitutes federal law for the purposes of Article III, *see, e.g.*, Louis Henkin, *International Law as Law in the United States*,

affirmatively establish that all customary international law is federal law. However, it did indicate that federal courts can directly implement sufficiently definite norms of the law of nations, suggesting that those principles of customary international law have federal law status.[123] Accordingly, it seems reasonable to conclude that, under *Sosa*, ATS cases concerning at least some law of nations violations may proceed under the "arising under" jurisdiction of Article III.[124]

Moreover, the historic events that influenced the creation of the ATS lend support to the notion that foreign persons can be named defendants in ATS suits. The case that is said to have triggered the enactment of the ATS involved the assault of the Secretary of the *French* Legation by a *French* adventurer.[125] If this was the kind of case the First Congress intended to address, surely it follows that the ATS presumptively permits suits against foreign defendants.

It also appears that the majority of ATS cases concern overseas conduct. By adding a foreign defendant to the equation, a plaintiff faces a high bar of overcoming the presumption against extraterritoriality, as demonstrated in *Kiobel*.[126] Therefore, it certainly may seem inadvisable to pursue a claim against a foreign defendant. However, there are plausibly cases out there that would sincerely concern the United States, despite involving a foreign defendant. For instance, in *Mwani v. bin Laden*, Kenyan plaintiffs brought suit against foreign defendant Osama bin Laden and the terrorist group Al Qaeda for injuries sustained in the bombing of the American embassy in Nairobi.[127] The D.C. Circuit determined that the terrorism allegation constituted a violation of international law that was sufficiently comparable to the eighteenth-century paradigms considered in *Sosa*.[128] The court also determined it had jurisdiction over the defendants because the defendants purposely directed their attacks at the United States.[129] Admittedly, it is difficult to think of a location outside of U.S. soil that impacts the interests of the United States more than a U.S. embassy. However, to not provide redress for conduct violating international law that similarly affects U.S. interests arguably goes against the grain of the ATS's generally accepted purpose. As Justice Sotomayor points out, a court can assess whether a suit against a foreign defendant should proceed under the ATS framework by considering the claim's nexus to the United States, with the backdrop of the

82 MICH. L. REV. 1555 (1984); Bradley, *supra* note 11, at 597-619; Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641 (2017).

[123] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[124] U.S. CONST. art. III, § 2, cl. 1.

[125] *Jesner*, 138 S. Ct. at 1396.

[126] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 118, 124-25 (2013).

[127] 417 F.3d 1, 4–5 (D.C. Cir. 2005).

[128] *Id.* at 14 n.14.

[129] *Id.* at 13.

presumption against extraterritoriality.[130] To foreclose all claims against foreign defendants seems unnecessary, relatively unsupported, and potentially unwise.

On the domestic front, while not specifically addressed in the majority opinion, *Nestlé* presented sufficient consensus to suggest that domestic corporations can be named defendants in ATS suits.[131] Moreover, the Supreme Court seems to assume, without the necessity of making an outright ruling, that the ATS at a minimum allows suit against U.S. natural persons.[132] Circuit courts have also determined that private actors may be liable for violations of customary international law under the ATS.[133] Indeed, if domestic natural persons could not be sued under the ATS, it would raise the question of who feasibly could be held liable under the statute. However, although not addressed by the Supreme Court, the D.C. Circuit determined that the ATS did not provide grounds to sue state officials for acts done in an official capacity.[134] Further, commentators have found that almost all ATS claims against U.S. government officials have been dismissed in the initial stages of litigation.[135]

One area of interest regarding domestic corporate liability under the ATS may be whether plaintiffs can sue domestic parent corporations with foreign subsidiaries engaging in international law violations. This kind of corporate relationship is arguably more significant than that in *Nestlé*, where the domestic corporation had influence over but did not control the farms in Ivory Coast. The Supreme Court has never faced this specific issue.[136]

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[130] *Jesner*, 138 S. Ct. at 1428.

[131] *See supra* Part II.A (acknowledging that five Supreme Court justices have concluded that domestic corporations can be sued under the ATS). Until 2010, courts assumed with little dispute that liability under the ATS applied equally to natural persons and corporations. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1519 (2014).

[132] *See, e.g.*, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1941 (2021) (Gorsuch, J., concurring) ("The law places corporations and individuals on equal footing when it comes to assigning rights and duties."); Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004) ("The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.").

[133] *See, e.g.*, Romero v. Drummond Co., 552 F.3d 1303, 1316 (11th Cir. 2008) ("Under the Alien Tort Statute, state actors are the main objects of the law of nations, but individuals may be liable, under the law of nations, for some conduct, such as war crimes, regardless of whether they acted under color of law of a foreign nation."); Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995) ("[W]e hold that 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.").

[134] Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985).

[135] *See, e.g.*, Stephens, *supra* note 131, at 1530.

[136] *Kiobel* did include Dutch-Anglo defendants and their Nigerian subsidiary. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 113 (2013). However, the Court was not required to analyze this relationship, focusing instead on the fact that all relevant conduct occurred outside of the United States. *Id.* at 124–25.

Lower courts have focused on whether there is an agency relationship between the parent and subsidiary. For example, in *Sinaltrainal v. Coca-Cola Co.*, the Eleventh Circuit affirmed the district court's dismissal of the plaintiffs' ATS claims against Coca-Cola USA.[137] The court reasoned that the corporation did not have day-to-day control over its subsidiary, Coca-Cola Columbia, and thus was not liable for the actions of a bottling company that the subsidiary contracted with.[138] The district court's focus on a lack of agreement for Coca-Cola USA to exercise control over the labor policies of the bottling companies seemingly adheres to the principles of agency law.[139]

Beyond the United States, supreme courts in other nations have displayed an increasing willingness to hold parent corporations liable for violations of international law committed by subsidiaries. For example, in *Nevsun Resources Ltd. v. Araya*, the Canadian Supreme Court determined that Nevsun, a Canadian corporation with 60% ownership of an Eritrean mine that utilized forced labor, could be held liable for breaches of customary international law.[140] Moreover, the Supreme Court of the United Kingdom recently permitted complaints to proceed against British corporations for offenses committed by foreign subsidiaries.[141] Ultimately, as far as the United States is concerned, courts will likely analyze the nature and involvement of the parent-subsidiary relationship rather than merely looking for domestic status or U.S. citizenship. Under *Nestlé*, general corporate activity "cannot alone establish domestic application of the ATS."[142] Accordingly, a court is unlikely to determine that an arms-length parent-subsidiary relationship in the modern global market sufficiently impacts the United States to establish ATS jurisdiction.

Finally, plaintiffs may potentially bring ATS suits against a mixture of foreign and domestic defendants. However, since the citizenship of a defendant influences a court's overall analysis of an ATS claim, a court would likely analyze claims against the respective parties separately. To illustrate, under *Jesner*, a court would need to throw out claims against a foreign corporation and proceed to analyze the conduct of a domestic corporation in the case of a mix of defendants. In practice, courts have

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[137] 578 F.3d 1252, 1259 (11th Cir. 2009).

[138] *Id.*

[139] Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1354-55 (S.D. Fla. 2003); *see also* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

[140] Nevsun Resources Ltd. V. Araya [2020] SCC 5 (Can.).

[141] *See* Vedanta Resources PLC v. Lungowe [2019] UKSC 20; Okpabi v. Royal Dutch Shell PLC [2021] UKSC 3. The U.K. Supreme Court takes a direct liability approach to dealing with this issue as opposed to assessing the violations under the color of customary international law, as a U.S. court would in ATS cases. For further discussion on the British approach to parent liability for international offenses, see Rachel Chambers, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court*, 42 U. PA. J. INT'L L. 519 (2021).

[142] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

analyzed claims against domestic and foreign parties separately.[143] It therefore seems unlikely that a mixture of foreign and domestic defendants would be treated as a unique, consolidated category of defendant.

B. Causes of Action

As discussed above, the ATS is a jurisdictional statute that does not confer authority on the Judiciary to modify substantive law.[144] Since *Sosa*, there appears to be a consensus that the ATS provides jurisdiction for cases involving the traditional international law violations that the First Congress contemplated: (1) violations of safe conducts extended to aliens, (2) interference with ambassadors, and (3) piracy.[145] However, whether the ATS provides courts with jurisdiction over other causes of action involving international law violations is subject to debate and is an area that reveals the ideological divide in the Supreme Court.

However, despite this disagreement, *Sosa's* door remains ajar subject to vigilant doorkeeping after *Nestlé*.[146] Thus, it is reasonable to conclude that causes of action beyond the traditional offenses remain viable. With that said, Supreme Court precedent sets a high bar for plaintiffs to meet by requiring them to establish a violation of a norm that is sufficiently specific, universal, and obligatory to equal the features of the three eighteenth-century paradigms. As case law indicates, conduct that does not reach a level of universal concern cannot constitute a law of nations violation for the purposes of the ATS.[147]

Research assessing the history of ATS cases indicates that plaintiffs have only ever made allegations that concerned a limited set of international law violations.[148] To some extent, this demonstrates that, even from a

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[143] *See Sinaltrainal*, 578 F.3d 1259-60 (noting that the district court first dismissed ATS claims against Coca-Cola USA and subsequently addressed the claims against the South American defendants in a separate judgment).

[144] Sosa v. Alvarez-Machain, 542 U.S. 692*,* 713 (2004).

[145] *Id.* at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *68).

[146] *See supra* Part III.B.

[147] *See, e.g.*, Bigio v. Coca-Cola Co., 239 F.3d 440, 448 (2d Cir. 2000) (determining that neither racial or religious discrimination nor discriminatory expropriation of property constitute acts of universal concern, unless such acts are committed by a state actor); Cisneros v. Aragon, 485 F.3d 1226, 1230–31 (10th Cir. 2007) (finding that an alien's allegations of sexual misconduct against her husband did not violate the law of nations as required by the ATS to find jurisdiction because the kind of sexual assault at issue did not substantially impact international affairs).

[148] Hathaway, *supra* note 31, at 1240–41. The list of international law violations alleged, in order of commonality, were torture; deprivation of liberty; cruel, inhuman or degrading treatment; unlawful killing; violation of the law of armed conflict; violation of civil and political rights; violation of due process; crimes against humanity; forced labor; violation of an international agreement; genocide; unlawful interference with property; and terrorism. *Id.* Of the 531 published opinions concerning ATS cases at the time of the article's publication, twenty-four included allegations that did not constitute violations of international law, and thirty-one included allegations of other international law violations. *Id.*

plaintiff's perspective, the ATS has minimal jurisdictional reach, irrespective of *Sosa's* "specific, universal, and obligatory" requirement. Further, the Restatement (Fourth) of Foreign Relations Law provides that jurisdiction exists for offenses "of universal concern, *such as* genocide, crimes against humanity, war crimes, certain acts of terrorism, piracy, the slave trade, and torture" regardless of having any other basis for jurisdiction.[149] The "such as" language indicates that analogous offenses may also fall under the scope of universal jurisdiction. However, perhaps unsurprisingly, many "successful" ATS claims rest on allegations of these offenses.[150]

In addition to its consideration of the law of nations, the text of the ATS provides for jurisdiction over "tort[s] … in violation of … a treaty of the United States." This part of the statute is often overlooked and is rarely addressed in cases and commentary. Of note, treaties not ratified by the United States when the conduct relevant to the ATS claim occurs cannot constitute bases for ATS claims, as those treaties are not "treaties of the United States."[151] Moreover, treaty ratification does not necessarily mean that the treaty at issue will create a private right of action, or that a damages claim will be available under the ATS.[152]

However, plaintiffs may still point to, and courts often consider, international agreements and other sources of law to assert a violation of customary international law that meets the *Sosa* step-one standard. For example, in *Kadic*, the Second Circuit looked to the Geneva Convention to define war crimes and genocide.[153] Courts also consider nonbinding sources of international law in determining whether an alleged offense meets the specificity, universality and obligation requirements of *Sosa.* For instance, in *Abdullahi v. Pfizer*, the Second Circuit determined that nonconsensual medical experimentation on Nigerian children constituted a violation of a universal norm of customary international law and thus fell within the jurisdictional scope of the ATS.[154] There, the plaintiffs grounded their claims in four sources of international law prohibiting the practice: "(1) the Nuremberg Code . . .; (2) the World Medical Association's Declaration of Helsinki . . .; (3) the guidelines authored by the Council for International

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[149] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 413 (Am. L. Inst. 2018) (emphasis added).

[150] *See, e.g.*, Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014) (war crimes, genocide, and crimes against humanity); Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201 (2d Cir. 2016) (terrorist attacks on civilians in Israel); Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242 (11th Cir. 2005) (state-sponsored torture based on international infliction of mental pain and suffering); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014) (abuse and torture during detention); Doe v. Constant, 354 F.App'x. 543 (2d Cir. 2009) (extrajudicial killing, torture, and crimes against humanity).

[151] *See* Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 738 (9th Cir. 2008); 28 U.S.C. § 1350.

[152] *See* Mora v. N.Y., 524 F.3d 183 (2d Cir. 2008).

[153] Kadic v. Karadžić, 70 F.3d 232, 241–43 (2d Cir. 1995).

[154] 562 F.3d 163 (2d Cir. 2009).

Organizations of Medical Services ('CIOMS') . . .; and (4) Article 7 of the International Covenant on Civil and Political Rights ('ICCPR')."[155] Accordingly, plaintiffs can successfully allege an international law violation that meets the requirements of *Sosa* if they are able to point to sources of international law affirming the offense as one of universal concern.

Overall, while the *Sosa* framework still stands, plaintiffs may be able to allege conduct that violates a more modern concept of the law of nations. The three traditional offenses considered in the eighteenth century constitute at most, and likely much less than, thirty-one of the more than 500 ATS lawsuits with published opinions.[156] Accordingly, Justice Souter was likely correct that reading the ATS to provide jurisdiction for only violations concerning safe conducts, ambassadors, and piracy would lead to the practical extinction of the statute.[157] However, what is clear is that federal courts will not entertain an ATS claim that does not affect the United States.[158] Accordingly, plaintiffs should be more concerned about overcoming step two of *Sosa*, the foreign policy concerns raised in *Jesner*, and *Nestlé's* requirement that the relevant conduct occurs in the United States.[159]

A final point of contention with respect to the viable causes of action under the ATS is whether plaintiffs can bring suits alleging the aiding and abetting of international law violations. This was exactly the cause of action at issue in *Nestlé*, although the Court did not directly address this matter.[160] Realistically, U.S. corporations are more likely to aid the perpetrators of law of nations offenses through financing or providing resources than directly commit human rights abuses. Therefore, if aiding and abetting claims are viable, they could have a significant impact on corporate liability.

As discussed briefly in Part II, several parties filed briefs in the *Nestlé* suit asserting their positions regarding whether aiding and abetting is a cognizable cause of action under the ATS. Notably, the Trump Administration argued that aiding and abetting is not a freestanding tort, but rather reflects secondary liability for a tort.[161] Further, the United States argued that, irrespective of the primary causes of action under the ATS,

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[155] *Id.* at 175.

[156] Hathaway, *supra* note 31, at 1240–41.

[157] Sosa v. Alvarez-Machain, 542 U.S. 692, 730—31 (2004).

[158] *See supra* Part II.

[159] *See supra* Part II.B.

[160] As far as this issue is concerned, *Nestlé* determined that the mere provision of resources and money in exchange for goods (and services) in the regular course of business without more is insufficient to constitute the aiding and abetting of a violation of the law of nations. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936–37 (2021).

[161] Brief for the United States as Amicus Curiae Supporting Petitioners, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416 and No. 19-453). Neither the Obama Administration nor Biden Administration filed a brief on the issue of aiding and abetting liability under the ATS.

courts should not create a cause of action for aiding and abetting.[162] The Washington Legal Foundation and Allied Educational Foundation supported this contention and argued that, under separation of powers principles, Congress, not the Judiciary, should create a cause of action for aiding and abetting violations of the law of nations.[163] On the other hand, Respondents in *Nestlé* argued that the aiding and abetting of forced labor and slavery has "been recognized as an international law violation for centuries, from the seventeenth century through Nuremberg to the present."[164] Further, Respondents noted that aiding and abetting was recognized as a cause of action under the ATS in the Supreme Court as far back as 1795.[165]

Both the history and modern concept of aiding and abetting liability in international law seem to favor the Respondents' perspective. From a historical standpoint, aiding and abetting was a contemplated crime under the law of nations at the time of the Founding. First, with respect to the violation of safe conducts, Blackstone affirmed that the "breaking of a truce and safe-conducts, or abetting and receiving the trucebreakers, was (in affirmance and support of the law of nations) declared to be high treason."[166] Second, anyone "soliciting" the arrest of an ambassador or the seizure of his goods was deemed a "violater[] of the law of nations."[167] Third, Blackstone recognized that "trading … consulting, combining, confederating, or corresponding with" pirates, providing "stores or ammunition," or "fitting out … any vessel" for the purpose of piracy would all constitute crimes.[168] Accordingly, even taking the conservative position that the ATS grants jurisdiction for only law of nations violations that existed in the Founding era, it is reasonable to find that the ATS encompasses aiding and abetting violations.

The modern concept of violations of the law of nations under the present ATS precedential framework further supports ATS jurisdiction over aiding

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[162] *Id.* The Trump Administration relied on the Supreme Court's decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A, which held that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant . . ., there is no general presumption that the plaintiff may also sue aiders and abettors." 511 U.S. 164, 182–83 (1994).

[163] Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Petitioners, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416 and No. 19-453).

[164] Brief of Respondents in 19-416 at 13 n.6, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416). Amicus briefs in support of Respondents detailed the historical development and contemporary law of nation's recognition of aiding and abetting as unlawful conduct. *See, e.g.*, Brief of International Law Scholars, Former Diplomats, and Practitioners as *Amici Curiae* in Support of Respondents, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416 and No. 19-453).

[165] Brief of Respondents in 19-416 at 13 n.6, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (No. 19-416). (citing Breach of Neutrality, 1 Op. Att'y Gen. No 57, 59 (1795)).

[166] 4 WILLIAM BLACKSTONE, COMMENTARIES *69.

[167] *Id.* *70-71.

[168] *Id.* *72.

and abetting claims. The aiding and abetting of crimes of universal concern has been recognized in several international mechanisms. Firstly, the Rome Statute of the International Criminal Court recognizes the aiding and abetting of or intentional contribution to the commission of a crime within the jurisdiction of the ICC: genocide, crimes against humanity, war crimes, and the crime of aggression.[169] Secondly, major international tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) recognized liability for aiding and abetting international crimes.[170] The ICTY acknowledged that the crimes under its jurisdiction, including aiding and abetting, were enshrined in customary international law.[171] In *Prosecutor v. Furundzija*, the ICTY confirmed liability for aiding and abetting in international law.[172] The tribunal found that the applicable "*actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[173] Further, the tribunal determined that the requisite *mens rea* is "knowledge that these acts assist the commission of the offence."[174] *Sosa*'s cautionary approach to establishing causes of action under the ATS did not make any distinctions with respect to primary and secondary liability. Instead, these international sources support the conclusion that aiding and abetting a violation of customary international law meets the specificity, universality, and obligation requirements of *Sosa.*

In U.S. practice, lower courts have found jurisdiction for aiding and abetting claims under the ATS. Two Second Circuit decisions contemplate aiding and abetting claims that sufficiently rebutted the presumption against extraterritoriality. The Ninth Circuit utilized these cases in *Doe v. Nestlé* to support its finding of jurisdiction.[175] First, in *Mastafa v. Chevron Corporation*, the court determined that the allegation that Chevron's

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[169] Rome Statute of the International Criminal Court arts. 5, 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90.

[170] S.C. Res. 827, art. 7 (May 25, 1993) [hereinafter "ICTY Statute"]; S.C. Res. 955, art. 6 (Nov. 8, 1994) [hereinafter "ICTR Statute"]. While these tribunals decided criminal cases, the cases in question concerned violations of customary international law, for which the Alien Tort Statute establishes a civil cause of action. Courts in the United States have utilized international criminal cases dating back to the Nuremburg trials when determining whether alleged conduct rises to the level of an international law violation for the purposes of the ATS. *See generally* Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts under the Alien Tort Statute*, 71 ALB. L. REV. 321 (2008); Mark Drumbl, *Meandering Jurisdprudence and Unanticipated Legacies: The ICTY's Reach into Domestic Civil Litigation*, *in* LEGACIES OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A MULTIDISCIPLINARY APPROACH 130, 134-43 (Carsten Stahn, Carmel Agius, Serge Brammertz & Colleen Rohan eds. 2020).

[171] Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, ¶ 662 (May 7, 1997).

[172] Case No. IT-95-17/1-T, Judgment, ¶ 249 (Dec. 10, 1998).

[173] *Id.*

[174] *Id.*

[175] Doe v. Nestlé, S.A., 906 F.3d 1120, 1125–26 (9th Cir. 2018).

purchase of oil, financing of Iraqi oil sales, and use of a New York escrow account and financing structures to support the Saddam Hussein regime's violations of customary international law sufficiently concerned the United States to displace the presumption of extraterritoriality.[176] Moreover, in *Licci by Licci v. Lebanese Canadian Bank, SAL*, the Second Circuit concluded that LCB's facilitation of New York-based "wire transfers between Hezbollah accounts" exclusively through U.S. bank accounts in the months leading up to terrorist attacks on civilians in Israel was sufficient to constitute the aiding and abetting of terrorism, a violation of the law of nations.[177] Several other circuits have determined that entities can be liable for aiding and abetting international law offenses.[178]

Ultimately, given that the Supreme Court had the opportunity to close the door on liability for aiding and abetting under the ATS but failed to do so, it is reasonable to conclude that aiding and abetting remains a feasible cause of action. There is a circuit split concerning the requisite conduct and mens rea for an allegation of aiding and abetting an international law violation.[179] However, there at least appears to be some consensus that aiding and abetting is a viable cause of action under the ATS.[180]

The current doctrinal framework of the ATS considers the challenged conduct's impact on the United States and relevant policy concerns.[181] Accordingly, whether a defendant will be held liable for aiding and abetting an international law violation will likely depend on the quality and substance of the assistance. For now, *Nestlé* informed us that general domestic, corporate activity and (indirect) profiting from human rights abuses will not pass muster.[182]

CONCLUSION

Just over four decades after the ATS's (re)birth, *Nestlé* reflects a leaner and far more cautious approach to finding jurisdiction under the ATS than

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[176] 770 F.3d 170 (2d Cir. 2014).

[177] 834 F.3d 201 (2d Cir. 2016).

[178] *See, e.g.*, Sarei v, Rio Tinto, PLC, 671 F.3d 736, 746 (9th Cir. 2011), *vacated on other grounds by* Rio Tinto PLC v. Sarei, 133 S. Ct. 1995 (2013) (aiding and abetting slavery); Doe v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011), *vacated on other grounds by* Doe v. Exxon Mobil Corp., 527 F.App'x. 7 (D.C. Cir. 2013) (aiding and abetting human rights abuses, including genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnapping); Aziz v. Alcolac, Inc., 658 F.3d 388, 401 (4th Cir. 2011) (acknowledging that aiding and abetting a violation of international law may attach liability). An in-depth discussion of the elements of aiding and abetting is beyond the scope of this Note. For a discussion of the requisite mens rea for aiding and abetting violations of the law of nations under the ATS, *see* Srish Khakurel, *The Circuit Split on Mens Rea for Aiding and Abetting Liability Under the Alien Tort Statute*, 59 B.C. L. REV. 2953 (2018).

[179] Khakurel, *supra* note 178, at 2966-69.

[180] *Id.*

[181] *See supra* Part III.B.

[182] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936–37 (2021).

first taken in *Filartiga*. However, despite the Supreme Court's continual chipping away of the ATS's jurisdictional reach, the ATS still formally provides avenues for bringing suit. As far as named defendants are concerned, ATS precedent permits suit against domestic parties. While there is debate over whether the ATS authorizes liability for any foreign party, the Supreme Court has not yet foreclosed the option to sue a foreign individual. With respect to causes of action, plaintiffs can bring suit for specifically defined and universally accepted international offenses under *Sosa*, including genocide, war crimes, crimes against humanity, slavery, and terrorism.[183]

However, neither an egregious violation of international law nor a domestic defendant engaging in activities within the United States alone will establish grounds for jurisdiction. The pattern of litigation over the past decade indicates that the presumption against extraterritoriality and foreign policy concerns enshrined in the modern ATS framework present significant obstacles.[184] As a practical matter, it is striking that the Supreme Court has never permitted jurisdiction for an ATS suit and has progressively carved away at the scope of the statute. While, from a doctrinal standpoint, there may still be available avenues for bringing ATS claims, the current trend suggests that the Supreme Court would foreclose them when given the opportunity. Therefore, it would be inadvisable for potential litigants to deplete their resources in the pursuit of ATS litigation at this time.

However, hope for seeking justice for human rights violations under the Alien Tort Statute may not be lost. In May 2022, Senators Dick Durbin and Sherrod Brown introduced the Alien Tort Statute Clarification Act (ATSCA).[185] While small in stature, the ATSCA provides an important framework for reestablishing the jurisdictional scope of the ATS. Of note, the proposed Act would add a second subsection to the ATS that provides the following:

> (b) EXTRATERRITORIAL JURISDICTION.— In addition to any domestic or extraterritorial jurisdiction otherwise provided by law, the district courts of the United States have extraterritorial jurisdiction over any tort [available under the ATS] if—
>
> > (1) an alleged defendant is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or
> >
> > (2) an alleged defendant is present in the United States, irrespective of the nationality of the alleged defendant.[186]

[183] *See supra* Part III.B.

[184] Hathaway, *supra* note 31, at 1276–77.

[185] Alien Tort Statute Clarification Act, S. 4155, 117th Cong. (2022).

[186] *Id.*

In sum, as amended, the ATS would grant jurisdiction over violations of the law of nations or a treaty of the United States that are committed (1) extraterritorially and (2) by defendants who are U.S. nationals, are U.S permanent residents, or are present in the United States.[187] The language appears to assert that actors subject to personal jurisdiction in the United States cannot avoid liability for abuses occurring abroad. In turn, the ATSCA would preclude corporations that profit from human rights abuses from gaining a competitive advantage over companies that respect human rights. Thus, the ATSCA would be a step in the right direction for both U.S. foreign policy and the U.S. economy.

For now, plaintiffs and human rights advocates may look to other avenues for seeking redress, exposing human rights abuses, and promoting accountability. First, for claims of overseas human rights abuses, plaintiffs may shift to bringing suits under expressly extraterritorial statutes. One such statute may be the TVPA, which provides a federal cause of action for official acts of torture,[188] against natural persons,[189] subject to an exhaustion requirement.[190] Another relevant statute is the Trafficking Victims Protection Reauthorization Act (TVPRA), which establishes a cause of action against those who benefit from slavery, forced labor, and human trafficking.[191] However, the Supreme Court determined that the TVPA does not grant jurisdiction over corporations,[192] and neither statute contemplates human rights abuses such as genocide or war crimes. Accordingly, the ATS remains a crucial statute for furthering domestic accountability for international law violations committed on foreign soil.[193]

Alternatively, while the Supreme Court progressively limits access to federal courts, plaintiffs may look to state courts to pursue their claims of international customary law violations. As state courts are courts of general jurisdiction, they can hear cases based on foreign conduct, provided they have personal jurisdiction over the defendant.[194] In a similar vein, plaintiffs may look to foreign courts that have shown a greater willingness to provide a forum for holding entities liable for involvement in international law violations. Meanwhile, we will wait and see whether the United States progresses as a defender of human rights or becomes a sanctuary for individuals and corporations that benefit from international law violations.

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[187] *Id.*

[188] 28 U.S.C. § 1350 note § 2(a); S. REP. NO. 102-249, at 3-4 (1991).

[189] *See* Mohamad v. Palestinian Auth., 566 U.S. 449, 459 (2012).

[190] 28 U.S.C. § 1350 note § 2(b).

[191] 18 U.S.C. §§ 1595(a), 1596, 1581, 1583.

[192] *Mohamad*, 566 U.S. at 459.

[193] *See* Alien Tort Statute Clarification Act, S. 4155, 117th Cong. (2022).

[194] Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 11 (2013).