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U.S. Corporate Liability Under the Alien Tort Statute After *Jesner v. Arab Bank, PLC*

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ABSTRACT

Global corporations breathed a sigh of relief when the United States Supreme Court held in Jesner v. Arab Bank, PLC*, that foreign corporations could not be defendants in suits brought under the Alien Tort Statute (ATS). The Jesner Court's decision, however, did not determine whether domestic corporations may be namable defendants in ATS cases. Whether victims of human rights violations can initiate ATS suits against U.S. corporations is now a question of much debate. This Article argues that U.S. corporations should be namable defendants in ATS lawsuits because such litigation (1) is consistent with the text, purpose, and history of the ATS; (2) involves enough of a domestic nexus to overcome the presumption against extraterritoriality; (3) would not substantially endanger U.S. foreign relations; and (4) would be consistent with several circuit court decisions that recognize U.S. corporations as ATS defendants under the theory of civil aiding and abetting.*

INTRODUCTION

Global corporations breathed a sigh of relief when the Supreme Court held, in *Jesner v. Arab Bank, PLC*, that "foreign corporations may not be defendants in suits brought under the [Alien Tort Statute (ATS)]."[1] The ATS provides U.S. courts with jurisdiction to review "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] The Court ruled that the ATS does not cover lawsuits against foreign corporations after considering the ATS's text, precedent, and separation-of-powers principles.[3] Concerns about damaging foreign relations and judicial overreach particularly influenced the Court's decision.[4]

1 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1390 (2018).

2 28 U.S.C. § 1350 (2019).

3 *Jesner*, 138 S. Ct. at 1389–90.

4 *Id.* at 1407.

The Court's decision in *Jesner*, however, did not determine whether *domestic* corporations may be defendants in suits brought under the ATS.[5] Whether foreign victims of human rights violations can initiate ATS suits against U.S. corporations is now a question of much debate.[6] The debate is important because in the global supply chain economy, U.S. corporations are linked with numerous instances of human rights violations involving labor abuse, child slavery, extrajudicial killings, pollution, and war crimes.[7] For example, courts have found that several U.S. corporations have financed and assisted the offshore activities of foreign goods suppliers that openly kidnap and enslave child workers.[8] In many supply chain cases, U.S. corporations are responsible and are the only actors capable of providing the victims with remedies.[9]

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5 *See id.* at 1390; Doe v. Nestle, S.A., 906 F.3d 1120, 1124 (9th Cir. 2018).

6 *Compare* Doe v. Nestle, S.A., 906 F.3d at 1124 (declaring that domestic corporations are namable defendants under the ATS), *and* Appellants' Opposition to Petitions for Rehearing and Rehearing En Banc at 2–3, Doe v. Nestle, S.A., 906 F.3d 1120 (No. 17-55435) (claiming that the Supreme Court's decision in *Jesner* did not eliminate corporate liability to domestic corporations), *with* Petition for Rehearing and Rehearing En Banc of Defendant-Appellee Cargill, Inc. at 17, Doe v. Nestle, S.A., 906 F.3d 1120 (No. 17-55435) (arguing that the Supreme Court's decision in *Jesner* casts doubt on the conclusion that domestic corporations are namable defendants under the ATS), *and* Brief of Amici Curiae Chamber of Commerce of United States, National Ass'n of Manufacturers, & Organization for International Investment in Support of Defendants-Appellees' Petitions for Rehearing and Rehearing En Banc at 12–13, Doe v. Nestle, S.A., 906 F.3d 1120 (No. 17-55435) (arguing that domestic corporations should not be namable defendants under the ATS). *See also* MARY ELLEN O'CONNELL ET AL., THE INTERNATIONAL LEGAL SYSTEM 475 (7th ed. 2015) (stating that it is states that are responsible for respecting, protecting, and fulfilling the rights of their citizens, and if they do not, they are answerable as states).

7 *See* Douglass Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 305–06 (2008) (listing several U.S. corporations linked with allegations of global human rights violations); Gabrielle Holly, Lise Smit & Robert McCorquodale, *Making Sense of Managing Human Rights Issues in Supply Chains 2018 Report and Analysis*, BRITISH INST. OF INT'L AND COMPARATIVE LAW (2018), https://www.biicl.org/documents/1939_making_sense_of_managing_human_rights_issues_in_supply_chains_-_2018_report_and_analysis_-_full_text.pdf?showdocument=1 [hereinafter *Making Sense of Managing Human Rights Issues in Supply Chains*] (providing an overview of human rights violations issues in the global supply chain economy).

8 *See Nestle, S.A.*, 906 F.3d at 1122–23 (involving claim against Nestle corporation for allegedly aiding and abetting Ivory Coast cocoa farms that kidnap and enslave child workers).

9 Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1799–1806 (2015) (claiming that corporate parent liability is warranted because foreign victims of human rights violations often cannot get remedies from subsidiary corporations in offshore host states). *See also* Sara Gold, *S.C.O.T.U.S. Review Fall 2017*,

This Article argues that U.S. corporations should be namable defendants in ATS lawsuits. Part I of this Article reviews the historical development of the ATS and ends with an overview of the Supreme Court's decision in *Jesner*. Part II explains why U.S. corporations should be namable defendants in ATS cases. Specifically, Part II argues that ATS litigation against U.S. corporations (1) is consistent with the text, purpose, and history of the ATS; (2) involves enough of a domestic nexus to overcome the presumption against extraterritoriality; (3) would not substantially endanger U.S. foreign relations; and (4) would be consistent with several circuit court decisions that recognize U.S. corporations as ATS defendants under the theory of civil aiding and abetting. Finally, this Article concludes with a review of the implications of this study.

I
HISTORICAL BACKGROUND OF THE ALIEN TORT STATUTE

In 1789, Congress enacted the ATS which states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[10] The ATS was enacted to protect the United States from foreign entanglements by ensuring the availability of a federal forum where the failure to have one might cause another nation to hold the U.S. government responsible for an injury to a foreign citizen.[11] The First Congress specifically enacted the ATS following a political embarrassment in which a French diplomat in the United States was assaulted and left without a remedy, as there was no legal cause of action in tort available to foreign citizens at the time.[12] When Congress enacted the ATS, it had in mind three principal offenses: (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and

THE COMMENTARY (Oct. 21, 2017), https://cwslcommentary.com/2017/10/21/professors-give-insight-into-2017-18-supreme-court-docket/ (quoting a professor claiming that if corporations are allowed to commit human rights abuse without liability, then governments could delegate human rights abuse to corporations).

10 Alien Tort Statute, 28 U.S.C. § 1350.

11 *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1389 (2018) (stating the purpose of the ATS); Sosa v. Alvarez-Machain, 542 U.S. 692, 715–19, 739 (2004) (stating the purpose of the ATS).

12 Martha Lovejoy, Note, *From Aiding Pirates to Aiding Human Rights Abusers: Translating the Eighteenth-Century Paradigm of the Law of Nations for the Alien Tort Statute*, 12 YALE HUM. RTS. & DEV. L.J. 241, 244 (2009).

(3) piracy.[13] These three offenses were particularly concerning to Congress because if these offenses took place without adequate redress in the United States, it could give rise to an issue of war.[14]

Immediately after its passage, the ATS was raised in cases concerning seized ships and ship cargo.[15] For example, in 1795, British nationals raised an ATS claim against U.S. citizens for "aiding a French ship in plundering British property."[16] Although the ATS fell into disuse during the nineteenth and early twentieth centuries, it reappeared in 1980 in *Filartiga v. Peña-Irala*.[17] There, the issue before the Second Circuit Court of Appeals was whether it had jurisdiction under the ATS to review a wrongful death claim by a Paraguayan citizen against another Paraguayan who had tortured and killed her brother.[18] The court ruled that jurisdiction was proper because the "law of nations" and "international law of human rights" clearly and unambiguously prohibited torture regardless of the nationality of the parties.[19] Whenever an alleged torturer was found and served with process by an alien within the borders of the United States, federal jurisdiction was appropriate.[20] After the Second Circuit's decision in *Filartiga*, foreign nationals increasingly began to raise ATS claims against individual and corporate defendants in the United States, on the grounds that the defendants violated the international law of human rights.[21]

However, the Supreme Court narrowed the jurisdictional reach of the ATS when it reviewed, for the first time, a case involving the ATS's scope in *Sosa v. Alvarez-Machain*.[22] There, the Court ruled that the ATS was a jurisdictional statute that created no new cause of action

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13 *Sosa*, 542 U.S. at 715.

14 *Id.*

15 Lovejoy, *supra* note 12, at 244.

16 *Id.*

17 *Id. See* Filartiga v. Peña-Irala, 630 F.2d 876, 879 (2d Cir. 1980).

18 *Filartiga*, 630 F.2d at 878.

19 *Id.*

20 *Id.*

21 *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996) (stating that the ATS requires no more than an allegation of a violation of the law of nations in order to invoke ATS jurisdiction); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 366 (E.D. La. 1997) (involving an ATS suit against a corporation alleged to have committed environmental torts, human rights abuse, and cultural genocide in violation of the law of nations); Paul v. Avril, 901 F. Supp. 330, 335 (S.D. Fla. 1994) (awarding damages to ATS plaintiff for harms caused by defendant's acts of torture in violation of the law of nations).

22 Sosa v. Alvarez-Machain, 542 U.S. 692, 699, 712 (2004) ("We granted certiorari . . . to clarify the scope of . . . the ATS.").

other than for claims involving three principal offenses that were commonly "accept[ed] among civilized nations" as violations of international law in the eighteenth century:[23] (1) "offenses against ambassadors,"; (2) "violation of safe conducts," and (3) "piracy."[24] The Court limited the ATS to cover only these three offenses because the decision to create a new right of action was "better left to legislative judgment" in most cases, and the Court had "no congressional mandate" to seek out and define new and debatable international law violations.[25] The Court also reasoned that U.S. courts should be "particularly wary of impinging on the discretion of the Legislative and Executive branches in managing foreign affairs."[26] Because the petitioner's claim of "arbitrary detention" in *Sosa* did not fall within the meaning of any of the three eighteenth-century principal offenses, the Court ruled that the petitioner's claim did not involve a tort committed in violation of the law of nations under the ATS.[27] The Court's holding served as the framework for evaluating jurisdictional issues under the ATS until the Court reexamined the ATS's scope in *Kiobel v. Royal Dutch Petroleum Co.*[28]

In *Kiobel*, the Supreme Court further narrowed the scope of the ATS when it ruled that the "presumption against extraterritoriality" applies to claims under the ATS.[29] The presumption against extraterritoriality provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[30] The presumption "serves to protect against unintended clashes between [U.S.] laws and those of other nations which could result in international discord."[31] Because the Court found that neither the text, history, nor purpose of the ATS rebutted the presumption,[32] the Court ruled that the ATS does not cover claims in which "all the relevant conduct took place outside the United

23 *Id.* at 732.

24 *Id.* at 720.

25 *Id.* at 727–28.

26 *Id.*

27 *Id.* at 738.

28 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013).

29 *Id.*

30 *Id.* at 115 (citing Morrison v. National Australia Bank, Ltd., 561 U.S. 247, 255 (2010)).

31 *Id.* (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

32 *Id.* at 118–24 (explaining through several examples why the text, history, and purpose of the ATS did not rebut the presumption against extraterritoriality).

States."[33] The only exception is where the claims "touch and concern" the territory of the United States with "sufficient force" to displace the presumption against extraterritoriality.[34] While articulating the exception, the Court neither explained the contours of the "touch and concern" test nor offered a workable way for lower courts to apply the test.[35] The Court eventually returned to shed more light on extraterritoriality issues under the ATS in *RJR Nabisco, Inc. v. European Community*.[36]

In *RJR Nabisco*, the Court provided a two-step framework for examining extraterritorial issues under the ATS.[37] There, the Court stated that when reviewing a statute like the ATS, courts first must consider "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially."[38] Courts can move on from step one only if the statute is not found to be extraterritorial.[39] At step two, courts then consider the statute's "focus" to determine whether the case involves a domestic application of the statute.[40] If 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.[41] However, if the relevant conduct occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of whether other conduct occurred in U.S. territory.[42] The Court's holding ultimately narrowed the scope of the ATS and left unanswered what corporate conduct fell outside the scope of the ATS.

With respect to corporate defendants, the Court did not rule on the merits (in *RJR Nabisco* nor *Kiobel*) as to whether the jurisdictional

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33 *Id.* at 124–25.

34 *Id.*

35 Candra Connelly, *The Alien Tort Statute: "An Avant-Garde Tool for Human Rights" or a Camoflaged Curse?*, 87 U. CIN. L. REV. 203, 210 (2018); Michael J. Kelly, *Atrocities by Corporate Actors: A Historical Perspective*, 50 CASE W. RES. J. INT'L L. 49, 82–83 (2018).

36 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016).

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

scope of the ATS covered corporations.[43] The Court ruled only that if all the "relevant conduct" took place outside U.S. territory, then ATS jurisdiction would not extend to suits against any defendant, regardless of whether the defendant is an individual or corporation.[44] Additionally, the Court did not apply *Kiobel*'s "touch and concern" test or *RJR Nabisco*'s "focus" test against corporate defendants.[45] Instead, the Court in *Kiobel* briefly stated which corporate activities would not fall under the ATS.[46]

In *Kiobel*, the Court established the "mere corporate presence" standard, which provides that corporations cannot be held liable under the ATS for merely being present at the time the relevant conduct took place.[47] Writing for the majority, Chief Justice Roberts stated in dicta that "mere corporate presence" in the United States does not involve enough of a domestic nexus to overcome the presumption against extraterritoriality.[48] Chief Justice Roberts did not explain what other factors were needed, beyond "mere corporate presence," in order for a corporation to be a namable ATS defendant.[49] In Justice Kennedy's concurring opinion, he wrote that it was "proper" for the Court to "leave open a number of significant questions regarding the reach and interpretation of the [ATS]."[50] However, in Justice Breyer's concurring opinion, he discussed which corporate activities, beyond "mere corporate presence," should fall under the ATS.

In Justice Breyer's concurring opinion, he proposed a standard for determining which corporate activities would allow a corporate defendant to fall under the scope of the ATS.[51] Specifically, Justice Breyer claimed that a corporation should fall under the ATS's scope when the corporation engages in conduct that "substantially and adversely affects an important American national interest."[52] Such an

43 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1388–89 (2018).

44 *Id.*

45 *See id.* at 1406.

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

47 *Id.*

48 *Id.*

49 Connelly, *supra* note 35, at 209–10 (stating that the Court failed to provide a workable way for courts to determine ATS corporate liability); Kelly, *supra* note 35, at 82–83 (stating that the Court provided no guidance for what beyond "mere corporate presence" is sufficient to satisfy the "touch and concern" test).

50 *Kiobel*, 569 U.S. at 125 (Kennedy, J., concurring).

51 *Id.* at 127 (Breyer, J., concurring). Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer in advancing his standard.

52 *Id.* (Breyer, J., concurring).

American interest is "substantially and adversely affected" when the conduct violates an international norm that is both "accepted by the civilized world" and "defined with a specificity comparable to the features" of the three principal eighteenth century offenses of (1) piracy, (2) violation of safe conducts, and (3) infringement of the rights of ambassadors.[53] For example, corporate conduct that provides "safe harbor" in the United States for perpetrators of genocide would "substantially and adversely affect" an important U.S. interest—and thus be covered by the ATS—because perpetrators of genocide, like pirates, are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment."[54] Under Justice Breyer's approach, the ATS's "jurisdictional reach" essentially "match[es] the statute's underlying substantive grasp."[55] That is, as long as the corporate conduct in question is as universally condemned as piracy, then the ATS would cover that conduct.[56]

However, the Supreme Court did not apply Justice Breyer's approach from *Kiobel* to its decision in *Jesner v. Arab Bank*, which involved the question of whether foreign corporations can be named defendants in suits brought under the ATS.[57] Instead, the Court established a bright-line rule that foreclosed ATS claims against any foreign corporation after considering the ATS's text, precedent, and separation of powers concerns.[58] Justice Kennedy, writing for the majority, in which Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch joined, reasoned that because Congress did not indicate through the language of the ATS that foreign corporations could be named defendants, "separation of powers concerns" counseled against "courts creating private rights of action."[59] The majority further noted that judicial restraint was warranted in the ATS context because the statute "implicate[d] foreign policy concerns that were the province of

53 *Id.* at 128 (Breyer, J., concurring) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 699 (2004)).

54 *Id.* at 131 (Breyer, J., concurring).

55 *Id.* at 132 (Breyer, J., concurring).

56 *Id.* at 133–34 (Breyer, J., concurring).

57 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018) (holding that foreign corporations may not be defendants in suits brought under the ATS primarily because Congress was better suited to decide whether foreign corporations could be sued).

58 *Id.* at 1389–90.

59 *Id.* at 1403.

the political branches."[60] In order to avoid straining foreign relations, courts have a responsibility to defer to the better-trained branches of government in foreign policy judgments.[61] Therefore, Justice Kennedy emphasized that, without further guidance from Congress, foreign corporations may not be defendants in suits brought under the ATS.[62] The majority's decision categorically foreclosed foreign corporate liability without evaluating whether the foreign corporation's conduct substantively fell under the ATS.[63]

Writing for the dissent, in which Justices Ginsburg, Breyer, and Kagan joined, Justice Sotomayor argued that the "text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort," confirmed that tort claims for law of nations violations could be brought against foreign corporations under the ATS.[64] First, Justice Sotomayor reasoned that the phrase "[any] civil action[] for tort[]" from the ATS made clear that foreign corporations could be named defendants because "corporations have long been held liable in tort under federal common law."[65] The text also indicated that Congress did not intend to exclude foreign corporations from the ATS's reach, given that the text limits the class of permissible plaintiffs to "alien[s]" but does not distinguish among classes of defendants.[66]

Second, Justice Sotomayor claimed that the majority's concerns about "separation of powers" and "foreign policy" were unwarranted because the executive branch and members of Congress repeatedly urged the Court that it "need not and should not foreclose corporate [tort] liability."[67] For example, the Attorney General and Solicitor General acknowledged to the Court that corporations could be held liable under the ATS.[68] Furthermore, Justice Sotomayor noted that immunizing corporate violators of human rights from ATS liability would undermine the "system of accountability for law-of-nations violations that the First Congress endeavored to impose."[69] Justice Sotomayor called for the Court to decide *Jesner* not by categorically

60 *Id.* at 1390.
61 *Id.*
62 *Id.* at 1407.
63 *Id.* at 1419 (Sotomayor, J., dissenting).
64 *Id.* (Sotomayor, J., dissenting).
65 *Id.* at 1425–26 (Sotomayor, J., dissenting).
66 *Id.* at 1426 (Sotomayor, J., dissenting).
67 *Id.* at 1436 (Sotomayor, J., dissenting).
68 *Id.* at 1426–27, 1431 (Sotomayor, J., dissenting).
69 *Id.* at 1437 (Sotomayor, J., dissenting).

barring ATS suits against foreign corporations.[70] Instead, she urged the Court to consider (1) whether the corporation's conduct sufficiently "touch[ed] and concern[ed] the United States," and (2) whether the international law norms alleged to have been violated were of "sufficiently definite content and universal acceptance" to give rise to a cause of action under the ATS.[71] Justice Sotomayor's approach essentially combined the standards articulated in *Kiobel*.[72]

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Overall, the Supreme Court in *Jesner* did not eliminate all corporate liability under the ATS.[73] In a five to four decision, the majority ruled only that *foreign* corporations may not be defendants in suits brought under the ATS.[74] As long as a *domestic* corporation's conduct sufficiently "touches and concerns the United States" and violates an international law norm of "sufficiently definite content and universal acceptance,"[75] then the domestic corporation may be sued under the ATS.

However, one school of thought contends that the majority's reasoning in *Jesner* for excluding foreign corporations from ATS litigation applies equally to U.S. corporations.[76] According to this view,

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70 *Id.* at 1436 (Sotomayor, J., dissenting).

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

72 In *Kiobel*, Chief Justice Roberts declared that to overcome the presumption against extraterritoriality, the ATS must "touch and concern" the U.S. with "sufficient force." Then, Justice Breyer claimed that a corporation should fall under the ATS's scope when the corporation engages in conduct that violates an international norm that is both "accepted by the civilized world" and "defined with a specificity comparable to the features" of the three principal eighteenth century offenses. *Compare* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (articulating the "touch and concern" test of Chief Justice Roberts), *with id.* at 128 (Breyer, J., concurring) (articulating Justice Breyer's approach).

73 *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1389 (2018). *See also* Doe v. Nestle, S.A., 906 F.3d 1120, 1124 (9th Cir. 2018) ("*Jesner* did not eliminate all corporate liability under the ATS."); William S. Dodge, Jesner v. Arab Bank*: The Supreme Court Preserves the Possibility of Human Rights Suits Against U.S. Corporations*, JUST SECURITY (Apr. 26, 2018), https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations/ (stating that the Supreme Court preserved the possibility of ATS suits against U.S. corporations after its decision in *Jesner*).

74 *Jesner*, 138 S. Ct. at 1407.

75 *Id.* at 1436 (Sotomayor, J., dissenting).

76 *See* Petition for Rehearing and Rehearing En Banc of Defendant-Appellee Cargill, Inc. at 18, Doe v. Nestle, S.A., 906 F.3d 1120 (claiming that the *Jesner* Court's reasoning with respect to foreign corporations applies equally to U.S. corporations). *See also Jesner*, 138 S. Ct. at 1401 (plurality opinion) (Justice Kennedy, Justice Thomas, and Chief Justice

whether a corporation is foreign or domestic is irrelevant for purposes of ATS liability because there is no "specific, universal, and obligatory norm of corporate liability under currently prevailing international law."[77] The international community has not clearly and ubiquitously taken the step of subjecting corporations to "liability for the crimes of their human agents."[78]

This school of thought further claims that subjecting domestic corporations to ATS liability would "discourage[] American corporations from investing abroad," including in developing countries where "economic development . . . often is an essential foundation for human rights."[79] According to the U.S. Chamber of Commerce, ATS plaintiffs have filed lawsuits against dozens of major U.S. corporations with respect to their activities in developing and post-conflict countries.[80] More than half of those corporations are listed on the Dow Jones Industrial Average, and they have spent millions of dollars litigating in court for dozens of years.[81] According to this school of thought, permitting ATS plaintiffs to sue U.S. corporations would effectively empower a single plaintiff to both "embargo [U.S.] trade with foreign nations" and "forc[e] the judiciary to trench upon the authority of Congress and the President."[82]

Notwithstanding the force and weight of this school of thought, stronger grounds exist for holding U.S. corporations accountable under the ATS. As shown in Part II, the text, purpose, and history of the ATS and the existing body of case law demonstrate that U.S. corporations should be namable defendants under the ATS.

Roberts claiming that there is weak support for finding a specific, universal, and obligatory norm of corporate liability under the ATS).

77 *Jesner*, 138 S. Ct. at 1401 (plurality opinion) (stating the views of Justice Kennedy, Justice Thomas, and Chief Justice Roberts).

78 *Id.* at 1402 (plurality opinion).

79 *Id.* at 1406 (plurality opinion).

80 Brief of Amici Curiae Chamber of Commerce of United States, National Ass'n of Manufacturers, & Organization for International Investment in Support of Defendants-Appellees' Petitions for Rehearing and Rehearing En Banc at 16, Doe v. Nestle, S.A., 906 F.3d 1120 (No. 17-55435).

81 *See id.*

82 *Id.* at 14.

II
THE SCOPE OF THE ATS SHOULD COVER U.S. CORPORATIONS

The Supreme Court's decision in *Jesner* left open the possibility of naming U.S. corporations as defendants in ATS lawsuits.[83] Several grounds exist for why the ATS should cover U.S. corporate defendants: (1) ATS litigation against U.S. corporations is consistent with the text, purpose, and legislative history of the ATS; (2) ATS litigation against U.S. corporations involves enough of a domestic nexus to overcome the presumption against extraterritoriality; (3) naming U.S. corporations as ATS defendants would not substantially endanger U.S. foreign relations; and (4) federal courts have increasingly recognized domestic corporations as ATS defendants, particularly under the theory of civil aiding and abetting.[84]

A. ATS Litigation Against U.S. Corporations Is Consistent with the Text, Purpose, and History of the ATS

Courts generally agree that statutory interpretation begins with the plain and ordinary meaning of the text.[85] The text is to be "construed reasonably[] to contain all that it fairly means."[86] But when the text of a statute is ambiguous or unclear, courts have looked to the statute's purpose and history for additional guidance.[87] With respect to the ATS,

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83 *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1389 (2018); *see also* Doe v. Nestle, S.A., 906 F.3d 1120, 1124 (9th Cir. 2018) (stating that *Jesner* did not eliminate domestic corporate liability under the ATS).

84 *See* Doe v. Nestle, S.A., 906 F.3d at 1124 (reviewing an ATS claim against a U.S. corporation). *See also* Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 213 (2d Cir. 2016) (same); Mastafa v. Chevron Corp., 770 F.3d 170, 191–94 (2d Cir. 2014) (same); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 765 (9th Cir. 2011) (same); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009) (same).

85 The Supreme Court has begun statutory interpretation by looking to the plain and ordinary meaning of the text in several recent cases. *See* King v. Burwell, 135 S. Ct. 2480, 2488 (2015); Hughes v. U. S., 138 S. Ct. 1765, 1775 (2018); Wis. Cnt., Ltd. v. U. S., 138 S. Ct. 2067, 2070–71 (2018).

86 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997).

87 Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) ("Legislative history helps a court understand the context and purpose of a statute. Outside the law we often turn to context and purpose to clarify ambiguity.").

the text, purpose, and history of the statute demonstrate that ATS suits may be brought against domestic corporations.[88]

1. Text

The ATS's express grant of jurisdiction to hear "any civil action" for "tort[s]" indicates that the statute covers all the "cluster of ideas" attached to the word "tort," including corporate tort liability.[89] Whenever Congress creates a tort action, it "legislates against a legal background of ordinary tort-related . . . rules and consequently intends its legislation to incorporate those rules," unless it instructs otherwise.[90] In *Jesner*, Justice Sotomayor's textual analysis of the ATS was premised on this principle with respect to foreign corporations;[91] with respect to domestic corporations, however, Justice Sotomayor's reasoning applies with even greater force. Compared to foreign corporations, U.S. corporations have long been held liable in tort under federal common law.[92] For example, in *Philadelphia, W. & B. R. Co. v. Quigley*, the Supreme Court ruled that a Maryland-based railroad company could be liable for its agents' tortious conduct committed during the course of business.[93] The Court observed that it was long "decided in Great Britain, as well as in the United States, that actions might be maintained against [such] corporations for torts; and instances [were] found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety."[94] The *Jesner* majority ultimately rejected this line of reasoning, as *Quigley* concerned a Maryland-based corporation while *Jesner* concerned a foreign corporation.[95] However, the Supreme Court would be hard-

88 The ATS 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." 28 U.S.C. § 1350 (2019).

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

90 *Id.* at 1426 (Sotomayor, J., dissenting) (citing Meyer v. Holley, 537 U.S. 280, 285 (2003)).

91 *Id.* at 1425–26.

92 *See, e.g.*, Philadelphia, W. & B. R. Co. v. Quigley, 62 U.S. 202, 210 (1858) ("[A]ctions might be maintained against corporations for torts); Aetna Life Ins. Co. v. Brewer, 12 F.2d 818, 820 (D.C. Cir. 1926) (ruling that a corporation may be liable under tort law for the slanderous acts of its employees); United Cigar Stores Co. v. Young, 36 App. D.C. 390, 405, 407 (D.C. Cir. 1911) (same).

93 *Quigley*, 62 U.S. at 210.

94 *Id.*

95 *Jesner*, 138 S. Ct. at 1390 ("[F]oreign corporations may not be defendants in suits brought under the ATS.").

pressed to distinguish *Quigley*'s holding when applied to domestic corporations under the ATS.

The ATS's text further suggests that domestic corporations may be namable ATS defendants, given that the statute includes the word "alien" to limit the class of permissible plaintiffs and omits any word that distinguishes among classes of defendants.[96] Several courts have noted this subtlety in the text and concluded that domestic corporations could be sued under the ATS.[97] For example, in *Doe v. Exxon Mobil Corp.*, the D.C. Circuit Court of Appeals held that a Texas-based corporation could be sued under the ATS, after acknowledging that the terms of the ATS expressed no limitation on the class of permissible defendants.[98] The Eleventh Circuit Court of Appeals similarly noted that "the text of the [ATS] provides no express exception for corporations," and ruled that "this statute grant[ed] jurisdiction" for the plaintiff's complaint against an Alabama-based corporation.[99] Similarly, the Seventh Circuit Court of Appeals ruled that bringing suit against a Tennessee-based corporation was possible under the ATS, in part because the text of the statute "is an objection not to corporate liability."[100] In all these cases "Congress could [have] curtail[ed] [the ATS's] scope" by limiting the class of available defendants but did not do so.[101] Congress's silence has led many Circuits to assume that U.S. corporations can be sued under the ATS.[102]

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96 *Id.* at 1426 (Sotomayor, J., dissenting) (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989)). *See also* Kristin L. Leveille, Note, *A Debate Two Hundred Years in the Making: Corporate Liability and the Presumption Against Extraterritoriality Under the Alien Tort Statute*, 50 HOUS. L. REV. 653, 683 (2012) (claiming that any defendant that violates customary international law can be held liable under the ATS, given that the text states "any civil action" and does not distinguish between classes of defendants).

97 *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 43 (D.C. Cir. 2011); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011). Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 753 (D. Md. 2010); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 55–56, 58 (E.D.N.Y. 2005) (noting that whereas the TVPA uses the term "individual" to describe the class of defendants, the ATS uses no such term; and concluding that "[l]imiting civil liability to individuals while exonerating the corporation directing the individual's action through its complex operations and changing personnel makes little sense in today's world").

98 *Exxon Mobil Corp.*, 654 F.3d at 43.

99 *Romero*, 552 F.3d at 1315.

100 *Flomo*, 643 F.3d at 1020–21.

101 *Id.* at 1016.

102 *Id.* at 1017.

2. Purpose

The purpose of the ATS is to provide redress to those who have been victims of torts in violation of the law of nations.[103] The ATS aims to ensure the availability of a U.S. forum where the failure to have one might cause another nation to hold the U.S. government responsible for an injury to a foreign citizen.[104] Indeed, Congress enacted the ATS after a political embarrassment in 1784 where a French diplomat was assaulted and left remediless.[105]

Now that *Jesner* ruled that foreign corporations cannot be defendants in suits brought under the ATS,[106] the statute would be empty rhetoric to thousands of victims of human rights violations if domestic corporations were also exempted. In the global supply chain economy, U.S. corporations are often the only actors from whom the victims can obtain remedies.[107] In a common ATS supply chain scenario, a U.S. corporation purchases goods through a supplier located in a foreign host state.[108] The goods typically originate as raw material, and the supplier gathers the goods either directly or indirectly through subcontracted farmers and laborers.[109] In many instances, the supplier and subcontractors perpetuate human rights abuses at the local level of a host state, for example, by kidnapping and enslaving adolescent workers.[110] These victims often cannot obtain redress other than through ATS litigation against the U.S. corporation.[111]

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103 Connelly, *supra* note 35, at 217 ("The purpose, which has been stated time and time again, is to provide a method of redress for those that have been the victims of violations of the laws of nations.").

104 *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1389 (2018) (stating the purpose of the ATS); Sosa v. Alvarez-Machain, 542 U.S. 692, 715–19 (2004) (same).

105 Lovejoy, *supra* note 12, at 244.

106 *Jesner*, 138 S. Ct. at 1389.

107 Skinner, *supra* note 9, at 1799–1806 (claiming that corporate parent liability is warranted because foreign victims of human rights violations often cannot get remedies from subsidiary corporations in offshore host states).

108 *See generally Respecting Human Rights Through Global Supply Chains*, SHIFT 3 (October 2012), https://www.shiftproject.org/media/resources/docs/Shift_UNGPssupply chain2012.pdf [hereinafter *Respecting Human Rights Through Global Supply Chains*] (describing typical supply chain structures and adverse impacts on human rights).

109 *Id. See Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence*, HUMAN RIGHTS WATCH (May 30, 2016), https://www.hrw.org/report/ 2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence.

110 *See, e.g.*, Doe v. Nestle, S.A., 906 F.3d 1120, 1123 (9th Cir. 2018).

111 Gwynne L. Skinner, *Beyond* Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUMAN RIGHTS L. REV. 158, 169–71 (2014) (describing the

First, many victims are unable to obtain remedies in the host state due to a lack of effective remedial mechanisms.[112] The host state often lacks the requisite finances, access, and training to evaluate the claims involving U.S. corporate activities, or may lack an independent and effective judiciary.[113] Second, the targets of ATS litigation in the host state often shift the blame to the U.S. corporation.[114] Many host state business associates of the U.S. corporation, for example, have argued that a U.S. good, service, or directive caused the injury in the host state.[115] Third, many host states lack pro bono legal services, which are essential to indigent victims.[116] The inability to hire lawyers in many host states has resulted in lack of representation for many victims.[117] Fourth, the targets of litigation in the host state often retaliate against the victims for initiating litigation.[118] The victims often face arbitrary detention, torture, or even death when they attempt to sue their supervisors or local authorities.[119] Finally, lawsuits against local officials or corporate employees in their individual capacities often fail to fully compensate the victims.[120] The officials often lack the personal resources to fully remedy the harm to the victims.[121] Taken together, numerous challenges to obtaining redress in the host state necessitate ATS litigation against U.S. corporations. This litigation would further the ATS's purpose of providing redress to those who have been victims of torts in violation of the law of nations.[122]

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challenges victims face in obtaining remedies, given that host countries often fail to remedy harms caused by transnational corporations).

112 *Id.* at 169.

113 *Id.* at 170–71.

114 *See, e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d 195, 198 (2d Cir. 1987) (noting how Indian officials directed plaintiffs to bring suit again U.S. defendant in the U.S.). *See also* Eri Osaka, *Corporate Liability, Government Liability, and the Fukushima Nuclear Disaster*, 21 PAC. RIM L. & POL'Y J. 433, 453–54 (2012) (claiming that U.S. corporation is legally responsible in part for Fukushima tort incident).

115 *See, e.g.*, Osaka, *supra* note 114, at 453–54.

116 Skinner, *supra* note 111, at 172.

117 *Id.*

118 *Id.*

119 *See generally id.*

120 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1435 (2018) (Sotomayor, J., dissenting) (stating that individual employees of a business are less likely to be able to fully compensate successful ATS plaintiffs).

121 *Id.*

122 *See* Connelly, *supra* note 35, at 217.

Moreover, excluding private U.S. corporations from the ATS's reach would undermine the statute's aim of "ensuring the availability of a federal forum where the failure to have one might cause another nation to hold the United States [government] responsible for an injury to a foreign citizen."[123] Compared to injuries caused by a foreign corporation, injuries caused by a U.S. corporation would lead more foreign nationals to fault the U.S. government if American courts and legislators categorically deny them from seeking justice against the U.S. corporation under the ATS.[124] Like the French diplomat who was injured and left remediless in 1784,[125] foreign nationals injured by a U.S. corporation and left with no recourse against that corporation under the ATS would view the U.S. government as partaking in a "scandal."[126] The *Jesner* Court was less concerned about the U.S. government receiving such blame because the corporate defendant, Arab Bank PLC, was a "*foreign* corporate entity," a centerpiece of "*Jordan*'s economy," and a power player in the "*Amman* Stock Exchange."[127] Having no forum under the ATS to sue Arab Bank for its torts would not cause victims to fault the U.S. government as much as having no such forum to review torts committed by U.S. corporations.[128] Furthermore, some courts have acknowledged that host state victims should rightfully blame and seek redress from U.S. corporations for financing, assisting, and directing egregious supply-chain practices.[129] These victims, like the injured French diplomat in 1784, would be without legal recourse if U.S. corporations were excluded from the ATS's reach.[130] Under such a scenario, the victim's

123 *Jesner*, 138 S. Ct. at 1389. *See also* Sosa v. Alvarez-Machain, 542 U.S. 692, 761 (2004) (Breyer, J., concurring).

124 *Jesner*, 138 S. Ct. at 1416 (Gorsuch, J., concurring) (suggesting that the U.S. government would rightfully face more "reprisals" for torts committed by U.S. entities than for those committed by foreign entities).

125 Lovejoy, *supra* note 12, at 244.

126 *Jesner*, 138 S. Ct. at 1417 (Gorsuch, J., concurring).

127 *Id.* at 1394, 1407 (emphasis added).

128 *Id.* at 1419 (Gorsuch, J., concurring) ("It is one thing for courts to assume the task of creating new causes of action to ensure *our* citizens [and corporations] abide by the law of nations and *avoid* reprisals against this country. It is altogether another thing for courts to punish *foreign* parties [and corporations] for conduct that could not be attributed to the United States and thereby *risk* reprisals against this country.").

129 *See, e.g.*, *Nestle, S.A.*, 906 F.3d at 1122–23 (involving ATS claim against Nestle corporation for allegedly aiding and abetting Ivory Coast cocoa farms that kidnap and enslave child workers).

130 Skinner, *supra* note 111, at 171–73 (describing the challenges victims face in obtaining remedies through means outside the ATS).

home country would be disappointed in the United States for not "ensuring the availability of a federal forum."[131]

3. History

The history of the ATS further indicates that ATS suits may be brought against U.S. corporations.[132] Although the ATS lacks a formal legislative history,[133] the historical context during which it was enacted suggests that the ATS was meant to cover domestic corporations.[134] When the ATS was passed in 1789, corporate tort liability was an accepted principle of tort law in the U.S.[135] Several state supreme courts recognized that a domestic corporation could be liable for the torts of its agents.[136] For example, in *Riddle v. Proprietors of the Locks & Canals*, the Supreme Judicial Court of Massachusetts reviewed several contemporaneous treatises and cases, and concluded that an action in tort may lie against a corporation.[137] Similarly, the Pennsylvania Supreme Court found, after reviewing several publications and American cases, that it was "beyond doubt" that a corporation could be liable for torts committed by its agents.[138]

Federal authorities and court decisions also suggest that domestic corporations could be sued when the ATS was enacted.[139] Attorney General William Bradford noted in a 1795 opinion that the Sierra Leone Company could raise a claim as a plaintiff under the ATS.[140] The Attorney General voiced no concern about a corporation's capacity to litigate under the ATS, suggesting that corporations could also

131 *Jesner*, 138 S. Ct. at 1397.

132 Kelly, *supra* note 35, at 77 (stating that the ATS has evolved throughout history to include claims against corporations).

133 Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004).

134 Doe v. Exxon Mobil Corp., 654 F.3d 11, 47–48 (D.C. Cir. 2011) (stating that "corporate liability in tort was an accepted principle of tort law in the United States"), *vacated on other grounds by* Doe v. Exxon Mobil Corp., 527 Fed. Appx. 7, 7 (D.C. Cir. 2013).

135 *See* Skinner, *supra* note 111, at 188.

136 Riddle v. Proprietors of the Locks & Canals, 7 Mass. 169, 186 (1810); Chestnut Hill & Spring House Tpk. Co. v. Rutter, 4 Serg. & Rawle 6, 18 (Pa. 1818).

137 *Riddle*, 7 Mass. at 186.

138 *Rutter*, 4 Serg. & Rawle at 18.

139 *See, e.g.*, Trs. of Dartmouth College v. Woodward, 17 U.S. 518, 667 (1819) (holding that corporations can sue and be sued).

140 Doe v. Exxon Mobil Corp., 654 F.3d 11, 47 (D.C. Cir. 2011), *vacated on other grounds by* Doe v. Exxon Mobil Corp., 527 Fed. Appx. 7, 7 (D.C. Cir. 2013).

be named ATS defendants.[141] Furthermore, in *Trs. of Dartmouth College v. Woodward*, the Supreme Court held that a corporation was not immune from all lawsuits.[142] The Court described a corporation as "a collection of individuals, united into one collective body, under a special name," and ruled that such a collective body could "be[] sued."[143] After analogizing corporations to "real person[s]," the Court observed that "corporations exist[] in every country governed by the common law."[144] Moreover, several modern federal courts have interpreted the time when the ATS was enacted as a period when "corporations, like individuals, [were] liable for their torts."[145] The recognition of corporate tort liability by state and federal courts when the ATS was enacted indicates that ATS litigation against U.S. corporations was also permissible at the time.

B. ATS Litigation Against U.S. Corporations "Touch and Concern" the Territory of the United States with "Sufficient Force" to Overcome the Presumption Against Extraterritoriality

In *Kiobel*, the Supreme Court held that the "presumption against extraterritoriality" applies to claims under the ATS, and that ATS claims will be recognized only if they "touch and concern" the territory of the United States with "sufficient force" to displace the presumption.[146] The Court similarly held, in *RJR Nabisco, Inc.*, that to overcome the presumption against extraterritoriality, courts must consider the statute's "focus" to determine whether the case involves a domestic application of the statute.[147] If 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.[148]

The Supreme Court did not explain the contours of, or the difference between, *Kiobel*'s "touch and concern" test and *RJR Nabisco*'s "focus" test in the context of ATS litigation.[149] However, ATS

141 *Id.*

142 *Woodward*, 17 U.S. at 667.

143 *Id.*

144 *Id.* at 667.

145 *Exxon Mobil*, 654 F.3d at 48; White v. Cent. Dispensary & Emergency Hosp., 99 F.2d 355, 358 (D.C. Cir. 1938).

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

147 RJR Nabisco, Inc. v. European Comm., 136 S. Ct. 2090, 2101 (2016).

148 *Id.*

149 Connelly, *supra* note 35, at 210.

practitioners generally agree that the two tests concur in concluding that the ATS will apply if the relevant conduct giving rise to the claim took place inside U.S. territory.[150] With respect to corporate defendants, courts have shown more willingness to find that the presumption against extraterritoriality was overcome where (1) the defendant was a U.S. business; (2) some decision-making leading to the abuses occurred in the United States; (3) products from the illegal activity came into the United States; (4) a substantial U.S. interest was affected in some way; (5) the claim alleged serious human rights violations by a business active within the United States; or (6) some combination of the above.[151] These factors taken together demonstrate that ATS claims may be brought against U.S. corporations.

First, domestic corporations are, by definition, incorporated in the United States pursuant to laws of incorporation, such as the Revised Model Business Corporation Act or Certificate of Incorporation of Delaware's General Corporation Law (DGCL).[152] Although U.S. corporations may have offices located in several foreign countries, they are "at home" in the United States for purposes of jurisdiction.[153]

Second, U.S. corporations are often involved in "some decision-making" linked to the abuse in the offshore host state. U.S. corporations often make financial, planning, and enforcement decisions to protect their interests, despite the occurrence of egregious harm to local laborers and the host state's environment.[154] For example, the Second Circuit found in *Mastafa v. Chevron Corp.* that the actions of a U.S. corporation were decisive for purposes of the *Kiobel* "touch and concern" test because the corporation purchased, financed, and transported oil to the offshore human rights violator, and it created and managed an escrow account to enable illicit payments for that violator.[155]

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150 *Id.*

151 Skinner, *supra* note 111, at 198.

152 WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 82 (5th ed. 2016).

153 Daimler AG v. Bauman, 571 U.S. 117, 127 (2014).

154 *Respecting Human Rights Through Global Supply Chains*, *supra* note 108, at 18–20 (reviewing how corporations can make better decisions to decrease human rights risks); *Making Sense of Managing Human Rights Issues in Supply Chains*, *supra* note 7, at 5 (stating that a company may cause or contribute to an adverse human rights impact in its supply chain).

155 Mastafa v. Chevron Corp., 770 F.3d 170, 195 (2d Cir. 2014).

Third, U.S corporations in global supply chain cases often receive products deriving from activities that create adverse impacts on human rights in the offshore host state.[156] For example, in *Doe v. Exxon Mobil Corp.*, a Texas-based corporation imported oil from an Indonesian site where the corporation's security forces allegedly committed murder, torture, sexual assault, battery, and false imprisonment.[157] In *Romero v. Drummond Co.*, an Alabama-based corporation received coal from a Colombian subsidiary that allegedly paid paramilitary operatives to torture and assassinate leaders of a Colombian trade union.[158] Similarly, in *Flomo v. Firestone Nat. Rubber Co.*, a U.S. corporation imported rubber from a Liberian plantation that allegedly abused child workers.[159]

Fourth, a "substantial U.S. interest is affected" when a U.S. corporation perpetuates human rights abuse in violation of the law of nations.[160] The victims often blame the U.S. corporation as the director of the supply chain operation.[161] The U.S. economy might also have less market access if host states expel U.S. investors and subsidiaries from their countries on grounds of human rights abuse.[162] Unlike the operations of foreign corporations, those of U.S. corporations directly implicate the interests of the U.S.

Fifth, ATS claims against U.S. corporations often do not involve serious human rights violations by a business active within the United States; the direct abuse of human rights usually occurs in the foreign

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156 *Respecting Human Rights Through Global Supply Chains*, *supra* note 108, at 3; *Trade Promotion and Human Rights: How States Should Use Economic Diplomacy to Incentivize Business Respect for Human Rights*, UN HUM. RTS. OFF. OF THE HIGH COMMISSIONER (June 2018), https://www.ohchr.org/Documents/Issues/Business/ExecutiveSummaryReportEconomicDiplomacy.pdf [hereinafter *Trade Promotion and Human Rights*] (stating that trade, exports, and imports of goods in global supply chains can have significant adverse human rights impacts).

157 Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011).

158 Romero v. Drummond Co., 552 F.3d 1303, 1309 (11th Cir. 2008).

159 Flomo v. Firestone Nat'l Rubber Co., 643 F.3d 1013, 1015 (7th Cir. 2011).

160 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 133 (2013) (Breyer, J., concurring) (stating that the U.S. has an interest in not becoming a safe harbor for violators of the most fundamental international norms).

161 *See, e.g.*, Doe v. Nestle, S.A., 906 F.3d 1120, 1123 (9th Cir. 2018) (involving an ATS suit by Ivory Coast plaintiffs against the U.S. corporation that spearheaded the entire supply chain).

162 Bill Reinsch, *The Alien Tort Statute's Impact on the Business Community*, WORLD COM. REV. 29 (June 2012), http://www.worldcommercereview.com/publications/article_pdf/612 (describing how revenue and hundreds of thousands of U.S. jobs could be lost if U.S. corporations withdraw from host countries).

host state.[163] However, the U.S. corporation may still play an active role domestically while perpetuating those violations abroad; for example, by aiding and abetting the perpetrator.[164] In *Mastafa v. Chevron Corp.*, the Second Circuit found that a corporation headquartered in California could be liable for actively aiding and abetting its beneficiaries in committing torture in Iraq.[165]

Taken together, many of the key factors that courts consider when determining whether there is enough of a domestic nexus to overcome the presumption of extraterritoriality indicate that ATS claims may be maintained against U.S. corporations. Although each factor alone may be insufficient to find that an act "touches and concerns" U.S. territory, the factors taken together provide strong grounds to permit ATS suits against U.S. corporations.

C. ATS Litigation Against U.S. Corporations Would Not Substantially Endanger U.S. Foreign Relations

A principal reason why the Supreme Court ruled in *Jesner* that ATS suits may not be brought against foreign corporations was that such suits would threaten U.S. foreign relations.[166] The *Jesner* Court's reasoning, however, loses much force when applied to domestic corporations. Unlike foreign corporations, U.S. corporations are not under the primary authority of another sovereign. Thus, ATS suits against U.S. corporations would not challenge the sovereignty of another nation like the *Jesner* plaintiff's suit challenged the sovereignty of Jordan.[167] In *Jesner*, the Court observed that the plaintiff's suit against Arab Bank PLC, a Jordanian corporation, "caused significant diplomatic tensions with Jordan, a critical ally" of the United States.[168] Jordan expressly considered the ATS litigation to be a "grave

163 Brief of Amici Curiae Chamber of Commerce of United States, National Ass'n of Manufacturers, & Organization for International Investment in Support of Defendants-Appellees' Petitions for Rehearing and Rehearing En Banc at 15, Doe v. Nestle, S.A., 906 F.3d 1120 (No. 17-55435). *See, e.g.*, Cassel, *supra* note 7, at 305–06; *Respecting Human Rights Through Global Supply Chains*, *supra* note 108, at 3.

164 Cassel, *supra* note 7, at 305–06 (listing several cases involving ATS claims against U.S. corporations for aiding and abetting).

165 Mastafa v. Chevron Corp., 770 F.3d 170, 195 (2d Cir. 2014).

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

167 *Id.* at 1390.

168 *Id.* at 1406.

affront" to its sovereignty.[169] According to an amicus brief filed by the Hashemite Kingdom of Jordan, the thirteen-year-old ATS suit "expos[ed] Arab Bank to massive liability, [and] thus threaten[ed] to destabilize Jordan's economy and undermine its cooperation with the United States."[170] Other countries, such as South Africa, Germany, and the United Kingdom, similarly objected to ATS suits against their respective domestic corporations.[171] However, when ATS claims are made against U.S. corporations, the United States would not face such disapproval from another country.

To be sure, another country might be disappointed in the United States if an ATS suit against a U.S. corporation caused the U.S. corporation to extract its investments, subsidiaries, and development projects from that country for fear of ATS liability.[172] That host country might lose all the benefits it derives from the U.S. corporation's economic activities in its country.[173] However, evidence of U.S. corporations pulling out from foreign host states for such reasons is sparse.[174] In fact, despite a boom of over 150 ATS cases against corporations within the past several decades, the number of transnational corporations has surged from approximately 7,000 in 1970 to approximately 100,000 in 2010.[175] In addition, most U.S. corporations that were targeted in ATS suits have not stopped their economic activities in the host states.[176] For example, Exxon Mobil Corporation still conducts business activities in Indonesia even though

169 *Id.* at 1407.

170 *Id.* (citing Brief for Hashemite Kingdom of Jordan as Amicus Curiae Supporting Respondent at 3, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018)).

171 *Id.*

172 *See* Reinsch, *supra* note 162, at 29–30.

173 *Id.*

174 Skinner, *supra* note 111, at 168–69 (reviewing the growth of transnational corporations despite increases in ATS litigation).

175 *Id.* at 168.

176 For example, Exxon Mobil still does business in Indonesia despite its experience as an ATS defendant. Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011). *See Exxon Mobil in Indonesia*, EXXONMOBIL (2019), https://www.exxonmobil.co.id/en-id/company/about-us/about-us. In addition, Firestone National Rubber Co. still operates in Liberia after undergoing ATS litigation. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011). *See About Firestone Liberia*, FIRESTONE NAT. RUBBER CO. (2019), https://www.firestonenaturalrubber.com/. Similarly, Drummond Co. continued its business in Columbia after being sued under the ATS. Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008). *See Our Products: Mines – Columbia*, DRUMMOND CO. (2019), http://www.drummondco.com/our-products/coal/mines/.

it was subjected to years of costly ATS litigation.[177] Chevron Corporation also still operates its oil mining operations in Ecuador despite having lost a lawsuit.[178] Furthermore, there is little evidence that host countries would be worse off if U.S. corporations were to pull out.[179] Indeed, according to impact assessments, Chevron Corporation's oil mining operations in Ecuador caused broad social discontent and over $100 billion in environmental damage;[180] thus, *not* pulling out and *not* abiding by human rights and environmental laws might actually worsen U.S. foreign relations.[181]

Moreover, the *Jesner* Court's argument that the judiciary is not well suited to decide issues that implicate U.S. foreign policy applies with less force in the context of U.S. corporations.[182] In *Jesner*, the Court emphasized that issues implicating foreign policy belonged to "the province of the political branches."[183] The Court stated that diplomatic tensions would result from a holding that foreign corporations could be sued under the ATS.[184] However, when the ATS

177 *Exxon Mobil Corp.*, 654 F.3d at 15. *See ExxonMobil in Indonesia*, EXXONMOBIL (2019), https://www.exxonmobil.co.id/en-id/company/about-us/about-us (reviewing ExxonMobil's current presence in Indonesia).

178 Chevron Corp. v. Donziger, 833 F.3d 74, 84 (2d Cir. 2016) (stating that trial court in Ecuador entered judgment against Chevron for over $8 billion in damages, even though Chevron would eventually get relieved from paying that remedy).

179 *See generally* Rosa Forte & Rui Moura, *The Effect of Foreign Direct Investment on the Host Country's Economic Growth: Theory and Empirical Evidence*, 58 SINGAPORE ECON. REV. 3 (2013) (concluding that the effects of foreign direct investment are not always beneficial and that there are negative effects); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 643 (1998) (claiming that while bilateral investment treaties "increase global efficiency, they likely reduce the overall welfare of developing states"). *See also* Diane A. Desierto, *Development as an International Right: Investment in the New Trade-Based IIAs*, 3 TRADE L. & DEV. 296, 320–22 (2011) (reviewing the various meanings of "development" in international investment agreements and concluding that measurements of economic development are not uniform and often do not take into account all possible socioeconomic variables that show negative effects of international investment agreements).

180 *See Texaco/Chevron Lawsuits (re Ecuador)*, BUS. & HUM. RTS. RESOURCE CTR., https://www.business-humanrights.org/en/texacochevron-lawsuits-re-ecuador.

181 *See, e.g.*, *id. See also* Diane A. Desierto, *Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses*, 9 MANCHESTER J. INT'L ECON. L. 162, 164 (2012) (stating that as a matter of normative and policy priority during an economic emergency, a host state might interrupt investment agreements with foreign investors in order to protect the social and economic rights of its citizens).

182 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1390 (2018).

183 *Id.* at 1390.

184 *Id.*

defendant is a U.S. corporation in U.S. territory, it is the duty of the Court to adjudicate issues concerning domestic corporate tort liability.[185] The Court would not implicate serious U.S. foreign policy concerns by deciding such issues, even if the claims related to offshore corporate activities.[186] The Court has regularly recognized jurisdiction to review the offshore activities of U.S. corporations under other federal statutes.[187] For example, the Supreme Court has long recognized the application of U.S. antitrust laws, including the Sherman Act and the Clayton Act, against U.S. corporations for their domestic and offshore activities.[188] The Court has also applied the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act against U.S. corporations for conduct performed abroad.[189] Thus, the Court's duty to adjudicate issues of domestic importance and to apply federal statutes in a consistent fashion militate in favor of permitting ATS litigation against U.S. corporations.

D. Modern Usage of the Corporate Aiding and Abetting Theory Warrants ATS Litigation Against U.S. Corporations

The number of ATS lawsuits against global corporations has grown to over 150 since the 1970s.[190] Over ninety-five percent of ATS lawsuits involve allegations of aiding and abetting.[191] Although most courts eventually dismissed those allegations, they did so on grounds unrelated to the merits of the aiding and abetting claims.[192] If U.S.

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185 *See, e.g.*, Philadelphia, W. & B. R. Co. v. Quigley, 62 U.S. 202, 210 (1859) ("[A]ctions might be maintained against U.S. corporations for torts); Aetna Life Ins. Co. v. Brewer, 12 F.2d 818, 820 (D.C. Cir. 1926) (ruling that a U.S. corporation may be liable under tort law for the slanderous acts of its employees); United Cigar Stores Co. v. Young, 36 App. D.C. 390, 405 (D.C. Cir. 1911) (same).

186 Leveille, *supra* note 96, at 671–72 (suggesting how extraterritorial application of ATS can be done while preserving international comity).

187 *Id.* at 670.

188 *Id.*

189 Skinner, *supra* note 111, at 248–49.

190 Donald E. Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 713 (2012).

191 Bill Reinsch, *The Alien Tort Statute's Impact on the Business Community*, WORLD COM. REV. 28 (June 2012), http://www.worldcommercereview.com/publications/article_pdf/612.

192 *See* Michael D. Goldhaber, *The Global Lawyer: The Life and Death of the Corporate Alien Tort*, THE AMERICAN LAWYER, https://www.law.com/americanlawyer/almID/1202472914956/ (citing a source which provides an exhaustive list of ATS cases brought

corporate defendants fall under the scope of the ATS, then courts can review—and still give corporate defendants a chance to defend themselves on—the merits of the aiding and abetting claims.

The growing relevance of corporate aiding and abetting liability now provides powerful grounds for courts to hear ATS claims against U.S. corporations.[193] Indeed, the Supreme Court in *Sosa* stated that it originally understood ATS jurisdiction "to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law."[194] Justice Breyer also emphasized in his *Kiobel* concurrence that the ATS's "jurisdictional reach" should "match the statute's underlying substantive grasp,"[195] which covers the three principal eighteenth-century offenses: (1) piracy, (2) offenses against ambassadors, and (3) violation of safe conducts.[196] Aiding and abetting liability fits within the purview of these offenses because it was both "accepted by the civilized world" and "defined with a specificity comparable to the features [of the three offenses]."[197]

1. History of Corporate Aiding and Abetting Liability Under the ATS

During the eighteenth and nineteenth centuries, aiding and abetting violations of the law of nations were a prime concern of legislators in England and colonial America.[198] English Judge William Blackstone

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against corporations). *See also* Susan Simpson, *All* Alien Tort Statute Cases Brought Between 1789 and 1990*, THE VIEW FROM LL2 (Dec. 18, 2010), https://viewfromll2.com/2010/12/18/all-alient-tort-statute-cases-brought-between-1789-and-1990/ (providing an extensive list of ATS cases from 1789 to 1990).

193 *See* Cassel, *supra* note 7, at 326 ("[A]iding and abetting international human rights crimes by private actors, including corporations and their executives, satisfies the tests set forth by the Supreme Court in *Sosa* for recognition of common law tort claims under the ATS"). *See also* Richard Mason, *Civil Liability for Aiding and Abetting*, ABA BUSINESS LAW TODAY (May 16, 2006), https://businesslawtoday.org/2006/05/civil-liability-for-aiding-and-abetting/ (providing a good overview of civil liability for aiding and abetting with respect to several different types of defendants, including corporations); Lovejoy, *supra* note 12, at 273 (reviewing whether corporations can be liable for aiding and abetting in light of *Sosa* and subsequent cases); Kelly, *supra* note 35, at 89 (calling for corporate liability under the ATS in order to stop corporate complicity in heinous crimes).

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

195 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 132 (2013) (Breyer, J., concurring).

196 *Sosa*, 542 U.S. at 720.

197 *Kiobel*, 569 U.S. at 128 (Breyer, J., concurring).

198 Lovejoy, *supra* note 12, at 250.

recognized that aiders and abettors could be punished consistent with principal liability.[199] He wrote, "A man may be principal in an offence . . . in the first degree [if he is the] actor[] or absolute perpetrator of the crime; and, in the second degree [if he is] present, aiding, and abetting the fact to be done."[200] Similarly, Judge Matthew Hale found that actors who "assisted in crimes of violence (trespasses) or mayhem are indistinguishable from the primary actors."[201] By 1790, the U.S. passed its first law confirming aiding and abetting liability for piracy in U.S. courts.[202] Aiders and abettors of piracy were treated as principals if they failed their "duty" to disclose their knowledge before the commission of the piracy[203] and were held liable under both common law and admiralty law jurisdictions.[204] In 1795, Attorney General William Bradford reaffirmed the significance of aiding and abetting liability when he asserted that aiding and abetting was applicable to cases of piracy under the ATS.[205] Throughout the 1800s, aiding and abetting piracy was distilled into three categories: (1) counsel or procurement of piracy, (2) material aid of pirates, and (3) comfort of or profit from pirates.[206]

Today, courts increasingly recognize ATS claims against U.S. corporations based on the theory of civil aiding and abetting.[207] In accordance with Justice Breyer's approach from *Kiobel*, courts have considered whether U.S. corporations have aided and abetted offenses committed by the "common enemies of all mankind" in violation of the law of nations.[208] For example, courts have found aiding and abetting torture to be a cognizable claim under the ATS because the offense is comparable to one of the three principal eighteenth-century offenses of

199 *Id.* at 252 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *34).

200 *Id.* at 252–53.

201 *Id.* at 253.

202 *Id.* at 262.

203 *Id.*

204 *Id.* at 254.

205 *Id.* at 263.

206 *Id.* at 266.

207 *See* Doe v. Nestle, S.A., 906 F.3d 1120, 1124 (9th Cir. 2018) (involving an ATS claim against a Virginia-based corporation for aiding and abetting child slavery in the Ivory Coast); Mastafa v. Chevron Corp., 770 F.3d 170, 191–94 (2d Cir. 2014) (involving an ATS claim against a California-based corporation for aiding and abetting torture in Iraq).

208 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 132 (2013) (Breyer, J., concurring); Doe v. Nestle, S.A., 906 F.3d at 1124; *Mastafa*, 770 F.3d at 191–94.

aiding and abetting piracy.[209] According to several courts, "today's pirates" include torturers, perpetrators of genocide, and enslavers of child workers, just to name a few.[210]

In order for a corporation to be liable for civil aiding and abetting, the plaintiff must establish two elements: (1) the conduct of the defendant who aids and abets (*actus reus*), and (2) the defendant's mental state (*mens rea*).[211] The actus reus element is met when the defendant renders "practical assistance, encouragement, or moral support which has a substantial effect on the perpetuation of the [offense]."[212] With respect to the mens rea element, however, courts are split over the required type of mental state.[213] On one hand, some courts have generally understood the mens rea element to mean that the defendant merely *knew* that his or her actions would facilitate the commission of the offense.[214] For example, in *Prosecutor v. Furundzija*, the Trial Chamber found the defendant guilty of aiding and abetting war crimes because he had the "knowledge that [his] acts assist[ed] in the commission of the offence."[215] On the other hand, other courts have equated the mens rea element with having a *purpose* to facilitate the commission of the offense.[216] The "purpose" standard has generally been more difficult for ATS plaintiffs to satisfy.[217] For example, in *United States v. Rasche*, the court ruled that even though the defendant bank *knew* that its loan would be used to perpetuate a crime, the bank was not guilty of aiding and abetting because it did not

209 *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 254–56 (2d Cir. 2009) (likening torturers to pirates in that they are "enem[ies] of all mankind" and stating that "a plaintiff may plead a theory of aiding and abetting liability [for torture against a corporation] under the ATS); Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 321 (D. Mass. 2013) ("[I]s aiding and abetting a crime against humanity tantamount to piracy, or one of the other narrowly defined crimes for which the ATS provided jurisdiction in 1789? Again, the weight of authority confirms that it is.").

210 *Kiobel*, 569 U.S. at 133 (2013) (Breyer, J., concurring); Doe v. Nestle, S.A., 906 F.3d at 1126; *Mastafa*, 770 F.3d at 180–81; *Presbyterian Church of Sudan*, 582 F.3d at 254–56.

211 Cassel, *supra* note 7, at 308.

212 *Id.*

213 *Id.*

214 *Id.* at 308–09.

215 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 249 (Dec. 10, 1998), https://www.icty.org/case/furundzija/4.

216 Cassel, *supra* note 7, at 310–15.

217 Skinner, *supra* note 111, at 223.

act with the *purpose* to perpetuate that crime.[218] The International Criminal Court codified the "purpose" standard in Article 25(3)(c), which holds responsible one who, "[f]or the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission."[219]

Although debate persists over which of the two mens rea standards is more appropriate for evaluating aiding and abetting claims under the ATS, most U.S. courts have applied the "purpose" standard.[220] These courts have reasoned that while "there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law, no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law."[221]

2. Modern Application of Corporate Aiding and Abetting Theory Under the ATS

In determining whether a corporation acted with the "purpose" to perpetuate a violation of the "law of nations," U.S. courts have looked to the circumstances of each case.[222] Although courts have not outlined a clear set of circumstances from which "purposeful intent" can be inferred, courts have generally inferred purposeful intent where the corporation (1) knew that its assistance would be used by the perpetrator to commit the offense, and (2) engaged in bad faith conduct outside the ordinary course of business to assist that specific

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218 United States v. Rasche (The Ministries Case), in 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 662 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf ("Loans or sales of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller . . . but the transaction can hardly be said to be a crime.").

219 Rome Statute of the International Criminal Court, *Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/9, 21, art. 25.3(c), 37 I.L.M. 999 (1998), https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#article25.

220 Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 217 (2d Cir. 2016); Mastafa v. Chevron Corp., 770 F.3d 170, 191 (2d Cir. 2014); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 765 (9th Cir. 2011); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009).

221 *Presbyterian Church of Sudan*, 582 F.3d at 259 (emphasis in original). *See also Licci*, 834 F.3d at 217 (citing *Presbyterian Church of Sudan*, 582 F.3d at 259); *Mastafa*, 770 F.3d at 191–92 (same).

222 *Presbyterian Church of Sudan*, 582 F.3d at 264 (testing the evidence to see if it supported an inference of purposeful intent); *Mastafa*, 770 F.3d at 192 (same).

perpetrator.[223] For example, in *Licci v. Lebanese Canadian Bank*, which involved an ATS claim against a bank for aiding and abetting acts of terrorism in Israel, the court held that the plaintiff stated a valid claim that the bank acted "with the purpose" to aid and abet terrorism.[224] The court reasoned that the bank's purposeful intent could be inferred from the fact that the bank (1) had knowledge that its transferred funds would "enabl[e] and assist[] [the perpetrator] to carry out terrorist attacks against Jewish civilians in Israel"; and (2) "engaged in activity 'intended to conceal and disguise the true source, nature, ownership, and control of' proceeds of illegal activities in a scheme that 'benefitted [the perpetrators].'"[225] The bank's attempt to "conceal and disguise" its assistance to the perpetrator particularly led the court to infer that that bank acted with purposeful intent.[226]

By contrast, in *Presbyterian Church of Sudan v. Talisman Energy Inc.*, which concerned an ATS claim against an oil company for aiding and abetting the Sudanese government in committing human rights abuse, the court found no purposeful intent on behalf of the company.[227] The court reasoned that while the company may have known that Sudanese military forces were committing human rights violations, there was no evidence that the company's assistance was "inherently criminal or wrongful" or used to specifically perform those violations rather than to facilitate "other activity the Government wanted to pursue."[228] Similarly, in *Mastafa v. Chevron Corp.*, which involved an ATS claim against an energy corporation for aiding and abetting the Saddam Hussein regime in committing torture, the court ruled that

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223 *See Licci*, 834 F.3d at 218–19 (holding that plaintiffs stated a valid aiding and abetting claim because defendant corporation knowingly provided practical assistance to the perpetrator with intent to "conceal and disguise" the illegal activities); *Mastafa*, 770 F.3d at 192–94 (holding that plaintiffs did not meet the mens rea requirement because plaintiffs alleged purposeful intent in mere conclusory terms without proof that defendant even had knowledge of the perpetrator's commission of the offense); *Presbyterian Church of Sudan*, 582 F.3d at 261–64 (stating that there were insufficient facts to infer that defendants acted with purposeful intent because the defendant's assistance was not inherently criminal or shown to have specifically perpetuated the offense).

224 *Licci*, 834 F.3d at 219. The claim was sufficient to pass the court's initial jurisdictional inquiry, but the court ultimately found that it did not have subject matter jurisdiction over the claim. *Id.*

225 *Id.*

226 *See id.*

227 *Presbyterian Church of Sudan*, 582 F.3d at 261–64.

228 *Id.*

purposeful intent could not be inferred from the circumstances.[229] The court based its ruling on (1) the plaintiff's failure to sufficiently plead that the corporation "had 'actual knowledge' that [its] actions would contribute to the commission of human rights abuses," and (2) the plaintiff's failure to show that the corporation took "deliberate steps" to assist Saddam Hussein in committing torture.[230] Taken together, *Mastafa* and *Presbyterian Church of Sudan* demonstrate that "purposeful intent" will likely not be inferred where the corporation did not know of the offense or engage in bad faith conduct outside the ordinary course of business to assist the specific perpetrator in committing the offense.

Modern application of corporate aiding and abetting theory under the ATS demonstrates that there is now a fair and reasonable standard for reviewing ATS claims against U.S. corporations. Concerns that ATS liability would overburden U.S. corporations are unwarranted because the "purposeful intent" mens rea standard both sets a high bar for plaintiffs to clear and ensures that only egregious aiders and abettors of human rights violations get persecuted.[231] Rather than "categorically foreclos[ing]" all U.S. corporations from ATS liability,[232] the Supreme Court should find jurisdiction to hear ATS claims against domestic corporations so that the most deserving aiders and abettors of human rights violations are brought to justice.

229 Mastafa v. Chevron Corp., 770 F.3d 170, 192–94 (2d Cir. 2014).

230 *Id.*

231 Skinner, *supra* note 111, at 223.

232 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1419 (2018) (Sotomayor, J., dissenting).

3. Corporate Aiding and Abetting Liability Going Forward: Doe v. Nestle, S.A.

A current case in the Ninth Circuit Court of Appeals, *Doe v. Nestle, S.A.*,[233] demonstrates why courts should have jurisdiction to review aiding and abetting claims against domestic corporations under the ATS. There, child slaves were kidnapped and forced to work on cocoa farms on the Ivory Coast.[234] The enslaved children raised an ATS claim against two American corporations: Nestle USA, a Virginia corporation, and Cargill, Inc., a Minnesota corporation.[235] Together, these corporations effectively controlled cocoa production on the Ivory Coast.[236] While enslaved children, the plaintiffs labored for up to fourteen hours a day without pay, and they witnessed other enslaved children get beaten and tortured for trying to escape.[237] Although the defendant corporations were well aware of the child slavery problem, they took steps to perpetuate the existing cocoa supply chain system to depress labor costs.[238] The corporations maintained exclusive buyer/seller relationships with Ivory Coast farmers who enslaved child laborers, and they visited the supplier farms several times each year.[239] To ensure the farmers' loyalty, the corporations provided the farmers with financial support, equipment, and personal spending money outside their contractual agreement.[240] The plaintiffs initiated the ATS claims on the premise that the two corporations aided and abetted child slavery.[241]

Before evaluating the merits of the aiding and abetting claims, the Ninth Circuit Court of Appeals first found that it had jurisdiction to review the case.[242] The court held that the defendant corporations' conduct was sufficiently relevant to the ATS's focus to warrant review of the aiding and abetting claims. The court first reasoned that the

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233 *See* Doe v. Nestle, S.A., 906 F.3d 1120 (9th Cir. 2018) (extending judicial review over plaintiffs' ATS claims against two U.S. corporations for aiding and abetting child slavery).

234 *Id.* at 1123.

235 *Id.* at 1122–23.

236 *Id.* at 1123.

237 *Id.* at 1122.

238 *Id.* at 1123.

239 *Id.*

240 *Id.*

241 *Id.* at 1122.

242 *Id.* at 1126.

Supreme Court's holding in *Jesner* abrogated only ATS jurisdiction over foreign corporations; thus, domestic corporations could still be defendants in suits brought under the ATS.[243] The court then ruled, in accordance with prior circuit court opinions,[244] that "aiding and abetting comes within the ATS's focus on 'tort[s] . . . committed in violation of the law of nations.' "[245] Finally, in accordance with the "touch and concern" test from *Kiobel* and the "focus test" from *RJR Nabisco*, the court ruled that the plaintiffs' claims involved enough of a domestic nexus to overcome the presumption against extraterritoriality.[246] Specifically, the court observed that the plaintiffs' claims "paint[ed] a picture of overseas slave labor that defendants perpetuated *from headquarters in the United States*."[247] These circumstances led the Ninth Circuit to order the parties to submit amended briefs specifying the merits of the aiding and abetting claim.[248]

Whether the defendant corporations will be charged for aiding and abetting under the ATS is now a question of much debate. Defendants Nestle USA and Cargill, Inc., both deny the aiding and abetting claims on two main grounds.[249] First, they claim that the plaintiffs failed to prove that there was domestic corporate activity beyond "mere corporate presence" that aided and abetted the offense.[250] They claim that their payments originating from the United States and visits to the

243 *Id.* at 1124.

244 *See* Mastafa v. Chevron Corp., 770 F.3d 170, 185 (2d Cir. 2014) ("[T]he 'focus' of the ATS is on . . . conduct of the defendant which is alleged by plaintiff to be either a direct violation of the law of nations or . . . conduct that constitutes aiding and abetting another's violation of the law of nations."). *See also* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 199 (5th Cir. 2017) (stating that aiding and abetting conduct comes within the focus of the ATS).

245 Doe v. Nestle, S.A., 906 F.3d at 1125.

246 *Id.* at 1125–26.

247 *Id.* at 1126 (emphasis added).

248 *Id.* at 1126–27.

249 *See* Petition for Rehearing and Rehearing En Banc of Defendant-Appellee Cargill, Inc. at ii–iii, Doe v. Nestle, S.A., No. C-05-5133-SVW (9th Cir. 2018) (No. 17-55435); Petition for Rehearing and Rehearing En Banc of Defendant-Appellee Nestle USA, Inc. at ii, Doe v. Nestle, S.A., No. C-05-5133-SVW (No. 17-55435).

250 Petition for Rehearing and Rehearing En Banc of Defendant-Appellee Cargill, Inc. at 15, Doe v. Nestle, S.A., No. C-05-5133-SVW (No. 17-55435) (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013)).

Ivory Coast farms are "not enough to overcome the Supreme Court's prohibition on extraterritorial ATS suits."[251]

Second, the defendant corporations claim that, even if there was domestic corporate activity beyond "mere corporate presence," they did not act with the requisite specific intent to aid and abet child slavery.[252] They contend that providing financial support, equipment, and personal spending money to maintain the farmers' "loyalty as exclusive suppliers" was a "common business occurrence across industries."[253] Such a business relationship, they claim, is not inherently illegal and does not prove that they purposely intended to assist the farmers in kidnapping and enslaving child workers.[254]

The defendants' claims will likely not pass muster, however, given the modern application of the corporate aiding and abetting theory under the ATS. First, sufficient domestic corporate activity will likely be found because, like the circumstances in *Mastafa v. Chevron Corp.*, the circumstances in *Nestle* involve a U.S. corporation that provided financial support to an egregious overseas violator of the law of nations.[255] The corporations in both cases also made decisions for, and imported illicitly produced goods from, their overseas counterparts.[256] In *Mastafa*, Chevron Corporation directed oil shipments and purchased oil from its supplier in Iraq, and in *Nestle*, both Nestle USA and Cargill, Inc., oversaw the cocoa plantations and purchased cocoa produced

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251 Petition for Rehearing and Rehearing En Banc of Defendant-Appellee Cargill, Inc. at 10, Doe v. Nestle, S.A., No. C-05-5133-SVW (No. 17-55435).

252 *Id.* at 15; Answering Brief of Nestle USA, Inc. at 50, Doe v. Nestle, S.A., No. C-05-5133-SVW (No. 17-55435).

253 Petition for Rehearing and Rehearing En Banc of Defendant-Appellee Nestle USA, Inc. at 15, Doe v. Nestle, S.A., No. C-05-5133-SVW (No. 17-55435).

254 *Id*; Petition for Rehearing and Rehearing En Banc of Defendant-Appellee Cargill, Inc., *supra* note 251, at 14.

255 *Compare* Mastafa v. Chevron Corp., 770 F.3d 170, 174 (2d Cir. 2014) (involving an ATS claim against a U.S. corporation for aiding and abetting Saddam Hussein's regime to commit torture), *with* Doe v. Nestle, S.A., 906 F.3d at 1122–23 (involving an ATS claim against a U.S. corporation for aiding and abetting Ivory Coast farmers to enslave child workers).

256 *Compare Mastafa*, 770 F.3d at 191 (describing how defendant corporation made purchases and performed financial transactions for the Saddam Hussein regime), *with* Doe v. Nestle, S.A., 906 F.3d at 1126 (reviewing how defendant corporations helped perpetuate a system built on child labor to depress labor costs in importing cocoa).

through child slavery from their suppliers on the Ivory Coast.[257] Thus, just as sufficient domestic activity under the ATS was found in *Mastafa*,[258] sufficient domestic activity should also be found in *Nestle*.

Second, Nestle USA and Cargill, Inc., likely exhibited the requisite intent because, like the banking corporation in *Licci v. Lebanese Canadian Bank*, both corporations in *Nestle* knew that their suppliers were committing egregious human rights violations, and they made dubious financial arrangements to ensure that their suppliers remained loyal and committed to their scheme.[259] Despite the U.S. corporations' contentions that providing "personal spending money" to the farmers was "common business" practice, those extracontractual payments were "more akin to 'kickbacks' " and served to ensure the farmers' loyalty and exclusivity as suppliers.[260] The "personal spending money" effectively ensured that no one else would do business with the farmers and uncover the particulars of their child slave labor scheme.[261] Like the dubious financial arrangements in *Licci*, the provision of "personal spending money" was intended, in part, to " 'conceal and disguise the true source, nature, ownership, and control of' [the] proceeds of illegal activities."[262] Thus, the requisite intent should be inferred from the circumstances in *Nestle* as it was from the circumstances in *Licci*.[263]

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Overall, the scope of the ATS covers U.S. corporations because ATS litigation against domestic corporations is consistent with the text, purpose, and legislative history of the ATS. In addition, ATS litigation against U.S. corporations involves enough of a domestic nexus to overcome the presumption against extraterritoriality: it "touches and concerns" U.S. territory with "sufficient force," given that decisions leading to human rights violations occur in the U.S., products from those violations often come into the U.S., and substantial U.S. interests

257 *Compare Mastafa*, 770 F.3d at 175 (describing defendant's activities with Saddam Hussein's regime), *with* Doe v. Nestle, S.A., 906 F.3d at 1123 (describing defendant's activities with Ivory Coast farmers).

258 *Mastafa*, 770 F.3d at 195 ("[P]laintiffs have alleged specific, domestic conduct in the complaint").

259 Doe v. Nestle, S.A., 906 F.3d at 1126.

260 *Id.*

261 Appellant's Opening Brief at 7–9, 27 Doe v. Nestle, S.A., No. C-05-5133-SVW (9th Cir. 2018) (No. 17-55435).

262 Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 219 (2d Cir. 2016) (partly quoting Flores v. Southern Peru Copper Corp., 414 F.3d 233, 358 (2nd Cir. 2003)).

263 Doe v. Nestle, S.A., 906 F.3d at 1126.

are affected. Furthermore, naming U.S. corporations as ATS defendants would not substantially endanger U.S. foreign relations because doing so would not challenge the sovereignty of foreign nations. Finally, courts have increasingly recognized domestic corporations as ATS defendants under the theory of civil aiding and abetting. Because several U.S. corporations meet both the actus reus and "purposeful intent" mens rea standards for aiding and abetting, U.S. corporations should be namable defendants under the ATS. Concerns that ATS liability would overburden U.S. corporations are unwarranted because U.S. corporations can still defend themselves on the merits of the ATS claims; the "purposeful intent" mens rea standard sets a high bar for plaintiffs to meet, thereby ensuring that only egregious aiders and abettors of human rights violations get prosecuted.

CONCLUSION

In the global supply chain economy, U.S. corporations are linked with numerous instances of human rights violations involving labor abuse, child slavery, extrajudicial killings, pollution, and war crimes in foreign host states.[264] The current Ninth Circuit case, *Doe v. Nestle, S.A.*,[265] now provides the United States with an opportunity to hold U.S. corporations accountable for aiding and abetting egregious human rights violations. Although the Supreme Court has yet to answer whether ATS claims may be raised against U.S. corporations, the existing body of case law and the ATS's text, purpose, and history demonstrate that the statute should cover domestic corporations, including the two corporations in *Nestle*.

Jurisdiction to review ATS claims against U.S. corporations would not pose an undue burden on domestic companies or "embargo [U.S.] trade with foreign nations."[266] For example, U.S. corporations can still defend themselves on the merits of the aiding and abetting claims by showing that they did not act with "purposeful" intent to assist an

264 *See* Cassel, *supra* note 7, at 305–06 (listing several U.S. corporations linked with allegations of global human rights violations); *see also Making Sense of Managing Human Rights Issues in Supply Chains*, *supra* note 7, at 18.

265 Doe v. Nestle, S.A., 906 F.3d at 1126 (extending judicial review over plaintiffs' ATS claims against two U.S. corporations for aiding and abetting child slavery).

266 Brief of Amici Curiae Chamber of Commerce of United States, National Ass'n of Manufacturers, & Organization for International Investment in Support of Defendants-Appellees' Petitions for Rehearing and Rehearing En Banc at 14, Doe v. Nestle, S.A., 906 F.3d 1120 (No. 17-55435).

affiliate in committing a violation of the law of nations.[267] Given that the standard of proving purposeful intent is a high bar for ATS plaintiffs to hurdle,[268] the existing legal framework for aiding and abetting liability ensures that only the most deserving aiders and abettors of human rights violations get prosecuted.

Furthermore, domestic corporate liability under the ATS would incentivize U.S. corporations to undertake better due diligence efforts to prevent the occurrence of human rights violations. To avoid liability, corporations would identify risks in their supply chains and work closer with suppliers to minimize adverse human rights impacts.[269] To promote transparency and good faith, corporations would also be encouraged to conduct compliance audits and disclose their findings.[270] Furthermore, domestic corporations subject to ATS suits would have an incentive to withdraw from host states and business relationships that cause, create, or are directly linked to adverse human rights impacts.[271] Holding U.S. corporations accountable under the ATS would result in greater overall due diligence efforts.

Having jurisdiction to review ATS claims against domestic corporations would ultimately serve the ATS's purpose: to provide redress to victims of torts committed in violation of the law of nations.[272] To prevent U.S. corporations from violating human rights with impunity, U.S. courts must have the jurisdiction to review domestic corporations under the ATS.

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267 Mastafa v. Chevron Corp., 770 F.3d 170, 192–94 (2d Cir. 2014).

268 Skinner, *supra* note 111, at 223.

269 *Respecting Human Rights Through Global Supply Chains*, *supra* note 108, at 8.

270 *Id.* at 15–18; *Making Sense of Managing Human Rights Issues in Supply Chains*, *supra* note 7, at 41–42; *see also* Diane A. Desierto, *Shifting Sands in the International Economic System: "Arbitrage" in International Economic Law and International Human Rights*, 49 GEO. J. INT'L L. 1019, 1103–06 (2018) (reviewing pre- and post-audit measures and concluding that states and corporations should consolidate their "international human rights law commitments, compliance reports, and other relevant records indicating their international human rights commitments into a single database accessible to the public").

271 *Trade Promotion and Human Rights*, *supra* note 156, at 3.

272 Connelly, *supra* note 35, at 217.