WILL CAPITALISM KILL COMPASSION?—AN ANALYSIS OF THE FUTURE OF CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

Dina H. Arouri[*]

Abstract

This Note proposes that the Court erred in the recent decision, *Jesner v. Arab Bank, PLC*, when it failed to adopt a standard that remained faithful to Congress's intent at the inception of the Alien Tort Statute (ATS): to remedy human rights violations while remaining relevant to the global economy. In *Jesner*, the Court was asked to reassess whether the ATS categorically forecloses corporate liability. Although the controversy surrounding the jurisdictional reach of the ATS is well placed, the statute has allowed for U.S. courts to fill the international void for a forum that adjudicates human rights. This Note discusses why corporations should be liable for human rights violations under the ATS.

This Note begins by explaining the historical circumstances that inspired Congress to implement the ATS. Part II explains the international significance of the statute and why civil remedies are preferable to criminal liability. Part III of this Note provides insight into modern cases that shaped the application of the ATS. Part IV explains why the Supreme Court in *Jesner* had the potential to permanently shift the tides of corporate liability. After discussing scholars' reasoning against corporate liability in Part V, this Note concludes by asserting that the Supreme Court should have ruled in favor of corporate liability under the ATS by applying the theory of universal jurisdiction.

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* J.D. candidate 2019, University of Florida Levin College of Law; B.A. 2015, Rollins College. I would like to take this opportunity to thank my parents, Hasan and May, for their unwavering faith in me over the years, and my younger brother, Said, for giving me peace of mind by taking care of Bella and Elmo whenever I am away from home. I would also like to thank the student editors and staff of the *Florida Law Review* who edited this Note, and the *Forum* Department for the honor of being published.

INTRODUCTION

Recent advances in technology have propelled the growth of a global economy.[1] A byproduct of the global economy is the emergence of multinational corporations.[2] Many of these multinational corporations have committed human rights violations through investments that fail the ethical standards of international law.[3] Collectively, members of the world economy have failed to hold multinational corporations accountable for large-scale atrocities and crimes against humanity.[4] The failure of organizations such as the United Nations Security Council to mitigate humanitarian atrocities has left victims of such violations with

1. Scott Coye-Huhn, *No More Hiding Behind Forms, Factors, and Flying Hats: A Proposal for a Per Se Piercing of the Corporate Veil for Corporations That Violate the Law of Nations Under the Alien Tort Claims Statute*, 72 U. CIN. L. REV. 743, 762 (2003).

2. *Id.*

3. *Id.*

4. ANTONIO CASSESE, CASSESE'S INTERNATIONAL CRIMINAL LAW 8 (Cassese et al. eds., 2d ed. 2003).

few options for vindication.[5] In fact, of the 193 member states of the United Nations, the United States has taken the most vigorous action against crimes committed abroad—through its application of the Alien Tort Statute (ATS).[6] In light of the United States' economic and political dominance, the application of the ATS has become a critical tool in the vindication of human dignity.[7]

The ATS provides, in full: "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."[8] Therefore, to state a claim under the ATS, a complaint must sufficiently allege three elements: the plaintiff is (1) an alien (2) suing for a tort (3) that was committed in violation of the law of nations or a treaty of the United States. While the plain language of the statute appears simple, this sentence has mysteriously fractured courts and baffled scholars since its inception over 200 years ago.[9]

The Alien Tort Statute, 28 U.S.C. § 1350, has been available to plaintiffs since 1789.[10] Despite the statute's longevity, the Supreme Court of the United States has failed to establish a clear, unanimous standard explaining its proper application.[11] And although the statute is brief, applying the ATS requires an intricate analysis of subject matter, causes of action, choice of law, constitutionality, and the presumption against territoriality.[12] A uniform standard for interpreting the ATS is essentially non-existent,[13] and fractured courts have argued over how to best interpret the statute.[14] With each new standard resolving one issue, another issue emerges.[15] To alleviate these ambiguities, this Note suggests that the Supreme Court should have adopted a standard that avoided antagonizing foreign nations and effectuated relief for international law violations.[16] This Note proposes that the Court should

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5. JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 339 (2003).

6. *Id.*

7. *Id.*

8. 28 U.S.C.A. § 1350 (2018).

9. Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1472–74 (2014).

10. Note, *Clarifying Kiobel's "Touch and Concern" Test*, 130 HARV. L. REV. 1902, 1902 (2017) [hereinafter *Clarifying Kiobel's*].

11. *Id.* at 1902, 1910.

12. *See* STEPHENS ET. AL., INTERNATIONAL HUMAN RIGHTS IN U.S. COURTS 27–42 (2nd ed. 2008).

13. *Id.*

14. Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1668 (2014).

15. *Id.*

16. Transcript of Oral Argument at 7–9, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (No. 16-499).

have applied the theory of universal jurisdiction to the ATS. Through this interpretation, the Court would have effectively created a standard that remains faithful to Congress's intent at the inception of the statute: to remedy human rights violations while also remaining relevant in the global economy.

Recently, the Court had the opportunity to solve one of the many riddles created by the ATS. At oral argument for *Jesner v. Arab Bank, PLC*, the Court was asked to reassess whether the ATS categorically forecloses corporate liability or if the presumption against extraterritoriality established in 2012 by *Kiobel v. Royal Dutch Petroleum* renders the question moot.[17] Although the controversy surrounding the jurisdictional reach of the ATS is well placed, the statute has allowed for U.S. courts to fill the international void for a forum that adjudicates human rights.[18]

In addition to evaluating and discussing precedential decisions impacting the statute's functionality, this Note suggests that the Court should have used the opportunity presented by *Jesner* to unambiguously affirm that the ATS permits corporate liability. Expanding the ATS to permit jurisdiction over corporations would create significant international consequences.[19] On one hand, exposing corporations to liability under the ATS would result in broader jurisdiction for the United States. On the other hand, maintaining the presumption against extraterritoriality would protect state sovereignty and limit the propensity for international friction. This Note suggests that the Supreme Court should have applied an overarching standard to the *Jesner* case—a standard that would have limited any radical, negative impacts to the United States' global economic, ethical and leadership positions.

This Note begins in Part I by explaining the historical circumstances that inspired Congress to implement the ATS. Part II explains the international significance of the statute, and why civil remedies are preferable to criminal liability. Next, the Part III of the Note provides insight on modern cases that shaped the application of the ATS. Part IV explains why the Supreme Court in *Jesner* had the potential to permanently shift the tides of corporate liability. After explaining scholars' reasoning against corporate liability, this Note concludes by asserting that the Supreme Court should have allowed corporate liability under the ATS by using the theory of universal jurisdiction.

17. In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 148 (2d Cir. 2015).

18. CASSESE, *supra* note 4, at 4.

19. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, INST. FOR INT'L ECON., AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 1–2 (2003).

I. THE ALIEN TORT STATUTE'S INCEPTION: THE *FAUX PAS* THAT STARTED IT ALL

Based on the scant but colorful history immediately preceding the ATS's passage, it appears as though the original purpose of the statute was to encourage foreign merchants to conduct business in the new nation.[20] The statute was meant to encourage business with foreign merchants by offering them a form of relief in the event of injury, relief which did not exist prior to the statute's passage.[21] As the international climate changed, so did the role of the statute. Rather than merely encouraging foreign trade relations, the ATS transformed into a means to vindicate international human rights grievances in federal court.[22]

In 1784, a foreign ambassador, French Consul General Marbois, fell victim to assault and battery by a notorious "obscure and worthless character," the Chevalier de Longchamps, in Philadelphia.[23] After de Longchamps was arrested and released on bail, he continued to antagonize General Marbois by sending him letters threatening assassination.[24] Lacking a proper forum in which General Marbois could properly press charges against his aggressor, the United States faced international criticism for Congress's apparent apathy.[25] Unfortunately, Congress had no judicial institution or theory through which it could adjudicate de Longchamps' assault on the ambassador, and the United States could not hold de Longchamps accountable in federal court.[26] Eventually, de Longchamps was apprehended and stood trial in state court.[27]

Congress recognized that it was virtually powerless to ensure an appropriate remedy for General Marbois in federal court, and thus was forced to defer the issue to state court.[28] But Congress was dissatisfied with de Longchamps' obligatory adjudication in state court.[29] Without an available medium through which foreign nationals could bring claims in federal court, Congress feared that stronger European nations would take retaliatory action against the United States in future crisis situations.[30]

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20. Lee, *supra* note 14, at 1656.
21. *Id.*
22. *Id.* at 1665.
23. JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL32118, REPORT FOR CONGRESS: THE ALIEN TORT STATUTE LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 8 (2003); William R. Castro, *The Federal Court's Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491 (1986).
24. Castro, *supra* note 23.
25. *Id.*; ELSEA, *supra* note 23.
26. Castro, *supra* note 23, at 492.
27. *Id.*
28. *Id.*
29. *Id.*
30. STEPHENS ET. AL., *supra* note 12, at 4.

The Marbois crisis, in combination with other, less well-documented incidents, incited Congress to establish a Federal remedy for international violations, ensuring that all issues of international magnitude would be adjudicated uniformly in federal court.[31]

Shortly after the infamous "Marbois Affair," the First Congress enacted the Judiciary Act of 1789.[32] The ATS was enacted as part of the Judiciary Act of 1789, which established U.S. federal courts and defined their domestic jurisdiction.[33] As part of the Judiciary Act, Congress included the ATS both as a prophylactic measure following the Marbois Affair, and as a symbol to the European powers that the newly minted American leadership would defend international standards of "good behavior."[34] An analysis of the statute's historical context reveals that the framers intended the ATS to serve two purposes.[35] First, the ATS was implemented as a national security measure to appease European nations with whom the United States wanted to maintain positive foreign relations.[36] Second, the framers' intended to avoid any further scandals like the Marbois Affair.[37] Granting federal jurisdiction for cases such as the Marbois Affair effectively strengthened the federal government's role in adjudicating international affairs by reflecting a concern for unity and granting federal jurisdiction in matters of international significance.[38]

II. SIGNIFICANCE OF THE ATS IN THE INTERNATIONAL CONTEXT

As the only U.S. statute granting foreign plaintiffs humanitarian relief, the ATS is a critical piece of legislation.[39] The statute's propensity for international jurisdiction, combined with its misleadingly complex language, has led to heated debates among scholars and litigants regarding the international impact of the ATS. For instance, the plain language of the statute omits clear definitions of what constitutes a "violation of the law of nations."[40] Furthermore, the statute is silent on the doctrine of extraterritoriality, a theory that bars the adjudication of violations of the law of nations that occur outside of the United States.[41] This presumption against extraterritoriality serves to protect against unintended clashes between laws of the United States and those of other

31. *Id.* at 5.
32. ELSEA, *supra* note 23, at 9.
33. Lee, *supra* note 14. at 1650.
34. HUFBAUER & MITROKOSTAS, *supra* note 19, at 3.
35. Lee, *supra* note 14, at 1651.
36. *Id.* at 1651–52.
37. *Id.*
38. STEPHENS ET. AL., *supra* note 12, at 6.
39. *Id.* at 45.
40. 28 U.S.C.A. § 1350 (2018).
41. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 118 (2013).

nations, which could result in international discord.[42] While this presumption is obviously intended to maintain foreign affairs, a secondary goal is preserving the separation of powers regarding international jurisdictions.[43]

A. *Violations of the "Laws of Nations"*

Traditionally, the "laws of nations" has been interpreted to mean "customary international law."[44] To establish a rule of customary international law, one must prove that: "(1) the rule has been followed as a 'general practice' and (2) *opinio juris*."[45] The "general practice" element is an objective inquiry evidenced by the actual practices of states.[46] The second element, *opinio juris*, is a subjective element satisfied by showing that states act according to the custom out of a "sense of legal obligation or necessity."[47] Currently, there are no "conceptual frameworks for developing and enforcing internationally recognized human rights."[48] Nonetheless, customary international law has gained increased adherence throughout the world without such a framework.[49]

Therefore, actionable claims under the ATS must constitute a *jus cogens* violation—an act considered so heinous that it offends the interest of all humanity.[50] In the interest of assessing whether an act is actionable under the ATS, *jus cogens* has been defined as "[a] norm accepted and recognized by the international community of the States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[51] Based on this definition and the lack of a codified framework, the most important requirement of a *jus cogens* violation is that it maintain a semblance of universality.[52]

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42. *Id.* at 124.

43. *See Clarifying Kiobel's*, *supra* note 10, at 1920.

44. Yihe Yang, *Corporate Civil Liability Under the Alien Tort Statute: The Practical Implications from Kiobel*, 40 W. ST. U. L. REV. 195, 198 (2013).

45. Tyler G. Banks, *Corporate Liability Under the Alien Tort Statute: The Second Circuit's Misstep Around General Principles of Law in* Kiobel v. Royal Dutch Petroleum Co., 26 EMORY INT'L L. REV. 227, 248 (2012).

46. *Id.*

47. *Id.*

48. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 236 (1993).

49. *Id.* at 237.

50. Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 244 (2001).

51. MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH U.S. TORTS LAW 22 (2009).

52. Sadat, *supra* note 50, at 257.

B. *Civil Remedies Provided by the ATS are Preferable to Criminal Adjudication*

It is undisputed that individual criminal liability of corporate officers falls within the jurisdiction of the International Criminal Court (ICC).[53] While there are no legal obstacles hindering criminal liability for corporations, there are some glaring issues when attempting to punish a fictitious entity.[54] First, corporations are unable to have the requisite mens rea for criminal liability.[55] Second, corporations cannot be imprisoned, leaving very limited pecuniary remedies available.[56] Third, and most importantly, international forums have not yet extended any theory allowing the adjudication of legal entities, as they are limited to jurisdiction over natural persons.[57] In discussing the civil-criminal distinctions applicable to corporate misconduct, Judge Leval explained:

> The reasons why the jurisdiction of international criminal tribunals has been limited to the prosecution of natural persons, as opposed to juridical entities, relate to the nature and purposes of criminal punishment, and have no application to the very different nature and purposes of civil compensatory liability.[58]

Unlike criminal liability, the objective of civil liability is to compensate victims for their pain and suffering and to attempt to restore them to their pre-tort state.[59] By imputing liability unto corporations, victims can be monetarily compensated by the corporations, whose profit may have been earned as a result of the illicit activities that caused the relevant tort.[60] In addition to the compensatory advantage of civil liability, civil suits may be brought directly to court by the victim.[61] The ATS's unique civil remedies provision renders it not only critical in the domestic sphere, but also one which remains relevant to the international community.[62]

III. DEFINING APPROPRIATE CAUSES OF ACTION UNDER THE ATS: JUST

53. Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 GEO. WASH. INT'L L. REV. 351, 396 (2016).

54. Banks, *supra* note 45, at 252–53.

55. *Id.*

56. *Id.*

57. *Id.*

58. Kaeb, *supra* note 53, at 362.

59. Banks, *supra* note 45, at 244–45.

60. *Id.*

61. *Id.* at 253–54.

62. STEPHENS ET. AL., *supra* note 12, at 45.

FOR *JUS COGENS*

When analyzed through a historical paradigm, it is clear that the ATS was passed to provide federal courts with jurisdiction over a limited number of causes of action recognized under the law of nations.[63] While the statute unambiguously provides courts with a domestic basis for jurisdiction, courts continue to battle over whether the statute's breadth violates jurisdictional principles under international law.[64] In reaffirming the *Filartiga v. Pana-Irala*[65] and *Sosa v. Alvarez-Machain*[66] decisions, the *Jesner* Court had the authority to codify the standard under which plaintiffs may seek relief.

A. *The* Filartiga *Court's Rejection of the ATS as an Independent Cause of Action*

After the ATS was passed, it lay dormant for nearly two centuries.[67] The ATS was revived in the 1980 *Filartiga* case.[68] In this case, a Paraguayan insurgent and his daughter sued a former Paraguayan police officer for the torture and wrongful murder of their family member, Joelito Filartiga.[69] Although the District Court for the Eastern District of New York originally dismissed the case for lack of jurisdiction, the Second Circuit Court of Appeals reversed the decision.[70] In reversing the decision, the court recognized that international law allows for universal jurisdiction pertaining to certain human rights.[71] Ultimately, the appellate court reasoned that the ATS was designed to open federal courts for the adjudication of unequivocal rights such as freedom from torture.[72] Given the nature of the plaintiffs' torture claim, the suit was proper in a United States court.[73] In reaching this conclusion, the court explained, "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[74]

Through this holding, the Second Circuit Court of Appeals resolved

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63. Sosa v. Alvarez-Machain, 542 U.S. 692, 717–18 (2004).

64. Lorelle Londis, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates A New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 153 (2005).

65. 630 F.2d 876 (2d Cir. 1980).

66. 542 U.S. 692, 697 (2004).

67. Stephens, *supra* note 9, at 1468.

68. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); ELSEA, *supra* note 23, at 13.

69. *Filartiga*, 630 F.2d at 876.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 878.

74. *Id.*

several issues presented by the ATS' language.[75] First, the court recognized that the international law of human rights is an evolving body of law.[76] Therefore, application of the ATS cannot be bound by the "law of nations" as it was contemporary to the statute's passage in 1789; it must evolve concurrent with the law of nations.[77] Given the ephemeral nature of international law, the court acknowledged that the violation in question must be considered a violation of human rights with "the general assent of civilized nations."[78] Finally, the court confirmed the constitutionality of the ATS by referring to Article III of the United States Constitution, explaining that federal jurisdiction "arising under the . . . laws of the United States," does not necessarily bar federal jurisdiction over international claims.[79] In fact, the court emphasized that international law is part of United States common law, thus explicitly granting jurisdiction under Article III of the Constitution.[80]

In explaining that the statute did not provide plaintiffs with any independent cause of action, the Second Circuit resolved one of the fundamental questions regarding the functionality of the ATS. It explained that the statute serves as a tool through which foreign plaintiffs may seek relief for violations of international law, rather than an independent cause of action.[81] Following the *Filartiga* court's holding, jurisdiction under the ATS applied to three distinct categories of cases:

> (1) cases in which an alien advances a theory of recovery based on international law or treaties of the United States; (2) cases in which an alien advances a theory of recovery based on United States domestic law—but only if the tortfeasor's acts also are in violation of international law or a treaty of the United States; and (3) cases in which an alien advances a theory of recovery based on the domestic law of a foreign country—but only if the tortfeasor's acts also are in violation of international law or a treaty of the United States.[82]

After ATS's resurrection in *Filartiga*, foreign litigants pursued actions under the ATS more frequently.[83] Many of these actions were dismissed pursuant to judicial avoidance doctrines such as *forum non conveniens*, sovereign immunity, and the political question doctrine.[84]

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75. STEPHENS ET. AL., *supra* note 12, at 9–10.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 32.
82. Castro, *supra* note 23, at 471; *see* KOEBELE, *supra* note 51, at 21.
83. ELSEA, *supra* note 23, at 15.
84. *Id.*

Cases that did survive, however, followed the *Filartiga* standard, which inherently allowed for jurisdiction over *jus cogens*[85] violations such as genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, and crimes against humanity.[86] The *Filartiga* court codified the ATS's jurisdiction related to *jus cogens* violations—thus breaking ground in domestic litigation for international human rights violations.[87]

The court's ultimate decision to allow *Filartiga* to continue in Federal court faced serious criticism. In a letter to the Department of Justice, the State Department Deputy Legal Advisor foreshadowed the international ramifications of the court's decision, particularly emphasizing how it approached the issue of a citizen subject to torture in his own state. In addition to the effect on victims of human rights violations, critics of the *Filartiga* decision also worried that the U.S. courts and government "would gradually become self-appointed policemen for the world," threatening international state sovereignty and international relations.[88]

B. *Enumeration of Acceptable Causes of Action Defined by the* Sosa *Court*

Despite the *Filartiga* court's codification of the ATS as a tool rather than as an independent cause of action, it was not until the Supreme Court heard *Sosa v. Alvarez-Machain*[89] that it established a framework defining acceptable causes of action. Plaintiff Humberto Alvarez-Machain was a Mexican national charged with murdering Drug Enforcement Agency (DEA) agents, former Mexican policemen, and Mexican civilians.[90] Upon hearing about Plaintiff's actions, U.S. officials hired a group of Mexican citizens to kidnap Plaintiff and bring him to the U.S. for indictment.[91]After his acquittal, Plaintiff brought an action under the ATS and the Federal Tort Claims Act (FTCA) alleging that his abduction violated his civil rights.[92]

In assessing Plaintiff's claims, the Court established a framework to define a "violation of the law of nations" under the ATS. The first step of the framework requires plaintiffs to identify a *jus cogens* violation.[93] The second step permits the court to exercise its "residual common law discretion" to determine whether the "private cause of action" that

85. Sadat, *supra* note 50, at 244.

86. ELSEA, *supra* note 23, at 15–16.

87. Lee, *supra* note 14, at 1647–48.

88. Stephens, *supra* note 9, at 1482 (quoting Honorable Robert B. Owen, Legal Advisor, U.S. Dep't of State, Address at the Annual Dinner of the American Branch of International Law Association (Nov. 14, 1980)).

89. 542 U.S. 692 (2004).

90. *Id.* at 697.

91. *Id.* at 698.

92. *Id.* at 698–99.

93. *Id.* at 724–25.

plaintiff alleges is appropriate under the ATS.[94]

Through this framework, the Court affirmed the *Filartiga* decision, which stated that *jus cogens* violations act as a trigger for jurisdiction under the ATS.[95] This framework, however, still failed to clarify other key doctrinal issues surrounding the statute, including the classification of appropriate defendants.[96] Upon deciding *Sosa*, the Court was cautious in its support of *Filartiga*. The Court supported the idea that federal courts had the constitutional authority to recognize claims regarding international human rights, but it emphasized that these powers should be used sparingly to avoid any adverse effects on international relations.[97] Despite this affirmation, litigators and scholars continued to debate the international ramifications of this authority.[98]

C. *The* Kiobel *Court's Failure to Address Corporate Liability Under the ATS*

In 2013, the Second Circuit held that ATS claims did not permit federal jurisdiction over claims against corporations.[99] While the Court granted certiorari in *Kiobel* for the question of corporate liability, the Court also asked the parties to argue the question: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within a territory of a sovereign other than the United States."[100] Before addressing the question of corporate liability under the ATS, the Court held that principles underlying the presumption against extraterritoriality prohibited federal courts from hearing cases regarding causes of action that occurred outside of the United States.[101]

In *Kiobel*, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations pursuant to the ATS.[102] Plaintiffs alleged that corporations aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.[103] In his concurrence, Justice Alito explained that the cause of action in *Kiobel* exceeded the domestic scope of U.S. jurisdiction under the ATS.[104] He clarified his opinion by explaining that a claim can only survive if "the

94. *Id.* at 738.
95. Stephens, *supra* note 9, at 1511.
96. *Id.*
97. *Id.* at 1508.
98. *Id.* at 1511.
99. Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609, 1610–12 (2014).
100. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 114 (2013).
101. *Id.* at 116.
102. *Id.* at 111–12.
103. *Id.*
104. *Id.* at 125–27 (Alito, J., concurring).

domestic conduct is sufficient to violate an international law norm."[105] In Justice Alito's view, an ATS claim is only appropriate under U.S. jurisdiction when (1) the conduct in question occurred on U.S. territory, and (2) that conduct clearly violated international law.[106] While the majority agreed that Justice Alito's "touch and concern" framework would sufficiently displace the presumption against extraterritoriality, it also agreed that "mere corporate presence" was insufficient to meet the "touch and concern" standard.[107] The Court explained:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial applications. Corporations are often present in many countries, and it could reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[108]

Reasoning that the ATS was silent on the presumption against extraterritoriality, the Court held that it was required to avoid adjudicating on a claim outside of the domestic scope of the U.S.[109] The final holding of *Kiobel* provided a new interpretation of the ATS by declining to permit claims filed by foreign citizens against foreign citizens based solely on extraterritorial conduct when the foreign defendant has only a "mere corporate presence" in the U.S.[110]

Given this explanation, the Court must think critically about how to proceed with its analysis of corporate liability and analyze the majority's reasoning in *Kiobel*.[111] The policy reason behind the presumption against extraterritoriality is "to protect against unintended clashes between our laws and those of other nations which could result in international discord" and to avoid "unwarranted judicial interference in the conduct of foreign policy."[112] While the Court clearly barred "mere corporate presence" as a sufficient standard to satisfy the touch and concern test, it suggested that future cases involving a stronger nexus to the U.S. may be sufficient.[113]

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105. *Id.*; *Clarifying Kiobel's*, *supra* note 10, at 1914.
106. *Clarifying Kiobel's*, *supra* note 10, at 1902.
107. Stephens, *supra* note 9, at 1539.
108. *Clarifying Kiobel's*, *supra* note 10, at 1908 (internal citation omitted).
109. *Kiobel*, 569 U.S. at 127.
110. Stephens, *supra* note 9, at 1540.
111. *Id.*
112. *Id.* (citing *Kiobel*, 569 U.S. at 116).
113. *Clarifying Kiobel's*, *supra* note 10, at 1910.

IV. *JESNER*—THE ATS'S CURRENT BATTLEFIELD

Recently, the Court had the opportunity to address the question of corporate liability, which was overshadowed by the presumption against extraterritoriality in *Kiobel*. In *Jesner*, Petitioners were foreign nationals who had been either injured or captured by terrorist organizations overseas or had family members who were victims of terrorist attacks.[114] Petitioners sought to impute liability onto Respondent, Arab Bank, PLC, an internationally renowned bank headquartered in Jordan with branches spanning the globe, including a prominent branch in New York.[115]

A. *The Road to Certiorari*

Petitioners alleged that from the period starting in 1995 and ending in 2005, Respondent accepted private donations for accounts which they knew were solicited by four Palestinian terrorist groups: The Islamic Resistance Movement (HAMAS), The Palestinian Islamic Jihad (PIJ), the Al Aqsa Martyrs Brigade (AAMB), and the Popular Front for the Liberation of Palestine (PFLP).[116] By raising funds for attacks and by distributing remittances to the "martyrs," Petitioners argued that Respondent committed crimes against humanity pursuant to the ATS, thus granting original jurisdiction to U.S. district courts.[117] Petitioners alleged that Respondent knowingly and intentionally facilitated terrorism through its activities at its New York branch.[118] Furthermore, Petitioners alleged that Respondent violated the law of nations by financing terrorism, which resulted in direct engagement of genocide and crimes against humanity.[119] The Second Circuit declined to allow Petitioners to bring claims against Respondent, reasoning that Petitioners could not impute liability onto a corporation based on the *Kiobel* precedent, which explicitly held that "[no] corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights."[120] However, it is impossible to apply the standard used in *Kiobel* considering the profound factual differences between the two cases.[121] In the instant case, Respondent allegedly used its New York branch to transfer millions of U.S. dollars to finance international terrorist attacks, actions that arguably "touch and concern"

114. In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 147 (2d Cir. 2015).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.;* Brief for Petitioners at 9, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (No. 16-499).

119. Brief for Petitioners, *supra* note 118, at 9.

120. *Jesner v. Arab Bank, PLC*, 138 S. Ct. at 1432 (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F. 3d 111 (2d Cir. 2010)).

121. *Compare* Brief for Petitioners, *supra* note 118, at 9, *with* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 127 (2013).

the United States in a way that Respondent's actions in *Kiobel* did not.[122] It is for this reason that *Kiobel*'s presumption against extraterritoriality cannot be extended to apply to corporate liability, and the ATS puzzle remains unsolved.[123]

While the circuit court relied on its opinion in *Kiobel*, it recognized that other circuits have allowed for corporate liability under the ATS.[124] In fact, the court implied that it now disagreed in part with the *Kiobel* decision and predicted that foreclosing corporate liability could result in the dismissal of meritorious cases and dissuade plaintiffs from asserting claims in the Second Circuit.[125] The court explained that Petitioners' claims, while meritorious, were dismissed exclusively due to the foreclosure of corporate liability based on *Kiobel* and foreshadowed that the Supreme Court "would decide to grant certiorari on this issue again—especially considering the divergence of federal case law since."[126]

B. *Petitioner's Arguments in Favor of Granting Corporate Liability Under the ATS*

In their brief, Petitioners heavily criticized the Second Circuit's *Kiobel* decision (on which the court based its opinion for *Jesner*).[127] Rather than a traditional analysis of caselaw or statutory interpretation, Petitioners emphasized that the *Kiobel* court decided the question of corporate liability by relying on a single footnote in *Sosa v. Alvarez-Machain*.[128] The footnote in question stated that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[129] Petitioners argued that this footnote was a misapplication of caselaw and

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122. Brief for Petitioners, *supra* note 118, at 2–3.

123. *In re Arab Bank, PLC*, 808 F.3d at 158.

124. *Id.* at 156 ("*See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *see also Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530–31 (4th Cir. 2014) (holding that the district court erred in concluding that it lacked subject matter jurisdiction over an ATS claim against a corporate defendant on extraterritoriality grounds and finding that the plaintiffs' ATS claims sufficiently "'touch[ed] and concern[ed]' the territory of the United States" based on, *inter alia*, the corporate defendant's "status as a United States corporation"); *Beanal v. Freeport–McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999) (dismissing ATS claims against corporate defendants under Rule 12(b)(6), and to that extent appearing to implicitly assume jurisdiction over ATS claims against corporate defendants)").

125. *Id.* at 158.

126. *Id.* at 157.

127. Brief for Petitioners, *supra* note 118, at 11.

128. *Id.*; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

129. *Sosa*, 542 U.S. at 732 n.20.

should have had no bearing in deciding that the ATS is barred from imputing liability unto corporations.[130] In fact, they argued, the footnote was a hypothetical consideration that was not intended to be interpreted as dicta, nor to be used to decide the basis of corporate liability through the ATS.[131] Additionally, the facts of *Jesner* resemble the issue in *Kiobel* too little to allow for a proper analysis through analogy. As such, Petitioners asserted that neither the *Kiobel* decision, nor the *Sosa* footnote, is an appropriate standard under which *Jesner* should be decided.[132]

During oral argument, Petitioners argued that the ATS should be construed according to the ordinary rules of statutory interpretation.[133] By applying the traditional presumption that corporations can be held liable for torts, Petitioners asserted that the analysis should yield a straightforward result.[134] Furthermore, Petitioners explained that the first Congress' intent in passing this statute was to prevent plaintiffs from bringing ATS cases into state court, while effectively creating a forum in which plaintiffs can seek relief.[135] Brilliantly, Petitioners paralleled terrorism to piracy and cited the Judiciary Act of 1789 as a whole, emphasizing that Congress did not limit the scope of defendants in any of the provisions.[136] Given the framers' specificity throughout the document, Petitioners argued that the framers intentionally omitted any language regarding defendants in order to give plaintiffs a broader range.[137]

The Second Circuit Court applied a standard that rests on a fulcrum issue: whether a corporation can be held liable under this statute.[138] Regardless of the outcome, the decision regarding the liability of corporations under the ATS will have a global impact on the United States' current and future role as the "world police." Additionally, scholars predict that the consequences will bleed into trade, economics, and human rights.[139] While maintaining the presumption against extraterritoriality may have been in the interest of international state sovereignty, extending the statute to include corporate liability would have provided for a remedy that is otherwise unavailable to aliens suffering from egregious human rights violations.[140]

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130. Brief for Petitioners, *supra* note 118, at 28; *see also Sosa*, supra note 128.
131. *Sosa*, 542 U.S. at 732 n.20.
132. *See* Brief for Petitioners, *supra* note 118, at 15–16.
133. Transcript of Oral Argument, *supra* note 16, at 3.
134. *Id*.
135. *Id.* at 10.
136. *Id.* at 69–71.
137. *Id.* at 71–72.
138. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1395 (No. 16-499).
139. HUFBAUER & MITROKOSTAS, *supra* note 19, at 37.
140. *Jesner v. Arab Bank, PLC*, 138 S. Ct. at 1432.

V. CORPORATE LIABILITY UNDER THE ATS UNDER ATTACK FOR INTERNATIONAL RAMIFICATIONS

The ATS has been a heated topic for scholars and politicians alike. The Bush Administration's Department of Justice submitted an amicus curae seeking to overturn *Filtargia* arguing that:

> [i]n recent years . . . the ATS has been commandeered and transformed into a font of causes of action permitting aliens to bring human rights claims in United States courts, even when the disputes are wholly between foreign nationals and when the alleged injuries were incurred in a foreign country, often with no connection whatsoever with the United States.[141]

As previously discussed, the significance of this statute is one of international concern, as there is no international codified law of nations. Therefore, the ATS's scope is as fluid as customary international law.[142]

Proponents of corporate liability under the ATS argue that it is a victory for human rights, whereas opponents of such liability claim that its potential to interfere in foreign affairs is too great.[143] Opposing scholars argue that corporate liability would disadvantageously affect free trade by implementing barriers to international trade, foreign investment, and transnational corporate activities.[144] Some scholars hypothesize that allowing claims concerning corporate liability under the ATS would harm corporate trade and dampen commerce due to the potential for ATS litigation resulting in billion-dollar awards.[145] Following the same logic, these scholars predict that ATS litigation will damage foreign direct investments, inbound and outbound, severely detracting from the domestic economy as well as countries with whom the U.S. normally trades.[146]

Other antagonists to the ATS pose alarmist hypotheticals and claim that corporate exposure under the ATS "could wreak havoc on global development and trade."[147] In analyzing relevant trade, investment, and debt statistics, opposing scholars argue that ATS suits will erect a barrier

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141. ELSEA, *supra* note 23, at 31.

142. Helen C. Lucas, *The Adjudication of Violations of International Law Under the Alien Tort Claims Act: Allowing Alien Plaintiffs Their Day in Federal Court*, 36 DEPAUL L. REV. 231, 237 (1987).

143. Stephens, *supra* note 9, at 1514.

144. *Id.* at 1521.

145. *See generally* HUFBAUER & MITROKOSTAS, *supra* note 19, at 37–45 (examining the potential U.S. losses from diminished trade and FDI and potential target-country losses).

146. *Id.*

147. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 614 (2004).

to participation in global trade investments in these countries.[148] This would curtail trade, investment, and access to credit, thereby damaging their economies and creating a paradoxical role in preventing human rights violations by reinforcing corruption and economic depravity.[149] In particular, these scholars target class-action suits, which have been labeled "an attack on global capitalism and foreign investment, initiated by out-of-control class action lawyers."[150] The fundamental question is not the whether the lawyers are out of control, but whether the corporations are out of control. These alarmist claims are severely misguided—monetary relief through ATS litigation has proven sparse.[151] Absent significant political pressure, ATS claims have been largely symbolic and rarely produce large sums of money for the plaintiffs.[152]

In addition to predicting damaging economic effects of corporate liability under the ATS, opponents argue that its application has inappropriately evolved from a domestic jurisdictional statute to one that borders on "humanitarian imperialism."[153] These criticisms are hyperbolic and do not reflect the jurisprudence of ATS litigation. Rather, ATS litigation has proven to limit claims to narrow criterion that has not exceeded a reasonable presumption against territoriality. The debate over whether an international norm applies to corporate liability and the medium through which these norms should be enforced could have been settled in the *Jesner* case.[154]

VI. THE *JESNER* ANSWER TO THE CORPORATE QUESTION

Historically, the most important and well respected rule of the laws of nations has been the preservation of state sovereignty.[155] Expanding the jurisdictional reach of the American court system through the ATS could reasonably be viewed as an infringement on state sovereignty.[156] On the other hand, failing to impute liability for acts as egregious as terrorism and genocide potentially exposes the United States and its citizens to further acts of terrorism shielded by corporate impunity.[157] While the United States' propensity for "humanitarian imperialism" gives rise to a valid concern, the ATS provides a forum for civil remedies—a forum the

148. *Id.*
149. *Id.* at 620.
150. Stephens, *supra* note 9, at 1522.
151. DELLAPENNA, *supra* note 5, at 339.
152. *Id.*
153. Banks, *supra* note 45, at 268.
154. Stephens, *supra* note 9, at 1523.
155. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 30 (2009).
156. *See id.*
157. *See* Stephens, *supra* note 9, at 1522.

international community lacks.[158] In reassessing the ATS, the Supreme Court must apply a standard that considers significant factors regarding public policy, foreign policy, and ethical implications.

A. Jus Cogens *Violations Are Granted Universal Jurisdiction*

Given multiple interpretations, the Court will always choose the interpretation least likely to trigger adverse effects on foreign policy.[159] In the case of *jus cogens* violations, however, the Court has an ethical duty to adjudicate and give plaintiffs the opportunity to seek relief. Classically defined, universal jurisdiction is created by treaty or customary international law.[160] Although the Supreme Court could have addressed the issue of international corporate accountability by applying treaty law, customary international law should have been sufficient to grant the Court jurisdiction of ATS claims.[161] Since the founding of the United States, customary international law has been implicitly enforceable, as granted by Article III of the Constitution.[162]

A violation under a literal reading of the ATS requires nothing more than a violation of a treaty or the law of nations.[163] A major obstacle to accepting this literal interpretation is that it allows for any lawsuit to be brought to federal court regardless of whether the cause of action is related to the United States.[164] Considering that universal jurisdiction pertains to any violation of customary international law by a state or non-state actor, even if there are no contacts with the forum, applying the theory would have eradicated this obstacle.[165]

While the International Law Commission admits that "there is not yet any general criterion by which to identify a general rule of international law as having the character of *jus cogens*," the Commission suggests seven fundamental principles governing customary international law by which one may adapt a framework: sovereignty, consent, recognition, good faith, international responsibility, freedom of the seas, and self-defense.[166] In addressing this issue, the Harvard International Law Journal proposes a clear, three-part test for determining a cause of action under the ATS: (1) definable and identifiable as a tort committed by individuals, (2) core norms must be textually obligatory, and (3) universal

158. Banks, *supra* note 45, at 268.
159. *Clarifying Kiobel's*, *supra* note 10, at 1916.
160. Sadat, *supra* note 50, at 244.
161. Kaeb, *supra* note 53, at 359.
162. Sadat, *supra* note 50, at 244.
163. KOEBELE, *supra* note 51, at 18.
164. *Id.*
165. Jordan J. Paust, *Kiobel, Corporate Liability, and the Extraterritorial Reach of the ATS*, 53 VA. J. INT'L L. DIG. 18, 26 (2012).
166. Georg Schwarzenberger, *International Jus Cogens*, 43 TEX. L. REV. 455, 457 (1965).

so that derogations are not defended by exercises of legitimate political diversity.[167] This standard coincides with the principles prescribed by the International Law Commission, discussed by the *Filartiga* court, and affirmed by the *Sosa* Court. Therefore, any meritorious cause of action brought under the ATS should be automatically deemed appropriate under the jurisdiction of the United States.

B. *Corporations Do Not Constitute Exceptions to Universal Jurisdiction*

Since the Court held that the presumption against extraterritoriality disposed of the question of corporate liability for the defendant in *Kiobel*, the international community had awaited a high-profile case, such as *Jesner*, to further narrow the definition of eligible lawsuits under the ATS.[168] If the Court continues to strictly follow the "touch-and-concern" standard established by the *Kiobel* decision, claims of misconduct by foreign corporations will effectively be removed from federal courts.[169] Categorically foreclosing corporate liability in this manner is unconscionable. Corporations must be held accountable for human rights violations— it logically follows that an entity given all the same rights as an individual be held accountable for the same violating duties as individuals.[170] Furthermore, in 1970, the International Court of Justice affirmed that the general principles of law include laws which apply to the corporate form.[171]

Given the principles of universal jurisdiction, the Court erred in failing to follow the International Court's lead in holding corporations accountable for *jus cogens* violations. At oral argument for *Jesner*, Justice Kagan echoed that the ATS should not categorically foreclose any defendant if the Court is to uphold the first Congress' intent.[172] She states, "Why would the foreign government care that the perpetrator was a corporation rather than an individual?"[173]

Finally, the ATS provides a civil remedy where theories of criminal law are inappropriate.[174] The purpose of the ATS is to effectuate civil remedies for tortious damage.[175] Monetary fines may serve as an effective alternative remedy, since it is impossible to imprison corporations.[176]

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167. KOEBELE, *supra* note 51, at 20.
168. Kaeb, *supra* note 53, at 357.
169. *Id.*
170. Paust, *supra* note 165, at 25–26.
171. *Id.*
172. Transcript of Oral Argument, *supra* note 16, at 29–45.
173. *Id.* at 33.
174. Banks, *supra* note 45, at 253.
175. *Id.* at 244–45.
176. Kaeb, *supra* note 53, at 400.

Refraining from imposing financial sanctions on corporations for fear of economic retaliation is akin to putting a price tag on human rights.[177] The commoditization of human rights may lead to consequences even more perverse than the *jus cogens* violations for which these corporations may be held liable.[178] As Judge Leval hypothesized in his concurrence in *Kiobel*,

> [s]o long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims.[179]

CONCLUSION

Including corporate liability under ATS jurisdiction would grant the judicial system the potential to balance profit-making and morality.[180] Granting the United States the ability to adjudicate decisions involving corporations for international law violations, however, could adversely pressure "the ideal of constraints on the exercise of power and the importance of world cooperation."[181] Despite the possible adverse consequences, the Court should have assessed *Jesner* as a case in which plaintiffs are suing for relief according to *jus cogens* violations of international law, which clearly includes corporate liability. In the absence of an international mandate, the Supreme Court failed to take the opportunity in *Jesner* to hold corporations accountable for their complacency in human rights violations.[182] As Justice Alito pointed out during oral argument, "[D]enying a forum in the United States for a case against a corporation will have equally serious foreign policy consequences."[183]

177. *Id.*

178. *Id.* at 373–74.

179. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 152 (2013) (Leval, J., concurring); Banks, *supra* note 45, at 245.

180. Londis, *supra* note 64, at 145.

181. *Id.*

182. Kaeb, *supra* note 53, at 359.

183. Transcript of Oral Argument, *supra* note 16, at 11.