Aberration of Accountability: Situating the Alien Tort Statute Against Corporate Human Rights Abuses

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The Alien Tort Statute (ATS), one of the United States' oldest laws, provides all federal district courts with general jurisdiction to hear cases brought by non–United States citizens. As written, the ATS empowers non–United States citizens—including victims of torture, kidnapping, forced labor, and child slavery—to sue American individuals and corporations for the customary international law torts committed against them. Over the past two decades, however, the Supreme Court has cabined the ATS such that it is unworkable for the non–United States citizens it was designed to empower. Instead, the Court has contorted the ATS to grant itself greater power over foreign policy and global governance. Meanwhile, amidst our increasingly globalized economy, human rights abuses committed by American multinational corporations (MNCs) against non–United States citizens remain widespread. A revival of a robust interpretation of the ATS would preclude American MNCs from evading the United States judicial system when they commit human rights abuses abroad.

This Comment argues that unraveling the doctrinal fallacies saturating ATS jurisprudence is the first step toward reform. Contextualizing the recent settlement achieved in Doe v. ExxonMobil*, this Comment argues that ATS doctrine has become a web of contortions that must be rectified before the Court further usurps foreign policymaking authority. It concludes by outlining a path for legislative action on the issue of human rights abuses committed against non–United States citizens by American corporate actors.*

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INTRODUCTION

A child slave in the Ivory Coast works on a cocoa farm where all its cocoa ends up in Nestlé products that line the shelves of American grocery stores. Thousands of miles away, a young fisherman in Indonesia is tortured to death and his home is burned down by the Indonesian security forces ExxonMobil executives deployed from their desks in New York City. The products of their labor, and the plans made to harm them, directly stem from the

United States. Thus, the child slave and the young fisherman's children may seek recourse and remedy in American courts. These kinds of human rights abuses including torture, kidnapping, exploitation, forced labor, and child slavery are rampant; in 2022, approximately 28 million people worked in forced labor conditions.[1] Forced labor generates approximately $236 billion in illegal profits each year,[2] including sales from luxury vehicles manufactured in part by forced Uyghur laborers in China, among many other cases worldwide.[3] For these workers, the Alien Tort Statute (ATS) should offer a rare respite. Instead, the power and potential of the ATS has been quashed by two decades of incongruous and convoluted Supreme Court interpretation.

Passed by the First Congress in 1789, the ATS grants United States district courts general jurisdiction to hear any non–United States citizen's civil action against an American citizen or corporation[4] accused of customary international law torts.[5] It reads that, "[t]he district court 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."[6] Consistent with the United States' treatment of corporations in torts and other areas of law, "citizens" refers to both persons and corporations.[7]

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1. *See Forced Labor, Modern Slavery and Trafficking in Persons*, INT'L LAB. ORG., https://www.ilo.org/topics/forced-labour-modern-slavery-and-trafficking-persons (last visited Oct. 26, 2024) [https://perma.cc/F47C-YTRL].

2. *See id.*

3. *See* Ana Swanson & Jack Ewing, *Senate Inquiry Finds BMW Imported Cars Tied to Forced Labor in China*, N.Y. TIMES (May 20, 2024), https://www.nytimes.com/2024/05/20/business/economy/senate-bmw-volkswagen-jaguar-land-rover-xinjiang.html (on file with the *Columbia Journal of Law & Social Problems*).

4. The ATS is often referred to as a tool for "corporate liability" or "corporate accountability." It is important however to recognize that in conferring jurisdiction, the ATS in itself does not confer any legal obligation upon American actors. Rather, it places them on notice that jurisdiction may be exercised by non–United States citizens seeking to vindicate customary international law tort claims in United States courts. *See* Eric De Brabandere, *Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System*, *in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM. MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 268, 279 (Jean d'Aspremont ed., 2011) ("Jurisdictional issues are a completely different matter from the responsibility of individuals and corporations for human rights violations. One cannot automatically infer international legal consequences as to the holder of the obligation from the mere exercise of jurisdiction by a state.").

5. *See* 28 U.S.C. § 1350.

6. *Id.*

7. *See generally* Ciara Torres-Spelliscy, CORPORATE CITIZEN?: AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE (2016) (describing the Supreme Court's treatment

The limited written legislative history on the ATS conveys that the Founders sought to ensure that non–United States citizens could secure accountability when they are wronged by American actors in violation of the "law of nations."[8] Recently uncovered documents from the 18th century show that the ATS drafters shared a desire to provide a jurisdiction grant for cases where "private U.S. subjects were involved in international-law violations outside the United States," including cases where the actions bore upon foreign affairs.[9] Together, the Founders and First Congress sought "to provide a forum for federal courts to hear claims for violations of international law when the absence of such a forum could impact U.S. foreign relations."[10] Nonetheless, plaintiffs and legal scholars seeking to effectuate the statute have struggled to convince courts to apply the ATS pursuant to its broad strokes meaning: Non–United States citizens can bring claims in United States district courts when they have been wronged by American actors in violation of customary international law.[11]

As a jurisdiction grant, the ATS is technically amenable to both "narrow" and "spacious" conceptions of permissible torts; yet, the Supreme Court has at times viewed the statute as a standalone cause of action in itself.[12] While lower courts have been more

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of corporations as persons across *First National Bank of Boston v. Bellotti* (1978), *Citizens United v. FEC* (2010), and *Burwell v. Hobby Lobby* (2014)).

8. STEVE P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER 4 n.30 (2022) [hereinafter CONG. RSCH. SERV., ATS PRIMER] (referencing a letter from James Madison to James Monroe emphasizing the importance of the United States fulfilling its duties vis-à-vis foreign states and The Federalist Papers No. 80 discussing accountability measures).

9. Tyler R. Giannini, LIVING WITH HISTORY: WILL THE ALIEN TORT STATUTE BECOME A BADGE OF SHAME OR BADGE OF HONOR, 132 YALE L.J. 814, 823–24 (2022).

10. CONG. RSCH. SERV., ATS PRIMER, *supra* note 8, at 2–4; *see also* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 222 (1996); JENNIFER K. ELSEA, CONG. RSCH. SERV., RL32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 2 (2003).

11. The Supreme Court has embraced "customary international law" as the contemporary equivalent to "law of the nations" as described in the ATS. *See* Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008) ("[T]he law of nations has become synonymous with the term 'customary international law.'" (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003))); David M. Howard, *A Revised Revisionist Position in the Law of Nations Debate*, 15 DUKE J. CONST. L. & PUB. POL'Y 53, 54 n.1 (2020) ("Customary international law as it is defined today was historically known as the 'law of nations.'"); *see also* Carlos Manuel Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AM. J. INT'L L. 531, 531–32 (2012).

12. *See* G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755, 781, 814 (2007) (stating that the first trilogy case "should be understood as an exercise in developing a 'new' federal common law of the ATS").

receptive to sustaining claims under the ATS,[13] one has never succeeded at the Supreme Court.[14] Through the *Sosa-Kiobel-Nestlé* trilogy,[15] a series of cases involving the customary international law torts of kidnapping, slavery, and murder, the Supreme Court has narrowed the application of the ATS over the past two decades.[16]

In *Sosa*, decided in 2004, plaintiff Humberto Álvarez-Machaín sued for arbitrary arrest and detention under the ATS after he was kidnapped and brought to the United States by a group of Mexican citizens hired by the United States Drug Enforcement Agency (DEA).[17] The district court found for the plaintiff on the claims pursuant to the ATS and the appeals court affirmed.[18] The Supreme Court held that the ATS did not provide an independent cause of action, but rather "furnish[ed] jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[19] In denying relief, the Court found that the plaintiff's "illegal detention of less than a day" did not violate any existing, well-defined norm of international law so as to supply a valid cause of action pursuant to the ATS, even though illegal detention is a well-defined customary international law tort.[20]

Then, in 2012, the Court in *Kiobel* denied a host of similar claims brought in a United States district court pursuant to the ATS. In that case, human rights activists alleged that Royal Dutch Petroleum had engaged in murder, unlawful detention, and torture in retaliation for the activists' peaceful protest against Royal Dutch Petroleum's expansion in Nigeria.[21] In its unanimous

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13. Approximately 17% of ATS cases in federal courts have resulted in favorable judgements for plaintiffs. *See* Ellen Nohle et al., *Has the Alien Tort Statute Made a Difference?*, TRANS. LITIG. BLOG (Aug. 1, 2022), https://tlblog.org/has-the-alien-tort-statute-made-a-difference/ [https://perma.cc/X99G-VBUM].

14. *See* CONG. RSCH. SERV., ATS PRIMER, *supra* note 8, at 22.

15. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Kiobel v. Royal Dutch Petroleum, 569 U.S. 108 (2013); Nestlé USA, Inc. v. Doe, 593 U.S. 628 (2021); see also *infra* note 45 and accompanying text for a discussion of customary international law.

16. Other high-profile ATS cases, excluded for the purposes of this Comment, include Doe I v. Cisco Sys., Inc., 73 F.4th 700 (9th Cir. 2023) (remanding to the district court after permitting the use of ATS against a corporation and finding that aiding-and-abetting liability is cognizable under the ATS); Jesner v. Arab Bank, 584 U.S. 241 (2018); and Daimler AG v. Bauman, 571 U.S. 117 (2014).

17. *See Sosa*, 542 U.S. at 697–98 (stating that Álaverz-Machaín was acquitted of the charges of torture and murder of a DEA agent levied against him).

18. *See id.*

19. *Id.* at 724.

20. *Id.* at 738.

21. *See* Kiobel v. Royal Dutch Petroleum, 569 U.S. 108 (2013).

opinion, the Court held that there is a presumption against extraterritorial applications of United States law under the ATS, and overcoming that burden requires a petitioner's claim to "touch and concern" the territory of the United States "with sufficient force."[22] In other words, the Court deemed that the acts of American corporations in providing food, transportation, compensation, and staging grounds for the perpetrators did not touch and concern the United States *enough*—without providing any metric, baseline, or other parameter for assessing "force."[23]

Later, in 2021, the Court in *Nestlé* denied relief to child laborers who had been forced to work on cocoa farms in the Ivory Coast in conditions amounting to child slavery.[24] The Court held that for the United States federal judiciary to exercise jurisdiction, a petitioner must allege tortious conduct that occurred in the United States or prove that a corporate defendant has sufficient connections to the United States beyond "mere corporate presence."[25] In other words, the Court foreclosed the ATS because it deemed the acts of providing child enslavers with technical and financial resources and buying cocoa produced from child slavery, as "operational decisions" equivalent to mere corporate presence.[26] Despite the language of the ATS suggesting broad applicability to a range of international torts, the *Sosa-Kiobel-Nestlé* decisions in tandem have closed the door on virtually all ATS litigation.[27]

Most recently, in November 2024, the ATS provided jurisdiction for three non–United States citizens, who had been tortured at the

22. *Id.* at 124–25.
23. *Id.* at 113.
24. *See* Nestlé USA, Inc. v. Doe, 593 U.S. 628 (2021).
25. *Id.* at 634 (quoting *Kiobel*, 569 U.S. at 125 (2013)).
26. *Id.* at 628–33.
27. This is a consensus view among activists, attorneys, legislators, and scholars. *See* William S. Dodge, *Corporate Liability Under the U.S. Alien Tort Statute: A Comment on* Jesner v. Arab Bank, 4 BUS. & HUM. RTS. J. 131, 137 (2019) ("So, while corporations continue to be subject to customary international law norms of human rights law, the prospects of holding them liable for violating those norms in US courts have faded nearly to the vanishing point."); CONG. RESCH. SERV., ATS PRIMER, *supra* note 8, at 23 ("Some commentators see the Supreme Court's ATS jurisprudence as having limited the statute's jurisdictional reach so significantly as to result in the end of the ATS's era of importance."); Symeon C. Symeonides, *Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 221, 228–33 (2016); Mateja S. Platise, *From Social to Legal Responsibility: The Rise of Due Diligence Laws and Their Limits*, MAX PLANCK INSTITUTE MPIL RESEARCH PAPER SERIES, No. 2023-20, 9 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4597829 [https://perma.cc/RAC5-NWNB]; Clara Petch, *What Remains of the Alien Tort State after* Nestlé USA, Inc. v. Doe? 42 NW. J. INTL. L. & BUS. 397, 420 (2022); Joseph Downey, *Domestic Corporations and the Alien Tort Statute*, 1 U. CHI. BUS. L. REV. 481 (2022).

Abu Ghraib prison in Iraq, to successfully pursue claims of torture against a private contractor that participated in their torture.[28] While a success for accountability, the case uniquely involved a defendant corporation that closely collaborated with the United States government to enable torture and other war crimes.[29] Many if not most customary international law torts against non–United States citizens are committed without such direct coordination with the United States government.[30] This leaves the Supreme Court's threshold for ATS application at an exaggerated level.

This Comment contextualizes one of the most recent high-profile ATS cases to reach a federal appeals court, *Doe v. ExxonMobil*, against the backdrop of the *Sosa-Kiobel-Nestlé* trilogy, and argues that for Congress to effectuate the meaning of the ATS, the legal community must first grapple with the interpretive contortions within the trilogy.[31] Part I discusses the contemporary landscape where mounting evidence indicates that American multinational corporations (MNCs) are utilizing foreign supply chains to commit tortious acts against non–United States citizens with impunity.[32] Part II traces the development of the ATS doctrine through the *Sosa-Kiobel-Nestlé* trilogy, highlighting how the Supreme Court has narrowed the ATS's applicability over time. Part III applies the Supreme Court's misinterpretation of the ATS to the recent settlement in *Doe v. ExxonMobil*—a case that produced district and circuit court opinions that crystallize the logical fallacies within ATS jurisprudence. Finally, Part IV proposes a legislative solution for resolving the incongruencies in

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28. *See* Oona A. Hathaway, *Abu Ghraib Torture Survivors' Landmark Win Gives Hope for Alien Tort Statute Cases*, JUST SECURITY (Nov. 20, 2024), https://www.justsecurity.org/104983/abu-ghraib-alien-tort-statute/ (on file with the *Columbia Journal of Law & Social Problems*).

29. *See* Al Shimari v. CACI Premier Tech., Inc., 684 F. Supp. 3d 481 (E.D. Va. 2023) (denying defendant's motion to dismiss).

30. The United States government leverages a diverse apparatus to monitor and prevent its own complicity in customary international law torts. *See, e.g.*, ALISON SISKIN & LIANA ROSEN, CONG. RSCH. SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 23 (2014).

31. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Kiobel v. Royal Dutch Petroleum, 569 U.S. 108 (2013); Nestlé USA, Inc. v. Doe, 593 U.S. 628 (2021).

32. Importantly, non-American multinational corporations exhibit similar practices. For example, the U.S. Department of Justice is investigating German corporation HelloFresh over allegations that it unlawfully employed migrant children to work in its factories in Illinois. *See* Laura Romero, *Labor Department Investigating Migrant Child Labor Claims at HelloFresh*, ABC NEWS (Dec. 6, 2024), https://abcnews.go.com/US/labor-department-investigating-hellofresh-allegedly-employing-migrant-children/story?id=116530077 (on file with the *Columbia Journal of Law & Social Problems*).

the ATS's interpretation by clarifying its applications, thereby adapting the ATS as a workable avenue for legal recourse in the contemporary global political economy. Part IV argues that these interventions would actualize the First Congress' intent in designing the ATS as a simple yet powerful tool for holding accountable American actors that commit wrongdoing.

I. THE CONTEMPORARY ATS BACKDROP: EMBOLDENED CORPORATE HUMAN RIGHTS ABUSES

A. INTRODUCING THE ATS REGIME

The ATS was intended to and does provide access to a forum for victims affected by torts committed by United States actors abroad.[33] It was "designed to afford greater jurisdictional protections to [non–United States citizens]."[34] Between its enactment in 1789 and 1979, "the ATS was rarely used as a source of federal jurisdiction."[35] This changed in 1979 with *Filártiga v. Peña-Irala*,[36] where the Second Circuit permitted a tort claim against the former United States Inspector General of Asunción, Paraguay, who had tortured a 17-year-old to death.[37] The Second Circuit established jurisdiction by finding that the alleged tort—torture—violated customary international law, the plaintiff was a non–United States citizen, and the action was properly brought in a district court.[38] The ruling was a watershed moment, situating the ATS as a prominent mechanism for establishing jurisdiction in cases brought by non–United States citizens.[39] This plaintiff-

33. *See* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1523 (2014) (finding that both critics and proponents of corporate ATS liability agree that the ATS extends to natural persons and may extend to corporations).

34. Doe v. ExxonMobil Corp., 654 F.3d 11, 56 (D.C. Cir. 2011).

35. CONG. RESCH. SERV., ATS PRIMER, *supra* note 8, at 6.

36. The ATS was enacted in 1789 but was little-used until 1979, when the Center for Constitutional Rights filed claims in Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). *See The Alien Tort Statute Fact Sheet*, CTR. FOR CONST. RTS., https://ccrjustice.org/files/ATSfactsheet10.10.pdf [https://perma.cc/87HE-DSR8].

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

38. *See id.* at 880–85, 887–88.

39. *See* CONG. RSCH. SERV., ATS PRIMER, *supra* note 8, at 7. In subsequent cases, the Court described the *Filártiga* ruling as part of an "evolving recognition—for instance, in the Nuremberg trials after World War II—that certain acts constituting crimes against humanity are in violation of basic precepts of international law." Jesner v. Arab Bank, 584 U.S. 241, 255 (2018).

friendly regime was short lived, and the court's contradictions have since ascribed a perplexing status to the ATS regime.

B. THE ASTONISHING SCALE AND SCOPE OF PLAUSIBLE ATS VIOLATIONS

In an age of rampant globalization, worker exploitation—even rising to the level of modern slavery—is widespread.[40] Corporations with global name recognition, such as McDonald's,[41] Chuck E. Cheese,[42] and Amazon,[43] have all successfully located their operations in far corners of the world where they or their surrogates are able to deceptively recruit workers into positions of indentured servitude. Under these regimes, workers are coerced into paying exploitative "recruiting fees," receive little to no compensation, have their passports withheld, are prevented from leaving their worksites, and are even required to pay "exit fees" to leave these abhorrent conditions.[44] These pervasive and exploitative practices of United States corporations give rise to the question: Why are victims of customary international law torts unable to seek redress in United States courts?[45]

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40. *See Rise of Modern Slavery & Its Place in Corporate Compliance*, DOW JONES (Dec. 6, 2023), https://www.dowjones.com/professional/risk/resources/risk-blog/the-rise-of-modern-slavery-and-its-place-in-corporate-compliance [https://perma.cc/9YWA-ANEV].

41. *See* Katie McQue & Pramod Acharya, *McDonald's and Chuck E Cheese Tied to Alleged Foreign Worker Exploitation*, THE GUARDIAN (Oct. 10, 2023), https://www.theguardian.com/business/2023/oct/10/mcdonalds-trafficking-links-claims-chuck-e-cheese-saudi-arabia [https://perma.cc/FXL5-RB44].

42. *See id.*

43. *See* Pramod Acharya & Michael Hudson, *Revealed: Amazon Linked to Trafficking of Workers in Saudi Arabia*, THE GUARDIAN (Oct. 10, 2023), https://www.theguardian.com/technology/2023/oct/10/amazon-trafficking-links-claims-saudi-arabia-workers-abuses [https://perma.cc/76CV-TQZQ].

44. *See* DOW JONES, *supra* note 40; McQue & Acharya, *supra* note 41; Acharya & Hudson, *supra* note 43.

45. Customary international law "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way." SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984). In this sense, customary international law is constantly evolving, adapting overtime as states engage (or fail to engage) in certain practices. *See id.* The courts' normative flexibility in interpreting the ATS has perniciously defined contemporary corporate activity. In a defense of customary international law, international law scholar Monica Hakimi described how a pervasive contemporary account of customary international law "presuppose[s] [customary international law] as a body of rules," and falls short of how the law actually operates "as a real-world sociological phenomenon" that "emerges more enigmatically." Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1490–91 (2020). According to Hakimi, in the ATS context, United States courts have applied "techniques for

Several meta-level trends are linked to an increase in exploitative MNC practices[46] and implicate customary international law torts.[47] Numerous studies of American MNCs have reproduced the finding that worker exploitation through poor working conditions, low wages, and job insecurity are on the rise.[48] According to labor economist David Levine, "[t]here's strong

constraining their own discretion on [customary international law] or otherwise limiting the normative positions that they recognize as [customary international law]." *Id.* at 1510.

46. For the purposes of this Comment, MNC practices refers to any conduct by a MNC that operates both in the United States and in at least one other country. Any corporation that engages in a global supply chain or global workforce therefore constitutes as an MNC. *See* Christopher Greenwood, *Sources of International Law: An Introduction*, UNITED NATIONS: OFFICE OF LEGAL AFFAIRS (2008), https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf [https://perma.cc/Q54Y-GBBW] (stating that customary international law "is not a written source," but rather, has two elements: first, a "widespread and consistent State practice," and second, *opinio juris*—"a belief in legal obligation"—meaning countries feel that they are conforming to a legal obligation). For example, the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights," published by the United Nations Subcommission on the Promotion and Protection of Human Rights in 2004, spelled out a realization that "transnational corporations . . . , their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treatises and other international instruments." U.N. Econ. and Soc. Council, Sub-Comm. on the Promotion and Prot. Of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises ith Regard to Human Rights*, 2, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003). Included in these norms are that MNCs "shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking, extrajudicial, summary or arbitrary executions," as forbidden by international law. *Id.* at 5. Of these potential torts, forced or compulsory labor-related violations is frequent in contemporary MNC practice. United Nations Economic and Social Commission for Western Asia, *Trade Openness*, https://archive.unescwa.org/trade-openness-0 [https://perma.cc/3JJH-TJDM] (last visited Mar. 12, 2024).

47. Trade openness is one mega-trend that has led to forced or compulsory labor disputes, especially impacting non–United States-citizens hired by MNCs. According to the United Nations Secretary-General, trade openness depressed wages between 1985 and 2005, with the worst impacts felt by low skilled workers. U.N. Secretary-General, *Fulfilling the promise of globalization: Advancing Sustainable Development in an Interconnected World*, ¶ 13, U.N Doc. A/72/301 (Aug. 8, 2017). In the 38 member countries of the Organization for Economic Cooperation and Development (OECD), the number of manufacturing jobs declined from nearly a quarter of all employment to just 11.9% of employment between 1970 and 2013. *Id.* Advancements in technology are forecasted to destroy as many as two billion jobs by 2030. *Id.* at ¶ 14.

48. Take, for example, the case of Uniqlo. Between 2017 and 2018, Uniqlo experienced a 75% increase in firm shares, taking the company's wealth to upwards of $25 billion. *See* Intan Suwandi, *Outsourcing Exploitation: Global Labor-Value Chains*, OPEN DEMOCRACY (Aug. 20, 2019), https://www.opendemocracy.net/en/oureconomy/outsourcing-exploitation-global-labor-value-chains/ [https://perma.cc/LAF5-Q9A3]. This occurred at the same time while two thousand Indonesian workers that sewed Uniqlo products "were laid off with unpaid wages and no severance payments" following a series of disputes between Uniqlo and workers accusing the company of union busting and wage theft. *Id.*; see *also* INTAN SUWANDI, VALUE CHAINS: THE NEW ECONOMIC IMPERIALISM (2019); *supra* notes 1 and 3 and accompanying text.

evidence that there are tragically high levels of exploitation in terms of violations of basic human rights" within MNCs,[49] whose success often relies on the egregious treatment of workers.[50] While broadly understood customary international law norms, like the norm against child labor, are enforced through best-practice monitoring systems, these systems often fall short of true enforcement and "cases of child labor are still routinely uncovered."[51] Beyond these prototypical practices, MNCs are engaging in other forms of conduct that may amount to the customary international law torts of forced and compulsory labor.[52] These practices include the reliance on algorithms and creation of work environments that generate unpredictability and anxiety, and otherwise invisibilize labor, suppress income, and lower labor standards.[53]

Several MNCs have committed forced labor torts against non–United States citizens within the United States' own borders.[54] A

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49. Laura Counts, *Do Multinational Corporations Exploit Foreign Workers? Q&A with David Levine*, BERKLEY HAAS (March 11, 2020), https://newsroom.haas.berkeley.edu/do-multinational-corporations-exploit-foreign-workers/ [https://perma.cc/A488-KUBB].

50. One study of exploitation within MNCs found that "most low-skilled workers in poor nations receive low wages and have poor working conditions, regardless of the employer's ownership." Emma Aisbett et al., *Do Multinational Corporations Exploit Foreign Workers?*, *in* GLOBAL GOLIATHS: MULTINATIONAL CORPORATIONS IN THE 21ST CENTURY ECONOMY 261 (C. Fritz Foley et al. eds. 2021), https://haas.berkeley.edu/wp-content/uploads/Global_Goliaths_7_Aisbett-Harrison-Levine-Scorse-Silver_2p_hc.pdf [perma.cc/R6TQ-C6JC].

51. The Fair Labor Association provides one such monitoring system. *See id.* at 285.

52. These forms of conduct include the substantially worse treatment of migrant workers as compared to non-migrant workers, such as the employer practice of holding onto workers' passports. *See* Emma Aisbett et al., *Do Multinational Corporations Exploit Foreign Workers?*, *in* GLOBAL GOLIATHS: MULTINATIONAL CORPORATIONS IN THE 21ST CENTURY ECONOMY 289–90 (C. Fritz Foley et al. eds. Nov. 27, 2021), https://haas.berkeley.edu/wp-content/uploads/Global_Goliaths_7_Aisbett-Harrison-Levine-Scorse-Silver_2p_hc.pdf [perma.cc/R6TQ-C6JC]. In other situations, foreign workers are "controlled by intergenerational debt" or are "disappeared" by the foreign government such that the MNCs are rendered "unaware of their involvement." Laure Moore, *Cutting Slavery from U.S. Supply Chains: How Supplementing U.S. Customs and Border Protection Withhold Release Order Procedures Will More Effectively Address Forced Labor in Supply Chains*, 50 FLA. ST. U. L. REV. 401, 405–07 (2023). For example, 20% of the global supply of cotton is produced using forced Uyghur labor in China's Xinjiang region; however, since the region's cotton is "combined with cotton from other regions before being sold to manufacturers," the global supply chain creates an additional "knowledge" barrier that allows MNCs to turn a blind eye to the forced labor producing their goods. *Id.* at 407.

53. *See generally* Veena Dubal, *The Time Politics of Home-Based Digital Piecework*, C. ETHICS. J. 50 (2020).

54. Those MNCs include Fruit of the Loom, Ben & Jerry's, J. Crew, Walmart, Target, Whole Foods, Ford, and General Motors. *See* Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 25, 2023),

New York Times investigation found that between 2021 and 2023 alone, thousands of migrant *children* were forced to work in factories[55] and other worksites across the United States.[56] The reporting also found "signs of the explosive growth of [the illegal child] labor force and warnings that the Biden administration ignored or missed."[57] Between 2015 and 2023, there was a 283% increase in child labor violations reported to the U.S. Department of Labor.[58] If MNCs commit these abuses in the United States,[59] where there is clear jurisdiction over their actions and heightened regulatory oversight because it is their country of domicile, it certainly compounds concerns around their behavior in jurisdictions where they know that they can act with near impunity.[60]

C. WHY UNITED STATES COURTS?

There is a lack of international accountability mechanisms available to non–United States citizens who suffer human rights abuses at the hands of American actors.[61] The ATS, if employed properly, grants victims access to United States district courts, which could effectively host litigation and hold abusive companies accountable. For this reason, access to the United States judicial system through the ATS is crucial for the credibility and legitimacy of the United States judicial system's mandate of independence

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https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html (on file with the *Columbia Journal of Law & Social Problems*).

55. *See id.*

56. *See* Hannah Dreier, *As Migrant Children Were Put to Work, U.S. Ignored Warnings*, N.Y. TIMES (Apr. 17, 2023), https://www.nytimes.com/2023/04/17/us/politics/migrant-child-labor-biden.html (on file with the *Columbia Journal of Law & Social Problems*).

57. *Id.*

58. *See* Michael Sainato, *Republicans Continue Effort to Erode U.S. Child Labor Rules Despite Teen Deaths*, THE GUARDIAN (Oct. 20, 2023), https://www.theguardian.com/us-news/2023/oct/20/republican-child-labor-law-death [https://perma.cc/HWV4-W73S].

59. These ATS claims would be made pursuant to the customary international law norm that obliges states to not engage child labor in their national economies. However, since these children have domestic jurisdiction grants available under state and federal laws that cover working conditions and wages for non-citizens, the ATS becomes irrelevant.

60. *See generally New Study Reports Widespread Forced Labor Abuses*, VOA NEWS (Mar. 19, 2024, 10:53 AM), https://www.voanews.com/a/new-study-reports-widespread-forced-labor-abuses/7533793.html [https://perma.cc/63XH-AXJJ] (discussing widespread forced labor).

61. *See* Susanne Prochazka, *'Did You Ever Expect a Corporation to Have a Conscience?': Human Rights Obligations of Transnational Corporations*, 2 QUEEN MARY HUM. RTS. L. REV. 84, 87–88 (2015).

and fairness. An unhampered ATS is a critical tool to provide such access.

The global legal system makes it extremely difficult to hold MNCs accountable for human rights violations. For example, the United Nations' Guiding Principles on Business and Human Rights, the foregrounding international mechanism for transnational customary international law violations by corporations, provides a set of norms for human rights accountability throughout global supply chains, but it does not provide any binding obligations.[62] The international system relies on nation states to be duty bearers, but nation states have failed to and in many instances are unable to adequately regulate corporate behavior and provide forums to adjudicate human rights harms.[63] On the domestic front, the United States offers soft law instruments, despite United States lawmakers' and agencies' acute awareness of the customary international law tort violations of American MNCs.[64] Civil litigation is generally a tool for victims of human rights abuses in common law jurisdictions, but the United States has increasingly become a notable outlier.[65] On the regional level, there have been soft and ineffective attempts to enhance MNC accountability in the global system. For example, the European Union's 2022 directive on civil liability for human rights abuses fails to provide meaningful recourse because it

62. *See* Charity Ryerson, Dean Pinkert & Avery Kelly, *Seeking Justice: The State of Transnational Corporate Accountability*, 132 YALE L.J. F. 787, 792–793 (2022) [hereinafter Ryerson et al., *Seeking Justice*].

63. *See* Prochazka, *supra* note 61, at 86.

64. *See, e.g.*, *Finance Chair Wyden Questions BMW Over Its Use of Components Made with Forced Labor*, U.S. SENATE COMM. FIN. (Jun. 10, 2024), https://www.finance.senate.gov/chairmans-news/finance-chair-wyden-questions-bmw-over-its-use-of-components-made-with-forced-labor [https://perma.cc/Q3TY-DPRZ]. Importantly, these issues are apparent with non-American MNCs as well. For example, in 2023 the United States State Department issued injunctions against Chinese textile manufacturing MNCs over suspicions of forced labor. The injunction warned of China's "ongoing genocide and crimes against humanity in [the city of] Xinjiang and the evidence of widespread use of forced labor there." *U.S. Bans 3 Chinese Manufacturers Over Suspicions They Used Forced Uyghur Labor*, VOICE OF AMERICA NEWS (Sept. 26, 2023, 7:41 PM), https://www.voanews.com/a/us-bans-3-chinese-companies-over-suspicions-they-used-forced-uyghur-labor/7285140.html [https://perma.cc/K9WV-8XYX]. The United States Department of Labor (DOL) also periodically publishes lists of goods that it alleges are "produced by child labor," though notably none of the corporations with credible reports of child labor in 2021 and 2022 were included in the DOL's 2022 report. *2022 List of Goods Produced by Child Labor or Forced Labor*, U.S. DEPARTMENT OF LABOR (2022), https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf [https://perma.cc/7AMJ-6EG6].

65. *See* Ryerson et al., *Seeking Justice*, *supra* note 62, at 790.

excludes a significant number of suppliers typically involved in complex labor and other abuses.[66] The directive also excludes liability in contexts where European companies establish business relationships with intermediaries that in turn enter business relationships with exploitative human rights abusers.[67] At the nation state level, laws aimed at improving "due diligence" fail to provide an effective civil cause of action when such due diligence fails.[68] In France, Germany, and the Netherlands, corporate accountability laws involving human rights center the protection of corporations from reputational harms rather than justice for victims of human rights abuses.[69] For example, Germany's Supply Chain Act and the Dutch Child Labour Due Diligence Law fail to provide a civil cause of action for victims in instances where corporations violate those laws.[70] Against this backdrop of impunity, an operational ATS is critically important.

A common theme in the discourse that exemplifies the isolationist yet foreign policy-focused stance of United States courts[71] is the notion that United States judicial systems are not the appropriate venue for these kinds of disputes. However, pursuant to the ATS, the "foreignness" of victims is not a factor to balance in considering their access to United States courts.[72] Denying access for economic efficiency purposes is in direct conflict with a deontological notion of rights in transnational corporate accountability cases involving customary international law tort allegations.[73] For example, "the utilitarianism inherent in economic argument" of efficiency—that it is less efficient to litigate

66. Directive 2024/1760, of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive 2019/1937 and Regulation 2023/2859, 2024 O.J. (L 1760) (EU), https://eur-lex.europa.eu/eli/dir/2024/1760/oj [https://perma.cc/2P7Z-CBXB].

67. *See id.* Third parties are a key driver of human rights abuses in global supply chains. *See* Ramesh Moosa, *Why Third-Party Risks are a Threat to Consumer Supply Chain Integrity*, EY (Aug. 4, 2021), https://www.ey.com/en_vn/insights/forensic-integrity-services/why-third-party-risks-are-a-threat-to-consumer-supply-chain-integrity [https://perma.cc/YYW8-VSHZ].

68. *See infra* notes 156–157 and accompanying text (discussing positive state-level developments).

69. *See* Ryerson et al., *Seeking Justice*, *supra* note 62, at 797–801.

70. *See id.* at 798–800.

71. *See generally* Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) [hereinafter Bookman, *Litigation Isolationism*].

72. *Id.* at 1085. The ATS provides access to United States district courts to any and all non–United States citizens. *See* 28 U.S.C. § 1350.

73. *See* James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121 (2014).

such cases in United States courts—"sits uncomfortably with a deontological notion of rights."[74] Civil litigation and its remedies provide some deterrence and retribution effects, and, as some have offered, "only retribution adequately respects the human dignity that human rights conventions sanctify."[75] A deontological view of the ATS is helpful for illuminating the central role that consent played in the First Congress' grant to non-citizens.[76] Normative regulative principles also tell us that litigation in United States courts provides degrees of "certainty, coherence, and transparency"[77] that are paramount in order for the rule of law to reach global economic governance.[78] But more simply, the efficiency argument is a non-starter; United States district courts are appropriate venues for these disputes because the ATS commands it.[79]

Additionally, the use of proxies to obfuscate identities in business transactions[80] and end-to-end encryption, as compared to email and print communication, have made it more difficult for non–United States citizen plaintiffs to connect defendants to their potentially violative conduct, underscoring the importance of

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74. *Id.* at 196.

75. *Id.* at 200–02.

76. *See* Larry Alexander, DEONTOLOGY AT THE THRESHOLD, SAN DIEGO L. REV. 893, 911 (2000).

77. As learned in *In Re: South African Apartheid Litigation*, litigation in United States courts also provides profound truth-telling effects, legitimizes emergent human rights abuses that stem from customary international law torts, and advances corporate social responsibility. *See* Susan Farbstein, *Perspectives from a Practitioner: Lessons Learned From the* Apartheid *Litigation*, 61 HARV. INT'L L. J. 451, 490–99 (2020).

78. This Comment takes no position on the merits of such a system and raises global economic governance insofar as it undergirds the global capitalist system within which American MNCs operate. *See* Kevin T. Jackson, *The Normative Logic of Global Economic Governance*, 22 MINN. J. INT'L L. 71, 109–11, 150–51 (2012) ("Advancement of global economic governance régimes toward a closer approximation of the ideals of rule of law and human rights is surely preferable to ceding affairs to domination by partisan interests of power players in a world order adverse to such ideals.").

79. *See* Pierre N. Leval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, FOREIGN AFFS., (Feb. 5, 2013), https://www.foreignaffairs.com/articles/united-states/2013-02-05/long-arm-international-law [https://perma.cc/DSN5-VHTS] ("[K]eeping courts open to civil suits about human rights can bring solace and compensation to victims. More important, these suits draw global attention to atrocities, and in so doing perhaps deter would-be abusers. And they give substance to a body of law that is crucial to a civilized world yet so under-enforced that it amounts to little more than a pious sham.").

80. Will Neal, *FAQ: What's a Proxy? Using Relatives, Shell Companies, and Other Stand-Ins to Hide Illicit Wealth*, OCCRP (Jan. 24, 2024), https://www.occrp.org/en/project/russian-asset-tracker/faq-whats-a-proxy-using-relatives-shell-companies-and-other-stand-ins-to-hide-illicit-wealth [https://perma.cc/HVH4-EPYV].

access to United States courts.[81] The ATS could serve as a bastion of due process for victims of torts by American MNCs. Unfortunately, the Supreme Court has contorted the ATS' meaning, subverted its purpose, and perversely emboldened American actors to continue their abuses abroad.

II. COURTS AND THE ATS: TRACING INTERPRETATIONS ACROSS THREE LANDMARK CASES

Before non–United States citizens invoke the ATS in United States district courts, they must first confront the confounding doctrinal evolution of the ATS.[82] This trilogy has served to define the ATS in a way that subverts its essential meaning.[83] The trilogy traces the Supreme Court's interpretation of "touch-and-concern" for jurisdiction purposes, and covers its means-testing-like approach to torts whereby the Court has seized the authority to craft foreign policy. According to several scholars, the *Sosa-Kiobel-Nestlé* trilogy "significantly narrowed the scope of the [ATS],"[84] however, this analysis will show there is ripe ground for challenging the inconsistencies within the Court's holdings.

A. *SOSA V. ALVAREZ-MACHAIN*

In *Sosa v. Alvarez-Machain* (2004), a citizen of Mexico alleged that the DEA "instigated" his abduction from Mexico to the United

81. *See Shifting Sands: How Encrypted Messaging is Transforming Compliance Norms*, LEAPXPERT (Nov. 10, 2023), https://www.leapxpert.com/shifting-sands-how-encrypted-messaging-is-transforming-compliance-norms/ [https://perma.cc/YWU4-8W7U]. New technologies are even allowing MNCs to delete evidence of transnational violations. For a case of a United States corporation employing end-to-end encryption to conceal evidence of illegal activity, see, e.g., James Fanelli, *FTX Used Signal to Avoid Hacks, Bankman-Fried Said*, WALL ST. J.: SAM BANKMAN-FRIED TESTIMONY (Oct. 28, 2023, 3:14 PM), https://www.wsj.com/livecoverage/sam-bankman-fried-trial-testimony/card/ftx-used-signal-to-avoid-hacks-bankman-fried-said-ZCmPtz7mvX8qaPX1TaKy (on file with the *Columbia Journal of Law & Social Problems*).

82. This Comment employs the term "ATS regime" to describe the benchmarks that plaintiffs must satisfy in order to successfully evoke jurisdiction for their customary international law tort claims in United States district courts. This term is favored over "standard," "rule," or "test" because federal courts have approached the ATS as a malleable system where courts reign over claims inconsistently or by evoking logical incongruencies.

83. *See supra* note 15.

84. *See, e.g.*, Lindsey Roberson & Johanna Lee, *The Road to Recovery After* Nestlé*: Exploring the TVPA as a Promising Tool for Corporate Accountability*, 6 COLUM. HUM. RTS. L. REV. 1, 4 (2019).

States and hence violated his civil and human rights.[85] The plaintiff, Humberto Álvarez-Machaín, attempted to establish jurisdiction in a district court by invoking the ATS.[86] Skeptical of the notion that an abduction claim can give rise to a valid cause of action under contemporary customary international law, the Court denied relief. In reaching its determination, the Court queried whether Álvarez-Machaín's tort claim would be understood as a customary international law tort by legislators in 1789.[87] This quasi-originalist, quasi-textual analysis has created a high bar for plaintiffs, requiring plaintiffs to show a historical analogue for the modern torts committed against them.

The Court further narrowed the ATS' scope by couching 1789 legislators' definition of customary international law torts in an interpretation of an 18th-century treatise by William Blackstone: "offenses against ambassadors," "violations of safe conduct," and "prize captures and piracy."[88] Even applying this standard, however, the Court's analysis is historically inaccurate. *Sosa* advanced a cause of action that would have clearly been recognized as tortious at the time of the First Congress: kidnapping.[89] The Court's reliance on Blackstone's guidance for what claims the ATS covered marked an egregious narrowing that contravenes its own admission that "[t]here is no record of congressional discussion about private actions that might be subject to the jurisdictional provision [that is the ATS]."[90]

Not only did the court limit its analysis to Blackstone's interpretation, ignoring 18th century jurisprudence that clearly defines kidnapping as a cause of action, it did so disingenuously.

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85. Sosa v. Alvarez-Machain, 542 U.S. 692, 699, 713 (2004).

86. The plaintiff also argued that the ATS established a "new cause of action" for "alleged violation[s] [of] the law of nations." *Id.* at 699, 713. The Court, however, held that the ATS is strictly "jurisdictional [in] nature" and that its reference to "violation[s] of the law of nations or a treaty of the United States" referred to the "modest number of international law violations" recognized at common law. *Id.* at 712–13, 724.

87. *See id.* at 712 ("We do not believe, however, that the limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Álvarez here.").

88. Those interpretations are that: "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations": "offenses against ambassadors," "violations of safe conduct," and "prize captures and piracy." *Id.* at 720. Blackstone considered these the "three principal offenses against the law of nations." *Id.* at 723.

89. *See* White, *supra* note 12, at 771 (noting Blackstone's discussion of "detention" and arguing that Blackstone's discussion of civil injuries was much broader than what was specifically enumerated).

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

The Blackstone passage cited by the Court explicitly recognizes that hostage-taking and ransoms, like the abduction of the plaintiff in *Sosa*, should be universally constructed as subject to "the law of nations," and highlighted "there is no other rule of decision but this great universal law, collected from history and usage."[91] The Court cherry-picked Blackstone's words to narrow the ATS' scope beyond what clearly he even imagined. This treatment embodies the deficits within and arbitrariness of the Court's conclusion that the ATS only applies to torts recognized at the time of passing—an invention future courts in the trilogy would come to sidestep[92] by recognizing claims for torts that could not have existed in the 18th century.[93]

B. *KIOBEL V. ROYAL DUTCH PETROLEUM*

In *Kiobel v. Royal Dutch Petroleum* (2013), a group of Nigerian citizens living in the United States sued Dutch, British, and Nigerian corporations for aiding and abetting the Nigerian government in violation of their rights under the law of nations and customary international law: "(1) extrajudicial killings; (2) torture; (3) rape; (4) arbitrary arrest and detention; (5) cruel, inhuman and degrading treatment; (6) crimes against humanity; (7) forced exile; (8) restrictions on assembly; and (9) the destruction of private property."[94] Here, the ATS succumbed to a misapplied canon of statutory interpretation.

Guided by the presumption against extraterritoriality—that "[w]hen a statute gives no clear indication of an extraterritorial

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91. 4 William Blackstone, *Commentaries* *38 (1769) ("So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage and such writers of all nations and languages as are generally approved and allowed of.").

92. *See* discussion *infra* Part II.B (describing Kiobel v. Royal Dutch Petroleum, where the Court avoided the question of whether aiding and abetting in crimes like property destruction amounted to "law of nations" violations and instead focused on the "putative" secondary question of extraterritoriality. 569 U.S. 108, 126–27 (2013) (Alito, J., concurring)).

93. *See, e.g.*, Jesner v. Arab Bank, PLC, 548 U.S. 241, 255 (2018) (noting an "evolving recognition" after World War II that expanded the ATS to permit claims for "redress for violations of international human-rights protections that are clear and unambiguous").

94. Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 113 (2013) (where the plaintiffs attempted to establish jurisdiction in the Southern District of New York by invoking the ATS); *see also* Amended Class Action Complaint at 2, Kiobel v. Royal Dutch Petroleum, 456 F. Supp. 2d 457 (S.D.N.Y. 2006) (No. 02-CV-7618) (alleging that the corporations provided food, transportation, compensation, and the staging ground for brutal attacks, including beatings, rape, and killings, of local environmental protestors in Nigeria).

application, it has none"[95]—the Court determined that there was no extraterritoriality within the text of the ATS. Thus, the claims against the defendants were beyond the ATS's jurisdictional grant because, according to the Court, the defendants' acts of aiding and abetting atrocities, including allowing the Nigerian military to use their property "as a staging ground for attacks," amounted to "mere corporate presence."[96]

The court substantiated this assessment by once again relying on Blackstone's three "law of nations" offenses, which the Court claimed lacked an extraterritorial application. However, at least two of Blackstone offenses, "violation of safe conducts" and "piracy," do indeed have extraterritorial applications. "Safe conducts" agreements very often carry extraterritorial applications.[97] For example, this occurs when a nation state's ambassador enters into two safe conducts agreements with neighboring states where the neighboring states conspire to arrange the ambassador's execution during her journey.[98]

Additionally, the ATS should be read to include a strong presumption of extraterritoriality, rather than a presumption *against* territoriality, for definitional reasons. The statute concerns civil tort actions committed by members of one state against members of another, where some customary international law is violated. This scenario will often involve conduct and harm that occurs outside the territorial limits of one of the two actors in an ATS case. The plaintiffs in *Kiobel* made a modified version of this argument—that even if the presumption against extraterritoriality applies, the ATS rebuts it—by stressing that the ATS drafters "necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil."[99] Relying on a narrow reading of the ATS, however, the Court rejected ordinary meanings and the separation of powers norm and instead chose to fixate on "touching" to end-run around the ATS.[100] By creating an artificial "touch and concern" test in *Kiobel*, the

95. *Kiobel*, 569 U.S. at 115 (quoting Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010)).

96. *Id.* at 113, 125.

97. A "safe conducts" agreement involves a sovereign granting a foreign power safe passage through the sovereigns' territory during times of war or hostility.

98. *See* 4 William Blackstone, *Commentaries* *39 (1769).

99. *Kiobel*, 569 U.S. at 118.

100. The Court relied on its precedent in *Morrison*, 561 U.S. 247, in formulating its "touch and concern" test for the ATS. *Id.* at 124–25. *Morrison*, however, is not an ATS case. 561 U.S. 247.

Court ignored the incongruity created by its prior treatment of the ATS and the presumption against extraterritoriality.[101]

C. *NESTLÉ USA, INC. V. DOE*

In the consolidated cases of *Nestlé USA, Inc. v. Doe* and *Cargill, Inc. v. Doe* (*Nestlé USA, Inc. v. Doe* (2021)), the Court refused to apply the ATS to an egregious case where six citizens of Mali alleged that they were enslaved on cocoa farms in the Ivory Coast.[102] MNCs Nestlé USA and Cargill, Inc. provided technical and financial resources to these farms in the Ivory Coast and all the cocoa produced on those farms was exclusively sold to the two companies.[103] The *Nestlé* Court expanded the principal fallacy in *Kiobel*, and applied a shallow and pretextual justification for determining that the relevant conduct "touch[ing] and concern[ing]" the United States did not carry sufficient force to displace the presumption against extraterritorial application of the ATS.[104] While the plaintiffs had alleged the "major operational decisions" that led to child slavery in the Ivory Coast *had* occurred in the United States,[105] the Court reasoned that "[p]leading general corporate activity" is effectively the same as pleading "mere corporate presence."[106]

The Court's equivalence between general corporate activity and corporate presence carries a detrimental normative imposition.[107] It reveals either a striking level of naïveté, or an unabashed pro-business bias, akin to what one may find in a "think" piece rather than a judicial opinion. After all, corporations are nothing without their decisions. American companies frequently "decide" to

101. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (failing to address any constraints on the location of relevant conduct in creating a new test for the "very limited category" of claims permitted under the ATS).

102. *See* Nestlé USA, Inc. v. Doe, 593 U.S. 628 (2021).

103. *See id.* at 628–32.

104. *Id.* at 634 ("allegations of general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS."). This justification is pretextual because there is a clear gradient of corporate activity that the binary framing of "decisionmaking" and "general activity" fails to accommodate. *But see* Doe I v. Cisco Sys., Inc., 73 F.4th 700 (9th Cir. 2023) (where an ATS claim was allowed against a U.S. technology firm that developed Chinese surveillance systems, evidencing a more accurate and holistic approach to analyzing corporate activity). After all, intellectual authorship and material authorship and related concepts can be applied to create violence. Decisionmaking—the affirmative making of a choice—is a form of conduct.

105. *Nestlé*, 593 U.S. at 632–34.

106. *Id.* at 634.

107. *See supra* Part I.

incorporate in Delaware in order to claim jurisdiction, and decision-based jurisdiction is highly precedential.[108] If corporate decision-making is insufficiently relevant conduct for the purposes of the ATS, the Court leaves no room for supposed "relevant conduct."[109] The core fallacy here is the unfounded equivocation—surely in a contemporary global economy, there is a gradation between activity and presence, from a contract to sell chocolate bars at a single airport to operating a full-blown manufacturing plant. In a digitized global economy, physical presence is no longer reflective of a corporation's ability to or intent to breach the duty of care that gives rise to torts.[110]

Where a corporation knowingly enters another country to engage in tortious acts, its decision to enter that country should suffice to rebut the presumption against extraterritoriality. United States tort law frequently subsumes intent, and the founders created the ATS to ensure that Americans and American corporations who commit certain torts that violate American norms and laws are not immune from American legal consequences. In other words, the ATS allows for the use of intent to commit a tort abroad to rebut the presumption against extraterritoriality.

Another pitfall in the Court's reasoning in *Nestlé* was the slippery-slope approach applied to material foreign policy concerns. The Court denied the plaintiffs' ATS claims by citing foreign policy concerns. However, to substantiate this concern, the Court merely cited the fact that the defendants were part of a partnership with the Department of Labor through the Harkin-Engel Protocol, an industry pledge to reduce child labor in cocoa production that has consistently failed to meet its objectives.[111]

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108. Place of incorporation is a default grant of general jurisdiction under the Federal Rules of Civil Procedure. *See* Daimler AG v. Bauman, 571 U.S. 117 (2014); *see also* Amy Simmerman et al., *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/ [https://perma.cc/9QJL-RKQR].

109. *See, e.g.*, William Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (Jun. 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usainc-v-doe-for-human-rights-litigation-and-extraterritoriality/ [https://perma.cc/PS5S-Q6FX].

110. *See supra* note 81.

111. *See* Oliver Balch, *Chocolate Industry Slammed for Failure to Crack Down on Child Labor*, THE GUARDIAN (Oct. 20, 2020), https://www.theguardian.com/global-development/2020/oct/20/chocolate-industry-slammed-for-failure-to-crack-down-on-child-labour [https://perma.cc/HE3S-GHED]; *The Cocoa Protocol: Success or Failure?*, INT'L LAB. RTS. F.

This reference to an industry pledge advanced the absurd principle that government partners should be immune from litigation if they commit wrongdoing because of an imagined fear of how companies may react to litigation.[112] The Court then draws the conclusion that because foreign policy concerns exist, "there will always be a sound reason for courts not to create a cause of action for violations of international laws," other than perhaps Blackstone's principal three law of nations offenses.[113] Using the mere possibility of a slippery slope as a self-standing justification abandons the cherished obligation that courts articulate well-reasoned opinions.

Taken together, the *Sosa-Kiobel-Nestlé* trilogy stands for a simple proposition: Congress' clear command to provide jurisdiction for torts in violation of the law of nations contains an unspoken exemption for MNCs. Today, the ATS regime is in shambles, patched together with Court-made inferences and innovations that leave much to the imagination.

III. *EXXONMOBIL V. DOE* AS A CASE STUDY ON THE ATS REGIME'S LOGICAL FALLACIES

In *Sosa*, the Court stated that it understands common law "as a product of human choice."[114] This description is apt given how the collective "human choices" of Justices has created a patchwork of incongruent interpretations of the ATS at each junction where the Court has chosen to hear an ATS claim in the past two decades. The result is a composite of logical fallacies in the *Sosa-Kiobel-Nestlé* trilogy and a Court that continues to employ contrived tools of argumentation to pour meaning into the sentence-long statute.[115] While courts serve to apply vague statutes, and

(Jun. 30, 2008), https://laborrights.org/sites/default/files/publications-and-resources/Cocoa%20Protocol%20Success%20or%20Failure%20June%202008.pdf [https://perma.cc/WPW8-MEC7].

112. Nestlé USA, Inc. v. Doe, 593 U.S. 628, 638 (2021) ("Companies or individuals may be less likely to engage in intergovernmental efforts if they fear those activities will subject them to private suits."). While the Court embraces that logic, the premise is faulty: plaintiffs sue for human rights violations within the scope of the ATS, not for participating in industry pledges. Those industry pledges are subject to ATS claims where they involve violative conduct.

113. *Id.*

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

115. These fallacies effectively function as "shadow amendments" to the ATS. William J. Aceves, *Shadow Amendments*, 60 HARV. J. LEG. 27, 30 (2023). Shadow amendments are "judicial interpretations that can broaden or narrow a statute's reach," which can in turn "take on a canonical role and are then construed by courts as if they appeared in the original

attorneys must exercise caution when offering extended meanings of short statutes, the Court's treatment of the ATS is enigmatic to the universal proposition that where there is delegation, courts must defer to Congress' own words.[116] In embedding fallacies within ATS jurisprudence, the Court both functionally and effectively has subverted the purpose of the ATS: to enable litigation in United States district courts against American actors, including MNCs, that commit customary international law violations and who otherwise may not fear the ability of their non–United States citizen victims to pursue claims. In analyzing the post-trilogy "shadow amendments," international law scholar William Aceves has argued that the Court has rewritten the ATS as follows:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of *[a specific, universal, and obligatory norm of]* the law of nations or a treaty of the United States *[but only when the conduct relevant to the statute's focus occurred in the United States, although general corporate presence or activity, including decisionmaking, is insufficient,] [and not when the violation is committed by a foreign State] [or a foreign corporation]*.[117]

The case of *Doe v. ExxonMobil* illustrates the merits of ATS litigation in the face of extreme resistance from courts and defendants. There, 11 villagers from Aceh, Indonesia, alleged that they or their relatives were abducted, tortured, and/or killed between 1999 and 2003 by ExxonMobil-backed members of the Indonesian military during the country's civil war between the central government and Aceh independence groups.[118]

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text." *Id.* (internal quotation omitted). According to Aceves, *Kiobel* "drafted a new shadow amendment that addressed the statute's extraterritorial reach" and *Jesner* incorporated a shadow amendment that created a "diplomatic tensions" exception for ATS enforcement. *Id.* at 39–40. In *Nestlé*, the shadow amendment replaced the *Kiobel* "touch and concern" standard with a new "focus" standard. *Id.* at 45.

116. *See* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2254–55 (2024).

117. Aceves, *supra* note 115, at 45 (emphasis added).

118. *See* Doe v. ExxonMobil Corp., 2022 WL 3043219 (D.D.C. Aug. 2, 2022). Importantly, ExxonMobil and its Indonesian subsidiary co-operated gas reserve extraction facilities in Aceh during this conflict. As the conflict progressed, ExxonMobil eventually decided to use the Indonesian government's security forces as a direct replacement for ExxonMobil's own security functions in Aceh. It is those ExxonMobil-linked security forces that the plaintiffs alleged had routinely abducted, tortured, and/or killed villagers in Aceh between 1999 and 2003. In 2019, the District Court for the District of Columbia dismissed

Empowered by the refusal of courts to consider ATS claims and the widespread permissibility of settlements in such cases, the defendants successfully prolonged[119] and eventually squashed ATS claims against them by the plaintiffs.[120] Triggering 20 years of litigation, *ExxonMobil* is a clear case of an American corporation effectively delaying justice to wronged non–United States citizens who sought to bring customary international law claims against an American actor—in this case, a United States corporation—just as the ATS explicitly empowered them to do. While the case ultimately concluded in a historic undisclosed settlement paid to victims, the case details the contours for successful human rights claims in the wake of the *Sosa-Kiobel-Nestlé* trilogy.

This Part seeks to rebut the crux of the Court's contemporary resistance to ATS claims. Part III.A examines *ExxonMobil* in the context of the ATS regime described in Part II to argue that the contemporary threshold is, simply put, wrong. Part III.B focuses on courts' struggles with the "corporate liability norm" fallacy, as well as the pitfalls of judicial foreign policymaking, arguing that both are fatal blows to the ATS in the contemporary age.

A. *DOE V. EXXONMOBIL*: A POST-TRILOGY SUCCESS

The ATS complaint in *ExxonMobil* mobilized American legislators and even the State Department to intervene in the name of foreign policy.[121] There, plaintiffs were Indonesian non–

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the ATS claims but allowed the wrongful death, battery, assault, arbitrary arrest, detention and false imprisonment, negligence, negligent hiring, negligent supervision, and conversion tort claims to proceed under Indonesian law through the choice of law doctrine. *See* Doe v. ExxonMobil, 391 F. Supp. 3d 76, 93 (D.D.C. 2019).

119. Over the two decades of litigation, plaintiffs' counsel and defendants went back and forth to litigate several ATS procedural disputes, including "contentious discovery disputes." *ExxonMobil*, 2022 WL 3043219, at *1; *see also* Doe v. ExxonMobil, 2015 WL 13926645 (D.D.C. Nov. 18, 2015). In another dispute, sanctions litigation ensued after one of the defendant's representatives provided "inaccurate" statements and "perversely obstructed his own deposition." Doe v. ExxonMobil, 2022 WL 1124902 at *1 (D.D.C. Apr. 14, 2022).

120. On May 15, 2023, after 21 years of litigation, Indonesian villagers agreed to an undisclosed settlement with ExxonMobil the day before the jury trial was set to begin. *Oil Giant ExxonMobil Settles Long-Running Indonesia Torture Case*, AL JAZEERA (May 16, 2023), https://www.aljazeera.com/news/2023/5/16/oil-giant-exxonmobil-settles-long-running-indonesia-torture-case [https://perma.cc/3W2E-LPMA].

121. In response to the plaintiffs' original complaint, 16 congressmen and two United States senators asked that the State Department not get involved as they did not want to convey "that the United States supports the climate of impunity for human-rights abuses in Indonesia." Melody Saint-Saens & Amy J. Bann, *Using National Security to Undermine Corporate Accountability Litigation: The* ExxonMobil v. Doe *Controversy*, 11 U. MIAMI INT'L

United States citizens, and the defendant was an American corporation. The Court of Appeals for the District of Columbia held that aiding and abetting liability was a "well established" international law norm under the ATS, sidestepping any discussion of Blackstone's three laws of nations offenses.[122] One of the most stunning moves in this case was the Court of Appeal's decision to suggest that extraterritoriality was a moot element in all ATS cases after it had determined that no circuit court had previously decided on the issue of extraterritoriality.[123]

However, three years later and shortly after *Kiobel*, in 2014 the District Court for the District of Columbia reversed course, finding that the plaintiffs' claims failed to "sufficiently touch and concern the United States to displace the presumption against extraterritoriality."[124] Specifically, the court determined that although plaintiffs alleged that defendants met in New York to make important decisions related to military members of its security personnel, they had not stated "*where* [material support to security personnel] was planned or authorized or if any of the material or monetary support came from the United States," invoking the same flavor of definitional uncertainty and unexplained line drawing seen throughout the *Sosa-Kiobel-Nestlé* trilogy.[125]

Eventually, in 2019, the District Court dismissed the plaintiffs' claims pursuant to the ATS because of foreign policy concerns.[126] The court "decline[d] to recognize domestic corporate liability

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COMP. L. REV. 39, 60–61 (2003) (quoting Peter Waldman & Timothy Mapes, *White House Sets New Hurdles For Suits Over Rights Abuses Sets New Hurdles for Human-Rights Cases*, WALL ST. J. (Aug. 7, 2002, 12:01 AM), https://www.wsj.com/articles/SB1028670793919574640 (on file with the *Columbia Journal of Law & Social Problems*)). Despite this, the State Department sent a letter arguing that United States interests would be disserved by the litigation specifically because the Indonesia government would become uncooperative in ways that affect the United States, among other reasons. *See id.* at 61.

122. Doe v. ExxonMobil Corp., 654 F.3d 11 (D.C. Cir. 2011).

123. *See id.* at 17, 23 ("As a jurisdictional statute, it would apply extraterritorially only if Congress were to establish U.S. district courts in foreign countries. To say that a court is applying the ATS extraterritorially when it hears an action such as appellants have brought makes no more sense than saying that a court is applying 28 U.S.C. § 1331, the federal question statute, extraterritorially when it hears a [Victims of Trafficking and Violence Prevention Act (TVPA)] claim brought by a U.S. citizen based on torture in a foreign country. Thus, the question here is not whether the ATS applies extraterritorially but is instead whether the common law causes of action that federal courts recognize in ATS lawsuits may extend to harm to aliens occurring in foreign countries.").

124. Doe v. ExxonMobil Corp., 69 F.3d 75, 106 (D.D.C. 2014).

125. *Id.* at 96 (emphasis added).

126. *See* Doe v. ExxonMobil, 391 F. Supp. 3d 76 (D.D.C. 2019).

under the ATS in circumstances, as here, the claims have caused significant diplomatic strife."[127] In making this determination, the court offered a parade of horribles that may ensue should "corporate liability" be recognized as a permitted cause of action through the ATS:[128] "[P]laintiffs may very well ignore the human perpetrators and concentrate on multinational corporate entities";[129] an affirmative holding would discourage Americans from investing in countries "where the host government might have a history of alleged human-rights violations";[130] "Congress is better suited to examine the difficult and complex policy questions about whether to impose liability on corporations";[131] and, the lawsuit has already caused much "significant diplomatic strife."[132] In addition, the court's reliance on "investor interests" is, at its best, anomalous to the growing sentiment among United States investors that they have a responsibility to invest ethically, transparently, and altruistically, and at its worst, pro-enslavement.[133] It definitively rests opposed to the intentions of the First Congress and Founders who recognized the need for the United States to provide a just forum of accountability when American actors meddle in foreign affairs and violate laws while abroad.[134] The court's manufactured concern for and prioritization of investors, specifically concern for investors' abilities to invest in war-torn, conflict ridden areas where corruption is both rampant and predictable, as justification for limiting ATS' applicability encapsulates the trilogy's overall pro-business thrust.[135]

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127. *Id.* at 78.

128. Again, though the ATS is a jurisdiction granting statute, the District Court viewed the ATS as a basis for causes of action, even though the only requirement on claims brought pursuant to the ATS' jurisdiction grant is that they be customary international law tort claims.

129. ExxonMobil, 391 F. Supp. 3d at 92 (quoting Jesner v. Arab Bank, 584 U.S. 241, 269 (2018)).

130. *Id.* at 84 (quoting *Jesner*, 584 U.S. at 270).

131. *Id.* at 92.

132. *Id.* at 87.

133. *See The Rise and Rise of Sustainable Investment*, FIN. TIMES, https://www.ft.com/partnercontent/london-stock-exchange-group/the-rise-and-rise-of-sustainable-investment.html [https://perma.cc/PY7F-89LN] (last visited Mar. 14, 2024) ("The growth of sustainable investment appears unstoppable."); *Individual Investors' Interest in Sustainability Is on the Rise*, MORGAN STANLEY INST. FOR SUSTAINABLE INVESTING (Jan. 26, 2024), https://www.morganstanley.com/ideas/sustainable-investing-on-the-rise [https://perma.cc/X3EB-9S8U].

134. *See supra* notes 8 and 9 and accompanying text.

135. The District Court manufactures concern for investors by citing to *Jesner*, 584 U.S. at 269–70 (An alternative ruling would "discourage[ ] American investment abroad, including in developing economies where the host government might have a history of

Though *ExxonMobil* ultimately settled, the federal court rulings it produced provide valuable insight into ATS jurisprudence. As evidenced by the courts' effort to grapple with the applicability of the ATS in this case, judges, lawyers, and plaintiffs alike remain uncertain about how and when the ATS grants jurisdiction. *ExxonMobil*, which was decided in parallel to a number of the trilogy cases, exposed the struggle of district courts to apply the evolving and incongruous interpretations of the ATS. For this reason, and above all its ability to achieve a settlement for plaintiffs where *Nestlé*, *Kiobel*, and *Sosa* could not, *ExxonMobil* was a tremendous success.

B. FATAL SELF-CONTRADICTIONS IN "CORPORATE LIABILITY" AND "DIPLOMATIC STRIFE"

Several inconsistencies exist within the federal courts' application of the ATS over the past two decades. Two recent cases, *Nestlé* and *ExxonMobil*, were notably decided on different grounds. In *Nestlé*, the Supreme Court found that plaintiffs failed to "create a cause of action" that permits the use of the ATS to establish jurisdiction and also found that general corporate activity was insufficient to establish jurisdiction over a domestic corporation.[136] Specifically, the Court determined that despite being decided within United States borders, the alleged corporate decision to partner with farms the company "knew or should have known" exploited enslaved children,[137] did not "touch and concern" the United States sufficiently to displace the presumption against extraterritoriality. Ultimately, the Court allowed foreign policy concerns to absolve the company altogether.

The *ExxonMobil* district court, in contrast, applied *Sosa*'s precedent to dismiss the ATS claims. The district court initially found no specific, universal, and obligatory norm of corporate liability as required by the ATS. Then, the "separation of powers and foreign relations concerns l[ed] the [c]ourt to decline to recognize corporate liability under the ATS in circumstances where, as [t]here, the claims ha[d] caused significant diplomatic

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alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts.").

136. Nestlé v. Doe, 593 U.S. 628, 634–37 (2021).

137. *Id.* at 631 (internal quotation omitted).

strife."[138] To balance "diplomatic strife," the court recommended that ATS plaintiffs focus instead on "human perpetrators" rather than "multinational corporate entities"[139] and expressed concerns for the implications of the lawsuit on investors who were not party to the litigation.[140]

Together, *Nestlé* and *ExxonMobil* illustrate the federal courts' willingness to flexibly construe precedents like *Sosa*, instrumentalizing them as "steps" when the factors are in fact wide-open vessels for normative judicial activism.[141] Civil procedure scholar Pamela Bookman characterized this evolution of ATS jurisprudence as part of a broader phenomenon of judicial activism.[142] When non–United States citizens bring claims to United States courts, as in ATS cases, defendants often employ "transnational litigation avoidance doctrines," like the presumption against extraterritoriality, which effectively "permit[s] or require[s] a court to dismiss a case because it is 'too foreign.'"[143] These avoidance doctrines purport to "reduce burdens on separations of powers and international comity by ensuring courts not adjudicate cases that could create such concerns," but in practice, they fail to effectively address these concerns "because federal courts are still the major decision makers in deciding whether to entertain transnational suits."[144]

In *Nestlé*, the Supreme Court fixated on foreign policy concerns and conflated "general corporate activity" with the decision-making of corporate executives.[145] In *ExxonMobil*, the district court, prior to any other analysis of extraterritoriality, corporate presence, or corporate decision making, defined the ATS as a collection of specific causes of action rather than the jurisdiction-

138. Doe v. ExxonMobil, 3931 F. Supp. 3d 76, 93 (D.D.C. 2019).

139. *Id.* at. 92 (quoting Jesner v. Arab Bank, 584 U.S. 241, 268–69 (2018)).

140. *See id.* The consideration of the impact of corporate liability on the transnational conduct of U.S. corporations that harm non–United States citizens is precisely the kind of "investment" that the Supreme Court in *Jesner* determined to be a "delicate judgement[ ], involving a balance that . . . is the prerogative of the political branches to make." *Jesner*, 584 U.S. at 273.

141. *See, e.g.*, *Nestlé*, 593 U.S. at 636–37.

142. *See* Bookman, *Litigation Isolationism*, *supra* note 71, at 1085 (referring to litigation isolationism as both the effect sought by defendants who seek dismissal because of their cases' "foreignness" and the common stated goal of "promoting separation of powers and international comity . . . and protecting the interests of defendants").

143. *Id.*

144. *Id.* at 1119–20.

145. *Nestlé*, 593 U.S. at 634.

grant it provides.[146] Specifically, it stated that the "[s]eparation of powers and foreign relations concerns lead the Court to decline to recognize domestic corporate liability under the ATS in circumstances where, as here, the claims have caused significant diplomatic strife."[147]

The interplay between the evolving and unpredictable doctrine of the Supreme Court in the trilogy cases and the *ExxonMobil* district court's attempt to apply and make sense of that doctrine provides two central conclusions that heavily bear on the Court's future ability to exercise judgment in ATS cases. First, federal courts have read a corporate liability exception into the text of the ATS. This exception does not exist within the text of *Sosa*,[148] and yet federal courts have interpreted *Sosa*'s language to provide a mandate for "looking to international law."[149] The corporate liability exception serves as a tool to distance courts' proffered reasonings for deciding against ATS plaintiffs and the extraterritoriality question at the core of the purported inquiry. In other words, federal courts have extorted the vagueness within corporate liability in the context of domestic relations to advance a pro-corporate agenda. Second, courts have dismissed ATS claims on the grounds of extrinsic "foreign policy" concerns, even though the ATS itself is premised on the inextricability between foreign policy and tort claims by non–United States citizens. In passing the ATS, the First Congress specifically determined "that diplomatic strife is best avoided by providing a federal forum to redress those law-of-nations torts that, if not remedied, could bring international opprobrium upon the United States."[150] The courts' pernicious use of "diplomatic strife" to dismiss ATS claims directly conflicts with the goal of the statute itself, and their subsequent determination of "how much" diplomatic strife is "too much," effectively situates themselves in the exact foreign policy-making sphere that they purportedly prefer to leave to Congress.

146. Doe v. ExxonMobil, 391 F. Supp. 3d 76, 85 (D.D.C. 2019) (stating that "Exxon cannot be held liable under the ATS in this case" although the ATS is a jurisdiction-grant and thus, unlike a cause of action, it does not alone provide a basis for liability).

147. *Id.*

148. The footnote at dispute reads: "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

149. *ExxonMobil*, 391 F. Supp. 3d at 87–88.

150. *Nestlé*, 593 U.S. at 649 (Sotomayor, J., concurring in part and concurring in the judgment).

Ultimately, courts make discretionary choices when defining contexts as rife with "diplomatic strife." All the while, courts neglect the text of the ATS that necessarily implicates foreign policy concerns: it grants jurisdiction for torts "committed in violation of the law of nations or a treaty of the United States."[151]

While some federal courts have engaged in foreign policymaking to dismiss ATS claims, other forms of policymaking, including worker protection and consumer protection policies, may supplant the current ATS regime. In the next and final Part, this Comment offers points of intervention for resolving the fallacies that have been extenuated by the rulings in the trilogy and *ExxonMobil*.

IV. LEGISLATIVE ACTION: POINTS OF RESOLUTION

The consequence of the *Sosa-Kiobel-Nestlé* trilogy and *ExxonMobil* is that laborers who American MNCs rely on, and members of the communities where those companies operate, do not have guaranteed access to a forum to vindicate their rights when torts are committed against them. Federal courts have subverted the purpose of the ATS by innovating an array of fallacies and contortions through the veneer of foreign policy concerns and imagined intractability of corporate liability and human rights abuses. Perhaps due to the short nature of the ATS and limited legislative history, courts have surpassed their allocated power to *create* law. As those courts have gutted the important jurisdiction grant of the ATS, legislators must course-correct to resolve this precise issue.

A. POTENTIAL ATS AMENDMENTS

Courts have lacked clarity and consistency and have used the law as a platform for their own judicial activism. Legislators can cure these ills by amending the ATS to disclaim the extraterritoriality presumption, corporate liability norm, and diplomatic strife factors innovated by the Court over the course of this trilogy. Legislators should untangle the Court's confounding fallacies and focus on a central goal for a revived ATS that provides

151. 28 U.S.C. § 1350.

a domestic right of action for victims of transnational human rights abuses committed by American actors.

Congress should amend the ATS to explicitly grant extraterritorial jurisdiction and specify that any conduct that reflects intent to commit a tort under the ATS should suffice as relevant conduct.[152] Additionally, to further clarify the statute, Congress could pass an amendment clarifying that the ATS applies to tort suits against all United States entities, including corporations. The Trafficking Victims' Protection Act (TVPA) does this by way of its specification that "the courts of the United States have extraterritorial jurisdiction over any offenses (or any attempt or conspiracy to commit an offense) under [the state] . . . [if] an alleged offender is present in the United States."[153] Similarly, Congress should also clarify that *all* non–United States citizens may invoke the ATS.

With respect to the foreign policymaking power seizure made apparent by *ExxonMobil*, Congress should spell the contours of its own, and the Executive Branch's own, authority to determine whether and when a foreign policy concern exists and thus should preempt civil litigation. The federal judiciary shall not assume national security preemption without such claims being raised by the Executive Branch or Congress. This default rule would distance courts from the foreign policy-making role they have adopted throughout the trilogy. This posture would also allow courts to address "separation of powers and international comity concerns" without stripping the ATS of its purpose and protections.[154] While the ATS should arguably apply in all circumstances, Congress could enumerate specific instances where non–United States citizens' rights to sue in United States courts is revoked, for example, where plaintiffs are located in a country that Congress has declared war pursuant to Article I, Section 8 of the U.S. Constitution.

Congress could also implore courts to look at the robust domestic tort regime in the United States, extending "negligence" and "intentional misconduct" tort standards for the MNC context, just as United States courts have managed to do in a wide range

152. For example, the Trafficking Victims Protection Act includes such an extraterritoriality grant. *See* 18 U.S.C. §§ 1595–96.

153. 18 U.S.C. § 1596.

154. Bookman, *Litigation Isolationism*, *supra* note 71, at 1133–34.

of contexts.[155] This would expand and clarify private rights of action for human rights abuses, and allow Congress to define standing, damages, injunctive power, and statutes of limitations.[156]

Another option would be for Congress to adapt the ATS with an eye towards the successes of the Anti-Terrorism Act (ATA), which creates a cause of action for United States citizens to sue those who "aid and abet" in the commission of terrorism.[157] Shockingly, despite the prevalence of human rights violations throughout MNC supply chains,[158] there is no cause of action available to victims of MNCs that aid and abet those violations. An analogue to the ATA in the realm of corporate accountability could allow United States citizens to sue when they engage in commerce or work for employers who "aid and abet" in the commission of transnational human rights violations. The *Doe I v. Cisco* case pending in the Ninth Circuit may offer reprieve in this regard.[159]

B. PREVIOUS EFFORTS TO SECURE A PRIVATE RIGHT OF ACTION FOR VICTIMS OF CORPORATE ABUSE

The International Corporate Accountability Roundtable (ICAR) has called for supply chain transparency and legislative reforms that create a private right of action for victims of corporate human rights abuse.[160] Those reforms include a reasonable statute of limitation, explicit grants of extraterritorial jurisdiction, non-exhaustive lists of qualifying violations, provisions on corporate subsidiaries, suppliers, and overseas agents, and strict liability

155. *See generally* Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U.L. REV. 111 (2008).

156. For instance, such a right of action would function to expand the Enforcing the Uyghur Forced Labor Prevention Act that already bars the importation of goods made with forced labor—products of forced labor have no place in United States courts, whether it's the labor of Uyghurs, children in the Ivory Coast, or any other non–United States citizen. Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525, 1541 (2021).

157. The Anti-Terrorism Act allows remedies for U.S. nationals injured by "an act of international terrorism" that is "committed, planned, or authorized by" recognized terrorist organizations, allowing them to sue those who "aid[ ] and abet[ ], by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333.

158. *See* discussion *supra* Part I.B.

159. Doe I v. Cisco Systems, Inc., 73 F.4th 700 (9th Cir. 2023).

160. Building a Rights-Based Economy: A Corporate Accountability Agenda, INTL. CORP. ACCOUNTABILITY ROUNDTABLE (Dec. 2023), https://icar.ngo/wp-content/uploads/2023/12/ICAR_CorporateAccountabilityReport_v4.pdf [https://perma.cc/NP42-KDZF], at 35–36.

throughout supply chains.[161] These interventions could all proceed as amendments to a revived ATS.

Legislators previously sought to reform the ATS to address concerns raised within this Comment, including the later-withdrawn 2005 Alien Tort Statute Reform Act (ATSRA), which provided a longer list of qualifying torts.[162] In 2022, in response to *Nestlé*, United States senators introduced the Alien Tort Statute Clarification Act (ATSCA), which would have amended the ATS to specify that for the purpose of rebutting the presumption against extraterritoriality, a defendant need simply be "present in the United States, irrespective of . . . nationality."[163]

Alternatively, state laws that effectively expand and clarify conditions for which courts may hear tort claims by non–United States citizen plaintiffs are a potential option to federal legislative inaction, but few states have taken steps towards such legislative action to date. Nonetheless, states could look to successful interventions such as Massachusetts' Act Extending the Statute of Limitations for Certain Actions Involving International Human Rights Abuses, which would allow a ten-year statute of limitation for personal injury and wrongful death victims to sue for fundamental rights violations.[164] States like California whose judicial system offers robust access and protections for litigants, including civil procedure laws that provide strong statutes of limitations and expanded tort structures, also remain a guiding force nationwide.[165]

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161. *See id.*

162. The ATSRA would have amended the ATS to include the following as qualifying torts: "torture, extrajudicial killing, genocide, piracy, slavery, [and] slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort." Unlike the current text of the ATS, the ATSRA specifically named corporations as potential defendants in ATS suits. Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005).

163. Christopher Ewell & Oona A. Hathaway, *Why We Need the Alien Tort Statute Clarification Act Now*, Just Security (Oct. 27, 2022), https://www.justsecurity.org/83732/why-we-need-the-alien-tort-statute-clarification-act-now [https://perma.cc/B2W8-KE78]/.

164. *See* Michelle Harrison, *This Small Change in the Law Will Be Huge for Human Rights*, EARTHRIGHTS INTL. (Mar. 19, 2015), https://earthrights.org/blog/this-small-change-in-the-law-will-be-huge-for-human-rights/ [https://perma.cc/XHG4-YM5S].

165. For a discussion of Section 354.8 of the California Code of Civil Procedure and its tremendous impact on human rights, see Fernando C. Saldivar, *An Oasis in the Human Rights Litigation Desert? A Roadmap to Using California Code of Civil Procedure Section 354.8 As a Means of Breaking Out of the Alien Tort Statute Straitjacket*, 51 COLUM. HUM. RTS. L. REV. 507 (2020).

C. ADDITIONAL REFORMS: EXECUTIVE ACTION AND A COMPARATIVE LOOK ABROAD

Beyond legislative interventions, the Executive Branch has an exceedingly important role in the revitalization of the ATS. In 2024, the Biden-Harris administration announced a National Action Plan (NAP) on Responsible Business Conduct with the goal of "strengthen[ing] and improv[ing] respect for human rights and labor rights."[166] One tenet of the NAP concerns access to remedies. Future administrations should now request the Department of Justice implement an effective system for non–United States citizens to pursue fair and equitable redress of human and/or labor rights violations.

Legislative action will remain pivotal as Executive Orders, other executive actions, and nonprofit mobilization will likely fall short on ridding the core lesions inflicted on the ATS by the *Sosa-Kiobel-Nestlé* trilogy. As the United States struggles with this issue, other countries including Canada and France have taken bold strides in the opposite direction, allowing non-citizens to bring claims within their domestic courts.[167] For example, in 2020, the Supreme Court of Canada ruled in favor of allowing Canadian corporations to be sued by non-Canadian citizens in Canadian courts for customary international law torts in a case involving Eritrean refugee forced laborers who were allegedly tortured by a Canadian mining company.[168] Similarly, United States legislators must examine the mounting evidence of rising covert and easily masked MNC abuses throughout the global supply chains and take action to prevent complicity by American actors.

CONCLUSION

The ATS is but one tool for foreign national litigants seeking to vindicate their tort claims in United States courts. Some have analogized ATS cases to personal injury lawsuits, calling ATS cases "poor substitute[s] for more robust criminal processes and penalties that better reflect the severity of the offenses

166. Press Release, *U.S. Government's National Action Plan on Responsible Business Conduct*, U.S. DEPT. OF STATE (Mar. 25, 2024), https://www.state.gov/u-s-governments-national-action-plan-on-responsible-business-conduct/ [https://perma.cc/46KY-K4EJ].

167. *See supra* note 163.

168. Nevsun Resources Ltd. v. Araya, [2020] 1 S.C.R. 166 (Can.).

involved."[169] While it is true that the ATS was not designed strictly for achieving "corporate accountability," it remains true that the statute was intended to allow redress for foreign nationals who have been victimized by American actors to pursue their customary international law tort claims in United States district courts. Over the past two decades, courts have agonized over their interpretation of this statute because the context has changed, and meanwhile, corporate capture of courts and both political and lawmaking institutions threatens our democratic processes. By adopting clarity and predictability in their ATS reasoning, federal courts can begin to turn the tide.

Non–United States citizens and their labor at American MNCs worldwide have bolstered the national economy, created essential products and services, and lowered costs for American consumers. Unfortunately, too many instances remain where American MNCs engage in exploitative and extractive practices that violate the human rights of non–United States citizens, and inadequate mechanisms for recourse exist for those adversely affected by such practices. The ATS could fill this void. Through innovations of legal realism, however, the Supreme Court has restrained this function of the ATS. Exposing the myths and fallacies created by the Supreme Court within ATS jurisprudence informs and equips the United States legislature to take appropriate action. Today, the First Congress' objectives in creating the ATS remain unrealized. Legislators must enact laws that conform with those objectives and modernize the ATS given the rapidly changing global economy and troubling doctrinal developments within federal courts.

169. Beth Van Schaack & Ronald C. Slye, *A Concise History of International Criminal Law: Chapter 1 of International Criminal Law: Intersections and Contradictions* (Jul. 1, 2020), https://ssrn.com/abstract=1016152 (on file with the *Columbia Journal of Law & Social Problems*).