COMMENTS

Legal Fictions and Foreign Frictions: An Argument for a Functional Interpretation of *Jesner v Arab Bank* for Transnational Corporations

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The Alien Tort Statute (ATS) allows noncitizens to bring civil actions in US federal courts for a select class of particularly egregious violations of international law. Human rights activists have pushed the boundaries of the ATS in recent decades, and the Supreme Court has responded by establishing several limiting rules for ATS jurisdiction. Most recently, in April 2018, the Supreme Court ruled in Jesner v Arab Bank *that foreign corporations cannot be defendants in ATS suits. Following* Jesner*, plaintiffs in ongoing ATS suits have dropped key corporate defendants from their complaints.*

This Comment argues that courts and litigants should pause to consider how "foreign corporation" ought to be defined when applying the Jesner *rule to transnational corporations. While a formalistic rule based on place of incorporation or location of headquarters might seem the obvious choice, it is not a necessary one. This Comment considers possible alternatives and concludes that a functional standard that determines a corporation's "foreignness" based on its actual ties to the United States best serves the purpose of the ATS as defined by* Jesner*. To that end, this Comment introduces a standard I call the Functional Foreignness Test, which defines a foreign corporation as a corporation whose ties to the United States are at least as strong as to any other nation. Such a standard ensures that ATS jurisdiction, which can have substantial implications for both foreign relations and human rights, does not turn on a formality that may have little relation to a corporation's actual ties or activities.*

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INTRODUCTION

Over ten years ago, former child slaves initiated a class action suit against numerous corporate defendants for aiding and abetting the use of child slavery in Ivory Coast in violation of international law norms that prohibit slavery, forced labor, child labor, torture, and cruel, inhuman, or degrading treatment.[1] Defendants included Nestlé SA, the Swiss parent company of various Nestlé subsidiaries throughout the world; Nestlé USA, a US subsidiary; and Nestlé Ivory Coast, an Ivorian subsidiary.[2] In a 2014 decision, the Ninth Circuit summarized some of the plaintiffs' experiences:

> They were forced to work on Ivorian cocoa plantations for up to fourteen hours per day six days a week, given only scraps of food to eat, and whipped and beaten by overseers. They were locked in small rooms at night and not permitted to leave the plantations, knowing that children who tried to escape would be beaten or tortured. Plaintiff John Doe II witnessed guards cut open the feet of children who attempted to

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1 *Doe v Nestle, S.A.*, 748 F Supp 2d 1057, 1064 (CD Cal 2010).
2 Id at 1063.

> escape, and John Doe III knew that the guards forced failed escapees to drink urine.[3]

With respect to Nestlé, plaintiffs described Nestlé's exclusive supplier-buyer relationship with certain farms, arguing that Nestlé thereby had "first hand knowledge of the widespread use of child labor on [those] farms" and provided "money, supplies, and training . . . knowing that their assistance would necessarily facilitate child labor."[4]

The plaintiffs in the ongoing Nestlé litigation relied on the Alien Tort Statute[5] (ATS), a one-sentence provision of the Judiciary Act of 1789, to establish the US federal courts' jurisdiction over the case.[6] In full, the ATS reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[7] The vague terms of the ATS, along with its lack of legislative history or early case law, have made its scope and aim elusive.[8] For almost two hundred years, litigants rarely invoked the ATS, and courts have found few clues as to the First Congress's precise intent.[9] As a result, judges and scholars' interpretations have ranged widely. Depending on the account, the ATS might broadly encompass "any intentional tort to an alien's person or personal property,"[10] apply modestly to cases involving foreign ambassadors,[11] or be restricted to cases of vessels captured during war.[12]

However, the ATS was successfully used to address violations of international law beginning in the 1980s.[13] Then, the Supreme

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3 *Doe I v Nestle USA, Inc*, 766 F3d 1013, 1017 (9th Cir 2014) (*Nestle I*).

4 *Doe v Nestle, S.A.*, 748 F Supp 2d at 1066 (citation omitted).

5 1 Stat 73, 77 (1789), codified as amended at 28 USC § 1350.

6 *Doe v Nestle, S.A.*, 748 F Supp 2d at 1062.

7 28 USC § 1350.

8 See, for example, Anthony J. Bellia Jr and Bradford R. Clark, *Two Myths about the Alien Tort Statute*, 89 Notre Dame L Rev 1609, 1637–43 (2014); William R. Castro, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn L Rev 467, 467–68 (1986) (calling the ATS's language "cryptic" and its origin and purpose "obscure").

9 Joe Lodico, Note, *Corporate Aiding and Abetting Liability under the Alien Tort Statute*, 30 J L & Commerce 117, 118 (2011). See also notes 28–32 and accompanying text.

10 Anthony J. Bellia Jr and Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U Chi L Rev 445, 446 (2011).

11 *Tel-Oren v Libyan Arab Republic*, 726 F2d 774, 813–15 (DC Cir 1984) (Bork concurring).

12 Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Intl & Comp L Rev 445, 447 (1995).

13 Bellia and Clark, 78 U Chi L Rev at 458 (cited in note 10).

Court intervened in *Sosa v Alvarez-Machain*[14] and *Kiobel v Royal Dutch Petroleum Co*,[15] each time restricting the scope of the ATS and casting doubt on its future viability as a mechanism for promoting human rights.

In 2018, the Supreme Court restricted the ATS once more by holding in *Jesner v Arab Bank*[16] that foreign corporations cannot be defendants in ATS suits.[17] In the opinion, the Court also gave a concise statement of the ATS's purpose. In its view, that purpose is "to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."[18]

Following *Jesner*, the Ninth Circuit issued its judgment in *Doe v Nestle, S.A.*[19] on appeal from the district court's dismissal of plaintiffs' complaints.[20] The district court had previously concluded that the plaintiffs were seeking an extraterritorial application of the ATS in violation of the Supreme Court's ruling in *Kiobel*.[21] Finding to the contrary, the Ninth Circuit reversed and remanded to the district court.[22] In light of *Jesner*, the Ninth Circuit concluded that plaintiffs must be given an opportunity to amend their complaint, and that "plaintiffs must remove those defendants who are no longer amenable to suit under the ATS, and specify which potentially liable party is responsible for what culpable conduct."[23] At that point, plaintiffs had already conceded in a supplemental brief that, "[a]s a result of *Jesner*, Plaintiffs' claims against Nestlé, S.A. [and] Nestlé Ivory Coast . . . cannot proceed and these parties should be dismissed."[24] While the case may still proceed against Nestlé USA, the case will be substantially more difficult for the plaintiffs now that they must prove

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14 542 US 692 (2004).

15 569 US 108 (2013).

16 138 S Ct 1386 (2018).

17 Id at 1403.

18 Id at 1397.

19 906 F3d 1120 (9th Cir 2018) (*Nestle II*).

20 Id at 1123.

21 *Nestle v Nestle, S.A.*, 2017 WL 6059134, *8–9 (CD Cal). In *Kiobel*, the Court held that there is a "presumption against extraterritoriality" in ATS cases. *Kiobel*, 569 US at 117.

22 *Nestle II*, 906 F3d at 1127.

23 Id.

24 Appellants' Supplemental Brief, *Doe v Nestle, S.A.*, No 17-55435, *1 (9th Cir filed May 18, 2018) (available on Westlaw at 2018 WL 2299135) (Doe Supplemental Brief).

the liability of Nestlé USA specifically; after *Jesner*, proving culpable acts by Nestlé SA or Nestlé Ivory Coast will no longer suffice.[25]

This Comment challenges the assumption that defendants such as Nestlé SA and Nestlé Ivory Coast cannot be sued under the ATS after *Jesner*. To do so, it explores the question of what precisely qualifies as a "foreign corporation" for ATS purposes, especially with regard to transnational corporations.[26] Part I provides an overview of the ATS's historical and present application, with special focus on the ruling in *Jesner*. It also considers the open question whether ATS suits against *any* corporations are permissible, and concludes that at least some jurisdictions are almost certain to continue allowing such suits. Part II turns to the question of transnational corporate defendants, considering several possible ways to define foreign corporations and concluding that a functional standard is best suited to accomplish the ATS's purposes as defined by *Jesner*.

Part III proposes a legal standard I call the Functional Foreignness Test, which determines if a corporation is foreign by asking whether the United States' ties to the corporation are *at least as strong* as the corporation's ties to any other nation. This test takes a holistic view of factors such as the nationality of corporate actors and shareholders, the location of corporate facilities, and the amount of business done in the United States. If this holistic picture suggests that the corporation is as closely tied to the

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[25] This is merely one example of a growing trend of frustrated attempts to hold transnational corporations responsible for their wrongdoing, especially with regard to human rights violations. As the world's economy becomes more globalized, transnational corporations are increasingly prevalent and influential, and current legal frameworks are inadequate to keep these corporations in check. This backdrop of insufficient accountability mechanisms for transnational corporations frames this Comment. For further discussion of underregulated transnational corporations, see Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations*, 121 Penn St L Rev 617, 651–67 (2017) (discussing the consequences of federal court decisions limiting personal jurisdiction over transnational corporations, especially with regard to human rights abuses); Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 Denver U L Rev 183, 190–203 (2010) (describing the weaknesses of current efforts to regulate the human rights violations of transnational corporations); Regina E. Rauxloh, *A Call for the End of Impunity for Multinational Corporations*, 14 Tex Wesleyan L Rev 297, 303–13 (2008) (explaining the shortcomings of international laws, national laws, and codes of conduct in addressing human rights violations of transnational corporations).

[26] This Comment uses the term "nondomestic" to refer to corporations that are not incorporated in the United States, but which may or may not be "foreign" for ATS purposes. When used to apply to corporations, the word "foreign" will always imply foreignness for the purpose of the *Jesner* rule.

United States as any other nation, the corporation fails the test and should not be considered "foreign" for ATS purposes. In this way, courts can apply the *Jesner* rule so as to better further the ATS's purpose of ensuring that US nationals will be held accountable for their actions, without allowing US courts to meddle in other countries' affairs. In addition, Part III discusses the way that courts ought to view the parent-subsidiary relationship. I argue that for purposes of the Functional Foreignness Test, distinctions between parent companies and subsidiaries should be relevant only to the extent that they reflect the reality of corporate activities. Otherwise, these sorts of legal fictions[27] could render the ATS impotent.

Next, Part III applies the Functional Foreignness Test to Nestlé SA and Nestlé Ivory Coast. This demonstrates how the test could provide the jurisdiction necessary to hold transnational corporations with strong ties to the United States responsible for severe violations of universal norms of international law. Finally, it concludes by responding to a likely criticism of the Functional Foreignness Test: that it violates the separation of powers by making a policy decision properly left to Congress, especially given that it implicates foreign relations.

In sum, this Comment argues that in spite of assumptions made by certain lower courts and litigants, the rule announced in *Jesner* need not be applied formalistically. A functional standard that assesses a corporation's operative ties to the United States better serves the ATS's purposes and addresses violations in a principled way.

I. HISTORY OF THE ALIEN TORT STATUTE

This Part briefly summarizes the history of the ATS. First, it provides an overview of the ATS's promulgation, long history of disuse, and recent emergence as a tool to address international human rights violations, including the Supreme Court's decisions

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[27] The idea that a corporate entity is a legal "person" entirely distinct from other individuals or corporations is often referred to as a "legal fiction," meaning a legal construct that does not truly reflect reality but is taken as true in applying the law. See *Skupski v Western Navigation Corp*, 123 F Supp 309, 311 (SDNY 1954) (referring to "the legal fiction of separate corporate entities"). This language of fiction derives largely from *International Shoe Co v Washington*, 326 US 310, 316 (1945) ("[T]he corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact.").

in *Sosa* and *Kiobel*. Then, it turns to the *Jesner* decision, summarizing the Court's reasoning for concluding that foreign corporations cannot be defendants in ATS suits.

A. The ATS before *Jesner*

The First Congress passed the ATS in 1789 as part of the Judiciary Act, the original bill that established and organized the federal judiciary.[28] From 1789 until 1980, only two cases relied on the ATS as a basis of jurisdiction, as noncitizens[29] rarely brought tort suits in US federal courts.[30] As a result, there is little case law from the ATS's early days to shed light on its meaning. Further obscuring efforts at interpretation, as the Court pointed out in *Sosa*, is the ATS's "poverty of drafting history," which has meant that "modern commentators have necessarily concentrated on the text" and "a consensus understanding of what Congress intended has proven elusive."[31] Scholars have put forth various

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[28] See Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 Pepperdine L Rev 847, 861–62 (2010) (describing the purpose of the Judiciary Act and the First Congress's intent not to vest federal courts with the full extent of jurisdiction permitted by Article III of the Constitution).

[29] Even the precise meaning of the term "alien," as used in the statute, is not entirely clear. Some have argued that the term only includes noncitizen residents of the United States, though this interpretation has failed to gain support in courts. Compare M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 Berkeley J Intl L 316, 381 (2009) (arguing that "aliens" must reside in the United States for ATS purposes), with *Lizarbe v Rondon*, 642 F Supp 2d 473, 492 (D Md 2009) (rejecting this interpretation and concluding that the Supreme Court disposed of this issue in *Rasul v Bush*, 542 US 466, 468 (2004), which stated, "the courts of the United States have traditionally been open to nonresident aliens . . . . And indeed, [the ATS] explicitly confers the privilege of suing . . . on aliens alone.") (citations omitted). Instead, courts appear to implicitly accept the term "alien" to include any noncitizen regardless of residence. See, for example, *Kiobel*, 569 US at 113 (failing to discuss whether the plaintiffs, former Nigerian residents turned legal permanent residents in the US, qualify as "aliens," despite a thorough argument against their "alien" status, in Supplemental Brief of KBR, Inc, as Amicus Curiae in Support of Respondents, *Kiobel v Royal Dutch Petroleum Co*, No 10-1491, *16–21 (US filed Aug 8, 2012)); *Sarei v Rio Tinto*, 671 F3d 736 (9th Cir 2011) (permitting an ATS claim by residents of Papua New Guinea without addressing the question of whether they qualify as "aliens").

[30] See *Abdul-Rahman Omar Adra v Clift*, 195 F Supp 857, 865 (D Md 1961) (relying on the ATS for jurisdiction in a child custody case); *Bolchos v Darrel*, 3 F Cases 810, 810 (DSC 1795) (referring to the ATS as an alternative ground of jurisdiction in a case involving a dispute over the ownership of slaves). See also *Developments in the Law: Extraterritoriality*, 124 Harv L Rev 1226, 1235 (2011); Bellia and Clark, 78 U Chi L Rev at 458 (cited in note 10).

[31] *Sosa*, 542 US at 718–19.

historical arguments for differing interpretations of the ATS.[32] Theories of congressional intent include goals such as protecting foreign diplomats, establishing jurisdiction over prize cases arising from wartime captures of merchant vessels, addressing violations of "safe-conducts or passports" in cases when foreigners were under the protection of the state, enabling the United States to take responsibility for certain violations of international law, or providing universal jurisdiction over a class of particular breaches of the law of nations.[33]

The use of the ATS changed dramatically in 1980, when litigants began to explore the possibility of using the statute as a tool for enforcing international human rights law. This transition was marked by the landmark case of *Filartiga v Pena-Irala*,[34] in which the Second Circuit used the ATS to establish jurisdiction over a case in which Paraguayan citizens sued another Paraguayan citizen for causing their son's death through torture.[35] *Filartiga* was the first case in which noncitizens used the ATS to sue other noncitizens for events that occurred outside US territory.[36] Following *Filartiga*, a circuit split arose regarding the use of the ATS for cases in which neither the parties nor the conduct at issue were tied to the United States.[37]

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[32] Kedar S. Bhatia, Comment, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 Emory Intl L Rev 447, 453 (2013) ("The intent of the First Congress remains unclear despite the attention of judges and legal scholars.").

[33] Jennifer K. Elsea, *The Alien Tort Statute: Legislative History and Executive Branch Views* *8–11 (Congressional Research Service, Oct 2, 2003), archived at http://perma.cc/7YF4-QK3L; Bellia and Clark, 78 U Chi L Rev at 465 (cited in note 10) (arguing that the ATS was designed to ensure that the United States could redress harms caused to foreigners by US citizens, in order to avoid reprisals by other nations); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum L Rev 830, 879–82 (2006) (arguing that the ATS was exclusively designed to target violations of "safe conducts").

[34] 630 F2d 876 (2d Cir 1980).

[35] Id at 878, 887.

[36] Bellia and Clark, 78 U Chi L Rev at 459–60 (cited in note 10).

[37] Compare *Abebe-Jira v Negewo*, 72 F3d 844, 847–48 (11th Cir 1996) (affirming a judgment against a former Ethiopian government official for torture and other cruel acts against former Ethiopian prisoners); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F3d 1467, 1475–76 (9th Cir 1994) (affirming a judgment against a former president of the Philippines for acts of torture, summary execution, and disappearance of Philippine citizens), with *Tel-Oren v Libyan Arab Republic*, 726 F2d 774 (DC Cir 1984) (per curiam) (dismissing a claim by Israeli citizens against a Palestinian organization allegedly involved in an armed attack abroad, with two of three concurring judges rejecting *Filartiga*).

Scholars also disputed whether *Filartiga*'s interpretation of the ATS was appropriate.[38] Some applauded the decision's willingness to take a more expansive view of international human rights law and the role of US courts in applying it. In one of the first articles providing a comprehensive analysis of the case, Professors Jeffrey Blum and Ralph Steinhardt concluded by calling it a "victory for human rights activists" and emphasizing the positive impact it could have both domestically and internationally.[39] They described *Filartiga* as a commendable shift toward accepting the legitimacy of international custom and away from the dichotomy between binding and nonbinding treaties.[40] Similarly, Professor Jack Garvey offered an endorsement of the "international tort" model for addressing international human rights violations, praising its ability to redress such injuries in a manner that avoids "parochialism" by relying on substantive international law.[41] Elsewhere, the *Filartiga* court was called "a court educated in modern international law, which recognized its constitutional authority and responsibility to apply that law in appropriate cases."[42] These positive reactions sometimes echoed and drew legitimacy from a brief submitted by the Department of Justice in the case, which stated that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."[43]

By contrast, others condemned *Filartiga* as inappropriately expanding the United States' role in policing human rights violations abroad, especially given that the decision came from the

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38 For a summary of favorable and unfavorable reactions to *Filartiga*, see Karen E. Holt, Filartiga v. Pena-Irala *after Ten Years: Major Breakthrough or Legal Oddity?*, 20 Ga J Intl & Comp L 543, 546–54 (1990). See also Bellia and Clark, 78 U Chi L Rev at 460–61 (cited in note 10) (summarizing conflicting responses to *Filartiga* and collecting sources).

39 Jeffrey M. Blum and Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 Harv Intl L J 53, 112–13 (1981).

40 Id at 74.

41 Jack I. Garvey, *Repression of the Political Émigré—The Underground to International Law: A Proposal for Remedy*, 90 Yale L J 78, 119 (1980).

42 Kathryn Burke, et al, *Application of International Human Rights Law in State and Federal Courts*, 18 Tex Intl L J 291, 321 (1983).

43 Memorandum for the United States as Amicus Curiae, *Filartiga v Pena-Irala*, No 79-6090, *22–23 (2d Cir filed June 6, 1980) (available on Westlaw at 1980 WL 340146).

courts rather than the political branches.[44] One commentator criticized the decision as "miss[ing] the point" of international human rights law, which should be "making the home government answerable before domestic legal tribunals," rather than "prosecut[ing] a foreign state" from afar.[45] One article, though offering a generally favorable view of *Filartiga*, nonetheless noted that it was "bound to evoke resentment abroad as an act of moral imperialism."[46] Others raised concerns that the ruling would discourage commerce with the United States, or do "more harm than good" by providing an illusory remedy that would likely be unenforceable.[47]

In 2004, the Supreme Court interpreted the ATS for the first time in *Sosa v Alvarez-Machain*. In *Sosa*, the Court concluded that "the ATS is a jurisdictional statute creating no new causes of action."[48] However, it clarified that this interpretation did not indicate that the ATS, when passed, was merely "a jurisdictional convenience to be placed on the shelf for use by a future Congress."[49] The Court reasoned instead that Congress designed the ATS to be immediately applicable only in cases involving a narrow class of torts that violated international law and were recognized at common law at the time of the ATS's enactment.[50] This is not to say that the possible causes of action would be forever limited to those that existed in 1789. Rather, the Court merely established that the ATS was immediately operative and could serve as a basis for jurisdiction, in conjunction with the common law, without requiring an additional statute creating a cause of action.[51]

Courts have distilled *Sosa*'s reasoning into a two-part test to determine whether a given cause of action exists under the ATS. First, courts must answer a "threshold question whether a plaintiff can demonstrate that the alleged violation is of a norm that is

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44 See, for example, Mark P. Jacobsen, Case Note, *28 U.S.C. 1350: A Legal Remedy for Torture in Paraguay?*, 69 Georgetown L J 833, 846 (1981) ("[T]he effect of the decision was to intrude upon the foreign affairs powers of the President and the Senate.").

45 Farooq Hassan, *A Conflict of Philosophies: The* Filartiga *Jurisprudence*, 32 Intl & Comp L Q 250, 257–58 (1983).

46 C. Donald Johnson Jr, Filartiga v. Pena-Irala*: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 Ga J Intl & Comp L 335, 340 (1981).

47 Holt, 20 Ga J Intl & Comp L at 552–53 (cited in note 38).

48 *Sosa*, 542 US at 724.

49 Id at 719.

50 Id at 714, 720.

51 Id at 724.

specific, universal, and obligatory."[52] Next, the court must decide "whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before [ ] liability can be imposed."[53] With this reasoning in *Sosa*, emphasizing judicial restraint and deference to the political branches, the Court suggested a more cautious application of the ATS than lower courts had been applying in cases such as *Filartiga*.

Almost a decade later, the Supreme Court took this restraint a step further by adding a territorial requirement to ATS suits.[54] Nigerian residents of an area called Ogoniland had brought suit against British, Dutch, and Nigerian corporations.[55] According to the complaint, when plaintiffs protested environmental damage caused by defendants' activities in Ogoniland, defendants "enlisted the Nigerian Government to violently suppress the burgeoning demonstrations," which led to military and police forces "beating, raping, killing, and arresting residents and destroying or looting property," allegedly with various forms of aid from defendant corporations.[56] In *Kiobel v Royal Dutch Petroleum Co*, the Court held that ATS suits cannot be sustained when "all the relevant conduct took place outside the United States."[57] Notably, the Court did not preclude all cases regarding extraterritorial conduct, but merely determined that a presumption against extraterritoriality applies to the ATS, such that in cases that "touch and concern the territory of the United States, they must do so with sufficient force to displace" that presumption.[58] So while *Kiobel* certainly ended ATS litigation for cases such as *Filartiga*, it still left open questions regarding the precise contours of ATS jurisdiction.

Following *Sosa* and *Kiobel*, the Supreme Court had substantially curtailed the use of the ATS as an international human rights tool, disappointing those who saw *Filartiga* as ushering in a new era of universal jurisdiction over international law violations. However, the Court had not entirely precluded ATS

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52 *Jesner*, 138 S Ct at 1399 (Kennedy) (plurality) (quotation marks omitted).

53 Id.

54 *Kiobel*, 569 US at 124 ("We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.").

55 Id at 111–12.

56 Id at 113.

57 Id at 124.

58 *Kiobel*, 569 US at 124–25.

jurisdiction over cases involving conduct abroad, nor cases involving foreign defendants. These issues would come to the fore once more in *Jesner*.

B. *Jesner v Arab Bank*

In June 2018, the Court made its third and most recent ruling on the ATS in *Jesner v Arab Bank*. *Jesner* involved a class action suit in which roughly six thousand plaintiffs[59] sued Arab Bank, a major Jordanian corporation.[60] The plaintiffs alleged that some of its officials "allowed the Bank to be used to transfer funds to terrorist groups in the Middle East, which in turn enabled or facilitated criminal acts of terrorism."[61] In an attempt to satisfy the requirement set in *Kiobel*, plaintiffs also alleged that Arab Bank used a branch in New York—its single branch in the United States—to "clear dollar-denominated transactions through the Clearing House Interbank Payments System."[62] To put this allegation more simply, plaintiffs claimed that an automated processing system in Arab Bank's New York branch, which processes about 440,000 transactions each day, was involved in the transactions that benefited terrorist groups outside the United States.[63] Unsurprisingly, the Court noted the tenuous connection to US territory.[64] However, the Court did not dismiss the case for failure to displace the *Kiobel* presumption against extraterritoriality. Instead, it issued a blanket holding that foreign corporations cannot be defendants in ATS suits.[65]

The Court's categorical denial of jurisdiction was based on two interrelated arguments. First, the ATS's purpose is to hold US actors accountable for injuries to foreign nationals in order to

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59 Petition for a Writ of Certiorari, *Jesner v Arab Bank*, No 16-499, *ii (US filed Oct 5, 2016) (Jesner Cert Petition).

60 *Jesner*, 138 S Ct at 1393.

61 Id.

62 Id at 1394.

63 Id at 1395.

64 *Jesner*, 138 S Ct at 1406 ("[T]he relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank.").

65 Id at 1407. Parts of Justice Anthony Kennedy's opinion in *Jesner* were for a plurality of three justices; there were also three concurrences and a dissent. This Comment focuses on the holding and the reasoning of the parts of Justice Kennedy's opinion that obtained a majority.

reduce diplomatic friction,[66] and the ATS should therefore not enable cases likely to *cause* such friction.[67] For example, the Court noted that the *Jesner* litigation had been going on for thirteen years, during which it "caused significant diplomatic tensions with Jordan, a critical ally . . . [that] considers the instant litigation to be a grave affront to its sovereignty."[68] Second, cases such as these, which implicate sensitive issues of international relations, are best left to Congress.[69]

Regarding Congress's purpose in enacting the ATS, a subject that has frequently been a topic of dispute among courts and legal scholars,[70] *Jesner* gives a concise formulation: "The principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."[71] In other words, the ATS aims to hold US actors responsible for injuries to foreign citizens in order to avoid diplomatic problems with other countries. Given this guiding objective, the Court noted that expansive ATS jurisdiction of the *Filartiga* variety had drawn criticism from abroad, indicating that such suits undermine the ATS's goal by causing diplomatic tensions rather than alleviating them.[72] Indeed, previous ATS suits have caused diplomatic strife.

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66 Id at 1397 (explaining that "[t]he principal objective of the [ATS], when first enacted, was to avoid foreign entanglements").

67 Id at 1406.

68 *Jesner*, 138 S Ct at 1406–07.

69 Id at 1402–03. It is common for courts and scholars to make similar arguments suggesting that the judiciary should avoid interfering with foreign relations or offending foreign sovereigns. See, for example, Eric A. Posner and Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 Yale L J 1170, 1177 (2007):

> Courts are alert to the risks of creating international tensions, and in many cases they seem to be making a presumptive judgment that deferring to the interests of foreign sovereigns produces benefits for Americans that outweigh the costs. . . . [C]ourts should play a smaller role than they currently do in interpreting statutes that touch on foreign relations.

See also *Sosa*, 542 US at 727–28.

70 See, for example, Mirela V. Hristova, *The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility*, 47 USF L Rev 89, 95 (2012) ("[T]here is no record of legislative debate on [the ATS's] purpose and 'consensus of what Congress intended has proven elusive.'"), quoting *Sosa*, 542 US at 718–19.

71 *Jesner*, 138 S Ct at 1397.

72 Id at 1398. Scholars have raised similar concerns regarding diplomatic consequences of ATS suits. See, for example, Gary Clyde Hufbauer and Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 St Thomas L Rev 607, 613 (2004) ("ATS decisions following *Filartiga*, . . . may seriously damage United States relations

For instance, Chinese citizens brought a series of ATS suits in response to the Chinese government's crackdown against the Falun Gong spiritual movement in 1999.[73] The Chinese government denounced the lawsuits, complained to US officials, and suggested the suits would cause "immeasurable interferences" with diplomatic relations.[74]

In addition to its concern regarding diplomatic friction, the *Jesner* Court cited its "general reluctance to extend judicially created private rights of action" as a reason for dismissing the suit.[75] The Court described various recent cases in which the Court refrained from establishing rights of action.[76] It reasoned that "the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability" and, therefore, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress."[77] The Court noted that this rule of deference has been applied to reject the expansion of an already-existing cause of action—specifically, liability under *Bivens*—to corporate defendants.[78] Adding that such concerns apply with special weight in cases that implicate foreign relations, the Court concluded that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations."[79]

By precluding ATS suits against foreign corporations, *Jesner* struck another blow to advocates who seek to use the ATS as a tool for combatting human rights violations abroad. In addition to the thousands of *Jesner* plaintiffs who failed to obtain any relief and the Nestlé litigants who are no longer pursuing claims against Nestlé SA or Nestlé Ivory Coast, other plaintiffs have also

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with foreign states, obstruct Executive policymaking, and reverse the effects of international trade and investment liberalization.").

73 Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 Wash U L Rev 1117, 1152–53 (2011).

74 Id at 1153, quoting *Doe v Qi*, 349 F Supp 2d 1258, 1300 (ND Cal 2004). However, Professor Robert Knowles notes that there is no evidence that the suits actually affected Chinese policy or sentiment toward the United States. Knowles, 88 Wash U L Rev at 1154 (cited in note 73).

75 *Jesner*, 138 S Ct at 1402.

76 Id at 1402, citing *Sosa*, 542 US at 727.

77 *Jesner*, 138 S Ct at 1402.

78 Id at 1403. *Bivens* actions were established by *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971). In *Bivens*, the Court created a private cause of action for a narrow set of claims regarding constitutional rights violations by individual government agents. Id at 395–97.

79 *Jesner*, 138 S Ct at 1403.

dropped defendants from suits following *Jesner*.[80] Moreover, international human rights violations by corporations across the world are widespread and notoriously difficult to punish.[81] For instance, in its 2018 report, the Corporate Human Rights Benchmark found that of 101 of the world's largest companies in human-rights-risk sectors,[82] 48 had been the subject of serious allegations of human rights violations between January 2015 and December 2017.[83] These allegations concerned violations such as forced labor, child labor, and infringements on rights to land, livelihood, and water.[84] The report found that in a majority of cases, companies failed to take any appropriate action in response.[85] The ATS might have helped to fill this accountability gap, but *Jesner* limits the statute's reach with respect to many corporate defendants.

Jesner also left a number of important questions unresolved. Most strikingly, it did not answer the question whether corporations in general may be named as ATS defendants. Though the petition for a writ of certiorari presented the single question of "[w]hether the Alien Tort Statute categorically forecloses corporate liability,"[86] and the Court discussed a number of lower court decisions ruling for or against corporate liability,[87] the Court

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80 See, for example, *Kaplan v Central Bank of the Islamic Republic of Iran*, 896 F3d 501, 515 (DC Cir 2018) (relying on *Jesner* to dismiss another case alleging funding of terrorist activities by a foreign bank).

81 For sources discussing inadequate accountability mechanisms for transnational corporations, see note 25.

82 The report considers companies in the agricultural, apparel, and extractive industries.

83 Corporate Human Rights Benchmark, *2018 Key Findings: Apparel, Agricultural Products and Extractives Companies* *44 (2018), archived at http://perma.cc/3UL2-3Q6G (CHRB Report).

84 Id at *45.

85 Id at *46. The report measures "appropriate action" by considering whether companies "engaged in dialogue with the allegedly impacted stakeholders," "[took] appropriate actions to address the alleged impact," or "demonstrate[d] improvements in the related management systems to reduce such impacts in the future." Id. When allegations were denied, the report considered whether companies "show[ed] [ ] participation in engagement efforts" or "disclose[d] reviews of related management systems." None of these actions were taken in 57 percent of allegations. Id.

86 Jesner Cert Petition at *i (citation omitted) (cited in note 59).

87 *Jesner*, 138 S Ct at 1395–96 (discussing the Second Circuit's determination that the ATS does not extend to suits against corporations, but noting that the Seventh, Ninth, and DC Circuits had all disagreed), citing *Kiobel v Royal Dutch Petroleum Co*, 631 F3d 111, 120 (2d Cir 2010); *Flomo v Firestone Natural Rubber Co*, 643 F3d 1013, 1017–21 (7th Cir 2011); *Nestle I*, 766 F3d at 1020–22; *Doe VIII v Exxon Mobil Corp*, 654 F3d 11, 40–55 (DC Cir 2011) (*Exxon Mobil*).

nonetheless limited its holding to *foreign* corporations. Additionally, as this Comment argues, the Court left open the question of what, precisely, makes a corporation "foreign" for ATS purposes.

C. Corporate Defendants in ATS Suits after *Jesner*

This Comment does not focus on whether ATS suits against corporations are permissible in the first place, as this question has been extensively debated elsewhere.[88] Instead, it addresses when, if corporations are indeed permissible ATS defendants, transnational corporations that are neither wholly domestic nor wholly foreign may be defendants in ATS suits. However, because corporations must generally be permissible defendants for this argument to have any relevance, this Comment briefly discusses why ATS suits against corporations are likely to survive after *Jesner*, at least for domestic corporations.

The question whether corporations can be ATS defendants is really two inquiries: whether there is corporate *liability* for the causes of action that give rise to ATS suits, and whether the ATS extends *jurisdiction* over cases involving corporate defendants. Before *Jesner*, courts focused on the first inquiry and viewed it as either a procedural question or a question of substantive international law. According to the former view, the ATS provides subject matter jurisdiction and international law provides the cause of action, but the court is free to allow or reject corporate liability according to its own procedures.[89] According to the latter view, the ATS provides the subject matter jurisdiction over particular causes of action established by international law,[90] and corporate liability depends on whether there is an international law norm of corporate liability for that cause of action.[91]

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88 See, for example, Julian G. Ku, *The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 Va J Intl L 353, 364–77 (2011) (summarizing the history of corporate ATS liability jurisprudence and scholarship); Dustin Cooper, Comment, *Aliens among Us: Factors to Determine Whether Corporations Should Face Prosecution in U.S. Courts for Their Actions Overseas*, 77 La L Rev 513, 522 (2016).

89 See, for example, *Exxon Mobil*, 654 F3d at 41–42 (allowing corporate liability because corporate liability is a procedural rather than substantive question).

90 *Jesner*, 138 S Ct at 1399 (Kennedy) (plurality) (restating rule that ATS provides jurisdiction over suits arising from specific, universal, and obligatory norms of international law).

91 See, for example, *Flomo*, 643 F3d at 1017–21 (allowing corporate liability because it is a norm of international law); *Kiobel*, 621 F3d at 120 (concluding that there is no international norm of corporate liability, and therefore precluding corporate ATS liability).

Jesner, however, addressed the second inquiry: whether the ATS extends *jurisdiction* to cases involving corporate defendants. The *Jesner* Court precluded a class of defendants by reference to the ATS's specific purpose,[92] meaning that it found a jurisdictional limitation inherent in the statute.[93] This inherent jurisdictional limit could potentially extend to all cases involving corporate defendants.[94] In this manner, *Jesner* adds an additional condition for suits against corporations to succeed: the statute must provide jurisdiction over such suits *and* corporate liability must be permissible for the particular cause of action according to either the court's procedure or international law norms, depending on which side of the pre-*Jesner* debate is taken. This Section considers generally whether a corporation can be named as a defendant in an ATS suit. This includes both the jurisdictional question raised by *Jesner* and the corporate liability question that has long been subject to debate.

Before *Jesner*, most circuits that ruled on the question of corporate ATS liability concluded that corporate liability is permitted. The Eleventh Circuit was the first to explicitly state this rule in *Romero v Drummond Co*.[95] The Seventh, Ninth, and DC Circuits followed, with only the Second Circuit ruling against such liability.[96] In resolving the issue of corporate liability under the ATS, courts took one of the two approaches described above. Some courts viewed the question of corporate liability as a procedural question separate from international law, and therefore simply applied their own procedures regarding corporate liability for the type of tort at issue. Other courts looked to international law, which must be violated in an ATS suit, and considered whether corporate liability exists under international law for the given cause of action. The Second Circuit took the latter approach.[97] It

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92 *Jesner*, 138 S Ct at 1403.

93 *Sosa*, 542 US at 724 (explaining that "the ATS is solely jurisdictional").

94 At least one court has interpreted *Jesner* as precluding corporate ATS liability entirely. See *Freeman v HSBC Holdings PLC*, 2018 WL 3616845, *18 n 35 (EDNY).

95 552 F3d 1303, 1315 (11th Cir 2008).

96 Compare *Flomo*, 643 F3d at 1017–21 (concluding that corporate liability is a norm of international law and is therefore appropriate for ATS purposes); *Sarei*, 671 F3d at 765 ("We . . . conclude that international law extends the scope of liability for war crimes to all actors, including corporations."); *Exxon Mobil*, 654 F3d at 41–42 (allowing corporate liability because corporate liability is a procedural rather than substantive question, such that it is unsound to ask whether such liability is a norm of international law), with *Kiobel*, 621 F3d at 120 (concluding that there is no international norm of corporate liability, and therefore precluding corporate ATS liability).

97 See *Kiobel*, 621 F3d at 120.

argued that customary international law determines the scope of ATS liability, and concluded that no sufficiently "specific, universal, and obligatory" norm of corporate liability exists in international law, invoking the high standard set by *Sosa*.[98]

The Seventh, Ninth, and DC Circuits also approached corporate liability as an international law question, but reached the opposite conclusion. In *Flomo v Firestone Natural Rubber Co*,[99] for instance, the Seventh Circuit discussed the issue extensively and found that corporate liability is indeed a norm of customary international law.[100] The Ninth Circuit took the same approach and reached the same conclusion.[101] This argument draws strength from successful lawsuits brought after World War II, under the authority of international law, against corporations that assisted the Nazi regime.[102]

The DC Circuit, meanwhile, approached the question as one of procedure. It reasoned that international law does not define the scope of liability, which is a question of remedy rather than of substantive prohibition.[103] As the court put it, "[t]here is no right to sue under the law of nations," and therefore it is unsound to ask whether there is a right to sue corporations under customary international law.[104]

Scholars, too, have made arguments taking either or both of these approaches to support or reject corporate ATS liability.[105] While these different arguments for and against corporate liability are distinct from *Jesner*'s jurisdictional ruling and the argument of this Comment, they help to illuminate the complex history and doctrine surrounding the question of permissible ATS defendants.

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98 Id at 136, 141.

99 643 F3d 1013 (7th Cir 2011).

100 Id at 1017–21.

101 See *Sarei*, 671 F3d at 765 ("We . . . conclude that international law extends the scope of liability for war crimes to all actors, including corporations."), vacd for reconsideration under *Kiobel* by *Rio Tinto PLC v Sarei*, 569 US 945 (2013), all claims dismissed, 722 F3d 1109 (9th Cir 2013). Though this decision was vacated and the complaint dismissed following *Kiobel*, the Ninth Circuit reaffirmed its conclusions regarding corporate ATS liability in *Nestle I*, 766 F3d at 1022.

102 *Flomo*, 643 F3d at 1017.

103 *Exxon Mobil*, 654 F3d at 41.

104 Id at 42.

105 See generally, for example, Daniel Prince, *Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute?*, 8 Seton Hall Cir Rev 43 (2011).

Although *Jesner* does not resolve the issue of corporate liability under the ATS, it does contain language that appears skeptical of whether the ATS extends jurisdiction to cases with corporate defendants. The *Jesner* Court emphasized deference to Congress in questions of international relations as well as judicial restraint in extending private causes of action. If this reasoning led to a blanket ban on corporate defendants, this would establish another inherent limitation of the ATS rather than follow the Second Circuit's holding based on its interpretation of international law.

However, the goal of reducing diplomatic friction provides a compelling rationale to treat domestic corporations differently from foreign ones. Holding *foreign* corporations accountable for acts that harm non-US citizens meddles in foreign affairs and is therefore likely to cause diplomatic friction. Yet, at the same time, *failing* to hold corporations with ties to the United States responsible for their actions against foreign nationals could have the same effect.[106] As a result, the reading of *Jesner* most consistent with its interpretation of the ATS does not suggest that a narrow application of the ATS is always better. Rather, courts should assess whether, by allowing a certain class of defendants, the court is holding the United States responsible for the actions of its nationals or simply meddling in the affairs of other nations.

Following *Jesner*, courts that have ruled on the question of suits against corporate ATS defendants have continued to permit them—at least against domestic corporations. The Ninth Circuit did so in the Nestlé litigation,[107] and several district courts have done the same.[108] The US District Court for the Eastern District of Virginia, for instance, reasoned that when a suit "involves foreign plaintiffs suing an American corporate defendant," the case "fully aligns with the original goals of the ATS: to provide a

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[106] Throughout this Comment, I discuss the United States' responsibility with regard to corporate activities. I do not mean to suggest that the US government itself is connected to these activities. Rather, I am referring to a government's responsibility for the acts of its nationals—including the obligation to make reparations for torts or crimes committed by those nationals—which I argue ought to apply to corporations as well.

[107] *Nestle II*, 906 F3d at 1124 ("*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding [permitting corporate liability] as applied to domestic corporations.").

[108] See *Estate of Alvarez v Johns Hopkins University*, 2019 WL 95572, *9 (D Md); *Al Shimari v CACI Premier Technology, Inc*, 320 F Supp 3d 781, 787 (ED Va 2018); *Nahl v Jaoude*, 354 F Supp 3d 489, 506 (SDNY 2018).

federal forum for tort suits by aliens against Americans for international law violations."[109] The court added, "because [the defendant] is an American, rather than a foreign, corporation, there is no risk that holding [the defendant] liable would offend any foreign government."[110] Notably, other district courts have barred ATS suits against corporations following *Jesner*.[111] However, it is clear that *Jesner* has not definitively resolved this debate, and that ATS suits against corporations will continue in some jurisdictions, at least for domestic corporate defendants.

Given that *Jesner* has not brought an end to ATS suits against corporations generally, lower courts that permit such suits must now draw a distinction between foreign corporations that are not amenable to suit and other corporations that are. This raises a novel question, which this Comment seeks to answer: For the purposes of the ATS, what counts as a foreign corporation?

II. ATS SUITS AGAINST TRANSNATIONAL CORPORATIONS

In several cases—including in the Nestlé litigation—plaintiffs have dropped certain defendants from their complaints in response to the *Jesner* holding without pausing to interpret it.[112] They appear to assume that whether a corporation is foreign for ATS purposes can be readily determined based on its place of incorporation. Yet it is not clear that such a formalistic rule need apply. The distinction between foreign and domestic corporations has not been significant in previous ATS suits, so there is no established definition of "foreign corporation" for ATS purposes. Moreover, different sources of law suggest different possible definitions that could be applied.[113] This Comment therefore challenges the assumption that "foreign corporation" must be defined

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[109] *Al Shimari*, 320 F Supp 3d at 787.

[110] Id.

[111] See *Wildhaber v EFV*, 2018 WL 3069264, *6 (SD Fl); *Freeman v HSBC Holdings PLC*, 2018 WL 3616845, *18 n 35 (EDNY); *Nahl*, 354 F Supp 3d at 497.

[112] Doe Supplemental Brief at *1 (cited in note 24); *Wildhaber*, 2018 WL 3069264 at *2.

[113] For instance, a corporation's citizenship for diversity purposes is determined by both its place of incorporation and its principal place of business. 28 USC § 1332. However, whether a corporation "resides" in a given place for the purpose of the general venue statute depends on whether it is subject to personal jurisdiction there, which is determined through a more flexible test. 28 USC § 1391(c). For the purpose of federal alienage diversity jurisdiction, a corporation has the nationality of "the state under the laws of which the corporation is organized," a formulation that follows international law. *JPMorgan Chase Bank v Traffic Stream (BVI) Infrastructure Ltd*, 536 US 88, 91–92 (2002). Some of

formalistically for ATS purposes. I argue that a functional approach based on a holistic assessment of a corporation's ties to the United States better advances the purposes of the ATS and is more aligned with *Jesner*'s reasoning.

This Part proceeds in three sections. First, it outlines some of the existing safeguards that limit the scope of the ATS in order to give context to the *Jesner* rule and show that concerns about expanding ATS liability are often overstated. With these safeguards in mind, I turn to whether the ATS is better served by a formalistic rule or a functional standard for the definition of foreign corporation. Drawing on analogous areas of law, I argue that formalistic rules for determining corporate nationality are inappropriate for the ATS. Then, I draw on personal jurisdiction doctrine to show that a functional standard is more appropriate. Such a standard more accurately promotes the ATS's urgent and sensitive foreign relations goals.

A. Existing Safeguards against Jurisdictional Overreach in ATS Suits

A number of existing safeguards already prevent ATS suits from overreaching and meddling in foreign affairs. As a result, many of the goals underlying the *Jesner* rule against foreign corporate defendants are largely addressed by other limitations on ATS suits. This Section provides a brief overview of those limitations in order to show that an overly cautious interpretation of the *Jesner* rule is unnecessary.

First, courts have interpreted the ATS to apply only to a limited set of violations of international law: the international norm giving rise to the suit must be "specific, universal, and obligatory."[114] This sets a high bar, limiting ATS suits to cases such as genocide, war crimes, and torture.[115] By contrast, ATS suits have not been permitted to address "crimes against humanity arising

these rules, which could provide guidance for the application of *Jesner*, will be discussed in more detail in Parts II.B and II.C.

[114] *Kiobel*, 569 US at 109.

[115] See *Sarei v Rio Tinto PLC*, 671 F3d 736, 758, 763 (9th Cir 2011) (genocide, war crimes); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F3d 1467, 1475 (9th Cir 1994) (torture).

from a food and medical blockade,"[116] "systematic racial discrimination,"[117] or violations of free speech,[118] among others. As a result, no matter how far the United States extends ATS jurisdiction with respect to permissible defendants, the ATS will still be limited to a small class of cases because it only applies to rare, egregious incidents. Additionally, the concern that the United States is overreaching must always be weighed against the high stakes on the other side: in any ATS suit, an extreme violation such as genocide or war crimes has allegedly occurred, and the perpetrators may escape liability if the ATS suit is not permitted.[119]

Next, the *Kiobel* rule already precludes suits based on events that took place outside US territory, except when they "touch and concern" US territory with "sufficient force to displace" the presumption against extraterritoriality.[120] So cases in which the United States might be accused of meddling in the affairs of other countries are already likely to be barred as ATS suits. For instance, *Jesner* would likely have been dismissed under the *Kiobel* rule even if the Court had not chosen to create a new rule regarding foreign corporations. The actual acts of terrorism at issue in *Jesner* occurred overseas, and the only connection to the United States was an extremely tenuous link based on automated processes that technically occurred at the New York branch.[121]

Another important safeguard against overzealous assertions of the US courts' jurisdiction is forum non conveniens.[122] Violations giving rise to ATS suits, especially those regarding conduct

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116 *Sarei*, 671 F3d at 767.

117 Id at 768.

118 See *Guinto v Marcos*, 654 F Supp 276, 280 (SD Cal 1986).

119 As discussed below, ATS suits should be dismissed under forum non conveniens if a court closer to the location of the violations would be more appropriate. Furthermore, though some international and regional tribunals do address some violations of international law, their capacity to hear cases and enforce judgments is severely limited. For instance, some bodies only hear cases between states or that are referred by states, while others hear only a small number of cases per year. See Emilie Hafner-Burton, *Making Human Rights a Reality* 36–40 (Princeton 2013) (providing an overview of international and regional courts). For a discussion of limited enforcement, see generally Gwen P. Barnes, Note, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 Fordham Intl L J 1584 (2011). Depending on these tribunals would fall far short of the ATS's goal of ensuring an available forum. *Jesner*, 138 S Ct at 1397.

120 *Kiobel*, 569 US at 124–25.

121 *Jesner*, 138 S Ct at 1394.

122 Black's Law Dictionary 770 (West 10th ed 2014):

outside the United States perpetrated by non-US actors, would often be better addressed by local courts in the affected communities. When such redress is possible, ATS suits ought to be dismissed under forum non conveniens.[123] Forum non conveniens is the principle that even if jurisdiction exists, courts may decline to hear a case in favor of a more convenient forum.[124]

In *Gulf Oil Corp v Gilbert*,[125] the Supreme Court listed various factors relevant to a consideration of forum non conveniens.[126] These include factors relating to the "private interest of the litigant," such as the various practical problems and costs of litigating in a faraway place.[127] They also include "[f]actors of public interest," including the consideration that "[i]n cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country."[128] This last consideration alone would likely end any ATS suit in which the underlying controversy could plausibly be dealt with by a country more closely tied to it. This is especially true given that issues as large as government-sponsored torture or genocide implicate entire communities, and these communities deserve to be close to the trials for those injuries if possible. Though there is some debate over whether forum non conveniens should apply to ATS suits,[129] this Comment assumes that it is among the available tools courts can use to limit ATS overreach

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> The doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place.

123 See *Kiobel*, 569 US at 139 (Breyer concurring) (proposing a jurisdictional approach to the ATS that relies on doctrines including *forum non conveniens* to limit the risk of overreach). See also Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 NYU J Intl L & Polit 1001, 1053 (2001) ("[T]he doctrine of forum non conveniens provides a useful check on the possible overextension of federal court subject matter jurisdiction in cases with few meaningful ties to the United States."); Jonathan C. Drimmer and Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J Intl L 456, 471 (2011) ("[C]ourts often still dismiss ATS cases on *forum non conveniens* grounds.").

124 See, for example, *Gulf Oil Corp v Gilbert*, 330 US 501, 507 (1947).

125 330 US 501 (1947).

126 Id at 508.

127 Id at 508–09.

128 Id at 509.

129 See generally Short, 33 NYU J Intl L & Polit 1001 (cited in note 123).

in appropriate cases, without resorting to blanket rules like the one pronounced in *Jesner*.[130]

In *Piper Aircraft Co v Reyno*,[131] the Supreme Court made it clear that a lack of available redress in the more convenient forum would only overcome forum non conveniens in extreme cases.[132] In *Piper Aircraft*, plaintiffs brought suit in a US district court regarding a plane crash that occurred in Scotland.[133] Given various practical concerns that made Scotland a more convenient location for suit—including the fact that the relevant evidence was located in Scotland, and the petitioners would be unable to implead relevant Scottish parties—the Court concluded that the district court was reasonable in dismissing the case under forum non conveniens.[134] The Court acknowledged that Scottish law would be far less favorable to plaintiffs, but concluded that this "should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry."[135] But it later added that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is *no remedy at all*, the unfavorable change in law may be given substantial weight."[136] Forum non conveniens thereby likely precludes any ATS suit in which there is some remedy available in a more appropriate forum,[137] restricting the number of cases amenable to ATS suits. The risk of US overreach is thereby limited to a small class of cases, and in these cases that risk must be weighed against a countervailing risk of allowing severe violations to go unaddressed.

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130 See Jordan B. Redmon, *Alien Torts in Foreign Courts: Responsible Restrictions on Extraterritorial Application of the Alien Tort Statute*, 84 Miss L J 1329, 1356 (2015) ("The extensive development of forum non conveniens jurisprudence in the United States . . . makes for predictable and efficient resolution of choice-of-forum inquiries in the ATS context.").

131 454 US 235 (1981).

132 Id at 254.

133 Id at 235.

134 Id at 237.

135 *Piper Aircraft*, 454 US at 247.

136 Id at 254 (emphasis added).

137 This may appear to suggest that forum non conveniens could mark the end of the most ATS litigation. However, it is often the case in ATS cases that no remedy is available abroad, as transnational corporations often commit abuses in the countries least-equipped to address those abuses. See Skinner, 121 Penn St L Rev at 659–60 (cited in note 25) (listing reasons that victims of human rights violations by transnational corporations are unlikely to obtain compensation, including corrupt judiciaries and lack of a legal basis to bring a claim). Nonetheless, it may be appropriate for courts to take a more permissive approach when applying forum non conveniens to ATS suits. See Drimmer and Lamoree, 29 Berkeley J Intl L at 471 (cited in note 123) ("[M]ultiple surveys confirm that plaintiffs refile a very small percentage of cases abroad after dismissal from United States' Courts.").

Even if a suit touches and concerns the United States sufficiently to satisfy *Kiobel*, and is brought by plaintiffs with no viable source of redress in their own country, the suit still cannot survive unless the court establishes personal jurisdiction over defendants. This means that any corporate defendant must either have affiliations with the forum state that are "so continuous and systematic as to render them essentially at home in the forum,"[138] or purposefully conduct activity within the United States that is related to the subject matter of the suit.[139] In ATS contexts, this severely limits the ability of US courts to meddle in foreign affairs. Either a corporation is essentially "at home" in a US state, such that there is little practical difference between the corporation and a domestic corporation, or the underlying violation is directly connected to the corporation's deliberate contacts with the United States, justifying the United States' stake in redressing the violation.

Given these safeguards, the only ATS suits that would survive without the *Jesner* rule would satisfy all of the following conditions: they must be violations of universal norms; the defendant must have either strong, consistent ties to the United States or modest ties connected to the underlying conduct giving rise to the suit; the violations must touch and concern the United States sufficiently to overcome the presumption against extraterritoriality; and either the United States must be the most convenient forum or the most convenient forum must offer no possibility of redress. Therefore, a conservative interpretation of *Jesner* is unnecessary to avoid US overreach. ATS suits were already carefully limited before *Jesner* was decided.

Indeed, with all these safeguards, it might seem dubious that the *Jesner* rule will matter in many cases. Even if a case is dismissed under *Jesner*, it may well have been dismissed under other rules in the absence of the *Jesner* rule. Yet although cases

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138 *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 (2011) (quotation marks omitted). For an application of general personal jurisdiction in an ATS suit, see generally *Daimler AG v Bauman*, 571 US 117 (2014) (finding that California district court did not have personal jurisdiction over a nondomestic corporation that did not have sufficiently strong ties to California).

139 *International Shoe Co v Washington*, 326 US 310, 316–17 (1945). General jurisdiction requires the defendant corporation to be at home in the forum state. See *Daimler*, 571 US at 127. But when a corporate defendant is not subject to any district court's jurisdiction, and the claim arises under federal law, specific jurisdiction only requires sufficient contacts with the nation as a whole. See *World Tanker Carriers Corp v MV Ya Mawlaya*, 99 F3d 717, 720 (5th Cir 1996).

that turn on the interpretation of *Jesner* may be rare, each of these cases will have high stakes. The example of the litigation against Nestlé shows how the interpretation of *Jesner* in a single case may determine whether a class of former child slaves will be able to hold culpable corporate actors responsible. In the Nestlé litigation, the alleged use of slavery was a sufficiently universal norm to satisfy *Sosa*;[140] the relevant conduct of employees in the United States overcame the presumption against extraterritoriality, at least enough to survive a motion to dismiss;[141] forum non conveniens was not raised, but likely would be defeated due to lack of redress for plaintiffs domestically, especially given the alleged role of government actors in the violations at issue;[142] and personal jurisdiction is likely established through defendants' interactions with the United States, which are connected to the violations alleged.[143] Despite all of this, and despite how different the case is from *Jesner*, Nestlé SA and Nestlé Ivory Coast appear to have escaped the courts' jurisdiction due to a formalistic application of *Jesner*'s rule. In addition to striking cases like this, courts will likely use the *Jesner* rule more frequently in the future. Corporations are becoming more global and complex, and neat distinctions between what is domestic and what is foreign are becoming increasingly blurred. Now is the time to clarify the scope of *Jesner*.

B. Why a Formalistic Rule is Poorly Suited to the ATS

With these considerations in mind, this Section turns to possible rules for determining whether a transnational corporation is foreign for purposes of the ATS. Though the term "transnational corporation" has been defined in various ways,[144] this

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[140] See *Nestle II*, 906 F3d at 1124. For a discussion of the *Sosa* standard, see notes 52 and 53 and accompanying text.

[141] See *Nestle II*, 906 F3d at 1125–26.

[142] *Doe v Nestle, S.A.*, 748 F Supp 2d 1057, 1066 (CD Cal 2010).

[143] First Amended Class Action Complaint for Injunctive Relief and Damages, *Doe v Nestle, S.A.*, No 205CV05133, *2 (CD Cal filed July 22, 2009) (available on Westlaw at 2009 WL 2921081).

[144] See, for example, Janet E. Kerr, *A New Era of Responsibility: A Modern American Mandate for Corporate Social Responsibility*, 78 UMKC L Rev 327, 332 n 24 (2009). Professor Kerr defines a transnational corporation as "an enterprise which owns or has production in a host-state outside the country in which it is based," and cites various alternative definitions, such as "a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy." Id, quoting Luzius Wildhaber, *Some Aspects of the Transnational Corporation in International Law*, 27 Neth Intl L Rev 79, 80 (1980).

Comment uses it to refer to any corporation that is part of an enterprise with substantial operations in multiple countries.[145] The obvious way to interpret *Jesner* for transnational corporations might simply follow a formalistic rule already used in other legal contexts. This Section will look at two such rules in turn: the place-of-incorporation rule applied at international law and the similar rule applied domestically to determine corporate citizenship for diversity purposes. Due to key differences between these legal contexts and the ATS, this Section concludes that such formalistic rules are inappropriate for ATS suits and would undermine the goals espoused in *Jesner*.

1. International law: the place-of-incorporation rule.

In international law, a corporation's nationality is determined by the state in which it was incorporated.[146] As the *Jesner* rule does not derive from international law, but is instead an interpretation of a domestic statute, there is no reason to assume it is adopting the international definition of "foreign corporation." Further, this international law rule is not clearly incorporated into US law, although the Supreme Court did allude to it in *JPMorgan Chase Bank v Traffic Stream (BVI) Infrastructure Ltd*.[147] In *JPMorgan Chase*, the plaintiff sought to sue under the federal alienage diversity statute, which grants district courts jurisdiction over civil actions regarding controversies "between citizens of a State and citizens or subjects of a foreign State."[148] The defendant corporation argued that it was not a citizen of a foreign state because it was technically a citizen of the British Virgin Islands, a territory of a foreign state (the United Kingdom) but not

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[145] In suits in US courts, defendants will presumably consist of discrete corporations rather than more broadly conceived "enterprises," which often consist of many corporations. This definition therefore refers to the individual corporations rather than the larger enterprises they may be a part of (though of course a corporation that individually comprises a transnational enterprise is also included). However, in Part III.B, I argue that parent-subsidiary distinctions should be given limited weight when determining whether a corporation is foreign, such that the "foreignness" of the larger enterprise is ultimately the key issue in determining whether a corporation is a permissible ATS defendant.

[146] See Restatement (Third) of Foreign Relations Law of the United States § 213, cmt c (1986).

[147] 536 US 88 (2002). For an early reference to this rule, see *National Steamship Co v Tugman*, 106 US 118, 121 (1882) ("[A] corporation [created by the laws of a foreign state] is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such state.").

[148] 28 USC § 1332(a)(2).

a state in its own right, an argument the Court ultimately rejected.[149] During its analysis, the Court quoted the Restatement (Third) of Foreign Relations Law of the United States § 213, which states: "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized."[150]

This issue bears many similarities to the issue of defining foreign corporations for ATS purposes. In both cases, the statute at issue is a part of the US Code granting original jurisdiction to district courts, and in both cases the nationality of the defendant is relevant to whether that jurisdiction survives. Additionally, both statutes implicate international relations, such that international law is a natural place to look for a guiding rule.

However, it is neither necessary nor sensible for courts to use this same state-of-incorporation rule to apply the *Jesner* rule to ATS cases. First, *JPMorgan Chase*'s use of the international law rule did not clearly incorporate it into domestic law. In *JPMorgan Chase*, the Court did not discuss the international place-of-incorporation rule or give a formal holding that it applies to US statutes. Instead, the court merely quoted the Restatement in a parenthetical following a "Cf." citation.[151] In addition, the rule is not central to the case, in which the disputed issue was whether the British Virgin Islands qualified as a "foreign state," not the citizenship of defendant corporation. *JPMorgan Chase* is hardly a definitive endorsement of international law's state-of-incorporation rule.

Additionally, key differences between the federal alienage diversity statute and the ATS counsel against extending the international state-of-incorporation rule to the ATS context. First, the federal alienage diversity statute explicitly limits jurisdiction to cases in which defendants are "citizens or subjects of a foreign state,"[152] whereas the ATS makes no mention of defendants' citizenship or nationality. Second, the federal alienage diversity statute makes no distinction between corporations and individuals, and the Court merely applied the rules of corporate citizenship in order to apply a rule that relates to individuals and corporations alike.

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[149] *JPMorgan Chase*, 536 US at 92.

[150] Id at 91–92, quoting Restatement (Third) of Foreign Relations Law of the United States § 213 (1986).

[151] See *JPMorgan Chase*, 536 US at 91–92.

[152] 28 USC § 1332(a)(3).

The *Jesner* Court, by contrast, did not interpret a statute that textually distinguishes defendants based on citizenship, but instead established a novel rule distinguishing foreign corporations as a precluded group without making any blanket rule regarding all foreign defendants or all corporations. It is therefore clear that this rule does not arise from legal doctrine or textual interpretation, but is instead based on the practical issues raised by foreign corporations specifically. For that reason, the *Jesner* rule need not be applied according to the simplistic place-of-incorporation rule, and indeed would be better served by a functional rule that addresses those practical concerns.

2. Domestic law: corporate citizenship for diversity cases.

Another possible source of guidance is the rule used to determine corporate citizenship for diversity jurisdiction purposes. In that context, the citizenship of a corporation is determined based on its place of incorporation and its principal place of business,[153] and the Supreme Court has interpreted "principal place of business" to mean the corporation's "nerve center"—usually its headquarters.[154] This statutory definition explicitly limits itself to the question of diversity jurisdiction, and the Supreme Court has left open the possibility that the citizenship of a corporation might be defined differently outside of the diversity context. Nonetheless, it is the most clearly established definition of corporate citizenship in US law, and courts might naturally be inclined to turn to this definition in applying *Jesner*.

The issues surrounding jurisdiction over corporations in diversity suits do bear some similarities to those underlying the issue of jurisdiction under the ATS. In diversity suits, courts determine citizenship for the purpose of deciding whether federal jurisdiction is necessary to avoid unfair bias at the state level in cases in which citizens of a state sue noncitizens of that state.[155] The question is whether the corporation is at home and will not be at risk of mistreatment due to being an outsider. Similarly, the Court's holding in *Jesner* suggests that Congress does not want to overreach by asserting jurisdiction over corporations that are not at home in the United States. In such cases, it will appear

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[153] 28 USC § 1332(c)(1).

[154] See *Hertz Corp v Friend*, 559 US 77, 92–93 (2010).

[155] *Hertz Corp*, 559 US at 85. See also Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 Yale J Intl L 1, 18 (1996).

that the United States is interfering in another country's economic affairs, and the United States might be accused of doing so due to bias or economic motivations.[156]

Still, the formalistic and bright-line rule for determining citizenship of corporations for diversity purposes is not appropriate in ATS suits. In the case of diversity jurisdiction, the question is one of removal, not dismissal, such that a defendant will end up in court in the United States one way or another. If the defendant is not a citizen of the forum state, it may remove to federal court,[157] but it may not escape the suit altogether. In other words, the option of federal court is assumed along with the option of suing in state court. As such, in diversity cases there is a smaller risk that injustice will go unaddressed, and courts therefore have little reason to hesitate in finding that a defendant may be subjected to bias and would be better treated in federal court. Admittedly, the right to invoke diversity jurisdiction hinges on bright-line rules that could be gamed by corporations, which can choose where to incorporate and where to build their headquarters, and need not do so in the jurisdictions where they do the most business or have the greatest impact. Nonetheless, courts need not fear such gamesmanship[158] because no matter how corporations manipulate their "citizenship," proving diversity can only lead to removal—not dismissal altogether.

In ATS suits, however, the risk is high that no justice will be available if the defendant is labelled a foreign corporation. That label would preclude ATS liability after *Jesner*, potentially barring the suit from US jurisdiction—and ATS suits tend to involve cases in which redress is not available in plaintiffs' home countries. This risk is exacerbated by the fact that ATS suits require particularly grave violations; allowing them to go unaddressed would be particularly harmful. At the same time, the fact that ATS suits are limited to such severe harms lessens the risk that

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156 See *Jesner*, 138 S Ct at 1407 ("[T]his suit thus threatens to destabilize Jordan's economy."), quoting Brief for Hashemite Kingdom of Jordan as Amicus Curiae Supporting Respondent, *Jesner v Arab Bank, PLC*, No 16-499, *3 (US filed Aug 28, 2017).

157 28 USC § 1441(b).

158 In addition to explicitly gaming legal systems in order to obtain benefits, corporations are also likely to make decisions on the margins that take advantage of beneficial laws. For instance, corporations generally incorporate in Delaware because of its business-friendly laws, even if this decision is not made for sinister reasons. Thus, when this Comment talks about gamesmanship in the ATS context, it not only refers to deceptive corporate behaviors aimed at avoiding law, but also strategic decisions that take advantage of legal technicalities, even when these decisions are not deceptive or are also motivated by more legitimate goals.

the United States will overreach and subject corporations to unfair biases, as these situations are relatively rare. Moreover, a bright-line rule that invites gamesmanship undermines the purpose of the ATS as stated in *Jesner*, which is to *ensure* an available forum in appropriate cases.[159]

Similarly, the high stakes and rarity of ATS suits suggest that the administrative costs of applying a flexible standard rather than a hard rule are unlikely to be significant.[160] By contrast, the benefits of applying a more comprehensive and therefore accurate standard are likely high, as preventing a single corporation from escaping liability through gamesmanship is significant in cases that involve violations such as genocide and war crimes, not only for the sake of justice, but also for accomplishing the ATS's goal of ensuring that the United States holds its actors responsible for wrongful conduct against foreigners.

In sum, compared to the question whether a defendant should be allowed to remove to federal court by invoking diversity jurisdiction, the question whether defendants should be permitted to escape ATS liability altogether lends itself to a stronger presumption in favor of upholding jurisdiction. The risks are lower because the cases are limited, while the stakes are high because of the severe violations at issue. Further, courts should consider the possible lack of redress for grave human rights abuses if ATS suits are not permitted, as well as corporations' incentives to game the system in order to escape liability through technicalities.

C. A Functional Standard Would Better Serve the ATS's Purpose

The preceding analysis of two possible formal rules for determining how to define foreign corporations for ATS purposes

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159 *Jesner*, 138 S Ct at 1397.

160 There is a great deal of literature on the tradeoffs between rules and standards. The conventional understanding is that rules, such as a speed limit of 60 miles per hour, have the advantage of being cheap to apply (it is easy to tell if someone is driving over 60 miles per hour), but the disadvantage of being less accurate because they are over- and underinclusive (under certain conditions, it might be safer to drive slower or faster than 60 miles per hour). Standards, such as laws requiring drivers to "drive safely," are costly to apply (How do you determine if someone is driving "safely"?), but more accurate because they can incorporate the facts of a situation (driving safely during a storm may require a different speed than driving safely to get someone to a hospital in an emergency). For an example of the discussion on rules and standards, see generally Isaac Ehrlich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J Legal Stud 257 (1974).

demonstrates why such rigid tests are inappropriate. *Jesner* cited practical motivations for its holding, but a state-of-incorporation or location-of-headquarters rule would poorly serve those considerations. Instead, a formal rule would allow suits to proceed or fail on easily manipulated legal technicalities. These considerations, which are common shortcomings of rules as compared to standards,[161] suggest that a functional standard may be better than a formalistic rule for determining ATS jurisdiction over transnational corporations.[162]

Personal jurisdiction over nondomestic corporations in federal courts provides guidance for what such a functional standard might look like. Though personal jurisdiction may seem somewhat removed from the question of how to define a foreign corporation, personal jurisdiction doctrine bears important similarities to the question of ATS jurisdiction. When courts find that they lack jurisdiction in either case, they dismiss the case; they do not simply allow removal to a different court as they do when they find diversity. As discussed above, this means that the stakes are higher and it is more important that courts get the answer right and prevent gamesmanship.

In addition, both personal jurisdiction and ATS jurisdiction are limited by vital and sensitive constitutional goals. Personal jurisdiction is bounded by due process, a constitutional principle that cannot be restricted. Due process is also a complex issue that cannot be resolved by any simple bright-line rule.[163] Jurisdiction under the ATS is limited by the separation of powers, as courts

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[161] See, for example, id at 268 (discussing the over- and underinclusiveness of rules).

[162] On the other hand, there are oft-cited advantages of rules over standards, such as the ease of understanding and applying them. See id at 262–67. As will be discussed further, however, the rarity and severity of ATS suits suggests that the relative ease of applying a rule is insignificant. It is easier to identify a defendant's place of incorporation than to conduct a functional analysis of corporate activities, but such an analysis is still not very difficult. In occasional suits arising from extreme international law violations, it is not unreasonable to ask courts to do some basic research into a corporation's business activity.

As for ease of understanding the rule, it is not necessary to provide corporations with absolute certainty as to whether they may be ATS defendants. If a corporation mistakenly fears it is subject to ATS suits and abstains from severe international law violations as a result, no harm is done. Conversely, a corporation is unlikely to be underdeterred in the ATS context, as any corporations incorporated in the United States will remain clearly subject to suit. Finally, it is not unfair to surprise corporations by holding them accountable for these severe violations, assuming jurisdiction is otherwise appropriate; they can hardly argue that they were unaware of international norms against genocide, slavery, or other such acts.

[163] See, for example, *Daimler*, 571 US at 125.

must refrain from interfering in foreign affairs by overextending their jurisdiction.[164] This goal is similarly urgent, and is also similarly ill-suited to a bright-line rule: whether a given suit risks causing diplomatic friction by meddling in the affairs of other nations is a complex question likely to turn on the facts of a given case.

Whether a federal court has personal jurisdiction over a nondomestic corporate defendant does not turn on a formalistic rule but instead looks to the reality of a corporation's contacts with the jurisdiction.[165] The governing standard for general jurisdiction over a defendant—that is, jurisdiction that covers all of the defendant's actions—is stated in *Goodyear Dunlop Tires Operations, S.A. v Brown*.[166] In *Goodyear*, the Court explained that "[a] court may assert general jurisdiction over foreign . . . corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum state."[167] In other words, personal jurisdiction is established based on a holistic picture of a corporation's ties to the forum.

The governing standard for specific jurisdiction—jurisdiction based on a relationship between the forum and the specific underlying controversy—derives from *International Shoe Co v Washington*.[168] In *International Shoe*, the Supreme Court reasoned that "in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, [due process requires that] he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[169] As with general jurisdiction, then, specific jurisdiction looks to a holistic picture of a corporation's relations with the forum. In *J. McIntyre Machinery, Ltd v Nicastro*,[170] the Court elaborated on this rule, concluding that the "minimum contacts" required must arise from a defendant's activity *directed* at the forum state, because such

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[164] See, for example, *Jesner*, 138 S Ct at 1398 ("ATS litigation implicates serious separation-of-powers and foreign relations concerns. Thus, ATS claims must be subject to vigilant doorkeeping.") (citations and quotation marks omitted).

[165] Id at 291.

[166] 564 US 915 (2011).

[167] Id at 919 (quotation marks omitted).

[168] 326 US 310 (1945).

[169] Id at 316 (quotation marks omitted).

[170] 564 US 873 (2011).

intentional activity constitutes a defendant's submission to the state's authority:

> Where a defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State.[171]

This provides a normative yardstick for measuring a corporation's connections to the forum: if they amount to "purposeful availment" of that forum, jurisdiction over cases arising from that availment is justified.

Personal jurisdiction, whether general or specific, thereby depends on a corporation's functional relationship with the forum. When judging that relationship, courts explicitly consider the normative goal of due process by asking whether a corporation's contacts with the forum make jurisdiction fair. While determining personal jurisdiction is therefore more burdensome than applying a bright-line rule, it is also more accurate because courts make a flexible judgment based on the full facts of the case. As discussed previously, this makes sense because jurisdictional questions are often outcome determinative, due process is an essential aim that should not be sacrificed to expediency or undermined by gamesmanship, and whether jurisdiction satisfies due process is a complicated question that cannot be easily reduced to a bright-line rule.

ATS suits would similarly benefit from a standard that prioritizes accuracy and flexibility over expediency. The stakes are high because dismissing a suit will likely mean that no redress is available to plaintiffs, the violations at issue are extreme, and the ATS serves the important goal of holding US actors accountable for their injuries to foreign nationals. At the same time, the complexity of determining whether a given case would effectively serve this goal suggests that any bright-line rule would fail to accurately distinguish between cases that would further the ATS's purpose and those that would undermine it. And finally, the relative infrequency of ATS suits means that the added burden of a functional standard is unlikely to be significant. For all of these reasons, a functional standard that reflects the ATS's goal—like

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[171] Id at 881 (quotation marks and citations omitted).

the functional standard used to determine personal jurisdiction—is far better suited to the ATS than a formalistic rule.

In addition to illustrating why a functional standard is appropriate for the ATS, personal jurisdiction doctrine offers guidance as to what such a standard might look like: courts should consider the nature of the corporation's functional contacts with the United States in light of the ATS's goal. In the case of personal jurisdiction, courts look at these contacts to determine whether jurisdiction is "fair," as fairness is the goal of due process.[172] In ATS suits, courts should look at these contacts to determine whether jurisdiction would further or inhibit the goal of holding US actors accountable for serious violations against foreign nationals. That is, courts should look holistically at a corporation's relationship with the United States, and exercise jurisdiction if it would further the ATS's goal of holding US actors accountable but refrain from jurisdiction over any case that would hinder that goal by meddling in the affairs of other nations.

III. THE FUNCTIONAL FOREIGNNESS TEST

A review of analogous areas of law has revealed that a functional standard based on the ATS's purpose is most appropriate for defining foreign corporations. *Jesner* states that the ATS's purpose is to "ensur[e] the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."[173] The definition of foreign corporation should therefore distinguish cases in which the United States has a genuine responsibility to hold a corporation responsible from those in which the United States would be policing corporations insufficiently connected to it. Guided by these considerations, I propose an inquiry into whether the United States' ties to a corporation are *at least as strong* as any other nation's. I call this standard the Functional Foreignness Test. A corporation that passes the Test proves that, in light of its relatively limited ties to the United States, it is in fact foreign. A corporation that fails the Test reveals that, though perhaps incorporated abroad, its functional ties to the United States show that it is not truly foreign. The United States has a responsibility to hold such a corporation accountable for its injuries to foreign nationals.

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[172] *International Shoe*, 326 US at 316.

[173] *Jesner*, 138 S Ct at 1397.

This formulation offers numerous advantages. As a broad standard rather than a formalistic rule, it prevents gamesmanship[174] and reduces the likelihood that severe injuries subject to the ATS will go unaddressed. By focusing on US actors' *relative* culpabilities, the Test hews closely to the guiding principle of *Jesner*, which is to prevent the United States from interfering with corporations with strong ties to another nation, while also preventing the United States from failing to take responsibility for injuries legitimately connected to it.[175] The Test both avoids blame directed at the United States for ignoring serious human rights violations and respects international norms of limited interference with the affairs of another nation's corporations. The administrative burdens of a flexible standard instead of a rule are not high given the narrow set of cases in which ATS suits are possible, especially in light of other existing safeguards. And above all, by remaining flexible and goal-oriented, this standard does not sacrifice sensitive foreign relations issues to the expediency of a formalistic rule.

To illustrate how the Functional Foreignness Test might be applied, this Part proceeds as follows: First, it identifies and explains a number of factors likely to be relevant to the Functional Foreignness Test. Then, it considers how the Functional Foreignness Test ought to view the parent-subsidiary relationship, as this issue is likely to be dispositive in many ATS cases. Next, it applies the Functional Foreignness Test to the Nestlé litigation to show how it could be decisive in high-stakes suits. Finally, it concludes by responding to a likely criticism: that the Functional Foreignness Test would amount to judicial overreach, violating the separation of powers.

A. Relevant Factors

A number of factors are likely to be relevant in a holistic analysis of a corporation's ties to the United States. These include: the place of incorporation; the location of corporate facilities; the amount of business conducted in the United States; the financial relationship to the United States; and the nationality of board members, employees, and shareholders. These factors should not be considered in isolation, but rather should contribute to a holistic picture that reveals whether US courts ought to hold

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[174] See Part III.B.2.

[175] See note 66 and accompanying text.

the corporation responsible for its wrongdoings.[176] Underlying each of these factors are two interwoven questions. First, is the United States contributing to the corporation's activity such that it bears some responsibility for the corporation's violations? And second, has the corporation chosen to take advantage of US resources, such that US oversight is justified and less likely to be interpreted as meddling?

If a corporation—including a subsidiary of another corporation—is incorporated in the United States, it will of course qualify as a domestic corporation for the purpose of ATS suits. Corporations not incorporated in the United States should be considered using the other factors to determine the extent of their contact with the United States. This avoids the potential technicality of allowing businesses to escape liability simply by filing chartering documents in another country while committing torts that touch and concern the United States.

Additionally, the Functional Foreignness Test should look at how much corporate activity is conducted through facilities in the United States. Following *Hertz Corp v Friend*,[177] corporations should be considered nationals of the United States if their headquarters are located in the United States. Beyond that, other facilities such as factories, retail locations, or warehouses should also be taken into account. Such facilities indicate that the United States is providing a forum for the corporation's activities, and also that the corporation is purposefully availing itself of US territory, to use the language of *J. McIntyre*.[178]

Similarly, when a corporation conducts a sufficient amount of business with the United States, the United States is implicated in that corporation's activity because it is supporting that corporation financially by providing access to the US market. At the same time, by availing themselves of the US market, transnational corporations arguably indicate "an intention to benefit

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[176] Similarly, the Test itself should not be considered in isolation from other ATS rules, especially the *Kiobel* rule requiring that cases touch and concern the United States. Both of these tests are driven by the same concern: avoiding United States overreach into affairs not sufficiently connected to it. Requiring that both the corporation and the violation at issue be closely tied to the United States is excessive and could prevent the United States from exercising oversight in cases closely connected with it. Instead, failing the Functional Foreignness Test should carry a presumption that the *Kiobel* rule has been satisfied as well. That is, courts should presume that the case touches and concerns the United States precisely because of its close tie to the alleged perpetrator.

[177] 559 US 77 (2010).

[178] See *J. McIntyre*, 564 US at 881.

from and thus an intention to submit to the laws of" the United States.[179]

If a transnational corporation relies heavily on financing from US banks or other US sources, the United States would implicate itself in the corporation's actions by financing and supporting the corporation. Again, the corporation's beneficial use of US finances would justify some US oversight. Conversely, when a corporation has stronger financial ties to another nation's economy than to the United States', as with Arab Bank, imposing liability would increase diplomatic friction[180] and therefore tilt the balance toward a finding of foreignness.

Finally, the Functional Foreignness Test should take into account the nationality of the various actors involved in the corporation. If many of those actors are US nationals, US actors are substantially responsible for the corporation's acts. If the board of directors includes many US citizens, then US citizens are responsible for overseeing the activities of the corporation. When many employees are US citizens, US citizens are carrying out the acts of the corporation. Finally, when US citizens make up a large portion of the shareholders, US capital is effectively funding the corporation and its activities, much like corporations financed by US banks. In each of these cases the corporation is receiving a substantial benefit from the United States, either through human capital or money, such that the United States can reasonably choose to impose costs in return for these benefits.

B. The Parent-Subsidiary Distinction in the Functional Foreignness Test

An important difficulty of the Functional Foreignness Test is how to treat parent-subsidiary relationships. This question is essential and could easily be dispositive in most cases, which is why I give it extended treatment here. The United States' ties to a transnational corporation will often be relegated to legally distinct US subsidiaries, and the international violations committed by transnational corporations will often be carried out by subsidiaries abroad. I argue that in applying the Test, courts should take a functional approach to differentiating the actions of parent corporations from their subsidiaries.

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179 Id.

180 See note 67 and accompanying text.

1. The importance of a functional assessment of parent-subsidiary relationships.

The same aspects of ATS suits that justify the Functional Foreignness Test generally suggest that a functional approach should also be taken with respect to parent-subsidiary relationships. Because the ATS furthers important and sensitive goals, its application should not turn on easily manipulated formalities. And once again, the high stakes and low frequency of ATS suits mean that accuracy is more important than expediency in determining which defendants are truly foreign.

Most importantly, the purpose of the ATS as stated in *Jesner* would be severely undermined by strict adherence to legal fictions. After all, the goal is to hold US actors responsible for their injuries to foreign nationals. Such a goal would be ill-served by a self-imposed technicality that allows corporations with strong ties to the United States to escape jurisdiction. When a transnational corporate enterprise is as strongly tied to the United States as to any other nation, such technicalities are unlikely to affect the United States' responsibility in the eyes of foreign nations. Yet over-adherence to corporate fictions would allow corporations that would otherwise be subject to the ATS to avoid liability easily by ensuring that corporate ties to the United States are sustained through a separate corporate personality than the one committing violations.

For these reasons, when applying the Functional Foreignness Test, legal fictions regarding distinct corporate personalities should be adhered to *only to the extent that they reflect the reality of the corporations' activities*.[181] This means that when a transnational corporate enterprise as a whole fails the Test, its various component corporations should fail as well. If a parent corporation fails the test, its subsidiaries should consequently fail. This

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[181] This rule would not be the first to acknowledge that corporations often consist of a cohesive enterprise legally divided into numerous distinct corporations. For antitrust purposes, for instance, US law distinguishes anticompetitive activity between distinct "entities" from anticompetitive activity between components of "a corporate enterprise organized into divisions," which "must be judged as the conduct of a single actor." *Copperweld Corp v Independence Tube Corp*, 467 US 752, 769–71 (1984) (explaining why "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act"). Similarly, countries such as England may, for legal purposes, recognize a "single economic entity" comprised of the various components of a transnational corporation. See Claudia M. Pardinas, *The Enigma of the Legal Liability of Transnational Corporations*, 14 Suffolk Transnatl L J 405, 453 (1991).

rule would ensure that corporations that ought to be held liable under the ATS cannot avoid that liability simply by relegating violations to subsidiaries that will be entirely beyond US reach.

2. Why a functional approach is consistent with current law.

This approach might appear to fly in the fact of current practice. Generally, under the principle of limited liability, the legal distinction between parent and subsidiary corporations protects each one from liability for the acts of the other. As the Supreme Court stated in *United States v Bestfoods*,[182] "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries."[183] The Court explained that even though a parent may own a subsidiary's stock and therefore elect directors, make bylaws, and otherwise control the subsidiary, the "bedrock principle" of limited liability nonetheless rules.[184]

But the Functional Foreignness Test is about *jurisdiction*, not *liability*. So the rule of limited liability does not require courts to give dispositive weight to legal distinctions between parents and subsidiaries for the purpose of the Functional Foreignness Test. Indeed, limited liability would still apply in its full force, guaranteeing that no corporate entity's assets would be used to pay for the acts of another. The functional view of parent-subsidiary relationships for which I advocate would consider the entire corporate enterprise's relationship to the United States only for the narrow purpose of determining whether the components of that enterprise ought to answer for grave international law violations in US courts. But it would not hold any corporation liable for the acts of another. This would have the limited effect of allowing courts to exercise jurisdiction over otherwise insulated subsidiaries.

Additionally, even the principle of limited liability gives way when justice demands it. As the *Bestfoods* Court explained:

> [T]here is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as

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182 524 US 51 (1998).

183 Id at 61 (quotation marks omitted).

184 Id at 62. See also Nina A. Mendleson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 Colum L Rev 1203, 1267 (2002); Timothy P. Glynn, *Beyond "Unlimited" Shareholding Liability: Vicarious Tort Liability for Corporate Officers*, 57 Vand L Rev 329, 356 (2004).

> generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf.[185]

Such cases are a "rare exception," but they indicate that even limited liability is not absolute.[186]

There is not a single, settled formulation of the federal common law rule[187] for piercing the corporate veil.[188] Generally, most circuits rely on a fact-intensive analysis focusing on the nature of the relationship between the corporation and the shareholders (or parent) as well as the risk of allowing injustice if the legal fiction of the separate corporate personality were upheld.[189] Courts often require fraud or some other egregious behavior by an actor in order to hold it liable for the acts of another, but there is also evidence that the federal doctrine—as compared to some state doctrines—is somewhat flexible, with more emphasis on federal policy.[190] In *Anderson v Abbot*,[191] for instance, the Supreme Court noted that "the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement."[192]

This is not to suggest that the rule of limited liability would look different in ATS contexts, or would more frequently allow for veil piercing, but it establishes that courts do not always give dispositive weight to legal fictions, and that federal policy is a relevant consideration in this regard. In ATS suits, when a sensitive federal policy is at stake and the question is jurisdiction rather than liability, there is no reason that the outcome should hinge on corporate fictions.

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185 *Bestfoods*, 524 US at 52.

186 *Dole Food Co v Patrickson*, 538 US 468, 475 (2003).

187 Federal common law would presumably apply to ATS cases given that they arise from federal common law causes of action. *Jesner*, 138 S Ct at 1397 ("Congress enacted [the ATS] against the backdrop of the general common law, which in 1789 recognized a limited category of torts in violation of the law of nations.") (quotation marks omitted).

188 See Joshua E. Kurland, *Veil-Piercing in Customs Enforcement Proceedings: The Role of Federal Common Law*, 23 Tulane J Intl & Comp L 363, 372 (2015) ("The federal veil-piercing standards differ somewhat among the various federal circuit courts.").

189 See id.

190 See id at 369–71.

191 321 US 349 (1944).

192 Id at 363.

C. Applying the Functional Foreignness Test: The Example of Nestlé

The Functional Foreignness Test would have a modest but important effect on ATS liability. Given the various hurdles discussed in Part II.A, it would only be relevant under certain circumstances. A transnational corporate enterprise would need to violate a universal norm of international law. The violation would need to be sufficiently connected to US territory to satisfy personal jurisdiction and overcome the presumption against extraterritoriality. Even then, the court would need to determine that a US forum is most appropriate, perhaps because redress is not available elsewhere.

The most likely cases to fit this profile are cases of integrated global enterprises wherein corporations conducting substantial activity in the United States simultaneously commit serious violations in other parts of the world. The US activity might be tied to those violations due to the integrated nature of the enterprise. For instance, products sold in the United States might derive from injuries committed elsewhere or corporate facilities in the United States might direct or oversee the injurious conduct. In this narrow but important set of cases, the final hurdle might be the *Jesner* rule. Under a formalistic test, jurisdiction would turn entirely on a formality such as whether culpable corporate defendants were initially incorporated abroad. Under the Functional Foreignness Test, courts would look instead to the reality of the enterprise's economic ties to the United States. Jurisdiction would attach only if the enterprise were as closely tied to the United States as to any other nation. However, once that condition was satisfied, jurisdiction would survive regardless of any legal formalities. The fact that a defendant was initially incorporated abroad, or was legally distinct from the portion of the enterprise tied to the United States, would not be dispositive.

For an example of how the Test might be applied, consider again the suit against Nestlé. In a supplemental brief before the Ninth Circuit, Nestlé USA emphasized that plaintiffs could only succeed by attributing to Nestlé USA the actions of its non-US affiliates, Nestlé SA and Nestlé Ivory Coast.[193] If this is true, then a formalistic rule labelling Nestlé SA and Nestlé Ivory Coast as

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[193] See Supplemental Brief of Nestlé USA, Inc, *Doe v Nestle, S.A.*, No 17-55435, *4–5 (9th Cir filed May 18, 2018) (available on Westlaw at 2018 WL 2299136) (Nestlé Supplemental Brief).

foreign corporations—a rule that the Ninth Circuit apparently applied without considering alternatives[194]—will preclude any recovery for the plaintiffs.

However, the Functional Foreignness Test would allow plaintiffs' suit to proceed against both Nestlé SA and Nestlé Ivory Coast. Nestlé SA, the original Nestlé corporation, was incorporated in Switzerland. However, the Nestlé enterprise has strong ties with the United States. As of Nestlé's 2018 Annual Review, which does not draw distinctions between Nestlé SA and its many subsidiaries, 36.5 percent of Nestlé's share capital was in the United States—more than the 34.9 percent in Switzerland, and more than seven times as much as in any other country.[195] As a result, the nationality of shareholders weighs against a finding of foreignness. Regarding the nationality of employees, the report stated that approximately 3.1 percent of Nestlé's employees were in Switzerland, whereas 33.9 percent were in the Americas.[196] Though the report did not break down this statistic by country, it is likely that most of these employees were in the United States, where 77 of Nestlé's 413 factories were located.[197] This is more than in any other single country, and only eleven factories were located in Switzerland.[198] As a result, the nationality of employees and the location of corporate facilities both weigh strongly against foreignness. Further, 44.9 percent of Nestlé's sales were in the Americas (again, there is no breakdown by country) compared to 29.4 percent of sales to Europe, the Middle East, and North Africa combined, indicating that business with the United States heavily factors against foreignness as well.[199] Finally, Nestlé SA's CEO is a US citizen, along with two other members of its twelve-person executive board, while four members of the board are Swiss.[200] In this way, Swiss leadership does not appear to significantly outweigh American leadership, which modestly supports a finding that Nestlé SA is not foreign.

Taken as a whole, Nestlé clearly fails the Test because its ties to the United States are at least as strong as (and in this case,

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194 See *Nestle II*, 906 F3d at 1124.

195 *Annual Review 2018* *59 (Nestlé 2018), archived at http://perma.cc/E2R2-M2US.

196 Id at *47.

197 Id at *56.

198 Id.

199 *Annual Review 2018* at *47 (cited in note 195).

200 See id at 62–63 (listing executive board members). Board member nationalities were determined based on CVs available on Nestlé's website. *Executive Board* (Nestlé 2019), archived at http://perma.cc/5225-7LV3.

stronger than) its ties to other nations. Though Nestlé SA began in Switzerland, Nestlé's ties to Switzerland are no stronger today than its ties to the United States, which contributes enormously to its monetary and human capital and serves as a key market for its products. In light of this reality, there is no logical basis for letting the outcome of the Nestlé litigation hinge on the place where Nestlé SA was originally incorporated. Such a formalistic rule would undermine the purpose of the ATS by allowing an actor with close ties to the United States to commit serious violations against foreign people without consequences. Nestlé admittedly does have strong ties to Switzerland, and Switzerland might still object to Nestlé SA being sued in US courts. However, this would be equally true of a corporation that began in the United States and later developed strong ties to another nation. In other words, there is no principled reason to make place of incorporation the dispositive issue; it simply makes more sense to focus on substantive economic ties.

As a technical matter, Nestlé's US activity is largely conducted by US subsidiaries of Nestlé. However, this activity ought to be viewed as part of a single, transnational corporate enterprise for the purposes of the Functional Foreignness Test in light of the functional reality of Nestlé's operations. First, the statistics cited above were in a single report from Nestlé's "global" website, Nestle.com, and the report does not distinguish between the operations of Nestlé SA and its various subsidiaries. In fact, the report does not include the term "subsidiary" at all. Nestle.com even has a page answering the question, "How many different Nestlé companies are there?" by saying, "There is just one Nestlé."[201] Though this page is merely a marketing tool and is clearly not making any legal claim, it nonetheless illustrates the way Nestlé conceives of its global enterprise and presents itself to the public. This characterization of the Nestlé enterprise stands in stark contrast to Nestlé USA's supplemental brief responding to *Jesner*, which emphasizes its distance from other Nestlé corporations: "Nestlé, USA, Inc. is a wholly owned subsidiary of Nestle Holdings, Inc., which is a wholly owned subsidiary of NIMCO US, Inc., which is a wholly owned subsidiary of Nestlé, S.A., a publicly traded Swiss corporation."[202] It is only when litigation begins that

[201] *How Many Different Nestlé Companies Are There?* (Nestlé 2019), archived at http://perma.cc/6NXZ-YVYN.

[202] Nestlé Supplemental Brief at *i (cited in note 193).

Nestlé—a transnational company whose global activities comprise an integrated enterprise—is suddenly framed as a disjointed conglomerate of distinct personalities. As a result, the legal fiction distinguishing Nestlé USA from its Swiss parent does not prevent Nestlé SA it from failing the Functional Foreignness Test.

For the same reason, Nestlé Ivory Coast fails the Functional Foreignness Test as a part of a larger corporate enterprise that fails the Test. In this manner, Nestlé SA—which has sufficient US ties to justify an ATS suit against it—cannot escape liability by shifting responsibility for its human rights violations to a foreign subsidiary. To reiterate, this does not mean Nestlé SA or any other component of the Nestlé enterprise will be held liable for the acts of another; this would only be possible if typical veil-piercing requirements were satisfied. It simply means that the United States, as the country most substantially implicated in Nestlé's global activity, might be able to exercise jurisdiction over Nestlé and its subsidiaries in order to hold each one accountable for its own violations.[203]

Ultimately, the Functional Foreignness Test would allow former child slaves the opportunity to face the perpetrators of their slavery that are closely tied to the United States in court. A formalistic rule, on the other hand, would deny this opportunity based solely on a technicality.

D. The Separation of Powers

Finally, I conclude by responding briefly to an objection that is sure to arise: that a court's application of the Functional Foreignness Test might violate the constitutional separation of powers. Even if the Functional Foreignness Test furthers the purpose of the ATS and is consistent with other areas of law, one might argue that this is a question for the political branches, not the courts. A proponent of this view might say that no matter how compelling the arguments in favor of a more expansive view of

[203] In the case of subsidiaries such as Nestlé Ivory Coast, personal jurisdiction may still pose a significant barrier if the subsidiary itself does not conduct business with the United States. This may be overcome in some cases, and a more realistic view of parent-subsidiary relationships for the purposes of establishing personal jurisdiction might be beneficial for many of the reasons discussed in this Comment. However, the issue of personal jurisdiction for transnational corporate actors is beyond the scope of this Comment. Moreover, even if personal jurisdiction ultimately bars ATS cases against subsidiaries such as Nestlé Ivory Coast, allowing suits against actors such as Nestlé SA under the Functional Foreignness Test will still be a significant step in the right direction.

ATS jurisdiction—whether based on principles of justice, statutory interpretation, policy considerations, or others—such arguments are ultimately trumped by the separation of powers, which suggests that the ATS, as a statute regarding foreign relations, should not be extended in any manner without input from Congress or the Executive.[204] However, the Functional Foreignness Test overcomes this objection for several reasons.

First, given the mystery that surrounds the initial goal and intended implications of the ATS, the question is not whether to expand the ATS, but rather what the ATS entails in the first place. There is no settled body of jurisprudence that could be said to constitute the ATS's traditional application; it had virtually no application whatsoever until it was suddenly applied in expansive and controversial ways, beginning with *Filartiga*. But even though it was several centuries ago, Congress *did* enact the ATS, and deference to Congress should therefore mean an attempt to determine the ATS's meaning as accurately, but not necessarily as restrictively, as possible.[205]

This argument might seem abstract or naïve to the realities of foreign relations as ordinarily directed by Congress and the Executive Branch. To be sure, one might argue that no matter how the ATS is understood, it is being applied in new ways that potentially interfere with foreign relations. Arguing that this new application is not an "expansion" may seem like a semantic trick. Yet even a more grounded view of the ATS, in light of its historic use and its purpose as formulated by *Jesner*, still suggests that a functional approach to defining foreign corporations is not an expansion and is unlikely to step on the toes of the legislature. To demonstrate this point, I will show that although *Jesner* advocates judicial restraint, implementing its holding through a functional standard is ultimately consistent with its reasoning. While

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[204] See, for example, *Jesner*, 138 S Ct at 1403 ("[S]eparation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS," which implicates "foreign-policy concerns" most appropriately addressed by the "political branches, not the Judiciary."); *Sosa*, 542 US at 748 (Scalia concurring in part and in the judgment) (warning that the lower courts, in interpreting the ATS too expansively, were headed down a path leading "directly into confrontation with the political branches"); id at 727 (Souter) (majority) (stating that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs").

[205] For a discussion probing Congress's original intent in passing the ATS, including the need to fulfill that intent without unduly expanding the statute, see Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 Notre Dame L Rev 1931, 1941–43 (2010).

courts are properly wary of interfering with the political branches' power over foreign relations, neither *Jesner* nor the ATS itself forecloses some judicial role in determining the scope of ATS jurisdiction over transnational corporations.

A close read of the majority's reasoning in *Jesner* supports this view. *Jesner* discussed the Court's "general reluctance to extend judicially created private rights of action," arguing that "the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability."[206] It counseled against creating a damages remedy if there are even "sound reasons" to believe Congress *might* disagree with that remedy.[207] Given the foreign policy implications of the ATS, the Court reasoned that this cautious approach applied with "particular force" to the ATS.[208] In its most skeptical remarks, the Court even casts doubt on whether a new cause of action under the ATS would *ever* be a proper application of judicial discretion under *Sosa*.[209] Considered as a whole, *Jesner* depicts an extremely narrow role for the courts in permitting ATS suits.

At first glance, this may appear damning for any application of the ATS besides the most conservative possible interpretation. However, the Court's reasoning essentially focuses on two problems with allowing ATS suits against foreign corporations. First, it would extend the United States' current role in policing the activities of foreign entities. Second, it would risk negative diplomatic responses. Neither of these concerns counsel against a functional standard for identifying foreign corporations.

The distinction between foreign and domestic corporations is a novel rule. So it is difficult to convincingly say that one way of distinguishing foreign corporations from others is an extension of the ATS, while a different interpretation simply upholds the status quo. There is no clear status quo regarding the ATS generally—it was only used twice over two hundred years, then suddenly wielded by parties in a series of recent and controversial cases—let alone its limitation to nonforeign corporations. Given this lack of precedent, taking a functional approach that considers *why* foreign corporate defendants have been precluded makes sense. The answer is that the ATS is about enabling the United States to take responsibility for the acts of its nationals rather

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206 *Jesner*, 138 S Ct at 1402.

207 Id.

208 Id at 1403.

209 Id.

than enabling it to police external actors.[210] In light of this goal, and the fact that there is little other congressional intent or precedent to look to for guidance, a functional standard that focuses on the defendant's relationship with the United States is best suited to determining the contours of ATS jurisdiction over transnational corporations.

Even if courts wish to take a conservative approach based on separation-of-powers concerns arising from foreign policy implications, they should at least be able to indicate *how* an alternative approach might cause diplomatic friction. The judiciary is not so inept that such a baseline inquiry into the consequences of its decisions is too far beyond its capacity. In fact, such an inquiry is necessary to determine what issues implicate separation-of-powers concerns in the first place. In *Jesner*, the risk of causing diplomatic friction was obvious given Arab Bank's prominent role in Jordan's economy.[211] However, for corporations that fail the Functional Foreignness Test, the United States is putting its own economic interests on the line as much as much as the interests of any other country.

Moreover, refraining from imposing liability on corporations closely tied to the United States would mean that the ATS's goal could not be achieved. Foreign nationals would be harmed by what are essentially US actors, and no forum would be available for redress—the very circumstance the ATS was designed to preclude.[212] In other words, the apparently conservative approach could be the choice that would cause diplomatic friction, so that courts cannot simply err on one side or the other to avoid such a result. Instead, they ought to judge whether each case runs a risk of causing such frictions, thereby implementing Congress' chosen policy as described in *Jesner*.

In a similar vein, courts should not discount the *long-term* goal of reducing diplomatic friction. When the United States holds corporations accountable for severe violations of international law, short-term friction related to particular defendants will likely be outweighed by long-term diplomatic benefits arising from protecting the rights of other foreign actors and promoting international law and global justice. These goals are better served if the judiciary, rather than the political branches, is the one exerting a broader vision of US jurisdiction over international bad

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[210] See notes 66–69 and accompanying text.

[211] See *Jesner*, 138 S Ct at 1406–07.

[212] Id at 1397.

actors; this reinforces the perception of the United States promoting the rule of law rather than making political maneuvers. Even if Switzerland does not like the idea of US jurisdiction over Nestlé SA, the international community—which has expressed outrage over Nestlé's use of child slavery and sought to curb it—may well applaud the United States for taking responsibility for actors closely tied to it.

CONCLUSION

The *Jesner* rule precluding foreign corporations as ATS defendants should not be applied in a strict, formalistic manner. Instead, courts should determine ATS jurisdiction in light of the corporation's functional relationship with the United States. In this way, the ATS will best achieve its primary goal of providing a forum for redress in cases in which US actors have injured foreign nationals. Such a standard will not be too costly or inconvenient due to the narrow class of cases that give rise to ATS suits in the first place. Moreover, it will not allow important foreign policy issues to be resolved based on a technicality. The *Jesner* court affirmed the United States' responsibility to hold its actors accountable for violations against foreign nationals. To honor that goal, corporations cannot be provided loopholes for escaping justice.