COMMENT

MODERN-DAY PIRATES: WHY DOMESTIC PARENT CORPORATIONS SHOULD BE LIABLE UNDER THE ALIEN TORT STATUTE FOR VIOLATIONS OF WORKERS' RIGHTS WITHIN GLOBAL SUPPLY CHAINS

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Due to a growing international focus on corporate social responsibility, transnational corporations increasingly have greater societal and legal duties to disclose and take responsibility for workers' rights within their supply chains. For example, countries have introduced reporting requirements for corporations of certain sizes, and wronged supply chain workers have successfully brought suit against transnational parent corporations. In 2018, a United Nations working group introduced a draft treaty that would hold transnational corporations liable for human rights violations arising in the context of business operations.

This Comment argues that the Alien Tort Statute (ATS) is an appropriate mechanism to provide U.S. courts with jurisdiction over claims that foreign workers bring against U.S. parent corporations for workers' rights violations within supply chains. The ATS provides district courts with jurisdiction over claims brought by foreign plaintiffs for torts committed in violation of the law of

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nations. Given the growing international trend of holding corporations responsible for workers' rights, U.S. courts should recognize a broader array of actionable torts under the ATS and U.S. parent corporations should reasonably foresee the risk of workers' rights violations within their supply chains. Accordingly, the ATS should remain an available option for foreign workers to hold U.S. parent corporations responsible for such violations.

TABLE OF CONTENTS

Introduction 1935
I. Background 1936
A. The Intersection of Supply Chains and Human Rights 1937
1. Corporate accountability for supply chain transparency 1938
2. Domestic efforts 1943
B. History of Corporate Liability 1947
1. Internationally 1947
2. Domestically 1949
II. ATS Litigation 1951
A. Historical and Legal Foundations 1951
B. Cases that Defined the Modern Scope of the ATS 1953
C. Modern ATS litigation and Corporate Defendants 1957
III. Analysis 1961
A. Corporate Responsibility for Violations of Workers' Rights as a Crystallizing Customary International Law Norm 1962
1. International acts demonstrate a crystallizing norm of corporate responsibility for violations of workers' rights 1963
2. U.S. domestic practice demonstrates the United States' recognition of a crystallizing customary international norm to promote corporate responsibility 1966
B. The Prohibition Against Workers' Rights Violations as an ATS-Actionable Universal Norm 1969
1. The limited scope of the current ATS framework under *Sosa* 1969
2. Why workers should have the right to bring ATS actions for "lesser" violations 1972

C. Parent Corporation Liability for Extraterritorial Human Rights Abuses within Global Supply Chains 1974
1. Piercing the corporate veil with foreseeable risk 1974
2. Displacing the *Kiobel* presumption against extraterritoriality 1977
Conclusion 1978

INTRODUCTION

In April 2018 the Supreme Court's decision in *Jesner v. Arab Bank, PLC*[1] categorically foreclosed the possibility of foreign plaintiffs bringing suits against foreign corporations in U.S. courts under the Alien Tort Statute (ATS).[2] Joining a line of Supreme Court precedent restricting the applicability of the ATS, the *Jesner* decision further limited the jurisdictional grant of the ATS to provide recourse for wronged plaintiffs.[3] Writing in dissent, Justice Sotomayor described the Court's holding as "absolv[ing] corporations from responsibility under the ATS for conscience-shocking behavior."[4] Referring to the appropriate ATS defendants through the lens of international norms existing at the establishment of the ATS,[5] the dissent identified the lingering question as, "Who are today's pirates?"[6] Who, as Justice Breyer wrote years before, are the "common enemies of all mankind"?[7]

Corporations are modern-day pirates, potential common enemies of mankind. Beasts of business, corporations possess the power to do both good and bad,[8] and they are increasingly independent of government control.[9] As corporations outsource production needs,

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1. 138 S. Ct. 1386 (2018).
2. *Id.* at 1407–08.
3. *Id.*
4. *Id.* at 1419 (Sotomayor, J., dissenting).
5. *See infra* Part II (identifying the 1789 ATS-appropriate norms as piracy, safe conducts, and ambassador rights).
6. *Jesner*, 138 S. Ct. at 1427 (Sotomayor, J., dissenting) (quoting Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108, 129 (2013) (Breyer, J., concurring)).
7. *Kiobel*, 569 U.S. at 131 (Breyer, J., concurring).
8. *See Jesner*, 138 S. Ct. at 1437 (Sotomayor, J., dissenting) (emphasizing the power corporations have to cause suffering by considering the destructive impact of the Rwandan Radio Television Libre des Milles Collines, which broadcast inflammatory rhetoric that incited hatred during the Rwandan Genocide).
9. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 463 (2001) (explaining that corporations have power over individuals

their supply chains become more vast and complex; thus, corporations continue to expand their global reach and presence.[10] Internationally, States and corporations have recognized the indelible role they now play in safeguarding basic human rights within these global supply chains.[11] Accordingly, the ATS should remain an available "statute that helps to protect basic human rights."[12]

Despite recent jurisprudence further limiting the scope of the ATS, this Comment will argue that the ATS is an appropriate mechanism to provide wronged foreign supply chain workers with their day in court. Part I will address the histories of supply chains and corporate civil liability. Part II will discuss the legal framework of the ATS, the seminal cases that transformed the jurisdictional grant of the ATS, and recent cases whose legal arguments have relied upon ATS jurisdiction. Part III will first argue that the practice of corporate responsibility for workers' rights violations is crystallizing into a norm of customary international law. Part III will then analyze why the ATS is well-suited for global supply chain workers to bring claims against domestic parent corporations and further suggest that the criteria for actionable ATS torts should grow to encompass a broader array of torts that supply chain workers incur in unsafe working conditions, given the international trend of holding corporations responsible for workers' rights. This Comment will assert that the ATS should remain a mechanism through which U.S. courts have jurisdiction over cases from foreign plaintiffs holding domestic parent corporations liable for violations of workers' rights within supply chains, to incentivize greater transparency and promote the global enforcement of fair working conditions.

I. BACKGROUND

Corporations and human rights are intrinsically linked in modern society. Historically, corporate acts that directly impacted human rights could evade governmental regulation or oversight. Today, however, the balance is starting to favor the worker as States and international bodies

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and can transfer their activities to States that have fewer regulatory burdens); *see also Kiobel*, 569 U.S. at 121 (majority opinion) ("Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction.").

10. *Infra* Part I.

11. *Infra* Part I.

12. STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 134 (2015).

continue to implement guidelines and legislations intended to improve global working conditions.

A. *The Intersection of Supply Chains and Human Rights*

Over 450 million people work in global supply-chain related jobs.[13] In an increasingly inter-related global economy, supply chains have become more complex. The International Labour Organization (ILO) characterizes global supply chains as "the cross-border organization of the activities required to produce goods or services and bring them to customers through inputs and various phases of development, production and delivery."[14] Supply chains emerge through the practice of outsourcing, whereby a parent company buys goods or services from outside suppliers rather than producing the goods or services within the parent company itself.[15] Parent companies outsource the production of a good or service to a subcontractor.[16]

The impact of supply chains on foreign workers is double-edged. Supply chain jobs often provide opportunities for foreign workers,[17] but the culture and business practices of subcontractors can have drastic effects on the workers.[18] For example, in 2010, the stressful work environment at Foxconn, a Chinese subcontracting factory for Apple iPhones, led assembly

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13. HUMAN RIGHTS WATCH, HUMAN RIGHTS IN SUPPLY CHAINS: A CALL FOR A BINDING GLOBAL STANDARD ON DUE DILIGENCE 2 (2016), https://www.hrw.org/sites/default/files/report_pdf/human_rights_in_supply_chains_brochure_lowres_final.pdf.

14. INT'L LABOUR CONF., 105TH SESS., REPORT IV: DECENT WORK IN GLOBAL SUPPLY CHAINS 1 (2016), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_468097.pdf.

15. *See Outsourcing*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* ORG. FOR ECON. CO-OPERATION AND DEV., OFFSHORING AND EMPLOYMENT: TRENDS AND IMPACTS 15 (2007) ("Outsourcing can occur within the country where the enterprise is located (*domestic outsourcing*) or abroad (*outsourcing abroad*).").

16. INT'L LABOUR ORG., 86TH SESS., REPORT V (2B): CONTRACT LABOUR (1998), https://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-v2b.htm (defining subcontractor as "a natural or legal person who undertakes by a contractual arrangement with a user enterprise to have work performed for that enterprise").

17. *See* INT'L LABOUR CONF., PROVISIONAL RECORD, 105TH SESS., REPORTS OF THE COMMITTEE ON DECENT WORK IN GLOBAL SUPPLY CHAINS: RESOLUTION AND CONCLUSIONS SUBMITTED FOR ADOPTION BY THE CONFERENCE 2 (2016), http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_489115.pdf (recognizing that global supply chains contribute to economic growth, create jobs, and can have a positive impact).

18. *See id.* (emphasizing that global supply chain failures also contribute to vulnerabilities in labor rights, such as occupational health and underpayment of wages); *see also* INT'L LABOUR CONF., *supra* note 14, at 26 ("The increasing cross-border flows of workers have also resulted in a greater risk of forced labour and trafficking in persons.").

line workers to commit suicide by jumping off the factory rooves.[19] Heightened societal interests in sustainability and decent working conditions have stimulated an interest in "conscious consumption."[20] Consumers' desires to not mistakenly endorse human rights abuses through the purchase of commodities have helped to reinvigorate a push for brands' transparency about the workings of their supply chains.[21]

1. Corporate accountability for supply chain transparency

Internationally, organizations and countries have implemented action plans and legislation to promote safe working practices. In 1976, the International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force.[22] State Parties, in their obligation under the UN Charter to promote universal respect for human rights, "recognize the right of everyone to the enjoyment of just and favourable conditions of work."[23] Under the ICESCR, favorable working conditions include safe and healthy working conditions, fair wages, equal opportunity for promotion, and reasonable rest days.[24]

Broadly, the ILO's resolutions and conventions emphasize a continuing commitment to respect workers' rights.[25] In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, wherein member states respect and promote the following: the

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19. Brian Merchant, *Life and Death in Apple's Forbidden City*, GUARDIAN (June 18, 2017, 4:30 AM), https://www.theguardian.com/technology/2017/jun/18/foxconn-life-death-forbidden-city-longhua-suicide-apple-iphone-brian-merchant-one-device-extract (reporting that in 2010 alone, eighteen workers attempted suicide, fourteen workers died, and Foxconn officials talked down another twenty).

20. Peter Needle, *Conscious Consumers, the Transparent Supply Chain and Ethical Sourcing*, BLOG, SEGURA (June 7, 2018), https://www.segura.co.uk/newsroom/conscious-consumers-transparent-supply-chain-and-ethical-sourcing (describing the "compassionate" or "conscious" consumer as a new type of buyer who considers the societal impact of the goods she purchases and is interested in the processes that made the product).

21. *See, e.g.*, Nike, Inc. v. Kasky, 539 U.S. 654, 656 (2003) (Stevens, J., concurring) (explaining that a California resident sued Nike, alleging that Nike made false statements or omissions concerning the manufacturing conditions of its products).

22. *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

23. 993 U.N.T.S. at 6.

24. *Id.* One hundred sixty-eight States are State Parties, four (including the United States) are signatories, and twenty-five have taken "No Action." *See* Status of Ratification Interactive Dashboard, U.N. HUMAN RIGHTS COUNCIL: OFF. HIGH COMM'R, http://indicators.ohchr.org (last visited June 1, 2019).

25. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, INT'L LABOUR ORG. (June 18, 1998), http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang–en/index.htm [hereinafter *ILO Declaration*].

right to collective bargaining, elimination of forced labor, abolition of child labor, and elimination of discrimination in employment.[26] One 187 countries are members of the ILO, and the ILO has eight fundamental Conventions, two of which the United States has ratified: the Abolition of Forced Labor Convention and the Worst Forms of Child Labor Convention.[27]

The launch of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011 spurred an international movement toward better business practices and business responsibility.[28] The UNGPs recognize the important role business corporations play in respecting human rights and the need for effective remedies upon a breach of their obligations[29]:

> Business enterprises . . . should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved . . . [and] seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[30]

The Organisation for Economic Co-operation and Development (OECD) introduced its Guidelines for Multinational Enterprises[31] in

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26. *Id.* ¶ 2.

27. *See Alphabetical List of ILO Member Countries*, INT'L LABOUR ORG., http://www.ilo.org/public/english/standards/relm/country.htm (last visited June 1, 2019); *Conventions and Recommendations*, INT'L LABOUR ORG., https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang–en (last visited June 1, 2019) (listing the subject matter covered by the eight fundamental Conventions, including the freedom of association and protection of the right to organize, the right to organize and collective bargaining, forced labor, abolition of forced labor, minimum age, child labor, equal remuneration, and employment discrimination); *see also* Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55, 58 (entered into force Sept. 15, 1946) (defining forced labor as "all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily").

28. U.N. Human Rights Council, UN Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31 (June 16, 2011), https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf; *see also* UN Office of the High Comm'r for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 1 (2011) [hereinafter *Implementing UNGPs*], http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

29. *Implementing UNGPs*, *supra* note 28, at 1.

30. *Id.* at 13.

31. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 9 (2011), http://www.oecd.org/corporate/mne/48004323.pdf [hereinafter OECD GUIDELINES].

2011, which encourage business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines.[32] Although the Guidelines are legally nonbinding, the OECD Investment Committee encourages adhering member countries, one of which is the United States, to implement these recommendations.[33] In 2018, forty-eight countries adopted and agreed to support implementing the OECD Due Diligence Guidelines for Responsible Business Conduct, which is the first government-backed standard for corporate due diligence across all economy sectors and pertains to the human risks within global supply chains.[34]

The UN Global Compact continues to support the underlying principle of promoting fair working conditions.[35] In 2015, countries adopted the 2030 Agenda for Sustainable Development, whose Sustainable Development Goals (SDGs) represent a universal blueprint to build upon the Millennium Development Goals[36] and "balance the three dimensions of sustainable development: the economic, social and environmental" to create decent work for all.[37] Goal 8 of the SDGs, Decent Work and Economic Growth, has two targets that expressly focus on promoting fair working conditions.[38]

Recently, the UN charged an open-ended intergovernmental working group with constructing a treaty addressing the intersection

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32. *Id.* at 41 (highlighting corporate responsibility among business partners and their suppliers, contractors, subcontractors, licensees and other entities).

33. *See Members and Partners*, OECD, http://www.oecd.org/about/members andpartners (last visited June 1, 2019) (listing thirty-six Member countries, ranging from advanced to emerging countries); *see also* OECD GUIDELINES, *supra* note 31, at 9.

34. *Countries Commit to Step Up Efforts to Drive More Responsible Business Conduct Through New OECD Instrument*, OECD (May 30, 2018), http://www.oecd.org/investment/mne/countries-commit-to-step-up-efforts-to-drive-more-responsible-business-conduct-through-new-oecd-instrument.htm [hereinafter *New OECD Instrument*] (including as members the OECD countries and various other countries).

35. *Infra* Section I.B.1.

36. The eight Millennium Development Goals (MDGs) were the predecessor to the Sustainable Development Goals (SDGs). The MDGs called for civil organizations and countries to develop action plans to combat the scourges of poverty, hunger, and disease by a 2015 target date. *See Millennium Development Goals* (MDGs), U.N., http://www.un.org/millenniumgoals (last visited June 1, 2019).

37. G.A. Res. 70/1, at 3 (Oct. 21, 2015).

38. *Sustainable Development Goals*, U.N., https://sustainabledevelopment.un.org/sdgs (last accessed Apr. 19, 2019) [hereinafter "*SDGs*"] (aiming to achieve productive employment and decent work for all women and men by 2030); *see also* G.A. Res. 70/1, *supra* note 37, at 29 (calling on businesses and States to foster a "well-functioning business sector," act to eliminate modern slavery (Target 8.7), and protect safe and secure working environments for all workers (Target 8.8)).

of business enterprises and human rights.[39] In 2018, the Permanent Mission of Ecuador introduced a zero draft of a legally binding instrument to regulate the transnational activities of corporations and other enterprises.[40] Within the purview of legal liability, Article 10(6) of the Zero Draft expressly states that those with transnational business activities shall be liable for human rights violations that arise in the context of their business operations, including "to the extent risk ha[s] been foreseen or should have been foreseen of human rights violations within its chain of economic activity."[41] Such a treaty would serve the purpose of ensuring that victims of transnational business human rights violations have effective access to justice and remedies for harms that they incur while working.[42]

Regionally, the 2014 European Union (EU) Directive on Non-Financial Reporting encourages EU corporations to disclose the social and environmental impacts of their business activities within non-financial statements.[43] The Directive on Non-Financial Reporting advances the transparency goals of corporate social responsibility and expressly states that the non-financial statement should include relevant information about a corporation's supply and subcontracting chains to identify and prevent adverse social impacts.[44] The non-financial reporting requirements should include, at the minimum,

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39. *Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUMAN RIGHTS COUNCIL: OFF. HIGH COMM'R, https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx (last visited June 1, 2019).

40. U.N. Office of the High Comm'r for Human Rights, Zero-Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, art. 2, ¶ 1 (July 16, 2018) [hereinafter U.N. Zero-Draft to Regulate Transnational Corporations], https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf.

41. *Id.* art. 10, ¶ 6(c).

42. *Id.* art. 2, ¶ 1.

43. *Non-Financial Reporting*, EUROPEAN COMM'N, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en (last accessed Feb. 12, 2019); *see also* MEMBER STATE IMPLEMENTATION OF DIRECTIVE 2014/95/EU 5 (2017), https://www.globalreporting.org/resourcelibrary/NFRpublication%20online_version.pdf. EU directives are legislative acts that put forth goals that all EU countries need to achieve, but the respective countries have the autonomy to implement laws to attain those goals. *See Regulations, Directives and Other Acts*, EUROPEAN UNION, https://europa.eu/european-union/eu-law/legal-acts_en (last updated May 24, 2018).

44. Council Directive 2014/95/EU, 2014 O.J. (L 330) ¶ 6 (Oct. 22, 2014), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095.

information on social and employee matters and respect for human rights.[45] All EU Member States had incorporated these disclosure rules through national legislation by the end of 2017.[46]

Keeping abreast of the broader international movement, individual States have also taken initiatives to implement national legislation that focuses on corporate due diligence for working conditions within supply chains. In 2015, the United Kingdom acted to regulate corporate disclosure about potential human rights abuses and implemented the landmark UK Modern Slavery Act ("UK MSA"),[47] and in 2017 France and Germany followed suit by passing the "Loi relative au devoir de vigilance des sociétés des mères et des entreprises donneuses d'ordre"[48] and the CSR Directive Implementation Act.[49] In 2019, Australia introduced a similar reporting requirement through its own Modern Slavery Act.[50]

Emerging modern slavery legislation continues to percolate on the international stage. Most recently, Hong Kong, and Dutch governments echoed the United Kingdom's call to attack human rights risks within

45. *See Non-Financial Reporting*, *supra* note 43.

46. *Innovative Implementation of EU Directive on Non-Financial Reporting*, GRI (Feb. 7, 2018) [hereinafter *Implementation of EU Directive*], https://www.globalreporting.org/information/news-and-press-center/Pages/EU-Directive-on-Non-Financial-Reporting.aspx. For example, Denmark built upon an already-existing regulation, the Danish Financial Statement Act that mandated corporate transparency about sustainability choices, while Greece imposed transparent reporting requirements on corporations of varying sizes. *Id.*

47. Modern Slavery Act 2015, c. 30, § 54 (UK) (requiring corporations that conduct business in the UK and have a global annual turnover of more than £36 million to disclose annually their steps to address slavery in supply chains).

48. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés des mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the corporate duty of vigilance for parent and instructing companies] (requiring French companies employing more than five thousand workers domestically or ten thousand worldwide to implement effective vigilance plans that directly address business-related human rights risks while mapping supply chain risks for all companies they directly or indirectly control).

49. Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage – und Konzernlageberichten [CSR Directive Implementation Act], April 2017, BGBLI at 802 (GER); *see also* Robert von Steinau-Steinrück & Stephan Sura, *Do Good—And be Obliged to Talk About It?* LAB. L. MAG. (June 26, 2017), https://www.laborlaw-magazine.com/2017/06/26/do-good-and-be-obliged-to-talk-about-it (explaining that the German Act obligates certain corporations to disclose their corporate social responsibility efforts, and that the disclosures must contain information regarding workers' issues and respect for human rights).

50. *Modern Slavery Act 2018* (Cth) (Austl), https://www.legislation.gov.au/Details/C2018A00153 (mandating that companies produce annual statements detailing their supply chain operations, slavery risks, and efforts to combat those slavery risks).

supply chains.[51] Pending enactment, the laws would respectively combat modern-day slavery through public statements, civil actions against involved parties, and plans to eradicate child labor from supply chains.[52] The trend continues to spread as other countries consider implementing anti-slavery, pro-due diligence legislation for national corporations that conduct business activities abroad.[53]

2. Domestic efforts

The U.S. government's response to addressing supply chain human rights abuses has primarily manifested in the form of regulation and disclosure laws. At the federal level, the Federal Acquisition Regulation (FAR) places due diligence requirements on the supply chain activities of government contractors with particular emphasis on eradicating human trafficking.[54] The government implemented FAR to combat human trafficking in federal contracting, after President Obama's Executive Order 13627, "Strengthening Protections against Trafficking in Persons in Federal Contracts,"[55] bolstered the government's

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51. Julia Steinhardt & Hannah Edmonds-Camara, *Developments in Modern Slavery Regulation: U.K., Hong Kong and Australia*, COVINGTON: GLOBAL POL'Y WATCH (July 12, 2018), https://www.globalpolicywatch.com/2018/07/developments-in-modern-slavery-regulation-u-k-hong-kong-and-australia.

52. *See id.* (noting the Hong Kong bill would require companies to publish annual slavery statements and allow victims to bring civil actions against those who benefitted from involvement in a venture that they should have known involved slavery); Gerard Oonk, Child Labour Due Diligence Law *for Companies Adopted by Dutch Parliament*, INDIA COMM. NETH. (Feb. 8, 2017), http://www.indianet.nl/170208e.html (illustrating how the Dutch law requires corporations to examine whether their supply chains contain child labor and, if they do, implement action plans to eradicate such labor).

53. *See, e.g.*, *Switzerland Considers Mandatory Human Rights Due Diligence Legislation*, ASSENT BLOG (June 22, 2018), https://blog.assentcompliance.com/index.php/switzerland-considers-mandatory-human-rights-due-diligence-legislation (proposing legislation that would compel Swiss companies in high-risk sectors to undertake human rights due diligence in their foreign business activities and include parent company liability); Michael Torrance, *Canada Must Develop a National Plan on Responsible Business and Human Rights*, GLOBE & MAIL (Aug. 29, 2017), https://www.theglobeandmail.com/report-on-business/rob-commentary/canada-must-develop-a-national-plan-on-responsible-business-and-human-rights/article36117097 (calling for the Canadian government to develop a national action plan on business responsibility to stay in-line with global standards).

54. *See generally* FAR 52.222-50 (2015) (prohibiting government contractors from engaging in human trafficking and using forced labor in the execution of their contracted work).

55. Exec. Order No. 13,627, 3 C.F.R. § 13627 (2013). In 1999, President Clinton also relied on his Executive Order power to introduce Executive Order No. 13,126, "Prohibition of Acquisition of Products Produced by Forced or Indentured Child

approach to not tolerating trafficking.[56] FAR requires contractors to certify that they have implemented compliance plans to prevent the occurrence of prohibited acts, and the rule contains "flow-down provisions" through which contractors will be responsible for the acts and omissions of subcontractors and agents at every tier of the supply chain.[57] Accordingly, contractors need to verify that they have conducted due diligence and none of their agents or subcontractors are involved in trafficking-related activities.[58]

Perhaps more well-known, § 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[59] is an example of regulating supply chains due to likely human rights violations associated with conflict minerals.[60] Under the Dodd-Frank Act, all publicly traded U.S. corporations must annually disclose whether any of their products contain conflict minerals.[61] Efforts to minimize connections to tainted goods later led to the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA),[62] which stipulates that U.S. Customs and Border Protection (CBP) can enforce regulations that govern imports and exports.[63]

Labor," which was intended to ensure that federal agencies do not obtain goods made by forced or child labor. 3 C.F.R. § 13126 (2000).

56. *Final FAR Rule Released*, VERITÉ, https://www.verite.org/final-far-rule-released; *see also* National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, tit. XVII, § 1702, 126 Stat. 1632, 2093 (requiring contractors to take specific preventative measures to eliminate human trafficking and forced labor in supply chains).

57. *See Final FAR Rule Released*, *supra* note 56 (imposing obligations on contractors with more than $500,000 worth of work abroad).

58. *See id.* (recognizing that if said agents or subcontractors are involved in trafficking practices, the contractors must take remedial or legal action).

59. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 and 15 U.S.C.).

60. § 1502, 124 Stat. at 2213 (codified at 15 U.S.C. § 78m note (2012)).

61. J. Anthony Hardenburgh, *Why Supply Chains Cannot Turn a Blind Eye to Sourcing Despite Regulatory Shifts*, SUPPLY CHAIN DIVE (Mar. 8, 2017), https://www.supplychai ndive.com/news /conflict-minerals-sourcing-risk-supply-chain-Dodd-Frank/437593 (defining "conflict minerals" as minerals whose trade funds millions of dollars channeled to armed rebels and insurgents, primarily in the Democratic Republic of Congo).

62. Pub. L. No. 114-125, tit. I, 130 Stat. 122 (2016) (codified at 19 U.S.C. §§ 4301–4454 (Supp. IV 2016)).

63. § 101, 130 Stat. at 127; *see also* Claire Reade & Samuel Witten, *Understanding the US Ban on Importing Forced Labor Goods*, ARNOLD & PORTER (Apr. 12, 2017), https://www.arnoldporter.com/en/perspectives/publications/2017/04/understand ing-the-us-ban-forced-labor-goods (discussing that Border Patrol had undertaken four enforcement actions against imports with forced labor concerns).

By way of pending legislation, the Business Supply Chain Transparency on Trafficking and Slavery Act, a proposed bill introduced in both the House and Senate, would require corporations to annually disclose their efforts to identify and combat supply chain abuses.[64] If enacted into law, the bill would require public companies with over $100 million in global gross receipts to publicly disclose—as part of their annual reports to the U.S. Securities and Exchange Commission (SEC)—their efforts to prevent human trafficking, slavery, and child labor within their supply chains.[65]

Most recently, President Trump introduced his own Executive Order to address global corrupt practices. Executive Order 13,818, "Blocking the Property of Persons Involved in Serious Human Rights Abuses or Corruption,"[66] strengthens implementation of the Global Magnitsky Human Rights Accountability Act (Global Magnitsky Act)[67] by seeking to "impose tangible and significant consequences on those who commit serious human rights abuses."[68] Congress passed the Global Magnitsky Act in 2016, authorizing the President to impose sanctions against human rights violators with the capacity to target conduct by former or current government officials anywhere in the world.[69]

Supply chain awareness persists beyond the purview of federal and executive action. On a state level, California became the first, and remains the only, state that has directly implemented disclosure

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64. Business Supply Chain Transparency on Trafficking and Slavery Act of 2018, H.R. 7089, 115th Cong.

65. *See id.* § 2 (expressing the sense of Congress that such legislation would prevent businesses from inadvertently endorsing products tainted by human rights violations within their supply chains, while providing consumers with information on products free of violations).

66. Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (2018).

67. Pub. L. No. 114-328, § 1261, 130 Stat. 2000, 2533 (2016) (codified at 22 U.S.C. § 2656).

68. 82 Fed. Reg. at 60,839. *See generally* Rob Berschinski, *Trump Administration Notches a Serious Human Rights Win. No, Really.*, JUST SECURITY (Jan. 10, 2018), https://www.justsecurity.org/50846/trump-administration-notches-human-rights-win-no-really (remarking upon the surprise that the Trump administration designated human rights abusers under an executive order tied to the elective authority of the Global Magnitsky Act).

69. *See* Global Magnitsky Act § 1263, 130 Stat. at 2534; *see also* Press Statement from Rex Tillerson, Sec'y of State (Dec. 21, 2017), https://www.state.gov/secretary/2017 2018tillerson/remarks/2017/12/276723.htm (expressing that the sanctions demonstrate the United States will continue to pursue consequences for those who commit serious human rights violations); Berschinski, *supra* note 68 (detailing how the Global Magnitsky Act could hold officials accountable).

requirements as a tool to combat the continuation of workers' abuses.[70] Under the California Transparency in Supply Chains Act,[71] large retailers and manufacturers doing business in California with annual worldwide gross receipts exceeding $100 million must provide consumers with information about their efforts to end human trafficking and slavery within their supply chains.[72] Privately, individual corporations have begun to pick up the torch to mitigate their supply chain abuses by voluntarily modifying their fundamental working principles or codes of conduct.[73] The heightened efforts to eradicate forced labor from production have transitively implicated pushes for more, or fully, transparent supply chains.[74]

The ABA Business Law Section created the Working Group to Draft Human Rights Protections in International Supply Contracts ("Working Group") to spearhead such an effort.[75] With an aim to achieve "protection that is legally effective and operationally likely,"[76] the Working Group proposed Model Contract Clauses ("MCCs") that could help companies comply with an increasing amount of human rights-focused legislation and minimize corporate risk.[77] The Working

70. *Client Alert: The California Transparency in Supply Chains Act*, LATHAM & WATKINS (Dec. 6, 2011), https://www.lw.com/thoughtLeadership/california-transparency-in-supply-chains-act-2010.

71. CAL. CIV. CODE § 1714.43 (West 2019).

72. *See* § 1714.43(a)(1) ("Retailers to disclose efforts to eradicate slavery and human trafficking from direct supply chain for tangible goods").

73. *See generally* CONSUMER GOODS F., BUS. ACTIONS AGAINST FORCED LAB. (2017), https://www.theconsumergoodsforum.com/wp-content/uploads/2017/12/The-Consumer-Goods-Forum-Social-Sustainability-Business-Actions-Against-Forced-Labour-Booklet.pdf (identifying Danone, Kellogg's, and MARS as corporations that transformed codes of conduct or implemented action plans to combat potential supply chain abuses).

74. *Cf. The Hidden Cost of Jewelry: Human Rights in Supply Chains and the Responsibility of Jewelry Companies*, HUM. RTS. WATCH (Feb. 8, 2018), https://www.hrw.org/report/2018/02/08/hidden-cost-jewelry/human-rights-supply-chains-and-responsibility-jewelry (describing how Cartier and Chopard have "full chain of custody" for portions of their gold supplies, whereas Tiffany and Co. can trace all of its newly mined gold back to a single source).

75. David V. Snyder & Susan A. Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts, ABA Business Law Section*, 73 BUS. LAW. 1093, 1093 (2018).

76. *Id.* at 1094.

77. *Id.* at 1095.

Group designed the MCCs to protect workers by applying to corporate policies that address a broad range of human rights issues.[78]

B. History of Corporate Liability

Judicial systems across the world continue to interpret the question of corporate "personhood" under the law. International courts have increasingly exercised jurisdiction over corporations for civil actions, and domestic courts have begun to more readily recognize civil corporate liability.

1. Internationally

The international community now recognizes the capacity to hold corporations directly responsible for civil violations,[79] and transnational corporations ("TNCs")[80] have direct duties under certain multilateral conventions.[81] That TNCs have the power to enforce their rights,

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78. *Id.* at 1094. Additional commentary on international supply chains and the MCCs by members of the Working Group can be found in this symposium issue. *See generally* Sarah Dadush, *Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses*, 68 AM. U. L. REV. 1519 (2019); E. Christopher Johnson Jr. et.al, *The Business Case for Lawyers to Advocate for Corporate Supply Chains Free of Labor Trafficking and Child Labor*, 68 AM. U. L. REV. 1555 (2019); Ramona L. Lampley, *Mitigating Risk, Eradicating Slavery*, 68 AM. U. L. REV. 1707 (2019); Jonathan C. Lipson, *Something Else: Specific Relief for Breach of Human Rights Terms in Supply Chain Agreements*, 68 AM. U. L. REV. 1751 (2019); Jennifer S. Martin, *Private Law Remedies, Human Rights, and Supply Contracts*, 68 AM. U. L. REV. 1781 (2019); Roza Pati, *Global Regulation of Corporate Conduct: Effective Pursuit of a Slave-Free Supply Chain*, 68 AM. U. L. REV. 1821 (2019); David V. Snyder, *The New Social Contracts in International Supply Chains*, 68 AM. U. L. REV. 1869 (2019).

79. Ratner, *supra* note 9, at 450; *see also* Doe v. Exxon Mobil Corp., 654 F.3d 11, 53–54 (D.C. Cir. 2011) ("Legal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood."), *vacated by* 527 F. App'x 7 (mem.) (D.C. Cir. 2013).

80. *See* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 909 (2003) ("[A]n economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively." (quoting Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003))).

81. *See* David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 946 (2004) (showcasing the International Convention on Civil Liability for Oil Pollution Damage and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment as examples of treaties that directly impose liability on

through mechanisms like arbitration or dispute resolution proceedings, indicates an international legal personality.[82] David Scheffer, in his amicus brief in support of the *Kiobel v. Royal Dutch Petroleum Co.*[83] petitioners, emphasized the consensus at the negotiations for the Rome Statute that corporate civil—but not criminal—liability stood as a recognized, general principle of law.[84]

International organizations have also introduced initiatives with the intent to influence business practices. In 1999, the UN Secretary General Kofi Annan proposed a "Global Compact" of shared values, which encouraged businesses to voluntarily support and adopt nine key principles, addressing general human rights obligations, environmental protection, and labor standards.[85] In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights approved "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," which, although not a treaty and accordingly not binding, the UN intended to also apply to domestic enterprises when relevant.[86]

Legal systems of individual States have permitted lawsuits that necessitate some finding of corporate liability or shared responsibility to the extent that courts may exercise jurisdiction.[87] In 2015, a German court exercised jurisdiction over a compensation claim that survivors of a Pakistan factory fire brought against KiK, a German corporation that was the factory's main customer.[88] In the same year, an appeals court in The Hague ruled that Royal Dutch Shell could be liable for the actions of its Nigerian subsidiary, when Nigerian farmers filed suit

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corporations, as legal persons); *see also* Phillip C. Jessup, *The Subjects of a Modern Law of Nations*, 45 MICH. L. REV. 383, 387 (1947) ("Corporations or partnerships may also be subjects of international law.").

82. *See* Ratner, *supra* note 9, at 459.

83. 569 U.S. 108 (2013); *see also infra* Section III.C.2.

84. Brief of Ambassador David J. Scheffer, Northwestern University School of Law, as Amicus Curiae in Support of the Petitioners at 3–5, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491), 2011 WL 2743194.

85. Weissbrodt & Kruger, *supra* note 80, at 903 (recognizing that this initiative failed to "bind all business to follow minimum human rights standards").

86. *Id.* at 901.

87. *See infra* Section III.C.

88. The 2012 fire at Ali Enterprise's factory killed over 260 people, and KiK publicly acknowledged that the factory manufactured most of its products. The survivors alleged that KiK shared responsibility for the factor's lack of fire safety measures. *Time Line of the Ali Enterprises Case*, CLEAN CLOTHES CAMPAIGN, https://cleanclothes.org/safety/ali-enterprises/time-line-for-the-ali-enterprises-case (last visited June 1, 2019).

for the destructive pollution from oil spills.[89] Within the United Kingdom, a court upheld claims that Zambian citizens brought against Vedanta Resources for injuries stemming from pollution and damages of copper mine discharges.[90] The court reasoned that since Vedanta was the holding company of the mine and thus had superior knowledge, Vedanta would be better suited to protect the subsidiary's employees against the risks of injury.[91]

2. Domestically

Domestically, "[t]he idea that corporations are 'persons' with duties, liabilities, and rights has a long history in American domestic law."[92] During apartheid in South Africa, U.S. corporations with affiliates in South Africa signed on to an agreement that called for the equal treatment of non-white employees. The Sullivan Principles, as this agreement came to be known, constituted a voluntary code of conduct designed to promote equal employment practices of U.S. corporations operating in South Africa. By signing on to the agreement, U.S. corporations affirmed their support for a high standard of labor practices that could contribute to ending apartheid.[93]

Case law demonstrates that U.S. plaintiffs face difficulties in "piercing the corporate veil" and convincing a court to exercise

89. *See Dutch Appeals Court Says Shell May be Held Liable for Oil Spills in Nigeria*, GUARDIAN (Dec. 18, 2015, 8:33 AM), https://www.theguardian.com/global-development/2015/dec/18/dutch-appeals-court-shell-oil-spills-nigeria (upholding jurisdiction because the court could not prematurely ascertain whether Shell was not liable for possible negligence of its Nigerian subsidiary).

90. Lungowe v. Vedanta Resources PLC, [2017] EWCA (Civ) 1528 [1–7].

91. *Id.* at [82]. To ascertain whether a parent company owed a duty of care, the court suggested a three-part test of foreseeability, proximity, and reasonableness. *Id.* at [69]; *see also id.* at [75] (referencing *Lubbe v. Cape PLC*, Lubbe v. Cape PLC, [2000] UKHL 41, [2000] 1 W.L.R. 1545, wherein the court held that it was appropriate to find a parent corporation had a duty of care to advise the subsidiary on steps to take for asbestos, given the parent's superior knowledge of the factory and management).

92. Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158, 225 n.278 (2014) (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013)).

93. The (Sullivan) Statement of Principles (Fourth Amplification), Nov. 8, 1984, *reprinted in* Reverend Leon H. Sullivan, *Sullivan Principles for U.S. Corporations Operating in South Africa*, 24 I.L.M. 1496 (1985) [hereinafter *Sullivan Principles*] (recognizing the importance of actively countering human rights violations and not just passively engaging).

jurisdiction.[94] In *Daimler AG v. Bauman*,[95] the Supreme Court limited situations in which federal and state courts can exercise personal jurisdiction over a corporation by stating that jurisdiction is likely limited to the state or country where the corporation is incorporated or headquartered.[96] Judicial hesitancy to exercise jurisdiction over corporations can also stem from reticence to interfere with foreign policy if the corporation is foreign.[97]

Increasingly, scholars have considered tort modes of liability as feasible methods of holding corporations responsible for the acts of their associates.[98] Scholars have proffered the possibility of direct liability[99] or the agency principle. The agency principle could impose liability based on contract concepts and find the parent corporation liable for the acts of a subsidiary "agent" that was under its control.[100]

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94. *See* Skinner, *supra* note 92, at 212–13, 216–17 (noting that human rights practitioners have been unsuccessful in asserting claims on "piercing the corporate veil" but have sometimes succeeded on agency theory claims); *see also* MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW 285 (2009) ("[T]he doctrine of piercing the corporate veil is an equitable concept which constitutes a judicial exception to limited liability," by which judges hold the parent company responsible).

95. 571 U.S. 117 (2014).

96. *See id.* at 139 n.20.

97. *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014) (noting the case does not implicate problems with bringing foreign nationals into U.S. courts because the defendants are citizens).

98. *See generally* Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 209 (2008) (exploring the relationship between corporate engagement and corporate liability under the ATS); Matthew E. Danforth, Note, *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations*, 44 CORNELL INT'L L.J. 659, 662 (2011) (arguing that human rights victims may be able to recover from corporations under the ATS).

99. *See* Jennifer M. Green, *Corporate Tort: International Human Rights and Superior Officers*, 17 CHI. J. OF INT'L L. 447, 450 (2017) (describing direct liability as the concept of "holding corporate officers liable for their role in human rights violations when they had a direct role" in the violations). For an international example, England's Companies Act of 2006 allowed for foreign direct liability: a parent corporation owes a duty of care to a subsidiary's employees or anyone impacted by the subsidiary's actions if the parent corporation is directly involved with the subsidiary's actions or exercises de facto control over the actions. *Id.* at 459 (citing Companies Act 2006, c. 46, § 1159 (U.K.)).

100. *See* KOEBELE, *supra* note 94, at 297 & n.86 (citing THE RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 1.01) (explaining that agency law imposes liability based on contract law concepts and may make the parent corporation, as the principal, responsible for obligations of the subsidiary, as the agent acting under the control of the parent corporation).

II. ATS LITIGATION

A. Historical and Legal Foundations

Originally part of the Judiciary Act of 1789,[101] the ATS, also known as the Alien Tort Claims Act (ATCA),[102] provides that "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."[103] The First Congress enacted the ATS to protect the United States from liability for violations of international norms by holding individuals, rather than the then-young nation, responsible for violations of such norms committed against other nations or their citizens.[104] The ATS allowed Congress to comply with the United States' obligation to rectify its citizens' violations of the law of nations.[105]

The term "law of nations" denotes "international law," which imposes obligations that can govern the behavior of States and private actors.[106] Article 38(1) of the Statute of the International Court of Justice (ICJ Statute), the foremost enumeration of international law sources, lists four distinct sources from which international law could arise: (1) international conventions; (2) "international custom, as evidence of a general practice accepted as law"; (3) general principles of law recognized by civilized nations; and (4) judicial decisions and teachings of highly qualified publicists.[107]

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101. Act of Sept. 24, 1789, ch. XX, § 9, 1 Stat. 73, 77.

102. 28 U.S.C. § 1350 (2012); *see also* Ali v. Rumsfeld, 649 F.3d 762, 775 n.21 (D.C. Cir. 2011) (noting that the Alien Tort Statute and Alien Tort Claims Act can be used interchangeably).

103. 28 U.S.C. § 1350; *see also* BREYER, *supra* note 12, at 135 (defining a tort as "a civil wrong causing injury").

104. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 449 (noting that in 1789 the United States was a young and weak country, and the First Congress wished to prevent conflict with other nations).

105. *See* Bellia & Clark, *supra* note 104, at 449.

106. *See, e.g.*, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1420 (2018) (Sotomayor, J., dissenting); EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 49 (Philadelphia, T. & J.W. Johnson 1863) (defining the law of nations as "the science which teaches the rights subsisting between nations or States, and the obligations correspondent to those rights").

107. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060.

Binding international legal "norms"[108] create, change, or terminate duties for States.[109] Binding legal norms primarily derive from conventions, such as treaties that States have ratified, or customary international law, which consists of norms that are not codified but nevertheless are the product of "general and consistent practice of [S]tates followed by them from a sense of legal obligation."[110] Essentially, States observe customary rules because they consider those rules to be binding.[111] When plaintiffs bring ATS suits, the plaintiffs allege that the defendant committed a tort that violated the law of nations—generally meaning that the committed tort violated a substantive prohibition on particular conduct, and under international law that prohibition was legally binding.[112]

Absent a treaty, custom can give rise to legally binding norms through the existence of State practice and *opinio juris*.[113] State practice need not be universal, but such practice must be general, consistent, and representative "at least of all major political and socio-economic systems."[114] Diplomatic acts and instructions, public measures and acts, and official statements of policy, whether unilateral or undertaken in cooperation with other States, can characterize a growing State

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108. *See Jesner*, 138 S. Ct. at 1420 (Sotomayor, J., dissenting) (contextualizing "norm" as referring to substantive conduct within international law); *see also* Ann Florini, *The Evolution of International Norms*, 40 INT'L STUD. Q. 363, 364–65 (1996) (referring to a "norm" as a standard of behavior that States obey because they view it as legitimate).

109. *See* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 6 (2d ed. 1997) (articulating that some binding legal norms are peremptory, meaning that they are non-derogable; some legal norms are non-peremptory and those from which States can derogate, although not unilaterally; and soft law, in comparison, is comprised of rules that States follow merely out of utility or for persuasiveness, but the rules do not legally bind the States).

110. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 1987).

111. ANDREW CLAPHAM, BRIERLY'S LAW OF NATIONS: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN INTERNATIONAL RELATIONS 50 (7th ed. 2012); *see also* VILLIGER, *supra* note 109, at 58 (stating that the binding force of treaties and customary law "must be identical").

112. *See Jesner*, 138 S. Ct. at 1420 (Sotomayor, J., dissenting) (introducing the norms against genocide, slavery, and torture as examples of such substantive prohibitions that international law considers binding).

113. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c.

114. VILLIGER, *supra* note 109, at 29; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b (presenting that State practice can be general even if not universally followed, but the practice should have a wide acceptance among States particularly involved in the relevant activity).

practice.[115] Of equal importance, *opinio juris* is the State's conviction that it follows a certain practice as a matter of law, rather than out of comity.[116] For example, a State's express statement that a particular rule is obligatory or customary can provide clear evidence of the State's legal conviction, as can votes that States cast during the UN drafting process.[117] A State that persistently objects, however, is not bound by an eventual customary rule if the State has consistently maintained its objections since the rule began to form.[118]

To assert jurisdiction under the ATS, then, plaintiffs must prove that the alleged tort violated a norm of international law.[119] Supreme Court jurisprudence has narrowed the applicable scope of international law, but the text of the ATS only requires that international law universally condemns the alleged conduct.[120]

B. Cases that Defined the Modern Scope of the ATS

Plaintiffs rarely invoked the ATS until the 1980s, when lower courts started to hear claims that relied on the ATS as an avenue for foreign citizens to sue other foreign citizens for violations of international law that occurred on foreign soil.[121]

In *Filartiga v. Pena-Irala*,[122] Paraguayan citizens sued a Paraguayan official whom they claimed tortured and killed their son.[123] Employing an expansive approach to the ATS, the Court of Appeals for the Second Circuit found that the ATS permitted federal jurisdiction when

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115. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b. S*ee generally* VILLIGER, *supra* note 109, at 17–29 (including the following as examples of State practice: opinions of national legal advisors, verbal statements, and national legislation).

116. *See* VILLIGER, *supra* note 109, at 48 (promoting the importance of *opinio juris* as a way of "asking whether a practice is law, or mere usage or comity, or even accidental"); CLAPHAM, *supra* note 111, at 57 ("Custom in its legal sense means something more than mere habit or usage . . . .").

117. *See* VILLAGER, *supra* note 109, at 50–51.

118. *See id.* at 34.

119. 28 U.S.C. § 1350 (2012); *see also* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014) ("[I]nternational law controls the threshold question of whether an international legal norm provides the basis for an ATS claim . . . .").

120. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1421 (2018) (Sotomayor, J., dissenting).

121. *See generally* Bellia & Clark, *supra* note 104, at 458 (discussing the modern expansion of the ATS).

122. 630 F.2d 876 (2d Cir. 1980).

123. *Id.* at 878 (contending that appellee Americo Norberto Pena-Irala, an Inspector General of Police, tortured Joelito Filartiga to death).

a foreign citizen sued for a violation of the law of nations.[124] In so doing, the *Filartiga* court introduced the threshold question for ATS claims: whether the alleged conduct violates the law of nations.[125] The court found that torture fit within the law of nations, given that modern international law prohibited torture and the international community universally abhorred torture.[126] The court looked to numerous international agreements to verify the universal condemnation of torture and ultimately deemed that the law of nations "may be ascertained by consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[127] Granting that the "alien" appellants properly brought the ATS action in federal court for a tort committed in violation of the law of nations, the court reaffirmed the jurisdictional standard under the ATS: "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."[128] According to the Second Circuit, "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[129]

More than two decades after the Second Circuit decided *Filartiga*, the Supreme Court first reviewed the jurisdictional scope of the ATS in *Sosa v. Alvarez-Machain*.[130] Respondent Humberto Alvarez-Machain, a Mexican physician, brought a suit against petitioner Jose Francisco Sosa, alleging that Sosa violated the norm prohibiting arbitrary arrest and detention when Sosa and others abducted Alvarez-Machain and brought him from Mexico to Texas, where federal officers arrested

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124. *Id.* at 887.

125. *Id.* at 880; *see also infra* notes 145–51 and accompanying text (examining the Supreme Court's analysis of this issue in *Kiobel v. Royal Dutch Petroleum Co.*).

126. *See Filartiga*, 630 F.2d at 884 (considering that the constitutions of over fifty-five nations expressly or implicitly prohibited torture, while the U.S. State Department reported a general recognition of the principle against torture).

127. *Id.* at 880 (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820)); *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) (exemplifying the principle that courts must interpret international law as it has evolved and exists today); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987) ("Customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation.").

128. *Id.* at 888.

129. *Id.* at 890.

130. 542 U.S. 692 (2004).

him.[131] Considering whether the courts could recognize new, enforceable international norms in ATS lawsuits, the Supreme Court found that as a jurisdictional grant, the ATS action must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [eighteenth century] paradigms we have recognized."[132] Absent an established rule of international law, Alvarez-Machain attempted to demonstrate that the prohibition against arbitrary arrest amounted to binding customary international law.[133] Although Alvarez-Machain cited two international agreements—the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR)—to support his customary international law argument, neither instrument created enforceable obligations for the United States,[134] and the Court reasoned that Alvarez-Machain cited little authority to support his claim of a binding customary norm.[135] Ultimately, the Court found that a single illegal detention for less than one day, accompanied by a lawful transfer to authorities, did not violate a norm of international law so well defined as to permit a federal remedy through the ATS.[136]

Adhering to the Supreme Court's decision that the ATS only provides jurisdiction over violations of specific international norms, the Second Circuit analyzed the creation of such a norm in *Abdullahi*

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131. *Id.* at 697–99. The Drug Enforcement Agency (DEA) asked for the Mexican government's assistance in bringing Alvarez-Machain to the United States, where a federal grand jury had indicted him for the 1985 torture and murder of a DEA agent. *Id.* at 697–98. When the negotiations with the Mexican government continued to stall, the DEA hired Mexican nationals (one of whom was Sosa) to abduct Alvarez-Machain from his house and bring him to the United States. *Id.* at 698.

132. *Id.* at 725. In the eighteenth century, at the time of the enactment of the ATS, the international community considered the three principal offenses against the law of nations to be: (1) violations of safe conducts; (2) infringement of ambassador rights; and (3) piracy. *Id.* at 724. William Blackstone reasoned that violations of the law of nations, particularly the principal offenses, would result in war if they were attributable to whole States or nations. *See generally* 4 WILLIAM BLACKSTONE, COMMENTARIES *68 (Wayne Morrison ed. 2001).

133. *Sosa*, 542 U.S. at 735.

134. *See id.* at 734–35. (differentiating that the Declaration does not impose its own obligations as a matter of international law and the Covenant, while binding, cannot create enforceable obligations because the United States ratified the Covenant with the understand that it would not be self-executing).

135. *Id.* at 736.

136. *Id.* at 738.

ex rel. Abdullahi v. Pfizer, Inc.[137] In *Abdullahi*, Nigerian children and their guardians sued Defendant Pfizer, alleging that Pfizer violated a customary international law norm prohibiting involuntary medical experimentation on humans by using children to test experimental antibiotics without the children's consent or knowledge.[138] The Second Circuit reversed the district court and held that the prohibition against nonconsensual medical experimentation fulfilled the *Sosa* stipulations for a law of nations norm.[139] The court referred to the ICJ Statute, which binds all UN members as parties, to identify authorities that provide proof of the sources of international law: international conventions, custom, general principles of law recognized by civilized nations, and judicial decisions.[140]

To analyze whether the prohibition amounted to a well-defined and universal norm, the court considered international and domestic actions.[141] In the United States, patient-subject consent has been required in drug research since 1962, when Congress mandated it; the FDA passed regulations regarding informed consent; and the government generally attributed importance to this norm.[142] International actions further supported the norm: in 2001, European Parliament and the Council of the EU passed a Directive requiring member States to adopt rules protecting those incapable of giving informed consent.[143] Additionally, since 1997, thirty-four member States of the Council of Europe had signed the Convention on Human Rights and Biomedicine, a binding convention and source of customary international law.[144]

In 2013, the Supreme Court further narrowed the reach of the ATS when it decided *Kiobel* and invoked the presumption against extraterritoriality to restrict foreign access to U.S. courts.[145] Nigerian nationals sued Dutch, British, and Nigerian corporations under the ATS, alleging that the corporations aided and abetted the Nigerian

137. 562 F.3d 163 (2d Cir. 2009).
138. *Id.* at 168.
139. *Id.* at 183–84.
140. *Id.* at 175.
141. *Id.* at 181.
142. *Id.* at 182.
143. *Id.* at 183.
144. *Id.*
145. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

government in violating the law of nations.[146] The Court focused on the following questions: (1) whether the law of nations recognizes corporate liability and (2) whether, and under what circumstances, the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within a territory of a foreign sovereign.[147]

Significantly, the Court identified a link between the ATS and a presumption against extraterritoriality: even when claims "touch and concern" the United States, the claims need to do so with "sufficient force to displace the presumption against extraterritorial application."[148] In this case, all of the relevant conduct occurred outside of the United States, the petitioners were foreign, and the respondents were foreign companies.[149] Concerned with the ramifications of judicial interference in foreign policy,[150] the Court declined to find that the petitioners' claims, and mere corporate presence in the United States, overcame the presumption against extraterritoriality.[151]

C. Modern ATS litigation and Corporate Defendants

Post-*Kiobel* litigation heralded a circuit split over ATS jurisdiction and a continuing debate over whether the ATS applies broadly to both individuals and legal persons.[152] After the Court foreclosed plaintiffs' ability to bring suit against a foreign corporation because the corporation lacked sufficient ties to U.S. soil, the circuit courts diverged over how to

146. *See id.* at 111–13 (stating that the respondents provided Nigerian forces with food and compensation while the Nigerian forces attacked Ogoni villages and killed residents).

147. *Id.* at 114 (announcing that the Court heard oral argument again and would affirm the judgment below based on its answer to the second question).

148. *Id.* at 124–25.

149. *Id.* at 113.

150. *Id.* at 124 (discussing the possibility that other nations could hale U.S. citizens into their courts for allegedly violating the law of nations, if the Court were to accept jurisdiction).

151. *Id.* at 124–25. In his concurrence, however, Justice Kennedy seemed to shy away from categorically preventing extraterritorial application and expressed that other cases may arise with serious allegations of international law violations that would warrant a proper deliberation over whether to grant jurisdiction under the ATS. *Id.* at 125 (Kennedy, J., concurring).

152. *See* Heather Cohen, *The Drafters Knew Best: Corporate Liability and the Alien Tort Statute*, OPINIO JURIS (Sept. 14, 2017), http://opiniojuris.org/2017/09/14/the-drafters-knew-best-corporate-liability-and-the-alien-tort-statute (examining the language and historical context of the ATS to determine that the drafters intended to place no limitation on who could be sued, even emphasizing that in 1666 a man successfully sued the East India Company).

characterize the scope of the ATS.[153] The contested question became whether corporations could be defendants under the ATS.

A series of successive cases highlighted the discord over the scope of ATS jurisdiction. In *Al Shimari v. CACI Premier Technology, Inc.*,[154] the plaintiffs claimed that the defendant's employees' abusive treatment of Abu Ghraib prisoners violated the law of nations, including the prohibition against torture.[155] The Court of Appeals for the Fourth Circuit held that the ATS provided a cause of action even though the acts occurred on foreign soil because: (1) the alleged torture occurred at a U.S. government-operated military facility and was perpetrated by U.S. citizens who were employed by the defendant; (2) the defendant was a U.S. corporation; and (3) the U.S. Department of the Interior issued the defendant's performance contract to conduct interrogations at Abu Ghraib.[156] The court noted that further litigation, the result of granting jurisdiction under the ATS, would also not interfere with foreign policy because the political branches had already indicated that the United States would not tolerate acts of torture.[157]

In *Doe I v. Nestle USA, Inc.*,[158] the Court of Appeals for the Ninth Circuit considered a class action filed by former Ivorian child slaves against Nestlé for allegedly aiding and abetting child slavery by sourcing cheap cocoa from Ivorian farms.[159] After holding that the norm against slavery was universal and could be brought against the corporate defendants,[160] the Ninth Circuit ultimately declined to decide whether the presumption against extraterritoriality barred the claim, and it remanded the complaint for plaintiffs to amend to allege that some of the underlying activity took place in the United States.[161]

In *Doe v. Drummond Co.*,[162] the Eleventh Circuit determined that U.S. corporate status was relevant to *Kiobel*'s "touch and concern" test

153. *See* Skinner, *supra* note 92, at 197–200 (noting that the *Kiobel* Court left open the possibility that claims touching and concerning the U.S. with sufficient force could rebut the presumption against extraterritoriality).

154. 758 F.3d 516 (4th Cir. 2014).

155. *Id.* at 521–22, 525.

156. *See id.* at 529–31 (deeming that the ATS claims involved "substantial ties" to the United States).

157. *Id.* at 530.

158. 766 F.3d 1013 (9th Cir. 2014).

159. *Id.* at 1017.

160. *See id.* at 1022 (finding support for corporate liability for slavery offenses in the statutes of international tribunals and liability for private and non-State actors at Nuremberg).

161. *Id.* at 1028–29.

162. 782 F.3d 576 (11th Cir. 2015).

because the extraterritorial application could be assuaged or inapplicable, given that the court would not be haling foreign nationals into U.S. courts to defend themselves.[163] In *Drummond*, the plaintiff brought the action on behalf of more than 100 Colombian citizens killed in an armed conflict with the Autodefensas Unidas de Colombia, a Colombian paramilitary group, and filed against multiple defendants, including an Alabama-based coal mining company.[164] The ATS claim put forth that the U.S. citizens aided and abetted or contributed to human rights violations outside the United States.[165] The court acknowledged that the plaintiffs may pursue claims against corporations, based on both direct and indirect theories of liability.[166] However, although the court found that the (1) U.S. citizenship and corporate status of the defendant, (2) U.S. interests implicated by the claims, and (3) alleged U.S. conduct were relevant in considering whether claims "touch and concern" the United States, the court concluded that the factors were not sufficient to displace the presumption against extraterritoriality.[167]

The most recent Supreme Court decision involving the ATS, *Jesner*, ultimately serves to further limit corporate liability under the statute. The petitioners, victims who were injured or killed in foreign terrorist attacks, sought to impose liability on Arab Bank—a Jordanian institution with a New York branch—for its role in facilitating or causing those terrorist attacks.[168] The international legal and human rights community hoped that the Supreme Court decision would affirm that corporations were appropriate ATS defendants.[169] However, the majority framed its analysis to ascertain whether

163. *Id.* at 593–94.
164. *Id.* at 579.
165. *Id.* at 582.
166. *Id.* at 584.
167. *Id.* at 600.
168. 138 S. Ct. 1386, 1394 (2018).
169. *See, e.g.*, Sarah A. Altschuller, *Corporate Liability and the Alien Tort Statute: Highlights from the Oral Arguments in Jesner v. Arab Bank*, CORP. SOC. RESP. & L. (Oct. 12, 2017), http://www.csrandthelaw.com/2017/10/12/jesner-v-arab-bank-highlights-from-the-oral-arguments (addressing the concerns of several Justices about the foreign relations implications of the ATS); John Bellinger & Andy Wang, *Jesner v. Arab Bank: The Supreme Court Should Not Miss the Opportunity to Clarify the "Touch and Concern" Test*, LAWFARE BLOG (Oct. 10, 2017, 8:12 AM), https://www.lawfareblog.com/jesner-v-arab-bank-supreme-court-should-not-miss-opportunity-clarify-touch-and-concern-test (arguing that the Supreme Court should clarify the touch and concern standard for determining whether the ATS will apply).

international law evinced a *Sosa*-level norm of holding corporations liable for human rights abuses and weighed whether Congress would be better suited to decide on a practice of corporate liability.[170] Ultimately, the majority looked to the language and purpose of the ATS to deny corporate liability, holding that foreign plaintiffs cannot sue foreign corporations under the ATS.[171] Notably, the Court declined to expressly foreclose the ability to bring ATS claims against domestic corporations for foreign human rights abuses.[172]

In contrast, the dissent criticized the majority for categorically absolving foreign corporations of responsibility under the ATS.[173] The dissent argued that the majority incorrectly applied the first part of *Sosa*, because the majority asked whether "a specific, universal, and obligatory norm of corporate liability" existed while *Sosa*'s "norm-specific first step" focuses on substantive norms of international law that prohibit certain conduct.[174] Rather than whether international law evinced a specific and universal norm of corporate liability, the dissent characterized the inquiry as whether the law demonstrates any reason why the ATS would distinguish between a corporation and natural person who allegedly violated the law of nations.[175] Although the *Sosa* precedent requires an international consensus about the violated norm, it does not require an international consensus that corporate liability is a norm as universal and specific as the main three norms identified in *Sosa*.[176] The dissent looked to States' collective and individual enforcement actions to determine that corporations are subject to certain international law obligations, noting that various

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170. *Jesner*, 138 S. Ct. at 1407. Concurring justices reached the same conclusion and found that recognizing a new cause of action would have been inappropriate because doing so would implicate foreign policy concerns and disrupt the balance of powers. *Id.* at 1408–10 (Alito, J., concurring).

171. *Id.* at 1407–08 (majority opinion) (naming the political branches as the bodies to decide whether the ATS should provide a remedy against foreign corporations, given that doing so could provide other countries with the equivocal right to hale U.S. citizens into foreign courts).

172. *Id.* at 1407 ("[T]the Court holds that foreign corporations may not be defendants in suits brought under the ATS.").

173. *Id.* at 1419 (Sotomayor, J., dissenting).

174. *Id.* at 1419–20.

175. *Id.* at 1425. As for the first step of the ATS analysis, determining whether the violated norm is *Sosa*-specific, the dissent would remand to the Court of Appeals to address whether the prohibition against financing of terrorism is sufficiently specific, universal, and obligatory. *Id.* at 1422.

176. *Id.* at 1420.

international agreements require State parties to hold corporations liable for certain conduct.[177]

Plaintiff reliance on the ATS as a remedy for human rights violations continues. In October 2018, the Ninth Circuit ruled that Nestlé and Cargill workers could sue the corporations under the ATS with allegations of slave labor.[178] While the plaintiffs' counsel argued that these claims "touch and concern" the United States because Nestlé's Headquarters in the United States decided to give money and technological support to the foreign farmers,[179] Nestlé argued that the claim was barred because the focus was on an injury that occurred in the Ivory Coast, not an alleged act of aiding and abetting that happened in the United States.[180] Thus, the appeals judges' ruling in favor of the plaintiffs demonstrates that the circuit split is likely to continue regarding the dual issues of whether (1) a specific tort is actionable under the ATS and (2) domestic corporations are appropriate defendants under the ATS.[181]

III. ANALYSIS

The First Congress created the ATS as one mechanism to grant civil redress and fulfill the government's obligations under the law of nations.[182] By recognizing the law of nations as referring to

177. *Id.* at 1423–24 (cataloguing historical examples of corporate liability: the U.S. Military Tribunal prosecuting corporate executives at Nuremberg; International Criminal Tribunal for Rwanda finding a private radio station responsible for genocide; the Special Tribunal for Lebanon holding that corporations may be prosecuted for contempt).

178. Doe v. Nestle, S.A., 906 F.3d 1120, 1122 (9th Cir. 2018).

179. *Id.* at 1126; *see also* Anthony Myers, *Nestle and Cargill Cocoa Slave Labor Lawsuit Takes Another Twist as Appeal Judges Rule Plaintiffs Can Sue the Companies in the US*, CONFECTIONARY NEWS (Jun. 18, 2018), https://www.confectionerynews.com/Article/2018/06/18/Nestle-and-Cargill-cocoa-slave-labor-lawsuit.

180. *Nestle*, 906 F.3d at 1125–26; *see also* Myers, *supra* note 179. In October 2018, the Ninth Circuit allowed the ATS case against Nestlé to continue. *See* Erik Slobe, *Nestle Child Labor Case Allowed to Continue*, JURIST (Oct. 24, 2018), https://www.jurist.org/news/2018/10/nestle-child-labor-case-allowed-to-continue (examining how the Ninth Circuit reversed the district court's dismissal).

181. *Compare* Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1024 (7th Cir. 2011) (refusing jurisdiction because that plaintiffs failed to prove that a norm prohibiting child labor met the universality requirement of *Sosa*), *with* Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377, 384 (S.D.N.Y. 2009) (granting jurisdiction over a claim of cruel, inhuman treatment, even though the court found no universal agreement on every element of the claim of crimes against humanity).

182. Brief of Amici Curiae Professors of Legal History William R. Casto, Martin S. Flaherty, Stanley N. Katz, Michael Lobban, and Jenny S. Martinez in Support of Plaintiffs-

international law,[183] the ATS becomes intertwined with norms of customary international law and should remain true to its purpose to provide recourse to wronged foreign plaintiffs.[184] Because corporate responsibility for violations of workers' rights within supply chains is crystallizing into a norm of customary international law, the ATS provides foreign workers with a remedy to sue domestic parent corporations for working conditions that amount to violations of certain specific, universal norms. To the extent that Supreme Court jurisprudence declines to find that certain other violations are actionable torts under the ATS, the United States fails to provide effective remedies to wronged workers and falls out of step with the international movement that increasingly finds corporations liable for a broader array of torts.

A. Corporate Responsibility for Violations of Workers' Rights as a Crystallizing Customary International Law Norm

Article 38(1) of the ICJ Statute lists customary law as one of four recognized sources of international law.[185] The product of State practice and *opinio juris*, customary law is equally as binding upon States as a ratified treaty.[186] Although still in the drafting process, the UN's proposed binding treaty on business and human rights denotes the strength of the movement to hold corporations responsible for supply chain violations, under the standard that corporations should have foreseen the risk of workers' rights violations.[187] Current

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Appellants and Reversing the District Court's Decision at 9–10, Doe v. Drummond Co., No. 13-15503 (Mar. 21, 2014) [hereinafter Amici Curiae Brief], 2014 WL 1870571; *see also id.* at 2 (arguing that enforcing the law of nations requires sovereigns to provide redress for violations "when the violation occurred on the sovereign's territory; when a sovereign's subject committed the violation; and when a perpetrator used the sovereign's territory as a safe harbor to avoid punishment for having committed great wrongs").

183. *See* Abdullahi *ex rel.* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 173 (2d Cir. 2009) (citing Flores v. Southern Peru Copper Corp., 414 F.3d 233, 247–48 (2d Cir. 2003)) (clarifying the law of nations as referring to customary international law).

184. *See* Amici Curiae Brief, *supra* note 182, at 27 ("To interpret the ATS to not apply to U.S. subjects would go against the well-established rule that if a country did not redress the wrongs of its subjects, it was an accessory to their wrongs.").

185. Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060.

186. *See* VILLIGER, *supra* note 109, at 58 (deeming customary law and treaties to be equivalent sources of international law).

187. *See generally* U.N. Zero-Draft to Regulate Transnational Corporations, *supra* note 40, art. 10, ¶ 6(b) (discussing the civil liability regimes State Parties should

international and national behaviors and trends indicate that States are increasingly able and willing to hold corporations responsible for violations of workers' rights within supply chains. Considering public acts and official statements of policy as instructive of practice that States follow as a matter of law, the trend of corporate responsibility for the violations of workers' rights in supply chains is crystallizing into a norm of customary international law.

1. International acts demonstrate a crystallizing norm of corporate responsibility for violations of workers' rights

International movements toward establishing corporate responsibility for the well-being of all "human components" within business enterprises largely fall into two practices: guidelines that are binding or suggestive and legislative acts of individual States.

The UN Guiding Principles serve as an overarching global framework that exhorts corporations to promote business practices that "mitigate adverse human rights impacts," even if the corporations have not directly contributed to those harmful impacts.[188] While international organizations have long maintained a general recognition of the right to "favourable conditions of work,"[189] over the past decade alone international bodies have increased efforts to align ethical business practices with respect for human rights. In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work, which mandates that member States respect and promote the elimination of deplorable practices such as forced and child labor.[190] The ILO champions the campaign to equalize working conditions and, with 187 member countries who can ratify conventions, can give weight to growing trends based on the number of States that ratify various conventions.[191] For example, of the ILO's eight fundamental conventions, 182 States have ratified the Worst Forms of Child Labour Convention, 171 ratified the Minimum Age Convention, and 178

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enforce on transnational corporations for violations of human rights "to the extent it exhibits a sufficiently close relation with its subsidiary . . . in its supply chain").

188. *Implementing UNGPs*, *supra* note 28, at 14.

189. *See* International Covenant on Economic, Social and Cultural Rights art. 7, Dec. 16, 1966, 993 U.N.T.S. 3, 6 (entered into force Jan. 3, 1976) (promoting general practices of healthy working conditions, fair wages, and reasonable rest days).

190. *See ILO Declaration*, *supra* note 25.

191. *Alphabetical List of ILO Member Countries*, INT'L LABOUR ORG., http://www.ilo.org/public/english/standards/relm/country.htm (last visited June 1, 2019).

ratified the Abolition of Forced Labour Convention.[192] In ratifying these conventions, member States affirm their commitment to abide by the labor standards that each convention propagates.

Currently, the international community has placed renewed emphasis on improving working conditions. Pursuant to the UN Global Compact, the transfer from the Millennium Development Goals ("MDGs") to the Sustainable Development Goals ("SDGs") represents a long-term commitment to promoting economic and social development within States.[193] Whereas the MDGs had no mention of better working practices, Goal 8 of the SDGs calls for "immediate and effective measures to eradicate forced labour" and the protection of labor rights for all workers.[194]

Increasingly, non-binding regulations and guidelines have begun to focus on the responsibilities of corporations in affirming the protection of workers' rights and eradicating abusive practices. Non-binding declarations also demonstrate States' willingness to adhere to a greater degree of responsibility for businesses in reference to human rights. The 2014 EU Directive on Non-Financial Reporting explicitly called upon States to implement legislation requiring corporations to divulge the social and environmental impacts of their subcontracting chains, and by 2017, the national legislations of all EU Member States contained complying disclosure rules.[195] OECD's transition from the 2011 Guidelines for Multinational Enterprises to the 2018 Due Diligence Guidelines for Responsible Business Conduct further depicts the renewed emphasis on corporate due diligence. Through this transition, the OECD moved from encouraging business partners to adopt certain working principles to implementing a government-backed due diligence standard in all economic sectors. These new standards are backed by forty-eight of OECD's member States.[196]

Respective States have also enacted legislation that regulates corporate disclosure of possible slavery within supply chains, and the growing movement for corporate responsibility supports the trend of a

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192. *Ratifications by Convention*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:12001 (last visited June 1, 2019).

193. *SDGs*, *supra* note 38, at 1–2.

194. *See generally* INT'L LABOUR ORG., SDG ALLIANCE: JOINING FORCES GLOBALLY TO END CHILD LABOUR, FORCED LABOR, MODERN SLAVERY, AND HUMAN TRAFFICKING (2016), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/ wcms_450718.pdf (discussing target 8.7, which is part of the larger SDG Goal 8).

195. *Implementation of EU Directive*, *supra* note 46.

196. *See New OECD Instrument*, *supra* note 34.

crystallizing customary norm. The landmark UK MSA was the first in a relatively quick series of State-specific implementation of legislation.[197] Within three years of the UK MSA's introduction, France passed its own vigilance law.[198] With slight variations, each law introduced compliance and disclosure plans that require corporations, which qualify based on threshold gross receipts or employee numbers, to disclose their steps to eradicate human slavery within their operations.[199] Germany announced its CSR Directive Implementation Act to mandate that corporations disclose information about workers' rights and provide an option for parent companies to include individual disclosures within a main group report on nonfinancial issues.[200] The nonfinancial information must contain details on workers' issues, respect for human rights, and environmental impacts.[201]

These concrete legislative acts are joined by budding proposals from other States. Joining its European counterparts, the Dutch Parliament's proposed Child Labour Due Diligence Law became yet another example of how State governments are imposing duties on their corporations to ensure the safety of their supply chains.[202] A continent away, the Hong Kong government released plans detailing the formation of its own anti-slavery law, which would require annual publishing of actions combatting slavery.[203] Hong Kong legislators imposed further restraints on corporate power and await final approval of their bill that would allow civil actions against defendants who benefited from business that they knew or should have known would involve slavery.[204]

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197. Modern Slavery Act 2015, c. 30, § 54 (U.K.).

198. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétiés des mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the Corporate Duty of Vigilance for Parent and Instructing Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [Official Gazette of France], Mar. 27, 2017 No. 99 (Fr.).

199. *See, e.g.*, Modern Slavery Act 2015, c. 30, § 54 (requiring annual disclosures from corporations who do business in the UK and have a global annual turnover of more than £36m annually).

200. Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage – und Konzernlageberichten [CSR Directive Implementation Act], April 2017, BGBLI at 802 (GER); *see also* Von Steinau-Steinrück & Sura, *supra* note 49.

201. Von Steinau-Steinrück & Sara, *supra* note 49.

202. Oonk, *supra* note 52.

203. *See Modern Slavery Law Proposed for Hong Kong*, HERBERT SMITH FREEHILLS (Jan. 8, 2018) [hereinafter *Hong Kong Proposed Law*], https://www.herbertsmithfreehills.com/latest-thinking/modern-slavery-law-proposed-for-hong-kong (requiring corporations conducting business in Hong Kong to "detail the steps taken that year to ensure that slavery and human trafficking is not taking place").

204. *Hong Kong Proposed Law*, *supra* note 203.

Prevalent adherence to the soft-law[205] principles and guiding documents propels the international acceptance of corporate regulation into a practice that States increasingly adhere to as a matter of law. Although difficult to ascertain, *opinio juris*[206] manifests itself through the deference States afford to conventions, directives, and respective national policies that promote workers' rights. For example, while the 178 ratifying members of the ILO Abolition of Forced Labour Convention indicates a consensus of State practice, the ratification of the individual convention also represents a State's conviction that it must strive to abolish forced labor as a matter of law.[207] State endorsement of voluntary guidelines and principles further conveys that a State feels bound to recognize corporate liability for workers' rights violations. Forty-eight States signed on to the new OECD Guidelines that promote corporate due diligence among all economic sectors,[208] and States implemented the requirements of the EU Directive on Non-Financial Information by transforming national legislation to acknowledge the well-being of workers.[209] Considering the expansive implementation of national legislations restricting corporate behavior and the emphasis on, and State compliance with, international guidelines that promote corporate responsibility, the practices of the international community indicate that corporate responsibility for workers' violations is a crystallizing norm of customary international law.

2. U.S. domestic practice demonstrates the United States' recognition of a crystallizing customary international norm to promote corporate responsibility

Domestic regulation and disclosure efforts, bolstered by consistent executive statements, indicate that the United States falls in line with the growing international practice of holding corporations responsible for the well-being of workers within their supply chains. Rather than objecting to the growing international norm, the United States' behavior evinces an acceptance of the crystallizing customary norm of holding parent corporations responsible for supply chain workers' rights violations.[210]

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205. *See* VILLIGER, *supra* note 109 (describing soft law).

206. *See supra* notes 116–18 and accompanying text.

207. *Cf.* VILLIGER, *supra* note 109, at 51 ("A vote cast in favour of a rule indicates a State's legal conviction, just as large majorities may serve as one indicator of a *communis opinio juris*.").

208. *See New OECD Instrument*, *supra* note 34.

209. *See Implementation of EU Directive*, *supra* note 46.

210. *See supra* notes 116–18 and accompanying text (describing that customary international law is binding except upon States who are persistent objectors).

The totality of legislative actions, implemented within the last decade alone, indicate congressional willingness to impose due diligence, disclosure requirements, and government oversight on corporations to mitigate the risk of workers' rights violations. Focused solely on the federal sector, FAR imposes direct responsibilities upon federal contractors to ensure that their subcontractors and involved subsidiaries neither knowingly or unknowingly, directly or indirectly, partake in human trafficking.[211] Federal contractors must produce and adhere to compliance plans if their activities involve a certain threshold of work abroad, and they must verify that they continue to conduct their own due diligence investigations into the human impact of their supply chains.[212]

Section 1502 of the Dodd-Frank Act further reaffirms the government's commitment to disavow connections to potential human rights violations because it expressly requires corporations to disclose whether their products contain conflict minerals;[213] such a stipulation requires, in part, that corporations have visibility into their supply chains to accurately report as to the presence of conflict minerals. Most comparable to international legislations' disclosure laws, albeit limited to enforcement in one state, California's Transparency in Supply Chains Act mandates that corporations provide consumers with published information on the corporations' efforts to eradicate trafficking and slavery within their supply chains.[214] Perhaps most promising is the prospect of the pending Business Supply Chain Transparency on Trafficking and Slavery Act, which would impose national compliance guidelines like those that the California Act promulgates and require corporations to annually disclose efforts to combat supply chain abuses.[215]

Efforts to restrict the flow of tainted goods into the United States also evince a desire to restrict the imports of foreign-sourced goods from corrupted supply chains. Through the TFTEA, U.S. Customs and Border Protection exercises the power to restrict the importation of goods from at-risk geographical areas or industries.[216]

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211. *Final FAR Rule Released*, *supra* note 56.

212. *Id.*

213. 15 U.S.C. § 78m(p) (2012).

214. CAL. CIV. CODE § 1714.43(a)(1)–(b) (West 2012).

215. Business Supply Chain Transparency on Trafficking and Slavery Act of 2018, H.R. 7089, 115th Cong.

216. Trade Facilitation and Trade Enforcement Act of 2015, § 910, Pub. L. No. 114-125, 130 Stat. 122, 239 (to be codified at scattered sections of 19 U.S.C.).

Executive statements or initiatives can serve as another factor that bolsters the finding of a State practice adhered to as a matter of law. Three of the last four Presidents have issued Executive Orders that pertain to recognizing the necessity of workers' rights while at the same time abating the risk of associating with tainted goods or corrupt practices. In 1999, President Clinton's Executive Order 13,126, "Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor,"[217] intended to prevent federal agencies from obtaining foreign goods produced by forced or child labor. In 2012, President Obama introduced Executive Order 13,627, "Strengthening Protections against Trafficking in Persons in Federal Contracts,"[218] which prohibited federal contractors and their employees from engaging in human trafficking activities. Most recently, President Trump continued the presidential disavowal of inhumane business activities with his Executive Order 13,818, "Blocking the Property of Persons Involved in Serious Human Rights Abuses or Corruption,"[219] which strengthened enforcement of the Global Magnitsky Act[220] and authorized the President to issue sanctions against global offenders of human rights.[221] Secretary of State Rex Tillerson even remarked that the sanctions regime indicated that the government would continue to pursue consequences for those who violate human rights.[222] By consistently aiming to prohibit involvement with goods or services tied to workers' rights violations within supply chains, the Executive Branch has conveyed an awareness that the international community disfavors associations that are connected to at-risk business enterprises.

The second element of customary international law, *opinio juris*, is "the conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form

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217. Exec. Order No. 13,126, 3 C.F.R. § 195 (2000).

218. Exec. Order No. 13,627, 3 C.F.R. § 309 (2013).

219. Exec. Order No. 13,818, 3 C.F.R. § 399 (2018) ("The United States seeks to impose tangible and significant consequences on those who commit serious human rights abuse or engage in corruption . . . .").

220. *See* Kerry Contini & Eunkyung Kim Sum, *US Government Implements the Global Magnitsky Act and Publishes Magnitsky Act Sanctions Regulations and Related Designations*, GLOBAL COMPLIANCE NEWS (Dec. 29, 2017), https://globalcompliancenews.com/us-magnitsky-act-20171229.

221. *See* Press Statement from Rex Tillerson, Sec'y of State, *supra* note 69 (expressing that the sanctions demonstrate the United States will continue to pursue consequences for those who commit serious human rights violations).

222. *See id.*

of sanction would, or ought to, fall on it."[223] Thus, U.S. attentiveness in controlling the imports of tainted goods through the TFTEA may provide one indicia of acting under the sense of a broader legal obligation. Executive invocation of the Global Magnitsky Act and Executive Orders—consistent over three presidencies—can also demonstrate desire to refrain from associating with sectors or countries that have a risk of forced labor, which can lend support to the possibility that the government follows such a practice under the conviction that it might otherwise be subject to sanctions. Legislatively, the government has imposed strict guidelines upon its contractors and suppliers through the FAR requirements, and FAR expressly provides for a mode of corporate liability for violations of workers' rights that occur within the contracting chains. Although *opinio juris* is often less distinct than State practice, the consistency with which the United States affirms the importance of clean supply chains while distancing itself from at-risk industries and regimes demonstrate its subjective understanding that protecting workers' rights is a crystallizing customary international norm.

B. The Prohibition Against Workers' Rights Violations as an ATS-Actionable Universal Norm

Pursuant to the Supreme Court's decision in *Sosa*, actionable ATS torts must rise to the level of a violation of an international norm that is specific, well-defined, and universal.[224] Violations of workers' rights can rise to the level of *Sosa* standards when the violations are of a particularly egregious nature, such as forced labor. To the extent that lesser violations may be actionable torts, such violations would likely be precluded pursuant to the *Sosa* standard, but preclusion would be inconsistent with international momentum to uphold equitable working conditions.

1. The limited scope of the current ATS framework under Sosa

Sosa jurisprudence requires that actionable torts under the ATS are specific, universal, and well-defined.[225] Pursuant to those stipulations, violations of the prohibitions against forced labor would provide plaintiffs with actionable torts under ATS jurisprudence.

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223. VILLIGER, *supra* note 109, at 48.
224. Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).
225. *Id.* at 715.

In *Filartiga*, the Second Circuit established that torture amounted to a *Sosa* norm because of the universal renunciation of torture.[226] As evidence of this norm, the Second Circuit examined international treaties and accords, such as the ICCPR and European Convention for the Protection of Human Rights and Fundamental Freedoms, and looked to modern national laws that banned torture.[227] The Second Circuit later deemed in *Abdullahi v. Pfizer, Inc.* that nonconsensual medical experimentation violated international law and amounted to the universal and specific nature of an actionable *Sosa* norm,[228] after once again looking to international treatment and the domestic history of medical consent.[229]

Following the Second Circuit's analytical approach—considering historical evolution of and adherence to a standard—the prohibition against forced labor fulfills the *Sosa* criteria of being universal, specific, and well-defined. Internationally, under the ILO's Declaration on Fundamental Principles and Rights at Work, member States have pledged to promote the elimination of forced labor and child labor.[230] The ILO defines forced labor as "all work or service which is extracted from any person under the threat of a penalty and for which said person has not offered himself or herself voluntarily."[231] The ILO has 187 member countries, which transitively implies that 187 countries

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226. Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980).

227. *See id.* at 884 (finding that over fifty-five national constitutions expressly or implicitly renounced torture and relying on the State Department reporting a general recognition of a principle against torture).

228. Abdullahi *ex rel.* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 177 (2d Cir. 2009) ("The prohibition on nonconsensual medical experimentation on human beings meets this standard because . . . it is specific, focused and accepted by nations around the world without significant exception.").

229. *See id.* at 180–82 (comparing the progression of the ICCPR Directive prohibiting nonconsensual medical experimentation and the subsequent adoption of the CHRB by 34 Council of Europe members, with Congress's mandate and FDA regulations regarding patient-subject consent).

230. To note, the Conventions for the Abolition of Forced Labour and Child Labour are the only two of the eight fundamental conventions that the United States has ratified. *See Ratifications for United States*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited June 1, 2019).

231. *What is Forced Labour, Modern Slavery, and Human Trafficking*, INT'L LABOUR ORG., https://www.ilo.org/global/topics/forced-labour/definition/lang–en (last visited June 1, 2019).

acknowledge the ILO's characterization of forced labor. The ILO's fundamental conventions also include the abolition of forced labor.[232]

Goal 8 of the UN Development Programme specifically promotes "tak[ing] immediate and effective measures to eradicate forced labour . . . and secur[ing] the prohibition and elimination of the worst forms of child labour," with the provision to end child labour by 2025.[233] The ILO's Forced Labour Convention has 178 ratifying countries,[234] 175 countries have ratified the Abolition of Forced Labour Convention,[235] and 182 countries have ratified the Worst Forms of Child Labour Convention.[236]

Within the domestic sphere, the U.S. government has fought, and continues to fight, the presence of forced labor within trade. The Tariff Act of 1930[237] defines "forced labor" as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily" and prohibits the importation of goods produced by convict or indentured labor.[238] Pursuant to the TFTEA, U.S. Customs and Border Protection has the authority and duty to prevent the importation of goods possibly associated with forced labor.[239]

Although certain U.S. courts have already recognized slave labor as a sufficiently defined norm that falls within the *Sosa* parameters,[240]

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232. *Abolition of Forced Labor*, INT'L LABOUR ORG., https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang–en (last visited June 1, 2019).

233. *SDGs*, *supra* note 38 (aiming to achieve productive employment and decent work for all women and men by 2030); *see also 2030 Agenda for Sustainable Development*, U.N., 2015, https://sustainabledevelopment.un.org/post2015/transformingourworld.

234. *C029—Forced Labour Convention, 1930 (No.29)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174 (last visited June 1, 2019) (abstaining from ratifying: the United States, China, Republic of Korea, and Afghanistan).

235. *Ratifications of C105—Abolition of Forced Labour Convention, 1957 (No. 105)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250 (last visited June 1, 2019).

236. *Ratifications of C182—Worst Forms of Child Labour Convention, 1999 (No. 182)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327 (last visited June 1, 2019).

237. Pub. L. No. 71-361, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.).

238. 19 U.S.C. § 1307 (2012).

239. *See* Reade & Witten, *supra* note 63.

240. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *see also* Myers, *supra* note 179 (noting that the Ninth Circuit allowed plaintiffs to sue Nestlé and Cargill under the ATS for allegations of slave labor).

modern developments further exemplify just how appropriate and suitable the ATS is for claims of forced labor.

2. Why workers should have the right to bring ATS actions for "lesser" violations

The UN Guiding Principles on Business and Human Rights serve as an example of a collective body of rights that are essential yet whose violations would likely fail the *Sosa* test to become actionable torts under the ATS.[241] The narrow *Sosa* standard prevents U.S. courts from hearing ripe claims and precludes important violations from gaining jurisdiction. For example, the United States has ratified the ILO convention against the worst forms of child labor.[242] However, under current *Sosa* restrictions, U.S. courts would potentially lack the jurisdictional grant to hear any claims based on violations of the prohibition against child labor. For instance, in *Flomo v. Firestone Natural Rubber Co.*,[243] Liberian employees and children attempted to bring a case against a corporate employer, but the Seventh Circuit held that the plaintiffs failed to provide concrete evidence of customs and practices of States to show that States feel themselves to be under a legal obligation to impose liability on employers of child labor.[244] The court declined to find a universal, cohesive perspective on child labor because of the diversity of economic conditions around the world and found it difficult to glean a defined rule from plaintiff's three relied-upon conventions: UN Convention on the Rights of the Child, ILO Minimum Age Convention, and ILO's Convention 182: The Worst Forms of Child Labor.[245]

Additionally, international courts have granted jurisdiction over claims alleging corporate liability for violations of health and safety conditions, violations which would likely fail under the *Sosa* test. A German court allowed the continuation of a claim against a German company, KiK, for a fire in a subsidiary-owned factory in Pakistan that

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241. *See Implementing UNGPs*, *supra* note 28, at 1; *see also* Skinner, *supra* note 92, at 182 (citing the three pillars of the Guiding Principles, the second and third of which emphasize businesses' obligations to comply with all applicable laws and respect human rights and the obligations of countries and businesses to provide victims with access to effective remedies).

242. *Ratifications for the United States*, *supra* note 230.

243. 643 F.3d 1013 (7th Cir. 2011).

244. *Id.* at 1023.

245. *Id.* at 1024. *But see* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1020 (9th Cir. 2014) (holding that child labor violates a norm that is specific, universal, and well-defined); Roe I v. Bridgestone Corp., 492 F. Supp. 2d 988, 991 (S.D. Ind. 2007) (permitting an ATS case to proceed when the plaintiffs presented a claim of child labor).

occurred due to the factory's lack of safety measures.[246] Similarly, a British court upheld jurisdiction for a case involving asbestos within a corporation's subsidiary company.[247] Both aforementioned cases would likely fail to meet the first threshold for ATS jurisdiction because the alleged torts—violations of safe and healthy working conditions—are not sufficiently specific to compare to the magnitude of the 1789 law of nations norms of safe conducts, ambassador rights, and piracy. However, the international community is championing a world that recognizes a sustainable economy with decent working conditions, and fair working conditions are arguably rising to, if not already at, the status of an international norm. The 2030 UN Agenda for Sustainable Development evinces such a desire, as the introduction of the declaration calls for the creation of conditions that promote shared prosperity and inclusive economic growth for all,[248] and Goal 8.8 of the Sustainable Development Goals calls for safe working environments for all workers.[249]

Furthermore, the actions of various corporations and multinational organizations indicates that they believe that safe working conditions are a basic right worth protecting. Corporations are proactively adapting their codes of conduct to mirror this trend,[250] and public opinion continues to advocate for greater corporate diligence in ensuring safe working conditions. The federal courts' continued adherence to the *Sosa* standard, however, likely forecloses the possibility of a foreign worker attaining redress from a parent corporation for a workplace tort, therefore leaving the injured workers without an effective remedy and arguably defeating the promising

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246. *See supra* notes 88–91 and accompanying text (examining the KiK case as an example of signaling that courts can hold transnational corporations responsible for workers' violations stemming from subsidiaries' working conditions).

247. *See* Green, *supra* note 99, at 459 n.51 (referring to Chandler v. Cape PLC, [2011] EWCA (Civ) 525, wherein an asbestos-exposed worker was able to recover from the subsidiary's parent company).

248. G.A. Res. 70/1, *supra* note 37, at 3 ("We resolve also to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities.").

249. *See id.* at 20 ("Protect labour rights and promote safe and secure working environments for all workers . . . .").

250. *See, e.g.*, SAFEWAY, SUPPLIER SUSTAINABILITY GUIDELINES AND EXPECTATIONS 2 (2015), https://suppliers.safeway.com/docs/supplier_sustainability_expectations.pdf; *Safety*, CLEAN CLOTHES CAMPAIGN, https://cleanclothes.org/safety (last visited June 1, 2019) (asserting that occupational health and safety are a "top priority in the struggle for better working conditions in the garment industry"); *Responsible Choice Seafood*, HYVEE, https://www.hy-vee.com/corporate/our-company/sustainability/responsible-choice-seafood (last visited June 1, 2019) (promoting responsible, sustainable seafood practices).

purpose of the ATS.[251] In doing so, the United States has fallen out of step with the international movement to hold corporations accountable for the safety of workers within their supply chains.

C. Parent Corporation Liability for Extraterritorial Human Rights Abuses within Global Supply Chains

The Supreme Court majority decision in *Jesner* significantly restricted the ability of foreigners to bring claims against corporate defendants because the majority held that foreign corporations are not appropriate defendants under the ATS.[252] However, the majority refrained from conclusively specifying whether domestic corporations remain suitable defendants. Accordingly, corporate civil liability allows for foreign workers to bring claims against parent corporations under the ATS. Suits against domestic parent corporations do not implicate the *Kiobel* concerns of extraterritorial application because traditional theories of tort liability connect the parent corporation to the foreign acts of its subsidiaries.

1. Piercing the corporate veil with foreseeable risk

Practices such as limited liability have historically shrouded corporations from suit; however, international players are increasingly relying on the law to directly impose duties or responsibilities on corporations and "pierce the corporate veil." Notably, TNCs have acquired direct duties under some multilateral conventions that impose liability on corporations.[253] The UN Open-Ended Intergovernmental Working Group is working on a proposed Treaty on Business and Human Rights, and Article 10(1) of the current "zero draft" explicitly identifies that legal persons may be held civilly liable for business activity-related human rights violations.[254]

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251. *Cf.* BREYER, *supra* note 12, at 134 (referring to the ATS as "a statute that helps to protect basic human rights"); *see also* International Covenant on Economic, Social and Cultural Rights art. 7, Dec. 16, 1966, 993 U.N.T.S. 3, 6 (entered into force Jan. 3, 1976) (recognizing "the right of everyone to the enjoyment of just and favourable conditions of work").

252. *See* Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1399 (2018).

253. *See* Kinley & Tadaki, *supra* note 81, at 946 (identifying the International Convention on Civil Liability for Oil Pollution Damage and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment as two multilateral conventions that directly place liability on corporations).

254. *See* U.N. Zero-Draft to Regulate Transnational Corporations, *supra* note 40, art. 10, ¶ 1 ("State Parties shall ensure through their domestic law *that natural and legal persons* may be held criminally, civil or administratively liable for *violations of human*

Persuasively, international judicial systems have pierced the corporate veil to find that parent corporations were liable for the actions or omissions of their foreign subsidiaries. A German court upheld a lawsuit that foreign workers brought against KiK, a German company, for poor fire safety measures that contributed to a destructive factory fire,[255] while English courts held that parent corporations owed a duty of care to subsidiaries' employees in *Chandler v. Cape PLC*,[256] *Lubbe v. Cape PLC*,[257] and *Lungowe v. Vedanta Resources PLC*.[258] Considering the four factors the *Chandler* court weighed before imposing a direct duty on the parent corporation for the asbestos conditions of its subsidiary[259] and the call for transparent supply chains,[260] U.S. corporations should be on notice of the possibility of

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rights undertaken in the context of business activities of transnational character. Such liability shall be subject to effective, proportionate, and dissuasive criminal and non-criminal sanctions, including monetary sanctions. Liability of legal persons shall be without prejudice to the liability of natural persons." (emphasis added)).

255. *See* BUS. & HUM. RIGHTS RES. CTR., CORPORATE IMPUNITY IS COMMON & REMEDY FOR VICTIMS IS RARE: CORPORATE LEGAL ACCOUNTABILITY ANNUAL BRIEFING 10, https://www.business-humanrights.org/sites/default/files/documents/CLA_AB_Final_Apr%202017.pdf [hereinafter CORPORATE IMPUNITY] (noting that the lawsuit could signal to transnational corporations that they can be held responsible for working conditions at subsidiaries and suppliers' companies).

256. [2012] EWCA (Civ) 525 (Eng.) (providing a cause of action against the parent corporation for a worker exposed to asbestos while working for the extinct subsidiary).

257. [2000] UKHL 41, ¶ [6] (appeal taken from Eng.) (holding that parent corporation's knowledge about a factory's asbestos risk and superior knowledge about the management of asbestos risk made it appropriate to find that the parent corporation had a duty of care to advise subsidiary on remedial steps).

258. [2017] EWCA (Civ) 1528, ¶ [78] (Eng.) (finding that a parent corporation owed a duty of care to residents harmed by the pollution discharge from the parent corporation's subsidiary mining company).

259. Considering whether the parent had assumed a direct duty of care for the subsidiary's employees, the court asked: (1) Are the businesses of the parent and subsidiary in a relevant respect the same? (2) Does the parent have, or ought it to have, superior knowledge on some relevant aspect of health and safety in the particular industry? (3) Does the parent know (or ought to know) that the subsidiary's system of work is unsafe in some way? (4) Does the parent know (or ought to have foreseen) that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection? *Chandler*, [2012] EWCA (Civ) 525, ¶¶ [72]–[80].

260. *See, e.g.*, *Urge Monster to Investigate Slavery Risk in its Drinks*, FREEDOM UNITED, https://www.freedomunited.org/advocate/monster-slavery (last visited June 1, 2019) (encouraging Monster Beverage Corp. to investigate the minimal risk of slavery and human trafficking in its supply chain after Monster also scored 0/100 in a report on the largest food and beverage companies addressing forced labour); Clare Leschin-Hoar, *Was Your Seafood Caught with Slave Labor? New Database Helps Retailers Combat Abuse*, NPR (Feb. 1, 2018, 6:01 AM) (quoting Maisie Ganzler, Chief Strategy and Brand

workers' rights violations within their global supply chains. The *Chandler* court considered a key question to be: should the parent have known that the subsidiary's work system risked workers' rights?[261]

Given the current domestic and international push for regulatory disclosure and due diligence,[262] U.S. parent corporations should reasonably foresee the risk of violations within their supply chains, such that parent corporations should be responsible for violations because they breached the duty of care they owed to the workers within their supply chains. Corporate social responsibility is effectively trending and topically at the forefront of multinational organizations of which the United States is a member.[263] Domestically, the United States has previously demonstrated a willingness to find corporations liable for human rights violations under certain conditions.[264] Legislatively, the FAR epitomizes parent liability through its flow-down provisions by which contractors will be responsible for commissions and omissions of subcontractors and agents at each tier of the supply chain.[265] Although the FAR only applies to government contractors,[266] the willingness to find parent contractor liability for acts along the supply chain indicates that such a chain of liability is possible and in practice.

Notably, U.S. corporations are stepping up and altering their workplace codes of conduct to comply with the international focus on corporate social responsibility.[267] Through these voluntary commitments, corporations are thereby acknowledging—at least to an extent—that an onus is on them to manage their societal impact. Regardless of whether corporations knew of workers' rights violations within their supply chains, corporations should have foreseen the possibility of such a risk and therefore should not be able to evade responsibility.

Officer at Bon Appétit Management Company, who stated that "[t]he reality is that no company right now can be 100 percent sure there's no slavery in the supply chain").

261. *Chandler*, [2012] EWCA (Civ) 525 ¶ [33].

262. *See supra* Part I.

263. *See, e.g.*, *SDGs*, *supra* note 38 ("[E]radicate forced labour, end modern slavery and human trafficking"); INT'L LABOUR CONF., *supra* note 17, at 5 (focusing on the human rights impact of global supply chains).

264. *See* Herz, *supra* note 98, at 224 (detailing the intentions of the Sullivan Principles for U.S. Corporations Operating in South Africa); *see also Sullivan Principles*, *supra* note 93 (promoting equal employment practices for U.S. corporations in apartheid South Africa).

265. *Final FAR Rule Released*, *supra* note 56.

266. *Id.*

267. *See supra* Section I.A.2.

2. Displacing the Kiobel *presumption against extraterritoriality*

In *Kiobel*, the majority held that even when claims "touch and concern" the United States, the claims need to do so with "sufficient force to displace the presumption against extra-territorial application."[268] The *Kiobel* court declined to exercise jurisdiction over the Nigerian corporation because it found that all relevant conduct took place outside the United States and emphasized the importance of not wanting to create a precedent where other countries could hale U.S. citizens into foreign courts for alleged violations of international law.[269] However, these judicial concerns do not carry the same weight in claims against domestic parent corporations.

Significantly, allowing claims against parent corporations would not entail hauling foreign nationals into domestic courts because the concerned parent corporations would have been incorporated in the United States. Additionally, jurisdiction over alleged violations of workers' rights within global supply chains would not unduly interfere with the power of other political branches. In *Al Shimari*, the Fourth Circuit upheld jurisdiction over an ATS claim for torture abroad and specifically noted that allowing further litigation would not interfere with U.S. foreign policy because the political branches had already demonstrated that the United States would not tolerate acts of torture.[270] With specific reference to supply chains and corporate liability, current congressional legislation suggests that permitting courts to hear ATS claims against domestic corporations for acts abroad would not unduly interfere with foreign policy.[271]

Further, connecting the parent corporation to the acts of its subsidiaries through modes of tort liability could displace presumptions against extraterritorial application. Superior or agency liability theories prevent corporations from remaining free of responsibility for actions within their supply chains.[272] Directly linking corporations to the failures of their subsidiaries would encourage vigilance in avoiding the corporate excuse of ignorance as to poor operational practices and instead offer victims the appropriate avenue

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268. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125 (2013) (Alito, J., concurring); *see also supra* notes 145–51 and accompanying text.

269. *Kiobel*, 569 U.S. at 124–25.

270. *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014).

271. *See supra* Section I.A.2.

272. *See* KOEBELE, *supra* note 94, at 297 (introducing the agency principle as imposing liability based on contract concepts of a fiduciary relationship between a principal and agent).

for redress from the parent corporation.[273] Given that holding domestic parent corporations responsible for the commissions or omissions of their foreign subsidiaries would neither implicate the *Kiobel* presumption against extraterritoriality nor unduly surprise the corporate defendants, courts should recognize domestic parent corporations as appropriate defendants under the ATS for workers' rights violations within global supply chains.

CONCLUSION

The *Jesner* dissent emphasized that the true lingering ATS question must remain, "Who are today's pirates?"[274] Piracy, historically involving high seas conduct and ships considered stateless, fell under no specific national jurisdiction.[275] Pirates, enemies of all mankind, could accordingly be prosecuted wherever found, regardless of their nationality or where the piratic acts occurred.[276] Today, corporations are pirates: corporations have global reach, yet can often act with relative impunity in advancing their enterprises.[277] Corporations are arguably the most appropriate defendants under the ATS because they are global actors with power over individuals and, importantly, they are increasingly independent of government control.[278] A foreign worker's ability to sue a parent corporation in federal court under the ATS could incentivize corporations to undertake more diligent

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273. *See* Brian Seth Parker, *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1, 26 (2012) ("Companies evaluate and analyze investments and operations comprehensively, to the point that claiming ignorance serves as no excuse when evidence of human rights violations, or the risk of human rights violations, stemming from the company's involvement is objectively available.").

274. Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1427 (2018) (Sotomayor, J., dissenting).

275. CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 221–22 (2d ed. 2015); *see also* Herz, *supra* note 98, at 211 (explaining that acts of piracy often occurred outside territory of the United States and the foreign citizen's sovereign, which is why courts had difficulty exercising jurisdiction over piracy claims).

276. BRADLEY, *supra* note 275, at 221.

277. *Cf.* CORPORATE IMPUNITY, *supra* note 255, at 2 (tracking 450 cases of attacks, in two years, against human rights defenders in the fight for corporate accountability).

278. *See generally* Ratner, *supra* note 9, at 449–63 (arguing that corporations should have obligations under international law because they benefit from international law and are increasingly powerful within their respective States); John Ruggie, *The New Normal of Human Rights Due Diligence*, SHIFT (Mar. 22, 2018), https://www.shiftproject.org/news/john-ruggie-weighs-in-on-swiss-debate-on-mandatory-human-rights-due-diligence ("Human rights due diligence throughout the value chain is the most effective tool for companies to avoid involvement in human rights harm. It protects values and value alike.").

compliance obligations. If corporations know that the ATS remains an open door for foreign supply chain workers to have access to U.S. courts, these parent corporations could investigate and improve the transparency of their supply chains to tackle the risk of labor violations.

Although the current *Sosa* and *Kiobel*-colored ATS jurisprudence narrowly construes definitions of actionable torts and defendants, under the current international corporate social responsibility movement U.S. courts should hold the ATS doors open for foreign supply chain workers. U.S. parent corporations are, or should be, aware of the risk of workers' rights violations within their supply chains, and many corporations have shouldered the responsibility by improving their workplace codes of conduct. In finding in favor of the plaintiff in *Filartiga*, the Second Circuit reasoned that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[279] As international law exists among the nations of the world today, corporations have greater social and legal obligations to disclose and take responsibility for the human impact of their global supply chains. Accordingly, the ATS remains one of the most vital pathways into U.S. courts for wronged foreign workers.

If U.S. courts truly have an interest in preventing the nation from "serving as a safe harbor for today's pirates,"[280] the courts should recognize a broader array of actionable torts under the ATS and allow foreign workers to bring suits under the ATS to hold domestic parent corporations responsible for workers' rights violations within their global supply chains.

279. Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980).

280. Jesner v. Arab Bank, PLC., 138 S. Ct. 1386, 1428 (2018) (Sotomayor, J., dissenting).