Note

The Supreme Court as a Tool of Foreign Policy?: Why a Proposed Flexible Framework of Established Judicial Doctrine Better Satisfies Foreign Policy Concerns in Alien Tort Statute Litigation

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INTRODUCTION

Human rights victims and advocates in the United States have been dealt a near-fatal blow. Since 1980, human rights activists have used the Alien Tort Statute (ATS) to obtain redress for victims of human rights violations.[1] However, in the recent *Jesner v. Arab Bank* decision, the United States Supreme Court held that human rights victims can no longer sue foreign corporations in American courts under the ATS.[2] The result has been devastating to human rights litigators and plaintiffs alike.

In Cote d'Ivoire, child slaves were allegedly forced to harvest cocoa for the benefit of numerous multinational corporations, including Nestle and Cargill.[3] Children were kidnapped, forced to work fourteen-hour days without pay, and were subjected to torture and beatings.[4] The former child laborers filed a class action lawsuit against multiple international corporations in the Central District of California.[5] Following *Jesner*, the Ninth Circuit

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1. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397–98 (2018) (discussing the history of ATS litigation beginning with *Filartiga* (citing Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980))).
2. *Id.* at 1403.
3. Doe v. Nestle, S.A., 906 F.3d 1120, 1122–23 (9th Cir. 2018).
4. *Id.* at 1122.
5. *Id.*

promptly dismissed all foreign corporations from the suit, many of whom operated within Cote d'Ivoire.[6]

In Israel, civilians fell victim to thousands of unguided missile attacks from Hezbollah, which resulted in the death of forty-three Israeli civilians.[7] Bank Saderat Iran and Bank Saderat PLC, both foreign banks, allegedly aided the transfer of funds used for the attacks perpetrated by Hezbollah.[8] The Israeli civilians affected by the horrendous attacks brought an action under the ATS in the District Court for the District of Columbia,[9] but the D.C. Circuit, relying on *Jesner*, upheld the bar on foreign corporate liability and affirmed the lower court's decision to dismiss the plaintiffs' case against the banks.[10] In a similar case, families throughout the Middle East banded together to make a legal stand against Hamas and their alleged coconspirators.[11] Plaintiffs filed suit in the Eastern District of New York against Arab Bank, a Jordanian corporation that allegedly funded attacks completed by Hamas that killed members of the plaintiffs' families.[12] Again, the court used *Jesner* and would not allow a suit against a foreign corporation under the ATS to move forward.[13]

As shown above, *Jesner*'s bar on foreign corporate liability under the ATS has severely limited redress for victims of human rights abuses. However, the *Jesner* decision is emblematic of a series of restrictive rules and cases that have narrowed the scope of the ATS since the turn of the twenty-first century.[14] *Jesner* is

6. *Id.* at 1122, 1127 ("Defendants are large manufacturers, purchasers, processors, and retail sellers of cocoa beans. Several of them are foreign corporations that are not subject to suit under the ATS.").

7. Kaplan v. Cent. Bank of the Islamic Republic of Iran, 896 F.3d 501, 504–05 (D.C. Cir. 2018).

8. *Id.* at 505.

9. *Id.*

10. *Id.* at 516 ("We therefore affirm the district court's dismissal of the ATS claims against the Banks based on the Supreme Court's decision in *Jesner*.").

11. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1393–94 (2018).

12. *Id.*

13. *Id.* at 1403 ("[I]t would be inappropriate for courts to extend ATS liability to foreign corporations.").

14. *See, e.g.*, *id.* (eliminating all foreign corporate liability under the ATS); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) (barring all claims under the ATS where the relevant conduct took place in foreign jurisdictions); *see also* Rich Samp, *U.S. Supreme Court Continues To Nibble Away at Alien Tort Statute's Sweep*, FORBES (Apr. 25, 2018), https://www.forbes.com/sites/wlf/2018/04/25/u-s-supreme-court-continues-to-nibble-away-at-alien-tort

not only symptomatic of the Supreme Court's concern for sweeping ATS litigation;[15] it is largely symptomatic of the Court's fear of foreign policy implications and overstepping its constitutional boundaries.[16] The Supreme Court believes awarding remedies to victims of international laws may hamper the ability of the other branches to engage in other foreign policy solutions,[17] and thus has consistently curtailed the reach of the ATS.[18] The Supreme Court's struggle with the scope of the ATS highlights the question: what is the best way to balance the need for redress under the ATS while honoring legitimate foreign policy concerns with judicial intervention?

This Note proposes a three-step framework that applies traditional judicial doctrines to ATS claims in order to effectively balance the importance of providing remedies for victims of human rights violations in the interest of foreign policy against legitimate concerns of judicial interference in foreign affairs. Drawing on multiple court-fashioned foreign policy doctrines, this Note argues that the Court should employ and favor existing flexible judicial doctrines in the evaluation of ATS suits because it gives the political branches more options to implement foreign policy-making and promotes the United States' interest of being a human rights-compliant, global player.

Part I discusses the constitutional underpinnings of the Judiciary's wariness of involving itself in foreign affairs, the devel-

-statutes-sweep/ [https://perma.cc/2H9F-XNAU] (discussing the timeline of Supreme Court decisions that have narrowed the applicability of the ATS); Milena Sterio, *Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act*, 50 CASE W. RES. J. INT'L L. 127, 130 (2018) ("In light of such increasing reliance on the [ATS], since *Filartiga*, the Supreme Court has . . . weighed in to limit the scope and reach of the [ATS].").

15. *Jesner*, 138 S. Ct. at 1398 ("The extent and scope of this litigation in United States courts have resulted in criticism here and abroad."); *see also Leading Cases—Federal Statutes—Alien Tort Statute—Foreign Corporate Liability*—Jesner v. Arab Bank, PLC, 132 HARV. L. REV. 397, 397 (2018) (noting that the Supreme Court has increasingly become concerned with the rise of ATS litigation).

16. *See, e.g.*, *Jesner*, 138 S. Ct. at 1404 ("[S]ignificant foreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS.").

17. *Id.* at 1398 ("The Court was quite explicit, however, in holding that ATS litigation implicates serious separation-of-powers and foreign-relations concerns." (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 727–28 (2004))).

18. Samp, *supra* note 14.

opment of judicial doctrine to limit judicial interference in foreign affairs, and the history of the ATS. Part II discusses how the Supreme Court has overregulated itself in ATS jurisprudence for fear of judicial interference in the political branches' foreign affairs powers, leading up to and including the seminal *Jesner* decision. Part II then discusses the need for and advantages of having a flexible framework as applied to the evaluation of ATS claims. Part III proposes a three-step framework in which the Supreme Court applies three distinct judicial doctrines which address concerns raised by the Supreme Court. Part III then applies this framework to *Doe v. Nestle* in order to illustrate its effectiveness in alleviating the foreign policy concerns raised by the Supreme Court.

Ultimately, this Note argues that existing foreign policy doctrine promoting judicial restraint most effectively satisfies the judicial overreach concerns while allowing the political branches to effectuate their foreign policy preferences through the Judiciary. This Note fulfills a significant role in ATS, international human rights, and American foreign policy literature by providing a novel solution from a foreign policy perspective, incorporating and unifying disconnected ATS scholarship, and harmonizing judicial doctrinal practice in foreign relations law.

I. HISTORY OF FOREIGN POLICY RESTRAINT AND THE ALIEN TORT STATUTE

Courts have long been wary of impeding the political branches' ability to govern foreign affairs.[19] The Supreme Court has enunciated numerous doctrines giving significant deference to both the Legislative and Executive Branches in cases implicating foreign relations.[20] This Part addresses both the rationale of judicial deference in cases implicating foreign policy, as well as the origins and history of the ATS. Section I.A explores the

19. *See, e.g.*, Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

20. *See* 13C RICHARD D. FREER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534.2 (3d ed. Aug. 2019 update); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 659 (2000) ("Since early in the nation's history, courts have been reluctant to contradict the [E]xecutive [B]ranch in its conduct of foreign relations.").

constitutional underpinnings of judicial deference to the "political" branches in the realm of foreign affairs. Section I.B discusses the difference between judicial doctrines and the Court's evaluation of cases that implicate foreign policy. Section I.C traces the history of the ATS and its development as a tool for holding international human rights violators accountable in the face of foreign resistance.

A. CONSTITUTIONAL UNDERPINNINGS OF FOREIGN POLICY DEFERENCE

Judicial deference to other branches regarding foreign affairs is rooted within the notion of separation of powers.[21] To avoid tyranny and authoritarianism, the Founding Fathers constructed three separate branches of government, each endowed with their own responsibilities and abilities to check the power of the others.[22] John Jay and James Madison both expressed the importance of foreign policy-makers remaining independent and requiring specialized knowledge in foreign affairs.[23]

The Constitution explicitly delegates foreign affairs powers to both the Executive and Legislative Branches, but not to the Judiciary.[24] The President is the Commander in Chief of the Army and Navy of the United States,[25] has the ability to appoint ambassadors,[26] and may make treaties.[27] Congress has the ability to declare war,[28] maintain the Army and Navy of the United

21. *See* Catherine Henson Curlet, *Should a Statement of Interest Matter?: Judging Executive Branch Foreign Policy Concerns*, 44 GA. L. REV. 1063, 1070–71 (2010) (noting the rationale for judicial deference when dealing with foreign affairs).

22. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1 (3d ed. 2006) (emphasizing that the structure of the United States government serves to "lessen the possibility of tyrannical rule").

23. THE FEDERALIST NO. 3 (John Jay) (Jacob E. Cooke ed., 1961) (discussing the importance of shielding foreign policy makers from foreign influence); THE FEDERALIST NO. 53 (James Madison) (Jacob E. Cooke ed., 1961) (discussing the requirement that legislators have knowledge of foreign policy in order to ensure a functional government).

24. *See* U.S. CONST. arts. I–III.

25. *Id.* art. II, § 2, cl. 1.

26. *Id.* cl. 2.

27. *Id.*

28. *Id.* art. I, § 8, cl. 11.

States,[29] regulate commerce with other countries,[30] and to make laws for conduct at sea and incorporate and punish under international law.[31] The President must also submit treaties and ambassador selections to the Senate for "Advice and Consent."[32] The Constitution, however, does not wholly allocate the foreign affairs power to either the Executive Branch or the Legislative Branch, making the boundaries of policy-making responsibilities between the two political branches unclear.[33] Although the Judiciary is not afforded foreign policy-making powers, the Constitution does not limit the ability of courts to hear cases that implicate United States foreign relations as long as they satisfy the case and controversy requirements of Article III.[34]

In the face of numerous explicit grants of power to the Legislative and Executive Branches to govern foreign relations, the Judiciary has remained respectful of the foreign policy decisions of both branches.[35] Even in the foundational case, *Marbury v. Madison*, Chief Justice Marshall and the Supreme Court recognized that foreign policy, especially within the Executive Branch, requires judicial deference and limited judicial interference.[36] As a foreign policy-maker, the Executive Branch required

29. *Id.* cl. 12–13.

30. *Id.* cl. 3.

31. *Id.* § 10.

32. *Id.* art. II, § 2, cl. 2.

33. *See* Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 806 (1989) (explaining that the lack of textual disposition of foreign policy powers creates an unresolved process for courts that define the roles of the political branches in the foreign policy arena).

34. *See id.* ("[The Constitution] contains no textual basis for excluding, limiting or altering the role of the courts when the cases or controversies they are called upon to decide relate to U.S. foreign relations.").

35. *See, e.g.*, Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 132 (2d ed. 1996) (putting succinctly that "foreign affairs make a difference"); Bradley, *supra* note 20, at 663–64 (noting that early jurisprudence has remarked that domestic and foreign affairs are fundamentally different).

36. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166, 170 (1803); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 946 (2004) (explaining Justice Marshall's recognition of the inherently executive power of governing foreign policy).

"a high degree of flexibility,"[37] and traditional constitutional jurisprudence views the President as "the sole organ of the federal government in the field of international relations."[38] Despite older jurisprudence primarily focusing on the Executive Branch, legal scholars have been quick to note that the courts are also deferential to the foreign policy decisions of Congress.[39] Congress has been allocated substantial foreign law-making power by the Constitution.[40] Debate rages amongst separation of powers scholars on whether the Executive Branch or Legislative Branch should have "primacy" over foreign affairs.[41] However, in practice, the Supreme Court has remained deferential to both political branches and has largely abstained from cases involving international controversy.[42]

B. JUDICIAL DOCTRINES AFFORDING DEFERENCE IN CASES IMPLICATING FOREIGN POLICY

Three court-fashioned doctrines have special bearing on issues of foreign policy: (1) the Political Question doctrine; (2) the Exhaustion principle; and (3) the Act of State doctrine. Each doctrine is premised on the separation of powers and the explicit constitutional powers granted to specific bodies of government

37. *See* Bradley, *supra* note 20, at 663–64 (explaining the traditional rationale for giving deference to the Executive Branch).

38. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936); *see also* Regan v. Wald, 468 U.S. 222, 243 (1984) (noting that courts have traditionally given much deference to the concerns of the Executive Branch). *But see* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1245–57 (2007) (arguing against judicial deference for the Executive Branch in favor of scrutiny of foreign policy practice).

39. JOHN HART ELY, ON CONSTITUTIONAL GROUND 149 (1996) ("The Constitution gives the president no general right to make foreign policy. Quite the contrary. . . . [V]irtually every substantive constitutional power touching on foreign affairs is vested in Congress.").

40. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 240–41 (2001) (explaining that specific powers, such as the power to make laws in accordance with international law, challenge the view of "presidential primacy" over foreign affairs).

41. *See id.* at 237–52 (noting that supporters of executive primacy or legislative primacy over foreign policy-making must rely on extratextual evidence to support their positions).

42. *See* Nzelibe, *supra* note 36, at 970 (discussing the long history of judicial deference to the political branches in the context of foreign affairs).

vis-à-vis other governmental entities.[43] Courts created these judicial doctrines, born of federal foreign relations common law and not of statutes, in order to avoid making nuanced foreign relations determinations "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[44] In fear of stepping on the toes of the other branches, the Judiciary has created these legal doctrines in order to curb their exercise of judicial review because of their lack of foreign relations expertise, political accountability, and centralized decision-making.[45] This Section examines how courts use the different judicial doctrines to evaluate cases implicating foreign policy and the political branches concerns.

1. Political Question Doctrine

The Political Question doctrine developed during the nineteenth century and was first invoked in *Marbury v. Madison*.[46] Justice Marshall noted that the Constitution vests the President "with certain important political powers" that allow the President to exercise their own discretion subject only to the electorate and "[their] own conscience."[47] Justice Marshall declared that these actions taken by the President, despite the Judiciary's own opinion, are "political" and not subject to the power of the Judiciary.[48] After Justice Marshall articulated that political subjects are not subject to review, courts have since clarified how to identify a Political Question.[49] The Political Question doctrine

43. *See* Curlet, *supra* note 21, at 10–72 (discussing that the heart of the issue for judicial deference to foreign policy decisions is separation of powers considerations).

44. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

45. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1668–69 (1997) (explaining that these rationales underlie the creation of the Political Question, Act of State, and other judicial doctrines in foreign affairs).

46. 5 U.S. (1 Cranch) 137 (1803).

47. *Id.* at 165–66.

48. *Id.* at 166 ("In such cases, [these] acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political.").

49. *See* Seth Korman, *The New Deference-Based Approach to Adjudicating Political Questions in Corporate ATS Cases: Potential Pitfalls and Workable*

itself was rarely invoked from its inception[50] until its revival in *Baker v. Carr*.[51] Justice Brennan and the *Baker* Court sought to clarify the ambiguities and confusion surrounding the meaning of a political question by announcing a six-factor test.[52] According to this approach, courts will pass upon a legal issue if: (1) the Constitution attributes the issue to another branch; (2) there are not judicially manageable standards for resolution; (3) the court must make a policy determination; (4) the decision shows disrespect to the political branches; (5) there is a need to adhere to an already-made political decision; or (6) there is a potential for international embarrassment to the United States.[53] While *Baker* led to clearer standards for evaluation, some argue that *Baker* has constrained the Judiciary's ability to hear traditionally justiciable questions,[54] and some note that lower courts have increasingly declared justiciable issues to be political, and therefore, fail to hear meritorious claims.[55]

The application of the Political Question doctrine in the context of foreign affairs implicates different concerns than in the context of purely domestic disputes. While the Judiciary has

Fixes, 9 RICH. J. GLOBAL L. & BUS. 85, 94 (2010) (tracking the development of the Political Question doctrine).

50. *Id.*

51. 369 U.S. 186 (1962).

52. *Id.* at 210–26.

53. *See* Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) ("'[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'" (quoting *Baker*, 369 U.S. 186, 217)).

54. *See, e.g.*, Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1478 (2005) ("[I]f the Court concludes that the resolution of certain constitutional questions would be inconsistent with proper performance of its essential role in our system of government, then it should invalidate efforts by the political branches to require it to do so.").

55. *See* LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 82 (1990); *see also Developments in the Law—The Political Question Doctrine, Executive Deference, and Foreign Relations*, 122 HARV. L. REV. 1193, 1196–201 (2009) (noting that lower courts have added more factors to the *Baker* analysis and have confused the issue).

used the Political Question doctrine less and less in purely domestic cases,[56] the doctrine has remained present and at the forefront of foreign relations cases.[57] Although employed frequently, the Supreme Court has not clearly articulated how *Baker* and the Political Question doctrine should apply in cases regarding foreign policy-making.[58] *Baker* recognizes that an argument can be made that "all questions touching foreign relations are political questions . . . [y]et it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[59] However, the Supreme Court has not given instruction in relation to these three unique challenges: (1) how to weigh traditional judicial deference to the political branches, especially the Executive Branch; (2) how to incorporate legal standards derived from international law; and (3) how to determine the risk of harm to the international reputation of the United States during litigation of foreign relations cases.[60] Consequently, *Baker*'s indeterminate Political Question doctrine factors have led to much confusion and unpredictable outcomes.[61]

Legal scholars have attempted to simplify the *Baker* factors to distill the Supreme Court's goals and aims in foreign policy

56. *See generally* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239–73, 300–19 (2002) (discussing and tracking the judicial movement away from using the Political Question doctrine).

57. *Id.* at 329 ("[T]he political question doctrine has remained more vibrant in the foreign relations context than in the domestic context . . . ."); Bradley, *supra* note 20, at 660 ("[A]lthough this 'pure' version of the political question doctrine has waned substantially in recent years as a general matter, it still appears to have some force in the foreign affairs area.").

58. *See generally* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 10–30 (1992) (identifying the inconsistent applications of the Political Question doctrine in cases implicating foreign affairs).

59. Baker v. Carr, 369 U.S. 186, 211 (1962). Some circuit courts, such as the Second Circuit, have articulated that "an assertion of the political question doctrine by the Executive Branch . . . would not necessarily preclude adjudication." Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995).

60. *See* Lisa Rudikoff Price, *Banishing the Specter of Judicial Foreign Policymaking: A Competence-Based Approach to the Political Question Doctrine*, 38 N.Y.U. J. INT'L L. & POL. 323, 335–36 (2006) (describing the unique challenges that foreign relations cases pose to the Political Question doctrine).

61. *See* Korman, *supra* note 49, at 95.

cases. The first three factors are commonly classified as the "judicially manageable standards" or "prudential" requirement of the Political Question doctrine.[62] The judicially manageable standards concern themselves with judicial restraint, making sure that courts rely on the Constitution, law, or statute to justify their conduct or legal analysis rather than inserting the Judiciary's foreign policy preference.[63] The last three factors are the "respect" requirement or "international reputation" requirement within the context of foreign relations cases.[64] Recognizing that "the President alone has the power to speak or listen as a representative of the nation,"[65] courts will give considerable weight to the Executive's views when the Political Question doctrine is invoked in the context of foreign affairs.[66] Executive statements, therefore, have much bearing on the court's evaluation of the respect requirement, especially the embarrassment assessment of the *Baker* factors.[67] This two-part simplification by legal scholars may provide guidance in discerning the Supreme Court's messy Political Question doctrine application.

62. *See id.* at 109 ("[T]he first three *Baker* factors . . . are reduced to the question of whether the matter before the court is a violation of international law . . . ."); Nzelibe, *supra* note 36, at 963 ("The most widely cited prudential or institutional competence factor involves the claim that the disputed issue 'lack[s] . . . judicially discoverable and manageable standards.'" (alterations in original)); Stewart Pollock, *A Political Embarrassment: Jurisdiction and the Alien Tort Statute, Foreign Sovereign Immunities Act, and Political Question Doctrine*, 51 CAL. W. L. REV. 225, 242 (2015) ("The first three parts of the *Baker* test concern the separation of powers . . . .").

63. *See* Nzelibe, *supra* note 36, at 962–65 (explaining the significance of the prudential requirement for judicial restraint).

64. *See* Korman, *supra* note 49, at 109 ("[T]he last three *Baker* factors . . . are really three separate ways of asking the question of whether adjudication infringes on the executive's ability to conduct the nation's foreign affairs."); Pollock, *supra* note 62, at 242 ("[T]he last three [parts of the *Baker* test] concern issues of respect."); Price, *supra* note 60, at 336 ("[T]he risk of harm to the international reputation of the United States is thought to come into play in foreign relations cases, implicating the final three *Baker* factors."); *The Political Question Doctrine*, *supra* note 55, at 1196 (noting that the courts are particularly interested in the three respect factors).

65. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936).

66. *See* Thomas R. Sutcliffe, Note, *"The Nile Reconstituted": Executive Statements, International Human Rights Litigation, and the Political Question Doctrine*, 89 B.U. L. REV. 295, 301 (2009).

67. *See id.* (explaining the weight courts should give to executive statements).

2. The Exhaustion Principle

The Exhaustion principle requires a claimant to first seek relief in a forum where the harm occurred.[68] Under international law, states are not required to hear claims by foreign nationals until they have exhausted all of their domestic remedies, unless the state does not offer adequate remedies.[69] The judicial doctrine originated within international jurisprudence and is customary international law.[70] Within the international arena, the International Court of Justice first recognized the Exhaustion principle in the *Interhandel Case*.[71] The International Court of Justice held that before a national could bring action against another state outside the forum of the respective state, the Exhaustion principle allows "the State where the violation occurred . . . [to] have an opportunity to redress [the violation] by its own means, within the framework of its own domestic legal system."[72] Within the American context, the Supreme Court first announced the principle of Exhaustion in *Banco Nacional de Cuba v. Sabbatino*.[73] The Court in *Sabbatino* noted that foreign individuals seeking relief in American courts normally should exhaust local remedies before looking for a remedy outside the borders of where the conduct took place.[74] Remedies can include and are not limited to judicial, administrative, and legislative

68. Regina Waugh, Note, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 555, 556 (2010) (explaining the Exhaustion of Remedies principle).

69. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. f (AM. LAW INST. 1987) ("Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.").

70. *See* Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1247–50 (2006) (tracking the historical roots of the Exhaustion principle).

71. Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6, 27 (Mar. 21).

72. *Id.*

73. 376 U.S. 398 (1964).

74. *Id.* at 422–23 ("Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.").

remedies.[75] The Exhaustion principle provides a procedural caution rooted in both international and domestic law.

3. Act of State Doctrine

The Act of State doctrine prevents plaintiffs from "inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."[76] The Supreme Court offered its rationale behind the doctrine in *Banco Nacional de Cuba v. Sabbatino*.[77] The doctrine reflects the Judiciary's hesitancy to engage "in the task of passing on the validity of foreign acts of state" because it "may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[78] The purpose of the Act of State doctrine is to balance relevant considerations to determine if a court's decision would impede the Executive's ability to engage in foreign affairs.[79] The Supreme Court offered three such factors in order to determine the court's ability to adjudicate: (1) "the degree of codification or consensus concerning a particular area of international law"; (2) whether there are "important . . . implications of an issue . . . for our foreign relations"; and (3) whether "the government which perpetrated the challenged [A]ct of [S]tate is no longer in existence."[80] However, the Supreme Court made clear that the factors were not to be interpreted as "an inflexible and all-encompassing rule."[81]

The rationale behind the Act of State doctrine is rooted in political considerations rather than within international law.[82] The Judiciary was concerned with issues of foreign sovereignty

75. *See* Duruigbo, *supra* note 70, at 1249 (noting that a variety of remedial types must be exhausted).

76. *Sabbatino*, 376 U.S. at 401. The original formulation of the Act of State doctrine is "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

77. *Sabbatino*, 376 U.S. at 421–27.

78. *Id.* at 423.

79. Sutcliffe, *supra* note 66, at 322.

80. *Id.* (quoting *Sabbatino*, 376 U.S. at 428).

81. *Sabbatino*, 376 U.S. at 428.

82. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 85–88 (2009) (noting that the Act of State doctrine is rooted in constitutional arguments rather than a reflection of international law practices).

infringement.[83] However, it is important to note that the Act of State doctrine does not categorically bar all suits involving a contested action by a foreign sovereign.[84] In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*,[85] the Supreme Court clarified that the doctrine applies only "when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."[86] The Supreme Court made a distinction between inquiring about the legality of a foreign action and the validity of a foreign action; legality of an action would be in reference to applicable American law, while validity of a foreign official action would be in reference to the foreign political and legal mechanisms through which official acts were decided and executed.[87] Respecting the validity of an official foreign act promoted the aversion of international conflict and prevention of undermining foreign government political processes by American courts.[88] The Act of State doctrine provides a procedural avenue for courts to avoid direct contestation of foreign state action.

C. THE HISTORY OF THE ALIEN TORT STATUTE

The ATS was part of the Judiciary Act of 1789.[89] The ATS allows for internationally-recognized torts to be recognized in American courts.[90] The federal statute reads simply as: "[t]he district courts shall have original jurisdiction of any civil action

83. *See id. But see* Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1960 (2003) (arguing that twentieth century concepts of national sovereignty immunity need to be changed in light of twenty-first century international commitments).

84. *See* Bradley, *supra* note 20, at 719–21 (addressing the post-*Sabbatino* decision approach to the Act of State doctrine).

85. 493 U.S. 400 (1990).

86. *Id.* at 406 (emphasis omitted).

87. *Id.* at 409 ("The [A]ct of [S]tate doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

88. *See* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1940 (1992) (arguing that the Act of State doctrine promotes harmony of international relations rather than harmony of international law).

89. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

90. *Id.* at 719–20.

by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[91] The First Congress enacted the jurisdictional grant following two international incidents involving foreign diplomats.[92] First, in 1784, French diplomat Francois de Barbee Marbois was insulted and physically assaulted by a French national in Philadelphia.[93] The Pennsylvania state court refused to subject the diplomat's attacker to international law, remedy, and extradition.[94] Second, Dutch diplomat Pieter Johan van Berckel had his diplomatic party searched by a New York law enforcement officer in violation of basic diplomatic privileges.[95] When pleading to then American foreign affairs secretary John Jay, Jay responded that "the foederal [sic] Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases."[96] In order to gain international legitimacy and gain admission into the European-based system of sovereign nations, Congress enacted the ATS.[97] The statute gave a civil cause of action for foreign plaintiffs and domestic recognition of international law; however, foreign plaintiffs rarely invoked the ATS for nearly 200 years.[98]

91. 28 U.S.C. § 1350 (2018).

92. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 466–67 (2011) (chronicling the events leading up to the passage of the ATS).

93. *Id.* at 467.

94. *Id.*

95. *Id.*

96. John Jay, *in* 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 111, 111 (Roscoe R. Hill ed., 1937).

97. *See* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 935–36 (2010) (explaining the importance for a young American government to gain international recognition); *see also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 481–88 (1989) (arguing that the ATS was passed for the purposes of national security, national duty to propagate and enforce international law, and the honoring of state practice and the international arena).

98. *See* Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 211 (2008). Three prominent cases have been brought under the ATS: IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975) (rejecting a claim brought under the ATS for theft within a transnational securities transaction); Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (involving a potential violation of passport control laws in an international child custody

The operative phrase within the ATS is "committed in violation of the law of nations."[99] The "law of nations" is a dynamic term; it refers to customary international law incorporated as part of federal common law.[100] The eighteenth century conception of the law of nations was nuanced and had multiple, concurrent meanings.[101] The law of nations was: (1) "a broad term for all international law"; (2) "included principles of domestic law perceived to be shared by all civilized nations"; (3) "a source of the U.S. law of federalism"; and (4) "perceived in part as unwritten natural law."[102] While the law of nations in the eighteenth century was a complex idea, customary international law today is defined as "a general and consistent practice of states followed by them from a sense of legal obligation."[103] Customary international law requires state practice, a sense of legal obligation, and a substantial period of time passed in order for a practice to become legally binding.[104] Initially, customary international law governed conduct between states, diplomats, and the regulation of the seas.[105] Post-World War II brought forth a dramatic trans-

case); and Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1785) (involving a French captain attempting to recover slaves he had captured from a Spanish ship). In *Vencap*, the court called the statute "a kind of legal Lohengrin . . . no one seems to know whence it came." 519 F.2d at 1015.

99. 28 U.S.C. § 1350 (2018).

100. *See* Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707, 1709 (2018) ("The law of nations was the original federal common law."). Although courts have accepted this argument for the sake of bringing ATS suits, there is still lively debate within legal scholarship if the ATS is constitutionally consistent with the *Erie* doctrine. For a discussion, compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852–70 (1997) (arguing that the *Erie* doctrine prevents the Courts from applying customary international law without further authorization from Congress), with William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 21–25 (2007) (arguing that the founding generation of judges understood that customary international law would be incorporated regardless of Congressional authorization).

101. *See* Lee, *supra* note 100, at 1716.

102. *Id.*

103. *See* Bradley & Goldsmith, *supra* note 100, at 817–18.

104. *Id.* at 838–39.

105. *Id.* at 818 ("Historically, CIL [customary international law] governed relations among nations, such as the treatment of diplomats and the rules of war.").

formation with the recognition of individuals and the rise of human rights.[106] New international organizations, treaties, and state practices created an international human rights regime and recognition of new individual rights.[107] In the course of centuries of international law, international human rights law is a relatively recent phenomenon.[108]

With the development of new customary international law practices and human rights jurisprudence, the ATS incorporated human rights for the first time in 1980 in *Filartiga v. Pena-Irala*.[109] In *Filartiga*, the family of Joelito Filartiga sued a Paraguayan police officer, Americo Pena-Irala, who tortured and killed Filartiga, under the ATS.[110] Initially, the district court dismissed the case, feeling obligated to "construe narrowly 'the law of nations,' . . . as excluding that law which governs a state's treatment of its own citizens."[111] However, the Second Circuit reversed the district court's decision on the grounds that international law clearly prohibits state-sponsored torture.[112] The high-profile *Filartiga* decision reinvigorated human rights advocates and signaled to the world that United States courts would provide a forum for victims of human rights abuses.[113]

Following *Filartiga*, plaintiffs filed hundreds of federal cases under the ATS.[114] Defendants have ranged from foreign

106. *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 9–12 (1982) (tracking the historical development of international human rights law).

107. *Id.*

108. *Id.* (noting that human rights was not legally recognized until the mid-twentieth century).

109. 630 F.2d 876, 878 (2d Cir. 1980). Notably, plaintiffs could not bring human rights claims under customary international law until recently because human rights law did not exist for much of the ATS's existence. *See supra* notes 106–08 and accompanying text.

110. *Filartiga*, 630 F.2d at 878–79.

111. *Id.* at 880.

112. *Id.* at 884–85.

113. *See* Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from* Kiobel*'s "Touch and Concern" Test*, 66 HASTINGS L.J. 443, 446–47 (2015) ("The ATS is, at least operatively, a human rights statute."); Korman, *supra* note 49, at 91–92.

114. *See* Korman, *supra* note 49, at 92. Following *Filartiga*, many Holocaust survivors brought ATS claims against Swiss banks within United States courts. For a brief description of the ATS litigation, see MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 54–58 (2003).

governments[115] to multinational corporations.[116] In corporate ATS cases, foreign plaintiffs brought federal lawsuits against corporate defendants for either complicit or direct liability for violations of customary international law.[117] While foreign governments would routinely escape liability by invoking a tortured sovereign immunity analysis or complex Act of State doctrine application,[118] corporations did not enjoy the same luxury. Instead, corporations brought to federal court under the ATS have asserted that they were not subject to federal jurisdiction due to foreign policy implications.[119] Disgruntled multinational corporations and the Bush Administration in the early 2000s proceeded to put pressure on the Supreme Court to invalidate or narrow the ATS.[120] Even questions about the validity of the ATS from legal scholars[121] contributed to an inevitable clash between the ATS and the Supreme Court at the turn of the twenty-first century.

II. REMOVING EFFECTIVENESS: THE SUPREME COURT SEVERELY LIMITS THE REACH OF THE ATS

Beginning in 2004 with *Sosa v. Alvarez-Machain*,[122] the Supreme Court began to curtail the broadly and inconsistently-applied ATS. Over the next fourteen years, the Supreme Court used the rhetoric of "foreign policy consequences" in order to: (1) create judicially manageable standards for the types of actions that can be brought forward;[123] (2) bar lawsuits alleging human

115. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (suing Libya under the ATS).

116. *See, e.g.*, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (suing Unocal Corp. under the ATS).

117. Korman, *supra* note 49, at 93.

118. *Id.* at 92.

119. *Id.* at 96–97.

120. *See* Richard Herz, *Text of Remarks: Corporate Alien Tort Liability and the Legacy of Nuremberg*, 10 GONZ. J. INT'L L. 76, 76 (2006) ("[T]he Bush Administration has vigorously opposed the use of complicity liability in Alien Tort Statute litigation. Actually, they vigorously opposed any use of the Alien Tort Statute whatsoever. They lost that issue before the Supreme Court two years ago in *Sosa v. Alvarez-Machain*. Now, they are attempting to do retail what they were unable to do wholesale, by attacking various aspects of the Alien Tort Statute . . . .").

121. *See supra* note 100 and accompanying text.

122. 542 U.S. 692 (2004).

123. *Id.* at 725, 727–28.

rights violations that took place in foreign jurisdictions;[124] and (3) eliminate the liability of foreign corporations.[125] Section II.A explores the three seminal ATS cases decided by the Supreme Court and its use of foreign policy doctrine. Section II.B examines the pitfalls of the inflexible approaches in the Supreme Court's two most recent ATS opinions. It argues that the Supreme Court's strict elimination of ATS cases based on hard-line rules undermines the flexibility needed to promote the separation of powers.

A. THE SUPREME COURT DEFINES THE PARAMETERS OF BRINGING ATS CASES AFTER TWO DECADES OF LITIGATION

Section II.A. tracks current Supreme Court ATS jurisprudence, taking special notice of the restrictive rules placed on ATS suits by the Court. Section II.A.1 details *Sosa v. Alvarez-Machain* and the court-mandated qualifications to recognize a cause of action under the ATS.[126] Section II.A.2 explores *Kiobel v. Royal Dutch Petroleum Co.* and the "touch and concern" requirement to overcome the presumption against extraterritoriality, which represents the first bright-line rule the Court applied to the ATS.[127] Section II.A.3 analyzes the most recent restriction placed upon the ATS by the Court in *Jesner v. Arab Bank*, which ruled that foreign corporations cannot be liable under the ATS.[128]

1. Defining Causes of Action Under the ATS

In 1985, an American DEA agent was captured, tortured, and murdered while on assignment in Mexico.[129] Alvarez-Machain, a Mexican physician, attended the torture of the DEA agent and allegedly kept the agent alive for further torture.[130] A California district court indicted Alvarez-Machain for torture and

124. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).
125. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018).
126. *Sosa*, 542 U.S. at 725.
127. *Kiobel*, 569 U.S. at 124–25.
128. *Jesner*, 138 S. Ct. at 1403.
129. *Sosa,* 542 U.S. at 697.
130. *Id.*

murder, and the DEA asked for the Mexican government to assist in his recovery.[131] When the Mexican government denied assistance, the DEA orchestrated and executed a plan to have Mexican nationals kidnap and transport Alvarez-Machain to the United States to stand trial.[132] Following acquittal of his criminal charges, Alvarez-Machain brought a civil suit under the ATS against his Mexican kidnappers and the American DEA agents who coordinated the kidnapping.[133] The district court awarded Alvarez-Machain $25,000 in damages, and the Ninth Circuit affirmed.[134]

The Supreme Court reversed the Ninth Circuit and held that Alvarez-Machain could not recover under the ATS.[135] The majority determined that, although the ATS is written in terms of a jurisdictional grant, the drafting Congress sought to have courts hear common law claims defined under the "law of nations."[136] However, in order to successfully identify a private action under the modern-day law of nations, courts must only recognize private claims that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[137] Specifically, the Court used the three central eighteenth-century international law violations—"violation of safe conducts, infringement of the rights of ambassadors, and piracy"—as examples of specific international law norms widely accepted.[138] The Supreme Court also praised the

131. *Id.* at 697–98.

132. *Id.* at 698.

133. *Id.*

134. *Id.* at 699.

135. *Id.* at 697.

136. *Id.* at 729–31. The United States argued that the ATS was purely jurisdictional and required further congressional action. *See* Brief for the United States as Respondent Supporting Petitioner at 6–8, *Sosa*, 542 U.S. 692 (No. 03-339), 2004 WL 182581, at *35 (arguing that without a congressional grant of action, recognition of private causes of action would violate the separation of powers).

137. *Sosa*, 542 U.S. at 725.

138. *Id.* at 724 (relying on Blackstone to understand what the First Congress's understanding of the law of nations was). *But see* Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004) (analyzing the international law against piracy and finding that the historical paradigms of piracy make it difficult for judges to recognize modern customary international law norms).

lower courts' articulable standards of requiring international law norms to be "specific, universal, and obligatory."[139] Ultimately, because Alvarez-Machain could not identify any customary international law or treaties that recognized arbitrary arrest within the same historical paradigms when the ATS was enacted, he did not have a cause of action and could not bring suit under the ATS.[140]

Along with general concerns of encroaching on the *Erie* doctrine's ban on federal common law causes of action[141] and fears of acting in a quasi-legislative fashion,[142] the Court's chief concern was allowing non-existent or less-established international causes of action forward.[143] These ill-defined causes of actions would have "potential implications for the foreign relations of the United States . . . [and] imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs."[144] The majority noted that modern development of international law concerns itself with holding states and foreign agents accountable, a task that the Court found would "raise risks of adverse foreign policy consequences."[145] The majority

139. *Sosa*, 542 U.S. at 732 (defining actions as "definable, universal and obligatory norms" (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring))); *In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.").

140. *Sosa*, 542 U.S. at 733–38 (detailing that the international community had not recognized arbitrary arrest as a universally accepted law norm).

141. *Id.* at 726 (explaining the "significant rethinking" of the ability of federal courts to create a federal general common law (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938))).

142. *Id.* at 727 ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.").

143. *See id.* at 725.

144. *Id.* at 727.

145. *Id.* at 728; *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (criticizing the notion that the ATS should allow "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens"). *But see* Brief of Career Foreign Service Diplomats as Amici Curiae in Support of Respondent, *Sosa*, 542 U.S. 692 (No. 03-339), 2004 WL 419428, at *11–17 (arguing that the U.S. has significant foreign policy interests in supporting human rights, complying with internationally-recognized individual rights, and allowing the Executive Branch to endorse ATS litigation).

suggested that case-specific deference may and should be applied in ATS cases, subject to the Executive's view of the case.[146] Additionally, both the majority opinion and Justice Ginsburg's concurrence suggested that the Exhaustion principle may apply.[147] However, the Court failed to clarify or mandate the use of case-specific deference and the Exhaustion principle.[148] Although the Court clarified which international law actions can be brought, it failed to instruct the lower courts what the role of traditional judicial doctrines should be during the course of ATS litigation.

2. The Presumption Against Extraterritoriality

In *Kiobel v. Royal Dutch Petroleum Co.*,[149] Kiobel and other residents in the Niger delta protested the environmental impact of oil exploration by Shell Petroleum Development Company of Nigeria, Ltd. (Shell), owned by Royal Dutch Petroleum Company in the Netherlands and Shell Transport and Trading Company, p.l.c. in England.[150] Shell enlisted the Nigerian military and police forces for security, who allegedly attacked villages and killed, raped, and arrested residents.[151] Following the atrocities committed by Nigerian forces, Kiobel moved to the United States and subsequently sued the three companies under the ATS.[152] The Second Circuit dismissed the complaint in its entirety, holding that the law of nations does not recognize corporate liability.[153] However, the Supreme Court circumvented the question of corporate liability and asked whether ATS suits may be brought for conduct arising entirely outside of the United States.[154]

146. *Sosa*, 542 U.S. at 733 n.21.

147. *Id.* at 733 n.21, 760 (Ginsburg, J., concurring) ("The Court also suggests that principles of exhaustion might apply . . . ."); *see also* Beth Stephens, Sosa v. Alvarez-Machain*: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 562 n.138 (2004) (suggesting that challenging ATS litigation on the basis of the Exhaustion principle may be the most appropriate challenge in some cases).

148. *See generally Sosa*, 542 U.S. 692.

149. 569 U.S. 108 (2013).

150. *Id.* at 113.

151. *Id.*

152. *Id.*

153. *Id.* at 114.

154. *Id.* (posing the question "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of

The Supreme Court affirmed the decision of the Second Circuit to dismiss the ATS suit, finding the ATS does not apply extraterritorially.[155] The Court relied on the statutory canon known as the presumption against extraterritorial application.[156] The presumption against extraterritorial application is the presumption that American law "governs domestically but does not rule the world," which works to avoid conflicts between the domestic law of the United States and the law of other nations.[157] Although the Court noted that the presumption typically applies to Acts of Congress regulating conduct abroad,[158] the majority found the concern of judicial interference into foreign policy compelling enough to justify the application of the presumption against extraterritoriality.[159] The Court found that the statutory language,[160] legislative history,[161] and historical context[162] did not rebut the presumption against extraterritorial application of the ATS for conduct occurring in a foreign territory. Justice Roberts argued that extraterritorial application of the ATS leads to foreign policy blunders, pointing to the long list of objections by foreign states in *Doe v. Exxon Mobil Corp*.[163]

nations occurring within the territory of a sovereign other than the United States." (second alteration in original)).

155. *Id.* at 124–25.

156. *Id.* at 115.

157. *Id.* (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

158. *Id.* at 116 ("We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad. . . . The ATS, on the other hand, is strictly jurisdictional." (internal citations omitted)). *But see id.* at 127, 133 (Breyer, J., concurring in part) (arguing against the use of the presumption against extraterritoriality and that the ATS can have extraterritorial application in cases where "distinct American interests are at issue" as determined by existing judicial limiting principles such as case-specific deference).

159. *Id.* at 117 (majority opinion) ("These concerns are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are 'specific, universal, and obligatory.'" (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004))).

160. *Id.* at 118 (explaining that the generic language of "any" in "*any* civil action" does not rebut the presumption against extraterritoriality).

161. *Id.* at 119–23 (arguing that the three principal offenses against the law of nations did not involve the application of extraterritoriality).

162. *Id.* at 123–24 (finding that the passage of the ATS was to supply judicial relief to foreign dignitaries injured within the United States).

163. *Id.* at 124 (noting objections of Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom (citing Doe v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part))). Other foreign states directly stated their objection to applying the

Even claims that "touch and concern the territory of the United States" must "displace the presumption" with "sufficient force."[164] The *Kiobel* decision closed the door for any ATS cases involving purely foreign conduct to be brought forward.

Although concurring in the judgement, four of the justices disagreed with the inflexible rule applied by the majority.[165] Noting that *Sosa* suggested deferential practices and the Exhaustion principle,[166] Justice Breyer suggested finding jurisdiction where "distinct American interests are at issue."[167] Keeping the ATS available for application extraterritorially preserves the United States' interest in "not becoming a safe harbor for violators" and "compensating those who have suffered harm at [their] hands."[168] Other nations routinely allow foreign plaintiffs to bring suits against other nationals in their courts, and national courts have taken the responsibility of recognizing international claims that fall under universal jurisdiction.[169] Limiting principles, such as the Exhaustion principle and deferential weight to the Executive Branch, would further limit the possibility of a foreign blunder.[170] Ultimately, the concurrence argued that using existing judicial doctrine in foreign relations law more readily

ATS extraterritorially. *See, e.g.*, Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents at 1, 10, *Kiobel*, 569 U.S. 108 (No. 10-1491), 2012 WL 379578, at *1, *10 (noting concern of extraterritorial application of the ATS); *see also* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 874 (2009) (warning that the growing extraterritorial application of law is unilateral imposition that undermines consent-based rules).

164. *Kiobel*, 569 U.S. at 124–25 (noting specifically that multinational corporations are present in the United States, and "it would reach too far to say that mere corporate presence suffices" to displace the presumption). *But see* Doyle, *supra* note 113, at 445–46 (noting that the Supreme Court did not define the "touch and concern" test and offering a balancing test application of the "touch and concern" test based on the Court's dicta).

165. *Kiobel*, 569 U.S. at 127 (Breyer, J., concurring in part) ("Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, [I would be] guided in part by principles and practices of foreign relations law . . . .").

166. *Id.* at 128.

167. *Id.* at 133.

168. *Id.*

169. *Id.* at 136–37; *see also* Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in* Kiobel *and Beyond*, 44 GEO. J. INT'L L. 1329, 1339–41 (2013) (finding the law of nations recognizes universal jurisdiction and *Kiobel*'s ruling is in direct conflict with the ATS).

170. *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring in part).

adjusts for foreign policy preferences of the political branches and is more harmonious with international practices.[171]

3. The Elimination of Foreign Corporate Liability Under the ATS

In *Jesner v. Arab Bank*, foreign nationals from the Middle East, including the named plaintiff, Jesner, pled that they and their families were victims injured and killed by terrorist acts during a ten-year period.[172] Jesner sued Arab Bank, PLC under the ATS for laundering money on the behalf of the terrorists who perpetuated the attacks.[173] Arab Bank allegedly helped fund Hamas and their terrorist activities in part by transmitting money through its New York City offices by electronic transfer.[174] The Second Circuit affirmed the lower court's ruling that the ATS claim could not be brought, but there was a significant split in reasoning with respect to the justification for the dismissal.[175] The majority concluded that the ATS did not apply to corporations because international criminal tribunals have limited their jurisdiction to natural persons.[176] The concurrence found that international law recognized civil corporate liability in this instance, but used *Kiobel*'s presumption against extraterritoriality framework to hold that there was no relevant conduct within the United States that could support a claim in a federal district court.[177] Foregoing the rule against extraterritoriality application from *Kiobel*, the Supreme Court then turned to the question of corporate liability and created a new rule.

171. *Id.* at 139 ("Thus, the jurisdictional approach that I would use is analogous to, and consistent with, the approaches of a number of other nations."). For a discussion of the different rationales that could be used to justify *Kiobel*'s rule against extraterritoriality application, see David L. Sloss, Kiobel *and Extraterritoriality: A Rule Without a Rationale*, 28 MD. J. INT'L L. 241, 255 (2013) (arguing that the Court's rationale for applying the bar on extraterritoriality application of the ATS should have led to a different outcome).

172. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1394 (2018).

173. *Id.* at 1394–95.

174. *Id.* Arab Bank argued that the CHIPS system that transferred the money electronically did not pass the "touch and concern" test because it occurred purely as a mechanical function without human intervention in the "blink of an eye." *See id.* at 1394–95, 1406.

175. *Id.* at 1395.

176. *Id.* at 1395–96.

177. *Id.* at 1396. The concurrence noted that civil corporate liability under the ATS was recognized by the Seventh, Ninth, and District of Columbia Circuit

In a 5–4 decision authored by Justice Kennedy, the Supreme Court decided that the ATS did not apply to foreign corporations.[178] Justice Kennedy used three justifications. First, international criminal tribunal charters only recognized criminal liability for natural persons, not corporations.[179] Second, in the ATS's vagueness, separation of powers dictated that the Supreme Court should not decide if foreign corporations may be sued; it should be left to the political branches to decide the foreign policy.[180] Third, if the Supreme Court recognized jurisdiction over foreign corporations, it would open up multinational corporations to liability,[181] strain American relationships with foreign nations,[182] and open up liability for American companies investing abroad.[183] Justice Kennedy claimed that, like the rule

Courts of Appeals. *Id.* (citing Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1020–22 (9th Cir. 2014); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017–21 (7th Cir. 2011); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 40–55 (D.C. Cir. 2011)).

178. *Jesner*, 138 S. Ct. at 1407 ("[T]he Court holds that foreign corporations may not be defendants in suits brought under the ATS."). Debate rages within legal scholarship if international law applies to corporations. For a discussion of whether international law recognizes corporate liability, compare Eli Bukspan & Asa Kasher, *Human Rights in the Private Sphere: Corporations First*, 40 U. PA. J. INT'L L. 419, 419–20 (2019) (using moral arguments to posit that human rights law should apply to corporations and that the international community should provide a remedy), and Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1094–95 (2009) (arguing that international corporate liability has been recognized since the Nuremberg trials), with Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 353 (2011) (arguing that, in the absence of a clearly recognized customary international law norm recognizing corporate liability, the ATS should not apply to corporations).

179. *Jesner*, 138 S. Ct. at 1400–01. *But see id.* at 1401 (conceding that there are both national and special tribunals that recognize civil liability); Oona A. Hathaway et al., *What Is a War Crime?*, 44 YALE J. INT'L L. 53, 104 (2019) (arguing that the Supreme Court's holding in *Jesner* "reflects persistent confusion created by overreliance on the jurisdiction of particular international tribunals in the ATS context").

180. *Jesner*, 138 S. Ct. at 1402–03.

181. *Id.* at 1405.

182. *Id.* at 1406–07 (noting past objections for ATS suits by sovereign nations); *see, e.g.*, Brief for the Hashemite Kingdom of Jordan as Amicus Curiae Supporting Respondent at 1–3, *Jesner*, 138 S. Ct. 1386 (No. 16-499), 2017 WL 3726004 (arguing that its sovereignty, its economic stability linked to Arab Bank, and its working relationship with the United States to combat terrorism would be in jeopardy).

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

against extraterritoriality application of the ATS, elimination of foreign corporate liability under the ATS served the purpose of judicial deference to the political branches in cases implicating foreign policy.[184]

In the dissent, the remaining four Justices argued that the text, purpose, and history of the ATS allows foreign corporate liability.[185] Justice Sotomayor explained that "[n]othing about the corporate form in itself raises foreign-policy concerns."[186] The dissent argued that the ATS is concerned with the substantive conduct of public and private actors, not the kind of actor.[187] The dissent addressed the foreign policy implications raised by the majority and concurrences in three fashions. First, Justice Sotomayor explained that the First Congress authorized district courts under the ATS to consider new claims as treaty laws and international obligations develop.[188] Second, the United States had an interest in upholding international law and, therefore, providing remedies for international violations.[189] Third, the majority committed a logical fallacy in concluding that, because the corporation at issue in this case had close ties to their respective national economy, all foreign corporations have close affiliations with their host nation, and thus all corporations deserve immunity from the ATS due to foreign policy implications.[190] Corporations may violate international law independent of a foreign

184. *Id.* at 1407–08.

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

186. *Id.*

187. *Id.* at 1420–21.

188. *Id.* at 1427; *see also* Ursula Tracy Doyle, *The Cost of Territoriality: Jus Cogens Claims Against Corporations*, 50 CASE W. RES. J. INT'L L. 225, 231–33 (2018) (arguing that precluding foreign corporate liability is directly incompatible with the enforcement of *jus cogens* norms, to which all international actors are subjected).

189. *Jesner*, 138 S. Ct. at 1428 (Sotomayor, J., dissenting); *see also* Brief of United States Senators Sheldon Whitehouse and Lindsey Graham as Amici Curiae in Support of Petitioners at *2, *Jesner*, 138 S. Ct. 1386 (No. 16-499), 2017 WL 2822776 (noting that the recognition of corporate liability under the ATS is a "substantial part in Congress's plan for keeping U.S. financial instrumentalities off-limits to terrorist operations overseas."); Brief for the United States as Amicus Curiae Supporting Neither Party at *8–24, *Jesner*, 138 S. Ct. 1386 (No. 16-499), 2017 WL 2792284 (arguing that international law recognized corporate civil liability and that the enacting Congress knew that corporations could be violators of international law).

190. *Jesner*, 138 S. Ct. at 1429–31 (Sotomayor, J., dissenting). The Kingdom of Jordan raised the contention that Arab Bank constituted "between one-fifth

state,[191] and there are judicial tools, specifically the use of Exhaustion principle, that will disaggregate the specific international friction that arises.[192] Ultimately, categorically barring foreign corporate liability for human rights abuses under the ATS would inflame international tensions that the ATS hoped to avoid.[193]

B. CURRENT INFLEXIBLE ATS JURISPRUDENCE UNDERMINES THE ABILITY OF THE POLITICAL BRANCHES TO ENGAGE IN FOREIGN POLICY-MAKING

In the three ATS cases brought to the Supreme Court, the Court took two approaches: either the implementation of a flexible evaluative framework or the articulation of non-negotiable rules creating uncompromising barriers to litigation.[194] While *Sosa* offered judicially manageable standards to evaluate ATS claims,[195] the Court's hard-line rules eliminating extraterritoriality applicability[196] and foreign corporation liability[197] closed avenues for international human rights redress and undermined the very separation of powers principles it claims to protect. As discussed in Part I, the Constitution gives the ability to engage in foreign policy-making to the Legislative and Executive Branches, excluding judges and courts entirely.[198] However, as Justice Brennan observed in *Baker v. Carr*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[199] The current inflexible framework of the ATS undermines the ability of the political branches to engage in foreign policy-making in the following three ways: (1) it fails to take into account the dynamic nature of the statute

and one-third of the total market capitalization of the Amman Stock Exchange." *Id.* at 1394 (majority opinion).

191. *Id.* at 1429–30 (Sotomayor, J., dissenting).

192. *Id.* at 1430–31 ("Courts also can dismiss ATS suits for a plaintiff's failure to exhaust the remedies available in her domestic forum . . . or when asked to do so by the State Department.").

193. *See id.* at 1431 ("Foreclosing foreign corporate liability in all ATS actions, irrespective of circumstance or norm, is simply too broad a response to case-specific concerns that can be addressed via other means.").

194. *See supra* Part II.A.

195. *See supra* Part II.A.1.

196. *See supra* Part II.A.2.

197. *See supra* Part II.A.3.

198. *See supra* Part I.A.

199. 369 U.S. 186, 211–12 (1962).

itself, and, more specifically, the constantly changing "law of nations"; (2) it falsely equates unilateral curtailment of the statute as practicing judicial deference; and (3) it hampers the effectiveness of the political branches to stay human rights compliant.

1. The Law of Nations Is Not Static

The law of nations is not static; customary international law is always changing.[200] As discussed earlier, international law has developed in dramatic fashion since the enactment of the ATS.[201] Current customary international law is different from the law of nations in 1789.[202] International human rights law has arguably progressed the most, especially since its establishment following World War II, the rise of international human rights organizations, and the re-shifting of international law from the rights of states to individual rights.[203] It is for this very reason that flexibility is needed in the evaluation of the law of nations when ATS claims are brought.[204] While bright-line rules promote consistency and predictability,[205] they ignore the reality that customary international law at one time is different than customary international law at a later time.[206] Instead of using hard-line rules to bar types of claims under the ATS indefinitely, courts need to base their language in time-based parameters and use narrow holdings.

200. *See supra* notes 103–08 and accompanying text.

201. *Supra* notes 103–08 and accompanying text (tracking the development of customary international law).

202. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 723–24 (2004) (noting that the customary international law in 1789 consisted primarily of piracy, violation of safe conducts, and treatment of diplomats).

203. *See* Sohn, *supra* note 106, at 9–12 (discussing the formation of international human rights law and international human rights institutions).

204. *See* Kathleen M. Sullivan, *Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992) ("Standards, by contrast, are flexible and permit decisionmakers to adapt them to changing circumstances over time.").

205. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985) (identifying certainty, uniformity, stability, and security as virtues of rules); Sullivan, *supra* note 204, at 65 (summarizing the advantages of rules as consistency, the appearance of consistency, uniformity, and predictability (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–82 (1989))).

206. *See* Schlag, *supra* note 205, at 400 (identifying that standards have an advantage over rules when flexibility, individualization, and dynamism are needed).

For example, the Supreme Court should revisit their rule in *Jesner* disallowing foreign corporate liability.[207] Here is a plausible hypothetical scenario. Let's assume that customary international law at the time of the *Jesner* decision did not recognize foreign corporate liability for an international human rights violation.[208] Five years following *Jesner*, the international community and the United States sign a treaty recognizing foreign corporate liability for the violation of human rights.[209] Following the American recognition and incorporation of foreign corporate liability into customary international law, a foreign plaintiff then brings an ATS claim against a foreign corporation into federal court. The district court judge will be faced with a difficult legal conundrum: will the court dismiss the suit under *Jesner* and the bar on foreign corporate liability, or will the court recognize foreign corporate liability in accordance with the law of nations? If the Supreme Court in *Jesner* had ruled that the law of nations had not recognized foreign corporate liability at the time of decision, the district court would retain the ability to use its power of judicial review to inquire as to the state of customary international law in the context of this new case.[210] Flexibility is therefore necessary to avoid this conflict.

207. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018) ("[T]he Court holds that foreign corporations may not be defendants in suits brought under the ATS.").

208. As noted earlier, debate continues regarding whether customary international law recognizes foreign corporate liability. *See supra* note 178. For another discussion of corporate liability, compare *Jesner*, 138 S. Ct. at 1400–05 (finding that the international community does not recognize foreign corporate liability), with *id.* at 1423–27 (Sotomayor, J., dissenting) (arguing that the majority conflates the role of international tribunals and argues that our military and other nations recognize foreign corporate liability).

209. The prospects of the international community recognizing transnational corporate liability in human rights abuses is not too far-fetched. At the twenty-sixth Human Rights Council session, the United Nations General Assembly established a working group on transnational corporations with respect to human rights whose mandate is to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations . . . ." Human Rights Council Res. 26/9, ¶ 1, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

210. *See* Sullivan, *supra* note 204, at 115 (finding that that standard-like approaches engage in context-specific balancing tests).

2. Limiting Options Under the ATS Is Not Deferential

Judicial deference invites political branch input, but hard-line rules close the deferential discourse.[211] Increasingly, as the world becomes more globalized and international issues enter American courtrooms more frequently, courts will need to grapple with cases with foreign policy implications.[212] Foreign policy-making reflects different administrations' and legislatures' ideals, goals, and interpretations of the global political environment.[213] It is settled that the Constitution does not grant courts the ability to engage in foreign policy-making,[214] and the Supreme Court has repeatedly affirmed the importance of deferring to the political branches in ATS cases.[215] Judicial deference to the political branches is, in effect, a dialogue. The Judiciary is faced with a legal question for which it needs the input of the political branches.[216] The political branches then submit their understanding of the international and policy ramifications of the case.[217] Based on the legal arguments and merits of the case, with the input of the political branches, the Supreme Court

211. *See* Bradley, *supra* note 20, at 661–62 (identifying that courts give significant deference to the Executive Branch's evaluation of facts implicating foreign affairs, including international ramifications, determinations of the facts, and international recognition of customary international law); Sullivan, *supra* note 204, at 69 ("Rules block the dialogue that standards promote.").

212. *See* Jack I. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 L. & POL'Y INT'L BUS. 461, 462 (1993) ("Notwithstanding the ostensible acceptance and legitimacy of these propositions, the evaluation of foreign policy considerations by the courts has dramatically increased in recent times. The phenomenon here described is a by-product of . . . 'globalization.'").

213. *See* HENKIN, *supra* note 35, at 31–35 (arguing that the drafters of the Constitution allocated foreign policy powers to Congress and the President to adapt the young, transforming nation to an ever-changing world).

214. *See supra* Part I.A. *But see* Garvey, *supra* note 212, at 462 (arguing that in practice, courts, in the consideration of applying judicial doctrine to cases that implicate foreign policy, implicate their own foreign policy choices within their decisions).

215. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018) (emphasizing that deference to the political branches is vital when foreign policy consequences are at stake (citing Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013))); Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (encouraging deference to the Executive Branch's view of the foreign policy implications).

216. *See* Bradley, *supra* note 20, at 661–62 (finding that courts invite the political branches to submit foreign policy assessments).

217. *See id.*

makes a ruling.[218] However, when courts curtail the types of cases that can be brought with bright-line rules, the dialogue about the merits of each case with the political branches can no longer take place.[219] To be clear, judicial deference should not be equated to always following the lead of the political branches or mandating that litigation proceed; judicial deference is keeping the availability of the deferential dialogue open for future ATS cases.[220]

A common response to these inflexible ATS rules by the Supreme Court is that Congress should just legislate and amend the ATS to overrule the courts.[221] While engaging in a traditional dialogic exchange would force clearer articulations from Congress,[222] it undermines the ATS in two regards. First, Congress intended the jurisdictional grant of the ATS to be broad and incorporate all law of nations norms.[223] As described earlier, the law of nations is dynamic and constantly changing.[224] Following

218. *See id.*

219. *See* Sullivan, *supra* note 204, at 69 ("Rules block the dialogue that standards promote.").

220. Across different administrations and partisan lines, actors within the political branches have advocated for keeping decisions tailored to the specific facts, and leaving possible remedies open for foreign policy-making purposes. *See* Brief of United States Senators Sheldon Whitehouse and Lindsey Graham as Amici Curiae, *supra* note 189, at *2 (arguing on behalf of the Crime and Terrorism Subcommittee of the Senate Judiciary Committee that keeping corporate liability available under the ATS is essential for Congress's foreign policy initiatives to fight terrorism); Brief for the United States as Amicus Curiae, *supra* note 189, at *5 (arguing on behalf of the Trump administration that corporate liability should be reserved under the ATS and the Court should dismiss on other grounds); Memorandum for the United States as Amicus Curiae at *22–23, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146 (arguing on behalf of the Carter administration that availability of human rights remedies are important for United States foreign policy in specific cases); *see also Jesner*, 138 S. Ct. at 1432 (Sotomayor, J., dissenting) ("Given the deference to the political branches that *Sosa* encourages, I find it puzzling that the Court so eagerly departs from the express assessment of the Executive Branch and Members of Congress that corporations can be defendants in ATS actions.").

221. *See Jesner*, 138 S. Ct. at 1406 (majority opinion) (alluding that Congress can simply amend the ATS because "Congress is well aware of the necessity of clarifying the proper scope of liability under the ATS . . . .").

222. *Id.*

223. *See supra* notes 91–97 and accompanying text (outlining the history and passage of the ATS).

224. *See supra* notes 103–08 and accompanying text.

international embarrassment, the purpose of this founding-era statute was to recognize all customary international law and incorporate it.[225] Adding qualifications, exceptions, and clarifications in response to Supreme Court cases may create inconsistencies and complications as the law of nations develops and changes. For example, suppose Congress articulates that extraterritoriality applies to specific customary international law violations at time *t*. At time *t*+1, the law of nations recognizes a new customary international law norm that puts an affirmative duty for nations to apply extraterritorially. However, the ATS only recognizes the extraterritorial claims enumerated at time *t*, which makes the law of nations at *t*+1 and the extraterritoriality amendment incompatible. Second, constant back-and-forth between Congress and the Supreme Court frustrates the ATS's flexibility by heightening the political costs of repeatedly recognizing and incorporating customary international law standards.[226] In its long history, Congress has amended the ATS three times with minor textual changes.[227] However, persistent legislative response to hard-line judicial positions would require frequent adjustments, expenditure of political capital, and constant monitoring of customary international law to make sure it is properly implemented.[228]

3. Inflexibility Makes Human Rights Compliance More Difficult

Hard-line rules are against the United States' foreign policy interest because it makes international human rights compliance more difficult for the United States. It is well-settled that

225. *See* Bellia & Clark, *supra* note 92, at 466–67 (describing the purposes of the passage of the ATS).

226. By political costs, I mean the time and political capital spent every time Congress seeks to draft and pass new bills. *See, e.g.*, Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 416–17 (2007) (explaining that, in the example of the Sherman Antitrust Act, "Congress . . . saved itself time and energy by legislating in this broad and vague fashion, and leaving the rest to judicial implementation").

227. *See* Act of June 25, 1948, ch. 646, 62 Stat. 869, 934 (1948) (codified at 28 U.S.C. § 1350 (2018)); Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1093 (1911); Revised Statutes tit. 13, ch. 3, § 563, para. 16 (1873).

228. *See, e.g.*, Siegel, *supra* note 226, at 417 (commenting that if courts had interpreted the broad Sherman Antitrust Act narrowly "Congress would have been forced to expend resources to overturn the decision and to craft a statute that the judges could enforce properly").

without a remedy, a recognized right is nothing more than political lip service.[229] Within the context of human rights, the United States routinely signs and ratifies conventions that place affirmative duties on states to enforce those rights.[230] From an idealist perspective, the United States is a traditional leader in the fight for human rights and has repeatedly affirmed its commitment for upholding them.[231] As discussed above, hard-line rules that make unilateral statements about the applicability of the statute may directly conflict with future human rights obligations.[232] From a more realist perspective, states have incentives to follow the rules of the international system to gain and operate under international legitimacy.[233] The ATS arose following international disasters that greatly affected the nascent nation's credibility on the world stage.[234] Inflexible approaches that do not reserve the ability for potential redress for alleged human rights violations would jeopardize the United States' position within the global order and the international human rights system.

229. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

230. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide art. V, Dec. 9, 1948, 78 U.N.T.S. 1021 ("The Contracting Parties undertake to enact . . . effective penalties for persons guilty of genocide.").

231. *See* NATALIE KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE 93 (1990) (discussing the leadership and influence of the United States over the drafting of international human rights conventions).

232. *See supra* notes 207–10 and accompanying text (explaining the hypothetical passing of an internationally recognized corporate liability treaty).

233. *See* FRANCK, *supra* note 58, at 155 ("[The United States] is concerned to see minimum standards [of human rights] observed in other countries in order to safeguard [its] own standards, to promote conditions that [are] conducive to American prosperity and to American interests in international peace and security."); *see also* David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879 (2003) (offering the signaling theory of human rights compliance to fill gaps in understanding from traditional scholarship).

234. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1435 (2018) (Sotomayor, J., dissenting) (explaining the ATS was the source of international law enforcement following international embarrassment).

III. USING THE EXISTING TOOLS IN THE TOOLBOX: SOLUTIONS TO THE JUDICIAL OVER-RESTRICTION OF THE ATS

This Part proposes a new, flexible three-step framework applying existing judicial doctrine to ATS actions in order to combat fears of judicial intervention in foreign policy. Section III.A introduces each step and addresses how applying these judicial doctrines balances competing foreign policy considerations. Section III.B then applies the new flexible framework to the most recent ATS Supreme Court case, *Doe v. Nestle*.[235]

A. NO NEED TO REINVENT THE WHEEL: A JUDICIAL DOCTRINE FRAMEWORK FOR THE ATS AND FOREIGN POLICY IMPLICATIONS

This Section proposes an alternative, step-by-step framework for federal judges to apply in an ATS case. The framework uses preexisting judicial doctrines in foreign relations law that limit judicial interference in foreign affairs, and each judicial doctrine corresponds to foreign policy concerns raised by the Supreme Court during the litigation of the ATS. The three-step inquiry is as follows: (1) apply an ATS-specific, two-step Political Question doctrine inquiry to continue to encourage judicial caution in the recognition of actions; (2) apply the Exhaustion principle to prevent foreign criticism while staying compliant with international law; and (3) apply the Act of State doctrine to respect foreign sovereignty while recognizing human rights abuses. The goal of the framework is not to mandate litigation or make litigation necessarily easier for plaintiffs. The goal is rather to provide flexibility for the political branches to pursue foreign policy objectives, keep the possibility of human rights redress open, and limit judicial concerns of foreign affairs intervention.

1. The Political Question Doctrine and Recognition of Claims Under the ATS

First, a court must ask itself two questions: (1) is the customary international law claimed by the plaintiff universal, specific, and obligatory as understood in the historical paradigms

235. 906 F.3d 1120 (9th Cir. 2018).

when the ATS was enacted?;[236] and (2) what are the political branches' understandings of the international ramifications if this customary international law claim is recognized?[237] This two-part inquiry will fulfill the "Political Question step." Taking the more accessible and modern approach to the Political Question doctrine,[238] the two-pronged inquiry seeks to satisfy the "judicially manageable" prong[239] and the "international reputation" prong[240] within the context of the ATS. The Political Question step addresses the Judiciary's fear of creating causes of action without express authorization from Congress.[241]

The first question incorporates the "judicially manageable" prong and the language from the one flexible standard announced by the Supreme Court in *Sosa v. Alvarez-Machain*.[242]

236. As discussed below, this question incorporates the standards articulated in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *See supra* Part II.A.1 (discussing the standard from *Sosa*).

237. This question incorporates judicial deference to the political branches in foreign affairs. *See supra* Part I.A (discussing judicial deference to the political branches in foreign affairs).

238. As previously noted, the Political Question doctrine faces frequent criticism for its confusing and complex application. *See* Pollock, *supra* note 62, at 242 ("At present, however, courts have unnecessarily complicated and confused the analysis of ATS claims by squarely addressing the political question doctrine.").

239. *See supra* Part I.B.1; *see also* Korman, *supra* note 49, at 109 ("[T]he first three *Baker* factors . . . are reduced to the question of whether the matter before the court is a violation of international law . . . ." (footnote omitted)); Nzelibe, *supra* note 36, at 963 ("The most widely cited prudential or institutional competence factor involves the claim that the disputed issue 'lack[s] . . . judicially discoverable and manageable standards.'"(alterations in original)); Pollock, *supra* note 62, at 242 ("The first three parts of the *Baker* test concern the separation of powers . . . .").

240. *See supra* Part I.B.1; *see also* Korman, *supra* note 49, at 109 ("[T]he last three *Baker* factors . . . are really three separate ways of asking the question of whether adjudication infringes on the executive's ability to conduct the nation's foreign affairs."); Pollock, *supra* note 62, at 242 ("[T]he last three [parts of the *Baker* test] concern issues of respect . . . ."); Price, *supra* note 60, at 336 ("[T]he risk of harm to the international reputation of the United States is thought to come into play in foreign relations cases, implicating the final three *Baker* factors."); *The Political Question Doctrine*, *supra* note 55, at 1196 (noting that courts are particularly interested in the three respect factors).

241. *See Sosa*, 542 U.S. at 728 ("Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.").

242. *Id.* at 724, 732 (ruling that ATS claims brought under the law of nations

Courts and scholars alike have recognized the importance of articulated standards to ground the Judiciary's exercise of claim identification under the law of nations.[243] Additionally, manageable standards give courts the ability to recognize the rise of new customary international law norms as they develop over time.[244] The second question incorporates the international reputation prong, which explicitly gives opportunity for courts to defer to the political branches. The international reputation prong attempts to avoid embarrassment, either in respect to the political branches or the international community.[245] Throughout its ATS decisions, the Supreme Court has articulated a desire for political branch deference but has never explained how deference would be incorporated into the ATS claim evaluation.[246] By mandating the second question, courts will have clear instruction for when to defer to the other branches and how to incorporate statements of interests.[247] The Political Question step adequately prevents the Judiciary from making internationally-unrecognized causes of action while creating a specific step for political branch deference.

needs to be specific, obligatory, and universal, as well as defined and recognized in the paradigms as eighteenth century customary international law).

243. *See, e.g.*, Kadic v. Karadzic, 70 F.3d. 232, 249 (2d Cir. 1995) ("[U]niversally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the [ATS], which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion."); Korman, *supra* note 49, at 109–10.

244. *See supra* Part II.B.1 (discussing the importance of maintaining flexible standards to account for the dynamic nature of the law of nations).

245. *See* Price, *supra* note 60, at 336 ("[T]he risk of harm to the international reputation of the United States is thought to come into play in foreign relations cases . . . .").

246. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018) (emphasizing that deference to the political branches is vital when foreign policy consequences are at stake (citing Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013))); *Sosa*, 542 U.S. at 733 n.21 (encouraging deference to the Executive Branch's view of foreign policy implications).

247. ATS scholarship often grapples with how to incorporate deference and executive statements into judicial review of ATS cases. *See, e.g.*, Korman, *supra* note 49 (advocating for deference-based approaches to ATS claims); Margarita S. Clarens, Note, *Deference, Human Rights and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation*, 17 DUKE J. COMP. & INT'L L. 415, 424–28 (2007) (analyzing how the Executive Branch can be involved with the litigation of ATS cases); Sutcliffe, *supra* note 66 (offering a comprehensive framework to incorporate executive statements).

2. The Exhaustion Principle and Balancing Foreign Criticism with Human Rights Compliance

The second question a court should ask is: has the plaintiff exhausted available local and domestic remedies in more appropriate jurisdictions?[248] In order to prove that the plaintiff satisfied the Exhaustion principle, they must prove that they: (1) exhausted all internal legal remedies in that host country; (2) exhausted all legal remedies that are available or accessible to them; and (3) the remedies offered by the host state are inadequate and ineffective.[249] The purpose of the Exhaustion principle is respecting foreign sovereignty while making certain that the aggrieved party will have a forum to remedy their injury.[250] Exhaustion allows a host state to have an opportunity to remedy a human rights violation.[251] The Supreme Court, throughout its ATS jurisprudence, has addressed the Exhaustion principle but has never required its application.[252] An Exhaustion principle requirement would discourage district courts from involving themselves in foreign affairs,[253] respect the sovereignty of adequate and effective host jurisdictions, and disincentivize plaintiffs from "forum-shopping."[254] The Exhaustion principle would also significantly quell foreign policy intervention concerns while still reserving the ability of the plaintiff to bring an ATS claim in American courts and requiring courts to make sure that injured parties can receive redress in at least some forum.

248. The second question incorporates the Exhaustion principle. *See supra* Part I.B.2 (discussing the Exhaustion principle).

249. *See* Duruigbo, *supra* note 70, at 1259–61 (providing a summary of the elements that need to be proved in order to satisfy the Exhaustion principle).

250. *Id.* at 1255–56.

251. *See* Waugh, *supra* note 68, at 556 (explaining the rationale for the Exhaustion principle).

252. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1430–31 (2018) (Sotomayor, J., dissenting) (noting that courts have the option to dismiss ATS suits under the Exhaustion principle); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 139 (2013) (Breyer, J., concurring) (arguing that exhaustion would minimize international friction); Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (suggesting that a requirement of exhaustion may apply).

253. *See* Ron A. Ghatan, Note, *The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1299 (2011) (noting the advantages of mandatory exhaustion over prudential exhaustion).

254. *See generally* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (arguing for anti-forum shopping measures in the face of increasing transnational litigation in United States courts).

The Exhaustion principle, rather than the elimination of extraterritorial application, would allow the political branches to have more flexibility in enforcing foreign policy and keep the United States in better compliance with international human rights law. The political branches may want to reserve the right to apply the ATS extraterritorially.[255] Notably, there have been multiple extraterritorial ATS cases in which plaintiffs were awarded damages.[256] Past conduct by the political branches indicate that extraterritorial application of the ATS may serve their policy interests.[257] Additionally, the Exhaustion principle allows for the United States to remain compliant with international law.[258] Some customary international law norms are deemed non-derogable and apply universally.[259] Forbidding enforcement of these vital international norms could severely damage the legitimacy of the United States within the international system.[260] The Exhaustion principle provides a flexible framework to both satisfy American foreign policy decisions and international law expectations.

3. The Act of State Doctrine and Balancing Foreign Sovereignty Infringement with Recognizing Human Rights Abuses

Third, a court should ask: is the court inquiring into the validity of the acts of foreign governments taken within their own

255. *See* Sloss, *supra* note 171, at 247 (explaining that Congress and the Executive Branch favored a case-by-case approach rather than a bright-line rule).

256. *Id.* at 248 (noting that *Filartiga* and *Tel-Oren* were applied extraterritorially).

257. *Id.* at 247–48.

258. *See* Doyle, *supra* note 188, at 231–32 (explaining that the territoriality requirement under the ATS is inherently incompatible with *jus cogens* norms of international law).

259. *See* Sloss, *supra* note 171, at 243–44 ("[T]he universality principle is a widely accepted principle of international law that authorizes States to apply their laws extraterritorially . . . .").

260. *Cf.* Ghatan, *supra* note 253, at 1291–92 (arguing that there should be an exception to the exhaustion requirement under the ATS for human rights violations with universal jurisdiction). I would argue that the Exhaustion principle should still be applied. Perhaps international tribunals and specialty courts are made specifically to address these violations. The United States may usurp the authority and legitimacy of the international courts and specialty courts.

territory?[261] This inquiry addresses a situation laden with foreign policy consequences; will an American court judge the actions of a foreign government conducted on its own soil? Courts traditionally reserve the right to dismiss a case if it realizes it is reviewing the actions of a foreign government.[262] Unlike the Exhaustion principle, which is an internationally recognized principle and avoids judicial intervention in foreign affairs,[263] the Act of State doctrine primarily operates to promote harmony in international relations, not in international law.[264] The Act of State doctrine guards against the most direct infringement of foreign sovereignty: putting a government on trial in a foreign court.[265] Although it has grown to recognize individual rights, the international system is, first and foremost, a state-first system, which aims to keep the integrity of the state intact.[266] Abstention from judicial review of ATS claims under the Act of State doctrine would directly address the consistent fear of courts to put a foreign government on trial.

The Act of State doctrine is an appropriate alternative to the creation of broad, hard-line rules, such as categorical elimination of foreign corporate liability. In *Jesner*, both the majority and the dissent raise the fear of infringing on the sovereignty of other

261. This question incorporates the Act of State doctrine. *See supra* Part I.B.3 (discussing the Act of State doctrine).

262. *See* FRANCK, *supra* note 58, at 98 ("The essence of the [A]ct of [S]tate doctrine is a refusal to rule on legitimacy of a foreign government's actions or laws insofar as these have taken effect entirely within the foreign jurisdiction.").

263. *See supra* Part I.B.2 (discussing the Exhaustion principle's roots in international and American law).

264. *See* Bradley & Goldsmith, *supra* note 100, at 839 ("[I]nternational law[,] generally, primarily governed relations among nations, not the relations between a nation and its citizens.").

265. *See* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1184 (2007) ("The [A]ct of [S]tate doctrine prevents courts from angering foreign sovereigns by expressing disapproval of their sovereign acts.").

266. *See* Burley, *supra* note 88, at 1940 (arguing that the Act of State doctrine promotes harmony of international relations rather than harmony of international law).

nations.[267] Citing this fear, however, the majority rules to categorically eliminate foreign corporate liability under the ATS.[268] However, this ruling is not sufficiently tailored to the interest that the Supreme Court aims to protect.[269] Nothing about a corporation being foreign in and of itself implicates sovereignty infringements;[270] corporations that are state-owned or state-controlled do offer questions of sovereignty infringement.[271] Applying the Act of State doctrine will cut straight to the heart of the issue by asking: are the courts reviewing the actions of a foreign government? This narrow tailoring, again, reserves flexibility for the political branches to use the ATS to continue to identify international law claims without the fear of putting a state on trial.[272]

B. APPLYING THE PROPOSED FRAMEWORK TO *DOE V. NESTLE*

This Section will apply the proposed three-step framework to the ongoing *Doe v. Nestle*[273] case to give an example of the proposed framework in action. In *Nestle*, plaintiffs were former child slaves who were trafficked from Mali to Cote d'Ivoire to cultivate cocoa beans on behalf of Nestle and Nestle Ivory

267. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018) ("Jordan considers the instant litigation to be a 'grave affront' to its sovereignty."); *id.* at 1429–30 (Sotomayor, J., dissenting) (noting that Jordan considers ATS action in this case to infringe its sovereignty).

268. *Id.* at 1412 (majority opinion) ("Foreign corporate liability would not only fail to meaningfully advance the objectives of the ATS, but it would also lead to precisely those 'serious consequences in international affairs' that the ATS was enacted to avoid.").

269. *Id.* at 1429 (Sotomayor, J., dissenting) ("Each source of diplomatic friction that respondent Arab Bank and the plurality identify can be addressed with a tool more tailored to the source of the problem than a blanket ban on corporate liability.").

270. *Id.* ("Nothing about the corporate form in itself justifies categorically foreclosing corporate liability in all ATS actions.").

271. *See* Larry Catá Backer, *The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy*, 50 VAND. J. TRANSNAT'L L. 827, 870 (2017) ("A state owner whose control is extensive enough may be deemed to have assumed both the authority for and the obligations of the enterprise.").

272. *Jesner*, 138 S. Ct. at 1430 (Sotomayor, J., dissenting) (noting that the United States prefers the Court to address the root of the foreign policy implications with the corresponding judicial doctrine).

273. 906 F.3d 1120 (9th Cir. 2018).

Coast.[274] Plaintiffs assert that both corporations are liable for aiding and abetting in child slavery under the ATS.[275] After applying the ATS framework, the Court would most likely find that: (1) the claim brought satisfies the Political Question step; (2) the plaintiffs have exhausted available domestic remedies; and (3) the actions of the defendant are not acts of state. Consequently, the case should proceed.

First, are the crimes of aiding and abetting child slavery by a foreign corporation universal, specific, and obligatory as understood in the historical paradigms when the ATS was enacted?[276] The ATS claim in *Nestle* has three components: (1) child slavery; (2) aiding and abetting; and (3) foreign corporate liability. Slavery is a customary international law violation, fitting within the parameters of being "universal, specific, and obligatory," and being repeatedly affirmed by American courts as a *jus cogens*, or non-derogable norm.[277] Aiding and abetting in the violation of customary international law, also, has been repeatedly upheld as a violation by American courts.[278] The question then turns on whether customary international law recognizes foreign corporate liability. As mentioned earlier, there is a split amongst judges and academics alike if customary international law recognizes foreign corporate liability.[279] However, the second prong of the Political Question step will tip the scale in favor of corporate liability recognition. What are the political branches'

274. *Id.* at 1122–23.

275. *Id.* at 1122.

276. *See supra* Part III.A.1.

277. *See, e.g.*, Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002) ("[S]lavery [is a] *jus cogens* violation[] and, thus, [a] violation[] of the law of nations . . . ."); Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1154 n.5 (7th Cir. 2001) ("The fact [is] that some *jus cogens* norms are beyond question, such as the norm against slavery . . . ."). *See generally* Thomas Weatherall, Note, *Lessons from the Alien Tort Statute:* Jus Cogens *as the Law of Nations*, 103 GEO. L.J. 1359 (2005) (using ATS jurisprudence to identify *jus cogens* norms understood by United States courts).

278. *See Nestle*, 906 F.3d at 1124 ("[W]e held that corporations are liable for aiding and abetting slavery . . . .").

279. *See generally* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (discussing, between the majority and dissent, if customary international law recognizes foreign corporate liability). For a discussion of whether international law recognizes corporate liability, see *supra* note 178.

understanding of the international ramifications if this customary international law claim is recognized?[280] Although the United States has not filed an amicus brief in this case, its brief in *Jesner v. Arab Bank* is instructive.[281] The United States argued extensively in *Jesner* that corporations can be a defendant under the ATS,[282] and customary international law recognizes corporate liability regarding human rights abuses.[283] In the face of judicial deadlock, executive deference dictates that the view and expertise of the United States to recognize corporate liability should sway the Court to recognize the claims brought by the plaintiffs in *Nestle*.[284] Consequently, the Political Question step is satisfied.

Second, has the plaintiff exhausted available local and domestic remedies in more appropriate jurisdictions?[285] Plaintiffs in this case adequately pled that they have exhausted all available local remedies.[286] In Mali, there is no law under which plaintiffs could recover damages for the injuries they incurred as a result of human rights violations.[287] In Cote d'Ivoire, judicial corruption is well-documented, and the lack of due process, judicial enforcement, and fair outcomes continues to be a problem.[288]

280. *See supra* Part III.A.1.

281. Brief for the United States as Amicus Curiae, *supra* note 189.

282. *Id.* at *8–25.

283. *Id.* at *24 ("Furthermore, a number of current international agreements . . . affirmatively require signatory nations to impose liability on corporations for certain actions.").

284. *See* Bradley, *supra* note 20, at 661–62 (identifying that deference to the political branches includes evaluating their views and expertise of what customary international law is).

285. *See supra* Part III.A.2.

286. First Amended Class Action Complaint for Injunctive Relief and Damages, Doe v. Nestle, No. 205CV05133, 2009 WL 292108, ¶ 2 (C.D. Cal. July 22, 2009).

287. *Id.*; *see also* U.S. DEP'T OF STATE, MALI 2018 HUMAN RIGHTS REPORT 9 (2018), https://www.state.gov/wp-content/uploads/2019/03/Mali-2018.pdf [https://perma.cc/M5TD-W57W] (noting that corruption, bribery, and executive influence seriously damage judicial credibility, and Mali's judicial system does not provide the same rights as civil courts).

288. First Amended Class Action Complaint for Injunctive Relief and Damages, *supra* note 286, ¶ 2; *see also* U.S. DEP'T OF STATE, COTE D'IVOIRE 2018 HUMAN RIGHTS REPORT 7–8 (2018), https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/cote-divoire/ [https://perma.cc/WZ5H-UBTL] (noting that injured parties are consistently denied due process due to corruption, lack of judicial independence, and harassment of judicial actors).

Simply put, the opportunity for both Mali and Cote d'Ivoire to legitimately provide remedies does not exist. The plaintiffs have satisfied the Exhaustion principle.

Third, is the Court inquiring into the validity of the acts of foreign governments taken within their own territory?[289] In this case, the answer is no. Nestle is neither a foreign government nor even a state-owned enterprise.[290] Although Nestle argues that litigation would infringe on the sovereignty of Mali and Cote d'Ivoire, that argument is in regard to the extraterritorial application of the ATS.[291] Instead of creating a broad, restrictive rule to address this concern,[292] the Exhaustion principle analysis is more sufficiently tailored to this concern than the Act of State doctrine.[293] With all steps of the proposed three-step framework satisfied, the plaintiffs in *Nestle* should be able to bring a claim forward under the ATS.

CONCLUSION

The Supreme Court has whittled away at the flexibility of the ATS through the use of bright-line rules, such as the elimination of extraterritorial application and foreign corporate liability. These categorical restrictions on the types of ATS cases that can be brought creates an inflexible framework through which the foreign policy objectives of the political branches cannot be advanced. A case-by-case approach to the ATS is necessary; the Supreme Court should use existing judicial doctrines

289. *See supra* Part III.A.3.

290. *See* NESTLÉ, NESTLÉ ANNUAL REVIEW 2018, at 59 (2018), https://www.nestle.com/asset-library/documents/library/documents/annual_reports/2018-annual-review-en.pdf [https://perma.cc/5T8U-EH68] (noting that Nestlé is owned by private institutions and individual shareholders); *see also* Backer, *supra* note 271, at 858 ("SOEs [state-owned enterprises] must be recognized by some national law as (1) an enterprise (2) in which the state (3) exercises ownership.").

291. *See* Supplemental Brief of Nestle USA, Inc. at *7–14, Doe v. Nestle, 906 F.3d 1120 (9th Cir. 2018) (No. 2:05-cv-05133-SVW-MRW), 2018 WL 2299136 (arguing that extraterritorial application of the ATS raises foreign policy concerns and the case should consequently be dismissed).

292. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1429 (2018) (Sotomayor, J., dissenting) ("Each source of diplomatic friction that respondent . . . identif[ies] can be addressed with a tool more tailored to the source of the problem than a blanket ban . . . .").

293. *Id.* at 1430 (emphasizing that the United States wants courts to address specific foreign policy implications with the corresponding judicial doctrine).

to restrict its own interference in foreign policy while still advancing the purpose of the ATS to allow redress for human rights violations in the interest of American foreign policy. The Supreme Court should institute a three-step judicial framework to the ATS. First, the Court should apply a two-part Political Question inquiry that satisfies both the judicially manageable standard and international reputation prongs. Second, the Court should employ the Exhaustion principle to better comply with international law while avoiding foreign criticism. Third, the Court should focus on the conduct of defendants and use Act of State inquiries to avoid infringing on the sovereignty of foreign nations. Employing this three-step framework will effectively balance the United States' flexible foreign policy interests against fears of judicial interventionism.