# Pharmaceutical Companies, Human Rights, and the Alien Tort Statute

## Health Policy Portal

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**Abstract:** On January 3, 2019, U.S. District Judge Theodore D. Chuang of the U.S. District Court of the District of Maryland took a crucial first step in redressing one of the worst human subjects research ethics violations in U.S. history.

On January 3, 2019, U.S. District Judge Theodore D. Chuang of the U.S. District Court of the District of Maryland took a crucial first step in redressing one of the worst human subjects research ethics violations in U.S. history. In *Estate of Arturo Giron Alvarez et al. v. The John Hopkins University et al.* ("*Alvarez*"), first filed on April 1, 2015, the Estate of Arturo Giron Alvarez and hundreds of other Guatemalan nationals brought suit against Johns Hopkins University, the Rockefeller Foundation, and the Bristol-Myers Squibb Company alleging that they "subjected them or their family members to medical experiments in Guatemala without their knowledge or consent during the 1940s and 1950s, in violation of the law of nations."[1] Rejecting the Defendants' motion for judgment on the pleadings, Judge Chuang allowed the Plaintiffs to pursue relief (including damages) under the Alien Tort Statute ("ATS").[2] Central to Judge Chuang's decision and a subsequent appeal was the question of whether and when U.S. corporations can be held liable under the ATS. A recent June 2021 Supreme Court decision in another ATS case, *Nestlé USA v. Doe*,[3] gave new guidance on this question, but also raised new issues about what activities inside the United States permit plaintiffs to pursue liability for human rights violations such as those alleged in *Alvarez*. In this article, we discuss the *Alvarez* case and its implications in light of *Nestlé* for other litigation alleging U.S.-based conduct by U.S. corporations that committed research ethics and other international law violations.

The *Alvarez* case has its origins in the "Investigation of Venereal Diseases in Guatemala," a National Institutes of Health research study that was fortuitously unearthed and publicized by the scholarly efforts of Professor Susan M. Reverby.[4] Carried out between 1946 and 1948 by U.S. Public Health Service investigators, the study called for the inoculation of vulnerable Guatemalan nationals (male prisoners, female sex workers, and psychiatric inpatients) with syphilis, gonorrhea, or chancroid.[5] On October 1, 2010, President Obama offered an apology as well as deep regrets to the Guatemalan President and the Guatemalan people.[6] A comparable joint statement was issued on behalf of Secretary of State Hillary Rodham Clinton and Secretary of Health and Human Services Kathleen Sebelius.[7] A subsequent study by the Presidential Commission for the Study of Bioethical Issues, titled *"Ethically Impossible,"* found the study in question to have violated the "basic tenets

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**About This Column**

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bearing on informed consent and risk reduction" in force at the time.[8]

The ATS allows non-U.S. citizens ("aliens") to sue in U.S. federal court for civil damages (torts) that violate the "law of the nations."[9] In the portion of their lawsuit relevant here, the Plaintiffs alleged that the Defendants committed "crimes against humanity, in violation of well-established and customary norms of international law."[10] The Defendants sought to dismiss this claim arguing that the ATS does not permit a lawsuit against a U.S. corporation. In 2019, the district court in *Alvarez* disagreed.

To understand the importance of this decision and the issues that will now be litigated anew in light of *Nestlé*, some historical context is necessary. From its inception in 1789, the ATS lay dormant for almost two centuries before being resurrected in a series of human rights cases, starting with the landmark 1980 decision, *Filartiga v. Pena-Irala*.[11] The subsequent cases established that modern-day violations of the law of nations include the abuse of fundamental human rights, like torture and mass atrocities. Most ATS litigation initially focused on claims against direct government perpetrators, but in the 1990s, federal courts began to permit claims against non-state actors, including corporations and other institutions. Starting in 2004, the Supreme Court weighed in on the modern litigation, permitting ATS suits to proceed but indicating that only a limited number international law claims that were "specific, universal, and obligatory" in nature could be brought under the statute.[12] Starting in 2013, the Court has revisited the ATS three times, cutting back on this litigation each time but not closing the door completely. In 2013, the Court announced a rule in *Kiobel v. Royal Dutch Petroleum Co.* that there was a "presumption against extraterritorial" application of ATS in a case involving foreign plaintiffs, foreign corporate defendants, and human rights violations that took place in Nigeria.[13] The Court expressed particular concern about the foreign policy implications of such suits and wanted to prevent U.S. courts from becoming a forum to judge violations for the "whole world."[14] On the facts in *Kiobel*, the Court specifically said that where "all relevant conduct took place outside of the United States," "mere corporate presence" in the United States would not suffice to create jurisdiction.[15] In 2018, the Supreme Court added another roadblock, holding in *Jesner v. Arab Bank, PLC*, that "*foreign* corporations may not be defendants in suits brought under the ATS."[16]

In the wake of *Jesner*, the question raised by the case of the Guatemalan victims was whether the same limitation applied to *domestic* corporations, like Johns Hopkins University. Judge Chuang answered decisively "no." Before reaching that question, the court decided that "there is an international law norm barring nonconsensual medical experimentation on human subjects."[17] Moving on to the question of domestic corporations, Judge Chuang offered a careful analysis of the Supreme Court's decision in *Jesner*, including a close reading of the majority opinion, several concurring opinions, and the dissent. He also examined the decisions of a few other courts that had broached the question since *Jesner*. In his analysis, Judge Chuang focused particularly on the underlying policy issues and goals that arise through ATS litigation — namely foreign policy implications, separation of powers between the political branches and courts, and the aim of providing remedies for victims in U.S. courts. Ultimately, Judge Chuang decided ATS litigation against foreign corporations is different in kind from those against domestic ones in important ways, and "the need for judicial caution is markedly reduced" with such cases not likely to raise the same foreign policy concerns.[18] Unlike in *Jesner*, the judge concluded that allowing litigation to go forward "would 'promote harmony' rather than 'provoke foreign nations.'"[19] Judge Chuang's discussion and decision were prescient of the debate that ensued before the Supreme Court in *Nestlé*.

The *Alvarez* Defendants appealed the case to the U.S. Court of Appeals for the Fourth Circuit. After the case was briefed but before argument, the U.S. Supreme Court granted certiorari in *Nestlé* on the question of whether *Jesner*'s reasoning extended to U.S. corporations. On August 6, 2020, the Fourth Circuit filed an order placing the case in abeyance pending the decision in *Nestlé*.[20]

The U.S. Supreme Court decided the *Nestlé* case on June 17, 2021. That case was brought by "six individuals from Mali who allege that they were trafficked into Ivory Coast as child slaves to produce cocoa."[21] The Defendants were U.S.-based companies that engaged in the purchasing, processing, and selling of cocoa.

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According to the allegations in the complaint, they bought cocoa from local farms in the Ivory Coast and provided training, tools, cash, fertilizer, etc., in return for an exclusive right to purchase cocoa, even though the Defendants did not own or operate farms in the Ivory Coast. The Plaintiffs alleged that the Defendants knew or should have known that the farms were exploiting child labor but continued to provide those farms with resources and did not use their economic leverage to try to block children from working there.[22]

Turning to the legal analysis, the Supreme Court did not extend the reasoning of *Jesner* to categorically bar suits against U.S. corporations, instead returning to an exterritoriality analysis. In a majority opinion joined by every Justice except Justice Alito, the Court sided with the defendants and found the allegations in the complaint insufficient to allow the case to proceed. The Court specifically rejected the idea that "general corporate activity — like [corporate] decisionmaking" could be enough to establish jurisdiction under the ATS, and instead held that plaintiffs must allege something more in terms of a corporation's domestic conduct.[23] The Court categorized the allegations involving "major operational decisions" in the United States, and "generic allegations of this sort do not draw sufficient connection" between the claims and U.S. domestic conduct.[24]

In not extending *Jesner* to apply to U.S. corporations, however, the Court signalled that cases involving U.S. actors and U.S. domestic conduct require a different analysis than cases involving foreign corporations. Indeed, the Court has had three opportunities — in *Kiobel*, *Jesner*, and now *Nestlé* — to consider the question of corporate liablity under the ATS. Each time, it has declined to create corporate immunity or a categorical bar on all such cases. At present, there are five Justices who have expressed support for corporate liability under the ATS. Writing separately in *Nestlé*, Justice Gorsuch (joined by Justice Alito) wrote to express his view that "[t]he notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding," and thus he would draw no distinction between corporate and personal defendants under the ATS.[25] Justices Sotomayor, Kagan, and Breyer have also expressed support for this position. Thus, there now appears to be a majority of Justices in favor of that position, even though the Court did not rest its opinion on that ground in *Nestlé*.

Now that *Nestlé* has been decided, we expect the Fourth Circuit to ask for briefing on how *Alvarez* should be decided in light of the Supreme Court's most recent pronouncement, or perhaps to remand to the district court to do a new analysis in light of *Nestlé*.

The *Alvarez* case will be critical arena to consider the implications of *Nestlé* and what relevant conduct in the United States will suffice to establish jurisdiction. The threshold question of corporate liablity for U.S. corporations should be of less concern in the case. Instead, the question of what these entities did in the United States and whether those actions involve a sufficient connection to the claims in question will be front and center in future proceedings.

No matter the outcome, any decision will have important implications in both the near and long term as to whether and how U.S.-based health care institutions may be held to account for both their current and historical practices at home and abroad that violate international principles such as undertaking nonconsensual experiments. For the *Alvarez* Plaintiffs themselves, there remains the hope that justice may be done for the victims of one of the worst atrocities in history perpetrated by the U.S. research community.

Note

Financial and Other Disclosures: Tyler Giannini filed an amicus brief on behalf of Professors of Legal History in *Nestlé USA v. Doe*.

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