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The Alien Tort Statute (ATS): A Primer

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Summary

Passed by the First Congress as part of the Judiciary Act of 1789, the Alien Tort Statute (ATS) has been described as a provision "unlike any other in American law" and "unknown to any other legal system in the world." In its current form, the complete text of the statute provides the following: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." While just one sentence, the ATS has been the subject of intense interest in recent decades, as it evolved from a little-known jurisdictional provision to a prominent vehicle for foreign nationals to seek redress in U.S. courts for injuries caused by human rights offenses and acts of terrorism.

The ATS has its historical roots in founding-era efforts to give the federal government supremacy over the nation's power of foreign affairs and to avoid international conflict arising from disputes about the treatment of aliens in the United States. Although it has been part of U.S. law since 1789, the ATS was rarely used for nearly two centuries. In 1980, that long dormancy came to an end when the U.S. Court of Appeals for the Second Circuit rendered a landmark decision, *Filártiga v. Peña-Irala*, which held that the ATS permits claims for violations of modern international human rights law.

Filártiga caused an explosion of ATS litigation in the decades that followed, but the Supreme Court has placed limits on ATS jurisdiction in its recent jurisprudence. In a 2004 case, *Sosa v. Alvarez-Machain*, the Court held that the ATS allows federal courts to hear only a "narrow set" of claims for violations of international law. And in 2013, the Supreme Court held in *Kiobel v Royal Dutch Petroleum Co.* that the statute does not provide jurisdiction for claims between foreign plaintiffs and defendants involving matters arising entirely outside the territorial jurisdiction of the United States. Lower courts' interpretations of these decisions are still evolving and, in some cases, conflicting, but many observers agree that *Sosa* and *Kiobel* have significantly narrowed the scope of the ATS.

In its most recent ATS case, *Jesner v. Arab Bank, PLC*, the Supreme Court further limited the scope of viable claims by holding that foreign corporations may not be defendants in suits brought under the ATS. *Jesner* involved claims by approximately 6,000 foreign nationals (or their families or estate representatives) who were injured, killed, or captured by terrorist groups in Israel, the West Bank, and Gaza. The plaintiffs alleged that Arab Bank—the largest bank in Jordan—aided and abetted the terrorist organizations allegedly responsible for the attacks by maintaining bank accounts that Arab Bank knew would be used to fund terrorism and by identifying the relatives of suicide bombers so that they could be compensated with so-called "martyrdom payments."

A divided Supreme Court held in *Jesner* that the claims must be dismissed because ATS jurisdiction does not extend to claims against foreign corporations, including Arab Bank. Separation-of-powers and foreign policy concerns led the Court to conclude that it would be "inappropriate" to permit ATS liability against foreign corporations. The High Court's narrowing of the available avenues to raise an ATS claim in *Sosa*, *Kiobel*, and *Jesner* has led commentators to debate whether the statute remains a viable mechanism to provide redress for human rights abuses in U.S. courts.

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Originally enacted by the First Congress as part of the Judiciary Act of 1789,[1] the Alien Tort Statute (ATS)[2] has been described as a provision that is "unlike any other in American law" and "unknown to any other legal system in the world."[3] In its current form, the complete text of the ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[4] Although it is only a single sentence long, the ATS has been the subject of intense interest in recent decades, as it evolved from a rarely used jurisdictional statute to a prominent vehicle for foreign nationals to seek redress in U.S. courts for human rights offenses and acts of terrorism. This report examines the development of the ATS, beginning with its origins in the First Congress and continuing through to the Supreme Court's recent decision in *Jesner v. Arab Bank, PLC*, where the Court held that foreign corporations are not subject to ATS liability.[5]

Deconstructed, the ATS statute provides federal district courts with jurisdiction to hear cases with four elements: (1) a civil action (2) by an alien (3) for a tort (4) committed in violation of the law of nations or a treaty of the United States. The significance of these requirements is as follows:

1. **A civil action:** The ATS allows only for civil (rather than criminal) liability.
2. **By an alien:** A crucial, distinctive feature of the ATS is that it provides jurisdiction for U.S. courts to hear claims filed only by aliens (i.e., non-U.S. nationals).[6] The ATS does not provide jurisdiction for suits alleging torts in violation of the law of nations by U.S. nationals[7]—although other statutes may allow for such claims.[8]
3. **For a tort:** As a general matter, a tort is "a civil wrong, other than breach of contract, for which a remedy may be obtained, [usually] in the form of damages[.]"[9]
4. **In violation of the law of nations or a treaty of the United States:** The ATS requires that the tort asserted be considered a violation of either the "law of nations" or a treaty ratified by the United States.[10] The term "law of nations" is

[1] An Act to Establish the Judicial Courts United States, 1 Stat. 73, 77 (1789) [hereinafter "Judiciary Act"] ("And [district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.").

[2] While the ATS is sometimes referred to as the Alien Tort Claims Act, this terminology may be misleading because the law was not passed as a stand-alone act. *See* 15 MOORE'S FEDERAL PRACTICE - CIVIL § 104.21 n.1 (2015 ed.).

[3] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010), *aff'd on other grounds,* 569 U.S. 108 (2013).

[4] 28 U.S.C. § 1350.

[5] Order Granting Petition for Certiorari, Jesner v. Arab Bank, PLC, 137 S. Ct. 1432 (Apr. 3, 2017) (No. 16-499).

[6] An "alien" is defined elsewhere in federal law to be "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

[7] *See e.g.*, *See, e.g.*, Yousuf v. Samantar, 552 F.3d 371, 375 n. 1 (4th Cir. 2009) ("To the extent that any of the claims under the ATS are being asserted by plaintiffs who are American citizens, federal subject-matter jurisdiction may be lacking."); Serra v. Lappin, 600 F.3d 1191, 1198 (9th Cir. 2010) ("The ATS admits no cause of action by non-aliens.").

[8] *See, e.g.*, 18 U.S.C. § 2333 ("Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism . . . may sue therefor in any appropriate district court of the United States"); *infra* § "The Torture Victim Protection Act" (discussing the Torture Victim Protection Act, which provides a cause of action to both U.S. nationals and aliens for certain claims arising from torture and extrajudicial killing).

[9] *Tort*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[10] *See generally* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008) [hereinafter "Agent Orange"] (describing the underlying jurisdictional requirements for an ATS claim); Arthur Miller,

now often understood to refer to "customary international law."[11] As a general matter, customary international law is international law that is derived from "a general and consistent practice of States[12] followed by them from a sense of legal obligation."[13] State practices that form the basis for customary international law are often referred to as international "norms."[14] But the process of identifying what norms are actionable under the ATS is a complex judicial function that was the subject of much debate and was addressed by the Supreme Court in *Sosa v. Alvarez-Machain*,[15] discussed below.[16]

Early History of the Alien Tort Statute

Under Article III of the Constitution, Congress is empowered (but not obligated) to create a system of federal courts inferior to the Supreme Court.[17] As one of its first official duties, the First Congress passed legislation, now known as the Judiciary Act of 1789 (Judiciary Act), creating a system of federal district and circuit courts.[18] The original iteration of the ATS was included in Section 9 of the Judiciary Act—a provision which broadly addressed the jurisdiction of the

Alien Tort Claims Act—Further Limitations on its Application, *in* 14A FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3661.1 (4th ed.2009) (collecting cases and describing basic principles under the ATS).

[11] *See Agent Orange*, 517 F.3d at 116 ("[T]he law of nations has become synonymous with the term 'customary international law[.]'").

[12] The term "States" when capitalized in this context and in this report refers to sovereign nations rather than the individual "states" that form the United States of America (*e.g.*, Rhode Island, Maryland).

[13] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §102(2) (1987) [hereinafter "RESTATEMENT"]. Certain rules of customary international law, such as the international prohibition against slavery or genocide, can acquire the status of *jus cogens* norms—peremptory rules which do not permit derogation. *Id.* §§ 331 cmt. e, 703 cmt. n. For more on the sources of international law and the development of customary international law and *jus cogens* norms, see CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Michael John Garcia.

[14] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[15] 542 U.S. 692 (2004).

[16] *See infra* § "The Supreme Court Addresses the Cause-of-Action Question: *Sosa v. Alvarez-Machain*."

[17] U.S. CONST. art. III, §1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[18] Judiciary Act, 1 Stat. 73, 77 (1789) ("And [district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.").

federal district courts.[19] Congress made minor modifications to the ATS in 1873[20] and 1911.[21] The current version, quoted above, was enacted in 1948.[22]

Congressional Intent

According to the Supreme Court, the ATS "was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of a remedy might provoke foreign nations to hold the United States accountable."[23] During the early years of the Republic, between the end of the Revolutionary War and the adoption of the Constitution, the United States faced a number of difficulties meeting its obligations regarding foreign affairs.[24] Under the Articles of Confederation, the federal government had little ability to provide redress to foreign citizens for violations of international law.[25] Instead, the Confederation Congress[26] passed a resolution *recommending* that each state create judicial tribunals to hear civil and criminal claims arising out of violations of the law of nations, and that state legislatures criminalize treaty infractions and other breaches of

[19] The original version of the ATS provided that district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act, 1 Stat. at 77. In addition to ATS-based jurisdiction, Section 9 of the Judiciary Act gave federal district courts authority to hear certain criminal cases, admiralty cases, and common law suits brought by the U.S. government and suits against certain diplomats. *Id.* at 76-77.

[20] Revised Statutes tit. 13, ch. 3, § 563, para. 16 (1873) ("The district courts shall have jurisdiction as follows: … Of all suits brought by any alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States."). The 1873 version of the ATS placed the word "only" in single quotation marks, but the legislative record does not provide an explanation for this change. The 1873 recodification of the ATS placed the provision in the section establishing concurrent jurisdiction with state courts, and thus the express reference to concurrent jurisdiction "with the courts of the several States" from the 1789 version was removed as unnecessary. *See* William R. Casto, *The Federal Courts Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 119 & n.4 (1999) [hereinafter "ACTA ANTHOLOGY"].

[21] Act of March 3, 1911, 36 Stat. 1087, 1093 (1911) (providing district courts with jurisdiction over "all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States."). The single quotations marks were removed from the word "only" and a comma was inserted following that word, but there is no discussion of the reason for the changes in the legislative history.

[22] Act of June 25, 1948, 62 Stat. 869, 934 (1948) (codified in 28 U.S.C. § 1350). In the current version of the ATS, the phrase "civil action" was reported to have been substituted for the term "suits" to comport with the terminology used in modern Federal Rules of Civil Procedure. *See* H.R. Rep. No. 308, 80-308, at 124 (1947). In addition, the phrase "An alien" was substituted for "any alien[,]" and the word "committed" was inserted prior to "in violation of the law of nations." *Compare* 28 U.S.C. § 1350 *with* 36 Stat. at 1093.

[23] Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1406 (2018).

[24] For further discussion of the United States' difficulties in the realm of foreign affairs under the Articles of Confederation, see Sosa v. Alvarez-Machain, 542 U.S. 692, 715-19 (2004); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 466-507 (2011).

[25] *See Sosa*, 542 U.S. at 715-16 (discussing the history of the Alien Tort Statute).

[26] Although some commentators use the terms interchangeably, the term "Confederation Congress" in this report refers to the congressional body convened under the Articles of Confederation between 1781 and 1789, and the term "Continental Congress" refers to the federal, congressional body that met during the Revolutionary War prior to the adoption of the Articles of Confederation. *See* Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 401–03 (2017).

international law.[27] But only one state, Connecticut, passed legislation creating penalties for violations of the law of nations.[28]

At the same time, international law during the founding era was understood to place an affirmative obligation on the United States to redress certain violations of the law of nations, even when those violations were perpetrated by private individuals.[29] The Framers expressed concern that the state governments did not fully understand or appreciate the duties that arose under international law by virtue of the United States' new position as a sovereign nation.[30] These concerns led the Framers and the First Congress to provide jurisdiction to federal courts in a number of circumstances that may implicate foreign relations concerns—such as suits involving foreign diplomats,[31] admiralty and maritime cases,[32] and disputes between U.S. citizens and citizens of foreign nations.[33] The ATS was included among those class of jurisdictional provisions designed to provide a forum for federal courts to hear claims for violations of international law when the absence of such a forum could impact U.S. foreign relations.[34]

The Marbois and Van Berckel Incidents

In the 1780s, two incidents involving foreign diplomats highlighted the potential for conflict in international relations under the Articles of Confederation. In 1784, a French "adventurer," Julien de Longchamps, assaulted a French diplomat, François Barbé-Marbois (Marbois), on a public

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[27] *See* Bellia & Clark, *supra* note 24, at 495-96 (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37 (GPO 1912). *See also Sosa*, 542 U.S. at 716 (discussing the Confederation Congress's efforts related to state regulation and criminalization of international law).

[28] *See Sosa*, 542 U.S. at 716. The text of the Connecticut law is reprinted in Bellia & Clark, *supra* note 24, at 552 n. 298.

[29] *See, e.g.*, EMMERICH DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATIONS, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS bk. 2, CH. 6, § 77, at 300 (Liberty Fund ed. 2008) (originally published 1758) [hereinafter "LAW OF NATIONS"] ("The sovereign who refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.");1JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 353 (Bumstead 4th ed 1792) (Thomas Nugent, trans) (originally published 1748) ("A sovereign, who knowing the crimes of his subjects, as for example, that they practise piracy on strangers; and being also able and obliged to hinder it, does not hinder it, renders himself criminal, because he has consented to the bad action, the commission of which he has permitted, and consequently furnished a just reason of war."). For scholarly discussion on nations' international law obligation to provide redress, see Bellia & Clark, *supra* note 24, at 466-94.

[30] *See* Letter from James Madison to James Monroe, (Nov. 27, 1784), https://founders.archives.gov/documents/Madison/01-08-02-0083 ("Nothing seems to be more difficult under our new Governments, than to impress on the attention of our Legislatures a due sense of those duties which spring from our relation to foreign nations."); THE FEDERALIST NO. 80 (Alexander Hamilton) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it.").

[31] U.S. CONST. art. III, § 2 (vesting the Supreme Court with jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls"); Judiciary Act, 1 Stat. 73, 80 § 13 (1789) (detailing which suits involving diplomats shall be brought in the Supreme Court and which may be brought in lower federal courts).

[32] U.S. CONST. art. III, § 2 (extending federal judicial power to "all Cases of admiralty and maritime Jurisdiction"); Judiciary Act, 1 Stat. at 76-77 § 9 ("[T]he district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction[.]").

[33] U.S. CONST. art. III, § 2 (extending federal judicial power to "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"); Judiciary Act, 1 Stat. at 78 § 11 (providing for alienage jurisdiction to federal courts under a $500 amount in controversy requirement).

[34] *See* Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1406 (2018); Sosa v. Alvarez-Machain, 542 U.S. 692, 716–17 (2004).

street in Philadelphia.[35] Because no national judiciary existed at the time, any case against Longchamps could occur only in a Pennsylvania state court. Concerned that Pennsylvania officials may not adequately address the incident—especially after Longchamps briefly escaped following his arrest[36]—the chief French diplomat in the United States lodged a protest with the Confederation Congress and threatened to leave the country unless an adequate remedy were provided.[37] Longchamps was eventually recaptured, convicted, and sentenced to two years in jail by a Pennsylvania court.[38] But Pennsylvania officials declined French requests to deliver Longchamps to French authorities,[39] and the Confederation Congress passed a resolution directing the Secretary of Foreign Affairs to apologize to Marbois for its limited ability to provide redress at the federal level.[40]

Three years later, similar tensions arose when a New York constable entered the home of the Dutch Ambassador and arrested one of his domestic servants.[41] When the Ambassador, Pieter J. Van Berckel, protested that his servant should have been afforded diplomatic immunity, U.S. Secretary of Foreign Affairs John Jay reported to Congress that the federal government was not "vested with any Judicial Powers competent" to adjudicate the propriety of the constable's actions.[42]

The United States was "embarrassed" by these incidents and by "its inability to provide judicial relief to the foreign officials injured in the United States[.]"[43] Moreover, such incidents were not seen as low-level diplomatic quarrels. During the founding era, assaults on ambassadors (among other violations of international law) were considered "just causes of war" if not adequately redressed.[44] Some dispute whether the Marbois and Van Berckel incidents were an impetus for the ATS.[45] But the Supreme Court interpreted the ATS as part of a class of provisions in the Judiciary Act that was designed, at least in part, to respond to concerns that the federal government under

[35] *See Sosa*, 542 U.S. at 716-17. *See also* Respublica v. De Longchamps, 1 Dall. 111, 111 (O. T. Phila. 1784); Alfred Rosenthal, *The Marbois-Longchamps Affair*, 63 PA. MAG. OF HIS. & BIOG. 294 (1939).

[36] Longchamps is said to have escaped after persuading Philadelphia police officials to allow him to return home to change his clothes before a preliminary court appearance. Rosenthal, *supra* note 35, at 295.

[37] *See* Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108, 120 (2013).

[38] *See* Respublica v. De Longchamps, 1 Dall. 111, 111 (O. T. Phila. 1784).

[39] *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 205 (2d ed. 2015).

[40] *Sosa*, 542 U.S. at 717 n.11 (quoting 28 JOURNALS OF THE CONTINENTAL CONGRESS 314 (G. Hunt. ed. 1912)).

[41] *See Kiobel*, 569 U.S. at 120-121.

[42] Report of Secretary for Foreign Affairs on complaint of Minister of United Netherlands (Mar. 25, 1788), *reprinted* in 34 J. Cont. Cong. 109, 111 (1788). *See also Sosa*, 542 U.S. at 717 (discussing Jay's communication with the Confederation Congress).

[43] Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108, 123 (2013).

[44] *See id.* at 123-24 (quoting THE FEDERALIST NO. 80, at 536 (Alexander Hamilton)). *See also Sosa* 542 U.S. at 715 ("An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war.").

[45] *See, e.g.*, Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1406 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("[E]ven if you think *something* in the Judiciary Act must be interpreted to address the Marbois incident, that doesn't mean it must be the ATS clause."). Some argue that the Marbois and Van Berckel incidents were not likely catalysts for the ATS given that both incidents were prosecuted as criminal (rather than civil) cases. *See, e.g.*, BRADLEY, *supra* note 39, at 205-06. It has also been argued that, even in a civil suit, the ATS would not have been necessary to address these incidents because the Founders and First Congress created independent jurisdictional provisions for cases involving foreign diplomats. *See supra* note 31.

the Articles of Confederation was unable to provide a judicial forum to protect the rights of foreign diplomats.[46]

The Long Dormancy: 1789 to 1980

Regardless of its original purpose, the ATS was rarely used as a source of federal jurisdiction for the first 190 years of its existence. Between 1789 and 1980, litigants successfully invoked the ATS as a basis for jurisdiction in only two reported decisions.[47] The first case, *Bolchos v. Darrel*,[48] involved a French captain attempting to recover a cargo of slaves he had captured along with a Spanish prize vessel. The second, *Adra v. Clift*,[49] was brought over 150 years later, and involved the use of forged passports in an international child custody dispute.[50] The dearth of judicial opinions led one federal judge and prominent commentator on federal jurisdiction to describe the statute as "an old but little used section [that] is a kind of a legal Lohengrin . . . no one seems to know from whence it came"[51]—a reference to a Germanic tale involving a knight who appears in a boat drawn by swans to help a noblewoman in distress, but refuses to disclose his origins.[52]

The End of the Long Dormancy: 1980-2004

The Rebirth of the ATS: *Filártiga v. Peña-Irala*

After nearly two centuries of dormancy, the ATS sprang into judicial and academic prominence in 1980 after the U.S. Court of Appeals for the Second Circuit (Second Circuit)[53] issued a landmark decision in *Filártiga v. Peña-Irala*.[54] In that case, two Paraguayan citizens (the Filártigas) brought suit against the former Inspector General of Asuncion, Paraguay, alleging that he had kidnapped, tortured, and killed the plaintiffs' relative in retaliation for their family's support of a political opposition party.[55] The defendant, Americo Norberto Peña-Irala, was also a Paraguayan citizen

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[46] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 717 (2004) (internal citations omitted) ("The Framers responded [to the Marbois and Van Berckel incidents] by vesting the Supreme Court with original jurisdiction over 'all Cases affecting Ambassadors, other public ministers and Consuls[,]"and the First Congress followed through. The Judiciary Act reinforced this Court's original jurisdiction over suits brought by diplomats [] created alienage jurisdiction, . . . and, of course, included the ATS[.]").

[47] Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007) ("During the first 191 years of its existence, the ATS lay effectively dormant. In fact, during the nearly two centuries after the statute's promulgation, jurisdiction was maintained under the ATS in only two cases.").

[48] 3 F. Cas. 810, 810 (D.S.C. 1795).

[49] 195. F. Supp. 857 (D. Md. 1961).

[50] *See id.* at 859. For additional discussion of cases in which litigants successfully invoked the Alien Tort Statute between 1789 and 1980, see BRADLEY, *supra* note 39, at 206-07.

[51] IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.).

[52] *Lohengrin*, ENCYC. BRITANNICA (last visited July 25, 2017), https://www.britannica.com/topic/Lohengrin-German-legendary-figure.

[53] This report references a large number of decisions by federal appellate courts in their respective regional circuits. For purposes of brevity, references to a particular circuit in the body of this report (e.g., the Ninth Circuit) refer to the U.S. Court of Appeals for that circuit.

[54] 630 F.2d 876 (2d Cir. 1980).

[55] *Id.* at 878.

who was discovered to be living in New York on an expired visa.[56] Relying on the ATS for jurisdiction, the Filártigas contended that Peña-Irala's actions constituted a tort in violation of the law of nations, but the district court initially dismissed the case on the ground that the law of nations actionable under the ATS did not include modern provisions in international law that govern how a nation (in this case, Paraguay) treats its own citizens.[57]

In a first-of-its-kind decision, the Second Circuit reversed and concluded that torture by a state official against its own citizen violates "established norms of the international law of human rights" and therefore provides an actionable claim under the ATS.[58] The *Filártiga* court reasoned that courts applying the ATS "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[59] Although *Filártiga* never reached the Supreme Court, it was a highly influential decision that caused the ATS to "skyrocket" into prominence as a vehicle for asserting civil claims in U.S. federal courts[60] for human rights violations even when the events underlying the claims occurred outside the United States.[61]

Framing the Cause of Action Question: *Tel-Oren v. Libyan Arab Republic*

While *Filártiga* was a watershed moment in the history of the ATS, courts soon began to identify certain limits on ATS jurisdiction that were not addressed in the Second Circuit's decision. In one prominent 1984 decision, *Tel-Oren v. Libyan Arab Republic*,[62] the D.C. Circuit framed one of the chief, conceptual questions related to the ATS: Is the statute solely jurisdictional in nature, or does it also create a cause of action for plaintiffs? As a general matter, plaintiffs pursuing a civil claim in federal court must both (1) identify a court that possesses jurisdiction over the subject matter of the case and (2) have a cause of action that allows them to seek the relief requested, such as compensatory relief for monetary damages.[63] In *Tel-Oren*, the D.C. Circuit addressed—but did not resolve—whether the ATS satisfies both requirements.

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[56] *See id.* at 878-79.

[57] *See* Filártiga v. Peña-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984) (district court dismissal on remand from the Second Circuit discussing its prior dismissal).

[58] Filártiga v. Peña-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

[59] *See id.* at 881.

[60] As a federal statute, the ATS does not affect the availability of claims that litigants may have under U.S. state law or under the laws of foreign nations.

[61] *See* Anthony D'Amato, *Preface in* ATCA ANTHOLOGY, *supra* note 20, at vii. *See also Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 116 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013) ("Since [*Filártiga*], the ATS has given rise to an abundance of litigation in U.S. district courts."); Balintulo v. Daimler AG, 727 F.3d 174, 179 (2d Cir. 2013) (describing the ATS as "a statute, passed in 1789, that was rediscovered and revitalized by the courts in recent decades to permit aliens to sue for alleged serious violations of human rights occurring abroad."); Stephen J. Schnably, *The Transformation of Human Rights Litigation: The Alien Tort Statute, the Anti-Terrorism Act, and JASTA*, 24 U. MIAMI INT'L & COMP. L. REV. 285, 290 (2017) ("What struck many commentators about [*Filártiga*] was that it involved events with seemingly no relation to U.S. actors or territory[.]"); Ingrid Wuerth, Kiobel v. Royal Dutch *Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 601 (2013) ("Since the 1980 court of appeals decision in *Filartiga v. Peña-Irala* permitting a wide of range human rights cases to go forward under the statute's auspices, the ATS has garnered worldwide attention and has become the main engine for transnational human rights litigation in the United States.").

[62] 726 F.2d 775 (D.C. Cir. 1984) (per curiam).

[63] *See* BRADLEY, *supra* note 39, at 209.

Tel-Oren involved a group of Israeli citizens and survivors of a terrorist attack in Israel who brought an ATS claim against the Palestinian Liberation Organization and others who allegedly orchestrated the attack.[64] In a per curiam opinion, a three-judge panel of the D.C. Circuit unanimously agreed to dismiss the case, but each judge issued a separate opinion relying on a different rationale for dismissal.

In a widely discussed concurring opinion,[65] Judge Bork concluded that the ATS is a purely jurisdictional statute that does not create a cause of action for damages.[66] To hold otherwise, Judge Bork reasoned, would violate separation-of-powers principles by allowing judges, rather than Congress, to create causes of action that could affect U.S. foreign relations.[67] Judge Edwards disagreed, and argued that the ATS itself creates a statutory cause of action.[68] However, Judge Edwards still concurred in the dismissal under the rationale that the case lacked official state action,[69] and that the claim for terrorism was not sufficiently recognized as a violation of international law.[70] In addition, Judge Robb found the case to raise nonjusticiable political questions—meaning it raised disputes more appropriately addressed by the legislative and executive branches.[71] But it was the broader, doctrinal disagreement between Judge Bork and Judge Edwards over the cause-of-action question that would eventually become the subject of a landmark Supreme Court decision, *Sosa v. Alvarez-Machain*,[72] discussed below.[73] However, *Sosa* was not decided until 20 years later. In the interim, Congress created a new statutory basis for civil claims for torture and extrajudicial killing—the same claims asserted in *Filártiga*—through the Torture Victim Protection Act.

The Torture Victim Protection Act

In 1992, President George H. W. Bush signed into law the Torture Victim Protection Act (TVPA), which creates a civil cause of action for damages against any "individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another to torture or extrajudicial killing.[74] Legislative history of the TVPA suggests the act was designed to establish an "unambiguous basis" for the causes of action recognized in *Filártiga* and to respond to Judge Bork's argument in *Tel-Oren* that there must be a separate and explicit "grant by Congress of a

[64] *Tel-Oren*, 726 F.2d at 775 (per curiam).

[65] *See, e.g.*, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 237-43 (1996).

[66] *Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring). ("[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.").

[67] *See id.* at 800-17.

[68] *Id.* at 778. (Edwards, J., concurring).

[69] Judge Edwards believed that a claim for torture required official state action. *See id.* at 791-96. And because the Palestinian Liberation Organization was not recognized as a state under international law, in his view, the torture claim failed. *See id.*

[70] *Id.* at 795-96.

[71] *See id*. at 823–27. For more background on the political question doctrine, see CRS Report R43834, *The Political Question Doctrine: Justiciability and Separation of Powers*, by Jared P. Cole (available to congressional clients upon request).

[72] 542 U.S. 692 (2004).

[73] *See infra* § "The Supreme Court Addresses the Cause-of-Action Question: *Sosa v. Alvarez-Machain*."

[74] Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified in 28 U.S.C. § 1350 note).

private right of action" in order to assert a tort claim for a violation of international law.[75] However, there are important distinctions between the TVPA and ATS.

Whereas the TVPA expressly creates a civil cause of action for torture and extrajudicial killing, the ATS refers only to the *jurisdiction* of federal courts.[76] Moreover, while the ATS applies only to civil actions brought by aliens, the TVPA allows a cause of action to be brought by and against "individuals."[77] Courts have interpreted this term as extending a cause of action to both U.S. and foreign nationals,[78] but excluding liability against corporations.[79] At the same time, the TVPA places limitations on civil actions that are not present in the ATS. Most notably, the TVPA requires that plaintiffs exhaust all "adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[80]

The relationship between the TVPA and the ATS is not clearly defined. Some courts concluded that the TVPA supplements (but does not displace) the ATS, and therefore plaintiffs can choose whether to bring claims for torture or extrajudicial killing under either statute.[81] Others courts reasoned that the TVPA was intended to "occupy the field," and that plaintiffs cannot avoid its exhaustion-of-remedies requirement merely by pleading their claims under the ATS.[82] Regardless of how the two statutes interact, the TVPA serves as an example of Congress providing an express cause of action for certain claims that litigants had argued were actionable under the ATS as torts in violation of the law of nations.

The Supreme Court Addresses the Cause-of-Action Question: *Sosa v. Alvarez-Machain*

Twenty years after Judge Bork and Judge Edwards framed the debate over whether the ATS creates a cause of action, the Supreme Court addressed the cause-of–action question in *Sosa v. Alvarez-Machain*.[83]

Background and History of *Sosa*

Sosa concerned a Mexican doctor, Humberto Alvarez-Machain (Alvarez), who allegedly participated in the torture and murder of a Drug Enforcement Administration (DEA) agent in

[75] H.R. REP. NO. 102-367, pt. 1, at 4 (1991).

[76] *Compare* Pub. L. No. 102-256, § 2(a) ("An individual who under actual or apparent authority, or color of law, of any foreign nation [commits torture or an extrajudicial killing] shall, in a civil action, be liable for damages[.]") *with* 28 U.S.C. § 1350 (providing that "district courts shall have original jurisdiction" over certain civil actions).

[77] *See* 28 U.S.C. § 1350 note (creating liability for "any individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects another individual to torture or extrajudicial killing).

[78] *See, e.g.*, Baloco ex rel. Tapia v. Drummond Co., 640 F.3d 1338, 1346 (11th Cir. 2011); Flores v. S. Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003) (quoting S. REP. 102-249, at 5 (1991)).

[79] *See* Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710 (2012) ("The text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not.").

[80] *See* 28 U.S.C. § 1350 note.

[81] *See, e.g.*, Aldana v. Del Monte Fresh Produce, 416 F.3d 1242, 1250-51 (11th Cir. 2005).

[82] *See* Enahoro v. Abubakar, 408 F.3d 877, 884–85 (7th Cir. 2005) ("We find that the [TVPA] does, in fact, occupy the field. If it did not, it would be meaningless. No one would plead a cause of action under the [TVPA] and subject himself to its requirements if he could simply plead under international law.").

[83] 542 U.S. 692 (2004).

Mexico by prolonging the agent's life so he could be further interrogated and tortured.[84] When the Mexican government declined the DEA's requests for assistance in apprehending Alvarez, DEA officials approved a plan to hire Mexican nationals to apprehend Alvarez and bring him to the United States for trial.[85]

The Supreme Court twice reviewed cases arising from Alvarez's seizure. After being brought into U.S. custody, Alvarez moved to dismiss the criminal indictment against him on the ground that his apprehension was "outrageous governmental conduct" and that it violated the extradition treaty between the United States and Mexico.[86] In its first decision arising out of his case, *United States v. Alvarez-Machain*,[87] the Supreme Court rejected Alvarez's arguments, finding no grounds to justify dismissal of the criminal case against him.[88]

The case was remanded to district court, but the district court dismissed the charges for lack of evidence at close of the government's case during trial.[89] No longer subject to criminal charges, Alvarez filed suit in 1993 asserting ATS claims against the Mexican nationals responsible for his abduction.[90] This civil case, *Sosa v. Alvarez-Machain*,[91] also reached the Supreme Court, which granted certiorari to clarify whether the ATS "not only provides federal courts with [jurisdiction], but also creates a cause of action for an alleged violation of the law of nations."[92]

The *Sosa* Holding

Adopting reasoning that largely appeared to comport with Judge Bork's concurring opinion in *Tel-Oren*, the *Sosa* Court agreed that the "ATS is a jurisdictional statute creating no new causes of action . . . ."[93] Among other things, the Court noted that the ATS is written in jurisdictional language and was originally enacted as part of the Judiciary Act—a statute that concerned the jurisdiction of all federal courts more broadly.[94]

While the *Sosa* Court agreed that the ATS was not intended to create statutory causes of action, a majority nevertheless concluded that the statute was not meant to be "stillborn"—meaning it was not intended to be a "jurisdictional convenience to be placed on a shelf" until a future Congress authorized specific causes of action.[95] Instead, the Court held that, under the "ambient law" of the era, the First Congress would have understood a "modest number of international law violations" to have been actionable under the ATS without the need for a separate statute creating a cause of

[84] *Id.* at 697.

[85] *See id.*

[86] *Id.* at 698.

[87] 504 U.S. 655 (1992).

[88] *See id.* at 670.

[89] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004). *See also* BRADLEY, *supra* note 39, at 212 (discussing background on the trial court proceedings).

[90] Alvarez also filed suit under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, against the United States and the federal officials whom he alleged to have orchestrated his seizure. *Sosa*, 542 U.S. at 698

[91] 542 U.S. 692.

[92] *Sosa*, 542 U.S. at 699 (quoting *Alvarez-Machain v. United States*, 331 F.3d 604, 611 (9th Cir. 2003)) (internal quotations omitted).

[93] *See id.*at 724.

[94] *See id*. at 712-14.

[95] Sosa v. Alvarez-Machain 542 U.S. 692, 714-19 (2004).

action.[96] In other words, *Sosa* held that, while the ATS is jurisdictional in nature, it was enacted with the expectation that federal courts could recognize a "narrow set" of causes of action as a form of judicially developed common law,[97] as opposed to a congressionally created, statutory cause of action.[98]

Sosa cited three particular offenses against the law of nations in 18th-century English criminal law that the Court believed the Founders would have considered to have been tort claims actionable under the ATS at the time of its enactment: violations of safe conducts,[99] infringement on the rights of ambassadors, and piracy.[100] But the Court also held that ATS jurisdiction is not limited to those claims.[101] Rather, under *Sosa*, federal courts can recognize common law claims for violations of the "present-day law of nations," provided the claims satisfy an important and overarching limitation: only those claims that "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms" of international law are actionable under the ATS.[102] Thus, while *Sosa* allows federal courts to recognize some tort claims for violations of modern customary international law, the Court emphasized the need for "judicial caution" and "restraint" in identifying new causes of action.[103] Applying these principles, the Court held that Alvarez's claim for arbitrary arrest and detention was not sufficiently defined or supported in modern-day international law to meet the newly described requirements for an ATS claim, and was thus dismissed.[104]

*Sosa'*s Two-Step Framework

Since *Sosa* was decided, a majority of Justices on the Supreme Court have interpreted the case to establish a two-step framework for addressing questions related to the breadth of ATS liability.[105] First, courts must determine whether the claim is based on violation of an international law norm that is "specific, universal, and obligatory."[106] Second, if step one is satisfied, courts should

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[96] *See id.* at 714-25.

[97] Common law is generally understood as the "body of law derived from judicial decisions, rather than from statutes or constitutions[.]" *Common Law*, BLACK'S LAW DICTIONARY (10th ed. 2014). The role of the common law in federal courts and the interplay between international law and common law is the subject of scholarly debate that is outside the scope of this report. *See generally* BRADLEY, *supra* note 39, at 139-58.

[98] *See Sosa*, 542 U.S. at 721-25. Justice Scalia authored a concurring opinion, joined by two other Justices, in which he argued that judges should not be permitted to recognize common law claims of action, and that only causes of action created through congressional action should be permitted under the ATS. *See id.* at 747.

[99] A safe conduct is a "privilege granted by a belligerent allowing an enemy, a neutral, or some other person to travel within or through a designated area for a specified purpose." *Safe Conduct*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[100] *Sosa*, 542 U.S. at 724.

[101] *See id.* at 724 ("[T]hough we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to [18th century paradigms of international law] . . . no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with [*Filártiga*] has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law[.]").

[102] *Id.*

[103] *Id.* at 725.

[104] *Id.* at 732-38.

[105] *See* Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1399 (2018) (plurality opinion); *id.* at 1409 (Alito, J., concurring); *id.* at 1419 (Sotomayor, J., dissenting). *See also* CRS Legal Sidebar LSB10025, *Can Corporations be Held Liable under the Alien Tort Statute?*, by Stephen P. Mulligan (discussing references to *Sosa*'s two-step framework during oral argument in *Jesner*).

[106] *See* Sosa v. Alvarez-Machain 542 U.S. 692, 732 (2004) (quoting In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994).

determine whether allowing the case to proceed is an "appropriate" exercise of judicial discretion.[107]

Although *Sosa* warned that lower courts should exercise "vigilant doorkeeping" and "great caution" before recognizing causes of action under the ATS,[108] the post-*Filártiga* movement of using the ATS to seek redress for human rights abuses continued "largely unabated" after *Sosa*.[109] Beginning in 2013, that trend slowed after the Supreme Court recognized restrictions on the territorial reach of the ATS in *Kiobel v. Royal Dutch Petroleum*.[110]

Extraterritoriality and the ATS: *Kiobel v. Royal Dutch Petroleum*

In *Kiobel*, a group of Nigerian nationals residing in the United States filed an ATS suit against Dutch, British, and Nigerian oil companies for allegedly aiding and abetting human rights abuses committed by the Nigerian police and military in Nigeria.[111] The Second Circuit dismissed the case on the ground that corporations cannot be liable for violations of the law of nations under the ATS, and the Supreme Court originally granted certiorari on the question of corporate liability.[112] After hearing oral argument, the Court requested additional briefing and ordered reargument on a new issue that would become dispositive for the case: Does the ATS confer jurisdiction to hear claims for violations of the law of nations occurring within the *territory of a sovereign other than the United States*?[113]

The *Kiobel* Majority

In a majority opinion written by Chief Justice Roberts, the *Kiobel* Court relied on a canon of statutory interpretation known as the "presumption against extraterritorial application" to conclude that the ATS does not reach conduct that occurred entirely in the territory of a foreign nation.[114] Also known as the "presumption against extraterritoriality," the canon of construction is intended to avoid unintended clashes between U.S. and foreign law that could result in international discord.[115] Reliance on the presumption also reflects the "more prosaic

[107] *See id.* at 738.

[108] *Id.* at 728-29.

[109] John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 2 (2009).

[110] 569 U.S. 108 (2013). *See also* Miller, *supra* note 10 at § 3661.3 (discussing the "dramatically narrowing effect on the applicability of the [ATS] as a jurisdictional basis for bringing claims of human rights violations in United States courts."); Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158, 265 (2014) ("Arguably the largest barrier that victims of transnational human rights abuses now face in the United States is *Kiobel*[.]"); *id.* at 265 n.50 (collecting scholarly discussions of the narrowing impact of *Kiobel* on human rights litigation).

[111] *Kiobel*, 569 U.S. at 113-14.

[112] *See id*. at 113. *See also* Petition for Writ of Certiorari, *Kiobel*, 569 U.S. 108 (No. 10-1491), at i.

[113] *Kiobel*, 569 U.S. at 114 (emphasis added).

[114] For more background on the presumption against extraterritoriality and other canons of statutory construction, see CRS Report 97-59, *Statutory Interpretation: General Principles and Recent Trends*, at 25 (available to congressional clients upon request).

[115] *Kiobel*, 569 U.S. at 115 (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

commonsense notion that Congress generally legislates with domestic concerns in mind."[116] Unless a statute gives "clear indication of an extraterritorial application," federal courts generally will presume that it is not intended to apply to claims that arise in foreign territory.[117]

According to the *Kiobel* Court, nothing in the text or history of the ATS suggests the First Congress intended the statute to have extraterritorial reach.[118] To the contrary, the events giving rise to the ATS—including the Marbois and Van Berckel incidents—demonstrate that the statute was designed to avoid the same types of "diplomatic strife" and foreign relations friction that the presumption of extraterritoriality is intended to guard against.[119] Accordingly, the Court held that the presumption against extraterritoriality applies to the ATS, and the Nigerian plaintiffs' claims for violations of the law of nations in Nigerian territory were barred.[120]

In a brief concluding paragraph, the *Kiobe*l Court suggested that the presumption against extraterritoriality might be displaced in future ATS cases if the claims "touch[ed] and concern[ed]" the United States:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[121]

The Court, however, did not provide any further explanation as to how an ATS claim could satisfy the "touch and concern" test—leading to divergent interpretations in the lower courts, as discussed below.[122]

The *Kiobel* Concurring Opinions

Kiobel produced two concurring opinions and one opinion concurring in the judgment only. Justice Kennedy wrote a one-paragraph concurrence, emphasizing his belief that it was the "proper disposition" for the majority to "leave open a number of significant questions regarding the reach and interpretation" of the ATS that will require elaboration in the future.[123]

Justice Alito, in an opinion joined by Justice Thomas, agreed that the majority's opinion "le[ft] much unanswered."[124] But Justice Alito would have further explained how litigants can satisfy the "touch and concern" requirement. Under Justice Alito's self-described "broader standard," only when the conduct that constitutes a violation of the law of nations occurred domestically will the

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[116] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (quoting Smith v. United States, 507 U.S. 197, 204 n. 5 (1993)) (internal quotation marks omitted).

[117] Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010).

[118] *See Kiobel*, 569 U.S. at 117-19.

[119] *See id*. at 117-124. *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2004) (describing how the United States "respond[ed] to the Marbois and Van Berckel incidents through a class of provisions that included the ATS); *supra* § "The Marbois and Van Berckel Incidents."

[120] *Kiobel*, 569 U.S. at 124.

[121] *Id.* at 124-25 (internal citation omitted).

[122] *See infra* § "The "Touch and Concern" Circuit Split."

[123] *Kiobel*, 569 U.S. at 125 (Kennedy, J., concurring).

[124] *See id*. at 125-26 (Alito, J., concurring).

claim "touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality.[125]

In a third separate opinion, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in the majority's decision to dismiss the case, but disagreed with its reasoning.[126] Justice Breyer argued the presumption of extraterritoriality should not apply because the ATS was always intended to create a cause of action for at least one act, piracy, which occurs outside the territorial jurisdiction of the United States.[127] Instead, Justice Breyer argued that the Court should have limited ATS jurisdiction to cases involving one of the following factors:

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[128]

Justice Breyer reasoned that his test was consistent with the United States' long-standing obligation under international law not to become a safe harbor for violators of fundamental international norms.[129] Applying this test to the facts of the *Kiobel*, Justice Breyer agreed that the matter should be dismissed because "the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction."[130]

Interpreting *Kiobel*

Although lower courts' interpretations of *Kiobel* are still evolving, many commentators see the Supreme Court's decision as having significantly limited the ATS as a vehicle to redress human rights abuses in U.S. courts.[131] In particular, *Kiobel* appears to preclude so-called "foreign cubed" cases in which a foreign plaintiff sues a foreign defendant for conduct and injuries that occurred in a foreign nation.[132] On the other hand, cases in which there is *some* connection to the United States—such as a defendant who is a U.S. citizen or corporation—are less easily resolved under *Kiobel*. In particular, courts have adopted differing interpretative frameworks for deciding what level of domestic conduct or contact is necessary to satisfy *Kiobel*'s "touch and concern" test, creating a split among the circuits.[133]

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[125] *See id.* at 126.

[126] *See id.* at 127 (Breyer, J., concurring in judgment).

[127] *See id.* at 129-132.

[128] *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring in judgment).

[129] *See id.* at 133.

[130] *Id.* at 128.

[131] *See supra* note 110. *See also* Schnably, *supra* note 81, at 292 (describing *Kiobel* as a "much more serious blow" against the ATS); Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1753 (2014) (stating that *Kiobel* "signals the end of the *Filártiga* human rights revolution.").

[132] *See, e.g.*, Chen Gang v. Zhao Zhizhen, No. 3:04CV1146 RNC, 2013 WL 5313411, at *3 (D. Conn. Sept. 20, 2013) ("Despite plaintiffs' attempts to distinguish their claims from those in *Kiobel*, this case is also a paradigmatic 'foreign[-]cubed' case."); Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCTOUSBLOG (Apr. 18, 2013), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/ ("'Foreign cubed' cases—cases in which there is a foreign plaintiff suing a foreign defendant for acts committed on foreign soil—are off the table.").

[133] For additional discussion of the "touch and concern" circuit split, see Note, *Clarifying* Kiobel's *"Touch and Concern" Test*, 130 HARV. L. REV. 1902, 1902-1911 (2017); Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from* Kiobel's *"Touch and Concern" Test*, 66 HASTINGS L.J. 443, 455-63 (2015); John B.

The "Touch and Concern" Circuit Split

As of the date of this report, five circuits have considered the "touch and concern" test in the context of the ATS. The Fifth and Second Circuits adopted a bright-line approach similar to Justice Alito's concurrence in *Kiobel*. In order to displace the presumption against extraterritoriality under this approach, the *conduct* that constitutes a violation of the law of nations must have occurred in the United States, regardless of whether the case has other domestic connections, such as a U.S. citizen defendant.[134]

The Fourth, Ninth, and Eleventh Circuits, by contrast, have developed flexible methods of interpretation. According to the Fourth Circuit, an ATS claim "touches and concerns" the United States "when extensive United States contacts are present and the alleged conduct bears . . . a strong and direct connection to the United States."[135] The Fourth Circuit emphasized that this is a fact-based analysis that most cases will not satisfy.[136] But it allowed one case to go forward that involved American employees of a U.S. corporation, even though the primary conduct giving rise to a violation of the law of nations—alleged torture at the Abu Ghraib prison facility in Iraq—occurred outside the territorial jurisdiction of the United States.[137]

The Eleventh Circuit has held that an ATS claim satisfies the "touch and concern test" if it "has a U.S. focus and *adequate* relevant conduct occurs in the United States."[138] Under this "fact-intensive" approach, the Eleventh Circuit has considered factors such as the citizenship of the defendants and potential U.S. national interests triggered by the nature of the defendants'

Bellinger III, *The Alien Tort Statute and the* Morrison *"Focus" Test: Still Disagreement After* RJR Nabisco, LAWFARE (Feb. 21, 2017), https://www.lawfareblog.com/alien-tort-statute-and-morrison-focus-test-still-disagreement-after-rjr-nabisco.

[134] *See* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 194-97 (5th Cir. 2017) (quoting RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016)) (holding that, if the conduct that constitutes a violation of the law of nations "occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred"), *cert. denied*, 138 S. Ct. 134 (2017); Balintulo v. Daimler AG, 727 F.3d 174, 192 (2d Cir. 2013) (holding that no ATS claim could lie when the defendant's conduct in the United States did not "giv[e] rise to a violation of customary international law"). *See also* Mastafa v. Chevron Corp., 770 F.3d 170, 185 (2d Cir. 2014) (interpreting *Balintulo* and explaining that the "focus" of the ATS for purposes of the "touch and concern" test is the "conduct alleged to constitute violations of the law of nations").

[135] Warfaa v. Ali, 811 F.3d 653, 660 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2289 (2017).

[136] *See id.* at 659-60.

[137] *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 528-29 (4th Cir. 2014).The Fourth Circuit found that the "touch and concern" test was satisfied when (1) the defendant was a U.S. corporation; (2) the defendant's employees upon whose conduct that ATS claims were based were U.S. citizens; (3) the defendant's contract to perform interrogation services in Iraq was issued in the U.S. by the Department of the Interior, and the contract required the corporation's employees to obtain security clearances from the Department of Defense; (4) the allegation that the defendant's managers located inside the United States gave "tacit approval" to the alleged acts of torture committed by the defendant's employees at Abu Ghraib and allegedly endeavored to cover up the alleged torture from within the United States; and (5) "the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad." *Id.* at 530-31.

[138] Doe v. Drummond Co., 782 F.3d 576, 592 (11th Cir. 2015) (affirming dismissal of ATS claims by heirs of Columbian citizens against a multinational coal mining company and its subsidiary and corporate officers for allegedly aiding and abetting extrajudicial killings and war crimes of a Columbian paramilitary group), *cert. denied*, 136 S. Ct. 1168 (2016). In a prior case in which plaintiffs alleged that two American corporations, acting in concert with paramilitary forces in Panama, were liable under the ATS for injuries caused by torture, the 11th Circuit appeared to focus solely on the nation where the alleged torture occurred. *See* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1191 (11th Cir. 2014) ("There is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force."), *cert. denied*, 135 S. Ct. 1853 (2015).

conduct.[139] But it deemed these factors insufficient on their own to displace the presumption against extraterritoriality.[140] Similarly, the Ninth Circuit reasoned "that a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish sufficient connection between an ATS claim and the territory of the United States."[141]

Applying *Morrison* and *RJR Nabisco Inc.* to the ATS

Some of the disparity among the circuits arises from their interpretation of *Morrison v. National Australia Bank Ltd.*[142]—a pre-*Kiobel* Supreme Court decision analyzing how the presumption of extraterritoriality applies to Section 10(b) of the Securities and Exchange Act of 1934.[143] Section 10(b) prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a "security registered on a national securities exchange[.]"[144] The plaintiffs in *Morrison* argued that, although they purchased their securities on a foreign stock exchange outside the United States, their claim was domestic in nature because the deceptive conduct took place in the United States.[145] The Supreme Court disagreed, and held that the presumption against extraterritoriality still defeated their case because the "focus" of Section 10(b) is on the "purchase and sale of securities"—which occurred in Australia—not the deceptive conduct.[146]

Application of *Morrison*'s "focus" analysis in ATS cases may make it more difficult for plaintiffs to displace the presumption against extraterritoriality,[147] but courts have reached differing conclusions about whether *Morrison* applies to the ATS.[148] The Ninth and Fourth Circuits concluded that the *Morrison* "focus" analysis should not control in ATS cases because the Supreme Court deliberately announced a different standard—the "touch and concern" test—in *Kiobel*.[149] By contrast, the Fifth and Second Circuits were guided by *Morrison*'s "focus" analysis in their interpretations of *Kiobel*.[150] And the Fifth and Second Circuits also adopted a bright line

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[139] *See Drummond Co.*, 782 F.3d at 595-96 (describing the U.S. citizenship of defendants and the allegation that the defendants funded an organization designated by the Department of State as a Foreign Terrorist Organization as relevant to the "touch and concern" inquiry, but insufficient on their own to displace the presumption against extraterritoriality).

[140] *See id.* at 592.

[141] Mujica v. AirScan Inc., 771 F.3d 580, 594 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 690 (2015). *Mujica* concerned allegations of extrajudicial killing; torture; crimes against humanity; cruel, inhuman, and degrading treatment; and war crimes by two American corporations that allegedly supported the bombing of a civilian village in Columbia by the Columbian Air Force. *Id.* at 584-86. Although the Ninth Circuit considered the domestic corporate status of the defendants, the court held that that corporate status alone was not sufficient to displace the presumption against extraterritoriality. *See id.* at 596.

[142] 561 U.S. 247 (2010).

[143] 15 U.S.C. § 78j(b).

[144] *Id.*

[145] *Morrison*, 561 U.S. at 266.

[146] *See id.* at 266-67.

[147] *See infra* note 151.

[148] *See infra* notes 149-152.

[149] Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1028 (9th Cir. 2014) ("[*Kiobel*] did not explicitly adopt *Morrison*'s focus test, and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt."), *reh'g en banc denied*, 786 F.3d 801 (2015), *cert. denied*, 136 S. Ct. 798 (2016); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527 (4th Cir. 2014) (interpreting *Kiobel*'s "touch and concern" test to address the underlying "claims" rather than the "focus" of the ATS).

[150] *See* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 195 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 134 (2017);

rule that plaintiffs can displace the presumption against extraterritoriality in ATS cases only when the conduct that constitutes a violation of the law of nations occurred domestically.[151] Finally, the Eleventh Circuit adopted a hybrid approach "amalgamat[ing] *Kiobel*'s standards with *Morrison*'s focus test[.]"[152]

The Supreme Court's 2016 decision in *RJR Nabisco, Inc. v. European Community*[153] may help to resolve this conflict. There, the Court applied the presumption against extraterritoriality to the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO).[154] In the course of discussing its prior jurisprudence on extraterritoriality, including *Kiobel*, the Supreme Court explained:

> *Morrison* and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. . . . If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus."[155]

Some commentators interpreted this reference to *Kiobel* as a clarification that *Morrison*'s "focus" analysis applies in ATS cases.[156] The Fifth Circuit also adopted this interpretation in the only court of appeals decision analyzing extraterritoriality and the ATS since the Supreme Court's ruling *RJR Nabisco*.[157] However, at least one district court held that *RJR Nabisco* did not overturn prior Ninth Circuit precedent that *Morrison*'s "focus" test does not apply to the ATS.[158] Thus, it remains to be seen whether *RJR Nabisco* will streamline lower courts' interpretive frameworks for analyzing extraterritoriality under the ATS.[159]

Moreover, even if the "focus" test becomes part of all the circuits' analyses, *RJR Nabisco* may still leave room for courts to disagree on precisely what the "focus" of the ATS is. But if courts follow the Fifth Circuit's interpretation of *RJR Nabisco* in ATS cases,[160] they appear more likely to create a bright-line rule that ATS plaintiffs can overcome the presumption against extraterritoriality only if the specific conduct constituting a violation of the law of nations occurred within the United States. Regardless of which interpretation courts adopt, the Supreme

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Mastafa v. Chevron Corp., 770 F.3d 170, 184 (2d Cir. 2014).

[151] *See supra* note 134.

[152] Doe v. Drummond Co., 782 F.3d 576, 590 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016).

[153] 136 S. Ct. 2090 (2016).

[154] 18 U.S.C. § 1964.

[155] *See RJR Nabisco, Inc.*, 136 S. Ct. at 2101.

[156] *See* Bellinger III, *supra* note 133 ("*RJR Nabisco* seemingly resolved the circuit split over whether to apply the *Morrison* test.").

[157] Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 194-97 (5th Cir. 2017) ("*RJR Nabisco* makes clear that *Morrison*'s 'focus' test still governs."), *cert. denied*, 138 S. Ct. 134 (2017).

[158] *See* Salim v. Mitchell, 268 F. Supp. 3d 1132, 1151 (E.D. Wash. Aug. 7, 2017) ("This court finds *RJR Nabisco* has not displaced *Kiobel* when the issue is extraterritorial application of the ATS. Therefore, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) remains controlling authority, including its determination that [*Kiobel*] did not incorporate *Morrison*'s focus test.").

[159] *Accord* Bellinger III, *supra* note 133 ("[I]t may be premature to say that *RJR Nabisco* resolves the circuit split over the interpretation of 'touch and concern.'").

[160] *See Adhikari*, 845 F.3d at 194-97.

Court's decision in *Jesner v. Arab Bank, PLC*, discussed below, is likely to further restrict the use of the statute in pursuing extraterritorial ATS claims.[161]

Jesner v. Arab Bank, PLC: Barring Foreign Corporate Liability

In the Supreme Court's most recent ATS case, *Jesner v. Arab Bank, PLC*, the Court granted certiorari to resolve another lingering circuit split in ATS litigation: May corporations be deemed liable under the ATS?[162] *Jesner* was the second time the Supreme Court took up the issue of corporate liability under the ATS. Although it ultimately decided *Kiobel* on extraterritoriality grounds, the Court originally granted certiorari in that case to review a holding in the Second Circuit that the law of nations does not recognize corporate liability.[163] At the time certiorari was granted in *Jesner*, however, the Second Circuit was the only circuit to reach this conclusion. All other circuits that considered the issue had determined that corporate liability is available under the ATS.[164]

Background on *Jesner*

Jesner involved claims by approximately 6,000 foreign nationals (or their families or estate representatives) who were injured, killed, or captured by terrorist groups in Israel, the West Bank, and Gaza between 1995 and 2005.[165] The plaintiffs alleged that Arab Bank—one of the largest financial institutions in the Middle East[166]—aided and abetted four terrorist organizations allegedly responsible for the attacks.[167] Among other things, the plaintiffs alleged that Arab Bank maintained accounts for the organizations knowing that they would be used for terrorist actions, and played an active role in identifying the families of victims of suicide bombing so that they

[161] *See infra* § "*Jesner v. Arab Bank, PLC*."

[162] *See* Petition for a Writ of Certiorari, Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386 (Oct. 5, 2016) (No. 16-499) ("This case presents the question this Court granted certiorari to resolve, but ultimately left undecided, in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013): Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability.").

[163] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013). *See also* Petition for Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (No. 10-1491), at i.

[164] Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1021-22 (9th Cir. 2014), *reh'g en banc denied*, 788 F.3d 946 (2015), *cert. denied*, 136 S. Ct. 798 (2016); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed.Appx. 7 (D.C. Cir. 2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008). *See also* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530-31 (4th Cir. 2014) (holding that an ATS claim against a corporate defendant sufficiently "'touch[ed] and concern[ed]' the territory of the United States" based on, among other things, the corporate defendant's "status as a United States corporation"). In addition, the Fifth Circuit appeared to implicitly assume that the ATS allows jurisdiction over corporations in *Beanal v. Freeport-McMoran, Inc*., although it ultimately dismissed the claims against the corporate defendants on other grounds. *See* 164, 164-68 (5th Cir. 1999) (dismissing ATS claims against corporate defendants for failure to plead sufficient facts in support of the claims without addressing whether defendants' corporate status makes ATS liability categorically unavailable).

[165] Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1394 (2018).

[166] *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 149 (2d Cir. 2015) (*In re Arab Bank*), *aff'd*, *Jesner*, 138 S. Ct. at 1408.

[167] *Id.* at 147. The organizations alleged to be responsible are the Islamic Resistance Movement (also known as Harakat al-Muqāwama al-Islāmiyya, or Hamas), the Palestinian Islamic Jihad, the Al Aqsa Martyrs' Brigade, and the Popular Front for the Liberation of Palestine. *Id*.

could be compensated in so-called "martyrdom payments."[168] As one court described the allegations, Arab Bank allegedly served as a "paymaster" for terrorist groups through its branch offices in the West Bank and Gaza Strip.[169]

Jesner was a consolidation of five cases filed in the Eastern District of New York, all of which assert similar allegations of facilitating and financing terrorism against Arab Bank.[170] Relying on its prior circuit precedent, both the district court and Second Circuit dismissed the ATS claims on the ground that the ATS does not permit any form of corporate liability.[171] Although the Second Circuit acknowledged there is a "growing consensus among [its] sister circuits" that the ATS allows for corporate liability, it nevertheless declined to overturn its prior circuit precedent.[172]

The *Jesner* Decision

After granting certiorari in *Jesner*, the Supreme Court sided with the Second Circuit's minority approach regarding corporate liability under the ATS, with one modification: the Court held that *foreign* corporations are not subject to liability under the ATS.[173] The Court left open the possibility that U.S. corporations could face claims under the ATS.[174]

Writing for a 5-4 majority, Justice Kennedy (joined, in relevant part, by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch) placed the decision in the context of the second step of the two-part inquiry described in *Sosa v. Alvarez-Machain* for evaluating whether violations of international norms are actionable under the ATS.[175] In *Sosa* step two, courts consider whether circumstances make it "appropriate" to deem a violation of an international norm cognizable under the ATS.[176] Although *Sosa* described federal courts' ability to recognize claims under the ATS as within judicial discretion, the *Sosa* Court instructed federal courts to exercise "great caution"[177] and to act with "restraint in judicially applying internationally generated norms."[178] In *Jesner*, the Court reasoned that the same restrained approach applies when evaluating the

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[168] *See id.* at 149-51.

[169] Linde v. Arab Bank, PLC, 269 F.R.D. 186, 192 (E.D.N.Y. 2010), *appeal dismissed*, 703 F.3d 92 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2869 (2014).

[170] *See* Almog v. Arab Bank, PLC, No. 04-CV-556 (E.D.N.Y. filed Dec. 21, 2004); Afriat-Kurtzer v. Arab Bank, PLC, No. 05-CV-0388 (E.D.N.Y. filed Jan. 21, 2005); Jesner v. Arab Bank, PLC, No. 06-CV-3869 (E.D.N.Y. filed Aug. 9, 2006); Lev v. Arab Bank, PLC, No. 08-CV-3251 (E.D.N.Y. filed Aug. 11, 2008); Agurenko v. Arab Bank, PLC, No. 10-CV-0626 (E.D.N.Y. filed Feb. 11, 2010).

[171] *See In re Arab Bank*, 808 F.3d at 147.

[172] *See id.* at 156-58.

[173] Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1407 (2018) ("[T]he Court holds that foreign corporations may not be defendants in suits brought under the ATS.").

[174] *See id. See also id.* at 1410 (Alito, J., concurring) ("Because this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS."); William S. Dodge, *Jesner v. Arab Bank: The Supreme Court Preserves the Possibility of Human Rights Suits Against U.S. Corporations*, JUST SECURITY (Apr. 26, 2018), https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations/ ("So while the Supreme Court dismissed the plaintiffs' claims against Arab Bank, the question of corporate liability in suits against U.S. corporations remains to be decided.").

[175] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

[176] *See supra* § "*Sosa*'s Two-Step Framework."

[177] *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.").

[178] *Sosa*, 542 U.S. at 725.

question of whether artificial entities like corporations can be defendants in ATS suits.[179] Against this backdrop of judicial caution, the *Jesner* Court concluded that it would be "inappropriate for courts to extend ATS liability to foreign corporations."[180]

The Court's decision arose, in part, from separation-of-powers and foreign affairs concerns.[181] Congress is in "the better position to consider if the public interest would be served by imposing" ATS liability on foreign corporations, the majority in *Jesner* reasoned.[182] And ATS claims against foreign corporations often impact the United States' foreign relations, according to the *Jesner* Court.[183] In fact, the Court noted, the claims against Arab Bank had already caused diplomatic tensions with Jordan, which filed an *amicus* brief describing the case as a "direct affront to its sovereignty."[184] Because the "political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign policy concerns[,]" the *Jesner* Court concluded that the judicial caution described in *Sosa* warranted the creation of a bright-line rule that "foreign corporations may not be defendants in suits brought under the ATS."[185]

Plurality, Concurring, and Dissenting Opinions in *Jesner*

Although a majority of the *Jesner* Court agreed to a categorical rule foreclosing ATS claims against foreign corporate entities, several Justices diverged in their rationale for the holding. A five-Justice majority joined *portions* of an opinion authored by Justice Kennedy, described above.[186] But only Chief Justice Roberts and Justice Thomas joined the remainder of Justice Kennedy's plurality opinion.[187]

In a separate opinion concurring in part with Justice Kennedy and concurring in the judgment, Justice Alito expressed the view that courts should decline to recognize ATS claims "whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife."[188] Justice Gorsuch also wrote separately to describe "two more fundamental reasons" why he believed *Jesner* should be dismissed.[189] According to Justice Gorsuch, (1) separation-of-powers principles dictate that courts should *never* recognize new causes of action under the ATS; (2) and a reexamination of the history of the ATS shows that the statute was intended to apply only to claims against U.S. defendants—regardless of whether they are corporations or natural persons.[190] Justice Thomas also wrote a one-paragraph concurring opinion in which he stated that, although

[179] Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1402 (2018).

[180] *Id.* at 1403.

[181] *Id.* at 1403 ("[T]he separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS.").

[182] *Id.* at 1402 (quoting Ziglar *v.* Abbasi, 582 U.S. __, 137 S. Ct. 1843, 1857 (2017)).

[183] *Id.* at 1406-07.

[184] Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1411 (2018) (quoting Brief for The Hashemite Kingdom of Jordan ma *Amicus Curie* Supporting Respondent at 5, *Jesner*, 138 S. Ct. 1386 (No. 12-1485)).

[185] *Id.* at 1407.

[186] *See id.* at 1393.

[187] *See id.*

[188] *Id.* at 1410 (Alito, J., concurring in part and concurring in the judgment).

[189] *Id.* at 1412 (Gorsuch, J., concurring in part and concurring in the judgment).

[190] *See* Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1412-19 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

he joined Justice Kennedy's opinion because he believed it "correctly applies" the Court's precedents, he also agreed with the concurrences of Justices Alito and Gorsuch.[191]

Justice Sotomayor, writing in dissent and joined by Justices Ginsburg, Breyer, and Kagan, argued that nothing in the "corporate form in itself raises" foreign policy concerns that require the Court to "immunize all foreign corporations from liability under ATS," regardless of the specific claim alleged.[192] To the extent that ATS suits against foreign corporate entities lead to friction in foreign affairs, the dissent contended, such tension is better resolved through other limitations on ATS jurisdiction, such as *Kiobel*'s presumption against extraterritoriality.[193] Further, while the majority emphasized that the political branches are better suited to consider the foreign policy implications of ATS suits, the dissenters observed that both the U.S. Solicitor General and certain Members of Congress urged the Supreme Court to permit foreign corporate liability.[194]

Implications of *Jesner*

Jesner has led to a debate over the continuing viability of the ATS as a prominent vehicle for civil lawsuits alleging human rights abuses.[195] Some observers have suggested that, when *Jesner* is combined with *Kiobel*'s presumption against extraterritoriality and the limitations of *Sosa*'s two-step framework, very few cases will satisfy the Supreme Court's requirements for ATS jurisdiction.[196] Others see the ATS as retaining at least some significance because the *Jesner* Court did not foreclose suits against U.S. corporations, and the Court's holding allows for claims against the individual employees of foreign companies.[197]

Although not resolved in the *Jesner* Court's opinion,[198] several Justices expressed a desire to revisit *Sosa*'s conclusion that federal courts have discretion under the ATS to recognize new causes of action for violations of modern international norms.[199] If the Supreme Court were, in a future case, to hold that federal courts do not possess such discretion, ATS jurisdiction potentially could be limited to three types of claims that were generally recognized as actionable violations of international law at the time of the ATS's enactment: (1) piracy; (2) interference with the rights of ambassadors; and (3) violations of safe conducts.[200] Such a holding could cabin the scope of

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[191] *See id*. at 1408 (Thomas, J., concurring).

[192] *See id*. at 1419 (Sotomayor, J., dissenting).

[193] *Id.* at 1428.

[194] *See id*. at 1431-32.

[195] *See, e.g.*, Chimène Keitner, *ATS, RIP?*, LAWFARE (Apr. 25, 2018), https://lawfareblog.com/ats-rip.

[196] *See, e.g.*, Beth Stephens, *Five Things I Don't Like About the* Jesner *Opinion*, HUMAN RIGHTS AT HOME BLOG (Apr. 29, 2018), http://lawprofessors.typepad.com/human_rights/2018/04/five-things-i-dont-like-about-the-jesner-decision.html.

[197] *See, e.g.*, Jan Von Hein, *The Supreme Court Deals the Death Blow to US Human Rights Litigation*, CONFLICT OF LAWS.NET (Apr. 25, 2018), http://conflictoflaws.net/2018/the-supreme-court-deals-the-death-blow-to-us-human-rights-litigation/ ("[T]he decision is not necessarily the end of the *US human rights litigation*. The ATS is still applicable if the defending corporation has its seat in the territory of the US.").

[198] *See* Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1403 (2018) ("[T]here is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case.").

[199] *See id. at* 1413 (Gorsuch, J., concurring in part and concurring in the judgment) (describing "serious doubts" about *Sosa*); *id.* at 1409 (Alito, J., concurring in part and concurring in the judgment) ("I am not certain that *Sosa* was correctly decided."); *id.* at 1408 (Thomas, J., concurring) ("Courts should not be in the business of creating new causes of action under the Alien Tort Statute").

[200] *See supra* notes 99-101.

ATS jurisdiction so significantly that it potentially could relegate the statute to its status during the long dormancy in which it was a rarely invoked jurisdictional provision.[201]

Conclusion

After nearly two centuries of relative obscurity, the ATS emerged as a prominent legal mechanism for human rights and terrorism-related litigation after the Second Circuit's decision in *Filártiga*.[202] But while numerous suits premised on the ATS were filed by foreign nationals in the aftermath of *Filártiga*, the Supreme Court has never ruled in the plaintiff's favor in an ATS case.[203] Instead, the High Court placed significant limitations on the scope of viable ATS claims through decisions in *Sosa*, *Kiobel*, and, most recently, *Jesner*.[204] Some commentators see the Supreme Court's ATS jurisprudence as having limited the statute's jurisdictional reach so significantly as to result in the end of the ATS's era of importance.[205] Others interpret the High Court's rulings as having left the door open for certain limited categories of cases against natural persons or U.S. corporate defendants.[206] Ultimately, the *Jesner* Court emphasized the need for "further action from Congress" before recognizing an expansion of ATS jurisdiction beyond its 18th century roots,[207] and therefore the future of ATS litigation may be dictated by the legislative branch rather than the courts.

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[201] *See supra* § "The Long Dormancy: 1789 to 1980."

[202] *See supra* § "The Rebirth of the ATS: *Filártiga v. Peña-Irala*."

[203] *See supra* §§ "The *Jesner* Decision; The *Kiobel* Majority; The *Sosa* Holding."

[204] *See supra* §§ "The Supreme Court Addresses the Cause-of-Action Question: *Sosa v. Alvarez-Machain*;" "Extraterritoriality and the ATS: *Kiobel v. Royal Dutch Petroleum*."

[205] *See e.g.*, Schnably, *supra* note 81, at 293 ("[T]he near-demise of the ATS and the explosive growth in anti-terrorism legislation reflect the predominance today of a more nationalistic vision, in which the protection of U.S. nationals and U.S. territory, and the effectiveness of U.S. foreign policy, determine the role of federal courts in human rights litigation.").

[206] *See* Dodge, *supra* note 174 ("*Jesner* does not settle the question of corporate liability for U.S. corporations, and such cases constitute the bulk of litigation against corporations under the ATS."); Keitner, *supra* note 195 ("U.S. corporate liability technically remains untouched by [*Jesner*]. Claims against individual human rights violators also remain untouched by this decision.").

[207] *See* Jesner v. Arab Bank, PLC, 584 U.S. __, 138 S. Ct. 1386, 1403 (2018).

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