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The Alien Tort Statute: 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), in its current form, 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 evolved over the years from an obscure 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 aliens' treatment 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. 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. Five years later, in 2018, the Supreme Court further limited the scope of viable claims in *Jesner v. Arab Bank, PLC* by holding that foreign corporations may not be defendants in suits brought under the ATS.

In its most recent ATS case, *Nestlé (USA), Inc. v. Doe,* the Supreme Court addressed the extraterritorial reach of the ATS for the second time, and it again ruled against the plaintiffs. *Nestlé* involved individuals from West Africa who alleged they were trafficked as children and forced to as slaves on cocoa farms. The alleged trafficking victims claimed that two U.S.-based corporations—Nestlé USA, Inc. (Nestlé USA) and Cargill, Inc. (Cargill)—aided and abetted child slavery by partnering with and purchasing cocoa from those farms. Although the actual forced labor occurred overseas, the alleged victims argued that the companies aided and abetted the slave labor from inside the United States by making decisions from U.S. corporate offices to support the farms.

The Supreme Court concluded that these allegations did not draw a "sufficient connection" between the alleged forced labor and U.S.-based conduct to sustain ATS jurisdiction. The Court reasoned that decision-making from within U.S. headquarters was too "common" or "generic" a corporate function to connect the claim to the United States. While the Supreme Court in *Nestlé* ruled against the alleged victims on extraterritoriality grounds, the majority did not adopt the defendants' broader argument that no corporation—foreign or domestic—can be held liable for ATS claims; rather, in concurring opinions, five Justices advanced the view that the ATS applies to domestic corporations to the same extent as natural persons.

The Supreme Court's repeated rulings against individuals in *Sosa*, *Kiobel*, *Jesner*, and now *Nestlé* have led commentators to debate whether the statute remains a viable mechanism to provide redress for human rights abuses in U.S. courts. Some observers argue Congress should amend the ATS to extend or clarify its jurisdictional reach. Others suggest that the ATS has been an ineffective avenue to address human rights abuses, and Congress should focus on other legislative initiatives.

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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 most recent ATS decision, *Nestlé (USA), Inc. v. Doe*.[5]

Deconstructed, the ATS provides federal district courts with jurisdiction to hear cases that contain the following 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 each element 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] *See infra* § *Nestlé USA, Inc. v. Doe*: Extraterritoriality Revisited. The *Nestlé* decision involved two consolidated cases: Nestlé USA, Inc. v. Doe, No. 19-416, 141 S. Ct. 1931, 1936 (2021) and Cargill, Inc. v. Doe, No. 19-453, 141 S. Ct. 1931, 1936 (2021).

[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)

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] 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

[hereinafter *Agent Orange*] (describing the underlying jurisdictional requirements for an ATS claim); Arthur Miller, *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[.]'"). *See also* Cong. Rsch. Serv., *Judicial Vesting Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-1-1-1/ALDE_00001175/ (last visited Jan. 6, 2022).

[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) (Am. L. Inst. 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 Stephen P. Mulligan.

[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."). *See also* Cong. Rsch. Serv., *Judicial Vesting Clause: Doctrine and Practice*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-1-1-1/ALDE_00001175/ (last visited Jan. 6, 2022).

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] In response, 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, 138 S. Ct. 1386, 1390 (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] 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 the 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.");1 JEAN 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, 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] 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]

Some dispute whether the Marbois and Van Berckel incidents were an impetus for the ATS.[43] Nevertheless, 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[.]"[44] 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.[45] The Supreme Court has 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

[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*, 1 Dall. at 111.

[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] *See, e.g.*, Jesner v. Arab Bank, PLC, 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.

[44] *Kiobel*, 569 U.S. at 123.

[45] *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.").

federal government under 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 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) ("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[.]") (internal citations omitted).

[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."). For analysis of early unsuccessful attempts to invoke the ATS, see Oona Hathaway, Christopher Ewell, and Ellen Noble, *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 7-8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927162.

[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 6, 2021), 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 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 court in *Filártiga* 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 in district court 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 affirmed the dismissal of 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 with Judge Bork and argued that the ATS itself creates a statutory cause of action.[68] 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] Lastly, Judge Robb determined that the case raised nonjusticiable political questions—meaning it raised disputes more appropriately addressed by the legislative and executive branches.[71] Ultimately, 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 20 years later, *Sosa v. Alvarez-Machain*,[72] discussed below.[73] 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] The TVPA's legislative history suggests that the act was designed to establish an "unambiguous basis" for the causes of action recognized in *Filártiga* under the ATS, and to respond to Judge Bork's argument in *Tel-Oren* that there must be a separate and explicit "grant by Congress of a private right of action" in order to assert a tort claim for a violation of

[64] *Tel-Oren*, 726 F.2d at 775 (per curiam). The district court "dismissed the action both for lack of subject matter jurisdiction and as barred by the applicable statute of limitations." *Id*.

[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 argued that a claim for torture required official state action, and, because the Palestinian Liberation Organization was not recognized as a state under international law, the torture claim necessarily failed. *See id*. at 791-96

[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).

international law.[75] In its report on the statute, the House Judiciary Committee stated that it did not intend for the TVPA to replace the ATS, but rather for it to "be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing."[76] As such, there are a few important distinctions between the TVPA and ATS worth noting.

First, 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.[77] 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."[78] Courts have interpreted this term as extending a cause of action to both U.S. and foreign nationals,[79] but excluding liability against corporations.[80] Lastly, 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."[81]

Given these important distinctions, 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.[82] 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.[83] 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*.[84]

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[75] H.R. REP. NO. 102-367, pt. 1, at 3, 4 (1991).

[76] *Id*. at 3.

[77] *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).

[78] *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).

[79] *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)).

[80] *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.").

[81] *See* 28 U.S.C. § 1350 note.

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

[83] *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.").

[84] 542 U.S. 692 (2004).

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 Mexico by prolonging the agent's life so he could be further interrogated and tortured.[85] 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.[86]

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 grounds that his apprehension was "outrageous governmental conduct" and that it violated the extradition treaty between the United States and Mexico.[87] In its first decision arising out of his case, *United States v. Alvarez-Machain*,[88] the Supreme Court rejected Alvarez's arguments, finding no grounds to justify dismissal of the criminal case against him.[89]

The case was remanded to district court, and the district court dismissed the charges for lack of evidence at close of the government's case during trial.[90] No longer subject to criminal charges, Alvarez filed suit in 1993 asserting ATS claims against the Mexican nationals responsible for his abduction.[91] This civil case, *Sosa v. Alvarez-Machain*,[92] 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."[93]

The *Sosa* Holding

Adopting reasoning that largely appeared to comport with Judge Bork's concurring opinion in *Tel-Oren*, the Court in *Sosa* agreed that the "ATS is a jurisdictional statute creating no new causes of action . . . ."[94] Among other things, the Court explained 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.[95]

While the Court in *Sosa* agreed that the ATS was not intended to create statutory causes of action, the 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

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[85] *Id.* at 697.

[86] *See id.*

[87] *Id.* at 698.

[88] 504 U.S. 655 (1992).

[89] *See id.* at 670.

[90] *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).

[91] 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.

[92] 542 U.S. 692.

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

[94] *See id.* at 724.

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

Congress authorized specific causes of action.[96] 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 action.[97] 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,[98] as opposed to a congressionally created, statutory cause of action.[99]

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,[100] infringement on the rights of ambassadors, and piracy.[101] The Court also held that ATS jurisdiction is not limited to those claims.[102] 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.[103] 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.[104] 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.[105]

*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.[106]

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

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

[98] 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.

[99] *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.

[100] 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).

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

[102] *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[.]").

[103] *Id.*

[104] *Id.* at 725.

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

[106] *See* Jesner v. Arab Bank, PLC, 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*).

First, courts must determine whether the claim is based on violation of an international law norm that is "specific, universal, and obligatory."[107] Second, if step one is satisfied, courts should determine whether allowing the case to proceed is an "appropriate" exercise of judicial discretion.[108]

Although *Sosa* warned that lower courts should exercise "vigilant doorkeeping" and "great caution" before recognizing causes of action under the ATS,[109] the post-*Filártiga* movement of using the ATS to seek redress for human rights abuses continued "largely unabated" after *Sosa*.[110] 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*.[111]

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.[112] The Second Circuit dismissed the case on the ground that corporations cannot be liable for violations of the law of nations under the ATS. The Supreme Court originally granted certiorari to consider whether it lacked subject matter jurisdiction because the law of nations does not recognize corporate liability.[113] 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*?[114]

The *Kiobel* Majority

In a majority opinion written by Chief Justice Roberts, the Court in *Kiobel* 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

[107] *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)).

[108] *See id.* at 738.

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

[110] 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).

[111] 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).

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

[113] *See id*. at 114 ("The Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. . . . We granted certiorari to consider that question.") (citation omitted). *See also* Petition for Writ of Certiorari, *Kiobel*, 569 U.S. 108 (No. 10-1491), at i.

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

nation.[115] Also known as the "presumption against extraterritoriality," this canon of construction is intended to avoid unintended clashes between U.S. and foreign law that could result in international discord.[116] Reliance on the presumption also reflects the "more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind."[117] Therefore, 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.[118]

According to the Court in *Kiobel*, nothing in the text or history of the ATS suggests that the First Congress intended the statute to have extraterritorial reach.[119] 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.[120] 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.[121]

In a brief concluding paragraph, the Court in *Kiobe*l 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.[122]

The Court, however, did not provide any further explanation as to how an ATS claim would satisfy the "touch and concern" test—leading to divergent interpretations in the lower courts.[123]

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 view 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.[124]

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[115] 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).

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

[117] 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).

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

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

[120] *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.

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

[122] *Id.* at 124-25 (emphasis added) (internal citation omitted).

[123] *See infra* § Interpreting *Kiobel*.

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

Justice Alito, in an opinion joined by Justice Thomas, agreed that the majority's opinion "le[ft] much unanswered," and would have further explained how litigants can satisfy the "touch and concern" requirement.[125] 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 claim "touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality.[126]

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.[127] 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.[128] 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.[129]

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.[130] Applying this test to the facts in *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."[131]

Interpreting *Kiobel*

Many commentators interpret the Supreme Court's decision in *Kiobel* as having significantly limited the ATS as a vehicle to redress human rights abuses in U.S. courts.[132] 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.[133] On the other hand, under *Kiobel,* cases in which there is *some* connection to the United States—such as a defendant who is a U.S. citizen or corporation—are not easy to resolve. In particular, courts have used differing interpretative frameworks for deciding what level of domestic connections are necessary to

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

[126] *See id.* at 126.

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

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

[129] *Id*. at 133.

[130] *See id.* at 133.

[131] *Id.* at 128.

[132] *See supra* note 111. *See also* Schnably, *supra* note 61, 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.").

[133] *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.").

satisfy *Kiobel*'s "touch and concern" test.[134] Some lower courts have adopted a bright-line rule whereby the conduct that constitutes a violation of the law of nations must occur in the United States.[135] Other courts have used more flexible, fact-specific frameworks that considered factors such as the citizenship and residence of the defendants and the potential U.S. national interests triggered by the nature of the defendants' conduct.[136]

The Supreme Court would revisit the extraterritoriality issue in its 2021 decision, *Nestle v. Doe*.[137] In the interim, the Court granted certiorari in *Jesner v. Arab Bank, PLC* to resolve the question it initially granted certiorari to resolve in *Kiobel*, but ultimately left undecided: whether the ATS forecloses corporate liability.

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

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.[138] The plaintiffs alleged that Arab Bank—one of the largest financial institutions in the Middle East[139]—aided and abetted four terrorist organizations

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[134] For additional discussion of the "touch and concern" requirement, 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. 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.

[135] *See*, *e.g.*, Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 194-97 (5th Cir. 2017) (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" (quoting RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016))), *cert. denied*, 138 S. Ct. 134 (2017); Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 217 (2d Cir. 2016) ("To displace the presumption against extraterritoriality, the conduct 'which the court has determined sufficiently touches and concerns the United States' must also, upon preliminary examination, state a claim for a violation of the law of nations or aiding and abetting another's violation of the law of nations." (quoting Mastafa v. Chevron Corp., 770 F.3d 170, 186-87 (2d Cir. 2014))), *cert. denied*, 138 S. Ct. 1691 (2018); 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").

[136] *See* Mujica v. AirScan Inc., 771 F.3d 580, 594 (9th Cir. 2014) ("[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."), *cert. denied*, 136 S. Ct. 690 (2015); Doe v. Drummond Co., 782 F.3d 576, 595-96 (11th Cir. 2015) (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), *cert. denied*, 136 S. Ct. 1168 (2016). *See also* Warfaa v. Ali, 811 F.3d 653, 660 (4th Cir. 2016) ("A plaintiff may rebut the presumption in certain, narrow circumstances: when extensive United States contacts are present and the alleged conduct bears such a strong and direct connection to the United States that it falls within *Kiobel's* limited "touch and concern" language."), *cert. denied*, 137 S. Ct. 2289 (2017); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 528-29 (4th Cir. 2014) (permitting ATS claims 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); Jane W. v. Thomas, 354 F. Supp. 3d 630, 639 (E.D. Pa. 2018) (finding jurisdiction under the ATS for claims arising from the first Liberian civil war based, among other things, on the "Defendant's residence in the United States").

[137] *See infra* § *Nestlé USA, Inc. v. Doe*: Extraterritoriality Revisited.

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

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

allegedly responsible for the attacks.[140] 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 could be compensated in so-called "martyrdom payments."[141] 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.[142]

Jesner was a consolidation of five cases filed in the Eastern District of New York, all of which asserted similar allegations of facilitating and financing terrorism against Arab Bank.[143] 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.[144] 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.[145]

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.[146] The Court left open the possibility that U.S. corporations could face claims under the ATS.[147]

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[148] of the two-part inquiry described in *Sosa v. Alvarez-Machain* for evaluating whether violations of

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138 S. Ct. at 1408.

[140] *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.*

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

[142] 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).

[143] *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).

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

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

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

[147] *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.").

[148] While five Justices in *Jesner* agreed that the case did not satisfy *Sosa* step two, the Court did not produce a majority opinion on whether the case passed *Sosa* step one. Only two Justices joined the portion of Justice Kennedy's plurality opinion analyzing *Sosa* step one. *See Jesner*, 138 S. Ct. at 1399-1402 (Kennedy, J., with Roberts, C.J. and Thomas, J.) (suggesting that the plaintiffs' claims in *Jesner* fail under *Sosa* step one, but stating that there is "at least sufficient doubt on the point" to instead resolve the case on *Sosa*'s second step).

international norms are actionable under the ATS.[149] In *Sosa* step two, courts consider whether circumstances make it "appropriate" to deem a violation of an international norm cognizable under the ATS.[150] Although *Sosa* described federal courts' ability to recognize claims under the ATS as within judicial discretion, the Court in *Sosa* instructed federal courts to exercise "great caution"[151] and to act with "restraint in judicially applying internationally generated norms."[152] In *Jesner*, the Court reasoned that the same restrained approach applies when evaluating the question of whether artificial entities like corporations can be defendants in ATS suits.[153] Against this backdrop of judicial caution, the Court in *Jesner* concluded that "it would be inappropriate for courts to extend ATS liability to foreign corporations."[154]

The Court's decision arose, in part, from separation-of-powers and foreign affairs concerns.[155] 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.[156] According to the Court, ATS claims against foreign corporations often impact the United States' foreign relations.[157] The Court explained that 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."[158] The Court concluded that, because the "political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign policy concerns[,]" 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."[159]

Plurality, Concurring, and Dissenting Opinions in *Jesner*

Although a majority of the Court in *Jesner* 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.[160] Only Chief Justice Roberts and Justice Thomas joined the remainder of Justice Kennedy's plurality opinion.[161]

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

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[149] *See Jesner* 138. S. Ct. at 1407 (holding that "judicial caution under *Sosa*" step two weighs against imposing liability on foreign corporations in ATS suits); Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

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

[151] *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.").

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

[153] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018).

[154] *Id.* at 1403.

[155] *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.").

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

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

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

[159] *Id.* at 1407.

[160] *See id.* at 1393.

[161] *See id.*

doing so would not materially advance the ATS's objective of avoiding diplomatic strife."[162] Justice Gorsuch also wrote separately to describe "two more fundamental reasons" why he believed *Jesner* should be dismissed.[163] According to Justice Gorsuch, (1) separation-of-powers principles dictate that courts should *never* recognize new causes of action under the ATS; and (2) 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.[164] Justice Thomas wrote a one-paragraph concurring opinion in which he stated that, although 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.[165]

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.[166] 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.[167] 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.[168]

Implications of *Jesner*

Jesner led to a debate over the continuing viability of the ATS as a prominent vehicle for civil lawsuits alleging human rights abuses.[169] Some observers 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.[170] Others argued the ATS retained at least some significance because *Jesner* did not foreclose suits against U.S. corporations, and the Court's holding allows claims against the individual employees of foreign companies.[171] Three years later, the Supreme Court again evaluated the statute's scope in its most recent ATS decision: *Nestlé v. Doe*.

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

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

[164] *See id*. at 1412-19.

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

[166] *See id*. at 1419 (Sotomayor, J., with Ginsburg, Breyer, & Kagan, JJ., dissenting).

[167] *Id.* at 1428.

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

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

[170] *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.

[171] *See, e.g.*, Jan Von Hein, *The Supreme Court Deals the Death Blow to US Human Rights Litigation*, CONFLICT OF LAWS (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.").

Nestlé USA, Inc. v. Doe: Extraterritoriality Revisited

In *Nestlé*, six individuals from Mali alleged that they were trafficked as children into Côte d'Ivoire (also known as Ivory Coast) and forced to work as slave laborers on cocoa farms.[172] The plaintiffs alleged that two U.S. based corporations—Nestlé USA, Inc. (Nestlé USA) and Cargill, Inc. (Cargill)[173]—aided and abetted child slavery by purchasing cocoa from those Ivorian farms.[174] Although the companies did not operate the farms themselves, they provided technical resources, such as training and tools, and financial assistance in exchange for the exclusive right to purchase cocoa.[175] According to the plaintiffs, Nestlé USA and Cargill had "economic leverage" over the farms and their labor practices, and continued to purchase cocoa after they "knew or should have known" that the farms exploited children for slave labor.[176] The plaintiffs' theory of the case was that the companies "depended on—and orchestrated—a slave-based supply chain."[177]

The *Nestlé* Holding

The Supreme Court's decision in *Nestlé* turned on the issue of extraterritoriality. In 2013, the Supreme Court held in *Kiobel* that the ATS does not apply to purely extraterritorial claims, but lower courts failed to reach consistent conclusions on when claims could go forward if they arose partially overseas but still had some connection to the United States.[178] The plaintiffs in *Nestlé* argued that, although the actual forced labor occurred overseas, their case survived *Kiobel's* extraterritoriality bar because the alleged aiding and abetting took place in the defendants' corporate offices in the United States.[179] According to the plaintiffs, Nestlé USA and Cargill made decisions from U.S.-based offices to provide personal spending money to cocoa farmers in Côte d'Ivoire in order to maintain their loyalty and secure a cocoa supply.[180] The plaintiffs also alleged that employees from the companies' U.S. headquarters "regularly inspect[ed] operations in the Ivory Coast and report[ed] back" to offices in the United States.[181]

In an 8-1 opinion authored by Justice Thomas, the Supreme Court concluded that these allegations did not draw a "sufficient connection" between the alleged forced labor and U.S.-based conduct to sustain ATS jurisdiction.[182] Although Nestlé USA and Cargill made or approved "every major operational decision" from the United States, the Court described that decision-making as too "common" or "generic" a corporate function to connect the claim to the United

[172] *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935 (2021).

[173] *See supra* note 5 (noting the consolidation of the *Nestlé* and *Cargill* cases).

[174] *See Nestlé USA, Inc.*, 141 S. Ct. at 1935-36.

[175] *Id.*

[176] *Id.*

[177] Doe v. Nestlé, S.A., 906 F.3d 1120, 1123 (9th Cir. 2018) ("Indeed, the gravamen of the complaint is that defendants depended on—and orchestrated—a slave-based supply chain."), *opinion amended and superseded on denial of reh'g*, 929 F.3d 623 (9th Cir. 2019), *rev'd and remanded sub nom.* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021).

[178] *See supra* § Extraterritoriality and the ATS: *Kiobel v. Royal Dutch Petroleum*.

[179] *Doe*, 906 F.3d at 1126.

[180] *Id.*

[181] *Id.*

[182] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

States.[183] Such "general corporate activity," the Court held, was not sufficient to plead a domestic application of the ATS.[184]

In reaching this conclusion, the Court in *Nestlé* applied a doctrinal framework previously used to examine extraterritoriality of U.S. statutes in non-ATS cases.[185] Under this rubric, courts first consider whether a statute gives a clear indication that the law applies to claims arising outside the United States.[186] The Court in *Nestlé* noted that it had previously examined the plain text of the ATS in *Kiobel,* and concluded that the statute does not contain a statement suggesting it applies extraterritorially.[187]

When there is no clear indication that a statute applies extraterritorially, courts next consider whether a claim involving overseas activity can still proceed because the "conduct relevant to the statute's *focus* occurred in the United States."[188] This step requires courts to pinpoint the precise "focus" of a particular statute, and determine whether the conduct related to this focus took place in U.S. territory. Before *Nestlé*, some lower courts had concluded that the "focus" analysis did not apply in ATS cases because *Kiobel* announced a different standard—the "touch and concern" test[189]—for ATS claims. [190] In *Nestlé*, however, the Supreme Court did not mention the phrase "touch and concern." Instead, the Court examined the extraterritoriality issue using the focus test as part of its standard framework for evaluating extraterritorial application of U.S. laws.[191]

While the Court in *Nestlé* clarified that the "focus" test applies to the ATS, it did not resolve the parties' disagreement over what conduct is, in fact, the focus of the statute. The defendant companies contended that ATS's focus is the act that directly caused the injury—in the plaintiffs' case, the alleged child trafficking and forced labor in West Africa.[192] The plaintiffs, by contrast, argued that the ATS's focus is the act that violates international law, which they viewed as acts of aiding and abetting forced labor through corporate support from U.S. offices.[193] In the end, the Supreme Court did not resolve the question or identify the focus of the ATS. The Court reasoned instead that, even if it accepted the plaintiffs' legal interpretation, their ATS claims were still

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[183] *Id.*

[184] *Id.*

[185] *See id.* at 1936 (citing RJR Nabisco, Inc. v. European Community, 579 U.S. 325 (2016)).

[186] *See id.*

[187] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013).

[188] *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021) (emphasis added) (quoting *RJR Nabisco, Inc.*, 579 U.S. at 337).

[189] For discussion of the "touch and concern" test, see *supra* § The *Kiobel* Majority.

[190] *Compare, e.g.*, Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1028 (9th Cir. 2014) ("[*Kiobel*] . . . 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); *and* 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); *with* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 195 (5th Cir. 2017) (applying the "focus" analysis in an ATS case), *cert. denied*, 138 S. Ct. 134 (2017); *and* Mastafa v. Chevron Corp., 770 F.3d 170, 184 (2d Cir. 2014) ("[O]ur inquiry here involves an evaluation of the 'territorial event[s]' or 'relationship[s]' that were the 'focus' of the ATS." (quoting Morrison v. National Australia Bank Ltd., 561 U.S. 247, 266 (2010))).

[191] *See Nestlé USA, Inc*., 141 S. Ct. at 1936 ("[W]here the statute, as here, does not apply extraterritorially, plaintiffs must establish that 'the conduct relevant to the statute's focus occurred in the United States.'" (quoting *RJR Nabisco, Inc.*, 579 U.S. at 337)).

[192] *See id*.

[193] *See id.*

improperly extraterritorial because "[n]early all the conduct that they say aided and abetted forced labor . . . occurred in Ivory Coast."[194]

Plurality, Concurring, and Dissenting Opinions in *Nestlé*

All of the members of the Court but Justice Alito joined the portion of Justice Thomas's opinion which held that the plaintiffs improperly asserted extraterritorial claims under the ATS. Several Justices wrote concurring opinions debating other aspects of the ATS. The portion of Justice Thomas's opinion joined only by Justices Gorsuch and Kavanaugh advocated for revisiting the Supreme Court's 2004 *Sosa* decision.[195] In *Sosa*, the Supreme Court concluded there are at least three offenses actionable under the ATS: violations of safe conducts, infringement on the rights of ambassadors, and piracy.[196] *Sosa* also stated that the "door is still ajar" for federal courts to allow new ATS claims,[197] but only when the new cause of action is specifically defined, universally accepted, and it would be "appropriate" for courts to recognize the new claim.[198] According to this portion of Justice Thomas's opinion, the plaintiffs' aiding and abetting claims should be dismissed for the alternative reason that they did not meet *Sosa*'s standards.[199] Justice Thomas also would have gone further and held that courts cannot recognize *any* new causes of action in ATS cases other than the three offenses recognized in *Sosa*.[200]

Justice Gorsuch wrote a two-part concurrence. In part I, joined by Justice Alito, Justice Gorsuch opined that domestic corporations are subject to ATS suits to the same extent as individual defendants.[201] In part II, joined by Justice Kavanaugh, Justice Gorsuch agreed with Justice Thomas that federal courts should no longer recognize any new ATS causes of action beyond the three claims cited in *Sosa*.[202]

Justice Sotomayor authored a concurring opinion, joined by Justice Breyer and Kagan, disagreeing with the portion of Justice Thomas's opinion on whether courts can recognize new ATS causes of action.[203] Justice Sotomayor argued that the First Congress expected the judiciary to interpret international law and identify those norms that, when breached, give rise to a cause of action.[204] To decline to recognize new causes of action, Justice Sotomayor argued, would be an abdication of the First Congress's legislative directive.[205]

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[194] *Id.* at 1937.

[195] *See id*. at 1937-40 (Thomas, J., plurality op.).

[196] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2014). For discussion of safe conducts, see *supra* note 100.

[197] *Sosa*, 542 U.S. at 729.

[198] *See id*. at 725, 738. *See also* § *Sosa*'s Two-Step Framework.

[199] *See Nestlé USA, Inc*., 141 S. Ct. at 1937 (Thomas, J., plurality op.).

[200] *See id.* at 1940 ("Under existing precedent, then, courts in some circumstances might still apply *Sosa* to recognize causes of action for the three historical torts likely on the mind of the First Congress. But as to other torts . . . courts may not create a cause of action for those torts.").

[201] *See id.* at 1941 (Gorsuch, J., concurring) ("The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding.").

[202] *See id.* at 1942-43.

[203] *See id.* at 1944 (Sotomayor, J., concurring in part and concurring in the judgment).

[204] *See id.* at 1947 ("Courts must, based on their interpretation of international law, identify those norms that are so specific, universal, and obligatory that they give rise to a 'tort' for which Congress expects federal courts to entertain 'causes'—or, in modern parlance, 'civil action[s],' 28 U.S.C. § 1350—for redress.").

[205] *See id.* at 1950.

Justice Alito authored the lone dissent in which he argued that it was procedurally improper to resolve the case on extraterritoriality grounds when unanswered questions remained concerning, among other things, whether the plaintiffs satisfied *Sosa*'s requirements to recognize new ATS causes actions.[206]

Interpreting *Nestlé* and the Future of Domestic Corporate Liability

The Supreme Court clarified the legal framework governing the extraterritorial reach of the ATS in *Nestlé* by abandoning the "touch and concern" test in favor of the "focus" test.[207] While the Court made clear which framework applies, it declined to specify the exact conduct that must transpire in the United States in order satisfy the "focus" test and plead a proper domestic ATS case.[208] Many commentators interpret the "focus" analysis as more restrictive than the "touch and concern" test[209] and view *Nestlé* as further constraining the types of human rights cases available under the ATS when the key conduct occurs outside the United States.[210]

Separate from the Court's central holding on extraterritoriality, the concurring opinions in *Nestlé* revealed that five Justices agreed on a different question in ATS litigation: can domestic corporations be liable under the statute? Although the Supreme Court held in *Jesner* that foreign corporations are not liable for ATS claims, five Justices in *Nestlé* either authored or joined concurring opinions which argued that domestic corporations can be held liable to the same extent as natural persons.[211] These opinions suggest that ATS claims against domestic companies can go forward provided they meet the ATS's requirements and satisfy the Supreme Court's increasingly strict extraterritoriality jurisprudence announced in *Nestlé*.

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[206] *See id.* at 1950-51 (Alito, J., dissenting).

[207] *See supra* notes 189-191.

[208] *See supra* § The *Nestlé* Holding.

[209] *See, e.g.*, William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/; John Bellinger, *In Spate of New ATS Decisions, Courts are Divided About Meaning of* Kiobel's *"Touch and Concern" Standard*, LAWFARE (Sep. 28, 2014).

[210] *See, e.g.*, Dodge, *supra* note 209 ("*Nestlé* . . . mark[s] the end of the *Filartiga* line of ATS cases against individual defendants whose relevant conduct occurs outside the United States."); Lauren A. Hopkins, et al., *Supreme Court Rejects Human Rights Lawsuit Against U.S. Corporations, But Leaves Door Open for Future Claims*, NAT'L L. REV. (July 1, 2021), https://www.natlawreview.com/article/supreme-court-rejects-human-rights-lawsuit-against-us-corporations-leaves-door-open ("Although U.S. corporations are subject to ATS liability in theory, the scope of the ATS has been curtailed."); Beth Van Schaak, Nestlé & Cargill v. Doe*: What's Not in the Supreme Court's Opinions*, JUST SEC. (June 30, 2021), https://www.justsecurity.org/77120/nestle-cargill-v-doe-whats-not-in-the-supreme-courts-opinions/ ("All told, this is clearly a defeat for these particular plaintiffs and for other plaintiffs who suffer extraterritorial harm from conduct with no discernable U.S. nexus.").

[211] *See Nestlé USA, Inc*., 141 S. Ct. at 1940 (Gorsuch, J. with Alito, J., concurring) ("The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding."); *id.* at 1948 n.4 (Sotomayor, J. with Breyer & Kagan, JJ., concurring in part and concurring in the judgment) ("[T]here is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons."). *See also id.* at 1950 (Alito, J., dissenting) ("Corporate status does not justify special immunity.").

Lastly, the Justices did not resolve their disagreement on whether to continue to leave the "door ajar" for courts to recognize new causes of action in ATS cases.[212] Three Justices (Thomas, Kavanaugh, and Gorsuch) argued that the Supreme Court should no longer recognize any new causes of action beyond the three historical offenses cited in *Sosa*—an approach that would likely eliminate a large majority of modern ATS claims. [213] Three Justices (Sotomayor, Breyer, and Kagan) argued that the Court has an affirmative obligation to identify new causes of action,[214] and three Justices (Roberts, Barrett, and Alito) did not address the issue. Accordingly, debate over the cause of action question is likely to continue in lower court litigation.

Conclusion and Considerations for Congress

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*.[215] While many 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.[216] Instead, the Court placed significant limitations on the scope of viable ATS claims through decisions in *Sosa*, *Kiobel*, *Jesner*, and, most recently, *Nestlé*.[217] 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.[218] Others interpret the Court's rulings as having left the door open for certain limited categories of cases against natural persons or U.S. corporate defendants.[219]

[212] *See supra* § Plurality, Concurring, and Dissenting Opinions in *Nestlé*.

[213] *See supra* notes 199-200, 202.

[214] *See supra* notes 203-205.

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

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

[217] *See supra* §§ The Supreme Court Addresses the Cause-of-Action Question: *Sosa v. Alvarez-Machain*; Extraterritoriality and the ATS: *Kiobel v. Royal Dutch Petroleum*; *Jesner v. Arab Bank, PLC*: Barring Foreign Corporate Liability; *Nestlé USA, Inc. v. Doe*: Extraterritoriality Revisited.

[218] *See e.g.*, Schnably, *supra* note 61, 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.").

[219] *See* Keitner, *supra* note 169 ("U.S. corporate liability technically remains untouched . . . . Claims against individual human rights violators also remain untouched . . . ."); Hopkins, et al., *supra* note 210 (stating that *Nestlé* will still allow some cases against corporate defendants "in theory," but that it is not clear what types of cases); Dodge, *supra* note 209 ("*Nestlé* . . . appears to limit the ATS cause of action to claims against U.S. corporations based on conduct in the United States that goes beyond making decisions about how to conduct operations abroad. There may be cases that fit that description, but they are likely to be few and far between.").

According to the Supreme Court, "Congress is well aware of the necessity of clarifying the proper scope of liability under the ATS[,]"and "further action from Congress" is needed before courts may expand ATS jurisdiction beyond its 18th century roots. [220] Despite the Court's suggestion that the legislative branch should consider clarifying the ATS, there have been infrequent discussions in Congress to amend the statute.[221] In the 109th Congress, the Alien Tort Statute Reform Act would have amended the ATS to, among other things, specify six violations of international law that are actionable under the statute,[222] but no congressional action was taken on the bill, and similar legislation amending the ATS has not since been introduced.

Commentators have suggested a variety of ways to amend the ATS to address disputes raised in litigation. Observers' proposals include legislation that: specifies the actionable violations of international law;[223] provides that the ATS applies to conduct overseas;[224] or expressly makes corporations subject to ATS jurisdiction.[225] Other commentators suggest that the ATS has been an ineffective avenue to address human rights abuses, and Congress should focus on other legislative initiatives, such as crafting alternative dispute resolution procedures[226] or mandating corporate supply chain due diligence to ensure that companies do not benefit from labor practices that violate international law.[227]

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[220] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403, 1406 (2018).

[221] The ATS has been mentioned occasionally during congressional hearings primarily focused on other subjects. *E.g.*, *Judicial Reliance on Foreign Law: Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution*, 112 Cong. 12 (2011) (testimony of Andrew M. Grossman, Visiting Legal Fellow, The Heritage Foundation) (discussing the ATS as an example of a statute that requires U.S. courts to interpret and apply international law); *Nomination of Harold H. Koh to be Legal Advisor to the Department of State: Hearing Before the S. Comm. on Foreign Relations*, 111 Cong. 33, 40, 52 (2009) (written questions and responses concerning changing presidential administrations' interpretation on the ATS); *Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?: Hearing Before the S. Comm. on the Judiciary*, 111 Cong. 116 (2010) (statement of Sen. Arlen Specter) (comparing the scope of personal jurisdiction available under the ATS with the Free Speech Protection Act of 2009, S. 449, 111th Cong. (2010)); *Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumseld*: Hearing Before the S. Comm. on Armed Services*, 109th Cong. 284-85 (2006) (written responses of Elisa C. Massimino, Director, Human Rights First) (discussing judicial interpretations of Common Article 3 of the Geneva Conventions in ATS litigation).

[222] S. 1874, 109th Cong. § 2 (2005). The bill would have made torture, extrajudicial killing, genocide, piracy, slavery, or slave trading actionable under the ATS. *See id.*

[223] *See*, *e.g.*, Alicia Pitts, Comment, *Avoiding the Alien Tort Statute: A Call for Uniformity in State Court Human Rights Litigation*, 71 SMU L. REV. 1209, 1222-23 (2018).

[224] *See*, *e.g.*, Van Schaak, *supra* note 210.

[225] *See*, *e.g.*, Ziad Haider, *Corporate Liability for Human Rights Abuses: Analyzing Kiobel & Alternatives to the Alien Tort Statute*, 43 GEO. J. INT'L L. 1361, 1383 (2012); Gary Clyde Hufbauer, *Why Shouldn't Corporations Be Liable Under the ATS?*, 43 GEO. J. INT'L L. 1009, 1011-12 (2012).

[226] *See* Hathaway, Ewell, & Noble, *supra* note 47, at 66-70.

[227] *See*, *e.g.*, Hopkins, et al., *supra* note 210; Hathaway, Ewell, & Noble, *supra* note 47, at 71-75.

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