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# The Alien Tort Statute (ATS): A Primer

**(name redacted)**
Legislative Attorney

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# Summary

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

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

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

In April 2017, the Supreme Court granted certiorari in *Jesner v. Arab Bank, PLC*, an ATS case against one the largest financial institutions in the Middle East. The plaintiffs in *Jesner* allege that Arab Bank maintained accounts for known terrorists; accepted donations that it knew would be used to fund terrorist activity; and distributed millions of dollars to families of suicide bombers in so-called "martyrdom" payments. The Second Circuit dismissed the case on the ground that the "law of nations" that is actionable under the ATS does not impose liability on corporate entities. But every other U.S. court of appeals to consider the issue has reached the opposite conclusion, holding that corporate liability is available under the ATS. The Supreme Court ostensibly granted certiorari in *Jesner* to resolve this circuit split over the question of corporate liability.

*Jesner* has generated significant attention among observers, including some Members of Congress. Senators Whitehouse and Graham filed an *amici* brief advocating for reversal of the Second Circuit's decision. The Senators' brief argues that the ATS serves as part of a larger legislative scheme to address terrorism, and that a limitation on corporate liability would create gaps in the United States' legal framework for combating terrorism. The Solicitor General also filed an *amicus* brief on behalf of the United States arguing that *Jesner* was wrongly decided. However, the Solicitor General's brief suggests that the case may be dismissed on other grounds by recommending that it be remanded to the Second Circuit for consideration of whether the claims are sufficiently connected to the United States to satisfy *Kiobel*'s presumption against extraterritoriality.

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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 has evolved from a rarely used jurisdictional statute to a prominent vehicle for foreign nationals to seek redress in U.S. courts for human rights offenses and acts of terrorism. This report examines the development of the ATS, beginning with its origins in the First Congress and continuing through to the Supreme Court's recent grant of certiorari in *Jesner v. Arab Bank, PLC*, where the Court will consider the question of whether corporations may be held liable under the ATS.[5]

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

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

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

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

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

[4] 28 U.S.C. § 1350.

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

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

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

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

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

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

now often understood to refer to "customary international law,"[11] though, as explained below, only certain violations of customary international law are actionable under the ATS.[12] As a general matter, customary international law is international law that is derived from "a general and consistent practice of States[13] followed by them from a sense of legal obligation."[14] State practices that form the basis for customary international law are often referred to as international "norms."[15] But the process of identifying what norms are actionable under the ATS is a complex judicial function that was the subject of much debate until it was addressed by the Supreme Court in *Sosa v. Alvarez-Machain*,[16] discussed below.[17]

# 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.[18] 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.[19] The original iteration of the ATS was included in Section 9 of the Judiciary Act—a provision which broadly addressed the jurisdiction of the federal district courts.[20] Congress made minor modifications to the ATS in 1873[21] and 1911.[22] The current version, quoted above, was enacted in 1948.[23]

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MILLER, ALIEN TORT CLAIMS ACT—FURTHER LIMITATIONS ON ITS APPLICATION § 3661.1 (4th ed.) (collecting cases and describing basic principles under the ATS).

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

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

[13] 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).

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

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

[16] 542 U.S. 692 (2004).

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

[18] 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.").

[19] 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.").

[20] 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.

[21] 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 (continued...)

## Congressional Intent

The original purposes of the ATS are uncertain, and there is virtually no legislative history for this portion of the Judiciary Act.[24] Still, most courts and commentators regard the law as a product of the First Congress's desire to give the federal government supremacy over the foreign affairs of the United States and to avoid international conflict arising from disputes about the treatment of aliens in the United States.[25]

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.[26] Under the Articles of Confederation, the federal government had little ability to provide redress to foreign citizens for violations of international law.[27] Instead, the Confederation Congress[28] 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 international law.[29] But only one state, Connecticut, passed legislation creating penalties for violations of the law of nations.[30]

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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"].

[22] 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.

[23] 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.

[24] For additional discussion of the original purpose of the ATS, see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002), William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); CRS Report RL32118, *The Alien Tort Statute: Legislative History and Executive Branch Views*, by (name redacted) , at 8-9 (archived).

[25] *See, e.g.*, Ali Shafi v. Palestinian Authority, 642 F.3d 1088, 1099 (D.C. Cir. 2011) (William, J., concurring) ("The concern was the U.S. citizens might engage in incidents that could embroil the young nation in war and jeopardize its status or welfare[.]"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring) ("There is evidence . . . that the intent of the [ATS] was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis."). *See also* CRS Report RL32118, *supra* note 24, at 8; Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 448-49 (2011).

[26] 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); Bellia & Clark, *supra* note 25, at 466-507.

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

[28] 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).

[29] *See* Bellia & Clark, *supra* note 25, 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 (continued...)

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.[31] The Founders 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.[32] These concerns led the Founders 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,[33] admiralty and maritime cases,[34] and disputes between U.S. citizens and citizens of foreign nations.[35] There is no definitive consensus on the congressional purpose for the ATS, but many courts and commentators have reasoned that it was designed to reduce potential conflicts with foreign nations by allowing sensitive tort cases to be heard in federal courts, particularly when the United States may have had an obligation under international law to provide redress to a foreign nation.[36]

## 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 street in Philadelphia.[37] Because no national judiciary existed at the time, any case against

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criminalization of international law).

[30] *See Sosa*, 542 U.S. at 716. The text of the Connecticut law is reprinted in Bellia & Clark, *supra* note 25, at 552 n. 298.

[31] *See, e.g.*, EMMERICH DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATIONS, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS bk. 2, CH. 6, § 77, at 300 (Liberty Fund ed. 2008) (originally published 1758) [hereinafter "LAW OF NATIONS"] ("The sovereign who refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.");1JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 353 (Bumstead 4th ed 1792) (Thomas Nugent, trans) (originally published 1748) ("A sovereign, who knowing the crimes of his subjects, as for example, that they practise piracy on strangers; and being also able and obliged to hinder it, does not hinder it, renders himself criminal, because he has consented to the bad action, the commission of which he has permitted, and consequently furnished a just reason of war."). For scholarly discussion on nations' international law obligation to provide redress, see Bellia & Clark, *supra* note 25, at 466-94.

[32] *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.").

[33] 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).

[34] 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[.]").

[35] 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).

[36] *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 205 & n. 5 (2d ed. 2015). *See also* sources cited *supra* note 25; Sosa v. Alvarez-Machain, 542 U.S. 692, 716–17 (2004).

[37] *See Sosa*, 542 U.S. at 716-17. *See also* Respublica v. De Longchamps, 1 Dall. 111, 111 (O. T. Phila. 1784); Alfred (continued...)

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[38]—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.[39] Longchamps was eventually recaptured, convicted, and sentenced to two years in jail by a Pennsylvania court.[40] But Pennsylvania officials declined French requests to deliver Longchamps to French authorities,[41] 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.[42]

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.[43] When the Ambassador, Peiter 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.[44]

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[.]"[45] 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.[46] Some scholars dispute whether the Marbois and Van Berckel incidents were an impetus for the ATS.[47] But the Supreme Court has interpreted the ATS as part of a class of provisions in the Judiciary Act that were designed, at least in part, to respond to concerns that the federal government under the Articles of Confederation was unable to provide a judicial forum to protect the rights of foreign diplomats.[48]

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Rosenthal, *The Marbois-Longchamps Affair*, 63 PA. MAG. OF HIS. & BIOG. 294 (1939).

[38] 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 37, at 295.

[39] *See* Kiobel v. Royal Dutch Petro. Co., 133 S. Ct. 1659, 1666 (2013).

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

[41] *See* BRADLEY, *supra* note 36, at 205.

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

[43] *See Kiobel*, 133 S. Ct. at 1666-67.

[44] 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).

[45] *Kiobel*, 133 S. Ct. at 1668.

[46] *See id.* (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.").

[47] *See, e.g.*, Bradley, *supra* note 24, at 641-42; Thomas H. Lee, *The Safe Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 855-66 (2006). 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 36, 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 33.

[48] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2004) (internal citations omitted) ("The Framers responded [to the Marbois and Van Berckel incidents] by vesting the Supreme Court with original jurisdiction over 'all Cases affecting (continued...)

## 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.[49] The first case, *Bolchos v. Darrel*,[50] involved a French captain attempting to recover a cargo of slaves he had captured along with a Spanish prize vessel. The second, *Adra v. Clift*,[51] was brought over 150 years later, and involved the use of forged passports in an international child custody dispute.[52] 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"[53]—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.[54]

# 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[55]) issued a landmark decision in *Filártiga v. Peña-Irala*.[56] 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.[57] The defendant, Americo Norberto Peña-Irala, was also a Paraguayan citizen who was discovered to be living in New York on an expired visa.[58] Relying on the ATS for jurisdiction, the Filártigas contended that Peña-Irala's actions constituted a tort in violation of the law of nations, but the district court initially dismissed the case on the ground that the law of

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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[.]").

[49] 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.").

[50] 3 F. Cas. 810, 810 (D.S.C. 1795).

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

[52] *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 36, at 206-07 and CRS Report RL32118, *supra* note 24, at 11-13.

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

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

[55] 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.

[56] 630 F.2d 876 (2d Cir. 1980).

[57] *Id.* at 878.

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

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.[59]

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.[60] The *Filártiga* court reasoned that courts applying the ATS "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[61] 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[62] for human rights violations even when the events underlying the claims occurred outside the United States.[63]

## 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*,[64] 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.[65] In *Tel-Oren*, the D.C. Circuit addressed—but did not resolve—whether the ATS satisfies both requirements.

*Tel-Oren* involved a group of Israeli citizens and survivors of a terrorist attack in Israel who brought an ATS claim against the Palestinian Liberation Organization and others who allegedly orchestrated the attack.[66] In a per curiam opinion, a three-judge panel of the D.C. Circuit

[59] *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).

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

[61] *See id.* at 881.

[62] 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.

[63] *See* Anthony D'Amato, *Preface in* ATCA ANTHOLOGY, *supra* note 21, 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 [*Filartiga*], 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 [*Filartiga*] 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.").

[64] 726 F.2d 775 (D.C. Cir. 1984) (per curiam).

[65] *See* BRADLEY, *supra* note 36, at 209.

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

unanimously agreed to dismiss the case, but each judge issued a separate opinion relying on a different rationale for dismissal.

In a widely discussed concurring opinion,[67] Judge Bork concluded that the ATS is a purely jurisdictional statute that does not create a cause of action for damages.[68] 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.[69] Judge Edwards disagreed, and argued that the ATS itself creates a statutory cause of action.[70] However, Judge Edwards still concurred in the dismissal under the rationale that the case lacked official state action, [71] and that the claim for terrorism was not sufficiently recognized as a violation of international law.[72] In addition, Judge Robb found the case to raise nonjusticiable political questions—meaning it raised disputes more appropriately addressed by the legislative and executive branches.[73] But it was the broader, doctrinal disagreement between Judge Bork and Judge Edwards over the cause-of-action question that would eventually become the subject of a landmark Supreme Court decision, *Sosa v. Alvarez-Machain*,[74] discussed below.[75] However, *Sosa* was not decided until 20 years later. In the interim, Congress created a new statutory basis for civil claims for torture and extrajudicial killing—the same claims asserted in *Filártiga*—through the Torture Victim Protection Act.

## The Torture Victim Protection Act

In 1992, President George H. W. Bush signed into law the Torture Victim Protection Act (TVPA), which creates a civil cause of action for damages against any "individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another to torture or extrajudicial killing.[76] Legislative history of the TVPA suggests the act was designed to establish an "unambiguous basis" for the causes of action recognized in *Filártiga* and to respond to Judge Bork's argument in *Tel-Oren* that there must be a separate and explicit "grant by Congress of a private right of action" in order to assert a tort claim for a violation of international law.[77] However, there are important distinctions between the TVPA and ATS.

Whereas the TVPA expressly creates a civil cause of action for torture and extrajudicial killing, the ATS refers only to the *jurisdiction* of federal courts.[78] Moreover, while the ATS applies only to

[67] *See, e.g.*, Dodge, *supra* note 24, at 237-43.

[68] *Id*. 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.").

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

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

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

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

[73] See id. at 823–27. For more background on the political question doctrine, see CRS Report R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, by (name redacted)

[74] 542 U.S. 692 (2004).

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

[76] Torture Victim Protection Act, P.L. 102-256, 106 Stat. 73 (1992) (codified in 28 U.S.C. § 1350 note).

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

[78] *Compare* P.L. 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).

civil actions brought by aliens, the TVPA allows a cause of action to be brought by and against "individuals."[79] Courts have interpreted this term as extending a cause of action to both U.S. and foreign nationals,[80] but excluding liability against corporations.[81] At the same time, the TVPA places limitations on civil actions that are not present in the ATS. Most notably, the TVPA requires that plaintiffs exhaust all "adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[82]

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.[83] 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.[84] 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*.[85] *Sosa* concerned a Mexican doctor, Humberto Alvarez-Machain (Alvarez), who allegedly participated in the torture and murder of a Drug Enforcement Agency (DEA) agent in Mexico by prolonging the agent's life so he could be further interrogated and tortured.[86] 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.[87]

The Supreme Court twice reviewed cases arising from Alvarez's seizure. After being brought into U.S. custody, Alvarez moved to dismiss the criminal indictment against him on the ground that his apprehension was "outrageous governmental conduct" and that it violated the extradition treaty between the United States and Mexico.[88] In its first decision arising out of his case, *United*

[79] *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).

[80] *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)).

[81] *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.").

[82] *See* 28 U.S.C. § 1350 note.

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

[84] *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.").

[85] 542 U.S. 692 (2004).

[86] *Id.* at 697.

[87] *See id.*

[88] *Id.* at 698.

*States v. Alvarez-Machain*,[89] the Supreme Court rejected Alvarez's arguments, finding no grounds to justify dismissal of the criminal case against him.[90]

The case was remanded to district court, but the district court dismissed the charges for lack of evidence at close of the government's case during trial.[91] No longer subject to criminal charges, Alvarez filed suit in 1993 asserting ATS claims against the Mexican nationals responsible for his abduction.[92] This civil case, *Sosa v. Alvarez-Machain*,[93] 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."[94] Adopting reasoning that largely appeared to comport with Judge Bork's concurring opinion in *Tel-Oren*, the *Sosa* Court agreed that the "ATS is a jurisdictional statute creating no new causes of action. . . ."[95] Among other things, the Court noted that the ATS is written in jurisdictional language and was originally enacted as part of the Judiciary Act—a statute that concerned the jurisdiction of all federal courts more broadly.[96]

While the *Sosa* Court agreed that the ATS was not intended to create statutory causes of action, a majority nevertheless concluded that the statute was not meant to be "stillborn"—meaning it was not intended to be a "jurisdictional convenience to be placed on a shelf" until a future Congress authorized specific causes of action.[97] 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.[98] 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,[99] as opposed to a congressionally created, statutory cause of action.[100]

*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,[101] infringement on the

[89] 504 U.S. 655 (1992).

[90] *See id.* at 670.

[91] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004). *See also* BRADLEY, *supra* note 36, at 212 (discussing background on the trial court proceedings).

[92] 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

[93] 542 U.S. 692.

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

[95] *See id.*at 724.

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

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

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

[99] 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 36, at 139-58.

[100] *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.

[101] 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).

rights of ambassadors, and piracy.[102] But the Court also held that ATS jurisdiction is not limited to those claims.[103] Rather, under *Sosa*, federal courts can recognize common law claims for violations of the "present-day law of nations," provided the claims satisfy an important and overarching limitation: only those claims that "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms" of international law are actionable under the ATS.[104] 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.[105] Under this restrained approach, 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.[106]

Although *Sosa* warned that lower courts should exercise "vigilant doorkeeping" and "great caution" before recognizing causes of action under the ATS,[107] the post-*Filártiga* movement of using the ATS to seek redress for human rights abuses continued "largely unabated" after *Sosa*.[108] 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*.[109]

# 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.[110] The Second Circuit dismissed the case on the ground that corporations cannot be liable for violations of the law of nations under the ATS, and the Supreme Court originally granted certiorari on the question of corporate liability.[111] 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

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

[103] *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[.]").

[104] *Id.*

[105] *Id.* at 725.

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

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

[108] 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).

[109] 133 S. Ct. 1659 (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).

[110] *Kiobel*, 133 S. Ct. at 1662-63.

[111] *See Kiobel*, 133 S. Ct. at 1663. *See also* Petition for Writ of Certiorari, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), at i.

claims for violations of the law of nations occurring within the *territory of a sovereign other than the United States*?[112]

## The *Kiobel* Majority

In a majority opinion written by Chief Justice Roberts, the *Kiobel* Court relied on a canon of statutory interpretation known as the "presumption against extraterritorial application" to conclude that the ATS does not reach conduct that occurred entirely in the territory of a foreign nation.[113] Also known as the "presumption against extraterritoriality," the canon of construction is intended to avoid unintended clashes between U.S. and foreign law that could result in international discord.[114] Reliance on the presumption also reflects the "more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind."[115] Unless a statute gives "clear indication of an extraterritorial application," federal courts will presume that it is not intended to apply to claims that arise in foreign territory.[116]

According to the *Kiobel* Court, nothing in the text or history of the ATS suggests the First Congress intended the statute to have extraterritorial reach.[117] 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.[118] 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.[119]

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

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[120]

[112] *Kiobel*, 133 S. Ct. at 1663 (emphasis added).

[113] 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 upon request).

[114] Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1664 (2013) (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

[115] 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).

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

[117] *See id.* at 1665-66.

[118] *See* Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1665-69 (2013); *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). *See also supra* § The Marbois and Van Berckel Incidents.

[119] *Id.* at 1669.

[120] *Id.* (internal citation omitted).

The Court, however, did not provide any further explanation as to how an ATS claim could satisfy the "touch and concern" test—leading to divergent interpretations in the lower courts, as discussed below.[121]

## The *Kiobel* Concurring Opinions

*Kiobel* produced two concurring opinions and one opinion concurring in the judgment only. Justice Kennedy wrote a one-paragraph concurrence, emphasizing his belief that it was the "proper disposition" for the majority to "leave open a number of significant questions regarding the reach and interpretation" of the ATS that will require elaboration in the future.[122]

Justice Alito, in an opinion joined by Justice Thomas, agreed that the majority's opinion "le[ft] much unanswered."[123] But Justice Alito would have further explained how litigants can satisfy the "touch and concern" requirement. Under Justice Alito's self-described "broader standard," only when the conduct that constitutes a violation of the law of nations occurred domestically will the claim "touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality.[124]

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.[125] 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.[126] 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.[127]

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.[128] Applying this test to the facts of the *Kiobel*, Justice Breyer agreed that the matter should be dismissed because "the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction."[129]

## Interpreting *Kiobel*

Although lower courts' interpretations of *Kiobel* are still evolving, many commentators see the Supreme Court's decision as having significantly limited the ATS as a vehicle to redress human

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

[122] *Kiobel* v. Royal Dutch Petroleum, 133 S. Ct. at 1669.

[123] *See id*. (Alito, J., concurring).

[124] *See id.* at 1670.

[125] *See id.* at 1670 (Breyer, J., concurring in judgment).

[126] Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659, 1672-73 (2013).

[127] *Id.* at 1671.

[128] *See id.* at 1674.

[129] *Id.* at 1671.

rights abuses in U.S. courts.[130] 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.[131] On the other hand, cases in which there is *some* connection to the United States—such as a defendant who is a U.S. citizen or corporation—are less easily resolved under *Kiobel*. In particular, courts have adopted differing interpretative frameworks for deciding what level of domestic conduct or contact is necessary to satisfy *Kiobel*'s "touch and concern" test, creating a split among the circuits.[132]

## The "Touch and Concern" Circuit Split

As of the date of this report, five circuits have considered the "touch and concern" test in the context of the ATS. The Fifth and Second Circuits adopted a bright-line approach similar to Justice Alito's concurrence in *Kiobel*. In order to displace the presumption against extraterritoriality under this approach, the *conduct* that constitutes a violation of the law of nations must have occurred in the United States, regardless of whether the case has other domestic connections, such a U.S. citizen defendant.[133]

The Fourth, Ninth, and Eleventh Circuits, by contrast, have developed flexible methods of interpretation. According to the Fourth Circuit, an ATS claim "touches and concerns" the United States "when extensive United States contacts are present and the alleged conduct bears . . . a strong and direct connection to the United States."[134] The Fourth Circuit emphasized that this is a fact-based analysis that most cases will not satisfy.[135] But it allowed one case to go forward that involved American employees of a U.S. corporation, even though the primary conduct giving rise to a violation of the law of nations—alleged torture at the Abu Ghraib prison facility in Iraq—occurred outside the territorial jurisdiction of the United States.[136]

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[130] *See supra* note 109. *See also* Schnably, *supra* note 83, 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.").

[131] *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.").

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

[133] *See* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 194-97 (5th Cir. 2017) (quoting RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016)) (holding that, if the conduct that constitutes a violation of the law of nations "occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred"), *petition for cert. filed*, (U.S. June 2, 2017) (No. 16-1461); Balintulo v. Daimler AG, 727 F.3d 174, 192 (2d Cir. 2013) (holding that no ATS claim could lie when the defendant's conduct in the United States did not "giv[e] rise to a violation of customary international law"). *See also* Mastafa v. Chevron Corp., 770 F.3d 170, 185 (2d Cir. 2014) (interpreting *Balintulo* and explaining that the "focus" of the ATS for purposes of the "touch and concern" test is the "conduct alleged to constitute violations of the law of nations").

[134] Warfaa v. Ali, 811 F.3d 653, 660 (4th Cir. 2016), *cert. denied*, No. 15-1345, 2017 WL 2722431 (U.S. June 26, 2017), and *cert. denied*, No. 15-1464, 2017 WL 2722432 (U.S. June 26, 2017).

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

[136] *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 528-29 (4th Cir. 2014).The Fourth Circuit found that the (continued...)

In the Eleventh Circuit, an ATS claim satisfies the "touch and concern test" if it "has a U.S. focus and *adequate* relevant conduct occurs in the United States."[137] Under this "fact-intensive" approach, the Eleventh Circuit has considered factors such as the citizenship of the defendants and potential U.S. national interests triggered by the nature of the defendants' conduct. [138] But it deemed these factors insufficient on their own to displace the presumption against extraterritoriality.[139] Similarly, the Ninth Circuit reasoned "that a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish sufficient connection between an ATS claim and the territory of the United States."[140]

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

Some of the disparity among the circuits arises from their interpretation of *Morrison v. National Australia Bank Ltd.*[141]—a pre-*Kiobel* Supreme Court decision analyzing how the presumption of extraterritoriality applies to Section 10(b) of the Securities and Exchange Act of 1934.[142] Section 10(b) prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a "security registered on a national securities exchange[.]"[143] The plaintiffs in *Morrison* argued that, although they purchased their securities on a foreign stock exchange outside the United States, their claim was domestic in nature because the deceptive conduct took place in the United States.[144] The Supreme Court disagreed, and held that the presumption against extraterritoriality still defeated their case because the "focus" of Section 10(b) is on the "purchase and sale of securities"—which occurred in Australia—not the deceptive conduct.[145]

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(...continued)

"touch and concern" test was satisfied when: (1) the defendant was a U.S. corporation; (2) the defendant's employees upon whose conduct that ATS claims were based were U.S. citizens; (3) the defendant's contract to perform interrogation services in Iraq was issued in the U.S. by the Department of the Interior, and the contract required the corporation's employees to obtain security clearances from the Department of Defense; (4) the allegation that the defendant's managers located inside the United States gave "tacit approval" to the alleged acts of torture committed by the defendant's employees at Abu Grahib and allegedly endeavored to cover up the alleged torture from within the United States; and (5) "the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad." *Id.* at 530-31.

[137] Doe v. Drummond Co., 782 F.3d 576, 592 (11th Cir. 2015) (affirming dismissal of ATS claims by heirs of Columbian citizens against a multinational coal mining company and its subsidiary and corporate officers for allegedly aiding and abetting extrajudicial killings and war crimes of a Columbian paramilitary group), *cert. denied,* 136 S. Ct. 1168 (2016).

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

[139] *See id.*

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

[141] 561 U.S. 247 (2010).

[142] 15 U.S.C. § 78j(b).

[143] *Id.*

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

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

Application of *Morrison*'s "focus" analysis in ATS cases may make it more difficult for plaintiffs to displace the presumption against extraterritoriality,[146] but courts have reached differing conclusions about whether *Morrison* applies to the ATS.[147] The Ninth and Fourth Circuits concluded that the *Morrison* "focus" analysis should not control in ATS cases because the Supreme Court deliberately announced a different standard—the "touch and concern" test—in *Kiobel*.[148] By contrast, the Fifth and Second Circuits were guided by *Morrison*'s "focus" analysis in their interpretations of *Kiobel*.[149] And the Fifth and Second Circuits also adopted a bright line rule that plaintiffs can displace the presumption against extraterritoriality in ATS cases only when the conduct that constitutes a violation of the law of nations occurred domestically.[150] Finally, the Eleventh Circuit adopted a hybrid approach "amalgamat[ing] *Kiobel*'s standards with *Morrison*'s focus test[.]"[151]

The Supreme Court's 2016 decision in *RJR Nabisco, Inc. v. European Community*[152] may help to resolve this conflict. There, the Court applied the presumption against extraterritoriality to the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO).[153] In the course of discussing its prior jurisprudence on extraterritoriality, including *Kiobel*, the Supreme Court explained:

> *Morrison* and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. . . . If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus."[154]

Some commentators interpreted this reference to *Kiobel* as a clarification that *Morrison*'s "focus" analysis applies in ATS cases.[155] The Fifth Circuit also adopted this interpretation in the only court of appeals decision analyzing extraterritoriality and the ATS since the Supreme Court's ruling *RJR Nabisco*.[156] However, at least one district court held that *RJR Nabisco* did not overturn prior Ninth Circuit precedent that *Morrison*'s "focus" test does not apply to the ATS.[157] Thus, it

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[146] *See infra* note 150.

[147] *See infra* notes 148-151.

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

[149] *See* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 195 (5th Cir. 2017), *petition for cert. filed*, (U.S. June 2, 2017) (No. 16-1461); Mastafa v. Chevron Corp., 770 F.3d 170, 184 (2d Cir. 2014).

[150] *See supra* note 133

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

[152] 136 S. Ct. 2090 (2016).

[153] 18 U.S.C. § 1964.

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

[155] *See* Bellinger III, *supra* note 132 ("*RJR Nabisco* seemingly resolved the circuit split over whether to apply the *Morrison* test.").

[156] Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 194-97 (5th Cir. 2017) ("*RJR Nabisco* makes clear that *Morrison*'s 'focus' test still governs."), *petition for cert. filed*, (U.S. June 2, 2017) (No. 16-1461).

[157] *See* Salim v. Mitchell, No. CV-15-0286-JLQ, 2017 WL 3389011, at *14 (E.D. Wash. Aug. 7, 2017) ("This court finds *RJR Nabisco* has not displaced *Kiobel* when the issue is extraterritorial application of the ATS. Therefore, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) remains controlling authority, including its determination that (continued...)

remains to be seen whether *RJR Nabisco* will streamline lower courts' interpretive frameworks for analyzing extraterritoriality under the ATS.[158] Moreover, even if the "focus" test becomes part of all the circuits' analyses, *RJR Nabisco* may still leave room for courts to disagree on precisely what the "focus" of the ATS is. But if courts follow the Fifth Circuit's interpretation of *RJR Nabisco* in ATS cases,[159] they appear more likely to create a bright-line rule that ATS plaintiffs can overcome the presumption against extraterritoriality only if the specific conduct constituting a violation of the law of nations occurred within the United States.

# Corporate Liability: *Jesner v. Arab Bank, PLC*

In *Jesner v. Arab Bank, PLC*, the Supreme Court granted certiorari to resolve another lingering circuit split in ATS litigation: May corporations be deemed liable under the ATS?[160] *Jesner* is the second time the Supreme Court has taken up the issue of corporate liability. Although it ultimately decided *Kiobel* on extraterritoriality grounds, the Court originally granted certiorari in that case to review a holding in the Second Circuit that the law of nations does not recognize corporate liability.[161] The Second Circuit, however, is the only circuit to reach this conclusion. All other circuits that considered the issue have determined that corporate liability is available under the ATS.[162] Thus, in 2015, when the Second Circuit relied on its prior circuit precedent to again hold that corporations may not be liable in ATS cases, it reinforced an existing split among the circuits. In *Jesner*, the Supreme Court appears poised to revisit this circuit split that it elected not to resolve in *Kiobel*.

## Background on *Jesner*

*Jesner* involves claims by approximately 6,000 foreign nationals (or their families or estate representatives)[163] who were injured, killed, or captured by terrorist groups in Israel, the West Bank, and Gaza between 1995 and 2005.[164] The plaintiffs allege that Arab Bank—one of the

(...continued)

[*Kiobel*] did not incorporate *Morrison*'s focus test.").

[158] *Accord* Bellinger III, *supra* note 132 ("[I]t may be premature to say that *RJR Nabisco* resolves the circuit split over the interpretation of 'touch and concern.'").

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

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

[161] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013). *See also* Petition for Writ of Certiorari, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (No. 10-1491), at i.

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

[163] Petition for Certiorari, *Jesner*, 137 S. Ct. 1432, at ii.

[164] *Accord In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 147 (2d Cir. 2015) ( *In re Arab Bank*), *reh'g en banc denied*, 822 F.3d 34 (2d Cir. 2016), *cert. granted sub nom*. Jesner v. Arab Bank, 137 S. Ct. 1432 (2017).

largest financial institutions in the Middle East[165]—aided and abetted four terrorist organizations allegedly responsible for the attacks.[166] Among other things, the plaintiffs allege 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."[167] 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.[168]

*Jesner* is a consolidation of five cases filed in the Eastern District of New York, all of which assert similar allegations of facilitating and financing terrorism against Arab Bank.[169] 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 corporate liability.[170] 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.[171]

## The Choice-of-Law Question Underlying Corporate Liability

Underlying the issue of corporate liability in *Jesner* is a critical choice-of-law question: Should courts look to domestic law or international law in determining whether corporations are subject to ATS liability?[172] Under long-standing American domestic law, corporations are "deemed persons" for "civil purposes"[173] that may "sue and be sued" for torts.[174] But the ATS creates jurisdiction only for torts that violate treaties or the law of nations, and the issue of corporate liability in international law is far less clearly defined. From the post-World War II Nuremberg Tribunals[175] to the recently established International Criminal Court (ICC),[176] international

[165] *Id.* at 149.

[166] *Id.* at 147. The organizations alleged to be responsible are the Islamic Resistance Movement (also known 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.*

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

[168] 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).

[169] *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).

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

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

[172] *Compare*, *e.g.*, Richard Herz, *It's Just a Tort Case*, SCOTUSBLOG (July 27, 2017), http://www.scotusblog.com/2017/07/symposium-just-tort-case/ ("[I]n assessing whether corporations can be held liable, courts look to well-established federal or traditional common-law rules.") *with* Kristen A. Linsley, *Dusting Off Corporate Liability in Jesner—Why There is no International Consensus and Why Courts Lack Authority to Innovate on the Issue*, SCOTUSBLOG (July 27, 2017), ("[T]he question of who may be liable is not one of 'remedy' to be decided under domestic law, but instead relates to the scope of substantive liability for the international norm.").

[173] *See* United States v. Amedy, 24 U.S. (11 Wheat.) 392, 412 (1826).

[174] *See* Cook County v. United States *ex rel*. Chandler, 538 U.S. 119, 125 (2003). *See also* 1 William Blackstone, Commentaries on the Law of England 463 (1765).

[175] Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. Some scholars and legal historians argue that, rather than using criminal trials, the Allies utilized other forms of punishment on corporations for violation of international law, such as military-ordered corporate dissolution. *See* Brief of International (continued...)

criminal tribunals have consistently recognized jurisdiction over natural persons, not corporations.[177] Moreover, while some modern treaties require nations to impose liability on corporations,[178] most treaties do not.[179] Accordingly, when the Second Circuit first held that the ATS does not recognize corporate liability, it did so based on the conclusion that "corporate liability has not attained a discernable, much less universal, acceptance among nations of the world[.]"[180]

Those favoring corporate liability respond that the jurisdictions of international criminal tribunals are irrelevant because their jurisdictions were crafted based on practical and political considerations rather than on any substantive limits of international law.[181] More fundamentally, they argue that, although international law defines substantive standards of conduct that cannot be violated, international law delegates to each individual nation the responsibility of selecting the means of enforcing or remedying such violations.[182] Under this argument, the ATS requires a cause of action to be based on a discernible and widely accepted international law standard of *conduct*, not a well-established international law standard of *liability*.[183] In other words, proponents of corporate liability argue that international law simply returns the question of how to remedy a violation of an international norm to the domestic law of the United States, which has a long-standing history of recognizing corporate liability.[184]

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Law Scholars as *Amici Curie*, Jesner v. Arab Bank, PLC, 137 S. Ct. 1432 (June 27, 2017) (No. 16-499), at 18-20 [hereinafter "International Law Scholars' Brief"]; Brief of *Amici Curie* Nuremberg Scholars, *Jesner*, 137 S. Ct. 1432 (June 27, 2017) (No. 16-499), at 6-38 [hereinafter "Nuremberg Scholars' Brief"].

[176] Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter "Rome Statute"].

[177] *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 119 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013); Bradley, *supra* note 36, at 218; Linsley, *supra* note 158. The ad hoc criminal tribunals created by the U.N. Security Council for the former Yugoslavia and in Rwanda likewise had jurisdiction over natural persons only. International Criminal Tribunal for the Former Yugoslavia Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *adopting* The Secretary-General, Report Pursuant to Paragraph 2 of Security Council Resolution 808, art. 6, U.N. Doc. S/25704 (May 3, 1993); Statute of the International Tribunal for Rwanda, art. 5, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[178] *See* United Nations Convention Against Transnational Organized Crime art. 10(1), 2225 U.N.T.S. 209; Convention on Combating Bribery of Foreign Public Officials in International Business art. 2, Dec. 18, 1997, 37 I.L.M. 1.

[179] *See* Bradley, *supra* note 36, at 218-19.

[180] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 148-149 (2d Cir. 2010), *aff'd on other grounds*, 133 S. Ct. 1659 (2013). *See also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[I]t would be quite odd for a U.S. court to allow a customary international law-based ATS claim against a corporation when no international tribunal has allowed a customary international law claim against a corporation."), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

[181] *See, e.g.*, Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1019 (7th Cir. 2011); International Law Scholars' Brief, *supra* note 175, at 16-23.

[182] *See, e.g.*, Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014) ("[I]nternational law defines norms and determines their scope, but delegates to domestic law the task of determining the civil consequences of any given violation of these norms."), *reh'g en banc denied*, 786 F.3d 801 (2015), *cert. denied*, 136 S.Ct. 798 (2016); *Flomo*, 643 F.3d at 1019 (describing the "distinction between a principle of that law, which is a matter of substance, and a means of enforcing it, which is a matter of procedure or remedy"); Brief for the United States as *Amicus Curie*, *Jesner*, 137 S. Ct. 1432 (June 27, 2017) (No. 16-499), at 17-18 [hereinafter "United States' *Jesner* Brief"] ("[I]nternational law . . . establishes substantive standards of conduct but generally leaves each nation with substantive discretion as to the means of enforcement within its own jurisdiction.").

[183] United States' *Jesner* Brief, *supra* note 182, at 6.

[184] *See supra* note 182. A U.S. Attorney General opinion in 1907 suggests that a U.S. corporation could be liable under the ATS for a treaty violation, although it does not include a direct analysis of the question. *See Mexican Boundary-*
(continued...)

As a rebuttal, opponents of corporate liability argue that, even if domestic law controls, U.S. law does not permit corporate liability in several analogous circumstances.[185] For example, corporations cannot be held liable for so-called *Bivens* claims—implied causes of action under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*[186] for violations of certain constitutional rights by federal employees.[187] And congressionally created causes of action for torture and extrajudicial killing in the TVPA[188] have been deemed by reviewing courts not to permit liability against corporations.[189] Opponents of corporate liability argue that, in light of *Sosa*'s warning that courts should exercise "great caution" when approaching ATS cases,[190] it would be inappropriate to allow ATS claims against corporations when the Supreme Court has not allowed for such liability in the constitutional context and Congress precluded it in an ATS-related domestic statute.[191]

Ultimately, the choice-of-law question is not easily resolved, but it may be decisive in the Court's ruling in *Jesner*.

## *Jesner*'s Companion Case: *Linde v. Arab Bank, PLC*

In addition to the ATS claims brought by foreign nationals, two of the five consolidated cases in *Jesner* included U.S. national plaintiffs asserting claims under the Anti-Terrorism Act.[192] Those claims were not available to the foreign nationals who filed suit under the ATS because the Anti-Terrorism Act provides, in pertinent part, that "*[a]ny national* of the United States" injured by an act of international terrorism may sue in federal district court.[193]

The district court would eventually bifurcate the Anti-Terrorism Act claims from the ATS claims, and form a separate proceeding for the U.S. nationals only, *Linde v. Arab Bank PLC*.[194] But early in the consolidated litigation, the full group of U.S. and foreign national plaintiffs obtained significant discovery sanctions against Arab Bank for its failure to produce certain financial records.[195] Arab Bank asserted that foreign bank secrecy laws prohibited it from disclosing

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*Diversion of the Rio Grande.*, 26 U.S. Op. Atty. Gen. 250, 253 (1907) (opining that the ATS would provide "a right of action and a forum" for a suit against the American Rio Grande Land and Irrigation Company).

[185] *See*, *e.g.*, Brief of Respondent Arab Bank, PLC in Opposition to Petition for Writ of Certiorari, Jesner v. Arab Bank, PLC, 137 S. Ct. 1432 (Dec. 14, 2016) (No. 16-499), at 29-30 [hereinafter "*Jesner* Opposition to Cert."].

[186] 403 U.S. 388 (1971).

[187] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001).

[188] *See supra* § The Torture Victim Protection Act.

[189] *See* Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1706 (2012).

[190] Sosa v. Alvarez-Machain 542 U.S. 692, 728-29 (2004).

[191] *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("In exercising the restraint mandated by the Supreme Court in ATS cases, we must follow Congress's approach to fashioning the TVPA for U.S. citizens and similarly fashion the ATS for aliens."), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013). *See also Jesner* Opposition to Cert., *supra* note 185, at 27-31; Brief for the Chamber of Commerce of the United States *et al*. as *Amici Curie*, *Jesner*, 137 S. Ct. 1432 (June 27, 2017) (No. 16-499), at 8-23 [hereinafter "Chamber of Commerce Brief"].

[192] 18 U.S.C. § 2333. *See also* 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).

[193] 18 U.S.C. § 2333(a) (emphasis added).

[194] *See* 97 F. Supp. 3d 287 (E.D.N.Y. 2015), *appeal docketed*, No. 16-2119 (2d Cir. June 22, 2016).

[195] Linde v. Arab Bank, PLC, 269 F.R.D. 186, 205-06 (E.D.N.Y. 2010) [hereinafter "*Linde Sanctions Order*"], *appeal dismissed*, 703 F.3d 92 (2d Cir. 2014), *cert. denied*, 134 S.Ct. 2869 (2014).

certain accounts and transaction records held abroad.[196] But the district court found that the bank did not exercise the "utmost good faith" in seeking foreign governments' permission for production,[197] and it sanctioned the bank with a host of adverse jury instructions.[198] One instruction allows the jury to infer that the failure to produce documents shows Arab Bank knowingly and purposefully processed and distributed payments to terrorists.[199]

In an amicus brief filed in support of Arab Bank's attempt to appeal the sanctions ruling, the Kingdom of Jordan (where Arab Bank is headquartered) called the sanctions a "serious affront to its sovereignty."[200] The appeal was unsuccessful.[201] In the meantime, the foreign national plaintiffs' ATS claims in *Jesner* were dismissed on corporate liability grounds, while the U.S. national plaintiffs proceeded to trial on their Anti-Terrorism Act claims in *Linde*. Following a six-week trial during which the jury was instructed on the adverse inferences to be drawn from Arab Bank's lack of document production, the *Linde* plaintiffs successfully obtained a judgment against Arab Bank for violating the Anti-Terrorism Act.[202] That judgment is currently on appeal in the Second Circuit, and *Linde* is not currently before the Supreme Court.[203]

Unlike in *Linde*, the *Jesner* plaintiffs face numerous potentially insurmountable legal arguments under which the federal district court lacks subject matter jurisdiction to even hold a trial over their claims.[204] However, if the Supreme Court were to reinstate the *Jesner* plaintiffs' ATS claims, and those claims survived subsequent pretrial motions to dismiss, the *Jesner* plaintiffs would receive the benefit of the same adverse jury instructions at trial that the *Linde* plaintiffs utilized in obtaining their 2015 judgment.[205]

## Congressional and Other Interest in *Jesner*

*Jesner* has generated attention in a number of interested communities, including legal scholars and historians,[206] human rights groups,[207] national security specialists,[208] and business interest

[196] *See id.* at 197.

[197] *Id.* at 200.

[198] *Id.* at 205. ("At trial, the jury will be instructed that, based on defendant's failure to produce documents, it may, . . . infer: (1) that defendant provided financial services to organizations designated by the United States as Foreign Terrorist Organizations, and to individuals affiliated with the FTOs; (2) that defendant processed and distributed payments on behalf of the Saudi Committee to terrorists, . . . ; and (3) that defendant did these acts knowingly and purposefully. In addition, (4) defendant is precluded from making any argument or offering any evidence regarding its state of mind or any other issue that would find proof or refutation in withheld documents[.]").

[199] *See id*. at 205.

[200] Brief for *Amicus Curie* The Hashemite Kingdom of Jordan, Arab Bank, PLC, v. Linde (No. 12-1485) (filed July 24, 2013), at 2, 4.

[201] Linde v. Arab Bank, PLC, 703 F.3d 92 (2d Cir. 2014), *cert. denied*, 134 S.Ct. 2869 (2014).

[202] *See* Linde v. Arab Bank, PLC, 97 F. Supp. 3d 287, 298 (E.D.N.Y. 2015), *appeal docketed*, No. 16-2119 (2d Cir. June 22, 2016). The extent to which the jury instructions were determinative is the subject of debate. *See id.* at 311-22.

[203] For information on the latest developments in the *Linde* appeal, see Pete Brush, *2nd Circuit Wants to See Arab Bank Hamas Terror Settlement*, LAW360 (May 16, 2017), https://www.law360.com/articles/924604/2nd-circ-wants-to-see-arab-bank-hamas-terror-settlement.

[204] *See, e.g.*, *Jesner* Opposition to Cert., *supra* note 185, at 12-31 (describing multiple, independent legal grounds for pretrial dismissal of *Jesner*); United States' *Jesner* Brief, *supra* note 182, at 25-30 (describing concerns of extraterritoriality which could serve as a basis for dismissal in *Jesner*).

[205] *See* United States' *Jesner* Brief, *supra* note 182, at 30 ("The underlying actions are subject to an order, entered when they were consolidated with other actions for pretrial purposes, that was imposed as a sanction for respondent's insistence on adhering to foreign bank-secrecy laws by withholding certain documents from discovery.").

[206] *E.g.*, International Law Scholars' Brief, *supra* note 175; Brief of *Amici Curie* Professors of Legal History, *Jesner*, (continued...)

groups.[209] As of the date of this report, various individuals and organizations have filed 28 "friend of the court" briefs.[210]

Senators Sheldon Whitehouse and Lindsey Graham filed *amici* briefs in support of the *Jesner* plaintiffs.[211] They argue that the ATS serves as part of a larger legislative scheme to address terrorism, and that a limitation on corporate liability in the ATS would "transform Congress's solid anti-terrorism architecture into a patchwork of ill-fitting parts" that leaves dangerous "gaps in the United States' counterterrorism framework."[212] Citing existing criminal law prohibitions on material support to terrorism[213] and financial regulations administered by the Office of Foreign Asset Control,[214] Arab Bank counters that the ATS is a not an essential element of U.S. anti-terrorism efforts, and it described the Senators' concerns as "hyperbole."[215]

In its brief for the United States, the Solicitor General asserts there is no categorical prohibition on corporate liability in the ATS, and that the Second Circuit's decision should be vacated.[216] However, the Solicitor General also argues that *Jesner* should be remanded to consider whether the case should be dismissed on the alternative ground that the claims are not sufficiently connected to the United States.[217]

# Conclusion

After nearly two centuries of relative obscurity, the ATS emerged as a prominent legal tool in human rights and terrorism-related litigation after the Second Circuit's decision in *Filártiga*.[218] But just over three decades later, the Supreme Court's rulings in *Sosa* and *Kiobel* placed significant limitations on the scope of the statute.[219] Some see *Kiobel*'s presumption against extraterritoriality as having so significantly limited the jurisdictional reach of the ATS that it resulted in the "near-demise" of the statute, although others interpret the ruling as having left the door open for certain major categories of cases.[220] Ultimately, *Kiobel*'s true impact is uncertain as

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137 S. Ct. 1432 (June 27, 2017) (No. 16-499).

[207] *E.g.*, Brief of *Amicus Curie* EarthRights International, *Jesner*, 137 S. Ct. 1432 (June 27, 2017) (No. 16-499).

[208] *E.g.*, Brief of Former U.S. Counterterrorism and National Security Officials as *Amici Curie*, *Jesner*, 137 S. Ct. 1432 (June 27, 2017) (No. 16-499).

[209] *E.g.*, Chamber of Commerce Brief, *supra* note 191.

[210] All *amici* briefs are available at *Jesner v. Arab Bank, PLC*, SCOTUSBLOG (last visited Sep. 13, 2017, 4:54 p.m.), http://www.scotusblog.com/case-files/cases/jesner-v-arab-bank-plc/.

[211] Brief of *Amici Curie* Senators Sheldon Whitehouse and Lindsey Graham, *Jesner*, 137 S. Ct. 1432 (June 27, 2017) (No. 16-499).

[212] *Id.* at 15.

[213] *See* 18 U.S.C. §§ 2339A-2339C.

[214] *See* 31 C.F.R. §§ 595-97.

[215] *Jesner* Opposition to Cert., *supra* note 185, at 30.

[216] United States' *Jesner* Brief, *supra* note 182, at 5-6.

[217] *See id.*

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

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

[220] *Compare, e.g.*, Schnably, *supra* note 83, 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 (continued...)

lower courts have not settled on a uniform method for deciding when a case sufficiently "touch[es] and concern[s]" the United States to rebut the presumption against extraterritoriality.[221] *Jesner* presents the Supreme Court with another occasion to modify the scope of the ATS.[222] A ruling that the law of nations does not recognize corporate liability in that case could further reduce the scope of actionable claims under the ATS, leading litigants to seek a remedy under other sources of U.S. state or foreign law, to the extent such law provides a cause of action. But resolution of the intricate choice-of-law question underlying *Jesner* is not easily resolved, and the ultimate outcome of the case is difficult to predict.

## Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

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rights litigation.") *with* Hathaway, *supra* note 131 ("[T]here may remain [after *Kiobel*] significant scope for 'foreign squared' cases – cases in which the plaintiff or defendant is a U.S. national or where the harm occurred on U.S. soil."). For discussion of courts' differing interpretations of *Kiobel*, see *supra* § Interpreting *Kiobel*.

[221] *See supra* § The "Touch and Concern" Circuit Split.

[222] *See supra* § Corporate Liability: *Jesner v. Arab Bank, PLC*.