UIC Law Review

Volume 57 | Issue 4 Article 5

2024

The Rise, Fall, and Resurrection of the Alien Tort Statute

Thomas J. Ellis

THE RISE, FALL, AND RESURRECTION OF THE ALIEN TORT STATUTE

THOMAS J. ELLIS*

I. INTRODUCTION

Between 1996 and 1998, six boys, between the ages of ten and fourteen, were abducted by traffickers in Mali and enslaved at cocoa plantations in Ivory Coast.[1] There, they were forced to work up to fourteen hours per day, six days a week, given only scraps of food to eat, whipped and beaten by overseers, and witnessed numerous other atrocities committed on other child slaves who dared to attempt escape.[2] Child slavery is pervasive in Ivory Coast and utilized to meet the demand for the arduous labor required to operate cocoa farms.[3]

American-based companies dominated the Ivorian cocoa

---

* Tom Ellis is a JD candidate (expected May 2024). He dedicates this article to his wife, Lynn, whose love, patience, and encouragement sustain him.

1. Terry Collingsworth, *Nestlé &Cargill v. Doe Series: Meet the "John Does"--the Children Enslaved in Nestlé & Cargill's Supply Chain*, JUST SECURITY (Dec. 21, 2020), www.justsecurity.org/73959/Nestlé-cargill-v-doe-series-meet-the-john-does-the-children-enslaved-in-Nestlé-cargills-supply-chain/ [perma.cc/6SAD-8BQZ]; Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1017 (9th Cir. 2014), *cert. denied*, 577 U.S. 1062 (2016).

2. *Doe I v. Nestle*, 766 F.3d at 1017.

3. Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/ [perma.cc/R76L-ZP82]. *See also* Ramona L. Lampley, *Child Slave Labor Rampant in Chocolate Supply Chain*, SAN ANTONIO EXPRESS-NEWS (Feb. 9, 2019), www.expressnews.com/opinion/commentary/article/Child-slave-labor-rampant-in-chocolate-supply-13602395.php [perma.cc/Z4K2-Z89S].

market through exclusive buyer/seller relationships with Ivorian farms.[4] These companies effectively controlled the production of Ivorian cocoa and were well aware of the child slavery problem in Ivory Coast.[5] Through their numerous visits to Ivorian farms, these companies acquired firsthand knowledge of the practice.[6] Yet, they continued to supply money, equipment, and training to Ivorian farmers, knowing that these provisions would facilitate the continued use of forced child labor.[7]

Contending that such aiding and abetting of forced labor violated the law of nations, the former child slaves sued Nestle USA, Inc., in the United States under the Alien Tort Act (ATS).[8] However, in *Nestle USA, Inc. v. Doe*, the Supreme Court held that since the conduct that directly caused the injury occurred overseas, mere allegations of corporate decision-making in the United States were insufficient to support a domestic application of the ATS.[9]

The Court further interpreted the ATS to "compel the conclusion that federal courts should not recognize private rights of action beyond the three historical torts identified in *Sosa [v. Alvarez-Machain]*."[10] These torts, existing since 1789, are: "violations of safe conducts, infringement of the right of

4. Brief for Respondent at 5, Nestle USA, Inc. v. Doe, 593 U.S. 628 (2019) (No. 19-416). These American corporations form part of only six multinationals that account for 100% of the cocoa exports from Ivory Coast. Ange Abo, *Ivorian Cocoa Traders Seek to End Multinationals' Dominance of Exports*, REUTERS (Jan. 26, 2021, 8:04 AM), www.reuters.com/article/uk-ivorycoast-cocoa-exporters/ivorian-cocoa-traders-seek-to-end-multinationals-dominance-of-exports-idUSKBN29V1MO [perma.cc/Z4PQ-HGXF]. Ivory Coast produces approximately 45% of the world's cocoa, yet only receives about 7% of the revenue derived from it. Elian Peltier, *Ivory Coast Supplies the World with Cocoa. Now it Wants Some for Itself.,* N.Y. TIMES (Aug. 13, 2022), www.nytimes.com/2022/08/13/world/africa/ivory-coast-chocolate.html?searchResultPosition=3 [perma.cc/EGD5-RB5].

5. *Doe I v. Nestle*, 766 F.3d at 1017. *See also* Lampley, *supra* note 3 (explaining U.S. chocolate manufacturers are aware of the slave trade and "detail on their websites their efforts to try to reduce child slave labor in the supply chain.").

6. Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173, 176 (D.D.C. 2022).

7. *Id.*

8. Nestle USA, Inc. v. Doe, 593 U.S. 628, 633 (2021); *See also* 28 U.S.C. § 1350 (providing 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").

9. *Nestle. v. Doe*, 593 U.S. at 634. *See However Unjust . . . the Slave Trade may be, it is not Contrary to the Law of Nations*, YALE MACMILLAN CTR., www.glc.yale.edu/however-unjustthe-slave-trade-may-be-it-not-contrary-law-nations [perma.cc/3MVQ-5B76] (last visited Apr. 17, 2024), for the statement of U.S. Secretary of State John Forsyth made before the adoption of the Thirteenth Amendment to the U.S. Constitution, that "[h]owever unjust . . . the slave trade may be, it is not contrary to the law of nations."

10. *Nestle v. Doe,* 593 U.S. at 637 (confirming that trading slaves was not a violation of the law of nations in 1789 when the ATS was enacted).

ambassadors, and piracy."[11]

The conclusion in *Nestle v. Doe* was the ultimate product of recent successive Supreme Court decisions that systematically circumscribed the types and nature of tort actions permitted under the limited subject matter jurisdiction of the ATS.[12]

This Comment explores the origin, purpose, reach, and limitations of the ATS. The analysis begins with the Constitution and the original text of the ATS within Section 9 of the Judiciary Act of 1789, then moves to the application of the ATS in the modern world and concludes with how the ATS may be more suitably utilized in the future. Part II discusses the origin and jurisdictional scope of the ATS, how the courts have historically interpreted what Congress intended by "a violation of the law of nations," and how these views have evolved. Part III discusses the jurisdictional nature of the statute and how it has increasingly been interpreted as a statute that creates causes of action. Also, it assesses the types and nature of actions falling within the permissible scope of the ATS, i.e., torts "committed in violation of the law of nations or a treaty of the United States."[13] This part ends with an analysis of the restrictive effects of recent Supreme Court rulings on the types and nature of actions that may be brought under the ATS in the future. Part IV details why legislative action will be required for the Court to recognize any cause of action brought under the ATS other than a very narrow and rare set of actions and proposes language and methodology for such legislation.

II. BACKGROUND

A. The Origin of the Alien Tort Statute and the Law of Nations

Article I, Section 8, Clause 10 of the Constitution vests Congress with the power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[14] The law of nations is defined as:

> [A] system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; [] in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more

11. *Id.* (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)).

12. *See* Rasul v. Bush, 542 U.S. 466, 468 (2004) (instructing that the ATS explicitly confers the privilege of bringing suit under the ATS on "aliens alone"). An "alien" is "any person not a citizen or national of the United States." U.S.C. § 1101(a)(3).

13. 28 U.S.C. § 1350.

14. U.S. CONST. art. I, § 8, cl. 10.

independent states, and the individuals belonging to each.[15]

Prior to the adoption of the Constitution, the Articles of Confederation "contain[ed] no provision for the case of offenses against the law of nations; and consequently [left] it in the power of any indiscreet member to embroil the Confederacy with foreign nations."[16] The necessity to change this circumstance in the Constitution was for the good of the external affairs of the nation based on the fundamental idea that "[i]f [the United States is] to be one nation in any respect, it clearly ought to be in respect to other nations."[17]

Upon adoption of the Constitution, Article III empowered Congress to establish a system of federal courts inferior to the Supreme Court.[18] Subsequently, the First Congress passed the Judiciary Act of 1789 (Judiciary Act) as one of its first items of business, creating a system of federal district and circuit courts.[19] The original text relating to the ATS was included in Section 9 of the Judiciary Act — that the 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]

From the framing of the Constitution through the enactment of the Judiciary Act, "the law of nations had the status of general law— legal norms that were not the law of any one sovereign and that courts applied in default of local law provided by the sovereign with jurisdiction."[21] The current text of the ATS, now codified in 28 U.S.C. § 1350, was enacted in 1948 and simply states, "[t]he district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." [22]

---

15. 4 WILLIAM BLACKSTONE, COMMENTARIES *67.

16. THE FEDERALIST NO. 42 (James Madison).

17. *Id.*

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 of 1789, ch. 20, § 2, 1 Stat. 73.

20. *Id.* § 9, at 79 (codified as amended at 28 U.S.C. § 1350). *See also* Anthony J. Bellia & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 507 (2011) (stating that a top priority of the Federal Convention of 1787 was to design a constitution that empowered the United States to act like an established European power and meet its obligations under the law of nations).

21. John Harrison, *The Constitution and the Law of Nations*, 106 GEO. L.J. 1659, 1661 (2018).

22. 62 Stat. 934 (1948). The ATS was first amended to read, "[t]he district courts shall have jurisdiction . . . [o]f 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." Rev. Stat. § 563 (1879). It was next amended in 1911 as part of the codification of the Judiciary Act, when a comma was added after "tort only" and a comma removed

B. Judicial Interpretation of the Alien Tort Statute

Early jurisprudence related to the ATS observed the laws of the United States as "being classed under three heads of descriptions."[23] These heads of descriptions are: one, all treaties made under the United States; two, the laws of nations; and three, the Constitution and statutes of the United States.[24] In 1820, the Court further expounded on the ATS, holding that the crime of piracy would be recognized and punished "as an offence against the law of nations (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race."[25]

ATS jurisdiction under the "law of nations" was invoked twice in the late 18th century and only once in the 167 years thereafter.[26] The sparse use of the jurisdictional provision of the ATS prompted the Second Circuit, in 1975, to comment that "[t]his old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, . . . no one seems to know whence it came."[27] However, the statute quickly shed its obscurity and came into prominence with *Filartiga v. Pena-Irala*.[28]

1. The Judicial Evolution of the ATS: Filartiga v. Pena-Irala

In *Filartiga*, the plaintiff sought recovery under the ATS

after "law of nations." 36 Stat. 1087, 1093 (1911). The statute took its present form in 1948 with the revision of the Judicial Code, when (1) the term "civil action" was substituted for "suits;" (2) the word "committed" was added, (3) , the term "any alien" reverted to "an alien," consistent with the original 1789 language, and (4) the word "original" was inserted before "jurisdiction." 62 Stat. 869, 934 (1948). None of the amendments to the ATS have been substantive or had any practical effect on its application. *See* JENNIFER K. ELSEA, CONG. RSCH. SERV., RL 32118, THE ALIEN TORT STATUTE: LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 5-7 (2003).

23. Henfield's Case, 11 F. Cas. 1099, 1100-01 (C.C.D. Pa. 1793).

24. *Id.*

25. United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820).

26. *See* Moxon v. The Fanny, 17 F. Cas. 942 (No. 9,895) (D.C. Pa. 1793); Bolchos v. Darrel, 3 F. Cas. 810 (No. 1,607) (D.C.S.C. 1795); O'Reilly de Camara v. Brooke, 209 U.S. 45, 52 (1908); Khedivial Line, S. A. E. v. Seafarers' Int'l Union, 278 F.2d 49, 51–52 (2d Cir. 1960) (per curiam).

27. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated by* Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247 (2010) (describing the historical obscurity of the statute, which is unrelated to the grounds for abrogation). Lohengrin is a legendary knight from German literature who mysteriously appears on a swan-pulled boat to help a distressed maiden, who in exchange for her protection, is not permitted to know his origin. *Lohengrin*, ENCYCLOPEDIA BRITANNICA, www.britannica.com/topic/Lohengrin-German-legendary-figure [perma.cc/N4QP-6RAF] (last visited Apr. 6, 2024).

28. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

arising from the wrongful death of Joelito Filartiga in Paraguay following his kidnap and torture at the hands of Americo Pena-Irala (Pena), the Inspector General of the Police in Asunción.[29] Pena moved to the United States following Joelito's death and overstayed his visitor's visa.[30] Joelito's sister reported Pena's unlawful presence in the United States to the U.S. Immigration and Naturalization Service, which resulted in Pena's arrest.[31] While in custody, Pena was served with a summons and complaint principally alleging he had wrongfully caused Joelito's death in violation of the law of nations, and that subject matter jurisdiction was proper in the United States District Court for the Eastern District of New York under 28 U.S.C. § 1350.[32] The district court dismissed the complaint on jurisdictional grounds, narrowly construing "the law of nations" as excluding the domestic laws of a state governing its own citizens.[33]

The threshold question addressed by the Second Circuit in *Filartiga* was whether the conduct complained of violated the law of nations.[34] To ascertain the law of nations, the court noted that the appropriate sources of international law were: "the works of jurists, writing professedly on public law; or by general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[35]

The *Filartiga* court also considered the Supreme Court's decision in *The Paquete Habana*.[36] In *Habana*, the Court instructed lower courts that the works of jurists and commentators are resorted to by the judiciary "not for the speculations of their authors concerning what the law *ought to be*, but for trustworthy evidence of what the law *really is*."[37] *Habana* further recognized that, over time, standards ripen into "settled rule of international law by the general assent of civilized nations."[38]

This instruction from the Court led the Second Circuit, in *Filartiga*, to proclaim "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and

29. *Id.* at 878.

30. *Id.* at 878-79.

31. *Id.* at 879.

32. *Id.; see also The Start of Modern Corporate Accountability Efforts – In Memory of Joel Filártiga*, INST. FOR HUMAN RTS. & BUS. (July 25, 2019), www.ihrb.org/other/remedy/commentary-in-memory-of-joel-filartiga [perma.cc/V9T5-SSUR] (acknowledging that but for the ATS, U.S. courts would normally not exercise subject matter jurisdiction based upon the facts of *Filartiga*).

33. *Filartiga*, 630 F.2d at 880.

34. *Id.*

35. *Id.* (quoting *Smith*, 18 U.S. (5 Wheat.) at 160-61).

36. *Filartiga*, 630 F.2d at 880-81

37. The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis added) (citing Hilton v. Guyot, 159 U.S. 113, 163, 164, 214, 215 (1895)).

38. *Filartiga*, 630 F.2d at 881 (internal quotations omitted) (quoting The Paquete Habana, 175 U.S. at 694).

exists among the nations of the world today."[39] The court subsequently noted that although criminal interrogations routinely involved torture in many nations at one time, such torture has been "universally renounced" in our "modern and hopefully more enlightened era."[40] As a result, the court found:

> In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.[41]

The court in *Filartiga* next considered the extraterritorial jurisdiction of the ATS.[42] There, the court found that a state or nation "has a legitimate interest in the orderly resolution of disputes among those within its borders, and where *lex loci delicti commissi*[43] is applied."[44] The court further noted that courts of the United States regularly adjudicate transitory tort claims between parties who are personally present within the court's jurisdiction regardless of where they occurred, disabusing any contention that federal jurisdiction was inconsistent with the dictates of Article III of the Constitution.[45] *Filartiga* concluded by noting its holding on subject matter jurisdiction decided only whether Congress intended to confer power to the judiciary to adjudicate claims brought under the ATS and whether it was authorized to do so by Article III.[46] The court reserved the issue of the substantive law to be applied in ATS claims for a later date, characterizing the issue as simply a matter of choice of law.[47]

2. The Judicial Evolution of the ATS: Sosa v. Alvarez-Machain

Nearly a quarter century after *Filartiga*, the Court examined

---

39. *Id.* (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)).

40. *Id.* at 884.

41. *Id.* at 880.

42. *Id.* at 885-89.

43. Black's Law Dictionary defines *lex loci delicti* as "the law of the place where the tort or other wrong was committed." *Lex Loci Delicti*, BLACK'S LAW DICTIONARY (11th ed. 2019). The *locus delicti* is "[t]he place where an offense is committed." *Id.*

44. *Filartiga*, 630 F.2d at 885.

45. *Id.*; Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 68 (1985).

46. *Filartiga*, 630 F.2d at 889.

47. *Id.;* Rachael E. Schwartz, *"And Tomorrow?" the Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271, 278 (1994).

the ATS in *Sosa v. Alvarez-Machain*.[48] In *Sosa*, Humberto Alvarez-Machain (Alvarez), a Mexican physician, allegedly participated in the torture of an agent of the United States Drug Enforcement Administration (DEA) in Mexico.[49] A federal grand jury indicted Alvarez for the torture and murder of the DEA agent, and a warrant was issued for his arrest.[50]

The United States government, unable to get the cooperation of Mexican authorities to bring Alvarez to the United States, hired a group of Mexicans including Jose Francisco Sosa (Sosa) to seize Alvarez and bring him to the United States for trial.[51] Sosa and the other Mexicans successfully apprehended Alvarez and took him to El Paso, Texas where he was arrested.[52] At trial, Alvarez was acquitted of the charges against him, after which he returned to Mexico and filed a civil action in the United States against Sosa.[53] Alvarez's civil action sought recovery of damages from the United States under the Federal Tort Claims Act (FTCA) for false arrest and separate recovery from Sosa under the ATS alleging conduct in violation of the law of nations.[54]

As to Alvarez's claim under the ATS, the Court held that the ATS is strictly a jurisdictional statute that does not create new causes of action.[55] However, from the Court's holding emerged a new question about the relationship between the ATS and federal common law.[56] The issue concerned whether the ATS stood as a self-executing species of federal common law or it required an additional statute to give it effect.[57]

After a lengthy analysis of the historical context of the origin and meaning of the ATS, the court concluded that "despite

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

49. *Id.* at 697.

50. *Id.* at 697-98.

51. *Id.*; *see also* Philip Shenon, *U.S. says it won't Return Mexican Doctor Linked to Drug Killing*, N.Y. TIMES, Apr. 21, 1990, § 1, at 3, www.nytimes.com/1990/04/21/world/us-says-it-won-t-return-mexican-doctor-linked-to-drug-killing.html [perma.cc/BY7E-3SY3].

52. *Sosa*, 542 U.S. at 697-98.

53. *Id.* at 698; *see also* David G. Savage, *Foreign Abduction Case goes to Court*, L.A. TIMES (Mar. 30, 2004, 12:00 AM), www.latimes.com/archives/la-xpm-2004-mar-30-na-scotus30-story.html [perma.cc/69GS-6HM6].

54. *Sosa*, 542 U.S. at 698.

55. *Id.* at 713-14.

56. *Id.* at 714.

57. Jonathan B. Lancton, *The Alien Tort Statute and Customary International Law: The Judicial Albatross Hanging Around the Executive's Neck*, 47 HOUS. L. REV. 1081, 1098–99 (2010) (discussing the opposing positions on existence and judicial application of federal common law in ATS cases). While the majority in *Sosa* recognized the abolition of general common law in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), it took the modern position that customary international law is deemed to be federal common law. *Id.* at 1098. However, the modern position also raises the possibility of the Judicial Branch overstepping into the Executive's foreign powers and Congress's legislative power. *Id.* at 1098-99.

considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive."[58] Nevertheless, the court found that history tended to support two propositions: one, the First Congress did not enact the ATS to be a jurisdictional convenience that had to wait for future action by Congress to provide a remedy to aggrieved aliens; and two, Congress intended the ATS to furnish jurisdiction for a relatively modest set of actionable violations of the law of nations.[59]

In *Sosa*, the Court also "found no basis to suspect Congress had any examples in mind beyond those corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy."[60] Yet, it assumed no development up to the modern line of cases beginning with *Filartiga*, which had categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.[61] *Sosa* then concluded that "courts should require any claim based on present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[62]

The Court in *Sosa* warned that judicial caution must be exercised when considering the kinds of claims that fall under § 1350.[63] The "good reasons" for caution detailed by the Court

---

58. *Sosa*, 542 U.S. at 718-19.

59. Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 463 (2011).

60. *Sosa*, 542 U.S. at 724. *Contra* 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) (explaining the Continental Congress' Resolution of 1781 set forth four categories of infractions: (1) violations of express safe-conducts "granted under the authority of Congress to subjects of a foreign power in time of war"; (2) "acts of hostility against such as are in amity, league or truce with the United States or who are within the same, under a general implied safe conduct"; (3) "infractions of the immunities of ambassadors and other public ministers"; and (4) "infractions of treaties and conventions to which the United States are a party." Further, the resolution called these four categories "only those offences against the law of nations which are most obvious." 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1137 (Library of Congress, 1912)).

61. *Sosa*, 542 U.S. at 724-25.

62. *Id.* at 725.

63. *Id.*; *see also* Lauren Elizabeth Holtzclaw, *Finding a Balance: Creating an International Exhaustion Requirement for the Alien Tort Statute*, 43 GA. L. REV. 1245, 1266 (2009). *But see* Kristen Hutchens, *International Law in the American Courts—Khulumani v. Barclay National Bank Ltd.: The Decision Heard 'Round the Corporate World*, 9 GERMAN L.J. 639, 659 (2008) (citing the concurring opinion of Judge Katzman in *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) in which Judge Katzman affirmed his understanding that the ATS is a jurisdictional statute and rejected a reading of *Sosa* as requiring a court to individually analyze each of the reasons the Court identified for exercising judicial caution when considering the kinds of claims falling under

included: one, the concept of common law has evolved since 1789 toward a reluctance to give judicial force to principles of internationally generated norms; two, the Court's denial of the existence of any federal common law in 1938 has called into question the role of the federal courts in making common law in the absence of legislative guidance; three, the creation of a private cause of action is more appropriately a decision for the legislature; four, there exists a potential for substantive harm stemming from infringement by the courts on the powers of the legislative and executive branches in the management of foreign affairs; and five, the courts have no congressional mandate to explore and define specific torts as violations of the law of nations, and the modern congressional understanding of the judicial role in defining the law of nations has not affirmatively encouraged greater judicial creativity.[64]

Still, these cautionary considerations in *Sosa* did not completely close the door on the exercise of judicial power to recognize any violation of modern international norms.[65] However, *Sosa* greatly reduced such class of norms by implementing a two-part test to be satisfied prior to recognizing a common-law action under the ATS.[66] The first prong of the test required the plaintiff to demonstrate an alleged violation "of a norm that is specific, universal, and obligatory."[67] The second prong of the test required that a discretionary determination be made by the court allowing the case to proceed that considers the "practical consequences of making the cause [of action] available" and may consider other factors on a case-specific basis such as whether a claimant exhausted all remedies or whether adequate deference has been given to the political branches.[68]

3. The Judicial Evolution of the ATS: Kiobel v. Royal Dutch Petroleum Co.

After *Sosa*, the Court did not consider the jurisdictional reach of the ATS again until *Kiobel v. Royal Dutch Petroleum Co.*[69] In *Kiobel*, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations pursuant to the ATS.[70]

---

the ATS).

64. *Sosa*, 542 U.S. at 725-28.

65. *Id.* at 729.

66. *Id.* at 732.

67. *Id.*

68. *Id.* at 732-33.

69. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

70. *Kiobel*, 569 U.S. at 111-12; *see also "I Will Fight to my Last Breath"—Esther Kiobel on her 22-year Battle to Get Shell in Court*, AMNESTY INT'L (Feb. 11, 2019), www.amnesty.org/en/latest/news/2018/06/i-will-fight-to-my-last-breath-esther-kiobel-on-her-22year-battle-to-get-shell-in-court/ [perma.cc/3BML-MRWQ].

They alleged that corporations aided and abetted the Nigerian government in committing violations of the law of nations specified as "(1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[71]

The question in *Kiobel* did not relate to failure to state a claim under the ATS.[72] Rather, it was concerned with where the defendants' conduct took place and to what extent such conduct occurring in a foreign territory touched and concerned the territory of the United States.[73] The Court's conclusion in *Kiobel* was "that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."[74] Further, all the conduct relevant to the plaintiffs' claims had taken place outside the United States, and it would have been too far a reach to find that a corporation's mere presence in the United States suffices to displace the presumption against the extraterritorial application of the ATS.[75]

4. The Judicial Evolution of the ATS: Jesner v. Arab Bank, PLC

Five years later in *Jesner v. Arab Bank, PLC*, the Court considered two issues under the ATS: "whether the law of nations imposes liability on corporations for human-rights violations committed by its employees," and whether the Court has "authority and discretion in an ATS suit to impose liability on a corporation without a specific direction from Congress to do so."[76]

In *Jesner*, the petitioners alleged that Arab Bank, a foreign corporation, allowed its bank, by means of currency clearances and bank transactions passing through its New York City offices, to be used to transfer funds to terrorist groups in the Middle East.[77] These funds, in turn, allegedly enabled or facilitated criminal acts of terrorism that resulted in the deaths and injuries for which the petitioners sought compensation.[78] The Court further noted the sinister purposes for which corporations may be used as well as the

71. *Kiobel*, 569 U.S. at 114.

72. *Id.* at 115.

73. *Id.* at 124; Ranon Altman, *Extraterritorial Application of the Alien Tort Statute After Kiobel*, 24 U. MIA. BUS. L. REV. 111, 114 (2016).

74. *Kiobel*, 569 U.S. at 124.

75. *Id.* at 124-25.

76. Jesner v. Arab Bank, PLC, 584 U.S. 241, 249 (2018).

77. *Id.* at 248.

78. *Id.*; *see also* Joint Release, *FinCEN and OCC Assess $24 Million Penalty against Arab Bank Branch*, COMPTROLLER OF THE CURRENCY ADM'R OF NAT'L BANKS & FIN. CRIMES ENF'T NETWORK (Aug. 17, 2005), fincen.gov/sites/default/files/news_release/20050817.pdf [perma.cc/3U4J-NE5K].

grave harm and suffering resulting from such conduct as support for the proposition that corporations should be subject to liability for the crimes of their agents.[79]

However, the Court found that the international community had not yet taken the step to subject corporate or fictional entities to prosecution under the law of nations in the specific, universal, and obligatory manner required by the two-step test in *Sosa*.[80] On the contrary, it observed that the jurisdictional reach of more recent international tribunals had been limited to "natural persons."[81] Furthermore, the Court balanced competing interests and found that the weighty foreign policy and separation-of-powers concerns implicated by creating an action against a foreign corporation in the context of the ATS, militated against courts creating private rights of action under the ATS.[82] Against this backdrop, the Court ultimately held in *Jesner* that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations."[83]

5. The Judicial Evolution of the ATS: Nestle USA, Inc. v. Doe

Nestle v. Doe, is the most recent Supreme Court decision involving the ATS.[84] This case involved allegations of child trafficking and slavery in Ivorian cocoa plantations.[85] The Court granted certiorari "to consider the petitioners' argument that the [ATS] exempts corporations from suit."[86] However, the Court did not resolve that question, rendering its decision on other grounds.[87]

Justice Thomas began the Court's opinion by labeling the action as one in which respondents sought "a judicially created cause of action to recover damages from American corporations that allegedly aided and abetted slavery abroad."[88] From there, the Court analyzed the propriety of the action under the two-step framework relating to the extraterritorial reach of the ATS statute.[89]

---

79. *Jesner*, 584 U.S. at 248, 270.

80. *Id.* at 263 (quoting *The Nurnberg Trial,* 6 F.R.D. 69, 110 (1946)) ("[T]he statement during the Nuremberg proceedings that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'").

81. *Id.* at 260-61.

82. *Id.* at 264-65.

83. *Id.* at 265.

84. *Nestle v. Doe*, 593 U.S. 628.

85. *Id.* at 631.

86. *Id.* at 640 (Gorsuch, J., concurring).

87. *Id.*

88. *Id.* at 631.

89. *Id.* at 632. *See also* 48 C.J.S. INTERNATIONAL LAW § 19 (citing and explaining the two-step framework followed in *Nestle v. Doe* to analyze issues

The Court first reasoned that since the ATS does not regulate conduct at all, much less evince a clear indication of extraterritoriality, the Court could not give "extraterritorial reach" to any cause of action created under the ATS.[90] Accordingly, respondents were required to establish that the conduct relevant to the focus of the ATS occurred in the United States.[91]

While the parties disputed what conduct was relevant to the focus of the ATS and whether that occurred domestically or abroad, the Court determined that the complaint impermissibly sought extraterritorial application of the ATS because "[n]early all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast."[92] The Court further found that to adequately support a domestic application of the ATS against a corporation, a plaintiff must allege domestic conduct beyond generic corporate activity.[93]

The Court also held, after deciding the suit failed for reasons relating to extraterritoriality, that it failed for another reason: that the Court cannot create a new cause of action because that job belongs to Congress.[94] The compulsion to reach this decision, bluntly stated by Justice Gorsuch in his concurring opinion, was that "the time has come to jettison the misguided notion that courts have discretion to create new causes of action under the ATS."[95]

In reaching its conclusion, the Court reasoned that the ATS is a jurisdictional statute creating no new causes of action and that the remedies afforded to aliens harmed by a violation of international law must be supplied by the legislature or the executive, not by the courts.[96] Yet, over the past 200 years, Congress has established just one remedy: The Torture Victim Protection Act of 1991 (TVPA).[97]

---

surrounding extraterritorial application of a statute, in which the court first "determines whether the text of a presumptively domestic statute at issue provides a clear, affirmative indication that rebuts the presumption," and second, where the presumption is not rebutted, have plaintiffs established that the "conduct relevant to the statute's focus occurred in the United States").

90. *Nestle v. Doe*, 593 U.S. at 632.

91. *Id.* at 633.

92. *Id.* at 634.

93. *Id.*; *see also* Tyler R. Giannini, *Living with History: Will the Alien Tort Statute Become A Badge of Shame or Badge of Honor?*, 132 YALE L.J. FORUM 814, 839 (2022) (emphasizing that such generic allegations would not create a sufficient connection between the cause of action and the United States to allow claims to proceed).

94. *Nestle v. Doe*, 593 U.S. at 634-35.

95. *Id.* at 640 (Gorsuch, J., concurring).

96. *Id.* at 635; *see also* Giannini, *supra* note 94, at 832 (explaining the Court's holding of no new causes of action was premised on ATS claims almost always implicating foreign affairs, and therefore courts should never recognize new causes of action without express congressional authorization).

97. *Nestle v. Doe*, 593 U.S. at 635. The TVPA established a cause of action for aliens and U.S. citizens under the ATS for recovery of damages arising out of torture or extrajudicial killings committed under actual or apparent color of

Even the majority in *Nestle v. Doe* acknowledged that a court likely has a narrow authority in certain circumstances to recognize causes of actions related to the three historical torts: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[98] However, the circumstances necessary to create any new cause of action are subject to a narrow exception under the two-step test derived from *Sosa*.[99] Moreover, this exception is now greatly narrowed due to the Court's more recent precedents holding that a "judicial creation of a cause of action is an extraordinary act that places great stress on the separation of powers."[100] Another part of the majority opinion in *Nestle v. Doe* focuses on the Court's finding that creating causes of action under the ATS inherently raises foreign-policy concerns, leaving "sound reason for courts not to create a cause of action for violations of international law–other than perhaps for those three torts that were well established in 1789."[101]

The majority opinion in *Nestle v. Doe* concludes first by clarifying that "[n]obody . . . has expressly asked [the Court] to revisit *Sosa*. But precedents since *Sosa* have substantially narrowed the circumstances in which 'judicial discretion' under the *Sosa* test is permitted."[102]Next, the opinion instructs that "[w]hether and to what extent defendants should be liable under the ATS for torts beyond the three historical torts identified in *Sosa* lies within the province of the Legislative Branch."[103]

Shortly after *Nestle v. Doe*, United States Senator Dick Durbin introduced Senate Bill 1455, titled "Alien Tort Statute Clarification Act" (ATSCA) which seeks to make the ATS available "against those responsible for human rights abuses whenever they are subject to personal jurisdiction in the United States, regardless of where the abuse occurred."[104] The success of this or any other proposed legislation affecting the ATS will require an understanding of the Court's reasoning in its post-*Filartiga* decisions.

---

law of any foreign nation. *See* James L. Buchwalter, Annotation, *Construction and Application of Torture Victim Protection Act of 1991, 28 U.S.C.A. § 1350 Note,* 199 A.L.R. FED. 389 (2005).

98. *Id.* at 636 (quoting *Sosa*, 542 U.S. at 724).

99. *Jesner*, 584 U.S. at 243-44 (quoting *Sosa*, 542 U.S. at 732) (identifying the first step as questioning whether a plaintiff can demonstrate that the alleged violation is of "a norm that is specific, universal, and obligatory," and, if so, then moving on to determine whether allowing the case to proceed under the ATS is a proper exercise of judicial discretion or if caution requires the political branches to grant specific authority before corporate liability can be imposed).

100. *Nestle v. Doe*, 593 U.S. at 636.

101. *Id.*

102. *Id.* at 640.

103. *Id.*

104. Alien Tort Statute Clarification Act, S. 4155, 117th Cong. (2022).

III. ANALYSIS

Filartiga was a pivotal moment for the ATS, as the Second Circuit held for the first time that courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[105] Following the *Filartiga* decision, there was an explosion in the number of cases brought under the jurisdiction of the ATS.[106] The Second Circuit's broad interpretation of what may be recognized as a violation of the law of nations under the ATS led to actions premised under widely diverse claims, such as arbitrary detention, violations of the right to peaceful assembly, forced labor, racial discrimination, and environmental harms.[107] This expanded scope of claims cognizable under the ATS further fueled fears that ATS litigation was "developing into a plaintiff's market, threatening massive class actions against powerful corporate and sovereign defendants."[108]

Nonetheless, the Supreme Court did not have any occasion to consider questions relating to the ATS until twenty-four years after *Filartiga*, when it decided *Sosa*.[109] During this period, the decisions of the lower court cases demonstrated that the judiciary was a capable doorkeeper of what constituted a violation of the modern notions of international law.[110] However, *Sosa* began to close the

105. *Filartiga*, 630 F.2d at 881.

106. *See* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER (2022).

107. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 611 (2004). *See, e.g.*, In re S. African Apartheid Litig., 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (alleging technology manufacturers aided and abetted apartheid policies); Garcia v. Chapman, 911 F. Supp. 2d 1222 (S.D. Fla. 2012) (holding the act of state doctrine did not preclude the court from hearing claims of arbitrary detention and torture in Cuba under the ATS); Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997) (finding an Indonesia citizen had standing to bring claims for personal injury under the ATS, arising from certain human rights violations, genocide, and environment torts, but failed to allege sufficient facts to support the claims).

108. Alex S. Moe, *A Test by any other Name: The Influence of Justice Breyer's Concurrence in Kiobel v. Royal Dutch Petroleum Co.*, 46 LOY. U. CHI. L.J. 225, 243 (2014) (citing Hufbauer & Mitrokostas, *supra* note 108, at 610).

109. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) (holding that the Foreign Sovereign Immunities Act provides the sole basis for jurisdiction over a foreign state in the United States courts, displacing any jurisdiction under the ATS). *See also Rasul*, 542 U.S. at 485 (finding in a case dealing primarily with applications for habeas corpus that the fact that the alien plaintiffs were in military custody was immaterial to the jurisdiction of the district court over their ATS claims).

110. In 2010, Susan Simpson compiled a list of sixty-eight cases, which she asserts represents all the ATS cases that were dismissed by courts from 1789-1990. *See* Susan Simpson, *All* Alien Tort Statute Cases Brought Between 1789 and 1990* (Dec. 18, 2010), www.viewfromll2.com/2010/12/18/all-alient-tort-statute-cases-brought-between-1789-and-1990 [perma.cc/AYD3-3727]. *See also* Susan Simpson, *Alien Tort Cases Resulting in Plaintiff Victories* (Mar. 2013),

door on the causes of action the Court would recognize as falling within the definition and scope of the law of nations.[111]

Some argue that the call for the Court to limit *Filartaga* came when the Ninth Circuit reversed a summary judgment finding in favor of petroleum giant, Unocal.[112] In *Unocal*, claims under the ATS for aiding and abetting crimes of government officials in Myanmar resulted in a substantial payout to plaintiffs.[113] Regardless of the Court's impetus, *Sosa* retreated from the interpretation in *Filartiga* that if a tort was committed in violation of international law, it should rest upon a present-day interpretation of the law of nations.[114] In fact, the Court held in *Sosa* that the permissible scope of any such interpretation is required to "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of offenses against ambassadors, violations of safe conduct, and piracy that Congress had in mind when it enacted the ATS in 1789.[115] This holding meant that many of the types of violations alleged in ATS cases during the post-*Filartiga* era would no longer be actionable under the ATS.

---

www.viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/ [perma.cc/EZ25-KTKU] (providing a companion listing of all ATS cases that resulted in disposition other than outright dismissal). These lists detail the many bars to a successful ATS case, demonstrate the effective doorkeeping capability of the courts, and lend support to the conclusion that "the argument that ATS litigation is financially ruinous for international businesses or a serious impediment to multinational operations is vastly overstated." *Id.*

111. *See Sosa*, 542 U.S. at 729 ("Whereas Justice Scalia sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms . . . the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.").

112. *See* Thomas M. Pohl, *From Blackbeard to Bin Laden: The Re-Emergence of the Alien Tort Claims Act and its Potential Impact on the Global War on Terrorism*, 34 J. Legis 77, 87 (2007) (averring that the settlement in *Doe v. Unocal* set the modern standard for using the ATS to go after private deep pockets, and that it was "only a matter of time before the Supreme Court would find itself called upon to interpret the Act"). *See also* Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 130, 146 (2005) (concluding that Unocal undoubtedly had cause for alarm and that the U.S. Department of Justice filed multiple *amici curiae* briefs in support of Unocal's arguments).

113. Christopher Ewell et al., *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1231 (2022) (referring to the ATS claims brought in Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (granting rehearing en banc, 395 F.3d 978 (9th Cir. 2003) (appeal dismissed by agreement, 403 F.3d 708 (9th Cir. 2005)).

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

115. *Id.; see also id.,* at 715 (concluding under its originalist approach that it was only this narrow set of violations with international consequence "that was probably on minds of the men who drafted the ATS with its reference to tort").

Yet the Court's reasoning in *Sosa* was explained with words that conflated different concepts: the previous function of the ATS, and the recognition of a new cause of action under the ATS.[116] By recognizing a new cause of action under the ATS, the Court held that "federal courts, exercising their authority in limited circumstances to make federal common law, may create causes of action that aliens may assert under the ATS."[117]

In cases concerning the ATS, including *Sosa*, federal courts have consistently held that the ATS is only jurisdictional in nature and does not have the power to create new causes of action.[118] Courts may only recognize a cause of action for a tort committed in violation of the law of nations. This semantic conflation had serious ramifications in *Nestle v. Doe*, where it was held that courts cannot create a new cause of action and that "*Sosa* indicated that courts may exercise common-law authority under the ATS to create private rights of action in very limited circumstances."[119] This holding misstated what *Sosa* indicated.[120] In fact, the next sentence

---

116. This conflation was between the application of a violation of the ATS (i.e., whether the ATS is self-executing as to a violation of the law of nations) versus the recognition of a violation of the ATS (i.e., whether extraterritorial abduction is a violation of the law of nations). *See* Jeffrey Loan, *Sosa v. Alvarez-Machain: Extraterritorial Abduction and the Rights of Individuals Under International Law,* 12 ILSA J. INT'L & COMP. L. 253, 289 (2005).

117. *Jesner*, 584 U.S. at 275 (Alito, J., concurring).

118. *Sosa*, 542 U.S. at 724 (noting that the ATS is "a jurisdictional statute creating no new causes of action"); Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1190 (11th Cir. 2014) (holding the ATS was purely jurisdictional and did not create new causes of action); Mastafa v. Chevron Corp., 770 F.3d 170, 179 (referring to "the singular character of the ATS as a jurisdictional statute"); *Kiobel*, 569 at 118 (quoting language from *Sosa* that the ATS is "strictly jurisdictional").

119. *Nestle v. Doe*, 593 U.S. at 635 (citing *Sosa*, 542 U.S. at 724).

120. The passage in *Sosa* from which the *Nestle* court derived its indication states:

> In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

Sosa, 542 U.S. at 724. Further compare the Court's recitation of *Sosa*'s two-step test in the concurring opinion in *Jesner*, 584 U.S. at 276 (Alito, J., concurring) (stating *Sosa* stressed that courts should follow a two-step process by which they first ensure that the contemplated cause of action reflects an international law norm that is specific, universal and obligatory, and then, if a suitable norm is identified, federal courts should decide whether there is any other reason to limit "the availability of relief"); Est. of Alvarez v. Johns Hopkins Univ., 598 F. Supp. 3d 301, 314 (D. Md. 2022) (finding the two-step test under *Sosa* for whether an alleged violation of the laws of nations can support an ATS cause of

in the *Nestle v. Doe* opinion states that *Sosa* suggests only that "courts could *recognize* causes of action for three historical violations of international law."[121]

This issue was subsequently clarified by the Eleventh Circuit in *Doe v. Drummond Co.*, where it recognized that "[s]ince the ATS does not create statutory claims, it is a bit of a misnomer to refer to 'ATS claims.'"[122] The court specified that the ATS simply "confers jurisdiction on the district courts over federal common law causes of action premised on 'law of nations' violations."[123]

Still, in *Sosa*, it was neither impermissible nor incorrect for the Court to interpret the intent of Congress to have been to provide a limited scope to what a "violation of the law of nations" could constitute when it enacted the ATS in 1789.[124]

Conversely, the Court's holding in *Kiobel* that the ATS has no extraterritorial application outside the United States is predicated on a judicial presumption rather than a finding of Congressional intent.[125] The Court's approach in *Kiobel* begins with the conclusion that there is nothing in the text of the ATS that provides a clear indication of an extraterritorial reach.[126] The Court then provides a historical background of the ATS but omits the context of the statute within which the ATS was originally enacted that could be dispositive in overcoming a presumption against extraterritoriality.[127]

The Court's approach in *Kiobel* also departs from its traditional approach to determining the meaning of ambiguous statutory language by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.[128]

The context in which the ATS was enacted was as part of

---

action is to determine (1) whether the violation of a sufficiently definite international law norm has been alleged to support the action and, if so, then (2) whether the availability of the action should be limited due to the practical consequences of allowing such an action to proceed).

121. *Nestle v. Doe*, 593 U.S. at 635 (emphasis added).

122. Doe v. Drummond Co., 782 F.3d 576, 583 n.7 (11th Cir. 2015).

123. *Id.*

124. James v. City of Boise, Idaho, 577 U.S. 306, 307 (2016) (reiterating that it is the Court's responsibility to say what a federal statute means, and once it has spoken, it is the duty of other courts to respect that understanding of the governing rule of law).

125. *See Kiobel*, 569 U.S. at 124 (concluding that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.").

126. *Id.; see also id.* at 118.

127. *See* RJR Nabisco, Inc. v. European Cmty., 579 U.S 325, 340 (2016) (instructing that the presumption against extraterritoriality does not require a constricted interpretation, that an express statement of extraterritoriality within the statute is not essential, and that context may be consulted and may be dispositive in overcoming a presumption against extraterritoriality).

128. *See* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (outlining the well-settled steps and determinations involved in statutory interpretation).

Section 9 of the Judiciary Act of 1789, which squarely addressed the jurisdiction of the courts in matters involving the high seas and foreign sovereigns. Further, the broad purpose of Section 9 was to confer the district courts with exclusive cognizance of all crimes and offenses cognizable under United States law committed within their district or upon the high seas, all civil causes of admiralty and maritime jurisdiction, and all suits against consoles or vice consuls.[129]

However, the question framed in *Kiobel* was whether a claim under the ATS may reach conduct occurring in the territory of a foreign sovereign.[130] While the text in Section 9 of the ATS does not reach the territory of a foreign sovereign, it provides a clear indication by Congress to extend the statute's jurisdictional reach to the high seas outside the territory of the United States.[131] Yet, the Court discounted the significance of this extraterritorial application by limiting its relationship to pirates, and stated, "[w]e do not think that the existence of a cause of action against [pirates] is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves."[132]

According to naval historians, the oceans today are plied by more ships than ever before and are more armed and dangerous than at any time since World War II.[133] Armed gangs are running protection rackets requiring ship captains to pay for safe passage, marine police officers routinely work in concert with fuel thieves, and human traffickers often ram competitors' boats.[134] Additionally, it is relatively common on these boats for fishermen to crowd in the same spots where tempers fray, fighting starts, and murders take place.[135]

The dangerous environment on our modern-day high seas highlights *Kiobel* as detrimentally over-cautious on a practical basis and errs in its broad supposition that every case or controversy that touches foreign relations becomes a political question beyond judicial cognizance.[136] Under *Kiobel*, an American citizen (or a

129. Judiciary Act, ch. 20, § 9.

130. *Kiobel*, 569 U.S. at 115.

131. *Argentine Republic*, 488 U.S. at 440.

132. *Kiobel*, 569 U.S. at 121.

133. Ian Urbina, *Murder at Sea: Captured on Video, but Killers go Free*, N.Y. TIMES (July 20, 2015), www.nytimes.com/2015/07/20/world/middleeast/murder-at-sea-captured-on-video-but-killers-go-free.html [perma.cc/D385-E8GS].

134. *Id.*

135. *Id.*

136. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) (providing an example that where there is a lack of government action on the question of whether a treaty has been terminated, the court can construe the treaty and find the answer it provides). *Baker* further notes, as applicable here, that "once sovereignty over an area is politically determined and declared, courts may examine the

United States Legal Permanent Resident) who committed acts of murder, human trafficking, or piracy on the high seas would avoid responsibility for torts committed against a foreign national due to lack of jurisdiction. This type of situation would be in opposition to the founding concepts of the ATS, which were to hold United States' actors accountable for injuries to foreign nationals to reduce diplomatic friction.[137]

After the Court limited the criteria for a violation of the law of nations under the ATS in *Sosa*, it greatly restricted the geographical application of the ATS in *Kiobel*, and in *Jesner*, limited who may be sued in an action under the ATS.[138] The Court concluded, in *Jesner*, that there were strong arguments for and against allowing victims to seek relief from corporations.[139] Further, the Court declared that the "urgency and complexity of this problem make it all the more important that Congress determine whether victims of human rights abuses may sue foreign corporations in federal courts in the United States."[140]

The need for congressional action and clarification has been a common refrain from courts and scholars analyzing cases under the ATS.[141] There is no record of congressional discussion about private actions that might be subject to the jurisdiction of the ATS, whether there is any need for further legislation to create private remedies or even a record of debate on these issues. For these reasons, in *Sosa*, the Court concluded that "despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive."[142]

In this vacuum of congressional intent, the Court has

---

resulting status and decide independently whether a statute applies to that area." *Id.* at 212. *See also* Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995) (rejecting "the rather categorical views as to the inappropriateness of judicial action" in an ATS case, noting that "[n]ot every case 'touching foreign relations' is nonjusticiable . . . .").

137. Kelly Geddes, *Legal Fictions and Foreign Frictions: An Argument for a Functional Interpretation of Jesner v. Arab Bank for Transnational Corporations*, 86 U. CHI. L. REV. 2193, 2204–05 (2019).

138. Jeffrey A. Van Detta, *Suing Sponsors of Terrorism in U.S. Courts: Rubin v. Islamic Republic of Iran and Jesner v. Arab Bank, Plc: Scotus Trims to Statutory Boundaries the Recovery in U.S. Courts Against Sponsors of Terrorism and Human-Rights*, 29 IND. INT'L & COMP. L. REV. 303, 336 (2019).

139. *Jesner*, 584 U.S. at 270.

140. *Id.*

141. *See Sosa*, 542 U.S. at 731, (stating, "[W]e would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations."); *Jesner*, 584 U.S. at 270 (noting, "Congress is well aware of the necessity of clarifying the proper scope of liability under the ATS in a timely way."); Jennifer L. Karnes, *Pirates Incorporated?: Kiobel v. Royal Dutch Petroleum Co. and the Uncertain State of Corporate Liability for Human Rights Violations under the Alien Tort Statute*, 60 BUFF. L. REV. 823, 889 (2012) (stating, "[C]ongressional guidance would prevent the courts from being in the precarious position of adjudicating public policy concerns.").

142. *Sosa*, 542 U.S. at 718–19.

continued to chip away at the ATS. In *Nestle v. Doe*, the court expanded on language found in *Jesner* that a court must not create a private right of action if it can identify even one sound reason to think Congress might doubt the efficacy or necessity of the new remedy.[143] It declared that "[t]his test is demanding by design, and we have yet to find it satisfied."[144] The last sentence of the majority opinion in *Nestle v. Doe* was clear, "Whether and to what extent defendants should be liable under the ATS for torts beyond the three historical torts identified in *Sosa* lies within the province of the Legislative Branch."[145] Therefore, according to the Court, it is up to Congress to determine what further actions are recognized under the ATS, not the judiciary.

Over the past twenty years, beginning with *Sosa*, the Court has effectively changed the meaning of the language of the ATS, now contained within the thirty-three words of 28 U.S.C. § 1350. It has read the statute to give the district courts original jurisdiction of any civil action by an alien only for a tort that, (a) arises from offenses against ambassadors, violations of safe conduct, and piracy as those concepts existed in 1789,[146] and (b) to the extent that such violations occurred within the territory of the United States.[147] Further, any such civil actions shall be permitted only against individual persons, and subject matter jurisdiction under the ATS for any new offenses or violations not specified herein shall not be permitted unless a further act of Congress so provides.[148]

The door to the recognition of modern-day violations of the law of nations, left ajar by *Sosa*, has now been closed. In Justice Gorsuch's opinion, it is a door that "no matter how vigilant the doorkeeper, should not have been cracked."[149] Despite the finding in *Sosa* that the ATS was not stillborn but intended to have a practical effect when enacted, the statute delivered by Congress in 1789 sits paralyzed in its original infancy.[150]

At least one scholar has suggested that the ATS could be revived if Congress were to add an extraterritoriality provision against individuals.[151] The timing and approach of the author's

143. *Nestle v. Doe*, 593 U.S. at 637.
144. *Id.*
145. *Id.*
146. *Sosa*, 542 U.S. at 724; *Nestle v. Doe*, 593 U.S. at 637-38.
147. *Kiobel*, 569 U.S. at 124.
148. *Jesner*, 584 U.S. at 265.
149. *Nestle v. Doe*, 593 U.S. at 644 (Gorsuch, J., concurring).
150. *Sosa*, 542 U.S. at 714.
151. *See* Ewell et al., *supra* note 114, at 1279-80 n.415 (positing a solution to this issue by either Congress using "the extraterritoriality language it enacted in the 2008 amendment of the TVPRA" or crafting an extraterritoriality amendment to the ATS with "language that explicitly grants extraterritorial jurisdiction if a 'defendant is subject to personal jurisdiction in the United States'" in cases where the defendant is not physically in the United States and has minimum contacts).

suggestion are coincident with the proposed ATSCA.[152] Proponents of the legislation claim that the ATSCA would one, resolve any questions that exist about human rights cases such as *Filartiga*; two, would work in tandem with the TVPA and other laws; and three, cover cases that those statutes do not reach.[153]

However, the wording of the proposed amendment to 28 U.S.C. § 1350 under the ATSCA does nothing to address the other myriad issues surrounding the current language and the intent of the ATS. It does not, for example, provide explicitly or by reference any definitions or related statutes to inform the courts what acts beyond the three historical violations will be considered offenses against the law of nations.[154] Further, during a hearing of the Committee on the Judiciary for the United States Senate held on September 28, 2022, there was uncertainty as to whether the ATSCA would operate in conjunction with the proposed legislation in the Justice for Victims of War Crimes Act, which was also being considered.[155] Senator Ossoff suggested that the ATSCA should operate in conjunction with the proposed war crimes legislation, but the lack of clarity as to the practical application of the proposed ATSCA suggests that it does not yet provide the clarity needed to resurrect the force and effect of the ATS that has steadily waned since *Sosa.*

IV. PROPOSAL

The door that was flung open in *Filartiga* and invited claims under the ATS, has now been shut by the Supreme Court.[156] The Court has made clear that the only torts it will recognize as violations of the law of nations under the ATS are the three historical torts enumerated in *Sosa* and torts specifically made actionable under the ATS by Congress.[157] The Court has also been clear in its instruction that for the ATS to have application to foreign corporations or to extraterritorial acts of any corporation,

152. S. 4155.

153. Douglas S. Dodge & Oona A. Hathaway, *Answering the Supreme Court's Call for Guidance on the Alien Tort Statute*, JUST SEC. (June 3, 2020), www.justsecurity.org/81730/answering-the-supreme-courts-call-for-guidance-on-the-alien-tort-statute/ [perma.cc/5WWA-698Z].

154. Compare with the fundamental human rights detailed in thirty articles drafted by the United Nations. G.A. Res. 217 (III)A, Universal Declaration of Human Rights (Dec. 10, 1948).

155. Justin Cole, *11 Takeaways from Senate Hearing on Expanding War Crimes Act and a Crimes Against Humanity Statute*, JUST SEC. (Oct. 3, 2020), www.justsecurity.org/83339/11-takeaways-from-senate-hearing-on-expanding-war-crimes-act-and-a-crimes-against-humanity-statute/ [perma.cc/VT5H-5ULS].

156. Justice Gorsuch characterized all the ATS cases that have been before the Court since *Sosa* as decisions in which "we have turned up our noses." *Nestle v. Doe,* 593 U.S. at 644 (Gorsuch, J., concurring).

157. *Nestle v. Doe*, 593 U.S. at 640.

legislative action will be required.[158]

Accordingly, Congress must act to one, sufficiently address the Court's foreign relations and separation of powers concerns relating to extraterritorial jurisdiction under the ATS; two, specify what offenses constitute violations of the law of nations; and three, expressly identify the extent to which a foreign corporation may be subject to jurisdiction of the United States courts in actions under the ATS, if at all.[159]

Historically, there are three situations in which the Court's statutory decisions will be overridden: first, when congressional preferences change over time; second, when the Court misinterprets congressional preferences or may be unpersuasive in its efforts to inform Congress of constitutional or other concerns; and third, when, for institutional reasons, the Court invites a congressional override.[160]

S.B. 4155 explicitly responds to the Court's call to action regarding the extraterritorial application of the ATS and seeks to correct what is considered, by its sponsors, to be the Court's misinterpretation of congressional preferences. The sponsors of the bill have declared that the legislation "will clarify Congress's intent to ensure that human rights violators within the jurisdiction of our courts can be held to account by their victims regardless of where the abuses occurred," and that Congress needs "to clarify that the Alien Tort Statute always applied to cases abroad, as Congress intended."[161]

Indeed, the proposed ATSCA contained in S.B. 4155 provides that the district courts shall have extraterritorial jurisdiction of actions cognizable under the ATS if:

> (1) an alleged defendant is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)); or (2) an alleged defendant is present in the United

158. *Kiobel*, 569 U.S. at 124; *Jesner*, 584 U.S. at 265.

159. *See Nestle v. Doe*, 593 U.S. at 640 (emphasis added) ("Whether and to what extent defendants should be liable under the ATS for torts beyond the three historical torts identified in *Sosa lies within the province of the Legislative Branch*."); *Kiobel*, 569 U.S at 125 (noting that *unless Congress states otherwise*, mere presence of a corporation in the United States is insufficient for jurisdiction when the acts occurred outside the United States); *Jesner*, 584 U.S. at 272 (emphasis added) (stating that whether a remedy under the ATS "for a narrow category of international-law violations committed by individuals . . . should be available against foreign corporations *is similarly a decision Congress must make*.").

160. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 387–88 (1991).

161. Press Release, Dick Durbin, United States Senator, Durbin, Brown Introduce Legislation to Clarify Critical Tool for Holding Human Rights Violators Accountable (May 5, 2022), www.durbin.senate.gov/newsroom/press-releases/durbin-brown-introduce-legislation-to-clarify-critical-tool-for-holding-human-rights-violators-accountable [perma.cc/JL8G-FV5J].

States, irrespective of the nationality of the alleged defendant.[162]

Yet, it is expressly stated in the prefatory findings in S.B. 4155 that one of the intentions of the ATSCA is to make the ATS "available against those responsible for human rights abuses whenever they are subject to personal jurisdiction in the United States."[163] However, "human rights abuses" is a broad and ambiguous category of offenses.[164] Here, the intent and language of the legislation ignores the fact that the Court has severely limited the types of violations it recognizes as actionable under the ATS and has instructed that any torts beyond those need to be specified by Congress.[165]

To satisfy the intent expressed in the ATSCA, S.B. 4155 needs to be modified to specifically define the human rights abuses Congress considers to be in violation of the law of nations under the ATS. The Court's recognition of the TVPA in *Nestle v. Doe* is instructive when considering the language and form of legislation that will properly inform the Court of violations falling within the jurisdictional ambit of the ATS.[166]

The TVPA authorizes a cause of action against an individual for acts of torture and extrajudicial killing committed under authority or color of law of any foreign nation.[167] This statute, incorporated by note to the ATS, is the only additional cause of action beyond the three historical torts the Court recognized under the ATS.[168] The Court also endorsed the TVPA as reflecting "Congress' considered judgment of the proper structure for a right of action under the ATS."[169] When legislators seek to include additional offenses as violative of the law of nations under the ATS, their goals will have the greatest likelihood of judicial recognition by replicating the specificity of language contained in the TVPA.

Next, in *Nestle v. Doe*, the Court noted that Congress passed the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA) to address the offense of slavery.[170] The TVPRA was later amended to add a private right of action against immediate perpetrators of human trafficking violations, and again in 2008 to

---

162. S. 4155 § 3.

163. *Id.* § 2(8).

164. Human rights are defined by the United Nations as "rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. . . . include[ing] the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more." *Global Issues Human Rights*, UNITED NATIONS, www.un.org/en/global-issues/human-rights [perma.cc/V66M-Q5MX] (last visited Apr. 3, 2024).

165. *Nestle v. Doe,* 593 U.S. at 640.

166. 28 U.S.C. § 1350 note (Torture Victims Protection Act of 1991).

167. H.R. REP. 102-367, pt. 1, p.4 (1991); 1992 U.S.C.C.A.N. 84.

168. *Nestle v. Doe*, 593 U.S. at 644 (Gorsuch, J., concurring).

169. *Jesner*, 584 U.S. at 266.

170. *Nestle v. Doe*, 593 U.S. at 638.

create a private right of action against defendants who were indirectly involved with slavery.[171] However, since the TVPRA was not in force at the time of the events giving rise to the claim in *Nestle v. Doe*, the Court never addressed whether it would recognize the offenses defined in the TVPRA as actionable under the ATS.

Consequently, there should be explicit language incorporated by note to the ATS to avoid any confusion that the TVPRA would be subject to the jurisdictional provisions of the ATS. The language should provide a perspicuous identification of the offenses enumerated in the TVPRA as violations of the law of nations, and any tort arising therefrom will be subject to the jurisdictional provisions of the ATS. Congress should approach defining covered offenses in accord with Justice Gorsuch's view that the Constitution could not be clearer where it vests Congress with the power to "define and punish . . . Offences against the Law of Nations."[172] While this constitutional provision relates to criminal offenses and a tort action is civil in nature, the ATS requires that the tort be committed in violation of the law of nations. It logically follows under the principle of *nullum crimen sine lege, nulla poena, sine lege*[173] that to find a violation of an offense, there must be a definition of that offense.[174] This process of adding the violations of international law actionable under the ATS as a note to the statute, as was done for the TVPA and proposed herein for the TVPRA, should serve as a model for Congress to incorporate any other human rights abuses as actionable torts in the future.

Further, Congress can make a statute extraterritorial where it wants to.[175] The proposed ATSCA demonstrates this ability but seeks to extend extraterritorial jurisdiction to any defendant who is simply "present" in the United States irrespective of nationality.[176] Such broad language is likely to be challenged under the Due

171. *Id.*

172. *Id.* at 1943 (Gorsuch, J., concurring); *see* U.S. CONST. art. I, § 8.

173. This phrase literally translates from Latin as "no crime without law, no punishment without law." Beth Van Schaak, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 n.1 (2008).

174. Sparf v. United States, 156 U.S. 51, 88 (1895).

175. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 258 (1991) (citing the Export Administration Act of 1979, 50 U.S.C. App. § 2415(2) (defining "United States person" to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern"); Coast Guard Act, 14 U.S.C. § 89(a) (Coast Guard searches and seizures upon the high seas); 18 U.S.C. § 7 (Criminal Code extends to high seas); 19 U.S.C. § 1701 (Customs enforcement on the high seas); Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001(5)(A) (definition of "national of the United States" as "a natural person who is a citizen of the United States . . . "); the Logan Act, 18 U.S.C. § 953 (applying Act to "any citizen . . . wherever he may be . . . .")).

176. S. 4155 §3(2).

Process Clause of the Fifth Amendment, a protection to which aliens as well as citizens are entitled.[177]

A corporate personality is a fiction, and the term "present" symbolizes those activities of a corporation's agent that are sufficient to meet the requirements of Due Process.[178] Ultimately, the determination of whether a defendant is "present" will turn upon the quality and nature of the alleged activities in relation to the fair and orderly administration of laws, which was the purpose of the Due Process Clause to ensure.[179]

In *Kiobel,* the Court instructed that if Congress was to determine that mere corporate presence satisfies to displace the presumption against territoriality, "a statute more specific than the ATS would be required."[180] This strikes an ominous tone of Due Process challenges. To circumvent such challenges, S.B. 4155 should adopt the "touch and concern" language from *Kiobel* in contrast to the more stringent "focus test" language referenced in *Nestle v. Doe*.[181] Clearly stated, the bill would read that extraterritorial jurisdiction extends when "an alleged defendant is present in the United States, irrespective of the nationality of the alleged defendant, and their conduct touches and concerns the United States."[182]

V. CONCLUSION

The ATS is only a thirty-three-word jurisdictional statute, but it carries significant importance in the foreign relations of the United States. The ATS serves as a political policy statement that garners global respect for providing a forum to aliens who have been harmed by violations of international law. Originally enacted in 1789, it was rarely invoked for nearly two centuries while the world evolved.

The Second Circuit changed the status quo in 1980 with its rulings in *Filartiga*, which included the directive that "courts must interpret international law not as it was in 1789, but as it has

177. *See* United States v. Pink, 315 U.S. 203, 228 (1942) (stating "[t]o be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment," but finding no Fifth Amendment bar to the federal government prioritizing the secured interests of its citizen over foreign creditor interests).

178. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945).

179. *Id.* at 319.

180. *Kiobel*, 569 U.S. at 125.

181. *Id.*; *Nestle v. Doe*, 593 U.S. at 633.

182. While not the subject of this Comment, such language would also resolve a current Circuit split over the use of the "touch and concern test" or the "focus test" in ATS cases, where the Second and Fifth Circuits apply the focus test; the Fourth and Ninth Circuits apply the "touch and concern" test; and the Eleventh Circuit combines the two tests. *See* Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring the TVPA as a Promising Tool for Corporate Accountability*, 6 COLUM. HUM. RTS. L. REV. ONLINE 1, 11 (2021).

evolved and exists among the nations of the world today."[183] A proliferation of ATS cases followed *Filartiga*, from which there emerged significant concerns over the intent behind the statute, the scope of the statute, the judiciary's role with respect to the statute, and the burden placed on judges to decide complex issues affecting foreign relations and the separation of powers.[184]

The Supreme Court considered these issues and progressively narrowed the scope and effect of the ATS, beginning with *Sosa* in 2004, followed by *Kiobel*, *Jesner*, and *Nestle v. Doe*. In doing so, the Court steadfastly expressed reluctance and outright refusal to afford the ATS any greater reach than it is currently afforded absent clear direction from Congress. Therefore, if the ATS is to have any modern-day application, it is incumbent upon Congress to provide such clear direction, and efforts are currently underway to do so.

The legislative challenge relative to this direction will be to properly and adequately address the foreign policy concerns expressed by the Court. In conformance with the cues from the Court, any proposed legislation should one, specifically define the international norm that qualifies as a law of nations; two, expressly state the extent to which the norm and a violation thereof have extraterritorial application; three, identify the parties against whom a cause of action may be brought for violation of the norm; and four, set forth the policy reasons for making the cause of action available to aliens.

The decisions of the Court leave no doubt that action by Congress is required to resurrect the ATS as a viable foreign policy instrument of the United States in its efforts to prevent international human rights abuses and to hold human rights abusers accountable to their victims. Absent such action, the ATS will be relegated to the antiquities of 1789, and the Court will continue to turn its nose up to any interpretation of the law of nations through a modern lens. The ATS is a timeless policy statement that instills global respect for providing a forum to aliens who have been harmed by violations of international law, and it is deserving of thoughtful action by Congress to regain its intended effect.

183. *Filartiga*, 630 F.2d at 881.

184. Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 718-19 (2012) (noting that prior to his article's publication, there were approximately 173 ATS cases filed after *Filartiga*, and going into detail about the significant concerns surrounding the statute, which led to heightened legal discourse, especially after the filing of an ATS case against Unocal Oil for its alleged complicity in human rights violations in Myanmar).