

THE SHADOW OF *KIOBEL* AND *JESNER*:  
AN EXAMINATION OF THE ALIEN TORT STATUTE AND  
BRINGING IT BACK INTO THE LIGHT

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ABSTRACT

*The Alien Tort Statute (“ATS”) was enacted in 1789 and for roughly two centuries seemed fated to go down as a curious historical footnote. Invoked only a handful of times over the ensuing two hundred years, the ATS had new life breathed into it in 1980 with the Second Circuit case of Filartiga v. Pena-Irala. The ATS subsequently became a vehicle for victims of human rights violations seeking redress in U.S. courts. But while Filartiga represented a small window of opportunity opening for human rights activists, this utility would prove short-lived as the Supreme Court quickly began to curtail the applicability of the ATS: first putting its hand on the window sill with the case of Sosa v. Alvarez-Machain, then slamming it closed in Kiobel v. Royal Dutch Petroleum Co., and finally bolting the lock and throwing away the key recently in Jesner v. Arab Bank, PLC. This constant chipping away at the ATS has sharply limited the circumstances in which it can be invoked, rendering it virtually toothless.*

*This Note argues that the Court’s interpretations of the ATS post-Sosa is both flawed and at odds with its underlying intent. It will contrast the workable standard laid out by the Sosa Court with the subsequent brittle constructions of the Kiobel and Jesner Courts. This Note posits that the standard imposed by the Court in Sosa is best interpreted using Justice Breyer’s concurrence from Kiobel and Justice Sotomayor’s dissent in Jesner and calls for the adoption of a synthesis of these as the best interpretation of the ATS going forward. Specifically, this hybrid test interprets the first prong of Sosa through Justice Sotomayor’s Jesner dissent and relies on customary international law to inform courts as to what recognized norms are. It interprets the second prong of Sosa through Justice Breyer’s Kiobel concurrence and allows courts to use their discretion in determining whether enforcement of these norms is appropriate, viz, does it concern distinct American interests. This Note will show that this hybrid test is an appropriately constrained interpretation of the ATS based on its text, history, and intent, and will also apply this hybrid test to two recent cases to demonstrate its viability and applicability in practice.*

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## I. INTRODUCTION

“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.”<sup>1</sup>

The Alien Tort Statute (“ATS”) is a one-sentence law enacted in 1789.<sup>2</sup> Despite its brevity, untold pages have been spent attempting to decipher its meaning.<sup>3</sup> After its passage, the ATS was invoked only a handful of times prior to 1980.<sup>4</sup> This changed with the Second Circuit decision *Filartiga v. Pena-Irala*.<sup>5</sup>

In its holding, the Second Circuit declared that the ATS “open[ed] the federal courts [to] adjudication of the rights already recognized by international law.”<sup>6</sup> In so doing, the Second Circuit offered up the ATS as a vehicle of redress for human rights violations.<sup>7</sup> But whatever window of opportunity opened by *Filartiga* was short-lived, as the Supreme Court slowly and consistently foreclosed the utility of the ATS. Beginning in *Sosa v. Alvarez-Machain*<sup>8</sup>—wherein the Court first put its hand on the window sill to proscribe the ATS as only encompassing

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1. 28 U.S.C. § 1350 (2012).

2. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (codified as amended at 28 U.S.C. § 1350 (1948)).

3. See generally, e.g., Roger P. Alford, *The Future of Human Rights Litigation after Kiobel*, 89 NOTRE DAME L. REV. 1749 (2014) (arguing that post-*Kiobel* human rights litigants should stop seeking relief under the ATS and look elsewhere); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011) (arguing the ATS was improperly interpreted in *Filartiga* and its progeny as well as in *Sosa*); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002) (hereinafter referred to as Dodge II) (arguing that the ATS was intended to be purely jurisdictional, that Congress did not mean to limit its jurisdiction solely to suits against U.S. citizens, and that the law of nations is part of the “Laws of the United States” per Article III); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (arguing that the ATS was not intended to create a statutory cause of action, that Congress meant to limit its jurisdiction to suits involving at least one U.S. citizen defendant, and that the law of nations was not encompassed by the “Laws of the United States” per Article III); accord 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) (hereinafter referred to as Dodge I).

4. See John Haberstroh, *The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue*, 32 DENV. J. INT'L L. & POL'Y 231, 236 (2004) (noting that the ATS was invoked in “only twenty-one cases” before 1980); see also Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 463 (1989) (“[T]he [ATS] virtually lay fallow for 200 years [after its passage].”).

5. 630 F.2d 876 (2d Cir. 1980).

6. *Id.* at 887.

7. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (“In *Filartiga*, transnational public law litigants finally found their *Brown v. Board of Education*.”).

8. 542 U.S. 692 (2004).

a “narrow set of violations of the law of nations”<sup>9</sup>—next in *Kiobel v. Royal Dutch Petroleum Co.*<sup>10</sup>—in which the Court ruled the ATS does not apply to extraterritorial violations of the law of nations and effectively slammed the window closed<sup>11</sup>—and most recently in *Jesner v. Arab Bank, PLC*<sup>12</sup>—in which the Court’s holding that the ATS does not extend to foreign corporate defendants represents bolting the lock and throwing away the key.<sup>13</sup> While some of this narrowing was appropriate, this Note argues that in its recent decisions the Court has gone too far, robbing the ATS of its intended efficacy.

Given the Supreme Court’s current narrow reading of the ATS, it begs the question what, if any, future role does the ATS have in U.S. courts? This Note argues that the ATS was incorrectly interpreted in the cases of *Kiobel* and *Jesner*, and it should instead be returned to the constrained moorings of *Sosa*,<sup>14</sup> with Justice Breyer’s *Kiobel* concurrence<sup>15</sup> and Justice Sotomayor’s *Jesner* dissent<sup>16</sup> serving as the logical outgrowths to the standard first imposed by the Court in *Sosa*.<sup>17</sup> Specifically, it will call for an adoption of a hybrid test interpreting the first prong of *Sosa* through Justice Sotomayor’s *Jesner* dissent and the second prong of *Sosa* through Justice Breyer’s *Kiobel* concurrence.<sup>18</sup> The first prong relies on customary international law to inform courts as to what recognized norms are.<sup>19</sup> The second prong allows courts to use their discretion in determining whether enforcement of these norms is appropriate, viz, does it concern distinct American interests.<sup>20</sup> This Note will show that not only is such a reading closer to the textual and historical foundations of the ATS,<sup>21</sup> but that it is also a

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9. *Id.* at 715.

10. 569 U.S. 108 (2013).

11. *Id.* at 117.

12. 138 S. Ct. 1386 (2018).

13. *Id.* at 1403.

14. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004) (holding that to find jurisdiction under the ATS, federal courts first should not recognize claims “for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted[.]” and second that “the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts”).

15. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 127 (2013) (Breyer, J., concurring).

16. *Jesner*, 138 S. Ct. at 1419 (Sotomayor, J., dissenting).

17. *Sosa*, 542 U.S. at 732-33.

18. See *infra* Part VI.

19. See *infra* Part VI.B.

20. See *infra* Part VI.A.

21. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring) (noting that “[n]ot content to treat aliens like citizens of a non-forum state,

workable standard that can be applied to current cases faced by U.S. courts.<sup>22</sup>

This Note proceeds as follows: Part II traces the early history of the ATS, from its enactment in 1789 to 1980, focusing on how little was understood about it during this long period of dormancy. Part III looks at the *Filartiga* decision, the period between it and the *Sosa* decision, and the impact this had on transforming the ATS into a tool for human rights activists seeking redress. Part IV examines the *Sosa* decision and discusses the narrowly proscribed definition it gave to the ATS. Part V looks at the *Kiobel* and *Jesner* decisions, comparing the majority opinion to Justice Breyer's concurrence for the former and Justice Sotomayor's dissent for the latter. Part VI will argue that the ATS was properly interpreted in *Sosa*—as succinctly restated in Justice Breyer's *Kiobel* concurrence—and that Justice Breyer's *Kiobel* concurrence and Justice Sotomayor's *Jesner* dissent can be fused to create a hybrid approach to the ATS. Part VII will focus on two cases that are recent as of this writing: *Rukoro v. Federal Republic of Germany* in the Southern District of New York<sup>23</sup> and the murder of journalist Jamal Khashoggi in the Saudi Arabian consulate in Istanbul.<sup>24</sup> These will be used to show how the hybrid test would work in practice and how this approach both effectuates the intent of the ATS and also remains in line with American policy concerns. Part VIII concludes.

## II. EARLY HISTORY OF THE ATS: 1789-1980

While much has been written about the ATS, its original meaning has never been fully settled,<sup>25</sup> thus creating a gap in what the first Congress truly intended of the ATS.<sup>26</sup> As Judge Friendly once stated, the ATS is “a kind of legal Lohengrin. . . . [N]o one seems to know

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the drafters [of the ATS] also gave district courts concurrent original jurisdiction” when an alien sued for a violation of the law of the nations).

22. See *infra* Part VII.

23. *Rukoro v. Federal Republic of Germany*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019) (hereinafter referred to as *Rukoro I*), *appeal filed*, *Rukoro v. Federal Republic of Germany*, No. 19-609. (2d Cir. Mar. 11, 2019) (hereinafter referred to as *Rukoro II*).

24. Shane Harris, Greg Miller, & Josh Dawsey, *CIA Concludes Saudi Crown Prince Ordered Jamal Khashoggi's Assassination*, WASH. POST (Nov. 16, 2018), [https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d\\_story.html](https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d_story.html).

25. Burley, *supra* note 4, at 463 (“[D]efinitive proof of the intended purpose and scope of the [ATS] is impossible.”).

26. This is partly due to a lack of specific materials from the eighteenth century regarding the impetus for the ATS. See generally Bellia Jr. & Clark, *supra* note 3, at 445.

whence it came.”<sup>27</sup> Part of the confusion behind the ATS is the text itself. While it specifies that it applies to torts committed against aliens, it notably does not specify whether it can be used against aliens and citizens alike.<sup>28</sup> There is solid evidence that the drafters of the ATS were partially motivated by a concern for dragging the nascent United States into an international conflict arising from mistreatment of an alien by a U.S. citizen.<sup>29</sup> Another source of confusion comes from the legal term of art “law of nations.”<sup>30</sup> Overall, the closest that exists resembling a consensus is that the ATS was a way of “show[ing] European powers that the new nation [of the United States] would not tolerate flagrant violations of the ‘law of nations,’ especially when victims were foreign ambassadors or merchants.”<sup>31</sup>

Originally, the language of the ATS gave the district courts “cognizance” of certain causes of action, which courts interpreted to mean it spoke only to a grant of jurisdiction, rather than creating a substantive cause of action.<sup>32</sup> In *Sosa*, however, the Supreme Court conceded that based on historical materials, the statute’s 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

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27. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). Lohengrin was an Arthurian knight who refused to reveal his identity. See, e.g., R. Wagner, *Lohengrin*, LIBRETTOS OF THE WAGNER OPERAS 68 (Avenel Books ed. 1980).

28. See 28 U.S.C. § 1350 (2012); Bellia Jr. & Clark, *supra* note 3, at 447.

29. See, e.g., John M. Rogers, *The Alien Tort Statute and How Individuals Violate International Law*, 21 VAND. J. TRANSNAT’L L. 47, 47 (1988). It is also apparent that Alexander Hamilton envisioned the federal judiciary as having alienage jurisdiction, although the Judiciary Act did not fully enact Hamilton’s vision. See THE FEDERALIST NO. 80 (Alexander Hamilton) (“[T]he federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.”). Others have argued that some drafters of the First Judiciary Act similarly saw the alienage clause of Article III to grant the federal courts jurisdiction between aliens. See William R. Casto, *The Federal Court’s Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 515 (1986).

30. Bellia Jr. & Clark, *supra* note 3, at 447; see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring) (“We confront at every turn broad and novel questions about the definition and application of the ‘law of nations.’”).

31. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* 3 (2003). This concern over the protection of ambassadors and merchants can be traced to two early incidents in which diplomats were assaulted, namely the well-publicized “Marbois Affair.” See Haberstroh, *supra* note 4, at 239; see also Dodge II, *supra* note 3, at 694 (“On May 17, 1784, the Chevalier De Longchamps threatened the French Consul General, Francis Barbe Marbois, in the home of the French Ambassador. Two days later, De Longchamps assaulted Marbois on a Philadelphia street.”). De Longchamps was ultimately convicted in Pennsylvania Supreme Court for violating the law of nations. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (1784).

32. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77 (codified as amended at 28 U.S.C. § 1350 (1948)); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713, 713 n.10 (2004). As understood when it was enacted in 1789, the word “cognizance” was a legal term of art meaning a court’s power to try a case. See Casto, *supra* note 29, at 479.

time.”<sup>33</sup> Based on historical materials considered by the Court,<sup>34</sup> the law of nations as defined by the ATS was thought to encompass three torts which corresponded to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.<sup>35</sup>

A main reason behind the lack of understanding of the ATS is that federal courts had few chances to study it prior to *Filartiga*.<sup>36</sup> One instructive early case is *Bolchos v. Darrel*, which involved an American citizen, Darrel, seizing a Spanish ship that had been captured by a French Privateer, Bolchos.<sup>37</sup> Bolchos sued Darrel in admiralty for the cargo of the ship, namely the slaves on board.<sup>38</sup> While the court ultimately concluded that the case could be resolved under admiralty law, it noted that, in the alternative, it would have jurisdiction over the suit arising under the ATS.<sup>39</sup> After the *Bolchos* decision, courts rarely had opportunities to examine the ATS, as it was invoked only sparingly over the next 167 years.<sup>40</sup> Jurisdiction was upheld under the ATS in only two reported cases.<sup>41</sup> It was not until *Filartiga* in 1980 that this statutory also-ran was given new life.<sup>42</sup>

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33. *Sosa*, 542 U.S. at 724. There is also evidence from the time of the ATS’s enactment that it was viewed not simply as a jurisdictional grant but as also providing a cause of action. See, e.g., 1 Op. Att’y Gen. 57, 59 (1795) (“[T]here can be no doubt that [a company of British soldiers] or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only . . . such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose . . . .”); see also 26 Op. Att’y Gen. 250, 252-53 (1907) (opining that injured Mexican citizens at the U.S.-Mexican border could sue under the ATS since it provided both jurisdiction and a cause of action).

34. See *Sosa*, 542 U.S. at 724-25.

35. *Id.* at 724.

36. See *Bellia & Bradford*, *supra* note 3, at 458-59; *Bradley*, *supra* note 3, at 588 (“The obscurity of the [ATS] ended in 1980 . . . with . . . *Filartiga* . . .”).

37. 3 F. Cas. 810, 810 (D.S.C. 1795).

38. *Id.*

39. *Id.*

40. See *O’Reilly de Camara v. Brooke*, 209 U.S. 45 (1908); *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975); *Abiodun v. Martin Oil Serv., Inc.*, 475 F.2d 142 (7th Cir. 1973); *Khedivial Line, S.A.E. v. Seafarers’ Int’l Union*, 278 F.2d 49 (2d Cir. 1960); *Trans-Cont’l Inv. Corp., S.A. v. Bank of the Commonwealth*, 500 F. Supp. 565 (C.D. Cal. 1980); *Cohen v. Hartman*, 490 F. Supp. 517 (S.D. Fla. 1980); *Valanga v. Metro. Life Ins. Co.*, 259 F. Supp. 324 (E.D. Pa. 1966); *Damaskinos v. Societa Navigacion Interamericana, S.A.*, 255 F. Supp. 919 (S.D.N.Y. 1966); *Lopes v. Schroder*, 225 F. Supp. 292 (E.D. Pa. 1963); *Upper Lakes Shipping Ltd. v. Int’l Longshoremen’s Ass’n*, 33 F.R.D. 348 (S.D.N.Y. 1963); *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793).

41. *Adra v. Clift*, 195 F. Supp. 857, 863-66 (D. Md. 1961); *Bolchos v. Darrel*, 3 F. Cas. 810, 810 (D.S.C. 1795).

42 See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (“[W]e believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as

III. FROM *FILARTIGA* TO *SOSA*: 1980-2004

In 1980, the Filartigas, Paraguayan citizens living in America, brought suit against a fellow Paraguayan, Americo Norberto Pena-Irala, for actions Pena-Irala allegedly committed while serving the government of Paraguayan President Alfredo Stroessner.<sup>43</sup> The Filartigas contended that Pena-Irala kidnapped and tortured a member of their family until he died.<sup>44</sup> The Filartigas presented evidence from three different independent autopsies to support their claim that the deceased died as a result of professional torture.<sup>45</sup> Pena-Irala moved to dismiss the case for lack of subject matter jurisdiction and forum non conveniens.<sup>46</sup> The district court agreed with Pena-Irala and dismissed the case for lack of jurisdiction.<sup>47</sup>

On appeal, however, the Second Circuit held that the federal court did in fact have jurisdiction over the claims made by the Filartigas.<sup>48</sup> The Second Circuit reasoned that torture had, by that time, become recognized as a violation of customary international law, and was therefore a violation of the law of nations.<sup>49</sup> As such, a violation of the law of nations was found to arise under the laws of the United States for Article III purposes as the law of nations “forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.”<sup>50</sup>

*Filartiga* represented a departure from how the ATS was previously viewed, and subsequent cases saw other circuits come to similar conclusions as the Second Circuit.<sup>51</sup> However, even as plaintiffs successfully won jurisdictional arguments under the ATS, the question remained of what kinds of suits were allowed under the statute, and whether it even functioned as a substantive cause of action or if it was

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opening the federal courts for adjudication of the rights already recognized by international law.”).

43. *Id.* at 878.

44. *Id.*

45. *Id.*

46. *Id.* at 879.

47. *Id.* at 880.

48. *Id.* at 889.

49. *Id.* at 884.

50. *Id.* at 886.

51. *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994); see *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); cf. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring); see also Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 466 n.16, 467 n.20 (1997) (listing first the extensive scholarship produced in response to *Filartiga* and then the scholarship rebuking Judge Bork's concurrence from *Tel-Oren*).

purely jurisdictional.<sup>52</sup> While the Second Circuit took a broad approach and allowed aliens to sue other aliens for a large number of claims,<sup>53</sup> the D.C. Circuit remained skeptical of the ATS and construed it narrowly.<sup>54</sup>

While the courts struggled to adapt to a post-*Filartiga* world, scholars similarly tried to keep up and found themselves coming to no more agreement than the courts.<sup>55</sup> The broad approach favored the idea that the ATS created a federal cause of action and thus fell under federal question jurisdiction, by relying on *Filartiga's* reasoning that the law of nations was a form of federal common law.<sup>56</sup> The narrow view was that the ATS was purely jurisdictional in scope and thus created no separate federal cause of action.<sup>57</sup>

Partially in response to this unease, Congress enacted the Torture Victim Prevention Act of 1991 (TVPA).<sup>58</sup> The TVPA was intended to eliminate the ambiguity in the ATS and give a federal cause of action to individuals, including aliens, for acts of torture committed under the color of law of a foreign sovereign.<sup>59</sup> Unfortunately, the TVPA did not solve the problem of interpreting the ATS, and it was not until the *Sosa* decision that the Supreme Court finally weighed in to provide the lower courts some guidance.<sup>60</sup>

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52. See Bellia Jr. & Clark, *supra* note 3, at 461. Compare Dodge II, *supra* note 3, at 710-11 (arguing that a violation of the law of nations is encompassed within the federal common law and thus the ATS created a cause of action), with Curtis A. Bradley, Jack L. Goldsmith, & David H. Moore, *SOSA, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 887-88 (2007) (arguing that the ATS was purely jurisdictional and created no cause of action).

53. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

54. See *Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. 2003).

55. Compare Michael Ratner & Beth Stephens, *Tyrants, Terrorists, and Torturers Brought to Justice: U.S. Courts Provide Compensation for Victim*, N.Y. L.J., May 15, 1995, at S5 (rejecting Judge Bork's *Tel-Oren* concurrence), with Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (arguing *Filartiga* rested upon flawed assumptions).

56. See Goodman & Jinks, *supra* note 51, at 480; Dodge II, *supra* note 3, at 710.

57. See Dodge II, *supra* note 3, at 689-90; Bradley, Goldsmith, & Moore, *supra* note 52, at 887-88.

58. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

59. *Id.*; see also H.R. REP. No. 102-367, at 2-5 (1991) (explaining the need for a clearly granted private right of action to avoid the problems of the ATS); see generally Philip Mariani, *Assessing the Proper Relationship between the Alien Tort Statute and the Torture Victim Prevention Act*, 156 U. PA. L. REV. 1383, 1385 (2008) ("The TVPA creates an explicit cause of action for a narrow set of conduct, precisely defines that conduct, and details the manner in which that cause of action must be pursued. In short, it lacks the fundamental ambiguity that characterizes the ATS.")

60. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) ("In sum, we think [the ATS] was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject."). The Court then explained that the ATS, though "a

IV. *SOSA* AND ITS IMPACT: 2004-2013

*Sosa* represented the first time the Supreme Court directly addressed the ATS.<sup>61</sup> The case involved a Drug Enforcement Agency (“DEA”) agent who had been captured, interrogated, tortured, and eventually murdered in Guadalajara, Mexico.<sup>62</sup> Fellow DEA agents came to believe that Humberto Alvarez-Machain, a Mexican physician, was present during these events and used his skills to keep the captured DEA agent alive in order to extend the interrogation and torture.<sup>63</sup> Alvarez-Machain was abducted in Mexico through joint efforts between the DEA and Mexican nationals, one of whom was Jose Francisco Sosa, and brought to the United States to stand trial.<sup>64</sup> Alvarez-Machain eventually prevailed on a motion for a judgment of acquittal, and subsequently brought civil suits against a number of individuals, including Sosa, under both the Federal Tort Claims Act (“FTCA”) and the ATS.<sup>65</sup>

At trial, Alvarez-Machain was awarded \$25,000 in damages on his ATS claim against Sosa, which was upheld by the Ninth Circuit.<sup>66</sup> On appeal at the Supreme Court, the Court considered the scope of both the FTCA and ATS, and ultimately reversed the Ninth Circuit’s decision.<sup>67</sup> The Court’s ATS holding attempted to define the parameters of the statute while also contextualizing it for the twenty-first century.<sup>68</sup>

One of the main holdings by the Court in *Sosa* was that the ATS was jurisdictional in nature; however, at the same time the Court also held that requiring a separate statute upon which to claim relief would result in the ATS being “stillborn.”<sup>69</sup> The Court based this on a historical analysis which concluded that “the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress . . . that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for . . . foreigners.”<sup>70</sup>

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jurisdictional statute creating no new causes of action” was enacted with the intent that the common law, namely the law of nations, would provide a limited number of offenses that one could be found personally liable under. *Id.* at 724.

61. See Bellia Jr. & Clark, *supra* note 3, at 462.

62. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

63. *Id.*

64. *Id.* at 697-98.

65. *Id.* at 698.

66. *Id.* at 699.

67. *Id.*

68. See *id.*

69. *Id.* at 714.

70. *Id.* at 719.

The Court determined that as a result, the ATS would have been meant to have “a practical effect.”<sup>71</sup> That said, the Court rejected the broader interpretations of actionable claims available under the ATS, and instead narrowly defined the law of nations referred to within as most likely a reference to the limited set of violations that Blackstone saw as “admitting of a judicial remedy and at the same time threatening serious consequences in international affairs.”<sup>72</sup> Thus, the law of nations as envisioned by the ATS covered violations of safe conduct, infringement of the rights of ambassadors, and piracy.<sup>73</sup>

The other main ATS holding from *Sosa* was that any modern claim made under the statute must “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” recognized by the courts.<sup>74</sup> In plain terms this created a two-prong test: first, it meant that any new causes of action under the ATS must in some way be analogous to the three violations proscribed at the time of its passage in 1789.<sup>75</sup> Second, in deciding whether a claim is analogous, courts were to employ “a restrained conception of . . . discretion.”<sup>76</sup> The Court held such discretion was necessary because it was “general practice . . . to look for legislative guidance before exercising innovative authority over substantive law.”<sup>77</sup> And in addressing the limited role the ATS had played up to that point, the Court noted “[i]t would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.”<sup>78</sup> Under

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71. *Id.*

72. *Id.* at 715.

73. *Id.*; see also 4 WILLIAM BLACKSTONE, COMMENTARIES \*67, \*68.

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

75. *Id.* at 732; cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that the ATS’s reach should be defined by “a handful of heinous actions—each of which violates definable, universal, and obligatory norms”); see also Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT’L. L.J. 53, 90 (1981) (listing genocide, summary execution, torture, and slavery as “core human rights violations”).

76. *Sosa*, 542 U.S. at 725; see also *id.* at 732 (“This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.”).

77. *Id.* at 726.

78. *Id.* The *Sosa* Court was keenly aware of the need for restraint in interpreting the ATS, given what it called “the poverty of drafting history,” and that “despite considerable scholarly attention . . . a consensus understanding of what Congress intended [when enacting the ATS] has proven elusive.” *Id.* at 718-19. Thus, in creating its analysis, the Court sought to preserve the separation of powers while also furthering what it viewed as Congress’

this analysis, the Court determined that Alvarez-Machain's claim for arbitrary arrest failed as a modern analogue and therefore had no shelter in the ATS.<sup>79</sup>

Decided in 2004, *Sosa* came to be the lodestar by which courts interpreted the ATS going forward.<sup>80</sup> By incorporating much of the *Filartiga* holding while also giving a definite set of violations to work with, the Court was able to lay down defined, narrow parameters for the ATS's boundaries.<sup>81</sup> While the Court was unanimous in its holding regarding the three historical violations that were sufficiently definite to be actionable under the ATS, it splintered as to whether new violations could become accepted enough under international law to also be sufficiently definite to be seen as violations of the law of nations.<sup>82</sup> This lack of consensus as to what, if any, new violations were viable under the ATS would prove to be a recurring theme in the Court's ATS jurisprudence.<sup>83</sup> Aside from what claims were actionable, another persistent question was who qualified as a valid entity for these claims to be brought against.<sup>84</sup> It was not until the Court took up the cases of *Kiobel* and *Jesner* that some clarity was provided.

## V. KIOBEL AND JESNER: 2013-2018

### A. *Kiobel v. Royal Dutch Petroleum Co.*

Post-*Sosa*, the Court next took a serious look at the ATS in *Kiobel v. Royal Dutch Petroleum Co.* in 2013.<sup>85</sup> The case involved Nigerian nationals who lived in the United States and brought suit against foreign corporations.<sup>86</sup> The petitioners claimed that these corporations

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intent that "federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction." *Id.* at 730.

79. *Id.* at 736-37.

80. See Mark W. Janis & John E. Noyes, INTERNATIONAL LAW: CASES AND COMMENTARY 314-15 (Jesse H. Choper et al. eds., 5th ed. 2014).

81. *Id.*

82. See generally *Sosa*, 542 U.S. at 692.

83. Bellia Jr. & Clark, *supra* note 3, at 463-64 (explaining how the Court rejected Justice Scalia's position that the ATS permitted no new claims for violations of modern customary international law while also conceding that the ATS would only recognize "a narrow class of international norms today") (citing *Sosa*, 542 U.S. at 729).

84. See *id.* at 464 (citing *Sosa*, 542 U.S. at 724) ("The Court did not directly address the Article III basis for subject matter jurisdiction over ATS claims. The Court simply stated several times that the ATS is solely a jurisdictional statute that creates no federal cause of action."). The Court also neglected to determine the scope of claims encompassed by the ATS, viz, whether it covered claims arising in foreign nations. *Id.*

85. 569 U.S. 108 (2013).

86. *Id.* at 111-12.

aided and abetted the Nigerian government in committing alleged violations of the law of nations.<sup>87</sup>

In examining the case, the Court sought to determine whether the ATS could be applied extraterritorially, that is, whether federal courts could recognize causes of action under the ATS for violations which occurred in foreign sovereign territory.<sup>88</sup> The Court ultimately held that the ATS was subject to the presumption against extraterritoriality,<sup>89</sup> as the text of the ATS was silent as to whether it should be applied extraterritorially or not.<sup>90</sup> As a result, the Court determined that “[t]he principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.”<sup>91</sup>

*Kiobel* represented a major retraction of the interpretation of the ATS compared to *Filartiga*, namely an about-face of the availability of federal courts to hear international human rights cases.<sup>92</sup> While post-*Filartiga* cases tended to result in favorable decisions for human rights activists, *Kiobel* was nothing less than an unequivocal victory for those who had become the common targets of these suits, namely foreign corporate entities.<sup>93</sup> The academic reaction to *Kiobel* was predictably split, depending on whether one was inclined to support a more protectionist view of corporate entities versus a more aggressive human rights advocacy.<sup>94</sup> Regardless of where one stood on the merits of the decision, practically, *Kiobel* meant that the ATS could now only be used against parties whose conduct “touch[ed] and concern[ed] the territory of the United States,” and even then, that conduct must have

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87. *Id.* at 112.

88. *Id.* at 112-113.

<sup>89</sup> See *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

90. *Kiobel*, 569 U.S. at 118.

91. *Id.* at 117.

92. David P. Stewart & Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 603 (2013) (“Going forward, if courts apply a strong version of the presumption and only permit claims based on conduct in the United States allegedly in violation of a norm of international law that meets the *Sosa* standard, then ATS litigation as we know it today is effectively dead . . .”).

93. *Id.* Many declared *Kiobel* as the death knell of the ATS. See e.g., Roger Alford, *Kiobel Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS, (Apr. 17, 2013), <http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/>. But see Oona Hathaway, *Kiobel Commentary: The Door Remains Open to “Foreign Squared” Cases*, SCOTUSBLOG (Apr. 18, 2013), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/>.

94. Compare Mark Walsh, *Global Warning: High Court Limits the Alien Tort Statute Slowing Suits Against U.S. Companies*, 99 A.B.A. J. 17, 17-18 (July 2013), with Anupam Chander, *Unshackling Foreign Corporations: Kiobel’s Unexpected Legacy*, 107 AM. J. INT'L L. 829, 829 (2013).

had “sufficient [enough] force” to displace the presumption against extraterritoriality.<sup>95</sup>

Notably, the original appeal in *Kiobel* was over whether the ATS could be used against foreign corporations.<sup>96</sup> The Second Circuit had held the ATS did not apply to foreign corporations when it decided *Kiobel*.<sup>97</sup> However, the Court instead decided the case on the issue over whether and under what circumstances the ATS applied to actions occurring outside the United States.<sup>98</sup> As a result, the Court did not reach the original issue of foreign corporate liability.<sup>99</sup> The Court would finally resolve this uncertainty in the 2018 case *Jesner v. Arab Bank, PLC*.<sup>100</sup>

### B. *Jesner v. Arab Bank, PLC*

*Jesner* was a suit brought by foreign nationals who were either personally injured by or on behalf of those injured by acts of terrorism committed outside the United States, primarily in the Middle East.<sup>101</sup> The petitioners alleged that these acts were aided financially by a Jordanian financial institution, Arab Bank.<sup>102</sup> They sought to impose liability on the bank based on the actions of its agents, namely that of high-ranking executives who allegedly allowed terrorists to use the bank to transfer funds, which in turn contributed to future acts of terrorism.<sup>103</sup>

The petitioners sought to overcome *Kiobel*'s presumption against extraterritoriality by tying some of the financial transactions to Arab Bank's New York branch.<sup>104</sup> One interesting feature of *Jesner* is it actually ran concurrent to *Kiobel* (which spanned roughly thirteen years total).<sup>105</sup> The issue the Court initially granted certiorari on in *Kiobel*—

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95. *Kiobel*, 569 U.S. at 124-25.

96. *See id.* at 114.

97. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010); *Kiobel*, 569 U.S. at 114.

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

99. *See id.* (“We granted certiorari to consider [whether the ATS recognizes corporate liability.] After oral argument, we directed the parties to file supplemental briefs addressing an additional question . . . and now affirm the judgment below, based on our answer to the [additional] question.”).

100. 138 S. Ct. 1386 (2018).

101. *Id.* at 1393.

102. *Id.*

103. *Id.*

104. *Id.* at 1394.

105. *Id.* at 1395.

whether the ATS extended to foreign corporate defendants<sup>106</sup>—was finally answered in *Jesner*, with the Court holding that the ATS did not extend to such entities.<sup>107</sup>

The Court justified its holding on both historical considerations as well as a concern for the separation of powers, reasoning that Congress is better equipped to make such determinations about whether to allow foreign corporations to be held liable under the ATS.<sup>108</sup> The Court was also concerned about the attenuated link between the terrorist attacks and the conduct which allegedly occurred within the United States.<sup>109</sup> Furthering this point, the Court noted the unique challenges foreign corporate defendants presented.<sup>110</sup>

Recognizing the nation of Jordan as a staunch ally of the United States, one it relies upon in combatting international terrorism, the Court was concerned about the diplomatic quagmire an adverse finding would create.<sup>111</sup> Namely, the Court feared a ratcheting up of tensions between the two sovereigns, especially given the weak link between the conduct and the United States.<sup>112</sup> The Court, seemingly both weary of past litigation and wary of a flood of future litigation brought against foreign corporate defendants, decided to foreclose such a possibility by narrowly construing the ATS's boundaries.<sup>113</sup> If the ATS had narrowly survived its encounter with *Kiobel*, *Jesner* was the knock-out punch.

## VI. CALL TO RETURN THE ATS TO ITS *SOSA* MOORS

This Note's underlying argument is that while in *Sosa* the Court took care to define the limitations of the ATS, in *Kiobel* and *Jesner* it treated the ATS as an almost ahistorical scrivener's error. The majority opinions in *Kiobel* and *Jesner* gave short shrift to the idea that the First Congress intended it to apply either extraterritorially or against foreign corporate defendants. However, a closer examination of those cases reveals how brittle the Court's post-*Sosa* interpretation of the ATS is, and why a return to *Sosa*'s principles is proper.

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<sup>106</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 114 (2013).

<sup>107</sup> *Jesner*, 138 S. Ct. at 1408.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1406.

<sup>110</sup> *Id.* at 1407.

<sup>111</sup> *Id.* at 1406.

<sup>112</sup> *Id.*

<sup>113</sup> *See id.*; *see generally id.* ("The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations . . . where the absence of such a remedy might provoke foreign nations to hold the United States accountable. But here, and in similar cases, the opposite is occurring.").

It is important to keep in mind while considering these cases *Sosa*'s two-step test to determining whether a federal court can recognize a new cause of action under the ATS.<sup>114</sup> First, there must be an alleged violation of an international norm that is definite, specific enough, and has been accepted by the civilized world.<sup>115</sup> Second, the court must use its discretion in determining whether to recognize such an alleged violation of customary international law.<sup>116</sup>

*Sosa* is an important case for the ATS not only because of the guidance it provided for courts interpreting the ATS going forward, but also because of the care Justice Souter took in both examining the statute's history and looking at that history contextually in light of modern law.<sup>117</sup> The Court's decision was both narrow in some senses while broad in others.<sup>118</sup> It was narrow in the sense that it limited the ATS to only a small number of violations.<sup>119</sup> It was simultaneously broad in that it recognized as laws evolve and change over time, so too will the law of nations come to recognize new violations that are so definite they qualify as customary international law.<sup>120</sup> While Justice Scalia's concurrence in *Sosa* did not agree with the majority's particular view, it has been tacitly endorsed by the Court in subsequent cases.<sup>121</sup>

By comparison, *Kiobel* looks like the embodiment of the Topsy Coachman doctrine come to life.<sup>122</sup> While all nine Justices agreed with

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114. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004).

115. *Id.*

116. *Id.* at 727-28.

117. See *id.* at 719-20, 724-25.

118. See Alford, *supra* note 3, at 1752 ("The central holding of *Sosa* was that the ATS was a jurisdictional statute that nonetheless permitted common law causes of action for torts committed in violation" of the law of nations.). Thus, we see the narrowness in holding the ATS was purely jurisdictional in nature but also its breadth in yielding to the common-sense wisdom that such a strict reading of the statute would render it toothless on its own. See *id.* Compare *Sosa*, 542 U.S. at 714 ("In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain causes concerned with a certain subject."), with *id.* ("[H]istory and practice" support a reading of the ATS allowing "federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time.").

119. *Sosa*, 542 U.S. at 714.

120. *Id.*; see also Alford, *supra* note 3, at 1752 ("[T]he U.S. Supreme Court in *Sosa* . . . limited the scope of the ATS, but left the door ajar for further litigation . . .").

121. See *Sosa*, 542 U.S. at 739 (Scalia, J., concurring); see, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). The *Sosa* holding is a good example of the Court deftly threading the needle by following sound principles of statutory interpretation while also acceding to the sound judgment that the First Congress likely would not have intended to write a statute that would be ineffective without some future, as-yet-unwritten statute coming to its aid. See, e.g., *Sosa*, 542 U.S. at 724.

122. The Topsy Coachman doctrine is one which allows appellate courts to affirm a lower court's ruling as correct, despite the reasoning being incorrect. See *Robertson v. Florida*, 829

the opinion by Chief Justice Roberts dismissing the action (i.e., the petitioners' claims lacked merit under the ATS), three separate concurrences were filed, all disagreeing on the *why* behind the dismissal.<sup>123</sup> This cacophony of theories repeated itself in *Jesner*, albeit splitting down more ideological lines with the five more conservative Justices in the majority while the four more liberal Justices dissented.<sup>124</sup> Justices Alito and Gorsuch filed separate concurrences; Justice Sotomayor, meanwhile, filed a bristling dissent that was joined by Justices Ginsburg, Breyer, and Kagan.<sup>125</sup> This Note posits that closer inspection of *Kiobel* and *Jesner* reveals flawed reasonings, and that the better interpretations of *Sosa* can be found in the concurring and dissenting opinions of *Kiobel* and *Jesner*. Specifically, it argues that the first prong of *Sosa*'s test should be viewed through Justice Sotomayor's dissent from *Jesner*, and the second prong of *Sosa* should be viewed through Justice Breyer's *Kiobel* concurrence. It will address these in reverse order for chronological convenience.

#### A. Deriving Prong Two of *Sosa* from *Kiobel*

Looking first at *Kiobel*, it is interesting to see Justice Kennedy note with approval that the Court “[left] open a number of significant questions regarding the reach and interpretation of the [ATS],” calling this the “proper disposition.”<sup>126</sup> Justice Kennedy praised the TVPA as helping to address some human rights abuses, but also conceded that instances would almost inevitably arise that neither the TVPA nor the majority's *Kiobel* holding would address.<sup>127</sup> In such instances, Justice Kennedy recognized that the presumption against extraterritoriality would require greater elaboration.<sup>128</sup> It would seem his *Jesner* opinion served as the logical next step from this concurrence.

This Note argues the *Kiobel* concurrence which does the most normative work is Justice Breyer's. Justice Breyer argued he “would not invoke the presumption against extraterritoriality,” but rather find:

[J]urisdiction under [the ATS] where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the

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So. 2d 901, 906 (Fla. 2002); see also *Lee v. Porter*, 63 Ga. 345, 346 (Ga. 1879) (“The pupil of impulse, it forc'd him along, / His conduct still right, with his argument wrong; / Still aiming at honor, yet fearing to roam, / The coachmen was tipsy, the chariot drove home.”) (quoting OLIVER GOLDSMITH, RETALIATION: A POEM 10 (1774)).

123. See *Kiobel*, 569 U.S. at 110.

124. See *Jesner*, 138 S. Ct. at 1393.

125. *Id.*

126. See *Kiobel*, 569 U.S. at 125 (Kennedy, J., concurring).

127. *Id.*

128. *Id.*

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.<sup>129</sup>

Justice Breyer's concurrence fits most neatly in line with the Court's holding from *Sosa*, serving as the natural evolution of the principles the Court laid out there (and which he echoed in his own *Sosa* concurrence).<sup>130</sup> As Justice Breyer noted, the Court in *Sosa* laid out "a framework for answering that question by setting down principles drawn from international norms and designed to limit ATS claims to those that are similar in character and specificity to piracy."<sup>131</sup>

Where Justice Breyer is most persuasive is in pointing out that the presumption against extraterritoriality "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters."<sup>132</sup> However, a look at the text, history, and intent of the ATS shows why it is a poor fit for this presumption.<sup>133</sup> Even with the lack of legislative history surrounding the ATS,<sup>134</sup> one thing most scholars agree on is it reflected a concern by the First Congress for U.S. entanglement in foreign affairs.<sup>135</sup> Justice Breyer supports this argument by pointing out that of the three violations *Sosa* listed, piracy generally takes place abroad.<sup>136</sup>

Given that piracy almost always occurs abroad, Justice Breyer argues that *Sosa's* holding actually dictates the opposite of Chief Justice Roberts' conclusion: by listing piracy as one of the actionable offenses

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129. *Id.* at 127 (Breyer, J., concurring).

130. *See id.* at 129; *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 760 (2004) (Breyer, J., concurring) (noting with approval the Court's holding "that to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy").

131. *Kiobel*, 569 U.S. at 129 (Breyer, J., concurring).

132. *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 255 (2010).

133. *See Kiobel*, 569 U.S. at 129 (Breyer, J., concurring).

134. *See* Warren Richey, *When Can Foreigners Sue in US Courts?*, THE CHRISTIAN SCIENCE MONITOR (Mar. 30, 2004), <https://www.csmonitor.com/2004/0330/p02s02-usju.html> (referring to *Sosa* as "The Case of the Inscrutable Statute" due to the lack of historical materials discussing the reasons behind the ATS).

135. *See* Carolyn A. D'Amore, *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigations been Left Open*, 39 AKRON L. REV. 593, 596 (2006); *see also* HUFBAUER & MITROKOSTAS, *supra* note 31, at 3 (denoting how the United States responded to violations against international figures prior to the enactment of the ATS).

136. *Kiobel*, 569 U.S. at 129-30 (Breyer, J., concurring); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES \*67, \*72 (defining the offense of piracy as a robbery or depredation committed on the high seas that if committed on land would amount to a felony).

under the ATS, the *Sosa* Court was explicitly invoking a presumption for extraterritoriality.<sup>137</sup> As Justice Breyer notes, applying U.S. law to pirates involves “applying [U.S.] law to acts taking place within the jurisdiction of another sovereign.”<sup>138</sup> This is because a ship is like land in that it falls under the jurisdiction of the flag it sails under.<sup>139</sup> Thus, in applying U.S. law to piracy—even on the high seas—it is an exercise of power against a foreign sovereign.

This reasoning builds to the most important principle laid out by Justice Breyer’s concurrence: that the ATS should provide jurisdiction “only where distinct American interests are at issue.”<sup>140</sup> Such a limitation would prevent the United States from becoming the *custos morum* of the whole world,<sup>141</sup> while simultaneously allowing U.S. courts to not turn away victims of heinous actions contemplated by the ATS.<sup>142</sup> As such, this Note contends that in looking at *Sosa*’s second prong regarding judicial discretion, courts should use Justice Breyer’s ‘distinct American interests’ test to determine whether to find jurisdiction exists under the ATS.

### B. Deriving Prong One of *Sosa* from *Jesner*

The plurality in *Jesner* determined that foreign corporate entities could not be liable under the ATS per the first step of *Sosa*, that is, the petitioners failed to show “a specific, universal, and obligatory norm of liability for corporations.”<sup>143</sup> In deciding there was no norm (and thus foreign corporate entities would fail the first step of *Sosa*), the plurality relied heavily on the Second Circuit’s opinion from *Kiobel* which

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137. See *Kiobel*, 569 U.S. at 129-31 (Breyer, J., concurring).

138. *Id.*

139. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 502 cmt. d (AM. LAW INST. 1987) (“[F]lag state has jurisdiction to prescribe with respect to any activity aboard the ship.”).

140. *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring). Justice Breyer interpreted this to mean circumstances where “(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.” *Id.* at 128.

141. *Id.*; see also *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551) (“No nation has ever yet pretended to be the *custos morum* of the whole world.”); see, e.g., *Pettingill v. Dinsmore*, 19 F. Cas. 392, 394 (D. Me. 1843) (No. 11,045) (noting a ship captain has authority over his crew to correct mistakes connected with “the due performance of their special duties on board” the ship, but that he “has not the authority of a *custos morum* to correct his crew for general immorality of conduct[]”). *Custos morum* means custodian of morals. *Custos Morum*, BLACK’S LAW DICTIONARY (10th ed. 2014).

142. *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring); see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring).

143. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1400 (2018).

interpreted a footnote of *Sosa* to “mean that corporate defendants may be held liable under the ATS only if there is a specific, universal, and obligatory norm that corporations are liable for violations of international law.”<sup>144</sup> Such an attenuated link crumbles under scrutiny. The footnote in question reads:

A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (CA DC 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).<sup>145</sup>

A closer reading of this footnote shows that the *Sosa* Court was merely speculating whether international law extends to corporate defendants. It was not making any sort of substantive determination on the matter. Betraying the weaknesses of its argument, the plurality concedes that “the enormity of the offenses that can be committed against persons in violation of international human-rights protections” can apply to corporations through their human agents.<sup>146</sup> And yet, in the next breath the Court bafflingly holds that the international community has apparently not taken the requisite step of defining a specific, universal, and obligatory norm that corporations are liable for violations of international law, namely aiding and abetting terrorism.<sup>147</sup>

The plurality attempts to bolster this argument by analogizing the ATS to the TVPA and arguing that because the TVPA speaks only to individuals, not corporations, the Court is precluded from creating a cause of action here.<sup>148</sup> But again, the plurality overlooks a key distinction, namely that the TVPA sought to remedy victims of torture, whereas the ATS’s grant of jurisdiction is broader.<sup>149</sup> Returning to *Sosa* principles one must ask who are modern pirates, to which the

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144. *Id.*; see also *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 127 (2d Cir. 2010).

145. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

146. *Jesner*, 138 S. Ct. at 1402.

147. *Id.*

148. *Id.* at 1403-04.

149. See, e.g., Mariani, *supra* note 59, at 1393 (quoting S. REP NO. 102-249, at 4-5 (1991) (“[The ATS] has other important uses and should not be replaced [by the TVPA]. . . . [C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [the ATS]. Consequently, the statute should remain intact.”)).

answer is simple: terrorists.<sup>150</sup> Individuals who operate without the color of law, without respect for international law or borders, and who can be prosecuted by any sovereign which apprehends them.<sup>151</sup>

An examination of Justice Sotomayor's dissent exposes how the plurality misunderstands *Sosa's* first step by asking whether it is a "categorical question whether corporations may be sued under the ATS as a general matter."<sup>152</sup> Justice Sotomayor correctly distinguishes the notion that international law offers guidance on what conduct violates the law of nations (e.g., genocide, slavery, torture, extrajudicial killings)—and how to satisfy *Sosa's* first prong, there must be international consensus as to the existence of these norms—from the idea that international law also dictates the enforcement mechanisms for these norms.<sup>153</sup>

As she writes "international law determines what substantive conduct violates the law of nations, [but] it leaves the specific rules of how to enforce international-law norms and remedy their violation to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems."<sup>154</sup> Justice Sotomayor also points out that the text of the ATS itself supports this distinction between prohibited conduct and enforcement mechanisms.<sup>155</sup>

150. See *Jaber v. United States*, 861 F.3d 241, 253 (D.C. Cir. 2017) (Brown, J., concurring) ("Civilizational peril comes in many forms—sometimes [as] malevolent philosophies, sometimes [as] *hostis humanis generis* (pirates, slavers, and now terrorists) . . .") (emphasis added); Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 326-27 (2006); Steven R. Swanson, *Terrorism, Piracy, and the Alien Tort Statute*, 40 RUTGERS L.J. 159, 213-14 (2008); Douglas R. Burgess, Jr., *Piracy Is Terrorism*, N.Y. TIMES (Dec. 5, 2008), <https://www.nytimes.com/2008/12/05/opinion/05burgess.html>; see also Eileen Rose Pollock, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236, 243 (1982) (discussing the general agreement among sovereign nations of terrorism as a violation of the law of nations).

151. See, e.g., Swanson, *supra* note 150, at 213-14 ("Modern terrorists and traditional pirates share significant similarities. . . . Pirates and terrorists . . . mirror each other in terms of methodology and mobility. Pirates have always been treated as a special case in the law because they act beyond the jurisdiction of any one state. Highly mobile, pirates make apprehension difficult and universal jurisdiction appropriate. Like pirates, modern terrorists live in a world with few boundaries.")

152. *Id.* at 1420 (Sotomayor, J., dissenting).

153. *Id.*

154. *Id.*; see, e.g., 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmt. h ("In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 245 (2d ed. 1996) ("International law itself . . . does not require any particular reaction to violations of law."); Eileen Denza, *The Relationship Between International and National Law*, in INTERNATIONAL LAW 423 (M. Evans ed. 2006) ("[I]nternational law does not itself prescribe how it should be applied or enforced at the national level").

155. *Jesner*, 138 S. Ct. at 1421 (Sotomayor, J., dissenting).

Justice Sotomayor's *Jesner* dissent shows the length to which the Court has become unmoored from the principles espoused in *Sosa*. Her argument in *Jesner* is a better means of approaching *Sosa* step one: when considering whether to recognize a new cause of action under the ATS and determining whether it is a universal norm of customary international law, courts should note the distinction between what these norms are versus how they are enforced.<sup>156</sup>

Thus, we have Justice Sotomayor's principle of reliance on customary international law to inform courts as to what norms are recognized, but then allow courts to use their discretion in determining whether enforcement of these norms is in line with American interests (using Justice Breyer's distinct American interests approach). This hybrid approach would allow for the ATS to have continued efficacy in line with the First Congress's goal that it be used to avoid foreign entanglements while also holding open the U.S. courts for aliens who have suffered wrongs.<sup>157</sup>

## VII. THE TEST IN ACTION

This section will show how the proposed hybrid test is applicable to two cases that are recent as of this writing—one on appeal after dismissal by the district court, one hypothetical—by running them through the two-step hybrid test to determine the likely result.

### A. *Rukoro v. Federal Republic of Germany*<sup>158</sup>

In January 2017, the Ovaherero and Nama peoples (indigenous peoples hailing from modern-day Namibia) brought suit in the Southern District of New York against the Federal Republic of Germany.<sup>159</sup> The suit alleged, *inter alia*, that Germany was responsible for geno-

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156. *Id.*

157. *Id.* at 1426.

158. There are questions of sovereign immunity regarding this case that this Note will not address—namely whether the federal courts have subject matter jurisdiction to hear the case pursuant to the Foreign Sovereign Immunities Act (“FSIA”). For the purposes of this Note’s argument, it is assumed that any issues of sovereign immunity regarding the FSIA have been overcome. While the district court that considered this case held that the plaintiffs were unable to overcome the FSIA barriers and dismissed for lack of subject matter jurisdiction, *Rukoro v. Federal Republic of Germany*, 363 F. Supp. 3d 436, 452 (S.D.N.Y. 2019), an appeal of that decision has been filed as of this writing, *Rukoro v. Federal Republic of Germany*, No. 19-609 (2d Cir. Mar. 11, 2019).

159. See *Rukoro I*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019).

cidal activities during the late nineteenth to early twentieth centuries.<sup>160</sup> Amongst their arguments for jurisdiction, the plaintiffs asserted the court could hear the case under the ATS.<sup>161</sup> This was not the first attempt by the Ovaherero and Nama peoples, who had previously been unsuccessful in attempting to bring action against Germany in the Permanent Court of Arbitration and other U.S. courts.<sup>162</sup> While the judge in the Southern District did not immediately dismiss the suit, as opposed to the prior cases, she ultimately did grant the defendant's motion to dismiss for lack of subject matter jurisdiction.<sup>163</sup>

Under the current interpretation of the ATS—and owing to sovereign immunity issues—it was arguably inevitable that this case would be dismissed. Had the plaintiffs overcome the sovereign immunity issues, they would have eventually run headlong into the presumption against extraterritoriality from *Kiobel*, a presumption the court would have likely found impossible for the plaintiffs to overcome.<sup>164</sup> Because the events in question took place entirely overseas,<sup>165</sup> the plaintiffs would have been forced to show some connection to the United States. While the alleged actions, that is, genocide or attempt to commit genocide, do consist of a specific, universal, and obligatory norm of customary international law,<sup>166</sup> nonetheless the presumption would have almost certainly rendered this claim dead on arrival.

However, assuming the plaintiffs overcame any issues of sovereign immunity and the court then analyzed the ATS using the hybrid approach (rather than the *Kiobel* and *Jesner* interpretations), the first question would be whether there is a violation of a clear norm of customary international law. As noted above, genocide is a recognized norm of customary international law.<sup>167</sup> Thus, the initial inquiry for Justice Sotomayor's test is satisfied. It is at prong two where there is

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160. *Id.* at 441.

161. *Id.* at 443.

162. Felicia Stephan, *The First Genocide of the 20th Century Before a Domestic Court*, VÖLKERRECHTSBLOG (May 28, 2018), <https://voelkerrechtsblog.org/the-first-genocide-of-the-20th-century-before-a-domestic-court/>.

163. See Rukoro I, 363 F. Supp. 3d at 452.

164. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 118 (2013) (“[T]o rebut the presumption [against extraterritoriality], the ATS would need to evince a ‘clear indication of extraterritoriality.’ It does not.”) (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) (citation omitted); see also *id.* at 124-25 (“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.”)).

165. See Rukoro I, 363 F. Supp. 3d at 441-42.

166. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004); see also *Kadic v. Karadžić*, 70 F.3d 232, 240 (2d Cir. 1995) (finding sufficient consensus existed that genocide violated international law).

167. See *Kadic*, 70 F.3d at 240.

a divergence between the current ATS interpretation and the proposed hybrid test.

The question of whether this is the kind of violation U.S. courts have an interest in enforcing is trickier than whether the violation is a clear norm of customary international law. While the United States has a clear interest in condemning genocide on the macro level,<sup>168</sup> this case would still seem to fail Justice Breyer's distinct American interests test.<sup>169</sup> The alleged torts did not occur on American soil,<sup>170</sup> the plaintiffs are largely not American citizens (although some are),<sup>171</sup> and it is hard to say that the defendant's conduct substantially affected a distinct American interest,<sup>172</sup> not least because these actions allegedly occurred between 1885-1909.<sup>173</sup> Critically, in the complaint there are extremely limited American interests implicated by the alleged actions of the defendants.<sup>174</sup> Thus, this case would seem to fail the second prong of the hybrid approach, viz, enforcing this recognized norm of customary international law would arguably be an abuse of the court's discretion because it does not concern a distinct enough American interest.

A counterargument in favor of this passing the second prong, however, is what one could almost term the "residual clause" of Justice

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168. See, e.g., *id.* (citing *Statement of Interest of the United States* at 5-13) (stating the government's position that private persons may be found liable for acts of genocide, war crimes, and other violations of international humanitarian law).

169. There is, however, a rebuttal argument that this would satisfy Justice Breyer's test since "[n]othing in the [text of the ATS] or its history suggest that our courts should turn a blind eye to the plight of victims in that 'handful of heinous actions.'" *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)). Because the "language, history, and purpose[] [of the ATS] suggest [it] was to be a weapon in the 'war' against those modern pirates who, by their conduct, have 'declared war against all mankind[,]'" there is a powerful argument in favor of finding jurisdiction under the ATS given the heinous nature of the alleged actions. *Id.* at 133-34 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*67, \*72). However, because of the distinct lack of any connection to the United States, this Note proceeds under the theory that even given Justice Breyer's broader interpretation of jurisdiction under the ATS, the plaintiffs in this case would still have failed had the case not been dismissed on other grounds. See *Rukoro I*, 363 F. Supp. 3d at 452.

170. See *Rukoro I*, 363 F. Supp. 3d at 441-42.

171. *Id.*

172. See *Kiobel*, 569 U.S. at 139 (Breyer, J., concurring) ("[T]he jurisdictional approach that I would use is . . . insisten[t] upon the presence of some distinct American interest," and is "consistent with the substantive view of the statute that we took in *Sosa*. This approach would avoid placing the statute's jurisdictional scope at odds with its substantive objectives, holding out the word of promise of compensation for victims of the torturer, while breaking it to the hope.") (internal quotations omitted).

173. *Rukoro I*, 363 F. Supp. 3d at 441-42.

174. See *id.* at 442-43 (invoking American interests in the context of human remains and records of the genocide that are allegedly currently in the possession of American museums as well as four real estate properties that funds derived from the genocide were allegedly used to purchase).

Breyer's concurrence, where he mentions the importance of making sure the United States does not become a safe harbor for a torturer or enemy of mankind.<sup>175</sup> Justice Breyer viewed the ATS as a means to ensure those individuals who have violated norms of customary international law cannot flee to the United States to avoid liability abroad.<sup>176</sup>

However, because this action is being brought against the Federal Republic of Germany and not any one individual,<sup>177</sup> this safe harbor provision would seem to also fail. There are by and large no allegations made against any specific individuals, or allegations that the United States is harboring tortfeasors liable for genocide.<sup>178</sup> Thus, dismissing this case for lack of jurisdiction would seem proper because there is no distinct American interest and allowing it to continue forward runs the risk of creating the perverse safe harbor Justice Breyer warned about.

### B. *The Case of Jamal Khashoggi*<sup>179</sup>

A case that is more in line with vindicating American interests is that of Jamal Khashoggi. Mr. Khashoggi was a Saudi Arabian national living in the United States on an "O" visa and employed as a journalist at the Washington Post.<sup>180</sup> On October 2, 2018, Mr. Khashoggi disappeared after entering a Saudi consulate in Istanbul, Turkey.<sup>181</sup> On October 19, 2018, Saudi state media officially acknowledged Mr. Khashoggi's death, blaming it on a fight inside the Turkish consulate.<sup>182</sup> This Note posits that using the hybrid test, the survivors of Mr. Khashoggi could attempt to recover damages against the foreign Saudi individuals responsible under the ATS.

As with the case of the Ovaherero and Nama peoples, this case would have little chance under the current interpretation of the ATS.

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175. *Kiobel*, 569 U.S. at 127 (Breyer, J., concurring); see also *supra* text accompanying note 129.

176. *Kiobel*, 569 U.S. at 138-39.

177. *Rukoro I*, 363 F. Supp. 3d at 436.

178. See *id.* at 441-43. The only specific individuals referenced are German military and government officials, with the exception of a German anthropologist named Felix von Luschan. *Id.*

179. As with the case of the Ovaherero and Nama peoples, there are sovereign immunity issues implicated in the case of Mr. Khashoggi. As before, these will not be addressed, and this Note assumes any issues of sovereign immunity, viz, those relating to the FSIA, are overcome for the purposes of any potential claim brought under the ATS.

180. Heather Timmons, *What Does the US Owe Jamal Khashoggi?*, QUARTZ (Oct. 19, 2018), <https://qz.com/1428499/jamal-khashoggi-what-trump-owes-khashoggi-under-us-law-and-constitution/>.

181. *Id.*

182. *Id.*

Setting aside sovereign immunity issues, the presumption against extraterritoriality would almost certainly spell doom for any claim brought by Mr. Khashoggi's survivors.<sup>183</sup>

However, under the hybrid approach, there are many factors weighing in favor of finding a distinct American interest. Mr. Khashoggi was a resident of the United States, three of his children are United States citizens and it is believed Mr. Khashoggi himself was applying for permanent residency in the United States through the green card program.<sup>184</sup> Further, Mr. Khashoggi was a well-known critic of the Saudi regime.<sup>185</sup> By allowing those responsible for the death of a U.S. resident—ostensibly killed because of his criticism of a foreign power—to escape liability, the United States risks allowing its shores to become a safe haven for torturers and enemies of mankind.<sup>186</sup> As such, in reverse order this would seem to satisfy the second prong of the hybrid test by concerning a distinct American interest.

The threshold question is whether Mr. Khashoggi's murder qualifies as a violation of a norm of customary international law. It does: torture is unequivocally a *jus cogens* norm.<sup>187</sup> There is then the question of whether enforcing this is in line with American interests and norms. This is also answered in the affirmative as the Supreme Court has held, presumption against extraterritoriality notwithstanding, U.S. courts have an interest in vindicating violations committed by the modern-day equivalents of pirates.<sup>188</sup> Thus, the case of Mr. Khashoggi would seem to pass the hybrid test. This and the case of the Ovaherero and Nama peoples show the hybrid test is not only more flexible than

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183. See *supra* Part VII.A.

184. See Timmons *supra* note 175; see also John Haltiwanger, *Killed Journalist Jamal Khashoggi's Children, Some of Whom Are Dual US Citizens, Are Reportedly Barred from Leaving Saudi Arabia*, BUSINESS INSIDER (Oct. 24, 2018), <https://www.businessinsider.com/khashoggis-children-are-reportedly-barred-from-leaving-saudi-arabia-2018-10>.

185. *Jamal Khashoggi; All You Need to Know About Saudi Journalist's Death*, BBC.COM (Dec. 11, 2018), <https://www.bbc.com/news/world-europe-45812399>; *Khashoggi: Saudi Arabia Can Never Be a Democracy 'on MBS Watch'*, AL JAZEERA (Oct. 3, 2018), <https://www.aljazeera.com/news/2018/03/khashoggi-saudi-arabia-democracy-mbs-watch-180323103543171.html>.

186. There is arguably an even greater American interest implicated given Mr. Khashoggi's death seemingly came about due to the exercise of his First Amendment rights to free speech. See U.S. CONST. amend. I, § 2.

187. *E.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

188 See *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 121 (2013) (holding that “[p]irates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction.”).

the Court's current ATS construction, but that it is applicable to the modern issues confronting U.S. courts.<sup>189</sup>

### VIII. CONCLUSION

The ATS was almost entirely dormant from the time it was enacted in 1789 until nearly two hundred years later, when it was reinvigorated with the case of *Filartiga* in 1980. In the subsequent four decades, the ATS has undergone drastic shifts in its utility and interpretation. With the Court's recent decisions in *Kiobel* and *Jesner*, the viability of the ATS for litigating human rights violations has diminished drastically. The Court has held the ATS cannot be applied to foreign corporate defendants and that it is also subject to the presumption against extraterritoriality. This means the ATS is virtually off-limits for conduct outside the United States and would rarely be invocable against a foreign defendant unless he committed a tort against another alien within the borders of the United States. These narrow views of the ATS have effectively rendered it, to use the language of *Sosa*, stillborn.<sup>190</sup>

This Note argued the Court's recent interpretations of the ATS are flawed. The *Sosa* Court envisioned potential new causes of action arising under the ATS, and yet subsequent cases heard by the Court have seemingly foreclosed any possibility of such an option. This Note contended that the Court should return to the principles laid down in *Sosa* using Justice Breyer's concurrence in *Kiobel* and Justice Sotomayor's dissent in *Jesner*. By relying on norms of international law to inform courts of whether a norm is definite enough to be considered viable under the ATS but enforcing new causes of action only where there is a distinct American interest, the ATS can be appropriately narrowed while also allowing for redress of torts committed by modern day pirates (e.g., terrorists, torturers, perpetrators of genocide).

This Note also showed how this hybrid test is applicable to modern problems facing U.S. courts, as seen in the ongoing case of the Ovahehoro and Nama peoples of Namibia against the government of Germany, as well as hypothetical future litigation by the survivors of

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189. There is some evidence that while the Supreme Court seems intractable on the ATS, some lower courts are moving towards adopting a more flexible standard such as the one proposed by this Note. See, e.g., *Jane W. v. Thomas*, 354 F. Supp. 3d 630, 639 (E.D. Penn. Dec. 14, 2018) (“[T]he [c]ourt [in denying the defendant’s motion to dismiss] concludes that Plaintiffs’ ATS claims touch and concern the United States with sufficient force to displace the general presumption against jurisdiction over extraterritorial claims . . . . Based on these pleadings, the [c]ourt concludes that jurisdiction over Plaintiffs’ ATS claims are proper under the *Kiobel* standard.”).

190. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1437-38 (2018) (Sotomayor, J., dissenting).

Jamal Khashoggi against Saudi Arabian officials. While the plaintiffs in those cases would likely face insurmountable obstacles in bringing their claims for relief in both their own domestic courts and the foreign courts of the defendants, the ATS could and should serve as a vehicle for such tort victims to seek redress, even if a potential victory is purely symbolic in nature. If America wishes to be the shining city upon a hill,<sup>191</sup> its courts must set an example and serve as forums where aliens can find justice.

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191. See *Matthew* 5:14 (King James) (“A city that is set on a hill cannot be hid.”); see also President-Elect John F. Kennedy, Address to Joint Session of the Mass. Legislature (Jan. 9, 1961) (“That we shall be as a city upon a hill—the eyes of all people are upon us. Today the eyes of all people are truly upon us.”); President Ronald Reagan, Farewell Address to American People (Jan. 11, 1989) (“I’ve spoken of the shining city all my political life, . . . in my mind, it was a tall proud city built on rocks stronger than oceans, wind swept [sic], God blessed, and teeming with people of all kinds living in harmony and peace—a city with free ports that hummed with commerce and creativity, *and if there had to be city walls, the walls had doors, and the doors were open to anyone with the will and the heart to get here.*”) (emphasis added); Then-Senator Barack Obama, University of Mass. at Bos. Commencement Address (June 2, 2006) (“As the earliest settlers arrived [in America], they dreamed of building a City upon a Hill. . . . I see students . . . believing like those first settlers that they too could find a home in this City on a Hill—that they too could find success in this unlikelyst of places.”).





