UCSD UNDERGRADUATE LAW REVIEW

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# In Pursuit Of Global Human Rights Accountability: The Filartiga Amendment To The Alien Tort Statute

**ABSTRACT.** 28 U.S.C. § 1350, dubbed the "Alien Tort Statute" (ATS), was part of the Judiciary Act of 1789 and grants United States federal courts original jurisdiction over tort cases committed by aliens against other aliens. An alien in this instance is an individual who is not a citizen or national of the United States. For almost 200 years, the law was rarely used, until 1976 when *Filartiga v. Pena-Irala* created a precedent which turned the ATS into a tool for global human rights. In the coming three decades, the ATS was used by aliens who were victims of human rights violations to bring a charge or seek compensation from their perpetrators. This precedent ended with *Kiobel v. Royal Dutch Petroleum* (2013) which placed a presumption against extraterritoriality, thereby barring the use of ATS for human rights violations committed abroad. This article argues that Congress should add the "Filartiga Amendment" to the ATS in order to explicitly encode the Filartiga precedent. The amendment would grant federal district courts with 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, regardless of whether or not the tort was committed in the territory of the United States. This empowers the ATS to be used as a tool for global human rights accountability and is in line with the United States' stated mission of being a global leader in human rights.

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## INTRODUCTION

Seventeen-year-old Joelito Filartiga was taken from his home in Paraguay by state forces in the middle of the night and never returned. His sister, Dolly Filartiga, spent the entire night wandering their village screaming for Joelito. She was eventually escorted by state forces to a warehouse to see Joelito's beaten and mangled corpse. Dolly's brother was a victim of torture and murder at the hands of Paraguayan police. Her family was never able to attain legal remedy for Joelito in Paraguay because of the military regime's iron grip on the justice system. However, four years later, she was finally able to bring her brother's murderer to court over 4,500 miles away from Paraguay in New York. In America, she was able to get the fair trial for her brother's murder that she could not get in Paraguay. Seeing as the entire crime took place in Paraguay and all of the involved parties were Paraguayan citizens, how was she able to attain justice in the United States? The Filartiga family sued Paraguayan state forces under the Alien Tort Statute—a statute which had been lying dormant in the American legal code for over 200 years.

The Alien Tort Statute (ATS) was codified in 1789 and gives US courts jurisdiction over cases of torts committed by aliens against other aliens. An alien is defined as an individual who is not a citizen or national of the United States.[1] The ATS was largely unused in American courts until the landmark case of *Filartiga v. Pena-Irala* in 1980. *Filartiga* set a precedent for US courts hearing cases concerning events that occurred outside of the United States involving aliens. Thus began a series of cases of aliens filing complaints against other aliens for torts that did not occur on United States territory and yet American courts were given jurisdiction to hear these cases, such as *Kadic v. Karadzic*, *Hilao v. Estate of Ferdinand Marcos*, and *Paul v. Avril*. Many of these cases involved human rights abuses being committed on aliens by officials of their own government or by proxies of their government. *Filartiga* had given the ATS a use in American courts: to empower them to deliver justice to victims of human rights violations even in cases where neither the victim nor the perpetrator had anything to do with the United States.

This period of America serving as a global court for human rights soon ended with *Kiobel v. Royal Dutch Petroleum*, which established the presumption against extraterritoriality in cases under the ATS. In a unanimous decision, the Supreme Court ruled that a presumption against extraterritoriality was warranted in ATS cases due to fears concerning international disputes as a result of ATS cases, as well as due to an

[1] 8 U.S.C. § 1101(a)(3).

absence of evidence that the ATS was originally meant to encompass actions which occurred internationally. *Kiobel* requires that for a court to have jurisdiction over a case concerning the ATS, the claim must "touch and concern territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[2] This effectively ended the possibility for victims of human rights abuses abroad to pursue cases in the United States as they previously had been able to do so.

For almost 30 years, many individuals were able to bring their abusers to court in the United States. The total amount of damages awarded to these victims has numbered in the millions of dollars. Aliens who, either themselves or their family, have been victims of horrible human rights atrocities in their home countries such as genocide, ethnic cleansing, forced labor, and extrajudicial killings have been able to attain justice in the courts of the United States when they were not able to in their home countries. But this all came to an end with *Kiobel*. This article will explore the judicial evolution of the Alien Tort Statute and raise criticisms of the *Kiobel* decision. Firstly, the test set in the *Kiobel* standard is problematic because it has resulted in conflicting interpretations among lower courts about its "touch and concern territory of the United States" doctrine. Secondly, *Kiobel* undermines and runs counter to the United States' commitment to international human rights treaties. Thirdly, from a human rights point of view, *Kiobel* is regrettable as it blocks human rights abuse victims from receiving redress from their abusers. Being a unanimous decision, *Kiobel* will be difficult to overturn through succeeding Supreme Court decisions. To solve this problem, the article will end by prescribing an amendment to the Alien Tort Statute encoding the *Filartiga* precedent.

## I. THE ALIEN TORT STATUTE

### *A. The Judiciary Act of 1789*

The Alien Tort Statute (ATS), also known as the Alien Tort Claims Act (ATCA) was created as part of the Judiciary Act of 1789. This act was adopted in the first session of the First United States Congress. The primary purpose of this act was to establish the federal judiciary of the United States. The act created circuit courts and district courts all across the original states, created the office of the Attorney General, as well as set the number of justices on the Supreme Court. The act also imbued the

[2] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010), aff'd, 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013).

Supreme Court with exclusive original jurisdiction over all civil actions between states and between states and the United States. Additionally, the act gave the Supreme Court appellate jurisdiction over the decisions of the federal circuit courts. All in all, this Act served as the bedrock of the American federal judiciary system.

### *B. Section 1350*

Section 1350 of the Judiciary Act of 1789 was dubbed as the Alien Tort Statute. The ATS states 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."[3] The three key elements here involve the fact that there was (1) a tort (2) committed by an alien and (3) it was in violation of the law of nations or a treaty of the United States. A tort is defined as "an act or omission that gives rise to injury or harm to another."[4] As aforementioned, an alien is defined as an individual who is not a citizen or national of the United States. The law of nations mentioned here is not specifically defined, but the concept largely has roots in the theories of English jurist William Blackstone who stated that, "[T]he law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."[5]

The original intention of the inclusion of the ATS in the act is largely unknown among scholars.[6] Many speculate that it was the founders' way of signaling to the European powers that they recognized the laws of nations in order to gain respect as a very young nation. Others hypothesize that it might have been for economic reasons in order to assure foreign dignitaries and merchants that they would have a means of protection should they be the victim of a tort while en route to or in the United States. Another theory is that the drafters of the ATS had distrust in the state courts' ability to interpret and enforce the laws of nations and so the ATS was created so that violations of the laws of nations and international treaties could be dealt with on the federal level. Additionally, Blackstone's commentary on the "law of nations" notes that there are three principal violations of the laws of nations: violation of safe passageways, torts

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3 28 U.S.C. § 1350.

4 *Tort*, Legal Info. Inst., https://www.law.cornell.edu/wex/tort (last visited Apr. 5, 2022).

5 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).

6 Carolyn A. D'Amore, *Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 Akron L. Rev. 596 (2006).

against ambassadors, and piracy. Another possible explanation, then, is that the ATS was created as a tool for victims of torts committed by pirates.

After 200 years of very minimal use, the ATS was revived in 1980 with *Filartiga v Pena-Irala* and began to serve a new function: a tool for human rights victims to sue their abusers.

## II. A TOOL FOR HUMAN RIGHTS

### *A. Filartiga v. Pena-Irala*

*Filartiga v. Pena-Irala* was a landmark case for the ATS that established a precedent in which aliens could bring other aliens to court in the United States for human rights violations even if it did not occur within the territory of the United States. The precedent set by *Filartiga* is that a federal court has subject matter jurisdiction over a case brought under the Alien Tort Statute so long as all of the following conditions are met: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*e.g.*, United Nations treaties).

The case involves a dispute between three Paraguayan nationals: Dolly Filartiga, her father Joel Filartiga, and Americo Pena-Irala, the former Inspector General of Police of the city of Asuncion, Paraguay. The Filartiga family allege that on March 29, 1976, seventeen-year-old Joelito Filartiga was kidnapped by state forces in the middle of the night. Dolly Filartiga, Joelito's brother, ran around their village screaming her brother's name and attempting to find where her brother was taken to. Then, Pena-Irala's underlings brought Filartiga to view the mutilated corpse of Joelito. The Filartigas claim that Pena-Irala and his men had tortured Joelito to death. They claim that this was in retaliation for Joel Filartiga's activism and opposition to the Paraguayan government. Later that year, the Filartiga family attempted to sue Pena-Irala and his police forces in Paraguayan courts for the murder of Joelito. Their lawyer was promptly arrested and their attempt at justice for Joelito failed. All of these events occurred in Paraguay.

Eventually, the Filartigas and Pena-Irala separately migrated to the United States. In 1979, Dolly Filartiga learned that Pena-Irala was also in the United States and, with the help of the Center for Constitutional Rights, brought Pena-Irala to court. Filartiga alleged that Pena-Irala had violated numerous international treaties and customs such as the Universal Declaration of Human Rights, the United Nations Charter, and the American Declaration of the Rights and Duties of Man. Their lawsuit was initially dismissed by the District Court for the Eastern District of New York because although

the court recognized torture to be a violation of international law, it viewed international law as only applicable to state relations and does not apply to individuals.

The Filartigas then brought their suit to the Second Circuit Court of Appeals. Here, they achieved success in overturning the district court's decision. The circuit's decision to reverse the district court's ruling set a precedent for aliens being able to sue other aliens for torts that did not occur within the territory of the United States. The Alien Tort Statute states that courts have jurisdiction over "all causes where an alien sues for a tort only (committed) in violation of the law of nations."[7] The circuit interpreted this as to meaning that if an individual within their territory is found to have violated the law of the nations, of which torture is an example of a violation, then that court has jurisdiction to deal with the matter.

In 1981, a default judgment against Pena-Irala was ordered by the district court and the case would proceed to a magistrate to determine how much compensation the Filartigas were entitled to. In 1984, the magistrate found that the Filartigas were entitled to $10,385,364 of compensation for the loss of Joelito and the emotional and mental toll that his wrongful death caused Dolly and Joel Filartiga. The family, however, was never able to claim their award as Pena-Irala lacked the resources to pay the amount. Still, the Filartiga family were largely satisfied with the result as they were not necessarily seeking any monetary compensation. Such is true of many other individuals pursuing action under the ATS. Simply receiving a court judgment is sufficient for receiving closure for the abuse they or their loved ones experienced.

### *B. Post-Filartiga Cases*

Following the ruling in *Filartiga*, several cases were brought before American courts by aliens under the Alien Tort Statute. *Filartiga* had established a precedent that that courts had federal jurisdiction over cases in which (1) an alien sues (2) for a tort (3) committed in violation of the law of nations. All three conditions must be satisfied for jurisdiction to apply. Another important precedent created by *Filartiga* is that in determining whether an act constitutes a violation of the law of nations, the court "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." Both precedents opened the door for victims of human rights violations across the world to bring their assailant(s) to court.

The string of cases after *Filartiga* serve as evidence for the ATS's ability as a tool to achieve justice for victims of human rights abuses. For many of these victims, they

[7] Judiciary Act of 1789 § 9(b), 28 U.S.C. § 1350.

would not have been able to attain justice against their abusers in their native country because of the latter's influence over their native country's judicial system. With the ATS, victims are able to receive a fair trial in the United States.

### *1. Kadic v. Karadzic*

A group of plaintiffs, comprised of Bosnia and Herzegovinian nationals, sued Radovan Karadžić on charges of genocide, rape, forced impregnation, and torture, among other actions described by the plaintiffs as violations of the law of nations. Karadžić was the leader of the Bosnian-Serb military forces which the group allege were the perpetrators of violations against them. All events mentioned in the suit took place in the territory of the former Republic of Yugoslavia. Karadžić himself is a former citizen of the former Republic of Yugoslavia. The plaintiffs submitted their case to the United States District Court for the Southern District of New York where their case was dismissed for lack of subject matter jurisdiction. The plaintiffs appealed to the Second Circuit Court of Appeals wherein the decision of the district court was reversed, and the case was remanded.[8]

John Newman, Chief Judge of the Second Circuit, cited *Filartiga* numerous times in his decision and used the standards it had established for ATS cases. Newman accepts that the suit suffices the first two conditions, an alien suing for a tort, and the only issue at hand was determining if the allegations against Karadžić constituted violations of the law of nations. Newman held that the allegations against Karadžić, specifically genocide, war crimes, and torture, clearly violated the laws of nations. One of Karadžić's defenses had been that he was not acting in any state capacity and therefore could not be brought to court over violations of international laws. Karadžić cites that in *Filartiga*, the defendant had been acting as a member of the state forces. Karadžić made the paradoxical claim that he was not a member of any state force despite also declaring himself as the president of an unrecognized Bosnian-Serb nation. This defense is rejected by Newman, however, who contends in his decision that the law of nations does not only apply to states and state actors but is also applicable to the actions of private citizens as well.

After the Second Circuit reversed the ruling of the district court and held that federal courts had subject matter jurisdiction over the case, it was remanded back to the district court to follow the guidelines set by the circuit's decision. In this trial, a jury decided that the plaintiffs were to be given approximately $4.5 billion in compensatory

[8] Kadic v. Karadzic, 70 F.3d 232, 237 (2d Cir. 1995).

and punitive damages.

### *2. Hilao v. Estate of Ferdinand Marcos*

A case often trumped as one of the big successes of the ATS is *Hilao*. In this case a group of plaintiffs were able to bring a former world leader to court and were awarded damages by a jury under the ATS. The number of plaintiffs in this case was upwards of 9,000 and over $1.2 billion was awarded by the jury in damages.[9]

Former Philippine President Ferdinand Marcos ruled the Philippines for over 20 years before being ousted from power by a civil movement which has come to be known as the "People Power Revolution." During his reign, Marcos had almost complete control of the government due to his declaration of martial law in the country from 1972-1981. During this period, over 3,000 extrajudicial deaths and 30,000 tortures were documented.[10] Several international human rights groups such as Amnesty International stated that the Marcos era in the Philippines was a time of major human rights atrocities and abuses.[11]

After being ousted from power in 1986, Ferdinand Marcos and his family sought refuge in the United States. Upon arrival in Hawaii, the Marcos family were met with a flurry of cases against them alleging human rights abuses. Over 10,000 cases were filed, and these would eventually be consolidated into a class-action suit known as *Hilao v. Estate of Ferdinand Marcos*. The human rights abuses alleged in this case included torture, disappearance, unjust arrest, and summary execution. Plaintiffs claim that these acts were committed by state forces under control of then-President Marcos.

This case was also notable in that it used inferential statistics to determine the amount of damages to be awarded. The court recognized that it would not be able to hear the testimonies of the over 10,000 plaintiffs, and so it randomly sampled a set of plaintiffs and used their experiences to be representative of the whole. The results of this assessment were supplied to the jury who, after deliberation, would decide to award the plaintiffs with a far larger amount of money that the court's statistical

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9 Hilao v. Est. of Marcos, 103 F.3d 767 (9th Cir. 1996).

10 Rachel A.G. Reyes, *3,257: Fact checking the Marcos killings, 1975-1985*, Manila Times (Apr. 12, 2016), https://www.manilatimes.net/2016/04/12/featured-columns/columnists/3257-fact-checking-the-marcos-killings-1975-1985/255735 (last visited June 15, 2022).

11 *Report of an Amnesty International Mission to The Republic of the Philippines*, Amnesty Int'l (1976).

analysis recommended. The court's analysis recommended an award amount of $767,491,493, but the jury awarded over $1.2 billion. All in all, this was a notable victory of the ATS because thousands of human rights victims were able to attain justice for their oppression at the hands of a world leader.

### *3. Paul v. Avril*

Another big victory for the ATS was in the 1991 case of *Paul v. Avril* wherein victims of the Haitian military leader and former president Proper Avril were awarded $41 million in damages for human rights abuses. This case serves as an example of the power of the ATS because it was the first time that a Haitian leader or member of the military was held accountable in a court for human rights abuses. Six Haitian activists sued Prosper Avril, alleging to have suffered human rights abuses during his reign as president of Haiti.

The six activists, headed by Evans Paul the former mayor of the Haitian capital Port-au-Prince, allege that they were victims of human rights abuses at the hands of state forces under the orders of Avril. These human rights abuses include "torture[,] cruel, inhuman or degrading treatment; arbitrary arrest and detention without trial; and other violations of customary international law." The activists had been protesting Paul's military government and were advocating for democratic reforms in Haiti. They were subsequently arrested and beaten by state forces among the other human rights violations aforementioned.

Avril was sued by the six activists under the ATS in the U.S. District Court of the Southern District of Florida. Avril repeatedly dodged investigations and refused to cooperate with court proceedings which led to a default judgment being held against him. A federal magistrate would go on to award Avril's victims $41 million judgment in compensatory damages.[12]

### *4. Licea v. Curacao Drydock Co., Inc.*

A group of Cuban nationals sued the Curaçao Drydock Company for illegal trafficking and subjecting them to inhumane working conditions in Curaçao and were awarded compensation for the physical and psychological torts they experienced. All events took place in Cuba, but the plaintiffs were residing in Miami when they

[12] Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993).

launched their case.

The plaintiffs allege that they were intimidated by Cuban state forces into working for the Curaçao Drydock Company by being threatened with imprisonment if they refused. Upon arriving at the worksite in Curaçao, the plaintiffs' passports were confiscated, thus essentially trapping them there. They were then forced to work under extremely harsh conditions. They worked very long hours every day for over a month, forced to perform extraneous and intense physical labor, and they were not given the proper safety gear. This resulted in all three plaintiffs sustaining workplace-related injuries including burns and broken bones. The plaintiffs state that they were not given proper medical treatment and often had to treat their own injuries themselves with makeshift remedies and bandages.

Additionally, the plaintiffs had almost no contact with their families throughout the entire time that they were forced laborers. Their families back in Cuba faced threats of imprisonment and intimidation from state forces for attempting to expose the reality of the plaintiffs' situation and the role that the Cuban government played in it. All of the plaintiffs reported that they were still experiencing chronic psychological and physical effects of their time as forced laborers.

In his decision, district judge James King considered the reports of forced labor and human trafficking in this case as constituting violations of international law, and thus deemed the ATS to be applicable and jurisdiction was granted. Furthermore, King included at length in his decision a discussion of the human rights situation in Cuba and stated as fact in his decision that "Cuba is a totalitarian state that abuses human rights." In the end, the group of plaintiffs were awarded a total of $80 million in compensatory and punitive damages.

### *C. Sosa Limits*

*Sosa v. Alvarez-Machain* is deemed to be another landmark case in the history of the Alien Tort Statute. In 2004, the case was heard by the Supreme Court and this was the first instance in which the Supreme Court would be ruling on the ATS. In *Sosa*, the Supreme Court upheld the precedent that *Filartiga* had set for giving federal courts jurisdiction over cases involving aliens suing other aliens for human rights abuses. However, the Supreme Court in *Sosa* placed limitations on what actions constituted human rights abuses and created the "Specific, Universal and Obligatory" test to decide if a certain action constitutes a violation of the law of nations as described by the ATS. *Sosa* is an important case in the discussion of the ATS as it set specific directions for

lower courts to be able to follow when dealing with the ATS.

### *1. Sosa v. Alvarez-Machain*

In 1985, an American DEA agent was captured, tortured, and killed in Mexico. Humberto Alvarez-Machain was deemed by the DEA to be an accomplice in the murder of the agent. The DEA attempted to coordinate with the Mexican government in order to extradite Alvarez, but they were unsuccessful. As a result, the DEA hired a group of Mexican nationals, including Jose Sosa, to capture Alvarez and bring him to the United States. Alvarez states that he was forcibly abducted by Sosa and was trapped in a hotel room for one night until being forced onto a plane bound for the United States.

Upon reaching the United States, Alvarez was put on trial for his role in the murder of the DEA agent. His case, *United States v. Alvarez-Machain*, would eventually reach the Supreme Court and dealt with issues such as if courts were able to try individuals who had been brought there through forced abduction. Alvarez was eventually acquitted because of lack of evidence. Alvarez then launched a series of suits including one against Sosa for arbitrary arrest under the ATS. Alvarez won the case in district court which concluded that Sosa was guilty of violating international laws against arbitrary arrests and therefore was liable under the ATS. Sosa appealed to the Ninth Circuit Court of Appeals, but his judgment was upheld there as well. The case was then brought to the Supreme Court level.

In applying the "Specific, Universal and Obligatory" test that the Supreme Court created in *Sosa* to the case of *Sosa* itself, the Supreme Court found that Alverez's charges against Sosa failed to live up to the scrutiny of the test. Alvarez cited the United Nations Declaration of Human Rights which denounced arbitrary arrests. The Supreme Court ruled that the Declaration failed the obligatory part of the test as it was merely a declaration of principle and was not meant to be interpreted as codified international law. For it to pass the obligatory requirement, there must be language in the treaty cited that requires an action on the part of the state party. Because the cited treaty (The United Nations Declaration of Human Rights) failed this test, the Supreme Court reversed the decision of the lower courts and acquitted Sosa.[13]

[13] Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004).

### *2. "Specific, Universal and Obligatory" Test*

The key contribution of Sosa to the history of the ATS is the establishment of a set of guidelines and standards by which to judge whether actions constituted sufficient reason for imploring the ATS. The Supreme Court did not want for just any violation to be liable under the ATS, but rather a very specific set of the most egregious violations only. To this end, the Supreme Court established the "Specific, Universal and Obligatory" test. This test is used to decide if the international norm that was allegedly violated is of enough significance that the violation would be liable to suits under the ATS.

Firstly, the norm has to be specific. The Supreme Court notes that when the ATS was first drafted, Congress was referencing William Blackstone's list of violations of the laws of nations created in his work, "Commentaries on the Laws of England." Specifically, the violations are attacks on ambassadors, piracy, and violations of safe passages. For an act to be considered international law under the ATS, it must have been codified with the same level of specificity as that created by the draftees of the ATS and Blackstone. Secondly, the norm must be universally recognized. In the 18th century when the ATS was first drafted, piracy was a prominent example of a universally recognized violation. In the modern era, a norm can be deemed universal if it is present in many international treaties. Thirdly, the norm must be obligatory. The code in which the norm is rooted must hold some sort of legally binding power. In the case of *Sosa*, the United Nations Declaration of Human Rights was deemed to not have a legally binding status and thus the claims of arbitrary arrest were deemed insufficient to grant liability under the ATS.

## *D. Kiobel v. Royal Dutch Petroleum*

In 2013, the Supreme Court ruling in *Kiobel v. Royal Dutch Petroleum* significantly hampered the ATS as a tool for human rights and essentially ended the streak beginning with *Filartiga* of victims being able to receive justice through the ATS.

Esther Kiobel, a Nigerian national, along with a group of other Nigerian nationals sued a group of Dutch, British, and Nigerian corporations which they allege aided the Nigerian government in committing human rights atrocities on the people of Nigeria which violated the laws of nations. Beginning in the 1950s, Royal Dutch Petroleum, through its subsidiary Shell Petroleum Development Company of Nigeria (SPDC),

began large-scale oil exploration, drilling, and operations in the Ogoni region of Nigeria. The activities of SPDC began to have a negative impact on the people in that region because of the effect that SPDC's operations had on the environment. A group of people from the Ogoni region began protesting the SPDC's operations. The plaintiffs allege that in 1993, SPDC conspired with the government of Nigeria, which at that time had been under military rule, to violently suppress the protesters. The plaintiffs state that Nigerian military forces committed several human rights atrocities on the people of Ogoni including murder, rape, destruction of property, and attempted genocide. The plaintiffs allege that SPDC aided the Nigerian forces in carrying out these atrocities by "(1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers."[14]

In 2002, Esther Kiobel, the wife of a victim of the Nigerian forces' actions, launched a class-action suit against Royal Dutch Petroleum under the ATS for several alleged violations of the laws of nations. These violations include extrajudicial killing, torture, property destruction, and crimes against humanity. At the time of launching her case, Kiobel was a legal resident in the United States after being granted asylum. The District Court of the Southern District of New York dismissed part of the plaintiffs' case because some of the violations they alleged failed the specificity part of the "Specific, Universal, and Obligatory" test as prescribed in *Sosa*. However, other allegations, namely those of torture and crimes against humanity, were not dismissed. This resulted in an interlocutory appeal that brought the case to the Second Circuit Court of Appeals. The circuit court's decision dismissed the entire case of the plaintiffs, holding that foreign corporations could not be held liable under the ATS, and the plaintiffs subsequently appealed to the Supreme Court.

The Supreme Court accepted the case and in Chief Justice John Roberts' opinion affirmed the ruling of the lower courts dismissing the plaintiff's case and established an important precedent for cases dealing with the ATS. The key takeaway from *Kiobel* was the creation of a presumption against extraterritoriality in cases dealing with the ATS. The Roberts Court feared international backlash arising out of ATS cases. Kiobel established that only cases that "touch and concern territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application" could be eligible for trial. This effectively ended the trend of cases that began with *Filartiga* as the vast majority of these cases involved events that did not occur in the

[14] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010), aff'd, 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013).

United States and largely had nothing to do with the United States.

### *E. Jesner v. Arab Bank*

Most recently, in 2018, the Supreme Court added a new chapter to the judicial history of the ATS. *Jesner v. Arab Bank* added yet another limitation to the ATS, that foreign corporations could not be held liable under the ATS.

Between 2004 and 2010, 5 ATS cases representing over 6,000 plaintiffs (almost all of whom are foreign nationals) were filed against Arab Bank, PLC. The plaintiffs' complaints ranged from a variety of grievances, including the fact that they or their family members had been injured, killed, or abducted during attacks by the group Hamas. The plaintiffs alleged that these attacks by Hamas were funded in part by Arab Bank. Additionally, the plaintiffs alleged that Arab Bank funded terrorist organizations and allowed terrorists to open and maintain bank accounts. One specific example cited by the plaintiffs is that Arab Bank gave out payments to families of suicide bombers whose acts had caused injury to plaintiffs and their families. Almost all of the alleged acts took place across the Middle East. Moreover, plaintiffs alleged that the Arab Bank had utilized the Texas-based charity Holy Land Foundation for Relief and Development to launder money for Hamas and terrorist organizations.

The court in *Jesner* sought to answer a question that *Kiobel* had left open: whether foreign corporations could be held liable under the ATS. Before reaching the Supreme Court, lower court rulings on *Kiobel* had deemed that the plaintiffs' case could be dismissed on the notion that foreign corporations could not be sued under the ATS. However, in the Supreme Court's decision, Chief Justice Roberts neglected to include this precedent and instead focused on the extraterritoriality aspect. In crafting the opinion for *Jesner*, Justice Kennedy referred to *Kiobel* extensively and utilized similar logic in his decision. Among other reasons, Kennedy noted that allowing foreign corporations to be sued in the United States by foreign nationals under the ATS would set a global precedent that could harm the activities of American corporations abroad. Additionally, Justice Kennedy cited that the *Jesner* case had been creating conflict in the United States' relationship with Jordan and avoiding this sort of international conflict was the exact reason for which the ATS had been created.[15] Because of these reasons and others, the Court ultimately set a precedent that the ATS could not be used against foreign corporations.

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[15] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1394, 200 L. Ed. 2d 612 (2018).

## III. KIOBEL CRITICISMS

### *A. Circuit Split*

The Court in *Kiobel* held that in order for a court to have jurisdiction over a case under the ATS, the facts of the case should "touch and concern territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." This ruling answered the question of what cases are not given jurisdiction under the ATS, but the Court failed to answer many questions created by this standard. For example, there was no definition of "sufficient force" nor were there any guidelines to determine what amount of force is "sufficient" to displace the presumption against extraterritoriality. Additionally, there was no explanation of what counts as "touching" or "concerning" the territory of the United States. Ultimately, the *Kiobel* standard created more confusion and vagueness in a statute that was already initially quite broad.

This lack of exact guidelines has resulted in a circuit split with courts being forced to create their own methods of deciding whether an action passed the "touch and concern" test of *Kiobel*. Some courts have opted to use the *Morrison* "focus" test to determine whether a case is extraterritorial. The focus test was established by the Supreme Court in *Morrison v. National Australia Bank Ltd* and is commonly cited by courts in cases involving a presumption against extraterritoriality. First, one must identify what is the "focus" of the statute being applied and which activity in the specific case is representative of that "focus." If that activity which is the focus of the statute occurred extraterritorially, then the case fails to overcome the presumption against extraterritoriality.[16] Some courts have elected to use this test, such as the Fifth Circuit, but others chose not to, such as the Second Circuit which explicitly rebuked the *Morrison* focus test's usage in ATS cases. This has resulted in major differences in outcomes.

As has been discussed, the "touch and concern" test has spawned numerous different interpretations, and there is a lack of unity among lower courts in which to use. This has resulted in different outcomes depending on which circuit your case is tried by. This is problematic in the United States which values rule by law, not rule by man. This is evidenced by the fact that all elected officials in the United States pledge to

[16] Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010).

serve and uphold the Constitution, not any other individual or politician.[17] The vagueness of the *Kiobel* decision leaves open the possibility of getting different results depending on which circuit your case is tried in. This goes directly against the concept of rule of law and is unacceptable in the American judicial system.

### *1. Al Shimari v. CACI Premier Technology, Inc.*

The Fourth Circuit was one of the first to rule on an ATS case post-*Kiobel* in *Al Shimari v. CACI Premier Technology, Inc*. In this case, the plaintiffs were able to successfully rebut the presumption against extraterritoriality. Four Iraqi plaintiffs brought action under the ATS against CACI Premier Technology, Inc., a corporation headquartered in the U.S. The plaintiffs allege that while they were prisoners in Abu Ghraib, a prison facility controlled by the U.S. in Iraq, they were tortured and abused by personnel supplied by CACI Premier Technology. These personnel were hired by the U.S. as interrogators when civil supply had run low. Some examples of the mistreatment that the plaintiffs allege they were victims to include being "repeatedly beaten," "shot in the leg," "repeatedly shot in the head with a taser gun," and "subjected to mock execution." The plaintiffs sued the defendant under the ATS for "war crimes, torture, and cruel, inhuman, or degrading treatment."[18]

The Fourth Circuit forewent applying the focus test and instead opted for a holistic review of all of the relevant circumstances and a "fact-based analysis." One consideration of the court was that fact that the alleged torturers were hired by a company based in the U.S. Additionally, the claims of human rights abuses occurred during the performance of a contract that CACI Premier Technology, Inc. had with the U.S. government. Finally, although Abu Ghraib is not U.S. territory, the facility at that time was completely controlled and operated by the U.S. With these factors in mind, the court ultimately ruled that the presumption against extraterritoriality had been overcome in this case and the suit under the ATS was allowed to continue.

One key aspect that sets this case apart from other circuit decisions is the court's emphasis on the claims, and not the tort itself. In stating that "[I]t is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory" the Fourth Circuit is placing emphasis on the claims having to pass the "touch and concern" test which distinguishes it from later

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[17] John R. Vile, A Companion to the United States Constitution and its Amendments (4th ed. 2006).

[18] Al Shimari v. CACI Premier Technology, Inc., 657 F. Supp. 2d 700 (E.D. Va. 2009).

circuits which instead emphasized the actual torts having to pass the "touch and concern test."

### *2. Adhikari v. Kellogg Brown & Root, Incorporated*

In contrast to the Fourth Circuit, the Fifth Circuit in *Adhikari v. Kellogg Brown & Root, Incorporated* employed the *Morrison* focus test and places the focus of the statute as "conduct that violates international law," meaning that they emphasize the actual tort and not just the claims. Using this focus, the court in *Adhikari* takes up an even broader view of the presumption against extraterritoriality established in *Kiobel* and holds that only torts which occurred on U.S. territory are applicable for action under the ATS. With this, the court barred the plaintiffs in the case from rebutting the presumption against extraterritoriality. This presents a large discrepancy in the courts' interpretation of the *Kiobel* decision. The Fifth Circuit utilized a different standard which would render drastically different results than the standard used in the Fourth Circuit.

In this case, 12 Nepali citizens sued Kellog, Brown & Root, Inc. (KBR), a U.S. military contractor based in Houston, for allegedly committing human rights abuses against them or a family member. In 2004, a group of 12 Nepali men were recruited by a Jordanian company to work on a project in Jordan. Upon arrival in Jordan, the men were told that they were instead going to be taken to Iraq to work in Al-Asad for KBR. While in transit to KBR's worksite in Al-Asad, their transportation was captured by Iraqi insurgents and almost all of the men were killed. The deceased are represented as plaintiffs in this case by their family members. The sole plaintiff who survived the ordeal and made it to the worksite claims that he was subjected to horrific and abusive work conditions for over 15 months. The 11 deceased men, represented by family members, along with the sole survivor sued KBR for their alleged involvement in their illegal trafficking.

Upon employment of the focus test, the court placed the focus of this case as the torts themselves. Because the torts took place on foreign soil, the case was barred for extraterritoriality. This exposes a problem of the *Kiobel* standard because of the likelihood that the Fourth Circuit would have ruled differently considering the similar details between this case and *Al Shimari*. Similar to *Al Shimari*, the plaintiffs experienced human rights violations while under the control of a U.S. company and while in transit to a U.S.-controlled site. While this may be speculation, it is clear to see how these two cases highlights major discrepancies in the lower courts' interpretations

of *Kiobel* and goes to show why *Kiobel* is problematic and requires overturning.

### *B. International Human Rights Law*

The United States has long expressed a commitment to upholding and protecting human rights globally. Eleanor Roosevelt, First Lady of the United States from 1933–1945, was the first Chairperson of the United Nations Commission on Human Rights.[19] Additionally, Roosevelt also played a key part in the formulation of the Universal Declaration of Human Rights. In 1977, the United States signed the International Covenant on Civil and Political Rights (ICCPR). Among the rights enshrined in this treaty include the "right to life and freedom from torture and slavery."[20] Also in 1977, the United States signed onto the International Covenant on Economic, Social, and Political Rights which holds that states are to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[21] Several of the cases brought before courts under the ATS allege instances of violations of rights that the United States has expressed it will uphold through its signature on these treaties. *Doe I v. Nestle USA, Inc* pertains to the issue of child slavery which is a clear violation of article 8 of the ICCPR. *Ellul v. Congregation of Christian Bros* contains a proven violation of article 7 of the ICCPR which states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Yet in both instances, despite explicit violations of rights which the United States has committed to upholding, American courts did nothing as they were constrained by the *Kiobel* standard.

The United States' involvement in international human rights is historically grounded and remains prominent in the contemporary. The Declaration of Independence and the United States Constitution were largely inspired by enlightenment thinkers espousing ideas of liberalism and self-determinism. These ideas, enshrined in the founding documents of the United States, serve as part of the foundation of modern-day human rights.

Furthermore, in the Nuremburg Trials, whereby Nazi officials were placed on trial for crimes against humanity, by far the largest delegation on the prosecution side came

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19 Rebecca Adami, *Women and the Universal Declaration of Human Rights*, United Nations (2018), https://www.un.org/sites/un2.un.org/files/2019/11/women_who_shaped_the_udhr.pdf (last visited May 5, 2022).

20 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967).

21 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

from the United States.[22] Because of how big their delegation was, the American prosecutors took on a significant portion of the prosecution work during the trial. This is yet another testament to the historical commitment of the United States to international human rights. *Kiobel* represents a break in this tradition.

## IV. MISSED OPPORTUNITIES

Following *Kiobel*, there were many cases brought before federal courts of human rights violations which courts could have been granted jurisdiction had it not been for the presumption against extraterritoriality. These cases serve as examples of missed opportunities in which the United States could have given the victims of human rights atrocities justice that they otherwise would not have been able to obtain in their home countries. From a human rights perspective, *Kiobel* has been a very regrettable decision as illustrated by the following cases because *Kiobel* effectively closed a path by which many victims of human rights atrocities worldwide have used to have their abusers punished by the law.

### *A. Ellul v. Congregation of Christian Bros*

A group of plaintiffs alleged several human rights violations against the Congregation of Christian Brothers (CCB), a Roman Catholic religious order. Plaintiffs claim that they were abducted as children, trafficked to Australia, made to work in slavery conditions, and were subjected to sexual abuse. Emmanuel Ellul states that when he was 14 years old, his family sent him and his brothers to what was supposedly a program allowing children in Malta to study in Australia. Upon arrival in Australia, however, Ellul and his brothers were sent to a farm owned by the CCB. They did not receive any education and were instead forced to perform manual labor. They were subjected to horrific living conditions, frequently beaten, worked long hours every day, and brainwashed into believing that their parents were dead. Ellul would eventually be separated from his brothers to work on a different farm and did not regain contact with them until after 20 years. Ellul was not compensated for any of his labor.

Ellul was joined in this suit by other plaintiffs claiming similar experiences of having been trafficked to Australia and forced into servitude as children. One such

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[22] Kim Christian Priemel, *The Betrayal: The Nuremberg Trials and German Divergence*, Oxford Univ. Press (2016).

plaintiff was Valerie Cormack, who when she was 10 years old was forced to work long hours at a nursery home and tricked into believing that her wages were being placed in a savings account that she could collect upon reaching adulthood. Once Cormack became an adult, she was not able to collect her supposed saved wages. Both incidences occurred in the 1960s and 40 years later in 2009, the plaintiffs took action against CCB for "slavery and involuntary servitude, forced child labor, and cruel, inhuman, and degrading treatment or punishment."[23]

Because all of the claims of the plaintiffs occurred in Australia, the case was barred because it could not overcome the presumption against extraterritoriality. This is despite the fact that in the court opinion, Circuit Judge Gerard Lynch states that "It is beyond question—and defendants do not dispute—that plaintiffs allege shocking violations of internationally accepted norms." Both parties acknowledged that the alleged abuses were undoubtedly horrific and against international customary law. This would have made the case perfect for litigation under the ATS, but it was not allowed to proceed due to the presumption on extraterritoriality. While it is impossible to speculate on what the court's decision would be without the bar against extraterritoriality, it is still quite regretful that even though there was a court-recognized violation of the human rights of the plaintiffs, they were not able to receive justice for their traumatic childhood experiences because of *Kiobel*.

### *B. Doe I v. Nestle USA, Inc.*

This case was also brought forth by plaintiffs alleging to be former child slaves. They were forced to work in cocoa farms in the Ivory Coast collecting cocoa for Nestle USA, Inc. The three plaintiffs are suing Nestle USA, Inc. for allegedly funding farming facilities (such as the one that the plaintiffs worked at) with the full knowledge that these facilities used child labor and subjected the children to horrific working conditions. The court in *Nestle* granted the plaintiffs' claims of child slavery as actionable under the ATS. The court made no ruling on the extraterritoriality of the case and vacated the case to allow the plaintiffs the opportunity to amend their case in order to respond to the *Kiobel* decision which had been made during the proceedings of this case. Unfortunately for the plaintiffs, their chances of success due to *Kiobel* are bleak.

The three plaintiffs in this case were former child slaves at cocoa farming facilities in the Ivory Coast. The plaintiffs report being subjected to atrocious working and living

[23] Ellul v. Congregation of Christian Bros., 774 F.3d 791, 793 (2d Cir. 2014).

conditions. They worked very long hours for 6 days a week, were barely fed, and were often beaten. To prevent them from escaping, they were locked in tiny rooms at night. The plaintiffs reported witnessing that children who tried to escape but were caught would have their feet sliced open by the facility managers. The plaintiffs note that their experience as child slaves has left them with permanent physical, emotional, and mental damage.

The widespread practice of child slavery in these facilities and in this region are well documented and reported by international organizations. The court in *Nestle* concluded that there was sufficient evidence to establish that Nestle were fully aware of these reports but ignored them in pursuit of the most lucrative profit margins. Thus, Nestle could be tried for aiding and abetting in the practice of child slavery, which is an actionable violation of international law under the ATS.

Ultimately, the court in *Nestle* ruled that the plaintiffs' claims were actionable under the ATS and there was sufficient evidence to prove their claims that Nestle knowingly aided and abetted facilities using child slavery.[24] Before *Kiobel*, this would perhaps have been the end of the case in favor of the plaintiffs, and it would be sent to a jury to award them their compensatory damages. However, the court instead vacated the case and allowed the plaintiffs time to amend their claims in response to the *Kiobel* decision which had come out while this case was being tried. The plaintiffs' chances of success have now gone from almost certain success to almost certain defeat due to the likelihood of their case being barred due to not being able to overcome the presumption against extraterritoriality. Again, this is a regrettable case wherein there is a court-recognized violation of international law actionable under the ATS and a chance for child slaves to bring their abusers to trial, but it will likely be barred due to the *Kiobel* decision.

## V. FILARTIGA AMENDMENT

As has been discussed until this point, there are undoubtedly problems with the *Kiobel* decision. The "touch and concern" test is too vague and has created a circuit split whereby different circuits use different methodologies which conflict with one another. *Kiobel* runs counter to America's goal of being a world leader in human rights. Additionally, it is regrettable from a human rights perspective because it has blocked human rights violation victims from being able to receive redress against their abusers. The best solution to restoring the power that *Filartiga* gave the ATS in giving justice to

[24] Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1027 (9th Cir. 2014).

human rights abuse victims is for Congress to amend the ATS to make it more similar to the Torture Victim Prevention Act of 1991 (TVPA).

### *A. Torture Victim Prevention Act of 1991*

The TVPA was signed into law in 1992 by President George H. W. Bush. The statute "gives rights to U.S. citizens and non-citizens alike to bring claims for torture and extrajudicial killing committed in foreign countries."[25] Similar to the ATS before *Kiobel*, this law allows for aliens to bring other aliens to court in the United States for crimes committed outside of the territory of the United States. A key difference is that this law only allows for aliens to take action over two kinds of offenses: torture and extrajudicial killing. Additionally, there are provisions in place in the statute that require plaintiffs to first exhaust all domestic legal remedies in their own country before seeking action in the United States. The first instance of the TVPA being used was in 1995 when Dianna Ortiz, a Guatemalan national, sued former Guatemalan Defense Minister Héctor Gramajo, also a Guatemalan national, for torture. She was awarded $5 million in damages by a grand jury.[26] The TVPA serves as an example of what a re-tooled and amended ATS might look like. A presumption against extraterritoriality is not applicable to the TVPA because the act itself explicitly states that individuals "of any foreign nation"[27] could be held liable for torture or extrajudicial killing no matter where the crime was committed.

### *B. Text Changes*

The Filartiga Amendment would add language to the ATS explicitly allowing for it to be applicable in situations where the tort was committed abroad. This would directly address part of the reasoning behind the Supreme Court's implementation of a presumption against extraterritoriality: the lack of clarity regarding whether the

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25 *Torture Victim Protection Act*, The Center for Justice and Accountability, https://cja.org/what-we-do/litigation/legal-strategy/torture-victim-protection-act/ (last visited May 20, 2022).

26 Ryan Di Corpo, *Dianna Ortiz, Nun who told of brutal abduction by Guatemalan military, dies at 62*, The Washington Post (Feb. 19, 2021), https://www.washingtonpost.com/local/obituaries/dianna-ortiz-nun-who-told-of-brutal-abduction-by-guatemalan-military-dies-at-62/2021/02/19/932ac25a-713a-11eb-85fa-e0ccb3660358_story.html (last visited June 13, 2022).

27 28 U.S.C. § 1350.

original framers of the law intended for the ATS to apply to actions occurring abroad. Additionally, the Filartiga Amendment would add a clear definition of "law of nations" so as to solidify the law as empowering American federal courts to serve as venues for human rights abuse victims to pursue their abusers. The Filartiga Amendment would change the ATS to as follows:

*Section 1: Establishment of Jurisdiction*
*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, regardless of whether or not the tort was committed in the territory of the United States.*

*Section 2: Definitions*
*(a) Law of Nations.—An international covenant or agreement to which the United States is a state-party to that is specific, universal, and obligatory.*

### *C. Section 1*

Section 1 of the Filartiga Amendment contains the original text of the ATS, but with added language which explicitly states the law's applicability to torts committed abroad. This would dispel the confusion left by the original framers and codify the precedent set in *Filartiga* of the ATS being used for international tort claims. This law finds basis in the TVPA which creates a cause for civil action against individuals who commit torture or extrajudicial killing, absent of any requirements for where the acts were committed and regardless of the perpetrator's nationality.

### *D. Section 2*

Section 2 of the Filartiga Amendment establishes a definition for "law of nations." This section serves many purposes. First, it addresses another piece of the Court's rationale for imposing a presumption against extraterritoriality: the possibility for ATS cases to cause conflicts in American foreign relations. Because of this section, only torts committed in violation of internationally agreed norms would be actionable under the ATS. Other countries should have no qualms regarding their citizens being pursued using the ATS if they are found to have committed violations of international standards.

Another function this section plays is to update the "law of nations" being referred to in the ATS from the ideas of 18th century English jurist William Blackstone to the modern-day human rights framework. Originally, violations of the "law of nations" referred only to acts such as violation of safe passageways, torts against ambassadors, and piracy. This section allows for the ATS to be used for violations of all of the modern conceptions of human rights and gives room for the ATS to adapt to a continually evolving framework as well.

Lastly, this section ensures that the ATS will only be used for the most egregious violations only by including the "Specific, Universal, and Obligatory" test established in *Sosa*. This adds credibility to the law as *Sosa* was not overturned by *Kiobel* and was the first ATS case to reach the Supreme Court, wherein the *Filartiga* precedent was essentially affirmed.

### *E. Need for Congressional Action*

Congressional action is the only viable pathway towards restoring the ATS as a tool for human rights because the *Kiobel* decision, although problematic as previously highlighted, is very unlikely to be overturned due to it being a unanimous decision. Human rights legislation, such as the potential Filartiga Amendment, is not unprecedented in Congress. For example, the TVPA had similar concerns with regard to creating issues with American foreign relations, but it was deemed that torture and extrajudicial killings were violations dire enough to warrant a cause for action in the United States no matter where the act was committed and the perpetrator's nationality. Why should slavery, rape, and genocide (which are all offenses whose victims have received redress thanks to the ATS) be any different? Passage of the TVPA has already proven that the United States pays no quarrel to individuals who commit acts which render them *hostis humani generis*. Updating the ATS to include similar language as the TVPA is thus a reasonable solution.

In terms of political feasibility, upholding and defending human rights globally is a position supported by individuals from all sides of the political spectrum. Recently, the Senate passed Senate Resolution 546 which condemns the actions of Russian President Vladimir Putin in Ukraine, alleging that Putin is complicit in war crimes and human rights abuses perpetrated by members of the Russian Armed Forces against the people of Ukraine. Additionally, the resolution urged member states of the International Criminal Court to petition a case against President Putin. In the resolution, there is language which states that "[T]he United States of America is a beacon for the values

of freedom, democracy, and human rights across the globe."[28] In a time where the nation is deeply politically divided[29] and the two major political parties forming the American government have found it almost impossible to work with each other, this resolution declaring the United States to be a beacon of human rights and urging international human rights bodies take action was passed unanimously in the United States Senate. Evidently, there is broad political support for human rights.

## CONCLUSION

The Alien Tort Statute was created as part of the Judiciary Act of 1789. The original intentions of the creators of the ATS are largely unknown, but many speculate it was in order to signal to the European powers and to foreign dignitaries that the United States, which was at that time still a fledgling nation, recognized the laws of nations and had mechanisms in place to enforce them. For almost 200 years, the ATS was an insignificant part of the American legal code until the case of *Filartiga v. Pena-Irala* in 1980 which began a trend of the ATS being used by victims of human rights violations committed abroad to obtain compensation and justice in the United States. In 2004, the Supreme Court in *Sosa v. Alvarez-Machain* affirmed the precedent set by *Filartiga* but narrowed its scope such that only violations of norms which passed the "Specific, Universal, and Obligatory" test were liable for jurisdiction in federal courts under the ATS. Then in 2013, the Supreme Court in *Kiobel v. Royal Dutch Petroleum* effectively ended the trend of the ATS being used as a remedy for human rights abuses abroad by establishing a presumption against extraterritoriality. This means that unless the events that took place in the case "touch and concern territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application," then federal courts could not have jurisdiction over the case under the ATS. The Supreme Court subsequently in *Jesner v. Arab Bank* further limited the ATS by determining that foreign corporations could not be held liable under the ATS.

The *Kiobel* decision is problematic for many reasons. First, its vague guidelines and language has resulted in different circuits using different methodologies which come into conflict with each other. This is a problem because plaintiffs have received results

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[28] S. Res. 546, 117th Cong. (2022) (enacted).

[29] Michael Dimock & Richard Wike, *America is exceptional in the nature of its political divide*, Pew Research Center (Nov. 11, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/ (last visited June 16, 2022).

that would be different had their case been tried in a different circuit. Second, *Kiobel* runs counter to the mission of the United States of becoming a world leader in human rights. Additionally, *Kiobel* is regrettable from a human rights perspective because the *Filartiga* standard which was effectively ended by *Kiobel* had given an outlet for human rights violation victims from countries with less accessible court systems to receive a fair trial in court against their abusers. This door was essentially shut by *Kiobel*. Because *Kiobel* was passed by unanimous decision, it will be nearly impossible to overturn this decision. The best course of action is for Congress to amend the ATS with the Filartiga Amendment. This amendment would include language allowing for United States federal courts to have jurisdiction over torts that occurred outside the territory of the United States. Additionally, it would also include a clear definition of the "law of nations" which ensures that only the most egregious violations of internationally accepted norms can be actionable under the ATS. This helps reduce the chance for conflict in foreign relations arising out of ATS cases.

The ATS has allowed for victims of human rights atrocities to be awarded millions in damages, and the opportunity to serve justice to their perpetrators in court. It is deeply regrettable that this once shining tool of human rights was rendered useless by *Kiobel*. Congress must act and pass the Filartiga Amendment to further cement the United States as a global leader in human rights.