JESNER V. ARAB BANK, PLC: CORPORATE ENEMIES AND THE ALIEN TORT STATUTE

ABSTRACT

As nations around the world enact legislation, ratify treaties, and sign international human rights conventions, it is no secret that the United States often observes these processes from the sidelines—refusing to sign, refusing to participate, and refusing to acknowledge egregious human rights concerns. This passivity, however, is not confined to the Legislative and Executive Branches. The Judiciary continues to limit recovery for those seeking redress from human rights abuses.

In 1980, the human rights community celebrated the reemergence of a small thirty-three-word long statute, the Alien Tort Statute. Buried in the Judiciary Act of 1789, the statute provides jurisdiction over civil claims brought by aliens seeking recovery for torts committed in violation of international law. The Supreme Court’s celebrated 1980 opinion on the Alien Tort Statute, Filartiga v. Peña-Irala, reflected an idealistic perspective on human rights. Today, idealistic notions have withered.

In Jesner v. Arab Bank, the Supreme Court held that corporations can no longer be defendants under the Alien Tort Statute. Courts reviewing Alien Tort Statute claims conduct a two-part analysis, which first asks whether the alien plaintiff’s allegations rest on a specific obligatory norm and then asks whether judicial caution is warranted. This Comment argues that the Court in Jesner misconstrued this two-part analysis to favor corporate protection. Specifically, this Comment argues that the Court failed to properly define international norms and thus disregarded international norms condemning the financing of terrorism. And even with this misconstrued analysis, the Court failed to recognize norms of corporate liability. This Comment also argues that the Court’s exercise of judicial deference overlooked the United States’ interest in holding corporations liable for their human rights abuses, and reinforced the international community’s resentment for America’s indifference to human rights accountability. Finally, this Comment analyzes the jurisprudential shift that evinces partiality toward corporations at the expense of victims.

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INTRODUCTION

Child laborers treated inhumanely. Individuals raped and faced with genital mutilation. Villagers robbed of their land and tortured. Innocent people subjected to extrajudicial killing. Children dead from medical testing without consent. Civilians and their homes bombed. The civilian complaints arising from these incidents are not frivolous—they are important and so are the individuals standing behind them. The Supreme Court of the United States, however, has continuously created roadblocks for victims seeking recovery for human rights abuses under the Alien Tort Statute (ATS). Recently, the Court decided to create an additional roadblock—if a corporation’s actions cause atrocious harms to civilians, the victims cannot bring their claims against the corporation in the United States.

Promulgated by Congress in 1789, the ATS provides 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.” After enactment, the ATS lay virtually dormant for almost 200

years.\textsuperscript{8} However, the Court’s 1980 decision in \textit{Filartiga v. Peña-Irala}\textsuperscript{9} breathed new life into the statute as the Court recognized a cause of action under the ATS for violations of international human rights.\textsuperscript{10} And, for the first time since the Founding Era, this decision opened the door for claimants to bring actions under the ATS.\textsuperscript{11} But, since this reemergence of the ATS, changes in foreign policy, developments in technology, continued international tensions, and fluctuating opinions regarding the importance of human rights collectively contributed to controversy in the statute’s application.\textsuperscript{12} The Court responded to these tensions by narrowing the scope of the ATS in recent decisions, reasoning that such a narrow scope was necessary to preserve the separation of powers, maintain executive control over foreign relations, and limit any potential for extraterritorial overreach.\textsuperscript{13} As a result, claims brought under the ATS today, whether brought against corporations or individuals, are either barred completely or are likely to result in a verdict for the defendants.\textsuperscript{14}

The Court’s most recent decision in \textit{Jesner v. Arab Bank, PLC}\textsuperscript{15} further narrowed the scope of the ATS by excluding corporations from liability.\textsuperscript{16} This Comment argues that the Court’s decision in \textit{Jesner} interprets the ATS in a manner most advantageous for defendants, thus signaling a continued lack of concern for human rights violations. Specifically, this Comment contends that the Court in \textit{Jesner} improperly applied the two-part analysis used to identify causes of action under the ATS, first articulated in \textit{Sosa v. Alvarez-Machain},\textsuperscript{17} to exclude corporations from liability under the ATS. Part I of this Comment discusses the history of the ATS and the Court’s trend towards limiting the scope of liability under the ATS. Part II provides a brief overview of the facts of \textit{Jesner}, in addition to the procedural history, majority opinion, concurring opinions, and dissenting opinion. Part III analyzes the Court’s categorical bar on corporate liability under the ATS and critiques the Court’s application of precedent. Specifically, this Part argues that the Court misapplied precedent in a manner

\textsuperscript{8} Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018); Filartiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
\textsuperscript{9} 630 F.2d 876.
\textsuperscript{10} See id. at 890 (“In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.”).
\textsuperscript{11} Donald Earl Childress III, \textit{The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation}, 100 GEO. L.J. 709, 713 (2012).
\textsuperscript{13} See id. at 1127–29; see also Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (refusing to apply the ATS unless the conduct “touch[es] and concern[s]” the United States with sufficient force to displace the presumption against extraterritoriality).
\textsuperscript{14} See Childress, supra note 11.
\textsuperscript{15} 138 S. Ct. 1386 (2018).
\textsuperscript{16} See id. at 1408.
\textsuperscript{17} 542 U.S. 692 (2004).
that overlooked human rights responsibilities and used judicial deference unnecessarily, ultimately perpetuating a trend of corporate favoritism.

I. BACKGROUND

The Continental Congress enacted the ATS in response to pressure by foreigners seeking redress in the United States. The Articles of Confederation provided no authority for the government to ensure adequate remedies for foreign citizens, which gave rise to substantial diplomatic tensions. For example, in 1784, a French citizen assaulted the Secretary of French Legation in Philadelphia. At that time, the U.S. federal government had no authority to redress the French Minister’s harm. So, he threatened to leave America unless the government adequately compensated him for his injury. Shortly after this case, a police officer wrongfully arrested a Dutch ambassador in the United States and similar difficulties arose in redressing the foreigner’s harm. Without authority from Congress, the state of New York convicted the police officer for violating the law of nations, as adopted in New York common law; however, the young nation still lacked federal power to punish law of nations violations. To remedy this problem, the Framers addressed issues regarding ambassadors in Article III of the Constitution, while the First Congress passed the Judiciary Act of 1789, which included the ATS. The ATS would resolve the problem facing our new nation by providing aliens with the ability to bring a claim in the United States and granting U.S. federal courts jurisdiction over their claims.

After its enactment, foreign claimants rarely invoked the ATS as a basis for jurisdiction until Filartiga in 1980. Before 1980, the ATS had only been invoked twenty-one times and courts granted jurisdiction in just two cases. In the first case, a court granted jurisdiction over a dispute

18. Id. at 1396–97; David M. Golove & Daniel J. Hulsebosch, The Law of Nations and the Constitution: An Early Modern Perspective, 106 Geo. L.J. 1593, 1606 (2018) ("[M]any in the Founding era believed that the Constitution directed courts to apply the law of ‘state-state relations’ because it was the system of public law norms that bound the United States and all other ‘civilized nations.’ To refuse to adhere to it, they believed, would have placed the new nation outside the community of such civilized states, which was a prospect that they viewed with dismay and trepidation . . . ").


20. Id. at 638.


22. Id.


24. Bradley, supra note 19, at 641–42.

25. U.S. Const. art. III, § 2 ("The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority—to all Cases affecting Ambassadors . . . "); Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789); Bradley, supra note 19, at 642–43.


27. See Childress, supra note 11, at 712–13.

concerning the seizure and sale of slaves that occurred while a ship was on land.\footnote{Bolchos v. Darrel, No. 1,607, 1795 U.S. Dist. LEXIS 4, at *1–2 (D.S.C. Sept. 29, 1795).} Even though the incident occurred on land, the court granted jurisdiction because the original cause of action arose at sea and the court had jurisdiction over admiralty disputes.\footnote{Id.} The court only used the ATS as a secondary justification for granting jurisdiction.\footnote{Id.} In the second case, a court granted jurisdiction over a custody dispute brought by a Lebanese national who was the father of a child living in the United States.\footnote{Adra v. Clift, 195 F. Supp. 857, 862–63 (D. Md. 1961).} His ex-wife and child gained admission into the United States using false documents and he sued to regain custody of his child.\footnote{Id. at 861.} He brought the case under the ATS.\footnote{Id. at 859.} The court granted jurisdiction, concluding that the taking of the child constituted a tort and that such action constituted a violation of the law of nations because the defendant’s use of a false passport constituted a wrongful act against both the United States and Lebanon.\footnote{Id. at 862–65.} Beyond these two distinct cases, courts refused to grant jurisdiction under the ATS until \textit{Filartiga}.

\textbf{A. Filartiga v. Peña-Irala}

In \textit{Filartiga}, Paraguayan citizens brought a wrongful-death claim in the Eastern District of New York against a Paraguayan officer who allegedly tortured and murdered the plaintiffs’ family member while living in Paraguay.\footnote{Filartiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).} One of the plaintiffs, Filartiga, was residing in the United States on a temporary visa while the defendant officer, Peña, was residing in the United States on an expired visa.\footnote{Id. at 878–79.} The Second Circuit Court of Appeals concluded it had jurisdiction to hear the action under the ATS, even for a claim brought by a foreign plaintiff against a foreign defendant who were both temporarily living in the United States and where all alleged harm occurred outside of the United States.\footnote{Id. at 887.} The court rejected Peña’s “extravagant” argument that the ATS was strictly jurisdictional by citing numerous judicial opinions that applied international law without explicit direction from Congress.\footnote{Id. at 886; Kedar S. Bhatia, \textit{Reconsidering the Purely Jurisdictional View of the Alien Tort Statute}, 27 EMORY INT’L L. REV. 447, 462 (2013).} As such, the court concluded that there was a universal right to be free from torture and that a violation of such a right constituted a violation of the law of nations under the ATS.\footnote{Filartiga, 630 F.2d at 890.} The court reasoned that the plaintiffs were not asserting a violation of a new right under international law, but rather that the federal courts were opening the
doors to adjudication of rights already recognized by international law.\footnote{\citelaw{Id.} at 887.} In coming to this conclusion, the court explained that the Judiciary should interpret international law “not as it was in 1789, but as it has evolved and exists among the nations of the world today.”\footnote{\citelaw{Id.} at 881.} Thus, the Second Circuit applied customary international law as federal common law under the ATS.\footnote{\citelaw{Id.} at 885; \textit{Bhatia, supra} note 39, at 463.} At this point in time, customary international law was accepted as American law and subject to adjudication in U.S. federal courts.\footnote{The \textit{Paquete Habana}, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . . [W]here there is no treaty, and no controlling executive or legislative act or juridical decision, resort must be had to the customs and usages of civilized nations . . . .”); \textit{Filartiga}, 630 F.2d at 886 (“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.”).}

\subsection*{B. Expanded Liability for Human Rights Violations Post-Filartiga}

The Second Circuit’s decision in \textit{Filartiga} led to substantial debate about how the courts should apply the ATS to modern human rights violations.\footnote{\citelaw{See Knowles, supra note 12, at 1127–28.}} Congress, recognizing a need for supplemental human rights protections, enacted the \textit{Torture Victims Protection Act} (TVPA) in 1991.\footnote{\citelaw{Id.} at 1128.} The TVPA creates a federal cause of action for torture and extrajudicial killing.\footnote{\citelaw{Id.} (citing \textit{Torture Victim Protection Act}, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006))).} The TVPA requires exhaustion of remedies in other international forums, applies to “individuals” as defendants, and extends opportunities for relief to all individuals, not just foreign citizens.\footnote{\citelaw{See Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1434 (2018) (Sotomayor, J., dissenting); Knowles, \textit{supra} note 12, at 1128.}} The relationship between the TVPA and the ATS continues to be a point of contention when attempting to determine how far liability should extend under the ATS.\footnote{\citelaw{Jesner, 138 S. Ct. at 1403–04.}} Some Justices see the TVPA and the ATS as closely interrelated and conclude that Congress created the TVPA to limit the boundaries of a cause of action under the ATS.\footnote{\citelaw{Id.}} Under this interpretation, it follows that corporations cannot be defendants under the ATS because corporations cannot be defendants under the TVPA.\footnote{\citelaw{Id.}} Other Justices see the TVPA and the ATS as distinct statutes and refuse to infer that the restrictions placed on defendants under the TVPA apply equally to the ATS.\footnote{\citelaw{Id. at 1434 (Sotomayor, J., dissenting).}}

Further, after \textit{Filartiga} and Congress’s enactment of the TVPA, parties have continuously challenged the scope of ATS litigation. In the last decade, plaintiffs have used the ATS to file claims against multinational
corporations that committed human rights violations while conducting large-scale operations abroad. Doe v. Unocal Corp. marked the beginning of this wave of litigation against corporations for aiding and abetting human rights violations. In Unocal, villagers of Myanmar’s Tenasserim region alleged that the California oil company, Unocal, contracted with the Myanmar government to assist with security during construction of a pipeline. Specifically, the plaintiffs alleged that the Myanmar military used a forced-labor program that compelled villagers to participate out of fear for their and their families’ lives. The military allegedly killed villagers who were unwilling or unable to work, raped women, and, in one instance, killed a baby by throwing it into a fire. Unocal was allegedly aware of the forced-labor program and the additional human rights abuses that accompanied the program. The case ultimately ended in a settlement, but had a large impact on the way both plaintiffs and defendants approached ATS claims.

The equivocal nature of the ATS became evident in the sporadic opinions that followed Unocal. In Doe v. Exxon Mobil Corp., the D.C. Circuit concluded that Exxon Mobil could be held liable for aiding and abetting murder, torture, sexual assault, battery, and false imprisonment under the ATS after the company had employed the Indonesian military.

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54. 395 F.3d 932 (9th Cir. 2002).
55. Knowles, supra note 12, at 1129 (citing to prominent claims against corporations that were brought under the ATS).
56. 395 F.3d at 938.
57. Id. at 938-40.
58. Id. at 939-40.
59. See id. at 940-42.
60. Childress, supra note 11, at 724 n.113 (explaining the wave of lawsuits that followed Unocal and its impact on the way corporations viewed claims under the ATS).
63. Compare Doe v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014) (holding corporation liable for involvement with slave labor), with Doe v. Drummond Co., 782 F.3d 576, 613 (11th Cir. 2015) (denying jurisdiction under the ATS for a corporation aiding and abetting extrajudicial killing), and Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1024 (7th Cir. 2011) (holding that child labor on a rubber plantation did not violate an international norm).
64. 654 F.3d 11 (D.C. Cir. 2013), vacated, 527 F. App’x 7 (D.C. Cir. 2013).
as security for an oil project knowing that the Indonesian military had previously committed human rights abuses and continued to do so under the supervision of Exxon.\textsuperscript{65} Similarly, in \textit{Doe v. Nestle USA},\textsuperscript{66} the Ninth Circuit held Nestle liable for contracting with Ivorian farmers, knowing that its resources would be funding slave labor.\textsuperscript{67} Conversely, the Seventh Circuit, in \textit{Flomo v. Firestone Natural Rubber Corp.},\textsuperscript{68} concluded that exploitative child labor on a rubber plantation in Liberia was not a violation of international norms under the ATS.\textsuperscript{69} Courts across jurisdictions struggled to reach a cohesive understanding of what constituted a “violation of the law of nations,” what defendants could be included in “any civil action,” and ultimately what the boundaries and implications were in extending litigation to foreign nationals.\textsuperscript{70}

\textbf{C. Sosa v. Alvarez-Machain}

Recognizing a need for clarification regarding the scope of liability under the ATS, the Supreme Court’s decision in \textit{Sosa} set forth a structure for analyzing ATS claims.\textsuperscript{71} In \textit{Sosa}, a Mexican national, Alvarez, was abducted and transported to the United States by foreign nationals at the direction of the Drug Enforcement Administration (DEA).\textsuperscript{72} At the time, the U.S. government suspected Alvarez of assisting in the torture and murder of a DEA agent in Mexico.\textsuperscript{73} He was tried for murder in the United States but was ultimately acquitted.\textsuperscript{74} Upon returning to Mexico, Alvarez sued Sosa, a Mexican national that assisted in his abduction.\textsuperscript{75} Alvarez brought this claim under the ATS to recover for the harm that resulted from his illegal detention.\textsuperscript{76} The Court recognized that the First Congress enacted the ATS out of concern for three principle law of nations violations: infringement on rights of ambassadors, violations of safe conduct, and piracy; however, the Court concluded that Congress never intended to limit a violation of the law of nations to just these three original causes of action.\textsuperscript{77} In drawing this conclusion, the Court announced that “courts should require any claim based on the present day law of nations to rest on a norm of international character accepted by the civilized world and de-

\begin{itemize}
\item \textsuperscript{65} \textit{Id.} at 15–16.
\item \textsuperscript{66} \textit{766 F.3d} 1013 (9th Cir. 2014).
\item \textsuperscript{67} \textit{Id.} at 1017.
\item \textsuperscript{68} \textit{643 F.3d} 1013 (7th Cir. 2011).
\item \textsuperscript{69} \textit{Id.} at 1024.
\item \textsuperscript{70} See Childress, \textit{supra} note 11, at 713–14; \textit{see also} 28 U.S.C. § 1350 (2018).
\item \textsuperscript{71} See Childress, \textit{supra} note 11, at 721–22.
\item \textsuperscript{72} 542 U.S. 692, 698 (2004).
\item \textsuperscript{73} \textit{Id.} at 697.
\item \textsuperscript{74} \textit{Id.} at 698.
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Id.} at 724–25. The Court in \textit{Sosa} concluded that law of nations violations should be narrowly construed, but rejected the notion that ATS claims consisted only of the principle three law of nations violations.
\end{itemize}
fined with specificity comparable to the features of the 18th-century paradigms."\textsuperscript{78} In application of this rule, the Court concluded that Alvarez’s brief illegal detention did not rise to the level of a customary international-norm violation.\textsuperscript{79} The Court explained that recognizing a single arbitrary arrest as a violation of customary international law would expand the definition of a norm under the ATS too far.\textsuperscript{80} Further, the Court emphasized the need for judicial discretion in recognizing causes of action under the ATS in light of potential foreign policy implications and the proper role of the Judiciary.\textsuperscript{81} Thus, the two-part approach articulated in \textit{Sosa} first determines whether an alien’s claim rests on a specific international norm\textsuperscript{82} and then asks whether the Judiciary should exercise caution by deferring to the other branches of government.\textsuperscript{83} This framework for analyzing ATS claims continues to be applied in U.S. courts.\textsuperscript{84}

\textbf{D. Kiobel v. Royal Dutch Petroleum}

Post-\textit{Sosa}, there remained the issue of whether a corporation could be held liable under the ATS for a violation of the law of nations. In 2010, \textit{Kiobel v. Royal Dutch Petroleum Co.}\textsuperscript{85} gave the Court an opportunity to address whether corporate defendants could be held responsible under the ATS.\textsuperscript{86} In \textit{Kiobel}, Nigerian nationals of the Ogoni region alleged that Dutch, British, and Nigerian oil corporations aided and abetted the Nigerian government in committing violations of the law of nations.\textsuperscript{87} Specifically, the oil corporations allegedly provided food, transportation, compensation, and staging areas to assist the Nigerian forces in suppressing the Ogoni people who resisted oil exploration around their homes.\textsuperscript{88} With the support of the oil corporations, Nigerian military forces allegedly beat, raped, arrested, and killed Ogoni residents while destroying their property.\textsuperscript{89}

The Court of Appeals for the Second Circuit acknowledged the longstanding domestic custom of holding corporations liable for tort claims, but ultimately concluded that governing customary international law did not support the recognition of such a cause of action.\textsuperscript{90} The court con-

\begin{itemize}
  \item \textsuperscript{78} \textit{Id.} at 725.
  \item \textsuperscript{79} \textit{Id.}
  \item \textsuperscript{80} \textit{Id.} at 736–37.
  \item \textsuperscript{81} \textit{Id.} at 725–29.
  \item \textsuperscript{82} \textit{Id.} at 725.
  \item \textsuperscript{83} \textit{Id.} at 727–28.
  \item \textsuperscript{84} \textit{See} Jesner v. Arab Bank, PLC, 138 S. Ct 1386, 1389 (2018).
  \item \textsuperscript{85} \textit{569 U.S. 108} (2013).
  \item \textsuperscript{86} \textit{See} Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117 (2d Cir. 2010), \textit{aff’d}, \textit{569 U.S. 108} (2013).
  \item \textsuperscript{87} \textit{Kiobel}, 621 F.3d at 123.
  \item \textsuperscript{88} \textit{Id.}
  \item \textsuperscript{89} \textit{Id.}
  \item \textsuperscript{90} \textit{Id.} at 118.
\end{itemize}
cluded that international law was the governing body of law for determining whether corporations could be liable under the ATS.\textsuperscript{91} In reaching this conclusion, the court relied heavily on \textit{Sosa}'s footnote twenty, which contemplated whether international law, not domestic law, extends the scope of liability under the ATS to corporations.\textsuperscript{92} The court then evaluated the practices of historical and modern international tribunals, which evidenced a trend toward extending liability only to natural persons, and thus concluded there was no universal norm supporting a finding of corporate liability under the ATS.\textsuperscript{93} With no universal international norm of corporate liability, the court concluded that corporations could not be held liable under the ATS and dismissed the Nigerian victims' complaint.\textsuperscript{94}

The Supreme Court granted certiorari and affirmed the Second Circuit's judgment, concluding that the plaintiffs' claim under the ATS could not be maintained.\textsuperscript{95} However, the rationale underlying the Court's decision differentiated from that employed by the Second Circuit as the Supreme Court did not base its decision on the corporate status of the defendant.\textsuperscript{96} Rather the Court's rationale was rooted in its application of the presumption against extraterritorial application.\textsuperscript{97} This statutory canon provides that "when a statute gives no clear indication of an extraterritorial application, it has none."\textsuperscript{98} The Court added that even claims that touch and concern the United States will not fall under the ATS unless they do so with sufficient force to displace the presumption.\textsuperscript{99} Thus, the Court's holding in \textit{Kiobel} continued to limit the reach of the ATS, as it required that any future claim brought under the ATS must be based on conduct occurring either in the United States or on conduct that sufficiently touches and concerns the United States.\textsuperscript{100} Because all relevant claims in \textit{Kiobel} took place outside of the United States, according to the majority opinion, the ATS gave no indication of extraterritorial application, and the Court dismissed the case.\textsuperscript{101}

Justice Breyer concurred with the judgement of the Court, but wrote an opinion that critiqued the Court's application of the presumption against extraterritoriality and analogized piracy to acts of genocide and torture that occur today.\textsuperscript{102} In his concurrence, Justice Breyer set forth a

\begin{flushleft}
91. \textit{Id.} at 130.
93. \textit{See id.} at 133–45.
94. \textit{Id.} at 149. When hearing \textit{In re Arab Bank, PLC Alien Tort Statute Litig.}, the Second Circuit expressed hesitation about their decision in \textit{Kiobel}. \textit{In re Arab Bank, PLC Alien Tort Statute Litig.}, 808 F.3d 144, 156 (2d Cir. 2015).
96. \textit{Id.} at 114.
98. \textit{Kiobel}, 569 U.S. at 115; \textit{see also Larry M. Eiger, Statutory Interpretation: General Principles and Recent Trends} 25 (2014).
100. \textit{See id.}
101. \textit{Id.}
\end{flushleft}
framework that would provide jurisdiction under the ATS 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.” In explaining this framework, Justice Breyer recognized a national interest in preventing the United States from becoming a safe harbor for enemies of mankind.

The decision in Kiobel left the door open for circuit courts to interpret what exactly “touch and concern” implied. Kiobel’s ambiguity led to a circuit split where some circuits allow for ATS claims only if the alleged tort occurred in the United States, while other circuits weigh the totality of the circumstances. Further, the Court’s decision left open the question of corporate liability under the ATS, which the Court later addressed in Jesner.

II. JESNER V. ARAB BANK

A. Facts

The petitioners asserted claims against Arab Bank, a financial institution in Jordan with various branches around the world. Specifically, the petitioners alleged that Arab Bank financed and supported terrorist attacks in the Middle East, victimizing foreign nationals. According to petitioners, Arab Bank knowingly maintained accounts that terrorist organizations and proxy organizations used for collecting money to fund suicide bombings and other attacks. Further, Arab Bank allegedly assisted in identifying families of martyrs and facilitated payments to those families on behalf of terrorist organizations.

The New York (NY) branch of Arab Bank was responsible for the dollar clearing of denominated transactions through the Clearing House Interbank Payment Systems (CHIPS). This dollar-clearing process facilitated currency exchange and some of these CHIPS transactions at the

103. Id. at 127.
104. Id.
106. Id. Scholars have argued that the Kiobel “touch and concern” test applies to conduct that does not actually reach the United States, but the effect of the action does, see, e.g., William S. Dodge, Morrison’s Effects Test, 40 SW. L. REV. 687, 687 (2011); others argue that the ATS is inherently extraterritorial because the “law of nations” implies that conduct does not need to occur in one specific jurisdiction, see, e.g., Anthony J. Colangelo, A Unified Approach to Extraterritoriality, 97 VA. L. REV. 1019, 1082-83 (2011) (“[T]he ATS . . . applies international substantive law, and therefore should also apply international jurisdictional law. Because international jurisdictional law has evolved to authorize extraterritoriality, so too should the ATS.” (footnote omitted)).
109. Id.
110. In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 150 (2d Cir. 2015).
111. Id.
NY branch allegedly supported terrorist efforts. The petitioners also alleged that the NY branch laundered money for a Texas-based charity affiliated with Hamas. The funds transferred by the NY branch contributed to terrorist efforts in the Middle East which resulted in widespread murderous attacks, including suicide bombings that targeted Jewish-Israeli citizens. All 6,000 petitioners alleged that they or their family members had been injured, killed, captured, or otherwise victimized by terrorist actions funded and supported by Arab Bank. Petitioners asserted their claims under the ATS for injuries that occurred over a ten-year period.

B. Procedural History

Plaintiffs filed suit in the U.S. District Court for the Eastern District of New York. That court granted Arab Bank’s motion for judgment on the pleadings. Plaintiffs appealed. The U.S. Court of Appeals for the Second Circuit affirmed the district court’s decision and rehearing en banc was denied. While the Supreme Court had not affirmed the Second Circuit’s holding in Kiobel concerning corporate liability, the Second Circuit acknowledged its prior holding in Kiobel I as binding precedent. The Second Circuit recognized multiple ways in which the Supreme Court’s Kiobel decision cast doubt on the Kiobel I holding that barred corporate liability under the ATS. However, the court ultimately dismissed Jesner v. Arab Bank. The Supreme Court of the United States granted certiorari.

C. Majority Opinion

Justice Kennedy authored the opinion for the majority, joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch with respect to Parts I, II-B-1, and II-C. The majority concluded that foreign corporations cannot be held liable under the ATS without further guidance.

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113. Id. at 1395.
114. Id.
115. Id. at 1393; In re Arab Bank, 808 F.3d at 149–50.
117. Id.
118. In re Arab Bank, 808 F.3d at 146.
119. Id. at 148.
120. Id.
121. Id. at 160.
122. Id. at 158. The Second Circuit’s decision is hereinafter Kiobel I, while the Supreme Court decision is Kiobel.
123. Id. at 156–57.
124. See id. at 155–57 (recognizing that the Court in Kiobel acknowledged some level of corporate liability; that the Court interpreted conduct as the international norm, not the type of defendant; that preventing corporate defendants would narrow the ATS beyond what Congress intended; and that sister circuits had come to a consensus that corporate liability is permissible under the ATS).
126. Id. at 1393.
from Congress. Justice Kennedy began by detailing the complicated history of ATS litigation and the potential implications of the Court’s most recent decision in Kiobel. He then applied the first Sosa prong by initially asking whether the alleged violation was of a norm that is specific, universal, and obligatory. Justice Kennedy explained his approach to this test via an interpretation of the controversial footnote twenty in Sosa. The footnote says a “related consideration [in deciding whether conduct violates a definite norm] 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 an individual.” Justice Kennedy interpreted this to mean that corporations are only liable under the ATS where it can be shown that corporate liability is an obligatory international norm. In application, he used international criminal tribunals and statutes that extend only to natural persons as evidence that corporate liability is not an international norm. Justice Kennedy cited the Charter for the Nuremberg Tribunal, the Statute of the International Criminal Tribunal for the Former Yugoslavia, and the Rome Statute of the International Criminal Court, which all limit jurisdiction to “natural persons,” as evidence that the international community does not support a norm of corporate liability. Through his examination of the practices of these criminal tribunals, Justice Kennedy concluded that there is no norm of corporate civil liability in the international community.

Justice Kennedy regarded petitioners’ citations to cases, statutes, and conventions where corporations were held liable for violations of international law as insufficient to establish a specific, universal, and obligatory norm. Petitioners relied on the International Convention for the Suppression of Financing Terrorism (ICSFT) as evidence of the United States’ obligation to prevent financing terrorism; however, Justice Kennedy rejected the relevance of the ICSFT because the convention only requires that signatory states “enable” corporations to be held liable. In the Court’s view, this requirement is fulfilled by domestic regulatory regimes that are in place to prevent financing terrorism. With this, Justice Kennedy concluded that it is not the role of the courts to interrupt these regulatory regimes. Further, Justice Kennedy rejected petitioners’ reliance

127. Id. at 1408.
128. See id. at 1396–99.
129. Id. at 1399.
130. Id.
133. Id. at 1400–01 (referencing the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Rome Statute of the International Criminal Court).
134. Id.
135. Id. at 1401.
136. Id.
137. Id.
138. Id.
139. Id.
on “a few cases” from other nations that held corporations liable because the cases were insufficient in establishing a specific and obligatory norm.\footnote{Id. at 1402. Justice Kennedy’s statement acknowledging “sufficient doubt” as to the first prong of Sosa evinces a lack of confidence in his own argument. Throughout the majority opinion, it seems as though the Court had enough evidence to decide the other way, but chose to rely on evidence that leaves “sufficient doubt.”} Even so, he concluded that there was sufficient ambiguity under the first component of Sosa to move on to the second—a determination of the appropriateness of judicial discretion.\footnote{Id. at 1404. Although there is a canon of statutory interpretation that allows for the use of related statutes to determine the meaning of a word, this is irrelevant because the word “individual” does not appear in the ATS. Even so, where statutes are silent, inferring what Congress meant is not always a reliable tactic. See EIG, supra note 98, at 15, 18.}

With respect to the second component of Sosa, Justice Kennedy evaluated whether the Judiciary must defer to Congress in recognizing a claim under the ATS.\footnote{Jesner, 138 S. Ct. at 1405.} In his analysis, Justice Kennedy used the TVPA’s limitation of liability to “individuals” as evidence that Congress intended the ATS to also be limited to individuals.\footnote{Id.} He further analogized the ATS to the Anti-Terrorism Act (ATA), but rejected the relevance of the ATA, which expressly permits corporate defendants, because the ATA only provides a cause of action to U.S. nationals.\footnote{Id. at 1405–06.} Justice Kennedy ultimately concluded that Congress was in the best position for deciding the scope of corporate liability under the ATS.\footnote{Id. at 1407.} He justified this conclusion by citing policy concerns.\footnote{Id.; Golove & Hulsebosch, supra note 18, at 1613–14 (citing early court cases and briefs from Hamilton to explain that the Founders incorporated the ATS not to “promote harmony” but rather to be considered a civilized nation that was included in the law of nations as a country that respected its “humane purposes, principles, and maxims”).}

At the forefront, he was concerned that reaching an opposite conclusion would deter American corporations from investing abroad out of fear for costly liability under the ATS.\footnote{Id. at 1405–06.} Next, he conveyed concerns regarding potential diplomatic strife between the United States and foreign governments.\footnote{Id. at 1407.} He coupled this discussion with a citation to the original intent of the ATS to “promote harmony in international relations,” and he reasoned that modern ATS litigation contradicts this intent by unjustifiably violating the sovereignty of other nations.\footnote{Id.}; Golove & Hulsebosch, supra note 18, at 1613–14 (citing early court cases and briefs from Hamilton to explain that the Founders incorporated the ATS not to “promote harmony” but rather to be considered a civilized nation that was included in the law of nations as a country that respected its “humane purposes, principles, and maxims”).
litical branches and that this concern was sufficiently compelling to exercise judicial restraint. Justice Kennedy’s majority opinion held that foreign corporations, whether connected to the United States or not, may not be defendants in suits brought under the ATS. Thus, petitioners’ claim against Arab Bank failed because of Arab Bank’s status as a corporation.

D. Justice Alito’s Concurring Opinion

Justice Alito filed his opinion concurring in part and concurring in the judgment. He agreed with Justice Kennedy that allowing the case to proceed would result in the exact diplomatic tensions that the ATS was originally intended to prevent. Justice Alito wrote separately to emphasize the need for judicial restraint in maintaining separation of powers. He began by expressing disagreement with the holding in Sosa, and he suggested the decision to allow a private right of action under the ATS is incorrect. Nevertheless, he invoked separation of powers in combination with the second prong in Sosa to conclude that courts should “decline to create a cause of action as a matter of federal common law where the result would be to further, not avoid, diplomatic strife.” Justice Alito placed an emphasis on the importance of fidelity to congressional policy in concluding that an extension of liability under the ATS would violate separation of powers while creating diplomatic strife.

E. Justice Gorsuch’s Concurring Opinion

Justice Gorsuch filed an opinion concurring in part with the majority opinion and concurring with the judgment. He wrote separately to acknowledge additional reasons why the Court properly dismissed the suit. He began his opinion by using the jurisdictional nature of the ATS to conclude that the statute provides no cause of action whatsoever and is essentially dormant. While Justice Gorsuch recognized the three original ATS causes of action explained in Sosa, he cast doubt on whether there

150. Jesner, 138 S. Ct. at 1408. Contrary to the majority’s assumption, the Judiciary has been involved with foreign affairs decisions since its inception. Ariel N. Lavinbuk, Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket, 114 YALE L.J. 855, 872 (2005) (showing that 323 of the Court’s 1303 cases from 1791–1835 involved foreign affairs. This was 25% of the Court’s docket.).
152. Id. at 1408. (Alito, J., concurring).
153. Id.
154. Id.
155. Id. at 1409.
156. Id. at 1409–10. Justice Alito’s focus on federal common law overlooks the fact that this case is about an international law violation where the cause of action is derived from customary international law.
157. See id. at 1410–12.
158. Id. at 1412 (Gorsuch, J., concurring).
159. Id.
160. See id. at 1412; id. at 1428 (Sotomayor, J., dissenting) ("[T]he concurrence suggests that federal courts may lack jurisdiction to entertain suits between aliens based solely on a violation of the law of nations."). Contrary to Justice Gorsuch’s opinion, no court has ever held that the ATS is a
are actually any causes of action under the statute due to the existence of other statutory provisions that provide jurisdiction over violations of safe conduct, piracy, and ambassador disputes. 161 Further, he reasoned that the proper application of Sosa would lead to all cases under the ATS being dismissed because the Judiciary lacks aptitude to decide matters of foreign policy. 162 Justice Gorsuch went on to suggest that the Court should not meddle in foreign disputes regarding international norms. 163 He justified this conclusion by inferring the original intent of the ATS to require a domestic defendant. 164 Because the language of the statute gives no indication of a domestic defendant requirement, he used precedent interpreting other provisions of the Judiciary Act to assume the First Congress meant for the ATS to include only U.S. defendants. 165 In drawing this conclusion, he explained how Article III of the Constitution requires diversity of citizenship. He then argued that, by default, a U.S. defendant is required under the ATS since the statute requires the plaintiff to be an alien. 166 Justice Gorsuch ended by reemphasizing the power of the Executive and Congress to address human rights violations or if they choose, to “look the other way.” 167

F. Justice Sotomayor’s Dissenting Opinion

Justice Sotomayor filed the dissenting opinion, joined by Justices Ginsburg, Breyer, and Kagan. 168 The dissenting opinion expressed concerns about the categorical foreclosure of corporate liability under the ATS and the analysis the majority used to reach that conclusion. 169 Justice Sotomayor began by reiterating the framework set forth in Sosa, specifically critiquing the majority’s analysis of the first prong. 170 In doing so, she distinguished violations of international norms, such as financing terrorism, with mechanisms for enforcing international norms, such as corporate liability. 171 Justice Sotomayor explained how mechanisms for enforcement are matters decided under domestic law, not international law. 172 With this,
she argued that U.S. domestic law, not international law, should determine the issue of corporate liability under the ATS. 173 Because corporations can be liable under domestic law, and domestic law applies to enforcement mechanisms, Justice Sotomayor concluded that corporations can be liable under the ATS. 174

Justice Sotomayor continued by critiquing the majority’s conclusion that corporations are different than individuals in the eyes of international law. 175 She used a textual analysis of Sosa’s footnote twenty to conclude that a court should consider the type of defendant when deciding whether the law of nations was violated, but should not foreclose the possibility of a corporate defendant entirely. 176 Justice Sotomayor agreed that there are some norms corporations cannot violate, but insisted that this distinction should be made on a norm-by-norm basis, not a categorical one. 177

The dissent also criticized the majority’s reliance on international criminal tribunals that do not extend liability to corporations as evidence to support limiting liability in civil claims. 178 Justice Sotomayor cited both the practices of other jurisdictions that impose liability on corporations and the United States’ involvement in international agreements that involve corporations to show that, even under the majority’s incorrect application of Sosa’s step one, they should have reached the opposite conclusion. 179

Justice Sotomayor continued by commenting on Justice Gorsuch’s approach to the ATS. 180 She indicated that Congress never intended the ATS to be stillborn with no new causes of action. 181 Rather, she argued that Congress intended the statute to evolve as the law of nations did. 182 In making this point, she explained that it is the role of the Court to ask: Who are today’s pirates? 183 Justice Sotomayor also maintained that the absence of a distinction between defendants under the ATS indicates that Congress never intended there to be a distinction. 184 She further critiqued Justice Gorsuch’s opinion by citing the Executive Branch’s approval of ATS litigation extending to corporations and raised the potential for diplomatic

173. Id.
174. See id. at 1425–26.
175. Id. at 1422–23.
176. Id. (“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.” (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732, 732 n.20 (2004))).
177. Id. at 1422.
178. Id. at 1423.
179. Id. at 1423–24 (citing to United States Military Tribunal, International Criminal Tribunal for Rwanda, Special Tribunal for Lebanon, and International Convention for the Suppression of Terrorism).
180. Id. at 1427.
181. Id.
182. Id.
183. Id.
184. Id. at 1425.
tensions in not holding corporations liable. Justice Sotomayor concluded by expressing disdain for the majority’s lack of empathy when dealing with egregious human rights violations.

III. ANALYSIS

In an era where corporations are some of the most powerful actors across the globe and their actions traverse borders to affect billions of people, the Supreme Court signaled a lack of concern for human rights abuses that occur as a result of corporate action in Jesner. While the ATS allows victims to recover from harms inflicted upon them by fellow individuals, victims may no longer recover under the ATS if their torturer, murderer, or perpetrator is a corporation. In other words, corporate enemies of mankind are now exempt.

This Part argues that the Court came to the incorrect conclusion in Jesner. First, this Part argues that the Court misconstrued what constitutes an international norm under Sosa’s first prong by evaluating corporate liability as an international norm instead of evaluating financing terrorism as an international norm. Next, it argues that, even under the misapplication of Sosa’s first prong, the Court still could have found corporate liability to be an international norm. Third, this Part argues that the Court’s misapplication of Sosa’s first prong led to a misapplication of Sosa’s second prong, which resulted in the Court unnecessarily exercising judicial deference that overlooks a national interest in holding corporations answerable for their human rights abuses. Lastly, this Part argues that the Court is following a questionable trend by disparately applying international law and domestic law in a manner that favors corporate rights but neglects corporate responsibilities.

A. The Court’s Misapplication of Sosa’s First Prong

The first prong in Sosa required the Jesner Court to ask whether the alleged claim under the ATS is based on an international norm that is specific, universal, and obligatory. This Comment argues that, under this first prong, a court should evaluate the alleged conduct as the international norm, not the type of defendant as the international norm. As Justice Sotomayor explained in her dissent, the Court in Jesner misapplied this step by examining corporate liability as the international norm, rather than financing terrorism—the alleged international norm violation. Further, even under the Court’s misapplication of Sosa’s first prong, this Comment

185. Id. at 1431.
186. Id. at 1436 (“[T]he Court ensures that foreign corporations—entities capable of wrongdoing under our domestic law—remain immune from liability for human rights abuses, however egregious they may be.”).
189. Jesner, 138 S. Ct at 1420 (Sotomayor, J., dissenting).
contends that the Court still could have found corporate liability to be an international norm as nations around the world allow corporations to be defendants. Specifically, the Court’s assessment of international norms failed to account for evidence indicating that Arab Bank, a corporation, should be accountable to the victims of terrorist activity funded by the bank.

1. Enforcement Mechanism Versus Conduct

Both precedent and legal scholarship recognize the term “international norm” as referring to conduct that nations universally abide by “out of a sense of legal obligation and mutual concern.” There is significant confusion, however, in determining exactly what this means, and, in application, deciding what conduct actually violates international norms. In determining norms, courts evaluate conduct, but in Jesner, the Court evaluated the type of defendant. This is incorrect because “[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them.” Corporate liability is not a norm or form of conduct to abide by; rather it is a means of enforcing a norm. The question the Court should have asked is: Does financing terrorism violate an international norm that is specific, universal, and obligatory? As Justice Sotomayor’s dissent emphasized, courts have historically evaluated international norms by answering this question, which focuses on the conduct at issue, rather than the type of liability. To answer this question, the Court could have then looked to customs of other civilized nations, international treaties, and precedent. In doing so, it would have found precedent, treaties, scholarship, and customs that indicate financing terrorism

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190. See id.; Kiobel, 621 F.3d at 152 (Leval, J., concurring); see also Robert C. Thompson et al., Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes, 40 GEO. WASH. INT’L L. REV. 841, 871 (2009) (noting that some countries make no distinction between natural and legal persons under domestic law when applying international criminal law).


192. Flores v. S. Peru Copper Corp., 414 F.3d 233, 247–48 (2d Cir. 2003) (“The determination of what offenses violate customary international law is not a simple task. Customary international law is discerned from myriad decisions made in numerous and varies international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source.”).

193. See Jesner, 138 S. Ct. at 1420–23 (Sotomayor, J., dissenting).

194. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1020 (7th Cir. 2011) (first citing Kiobel, 621 F.3d at 172–74 (Leval, J., concurring); then citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422–23 (1964); and then citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777–78 (D.C. Cir. 1984) (per curiam)).

195. See Jesner, 138 S. Ct. at 1420 (Sotomayor, J., dissenting); Nestle, 766 F.3d at 1022 (explaining that the analysis under Sosa is “norm-by-norm” with no categorical corporate immunity); Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011) (concluding that the ATS does not suggest corporate immunity), vacated, 527 F. App’x 7 (D.C. Cir. 2013).

196. Jesner, 138 S. Ct. at 1420 (Sotomayor, J., dissenting); Kiobel, 621 F.3d at 151 (Leval, J., concurring).

197. Jesner, 138 S. Ct. 1423–24 (Sotomayor, J., dissenting); see Nestle, 766 F.3d at 1019–20 (explaining that courts should refer to customary international law which includes evaluating statutes
is in fact a violation of the law of nations.\textsuperscript{198} The \textit{Sosa} opinion itself indicates that the proper evaluation of an international norm is based on conduct.\textsuperscript{199} The Court in \textit{Sosa} did not ask whether there was an international norm for holding government drug-enforcement agencies liable; instead, it asked whether illegally arresting and transporting a person across national borders violates an international norm.\textsuperscript{200} Regardless of the outcome, the rule developed in \textit{Sosa} and applied in subsequent cases clearly supports a norm determination based on conduct, not enforcement mechanisms.\textsuperscript{201}

After \textit{Sosa}, most courts followed similar reasoning to Justice Sotomayor's and asked whether the alleged conduct violates an international norm, not whether the type of defendant is recognized as liable under international law.\textsuperscript{202} For example, the Court in \textit{Kiobel} explained that the question under \textit{Sosa} is not whether courts have jurisdiction over causes of action provided by international law, but rather whether courts have "authority to recognize a cause of action under U.S. law to enforce a norm of international law."\textsuperscript{203} Under this reasoning, the Second Circuit in \textit{In re Arab Bank, PLC Alien Tort Statute Litigation}\textsuperscript{204} conceded that \textit{Kiobel} may stand for the proposition that a norm evaluation should focus on conduct that violates international law, not remedies or types of defendants.\textsuperscript{205} The Second Circuit also conceded that its decision in \textit{Kiobel I} may have resulted from a misreading of \textit{Sosa}.\textsuperscript{206} Additionally, the Second Circuit recognized the growing consensus among all other circuits that allows for corporate liability under the ATS.\textsuperscript{207} This growing consensus indicates that

\begin{footnotesize}
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    \item 198. See 18 U.S.C. § 2333 (2018) (enacted to hold corporations liable for terrorism); \textit{Jesner}, 138 S. Ct. at 1422–25 (Sotomayor, J., dissenting); \textit{Nestle}, 766 F.3d at 1020–21 (recognizing that federal courts, under contemporary international law, allow ATS claims against supporters of terrorism); Knowles, supra note 12, at 1172 (describing terrorism as modern day piracy).
    \item 200. \textit{Id.} at 734–36.
    \item 201. Plaintiffs must show that the conduct was a violation of international norms; however, the majority is indicating that plaintiffs must show that the form of liability is an international norm. Under the majority's reasoning, plaintiffs suing a group of pirates would be barred from bringing a claim if the pirates incorporated themselves. This turns the ATS on its head because plaintiffs' alleged harm becomes irrelevant depending on who caused their harm. \textit{Flomo v. Firestone Nat. Rubber Co.}, 643 F.3d 1013, 1019 (7th Cir. 2011) ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort Statute could ever be successful, even claims against individuals . . . .").
    \item 202. See \textit{Nestle}, 766 F.3d at 1022; Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014); \textit{Flomo}, 643 F.3d at 1021; Doe v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011), \textit{vacated}, 527 F. App’x 7 (D.C. Cir. 2013); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).
    \item 204. 808 F.3d 144 (2d Cir. 2015).
    \item 205. \textit{Id.} at 155.
    \item 206. \textit{Id.}
    \item 207. \textit{Id.} at 156 (citing to other circuit courts that decided ATS claims based on the alleged conduct, not the corporate status of defendants).
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courts are less concerned with the type of defendant under the ATS and more concerned with the human rights violations that lead to ATS claims. However, the Court in Jesner decided against this reasoning and instead focused on the corporate status of the defendant while overlooking the catastrophic human rights violations from which the claims arose.

2. Corporate Liability Exists as an International Norm

Even under the Court’s incorrect application of Sosa’s first prong, the Court should have found a basis for corporate liability. Specifically, in assessing whether corporate liability is an international norm, the Court should have acknowledged contrary domestic case law, the domestic laws of other nations, and the practices of international tribunals to conclude that corporate liability is in fact an international norm. Instead, the Court incorrectly relied on criminal tribunals as justification for barring corporate civil liability.208

The majority’s reliance on international criminal tribunals is flawed because it fails to recognize the vast difference between criminal and civil liability.209 The objective of criminal liability is crime prevention through arrest, prosecution, and incarceration,210 while civil liability serves to punish individuals and corporations by making them pay for the harm they caused.211 And, international criminal tribunals are restricted to natural persons because criminal law itself seeks to punish natural persons for the harm they intended to cause—a punishment and intent that should not apply to corporations.212 Further, international criminal tribunals do not impose criminal liability on corporations because corporate criminal liability is less universally accepted, not because corporate liability as a whole is unfounded.213 Corporate criminal liability can be challenging in application and has not yet been established in the international context.214 In fact, with the government trending toward civil remedies as punishment for disruptive behavior, civil sanctions are more relevant than ever for punishing

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211. Kiobel, 621 F.3d at 152 (Leval, J., concurring); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 10 (2d ed.).
212. Kiobel, 621 F.3d at 152–53 (Leval, J., concurring) (“No principle of domestic or international law supports the majority’s conclusion that the norms enforceable through the ATS . . . apply only to natural persons and not to corporations, leaving corporations immune from suit and free to retain profits earned through such acts.”).
213. Id. at 152.
214. Id. at 151–52. Because there are immense differences in the way nations view corporate criminal liability, the international community has not been able to negotiate an agreeable framework for corporate criminal liability. See David Scheffer, Keynote Address, Is the Presumption of Corporate Impunity Dead?, 50 CASE W. RES. J. INT’L L. 213, 217–18 (2018).
corporations’ human rights violations.\textsuperscript{215} For these reasons, the majority’s reliance on criminal tribunals as evidence against corporate liability is meritless. This reliance is not the only evidence that the majority misapplied to find no norm of corporate liability.

The Jesner Court also ignored contrary domestic case law when it concluded that there is no norm of corporate liability under the ATS.\textsuperscript{216} Judge Leval’s concurrence in Kiobel I led to multiple opinions that held corporations liable for their violations of international law.\textsuperscript{217} Before 2010, no court had ruled that corporations were immune from civil liability under the law of nations.\textsuperscript{218} In fact, of all the ATS cases brought against corporate defendants, the only two cases that barred corporate liability were Kiobel I and the Central District of California’s Nestle decision, which was ultimately reversed.\textsuperscript{219} The majority of cases decided under the ATS presume corporations can be defendants and have decided these cases on the merits, rather than the corporate status of the defendant.\textsuperscript{220} However, the

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\item \textsuperscript{215} Kiobel, 621 F.3d at 152 (Leval, J., concurring); Cheh, supra note 210, at 1325–26. There is also significant evidence of growing corporate criminal liability around the globe. While this is not the same as civil liability, this is further evidence that the international community is trending toward holding corporations accountable. This reveals additional flaws in the majority’s analysis of criminal tribunals. See Scheffer, supra note 214, at 217–18 (explaining that a significant number of nations have enacted legislation that establishes corporate criminal liability).
\item \textsuperscript{216} Jesner, 138 S. Ct. at 1396 (citing Doe v. Nestle USA, Inc., 766 F.3d 1013, 1020 (9th Cir. 2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017–21 (7th Cir. 2011); and Doe v. Exxon Mobil Corp., 654 F.3d 11, 51–55 (D.C. Cir. 2011)).
\item \textsuperscript{217} Kiobel, 621 F.3d at 151 (Leval, J., concurring).
\item \textsuperscript{219} Kiobel, 621 F.3d at 161 n.12 (Leval, J., concurring) ("See, e.g., Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir.2009) (holding that allegation that a corporate defendant engaged in non-conventional medical experimentation on human subjects stated a claim under the ATS for violations of law of nations), cert. denied, ___ U.S. ___, 130 S.Ct. 3541, 177 L.Ed.2d 1121; Sareen v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir.2007) (concluding that nonfrivolous claims against international mining corporation for vicarious liability for violations of jus cogens norms were sufficient to warrant exercise of federal jurisdiction under the ATS), vacated in part on other grounds, 550 F.3d 822 (9th Cir.2008) (en banc); Doe v. Unocal Corp., 395 F.3d 932 (9th Cir.2002) (concluding that a private party—such as Unocal, a corporation—may be subject to suit under the ATS for aiding and abetting violations of customary international law and for violations of certain jus cogens norms without any showing of state action), reh’g en banc granted, 395 F.3d 972 (9th Cir.2003), appeal dismissed, 403 F.3d 708 (9th Cir.2005); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir.2002) (dismissing ATS case against corporate defendant on forum non conveniens grounds, because courts of Ecuador provided adequate alternative forum); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir.2000) (reversing district court’s dismissal of ATS complaint against corporations on forum non conveniens grounds, and affirming district court’s ruling that corporations were subject to personal jurisdiction in New York); Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir.1998) (vacating district court’s dismissal of ATS case against corporation on forum non conveniens grounds and remanding for further proceedings); Bowoto v. Chevron Corp., 557 F.Supp.2d 1080 (N.D.Cal.2008) (denying oil company defendants’ motion for summary judgment on claims that U.S. corporation, acting through its Nigerian subsidiary, aided and abetted violations of laws of nations; case proceeded to trial before jury, which found in favor of defendants); Licea v. Curacao Drydock Co., 584 F.Supp.2d 1355 (S.D.Fla.2008) ($80 million ATS judgment against defendant corporation for human trafficking and forced labor); Chowdhury v. WorldTel Bangladesh Holding, Ltd., No. 08 Civ. 1659(BMC) (E.D.N.Y. Aug. 6, 2009), ECF No. 48 ($1.5 million ATS jury verdict entered against defendant holding company
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Jesner Court unwisely ignored this domestic case law in its decision, not even mentioning the mounting opinions concluding that corporations could be held liable under the ATS.221

Further, the United States has expressly defined corporations as potential defendants in its adoption of international tribunals into domestic law; seemingly indicating that corporations can be held liable for violations of the law of nations. Most relevant to Jesner, the United States adopted the ICSFT into U.S. domestic law verbatim.222 The statute indicates that “[w]hoever . . . by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used” to carry out any acts related to terrorism is subject to punishment.223 When interpreting any act of Congress, the U.S. Code provides that the term “whoever” includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”224 Because the United States is a signatory state to an international convention that holds corporations liable for financing terrorism and the United States has incorporated that convention into domestic law, it would seem obvious that there is not only a norm of corporate liability, but a specific norm of corporate liability in relation to financing terrorism.

In finding a norm under international law, the Court also failed to consider the laws of other nations.225 Significant scholarship suggests that the U.S. courts struggle to define Customary International Law (CIL). In practice, American courts erroneously defer to American law as evidence of international norms instead of methodically identifying the existence of state practice and opinio juris in support of international law.226 Such a habit causes significant problems, as using American law as a proxy for international law supports a parochial view of what constitutes CIL.227
Thus, it is unsurprising that the number of foreign jurisdictions surveyed or cited to in the Jesner majority opinion is minimal. The Court concluded international corporate liability is not a norm without adequately considering other nations in the international community. Had the Court surveyed other national laws for existence of corporate liability, it would have found international evidence of an international norm.228

The Court also overlooked the practices of international tribunals that held corporations liable for certain human rights violations and were thus wholly relevant to the facts of Jesner. These tribunals prohibit the practices of genocide, financing of terrorism, and crimes against humanity, thus suggesting that nations should hold private actors liable for such acts.229 Further, the United States previously asserted jurisdiction over claims against corporations by citing to international prohibitions of genocide, financing of terrorism, and crimes against humanity as evidence of an international norm violation conventions.230 For example, the court in Sarei v. Rio Tinto231 held that the prohibition against genocide was universal and therefore corporations could be liable for genocide.232 The court in Flomo rejected the argument that there was a norm forbidding corporate liability for crimes against humanity.233 Similarly, the court in Nestle held that “it would be contrary to both the categorical nature of the prohibition on slavery and the moral imperative underlying that prohibition to conclude that incorporation leads to legal absolution for acts of enslavement.”234 Our court system has recognized the precedential effect of the actions and decisions of these relevant tribunals, yet the Court in Jesner dismissed relevant conventions as “weak support” with little explanation.235

Thus, the Court misapplied Sosa’s first prong by incorrectly attempting to find an international norm supporting the imposition of corporate liability. Instead, the Court should have searched for the existence of an international prohibition on financing terrorism, which currently exists and

228. Scheffer, supra note 214, at 218; Thompson et al., supra note 190, at 856.
230. See, e.g., Doe v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011) (rejecting argument that there is no norm forbidding corporations from committing crimes against humanity); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 759–60 (9th Cir. 2010); In re S. Afr. Apartheid Litig., 15 F. Supp. 3d 454, 456 (S.D.N.Y. 2014) (asserting jurisdiction over corporate defendants for violations including genocide); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007) (“Neither the Bombing Convention, the Financing Convention nor the other sources of international law which give rise to this norm [financing terrorism] require state action.”).
231. 671 F.3d 736.
232. Id. at 760.
233. 643 F.3d at 1017.
234. Nestle, 766 F.3d at 1022.
would have sustained the plaintiffs’ case. However, even under the Court’s incorrect approach to the first prong, it could have found a norm supporting a finding of corporate liability under international law. The Court disregarded significant evidence of international corporate liability to reach an unnecessarily broad conclusion that demonstrates an unwillingness to hold corporations responsible for their actions. As the Court broadened immunity for corporations in *Jesner*, it continues to expand privileges for corporations under the Constitution.

B. The Court’s Misapplication of Sosa’s Second Prong

The Court’s failure to analyze financing terrorism as a violation of an international norm thwarted its application of *Sosa*’s second step in weighing potential diplomatic strife. By misapplying corporate liability as the international norm, the Court came to a drastic conclusion that “use[d] a sledgehammer to crack a nut.” The question of corporate liability fits more appropriately in *Sosa*’s second step, which requires courts to weigh the practical consequences of making a cause of action available to litigants in federal courts.

In *Jesner*, it was easier for the majority to justify the negative practical consequences of corporate liability than to justify the negative practical consequences of providing a safe harbor for terrorist activity. As a result, the Court sidestepped the issue of financing terrorism and ignored the dangers of allowing companies to exploit their U.S. branches for financing terrorist efforts. The Court foreclosed corporate liability to protect U.S. businesses from being haled into court in other jurisdictions for their human rights violations and to protect the investment interests of the U.S. market. These justifications were deemed practical, but the Court did

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238. If the Court concluded that financing terrorism is the international norm, it would have then asked whether there is anything that counsels against court enforcement. In doing so, the Court could look to the ICSFT to see that Congress permits the judiciary to punish the financing of terrorism committed by “whoever,” which by definition includes corporations. See Dictionary Act, 1 U.S.C. § 1 (2018); 18 U.S.C. § 2339C.


241. Compare Huber & Mitrokostas, supra note 61 (predicting that the global economy will be interrupted by ATS litigation), with Knowles, supra note 12, at 1156 (explaining that there is no evidence of ATS litigation leading to divestment).


not thoroughly consider the practical effect of foreclosing corporate liability.

The Court concluded that corporate liability under the ATS would discourage investment abroad due to the constant risk of liability for human rights violations. While the U.S. market and foreign investments are an important part of the U.S. economy, there is no evidence to support the claim that liability under the ATS will have a negative impact. In fact, all evidence indicates that a demonstrated commitment to human rights and civil liberties promotes economic development.

1. Unnecessary Judicial Deference Under Sosa’s Second Prong

Instead of categorically barring corporate liability, the Court should have considered the defendant’s corporate status among all other factors in determining whether deference to Congress is necessary. But, because of the misapplication of Sosa’s first prong, the Court ignores corporate liability in evaluating the need for judicial deference. As such, the Court overlooks evidence that the Legislative and Executive Branches approve of corporate defendants in ATS litigation. In doing so, the Court insists on deference to Congress. This deference and consequential narrowing of liability further challenges a plaintiff’s ability to recover under the ATS.

Over time, courts have become more reluctant to decide both ATS and human rights cases generally, reasoning that questions of foreign policy are often better left to the other branches. The Court in Jesner took this judicial caution to an extreme and, in doing so, it created a new rule on corporate liability that neither Congress nor the Executive approved of—the opposite of what judicial caution intends. Specifically, because the Court already concluded under the first prong that corporate liability was not an international norm, it did not properly consider the practical effect of barring corporate defendants under the ATS. Had the Court considered the practical effect of a categorical bar on corporate liability, it may have more clearly examined evidence of approval of corporate liability from the

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244. The Court does not explain why the human rights violations are less important than foreign investments and the U.S. market. The Court also fails to acknowledge that corporations are at constant risk of liability regardless of the ATS. Knowles, supra note 12, at 1156–57.

245. Petition for Writ of Certiorari at 11, Mohamad, 132 S. Ct. 1702 (Nos. 11-88, 10-1491) ("[D]ire predictions of the impact of the ATS have simply not materialized."); Knowles, supra note 12, at 1156–57.

246. Petition for Writ of Certiorari, supra note 245, at 15 (explaining the positive impact on an economy that respects human rights).


248. See id. at 1402–08 (majority opinion).

249. See id. at 1424, 1431 (Sotomayor, J., dissenting).

other branches and recognized that refusing to hold corporations liable presents significant dangers.

The Court disregarded evidence suggesting both executive and congressional approval of corporate liability in law of nations violations.\(^{251}\) First, the United States is a signatory state to the ICSFT.\(^{252}\) The U.S. and 131 other nations agreed to “take necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable” for violation of the conventions terms, which in essence prohibit any connection with funding terrorism.\(^{253}\) With the United States’ agreement to this convention, the judiciary, as a primary enforcement mechanism in the United States, has not only the approval of the other branches but a responsibility to hold companies accountable for financing terrorism.\(^{254}\) When regulatory regimes are failing to deter corporate involvement with law of nations violations, the judiciary must act to assure U.S. commitment to international treaties.\(^{255}\) Second, the Court quickly disregarded the relevance of the ATA because it is limited to domestic plaintiffs; however, this statute is relevant in determining legislative intent.\(^{256}\) Under the ATA, corporations can be liable for involvement with international terrorism.\(^{257}\) The ATA is relevant because it is legislative recognition that terrorism violates an international norm and, more importantly, that the actor who violates that norm can be a corporation.\(^{258}\)

Thus, none of this evidence reveals an intent on behalf of the other branches that the judiciary should bar corporate liability such that foreign corporations can use the United States as a safe harbor for terrorist financing. By concluding corporate liability is not a norm under \textit{Sosa}’s first prong, the Court’s use of judicial discretion in the second step was flawed. Consequently, the Court’s exercise of judicial caution was self-contradictory in the creation of a new rule. The Court’s new rule in \textit{Jesner} further deprives ATS plaintiffs of an opportunity to recover and absolves corporations of liability for law of nations violations without congressional approval.

\(^{251}\) \textit{Jesner}, 138 S. Ct. at 1431–32 (Sotomayor, J., dissenting) (citing evidence of executive and congressional approval of holding corporations liable under the ATS).

\(^{252}\) \textit{Id.} at 1424 (Sotomayor, J., dissenting).

\(^{253}\) \textit{Id.} at 1424 n.4.

\(^{254}\) \textit{See Brief for Yale Law School Center, supra note 229.}


\(^{256}\) \textit{Jesner}, 138 S. Ct. at 1404–05 (rejecting the notion that the ATA is a relevant comparison to the ATS because it is limited to U.S. national plaintiffs).


2. Corporate Accountability Under International Law

The majority opinion voices legitimate concerns over the increased potential for diplomatic strife that may arise if corporations can be held liable under the ATS; however, these concerns are not resolved by the categorical foreclosure of corporate liability. Instead, the Court’s refusal to impose liability could create friction comparable to that of imposing liability because the Jesner decision undoubtedly sends a message to other nations that America is unconcerned with being used as a safe harbor for terrorist-related activity. America’s proclaimed respect for human rights during a time of vast corporate globalization is seemingly hollow as the nation loosely follows human rights norms and the courts continue to protect malicious corporations from liability.

The majority’s concerns about diplomatic strife suggest that, if the Court were to hold corporations liable under the ATS, this would be an overextension of the judiciary’s authority. The rule created from these concerns, however, was unreasonably disproportionate to the issue at hand. If the Court held that corporations could be liable, it would not directly follow that corporations would be liable. As Justice Sotomayor acknowledged in her dissent, there are other means for limiting the number of ATS claims brought against corporations in the United States, such as Kiobel’s touch and concern test. Further, the judiciary has already created tools that would allow courts to hold bad actors accountable without overstepping into diplomatic concerns. Case after case, the Court creates a new framework and sets forth multipart tests for narrowing claims that involve a foreign element, but the Court seemingly forgets to apply this precedent, and instead creates additional rules that narrow foreign claims from yet another angle. By overlooking and misusing precedent, the Court created a categorical rule that limited the ATS far beyond what was necessary. It is true that the factual scenario presented in the Jesner case itself may not have overcome the presumption of extraterritoriality.

259. Jesner, 138 S. Ct. at 1428 (Sotomayor, J., dissenting) (“[O]ur nation has an interest not only in providing a remedy when our own citizens commit law of nations violations, but also in preventing our Nation from serving as a safe harbor for today’s pirates.”); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 783 (D.C. Cir. 1984) (“If the court’s decision constitutes a denial of justice, or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to its home state.”).

260. Jesner, 138 S. Ct. at 1407; see also id. at 1418–19 (Gorsuch, J., concurring).

261. Id. at 1431 (Sotomayor, J., dissenting); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 125 (2d Cir. 2010).


and it is also true that the judiciary should exercise caution to avoid causing diplomatic tensions; however, this does not erase the Court’s responsibilities to hold wrongdoers accountable for the harm that they cause.264

A hypothetical with stronger connections to the United States reveals the vulnerabilities of the Jesner decision and the diplomatic friction that could follow.265 Under the new rule, a foreign corporation with significant operations located in America using foreign nationals for slave labor on U.S. soil could not be held liable for violating the law of nations under the ATS because of its corporate status.266 While the corporation would face sanctions under different statutes, the people victimized by the corporation could struggle to recover in the United States.267 In this hypothetical, Jesner’s categorical bar on corporate liability makes little sense and, more importantly, reveals America’s failure to hold corporations liable for conscious-shocking behavior. The United States is signaling to the world that human rights are negligible—a stance that has historically led to diplomatic tensions.268

Proponents of narrowing the scope of ATS liability are skeptical that such diplomatic strife will arise as a result of Jesner because they do not believe anyone is actually looking to the United States to hold corporations liable.269 One might ask, Who would be disillusioned with the U.S. justice system for not providing a remedy under the ATS?270 This question ignores one important party: the plaintiffs. In 1789, the anticipated ATS plaintiffs were wealthy foreign diplomats. However, current, average ATS plaintiffs look very different from their eighteenth century counterparts and, as such, are easily overlooked and may lack judicial recourse for their injuries.271 Yet, while modern ATS plaintiffs are not affluent French Ministers, they are people and they are people harmed by actions, at least in part, associated with the United States.272 In fact, the potential for diplomatic strife arising from ATS claims is less imminent in modern ATS

266. Id.
267. See Jesner, 138 S. Ct. at 1431 n.9 (Sotomayor, J., dissenting).
268. See Childress, supra note 11, at 726–27 (explaining the power and stigma behind ATS claims); Knowles, supra note 12, at 1161.
269. See Jesner, 138 S. Ct. at 1417 (Gorsuch, J., concurring); Transcript of Oral Argument, supra note 240, at 30; Childress, supra note 11, at 727.
271. Modern ATS plaintiffs are often underrepresented populations that are easily subjected to human rights abuses. See, e.g., Jesner, 138 S. Ct. at 1394; Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 113 (2013); Doe v. Nestle USA, Inc., 766 F.3d 1013, 1016 (9th Cir. 2014); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1015 (7th Cir. 2011); Abdullahi v. Pfizer, Inc., 562 F.3d 163, 168 (2d Cir. 2009); Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1198 (9th Cir. 2007); Khulumani v. Barclay Nat’l Bank, Ltd., 504 F.3d 254, 258 (2d Cir. 2007); Doe v. Unocal Corp., 395 F.3d 932, 936 (9th Cir. 2002).
cases because the plaintiffs are not diplomats themselves. Instead, they are typically persons victimized by their own nations with little to no access to justice in their own countries. Thus, although diplomatic strife may not arise tomorrow from the Court’s decision in Jesner, the United States’ continued refusal to comply with international agreements and its denial of redress for law of nations violations may lead the United States into problematic territory.

C. Abundant Corporate Rights, Minimal Corporate Responsibilities

In other decisions, the Court has broadened corporate rights by granting corporations the right to religious expression, First Amendment freedoms, and the ability to finance campaigns. Thus, while corporations are treated as “persons” under the law when they seek affirmative rights, their status is treated differently when they are confronted with obligations. The Court refuses to explicitly recognize this distinction because it treats domestic constitutional law as distinct from international law. However, this ignores a basic principle of international law—international law is incorporated into domestic law. International law provides the norms, while domestic law provides enforcement mechanisms. Under U.S. law, corporations are legally recognized bodies that have constitutional rights, are frequently defined as “persons,” and should therefore be subject to the same liabilities as individuals. U.S. courts, however, are increasingly inclined to reject international law as a component of domestic law. Because of this rejection, the courts are drawing directly contradictory conclusions about corporate rights and corporate responsibilities.

If the Court’s analysis recognized international law and domestic law as intertwined, the Court’s analysis in Jesner would have been simple and

273. COMM’N ON LEGAL EMPOWERMENT OF THE POOR & UNITED NATIONS DEV. PROGRAMME, MAKING THE LAW WORK FOR EVERYONE 5 (2008) (estimating that tens of millions of individuals lack a legal identity and even more individuals are too poor to access the justice system in their respective nations); see Knowles, supra note 12, at 1161; see also Thompson et al., supra note 190, at 888–92.
274. See Knowles, supra note 12, at 1175.
276. The Author is not overlooking the fact that the Constitution and CIL are applied differently in the U.S. justice system. The comparison in this part focuses simply on the distinct manner in which justices characterize corporations when they seek to grant rights versus when they are asked to enforce obligations.
278. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 152 (2d Cir. 2010) (Leval, J., concurring) (“The position of international law on whether civil liability should be imposed for violations of its norms is that international law takes no position and leaves that question to each nation to resolve. . . . It leaves the manner of enforcement including the question of whether there should be private civil remedies for violations of international law, almost entirely to individual nations.”).
280. Chicago & S. Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (cited by Justice Gorsuch who uses this case as evidence that the judiciary should not involve itself with anything related to foreign policy or national security); Scoville, supra note 226, at 1934–35.
more consistent with other decisions involving corporations. There are international obligations in place to prevent financing terrorism and each respective nation must use their domestic laws to enforce these international obligations. U.S. domestic law uses corporate liability as an enforcement mechanism, so when corporate defendants commit violations of the law of nations, courts are obliged to hold corporations responsible. International law expressly leaves the door open for nations to apply their own definition of corporation.

Refusal to integrate international and domestic law is evident in the method courts use to evaluate corporate rights under the Constitution versus corporate rights under international law. If the Court were to view international law as part of domestic law, judicial recognition of corporations as persons would be consistent in both spheres. Instead, the judiciary provides extensive analysis regarding why corporations are people under domestic law and rejects, with minimal explanation, that they are unknown entities under the law of nations. In Citizens United v. Federal Election Commission, just months before Kiobel I, the Supreme Court held that the First Amendment bars the government from suppressing speech on the basis of the speaker’s corporate identity. The Court’s analysis in Citizens United acknowledged that the First Amendment distinguished between speech, but not speakers; that the First Amendment applies to corporations because there is nothing in the Constitution that indicates otherwise; and that corporations are robust and multidimensional entities

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281. 18 U.S.C. § 2339C.
282. Kiobel, 621 F.3d at 152 (Leval, J., concurring).
283. Barcelona Traction, Light and Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 38 (Feb. 5) (“[International law] recognize[s] the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law”); see Doe v. Exxon Mobil Corp., 654 F. 3d 11, 57 (D.C. Cir. 2011) (coming to the same conclusion under Sosa precedent), vacated, 527 F. App’x 7 (D.C. Cir. 2013).
284. Beth Stephens, Are Corporations People? Corporate Personhood Under the Constitution and International Law: An Essay in Honor of Professor Roger S. Clark, 44 Rutgers L.J. 1, 4–5 (explaining the intricate analysis used to declare corporations people under the Constitution versus the cursory look at corporate form when analyzing obligations under international law); see, e.g., Kiobel, 621 F.3d at 149 (holding that corporations are entities unknown to international law); compare Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 343 (2010) (explaining that speech should not receive less protection simply because it is coming from a corporation and that speech from corporations should not be treated differently simply because it is not coming from a “natural person”), with Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1406 (2018) (refusing to impose corporate liability because corporate defendants under the ATS create unique problems).
289. Id. at 386, 389 (Scalia, J., concurring) (“Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are not covered, but places the burden on appellant to bring forward statements showing that they are. . . . The dissent offers no evidence—
whose characteristics should be thoroughly examined when determining whether they are subject to certain laws.\textsuperscript{290} Thus, in light of the Court’s recent decision to grant corporations personhood under domestic law, one might assume similar justifications exist that justify holding corporations responsible as persons under the law of nations. Instead, the judiciary rejected its own justifications and followed the trend of rejecting international law as part of domestic law.

When the Court analyzes the issue of corporate liability under the law of nations, corporations are no longer multidimensional entities to be methodically examined as they are under domestic law. Instead, they are “undefined concepts...unknown to international law.”\textsuperscript{291} In \textit{Citizens United}, the Court insisted that corporations should not be treated differently from individuals simply because “the speaker is an association that has taken on corporate form.”\textsuperscript{292} In direct contradiction, the Court in \textit{Jesner} indicated that corporations should be treated differently from individuals simply because the actors have taken on a corporate form.\textsuperscript{293} The Court in \textit{Jesner} recognized that corporations can commit human rights violations, but relied on its own fabricated notion that corporate liability is not an international norm to conclude that corporations are different when they are donating money to terrorism versus when they are donating money to campaigns. The stark contrast in the Court’s analysis of corporations when granting rights to these entities compared to its analysis when shielding these entities from liability highlights the Court’s auspicious treatment of corporations. Even though the judiciary should be cautious when deciding cases with international components, the Court’s decision in \textit{Jesner} misunderstood this reasoning to favor corporations. The Court’s ability to maneuver analyses in favor of corporations could lead to a precarious inequity in corporate power that will leave individuals at a disadvantage.

The Court’s continued tendency to inconsistently apply international and domestic law to corporations will lead to corporations with abundant rights and minimal liabilities. This imbalance could pose a threat to the U.S. government and citizens alike. The Founders of the Constitution gave significant thought to the delegation of authority within the government to achieve balance and separation of powers. As corporations gain increasing amounts of power over the government, and decreasing risks of liability,

\textsuperscript{290} Stephens, supra note 284, at 4.

\textsuperscript{291} Id. at 36 (explaining that Judge Cabranes in \textit{Kiobel} “essentially ruled that the corporation is unknown to international law” and stating that the opinion makes a corporation seem like an “undefined concept, an entity without a recognizable structure or function to which obligations can be ascribed”).

\textsuperscript{292} \textit{Citizens United}, 588 U.S. at 349.

\textsuperscript{293} \textit{See Jesner v. Arab Bank, PLC}, 138 S. Ct 1386, 1402, 1419 (2018) (Sotomayor, J., dissenting) (“Nothing about corporate form in itself raises foreign-policy concerns that require the Court...to immunize all foreign corporations from liability under the ATS.”).
there is great incentive to “abdicate state duties to corporations because incorporation may effectively insulate all parties—states, armed groups, and corporations—from liability.” If corporations with abundant resources have the ability to alter government conduct while committing severe human rights abuses sans repercussions, our justice system and government as a whole is at risk. The Court in Jesner exemplifies this alarming inclination to give more power to corporations at the expense of human lives.

CONCLUSION

“From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun.” These words from Filartiga, and other perfectionist sentiments from the opinion reflect America’s optimistic mindset at the time. The Supreme Court’s decision in Jesner, reflects a much bleaker outlook on humanitarianism. Even though the opinion cites to legal authority, the misapplication of this authority and the Court’s improper exercise of judicial restraint reflect a nation that has little interest in fundamental human rights. In its assessment of Sosa’s first prong, the Court failed to draw a proper distinction between conduct leading to a violation of the law of nations and enforcement mechanisms. Even still, the Court overlooked significant evidence indicating that corporate liability could be an international norm. Under Sosa’s second prong, the Court missed an opportunity to exercise its enforcement authority and hold a corporation accountable for its atrocious human rights abuses. Taken together, the Court’s analysis of the first and second prong of Sosa display a continued trend toward granting corporate entities affirmative rights while simultaneously diminishing their incentives to employ ethical business practices.

At each step, the majority recognized that it could approach the analysis differently—corporate liability could be a norm, the ATS could be compared to other terrorist-related legislation, diplomatic strife could result regardless of the Court’s decision. In the end, the opinion was full of “coulds” and, as a result, the Court did not consider what it should do. Our justice system should see terrorism as violating an international norm. Our justice system should recognize legislation that highlights the importance of human rights. Our justice system should see safe harboring terrorist activity as conduct that may cause diplomatic strife. The Jesner Court created a categorical rule that unnecessarily forecloses claims against corporations under the ATS. But meritorious claims brought by

296. See id.
individuals subjected to severe human rights abuses should be heard in U.S. courts, regardless of the corporate status of the defendant. Therefore, the Supreme Court must find a way to remedy this wrong.

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