

United States Supreme Court—Alien Tort Statute—corporate liability—international human rights violations

JESNER V. ARAB BANK, 138 S. Ct. 1386.
United States Supreme Court, April 24, 2018.

The exclusion of transnational human rights litigation from U.S. federal courts is, for most practical purposes, now complete. On April 24, 2018, the U.S. Supreme Court delivered a 5–4 ruling in *Jesner v. Arab Bank*, deciding that foreign corporations cannot be sued under the Alien Tort Statute (ATS).

The ATS, a sparsely worded statute from 1789, grants U.S. federal courts jurisdiction over “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.”¹ After almost two centuries of dormancy, the ATS was revived at the urging of American human rights lawyers in 1980,² ushering in the modern era of transnational human rights litigation in U.S. courts.

The petitioners in *Jesner* were some 6,000 foreign nationals who were the plaintiffs in five lawsuits, filed in New York between 2004 and 2010. Their ATS suits alleged that they or their families were injured or killed by terrorist activity in the Middle East. And they claimed that the defendant, Arab Bank, helped finance such activity in violation of international law. Arab Bank, based in Jordan, is valued at “one-fifth to one-third of the total market capitalization of the Amman Stock Exchange.”³

The District Court dismissed their claims on the grounds that corporations could not be sued under the ATS, and the Second Circuit Court of Appeals affirmed. The U.S. Supreme Court then granted certiorari.

Jesner is not the first time that the question of corporate liability under the ATS has been presented to the U.S. Supreme Court. As the petitioners’ lawsuits made their way through New York federal courts, the Court decided another ATS case arising from litigation in New York. That case, *Kiobel v. Royal Dutch Petroleum*, involved Nigerian plaintiffs.⁴

Kiobel had been dismissed by the Second Circuit Court of Appeals in New York on the basis that there was no corporate liability under customary international law and that therefore corporations could not be sued under the ATS. The *Kiobel* plaintiffs petitioned the U.S. Supreme Court, which granted certiorari to address the corporate liability question. Instead, however, the Court asked for re-argument and ultimately dismissed the *Kiobel* petitioners’ claims on the grounds that the presumption against extraterritoriality applied to the ATS and that the alleged unlawful conduct in Nigeria fell outside the statute’s scope.⁵ In so doing, it left the Second Circuit’s holding on corporate liability intact, paving the way for the question to come back to the Court in *Jesner*.

¹ 28 U.S.C. § 1350.

² *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

³ Brief for Hashemite Kingdom of Jordan as Amicus Curiae at 2, *Jesner v. Arab Bank*, 138 S. Ct. 1386 (No. 16–499).

⁴ See David P. Stewart & Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AJIL 601 (2013). See also Anupam Chandler, *Agora: Reflections on Kiobel*, 107 AJIL 829 (2013).

⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

The *Jesner* decision garnered five separate opinions. Justice Kennedy wrote the plurality opinion, joined by Chief Justice Roberts and Justice Thomas. Justices Alito and Gorsuch each wrote concurring opinions—joining Justice Kennedy’s opinion in part and concurring in the judgment. Justice Thomas also wrote a short concurrence to signal his agreement with Justices Alito and Gorsuch. Justice Sotomayor wrote the dissent, joined by Justices Ginsburg, Breyer, and Kagan.

After presenting the background to the case, the Court began with the history of the ATS. Justice Kennedy described the ATS as a jurisdictional statute that “does not by its own terms provide . . . a cause of action for violations of international law” and emphasized that its original purpose was “to avoid foreign entanglements” by providing a federal forum to litigate injuries to foreign citizens (p. 8). He then set out the two-part test established by the Court in a 2004 ATS case, *Sosa v. Alvarez Machain*,⁶ to identify circumstances in which federal courts may recognize a cause of action based on customary international law of the present day.

Part one of the *Sosa* test asks whether the alleged wrongdoing violates a norm that is “specific, universal, and obligatory.”⁷ If the answer is no, then the ATS claim must be dismissed. But if the allegations do involve the violation of such a norm, then the Court must consider, under part two, whether allowing the case to proceed would reflect a “proper exercise of judicial discretion” in light of the deference generally given to the political branches in managing foreign affairs (p. 12).

As an initial matter, petitioners and respondents disagreed about whether part one of *Sosa*—whether the alleged wrongdoing violated an international law norm—was even relevant to the question certified by the Court. The petitioners argued that whether a corporation can be sued is a remedial consideration, subject to domestic law. The petitioners nonetheless presented examples, including the International Convention for the Suppression of the Financing of Terrorism and the Special Tribunal for Lebanon, where corporations have been subject to liability for violating international law.⁸

By contrast, Arab Bank, following the Second Circuit’s decision in *Kiobel*, pointed to a footnote in *Sosa* that suggested that “[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.”⁹ This footnote, Arab Bank argued, established that the certified question of corporate liability was subject to part one of the *Sosa* standard.

Writing for the plurality, Justice Kennedy agreed with Arab Bank and the Second Circuit that the question of whether international law supports corporate liability is subject to part one of *Sosa* (p. 13) and that corporate liability fails to meet *Sosa*’s standard of a specific, universal, and obligatory norm. The plurality pointed to the dearth of international criminal tribunals with jurisdiction over corporations and cited to Justice Jackson’s well-known comments at the Nuremberg Trial that crimes are “committed by men, not by abstract

⁶ 542 U.S. 692 (2004).

⁷ *Id.* at 732.

⁸ See International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, TIAS 13075, 2178 UNTS 197; Case Against Al Jadeed, Case No. STL-14-05/T/CJ, Judgment (Sept. 18, 2015).

⁹ *Sosa*, 542 U.S. at n. 20.

entities” (p. 17). Still, it ultimately concluded that it “need not resolve” whether international law imposes liability on corporations since there is “at least sufficient doubt on the point to turn to *Sosa*’s second question” (p. 18).

The Court situated part two of *Sosa* within its “general reluctance to extend judicially created private rights of action” (p. 18). And it emphasized that separation of powers concerns are especially relevant where foreign policy concerns are implicated. In a section of the opinion not joined by Justices Alito or Gorsuch, Justice Kennedy added that analogous statutes demonstrate that Congress is the appropriate actor to make the choice whether or not to permit corporate liability (p. 23). As Justice Kennedy repeated for the plurality at the end of the decision, it is the political branches, which, based on both expertise and accountability, are best positioned to determine whether foreign corporations can be held liable under the ATS (pp. 27–29).

Continuing for the plurality, Justice Kennedy looked at other considerations that might counsel against recognizing corporate liability. First, he stated that victims have options outside the ATS for holding perpetrators accountable, including by suing the individual employees of corporations. Second, he raised concerns about retaliatory actions by foreign courts against U.S. corporations. The risk of such litigation could dissuade U.S. corporations from investing in foreign countries, thereby reducing “the economic development that so often is an essential foundation for human rights” (p. 24).

Rejoined by Justices Alito and Gorsuch, Justice Kennedy finally considered the diplomatic implications of the suit, highlighting the tensions the litigation had created with Jordan, a U.S. ally. The petitioners argued that, whatever the causes of such diplomatic tensions, “the fact that Arab Bank is a foreign corporate entity, as distinct from a natural person, is not one of them” (p. 26). The Court, however, found that “foreign corporate defendants create unique problems” and that the decision to impose ATS liability on foreign corporations should be made by the political branches (p. 26). “Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS” (p. 27).

The first concurrence was by Justice Thomas, who briefly noted his agreement not only with Justice Kennedy’s opinion, but also with the other concurrences. Justice Alito’s concurrence began by questioning whether *Sosa* was correctly decided given that it allowed federal courts to create new causes of action under the ATS. This he found hard to reconcile with the Court’s 1938 decision in *Erie* that “[t]here is no federal general common law.”¹⁰

Regardless, Justice Alito went on to say that even accepting *Sosa*, part two of its test easily resolved the issue in this case given the diplomatic tensions that *Jesner* had created with Jordan. He also pointed out that because *Jesner* involved a foreign corporation, there was no need for the Court to address whether U.S. corporations can be sued under the ATS.

Justice Gorsuch’s concurrence described the situation before the Court as one involving foreign plaintiffs asking federal courts to create a new cause of action against foreign defendants for alleged violations of international law. This, he said, is something federal courts have no business doing, and to the extent they have done so up until now, it is time to “end ATS exceptionalism” (p. 1). Like Justice Alito, Justice Gorsuch questioned whether *Sosa* was correctly decided, but noted that even with *Sosa* in place, judges should exercise restraint and decline to create any new cause of action. Justice Gorsuch then turned to the text and history

¹⁰ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

of the ATS to argue that the statute should be read to require a U.S. defendant. This, he said, would be consistent with Article III of the U.S. Constitution, which requires diversity of citizenship in cases before federal courts.

Justice Sotomayor's dissent began by critiquing the plurality for subjecting the question of corporate liability to part one of *Sosa* at all. Doing so, she stated, "fundamentally misconceives how international law works" (p. 2). International law establishes substantive prohibitions, such as those against genocide or slavery. It does not determine the mechanisms through which those prohibitions should be enforced. It is only substantive prohibitions that should be subjected to part one of *Sosa* to determine if they are "specific, universal, and obligatory" norms of international law. The prohibition on the financing of international terrorism could, for example, be scrutinized under part one of *Sosa*. Corporate liability, by contrast, is simply a mechanism for enforcing that prohibition and not itself subject to *Sosa*.

Justice Sotomayor then reproduced the *Sosa* footnote in full:

A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 791–795 (CA2 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadžić*, 70 F. 3d 232, 239–241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law). (P. 5)¹¹

She explained that the part of the footnote omitted in Justice Kennedy's opinion demonstrated that the *Sosa* court's concern was that under international law "the distinction between conduct that does and conduct that does not violate the law of nations can turn on whether the conduct is done by or on behalf of a State or by a private actor independently of a State" (p. 6).¹²

Seen in this context, the *Sosa* court would not, Justice Sotomayor argued, have understood corporate liability to be subject to part one of its test. The Court was simply drawing attention to the fact that some international law prohibitions, such as genocide, are insensitive to whether the perpetrator is a state actor or a private actor, whereas others, such as the prohibition on torture, require perpetration by a state actor. Thus, the crucial distinction being drawn in the *Sosa* footnote is not between an individual and a corporation, but between a state and a private actor (be it an individual or a corporation).

Justice Sotomayor went on to challenge the plurality's reliance on the absence of international criminal prosecutions of corporations to demonstrate that corporate liability fails the first part of *Sosa*. Again, she explained, this confuses the substance of international law with its mechanisms for enforcement. The question the Court should have addressed, said Justice Sotomayor, is not whether international law has a norm of corporate liability that satisfies part one of *Sosa*, but whether there is any reason "to distinguish between a corporation and a natural person" under the ATS. The answer, she concluded, is no. For the reasons explained above, international law makes no such distinction. And under domestic law,

¹¹ *Sosa*, 542 U.S. at n. 20.

¹² *Citing Kiobel*, 621 F. 3d at 177 (Leval, J., concurring in judgment).

corporations have long been held liable for torts, and neither the text nor history of the ATS contains anything to suggest an exception to that practice.

Next, Justice Sotomayor addressed Justice Gorsuch's concurrence directly. She dismissed his Article III concerns, noting that the Court considered the issue when it decided *Sosa*. And she defended *Sosa*, calling it "correct as a legal matter" (p. 18).

Turning to part two of *Sosa*—the call for judicial restraint in relation to foreign affairs—Justice Sotomayor wrote that "[n]othing about the corporate form in itself justifies categorically foreclosing corporate liability in all ATS actions" (p. 19). Indeed, if a suit generates diplomatic tensions, courts have a range of tools at their disposal—including jurisdictional requirements, exhaustion of domestic remedies, and *forum non conveniens*—to prevent the suit from going forward. And following *Kiobel*, the presumption against extraterritoriality also applies. A number of these doctrines, Justice Sotomayor noted, are implicated in *Jesner* and could have been used by the lower courts to dismiss the case. But instead of remanding for consideration with these tools, she wrote, the majority "prefers to use a sledgehammer to crack a nut" (p. 23).

Justice Sotomayor questioned the Court's purported deference to the political branches, noting that executive branch lawyers repeatedly urged the Court not to put a categorical bar on corporate defendants under the ATS. Likewise, to the extent members of Congress weighed in on the issue, they also cautioned against the categorical rule that the Court adopted.

Next, she refuted the "other considerations" in Justice Kennedy's opinion. Whether or not victims have accountability options outside of the ATS is beside the point; the First Congress wanted foreign plaintiffs to be able to sue for law-of-nations violations in federal courts. Moreover, the continued provision of such a forum "may well be necessary to avoid the international tension with which the First Congress was concerned" (p. 30). As for the plurality's concerns about deterring U.S. corporations from investing in developing countries, Justice Sotomayor described them as "alarmist conjectures" presented without empirical support (p. 32).

Justice Sotomayor concluded that she "would hold that the ATS does not categorically foreclose corporate liability" (p. 32). As such, she would have reversed the Second Circuit and remanded the case for consideration of issues including whether *Jesner* satisfies *Kiobel*'s extraterritoriality limits, and whether the financing of terrorism satisfies part one of the *Sosa* standard.

* * * *

In its heyday, some two decades ago, the ATS was a beacon of hope for survivors of human rights atrocities. That period is now over. *Jesner* did not kill the ATS, but it may reasonably be viewed as its 990th paper cut.

What remains of the ATS is highly circumscribed. *Sosa* had already insured that only the most egregious human rights violations fell within the statute's ambit. *Kiobel* then excluded any violations without a strong enough connection to the United States to displace the presumption against extraterritoriality. And *Jesner* further limits the statute's reach by exempting foreign corporate defendants.

The now-retired Justice Kennedy directed victims to the possibility of suing the individual employees of the corporations that have harmed them. But such an approach has clear

limitations. First, individual employees may well be judgment proof. Second, if the harm stems from corporate policies and practices, then suing an individual employee fails to reach the root of the problem.

As Justice Alito noted, *Jesner* does not reach U.S. corporations. That said, there is nothing in the Court's analysis of corporate liability under part one of *Sosa* that provides any basis for distinguishing corporate defendants on the basis of their citizenship. If corporate liability fails to meet *Sosa's* standard of a "specific, universal, and obligatory" norm of international law—an issue the plurality does not resolve—then it fails regardless of whether the corporation is registered in the United States or elsewhere. A future case could pick up this line of argument, but there is no obligation to do so.¹³

It is not hard to imagine *Jesner* coming out differently. Once the copious dicta are sifted out of the *Jesner* opinion, the basis for the decision looks quite slim. The only arguments relevant to the holding that garnered majority support were that: (1) separation of powers considerations counsel against the recognition of foreign corporate liability by the judiciary; and (2) liability for foreign corporate defendants generates diplomatic tensions that the ATS was designed to avoid.

As the dissenters observed, there were plenty of tools of deference that the lower courts could have used to dismiss the case. And remand for consideration under these tools is exactly the path that numerous amici, including the executive branch of the U.S. government, urged the Court to take.¹⁴ There was no need for the Court to announce a categorical bar on foreign corporate defendants. Why then, did it do so? Some have situated *Jesner* within the Court's broader turn toward strengthening the hand of corporations,¹⁵ and indeed Justice Sotomayor closed her dissent by explicitly referencing two recent decisions in which the Court granted corporations fundamental rights (p. 30).¹⁶ But the decision is equally consistent with the Court's growing hostility toward transnational litigation in general.¹⁷

Independent of one's views on the outcome itself, *Jesner* is a dispiriting read for international lawyers. As the dispute over the *Sosa* footnote illustrates, the justices in the plurality seem to have little interest in understanding the structure of international law. The footnote draws attention to the fact that some prohibited conduct requires state action, and that the relevant distinction from the perspective of international law is not between private individuals and private corporations, but between state actors and private actors of any kind.

¹³ It is worth emphasizing that the plurality's analysis of corporate liability under part one of *Sosa* was dicta and future courts are not bound by it. In an ongoing ATS case against a U.S. corporation in the Eastern District of Virginia, Judge Leonie M. Brinkema rejected the defendant's argument that *Jesner* prevented the suit against it from going forward. *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08-cv-827 (LMB/JFA), 2018 U.S. Dist. LEXIS 106026, at n. 6 (E.D. Va. June 25, 2018) ("*Jesner's* careful analysis and holding suggests to this Court that the *Jesner* Court did not intend to disturb this status quo with respect to domestic corporations.>").

¹⁴ Brief for The United States as Amici Curiae Supporting Neither Party at 25–30, *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018) (No. 16–499), 2017 WL 2859943.

¹⁵ See, e.g., Todd Tucker, *Is the Supreme Court Going Too Easy on Overseas Corporations?* POLITICO (May 8, 2018), at <https://www.politico.com/agenda/story/2018/05/08/supreme-court-overseas-corporate-accountability-000659> ("In a highly globalized world, the picture emerging from America's highest court is of a playing field in which corporations enjoy plenty of rights, and the rest of us face a shrinking set of tools to hold them accountable.>").

¹⁶ *Citing Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014).

¹⁷ See generally Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV 1081 (2015).

Moreover, the plurality's reliance on the charters of various international criminal tribunals to demonstrate the absence of an international law norm of corporate civil liability was, as Sotomayor noted, inapposite. Even if international criminal tribunals from Nuremberg to the International Criminal Court had jurisdiction over corporate defendants, it would not provide any evidence for or against a norm of civil liability.

The plurality's effort to survey different international tribunals also failed to appreciate the basic distinction between what international law prohibits, and how those prohibitions are enforced. None of these errors were necessary. International legal scholars provided the Court with plenty of material to demonstrate that international law accepts that corporations are capable of violating *jus cogens* norms, and that whether corporations are held liable for such violations in domestic legal systems is a question of enforcement.¹⁸

Questions of enforcement, whether through civil or criminal means, often turn on a host of non-legal factors. As amici noted, considerations of the postwar economy affected the decision not to prosecute German corporations at Nuremberg.¹⁹ Time constraints and the absence of consensus about corporate criminal—as opposed to civil—liability, kept negotiations over the design of the International Criminal Court focused on natural persons.²⁰

At the international level, these non-legal factors, while particular to each situation and often defensible on their own terms, have frequently tipped the scales against providing a mechanism for holding corporations liable for their wrongdoing. This is unfortunate. Corporations are the major players of the twenty-first century. As the dissenters in *Jesner* rightly concluded, nothing in the structure of international law precludes corporations being held liable for human rights violations.

Jesner has closed the door on survivors seeking to hold foreign corporations accountable for human rights violations in U.S. federal courts. Of course, the U.S. Congress could reopen the door by passing legislation to expressly permit foreign corporations to be sued under the ATS. But in the current political environment, this seems unlikely. The way forward involves looking to other venues. In the United States, this may be state courts.²¹ Looking abroad, it is time to encourage existing regional and international forums to hold corporations liable or create new forums to do so.²² Nuremberg was a watershed moment for piercing the veil of the state and holding individuals to account. But there is no reason that this development must be

¹⁸ See, e.g., Brief for Castro et al. as Amici Curiae Supporting Petitioners, *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018) (No. 16–499), 2016 WL 6803674; Brief for Int'l Law Scholars as Amici Curiae Supporting Petition for Writ of Certiorari, *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018) (No. 16–499), 2017 WL 2859943; Brief for Nuremberg Scholars as Amici Curiae Supporting Petition for Writ of Certiorari, *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018) (No. 16–499), 2017 WL 2859943.

¹⁹ Brief for Nuremberg Scholars, *supra* note 18, at 4.

²⁰ Brief of Ambassador David J. Scheffer, Northwestern University Pritzker School of Law as Amici Curiae Supporting Petition for Writ of Certiorari at 9–18, *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018) (No. 16–499), 2017 WL 2859943.

²¹ See generally, Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397 (2018) (arguing state courts are a promising forum for the provisions of remedies for international human rights violations). But see Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 39–43 (2013) (highlighting the barriers to success at the state level).

²² Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/26/L.22/Rev.1 (June 24, 2014); see also Pierre Thielbörger & Tobias Ackermann, *A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?*, 24 IND. J. GLOBAL LEGAL STUD. 43 (2017).

maintained at the expense of, rather than in addition to, the pursuit of accountability for corporations.

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Canada Supreme Court—international comity—speech rights—jurisdiction over the internet—conflict of laws—data across borders—multinational tech companies

GOOGLE INC. v. EQUUSTEK SOLUTIONS INC. [2017] 1 S.C.R. 824. At <https://scc-csc.lexum.com/scc-csc/scc-csc/en/16701/1/document.do>.

Supreme Court of Canada, June 6, 2017.

In *Google v. Equustek*, the Supreme Court of Canada ordered Google to delist all websites used by Datalink, a company that stole trade secrets from Equustek, a Canada-based information technology company.¹ Google had agreed to do so in part, but with respect to searches that originated from google.ca only, the default browser for those in Canada. Equustek however, argued the takedowns needed to be global in order to be effective. It thus sought an injunction ordering Google to delist the allegedly infringing websites from all of Google's search engines—whether accessed from google.ca, google.com, or any other entry point. Google objected. The Canadian Supreme Court, along with the two lower Canadian courts that considered the issue, sided with Equustek (para. 54). The ruling sets up a potential showdown between Canadian and U.S. law and raises critically important questions about the appropriate geographic and substantive scope of takedown orders, the future of free speech online, and the role of intermediaries such as Google in preventing economic and other harms.

The case between Google and Equustek arose out of a dispute that did not involve Google at all. Rather, it was an intellectual property dispute involving two then-Canada-based companies that manufacture networking devices permitting complex industrial equipment made by one manufacturer to communicate with equipment made by a different manufacturer. Specifically, the Canada-based Equustek accused Datalink, which at the time operated in Vancouver, of stealing its trade secrets and manufacturing and selling a competing device online.

In response to credible allegations by Equustek, the trial court ordered Datalink to return all source code and other intellectual property that belonged to Equustek, to stop referring to Equustek on its websites, and to direct interested customers to Equustek instead of selling them their competing device, as Datalink had been doing. Datalink, however, failed to comply, fled the jurisdiction, and continued to carry on its business from outside Canada. In response, Equustek reached out to Google for help. At Equustek's request, Google voluntarily delinked 345 webpages associated with Datalink. Google did not delink the entire websites maintained by Datalink, but rather individual webpages. Moreover, Google only delinked the

¹ Google Inc. v. Equustek Solutions Inc., [2017] 1 S.C.R. 824 (Can.).