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Jesner v. Arab Bank, PLC: Limiting the Liability of Foreign Corporations by Curbing the Breadth of the Alien Tort Statute

SUDIPTA DAS*[©]

INTRODUCTION

In *Jesner v. Arab Bank, PLC* (“*Jesner*”),¹ the Supreme Court addressed whether the law of nations imposes liability upon corporate entities for human rights violations committed by their employees and, more specifically, whether foreign corporations may be defendants in lawsuits brought in under the Alien Tort Statute (“ATS”).² The Supreme Court held that without further action or legislation from Congress, courts may not extend ATS liability to foreign corporations, thus barring corporations from being defendants in ATS suits.³ The Court wrongly held that foreign corporations may not be brought in as defendants in lawsuits under the ATS, as this may enable many potential defendant corporations to engage in human rights violations without redress. However, the Court was proper in holding that Congress must speak on the ATS and specifically elucidate the extent to which ATS liability may apply to foreign corporations with designated limitations.⁴

I. THE CASE

Petitioners in this case consist of both foreign persons who were injured, captured, or killed by terrorists overseas, or family members and representatives of the estates of those who were subject to those harms.⁵ Petitioners brought suit against Arab Bank, PLC (“Arab Bank”) for allegedly financing the terrorist organizations

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

2. *Id.* at 1394.

3. *Id.*

4. *Id.* at 1407–08.

5. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 147 (2d Cir. 2015), *aff’d sub nom Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

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responsible for petitioners' grievances.⁶ Specifically, petitioners assert that Arab Bank was heavily involved in the terrorist scheme because it had financed terrorist attacks⁷ in three ways: first, by maintaining "accounts that the terrorist organizations used to solicit funds directly";⁸ second, by maintaining "accounts that proxy organizations and individuals used to raise funds for the terrorist organizations";⁹ and third, by playing "an active role in identifying the family of 'martyrs'¹⁰ and facilitating payments to them ... on behalf of the terrorist organizations."¹¹

In court, petitioners brought their claims under the Anti-Terrorism Act¹² ("ATA"), and the ATS.¹³ The District Court for the Eastern District of New York held that petitioners could not bring claims against foreign corporations under the ATS as per the decision given by the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co* ("*Kiobel I*"),¹⁴ which held that the ATS does not hold corporations liable.¹⁵ The district court reasoned a "decision by a panel of the Second Circuit 'is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court.'"¹⁶ *Kiobel I* was in fact heard by the Supreme Court ("*Kiobel II*"),¹⁷ however, the Supreme Court left the question of corporate liability under the ATS unanswered.¹⁸ On appeal to the Court of Appeals for the Second Circuit, petitioners in this case argued that the facts of their allegations sufficiently "touch and concern" United States territories¹⁹ in a non-attenuated way to support jurisdiction. Additionally, petitioners suggested

6. *In re Arab Bank*, 808 F.3d at 147.

7. Petitioners cite several groups that were funded by Arab Bank, including: "Islamic Resistance Movement (" Hamas"), the Palestinian Islamic Jihad ("PIJ"), the Al Aqsa Martyrs' Brigade ("AAMB"), and the Popular Front for the Liberation of Palestine ("PFLP"). *Id.*

8. *Id.*

9. *Id.*

10. Suicide bombers hired by these terrorist groups, whose families were paid after they detonated the bombs. *Id.*

11. *Id.*

12. 18 U.S.C. § 2333(a). This statute provides that any "national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors or heirs, may sue therefore in any appropriate district court of the United States." *Id.*

13. *In re Arab Bank*, 808 F.3d at 147 (explaining that the ATS differs from the ATA in that the former provides jurisdiction "only with respect to suits by 'aliens,'" while the latter provides jurisdiction only for suits by United States nationals. Many of the petitioners in this case are foreign nationals).

14. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd* 569 U.S. 108, 133 S. Ct. 1659 (2013).

15. *Id.* at 148–49.

16. *In re Arab Bank*, 808 F.3d at 148 (quoting *Baraket v. Holder*, 632 F.3d 56, 59 (2d Cir. 2011)).

17. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 S. Ct. 1659 (2013).

18. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1395 (2018).

19. The New York branch of Arab Bank allegedly participated in CHIPS transactions to hold money & transfer funds while proxy charities (actually terrorist fronts) in Texas used an account with Arab Bank to transfer funds to other proxy charities in foreign nations. *Id.* at 1406, 1435.

that since *Kiobel II*²⁰ did not speak on whether or not corporations are covered by the ATS, it actually implied that the ATS may allow for corporate liability.²¹

The Court of Appeals affirmed the district court's decision based on *Kiobel I* and stated that the Court's former ruling not to include corporate liability should be upheld.²² However, the Court did acknowledge a circuit split²³ and noted that there was a "growing consensus" among the sister circuits to hold that the ATS should extend liability to incorporated entities.²⁴ The United States Supreme Court granted certiorari to address whether a corporation can be subject to liability and suit under the ATS.²⁵

II. LEGAL BACKGROUND

In the United States, claims are rarely brought under the Alien Tort Statute; in fact, many of the initial cases interpreting the statute came nearly a hundred or more years after it was written.²⁶ However, when the ATS has been used, it has provided redress for many egregious human rights violations committed by various defendants. Section II.A reviews the statute itself and several of the early cases delineating the limits of the ATS. Section II.B. reviews the case, *Kiobel II*, which brought the issue of whether corporations fall under the scope of the ATS's jurisdiction to the attention of the Supreme Court.

A. Prominent Cases Discussing the ATS

Originally part of the Judiciary Act of 1789,²⁷ the ATS reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁸

While the text of the statute itself is quite succinct, the statute has had great influence—in fact, foreign citizens have used the ATS to gain relief since the 1980s.²⁹ Plaintiffs have used the statute to obtain remedies in U.S. courts for human-rights violations that have occurred outside of the U.S., but are still related to the U.S. in

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

21. *In re Arab Bank*, 808 F.3d at 148.

22. *Jesner*, 138 S. Ct. at 1396.

23. Decisions in the Courts of Appeal for the Seventh, Ninth, and District of Columbia Circuits agree that foreign corporations can be subject to suit under the ATS. *Id.* at 1396.

24. *In re Arab Bank*, 808 F.3d at 151.

25. *Jesner*, 138 S. Ct. at 1395.

26. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) discussed below, brought the ATS into issue in 1980. The ATS was written in 1789.

27. This act created the federal district courts & delineated what their jurisdictions covered. *Jesner*, 138 S. Ct. at 1396–97.

28. 28 U.S.C. §1350 (1948).

29. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (this was the first case to actively examine the ATS).

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some manner.³⁰ The first case to actively employ the ATS in this sense was *Filartiga v. Pena-Irala*.³¹ Decided in 1980³² by the U.S. Court of Appeals for the Second Circuit, *Filartiga* “paved the way for a new conceptualization of the ATS.”³³ The appellants in that case were two Paraguayan citizens who had lodged a case against another Paraguayan citizen who was living in the United States.³⁴ The appellee, a former police chief in Paraguay, had allegedly caused the death of appellants’ family member by torturing him for his political beliefs against Paraguay’s leadership.³⁵ The District Court for the Eastern District of New York had dismissed the action for lack of subject matter jurisdiction, but the appellants appealed the action citing the law of nations, which prohibited egregious acts such as official torture and did not distinguish aliens from citizens.³⁶

The appellants argued that they could use the ATS as a vehicle by which to bring their claims, since it explicitly states that the district courts “shall have original jurisdiction,” for an act that is “committed in violation of the law of nations.”³⁷ They then argued that official torture would surely fit under this provision, and the court agreed.³⁸ The court found “that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence [also violates] the law of nations.”³⁹ As an act of torture is covered by the law of nations, then such an act is also covered by United States federal courts; and thus, since the law of nations falls within the federal common law, the ATS must also come within the purview of federal-question jurisdiction.⁴⁰

The appellee conceded that official torture may be covered by the ATS, but sought dismissal based on a lack of personal jurisdiction.⁴¹ The Court struck this argument down, noting that “[common] law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred.”⁴² Thus, although none of the parties in *Filartiga* was a citizen of the United States, whenever an alleged torturer was found and served with process by an alien within the borders of the United

30. *Id.* at 877–78 (2d Cir. 1980).

31. *See generally id.*

32. This case was decided nearly one hundred and seventy years after the ATS was originally written.

33. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 610 (2004).

34. *Filartiga*, 630 F.2d at 878.

35. *Id.*

36. *Id.* at 880.

37. 28 U.S.C. §1350 (1948).

38. *Filartiga*, 630 F.2d at 884.

39. *Id.* at 880.

40. *Id.* at 885.

41. *Id.*

42. *Id.*

States (satisfying personal jurisdiction requirements), they may be brought in. This idea is also supported by the language in the first Judiciary Act,⁴³ which denotes that federal jurisdiction may preside over aliens for suits where principles of international law are in issue.⁴⁴

Over twenty years later, the ATS was again brought into issue in *Sosa v. Alvarez-Machain*,⁴⁵ the first Supreme Court case to speak on the ATS. In this case, plaintiff Alvarez brought a claim under the ATS against Sosa for arbitrary arrest and detention, after he was abducted by Sosa prior to being arrested.⁴⁶ The U.S. Court of Appeals for the Ninth Circuit found that Alvarez's arrest was arbitrary due to his abduction and thus, violated international law and could be brought in under the ATS like the official torture claim in *Filartiga*.⁴⁷

However, the Supreme Court reversed the Ninth Circuit's ruling, clarifying that the ATS itself cannot be used to *create* a cause of action.⁴⁸ Instead, the Court clarified that the ATS can only be used as a method of bringing in claims by setting jurisdiction "for a relatively modest set of actions alleging violations of the law of nations."⁴⁹ Here, Alvarez's claim would not fit within the purview of accepted actions—although he was abducted and subsequently arrested, his arrest lasted for less than twenty-four hours and did not subject him to any outrageous amount of discomfort;⁵⁰ in fact, he was later transferred into the custody of proper authorities.⁵¹ Ultimately, Alvarez's short stint in jail did not fall under what could be considered a violation of the law of nations.

The Court defined the acts that *do* violate the law of nations as actions that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized."⁵² This sentence would become a two-part test created by *Sosa* to be used in ATS cases: the first prong asking whether the claim relates to a norm that has been violated and is a norm universally recognized by the civilized world,⁵³ and the second prong asking courts to decide whether the claim is so

43. §9(b), 1 Stat. 73, 77 (1789).

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

45. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *See also id.* at 733 n.20 ("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.").

46. *Id.* at 697–99.

47. *Id.* at 699.

48. *Id.* at 720.

49. *Id.*

50. *Id.* at 738.

51. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004).

52. *Id.* at 725; *see also generally* Pamela J. Stephens, *Spinning Sosa: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L.J. 1, 32–33 (2007).

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

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specific as to be comparable enough with violations of international law in place at the time the ATS was effected.⁵⁴ Naturally, the Court explained that the ATS's scope would be expanded outside of violations recognized only in the eighteenth century, but the Court also made clear that only truly horrendous human rights violations that are internationally recognized should be the claims for which the ATS is used.⁵⁵ Thus, Alvarez's claim did not pass the first prong of the *Sosa* test because his few hours in detention could not be considered a horrendous violation of any internationally-recognized norm.⁵⁶ Crimes that are exemplary of violating such norms would include torture (as in *Filartiga*), "cruel, inhuman, or degrading treatment ... genocide ... war crimes ... crimes against humanity ... summary execution ... prolonged arbitrary detention ... [and] forced disappearance."⁵⁷

While these crimes are archetypal of what can be brought under an ATS claim, the actual requirements are still quite vague. In *Doe v. Qi*⁵⁸ the Court held that even though the specific limits of each crime may make the applicability of the ATS unclear,⁵⁹ the ATS will be applicable in "clear cases."⁶⁰

Undoubtedly, the use of the ATS in these cases has created controversy, and although Congress has yet to speak on the matter, many Courts and scholars alike have suggested that Congress do away with the statute.⁶¹ The crux of the problem appears to be that many disfavor the United States' involvement in human rights violations that have been occurring outside of the country—that it is a form of judicial overreach to allow the exercise of legal jurisdiction in the United States for violations that have occurred in foreign countries, especially when the United States has otherwise good relations with those countries.⁶² A circuit split had formed over this issue, especially in the realm of whether corporations could be held liable under the ATS just as individual persons could be held liable.⁶³ That question was initially posed in *Kiobel I*.⁶⁴

54. *Id.*

55. *Id.* at 725.

56. *Id.* at 727.

57. Stephens, *supra* note 52 at 5, 7.

58. *Doe v. Qi*, 349 F.Supp.2d 1258 (N.D. Cal. 2004).

59. *Sosa* is exemplary of this, where the plaintiff was clearly arbitrarily arrested and detained illegally, but despite the act being wrong in and of itself, the fact that his arrest was not that long and did not cause suffering voided his use of the ATS.

60. Additionally, there are differing levels of invasions of bodily integrity that are to be considered cruel and not cruel—choking a plaintiff being detained for one day was not considered cruel by the Human Rights Committee, but sexual assault of a plaintiff was considered cruel by both the Human Rights Committee and the European Court of Human Rights. *Doe v. Qi*, 349 F.Supp.2d 1258, 1322, 1323–24 (N.D. Cal. 2004).

61. Bradley Curtis, *Judicial Foreign Policy We Cannot Afford*, WASH. POST (Apr. 19, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/17/AR2009041702859.html>.

62. *Id.*

63. See *supra* footnote 23 and accompanying text.

64. 621 F.3d 111 (2d Cir. 2010).

B. Answering the Un-Answered Question in Kiobel II

Kiobel I was decided by the Second Circuit Court of Appeals in 2010. In that case, the court limited the breadth of ATS's jurisdictional reach, stating that "customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the laws of nations."⁶⁵ Thus, any plaintiffs' claims against a corporation are likely to fall outside of the narrow purview of the ATS's jurisdiction.⁶⁶

However, the statute itself does not have any mention of *who* falls within its jurisdiction except for the words "action by an alien for a tort only, committed in violation of the laws of nations."⁶⁷ There is no real clarity as to whether the phrase "an alien" refers to individuals alone or to both individuals and corporate entities.⁶⁸ The statute is also unclear as to *who* is committing the violation—the language is passive and does not identify whether actionable crimes can be committed only by either individual persons or again, by a corporate entity. As for the court's holding in *Kiobel I*, while the Second Circuit stated that corporations could not be brought in under the ATS, other circuits ruled on the side that corporations could and should be brought in and held liable under the statute, including the Seventh Circuit,⁶⁹ the Ninth Circuit,⁷⁰ and the D.C. Circuit.⁷¹

The Supreme Court granted certiorari for *Kiobel II* 2013; however, the question of whether the ATS could be used in lawsuits against foreign corporations was left unresolved, and the Second Circuit's holding has been subsequently acknowledged as proper by the Supreme Court in *Jesner*.⁷² Therefore, the Supreme Court's holding in *Jesner* simultaneously answered this previously unanswered question in *Kiobel I*, where the Court of Appeals for the Second Circuit held that the ATS did not extend to suits against corporations.⁷³ *Kiobel I*'s holding is now binding precedent, and foreign corporations cannot be sued under the ATS.

65. *Kiobel*, 621, F.3d at 120.

66. *Id.*

67. 28 U.S.C. §1350 (1948).

68. See generally Susanna K. Ripken, *Corporations are People Too: A Multi-Dimensional Approach to Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97 (2009) (discussing whether or not a corporation is to be considered a "person," or if this is a legal fiction that holds no merit; often corporations are treated as a person in that they have certain relationships with the government and court system because they can sue and be sued).

69. *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011).

70. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744–45, 747–48 (9th Cir. 2011).

71. *Doe VIII v. Exxon Mobil Corp.* No. 09-7125 (D.C. Cir. 2011).

72. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1396, 1398, 1403, 1408 (2018).

73. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 210 (2d Cir. 2010).

III. THE COURT'S REASONING

In *Jesner*, the Supreme Court wrongly determined that the ATS does not impose liability on corporations for human rights violations committed by its employees. Section III.A will discuss Justice Kennedy's Opinion written for the majority, which focused on narrowing the liability the ATS could impose upon corporations. That Section will also examine the irony of the majority's opinion in stating that Congress should clarify the meaning of certain terms within the ATS, while simultaneously engaging in judicial overreach by defining those same terms. Section III.B will examine Justice Sotomayor's Dissent, which was joined by Justices Ginsburg, Breyer, and Kagan. Sotomayor's dissenting opinion considered the long-standing negative effects the majority's decision will have, and rightly supports a broader understanding of the ATS's words, "an alien."⁷⁴ The Dissenting opinion rightfully would have left the ATS open to interpretation, until the legislative branch decides it truly wants to bar "corporations" from the definition of "an alien."

A. *The ATS's Scope has Become Overly-Narrowed, Allowing for Corporations to Reign Supreme Over Transnational Human Rights – Justice Kennedy's Majority Opinion*

With Justice Kennedy writing for the majority, the Court held that foreign corporations may not be defendants in suits brought under the ATS.⁷⁵ The Court reasoned primarily that the issue revolves around the of separation of powers, and that it would be better placed upon Congress to determine the bounds of ATS liability.⁷⁶

Justice Kennedy first walked through the Court's analysis in *Kiobel II*⁷⁷ and acknowledged that the Court had left the question of corporate liability under the ATS unanswered when it decided that case.⁷⁸ Judge Cabranes, who wrote the majority opinion in *Kiobel I*, held that the ATS does not apply to alleged international-law violations by a corporation.⁷⁹ Justice Kennedy noted *Kiobel's II's* requirement that "where the [petitioners'] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."⁸⁰ In other words, the connection to the United States in the allegations presented must be enough so the case is not dismissed.

74. 28 U.S.C. §1350 (1948).

75. *Jesner*, 138 S. Ct. at 1403.

76. *Id.* at 1402.

77. The Opinion in this case was written by Chief Justice Roberts.

78. *Jesner*, 138 S. Ct. at 1395.

79. *Kiobel*, 621 F.3d 111, 120 (2d Cir. 2010).

80. *Jesner*, 138 S. Ct. at 1398.

As for the instant case, the majority noted that most of petitioners' allegations involve conduct that had occurred largely in the Middle East.⁸¹ The majority did, however, acknowledge petitioners' allegations that Arab Bank had used its New York branch to clear transactions related to the purported terrorist acts and to launder money for certain Hamas-affiliated organizations located in Texas.⁸² Despite these U.S.-based activities, the Court believed that the alleged activities of the defendant corporation and its employees had "insufficient connections to the United States to subject it to jurisdiction under the ATS."⁸³ However, even if these aforementioned connections were to reach "sufficiency," Justice Kennedy wrote that it was still appropriate to deny petitioners' ATS claim, emphasizing that international relations would be strained if the ATS was used in this manner.⁸⁴

The Supreme Court decided to maintain Judge Cabranes' holding in *Kiobel I*, essentially to avoid any foreign-relations issues with other countries. Justice Kennedy noted that Congress's main purpose in drafting the ATS was to "avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."⁸⁵ First, the Court studied the charters of various international criminal tribunals, noting that such tribunals "often exclude corporations from their jurisdictional reach,"⁸⁶ and are usually limited to "natural persons."⁸⁷ Justice Kennedy reasoned that these charters provide against a broad holding of corporate liability under the Court's understanding of the ATS.⁸⁸ The Court did assert that "corporations should be subject to liability for the crimes of their human agents,"⁸⁹ but since the "international community has not yet taken that step," it would be averse for the Court to take such a leap forward.⁹⁰

Justice Kennedy further corroborated the importance of foreign relations by noting that there are global consequences to claims brought under the ATS.⁹¹ For example, the instant case has purportedly strained relations with Jordan,⁹² as both Jordan and Arab Bank are considered "counterterrorism partners" to the United

81. *Id.* at 1394.

82. *Id.* at 1394–95. The majority claimed these transactions (called "CHIP transactions") are so numerous and used widely between U.S. and foreign banks, that supervision of all these sorts of transactions is not practicable. *Id.* at 1395.

83. *Id.* at 1398.

84. *Id.*

85. *Id.* at 1397.

86. 86 *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1400 (2018).

87. *Id.*

88. *Id.* at 1400–01.

89. *Id.* at 1402.

90. *Id.* at 1402.

91. *Id.* at 1406–07.

92. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406–07 (2018).

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States.⁹³ Furthermore, Justice Kennedy warned of a possible slippery slope: if the Supreme Court decided to hold foreign corporations liable under the ATS, it would be a “precedent-setting principle” that would enable various other nations to pull American corporations into “their courts for alleged violations of the law of nations.”⁹⁴ Thus, in light of these diplomatic disruptions, the Court believes it apt to leave it to Congress’s discretion to determine the breadth of ATS liability. Justice Kennedy clarified that even if the petitioners’ claims had a sufficient connection to U.S. activity and there was no foreign relations issue, allowing an ATS claim in this case would be problematic because the ATS has been explicitly noted to just cover “an alien,” and not “corporations.”⁹⁵

According to the Court, it is the job of Congress to further expand the definition of “an alien” within the ATS to include corporations if they so choose, as they are the political branch the Court believes is best able to handle the question.⁹⁶ However, as of the *Jesner* decision, the Court foreclosed this Congressional opportunity by limiting the scope of ATS liability to exclude corporations completely, and by holding that “foreign corporations may not be defendants in suits brought under the ATS.”⁹⁷

Despite suggesting that Congress did not intend for ATS liability to encompass foreign corporations, the Court hypothesized several ways by which Congress could incorporate foreign corporations into the ATS’s jurisdiction.⁹⁸ Justice Kennedy posited a situation where Congress could allow foreign corporations to be subject to ATS liability as long as “some limitations or preconditions” were in place.⁹⁹ He suggested that corporate liability be limited to “cases where a corporation’s management was actively complicit in the crime,” or where members of the board of directors or other officers were acting criminally on behalf of the corporation itself.¹⁰⁰ The Court then reiterated that these proposed theories are better left to the purview of Congress.¹⁰¹

Lastly, as a minimal consolation to petitioners, the Court suggested other vague alternative routes to bring in petitioners’ case against Arab Bank aside from use of

93. *Id.* at 1406.

94. *Id.* at 1405.

95. 28 U.S.C. §1350 (1948).

96. *Jesner*, 138 S. Ct. at 1407.

97. *Id.* Ironically, immediately after stating this holding Justice Kennedy pivots back to it being a decision for Congress, stating that with “the ATS, the First Congress provided a federal remedy for a narrow-category of international-law violations committed by individuals. Whether, more than two centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make.” *Id.*

98. *Id.* at 1407–08.

99. *Id.*

100. *Id.* at 1408.

101. *Id.*

the ATS.¹⁰² The Court suggested that petitioners could individually sue the Arab Bank employees who were potentially responsible for violating any international laws under the ATS.¹⁰³ Justice Kennedy also discussed the option of suing individual employees by using the Torture Victim Protection Act¹⁰⁴ of 1991 (“TVPA”), a “codified note following the ATS”¹⁰⁵ which is the only cause of action under the ATS created by Congress rather than the Courts.¹⁰⁶ A “key feature of TVPA” is that it limits liability to “individuals,” thereby failing to reach corporations.¹⁰⁷ The Court used this feature to further support the idea that Congress would likely not have wanted ATS liability to cover corporations instead of just natural persons.¹⁰⁸ The majority concluded their opinion by noting that it is again up to Congress and not judicial deference to decide if corporate liability is to be given under the ATS, and if it is, what limitations are to be set upon it.¹⁰⁹

B. The ATS Had Potential to Bar Foreign Corporations from Engaging in Egregious Human Rights Violations – Justice Sotomayor’s Dissenting Opinion

According to Justice Sotomayor in her dissent, the majority’s decision will have lasting effects, because it “absolves corporations from responsibility under the ATS for conscience-shocking behavior.”¹¹⁰ Sotomayor’s concern is justified, as immunizing corporations from the liability that the ATS provides can be detrimental because it “allows these [corporate] entities to take advantage of the significant benefits of the corporate form and enjoy fundamental rights¹¹¹ ... without having to shoulder attendant fundamental responsibilities.”¹¹² In other words, these corporations may be enabled to abuse their rights without any worry of proscription.

Sotomayor’s dissent initially runs through the history and purpose of the ATS. Pursuant to the first prong of the two-part *Sosa* test, the ATS permits federal courts to recognize private causes of action for certain torts that violate the established

102. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1405 (2018).

103. *Id.*

104. Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1991). This was originally a note following 28 U.S.C. §1350, that later became a codified note and its own act.

105. *Jesner*, 138 S. Ct. at 1398.

106. *Id.* If the term “individuals” is to be limited to actual individual citizens, then the Act clearly provides no connection between the employee-individual and employer-corporation.

107. *Id.* at 1404.

108. *Id.*

109. *Id.* at 1408.

110. *Id.* at 1419 (Sotomayor, J., dissenting).

111. See also generally *Citizens United v. FEC*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores* 134 S. Ct. 2751 (2014).

112. *Jesner*, 138 S. Ct. at 1437. (Sotomayor, J., dissenting).

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law of nations, “without the need for any ‘further congressional action.’”¹¹³ Courts undertaking ATS claims must first analyze the international law norm that has allegedly been violated and determine whether it falls under the category specified in *Sosa*¹¹⁴ (specific, universal, obligatory and internationally recognized human rights violations recognized from the eighteenth century onwards).¹¹⁵ Sotomayor clarified *Sosa*’s holding, stating that the term “norm,” as used in these cases, means substantive conduct, not just an already accepted act within the prohibited categories of the laws of nations.¹¹⁶ In other words, the acts should not be limited to what has already been deemed as a prohibited violation of a recognized norm.¹¹⁷

The dissent addressed the majority’s analysis of *Sosa*’s footnote twenty, which contemplated whether or not international law extends liability for norm violations to corporations, who are private actors.¹¹⁸ Justice Sotomayor conducted a statutory interpretation of the thirty-three-word ATS, noting that the statute’s phrase, “committed in violation of the law of nations or a treaty of the United States,”¹¹⁹ requires only that the alleged violation be conduct that is condemned as under international law standards.¹²⁰ The relevant test is centered on a “norm-specific inquiry, not a categorical one”,¹²¹ thus, the focus is whether act of financing terrorism is sufficiently “specific, universal, and obligatory,” such that it passes the rigor of *Sosa*’s first step.¹²² The focus would not be categorical, meaning it would not center on whether private entities such as corporations may or may not commit such a prohibited violation of said norm.¹²³

Justice Sotomayor’s analysis critiques the majority’s limited reading of *Sosa* footnote twenty,¹²⁴ where the Court created a distinction between how international law will treat corporations and natural persons.¹²⁵ The dissent noted

113. *Id.* (quoting *Sosa*, 542 U.S. at 724, 712) (emphasis added).

114. 542 U.S. 692 (2004).

115. *See supra* Part II.B, and notes 54–57 and accompanying text.

116. *Jesner*, 138 S. Ct. at 1420, (Sotomayor, J., dissenting).

117. *Id.*

118. *See supra* footnote 43 and accompanying text.

119. 28 U.S.C. §1350 (1948). (emphasis added).

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

121. *Id.* at 1422.

122. *Id.*

123. *Id.*; *See also id.* at 1425 (stating that “instead of asking whether there exists a specific, universal, and obligatory norm of corporate liability under international law, the relevant inquiry in response to the question presented here is whether there is any reason—under either international law or our domestic law—to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS ... international law provides no such reason ... [nor] does domestic law.”).

124. *See supra* notes 43, 91 and accompanying text.

125. *Jesner*, 138 S. Ct. at 1423, (Sotomayor, J., dissenting). Sotomayor notes that the “question of who must undertake the prohibited conduct for there to be a violation of an international-law norm is one of international

that the majority's argument is faulty, as it is insufficient to prove that international law "distinguishes between corporations and natural persons as a categorical matter."¹²⁶ Even if international laws are to treat the two entities entirely differently, the ATS's words itself do not say a corporation cannot be a violator. As such, the focus should be on whether an egregious act was committed, and whether such act violated norms considered under the law of nations, regardless of whether the norm-violator was a natural person or a corporation. Justice Sotomayor had pointed to various evidentiary pieces demonstrating that corporations do, in fact, come under fire in the international law realm, including under Military Tribunals,¹²⁷ and International Criminal Tribunals.¹²⁸

Importantly, the dissent notes another international body that recognizes corporations¹²⁹—the International Convention for the Suppression of the Financing of Terrorism,¹³⁰ an organization that requires its members to hold corporations liable for using and collecting funds, directly or indirectly, for the purpose of assisting terrorist acts. Incidentally, the United States is a party to this organization—a fact that, as the dissent noted, the majority failed to point out.¹³¹ Justice Sotomayor described how corporations have long been held liable for their wrongdoings through routes other than the ATS—she wrote of several states within the U.S. that have imposed "criminal and civil liability on corporations for law-of-nations violations through their domestic legal systems."¹³²

Next, the minority wrote that the text of the statute itself allows for corporate liability, as it "confers jurisdiction on federal district courts to hear"¹³³ civil actions for torts, and corporations "have long been held liable in tort under the federal common law."¹³⁴ Justice Sotomayor noted that while the ATS expressly limited "the class of permissible plaintiffs"¹³⁵ to "alien[s],"¹³⁶ there is no delineation of what

law, but how a particular actor is held liable for a given law-of-nations violation generally is a question of enforcement left up to individual states." *Id.*

126. *Id.*

127. *Id.* at 1423–24. Corporations are considered private entities, and where "private individuals ... proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action ... is in violation of international law." *Id.*

128. *Id.* (noting that the "nonnatural [corporate] entities ... were responsible for genocide.").

129. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1424 (2018) (Sotomayor, J., dissenting).

130. Dec. 9, 1999, Art. 2, S. Treaty Doc. No. 106-49, 2178 U.N.T.S. 230.

131. *See infra* notes 173–174 and accompanying text.

132. *Jesner*, 138 S. Ct. at 1425. (Sotomayor, J., dissenting).

133. *Id.*

134. *Id.* at 1425 (pointing to various cases see generally *Philadelphia, W., & B.R. Co. v. Quigley*, 62 U.S. 202 (1859), *Meyer v. Holley*, 537 U.S. 280 (2003)).

135. *Id.* at 1426.

136. 28 U.S.C. §1350 (1948).

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“alien” entails or covers in terms of types of defendants.¹³⁷ The dissent acknowledged the majority’s concern with making a decision better suited for Congress—namely that Congress should be the body to decide what is included under the definition of “alien.”¹³⁸ However, the dissent argued that Congress’s silence here was not inadvertent, and that silence is not demonstrative of the need to “limit the range of permissible defendants.”¹³⁹

Lastly, Justice Sotomayor concluded her dissent by addressing several other concerns raised by the majority, including their fear with regard to the destruction of international relations. On this matter, the minority is quite candid, explaining that if “diplomatic strife” is to occur, it may not make much difference whether the crime is accountable to the country as a whole, or to a corporation acting on behalf of their country.¹⁴⁰ As for the majority’s concerns of American corporations being dragged into courts for their conduct around the world, the dissent pointed to the lack of evidence given by the majority to corroborate these harrowing complaints.¹⁴¹

IV. ANALYSIS

In *Jesner*,¹⁴² the Supreme Court narrowed the scope of the ATS to exclude corporations, thereby barring corporations from being brought in as defendants under ATS suits.¹⁴³ The Court made an incorrect judgment in this instance because the Court erroneously assessed petitioners’ claim as not having sufficient connection to the U.S. While maintaining foreign relations is a valid concern, the Court inadequately defended this concern by suggesting that corporations should not be held liable under the ATS because of the creation of the TVPA. The Court’s reasoning that the TVPA would be a good substitute for the ATS is flawed because the TVPA is an even more narrowly construed method that will likely not provide relief to petitioners such as those in the instant case. Additionally, the Court acted in Congress’s stead by closing all interpretation of the ATS before Congress actually spoke on the issue. The plain language of the ATS itself supports the inclusion of corporations within its jurisdiction, and Congress’s silence on the matter should not be used to exclude all corporate entities from liability. As stated by Justice Sotomayor in her dissent, the “text, history, and purpose of the ATS plainly support

137. *Jesner*, 138 S. Ct. at 1426 (Sotomayor, J., dissenting) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (“it does not distinguish among classes of defendants.”)).

138. *Id.*

139. *Id.*

140. *Id.* at 1435.

141. *Id.* at 1435.

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

143. *Id.* at 1407–08.

the conclusion that corporations may be held liable.”¹⁴⁴ The Court’s decision will likely have rippling effects, as the ATS can no longer be used as a method to hold corporations accountable for egregious acts that they commit.

A. *The Court Erroneously Concluded that the Petitioners’ Claim was Too Tenuous in its Connection to the United States*

The Justices partaking in the majority exalted the position of Arab Bank as a foreign-relations necessity¹⁴⁵ and gave substantially less consideration to the position of the petitioners. The Court dismissed petitioners’ claims as being too attenuated and minor in substantive connections to U.S. territories.¹⁴⁶ However, petitioners’ claims were not revolving around the actual terrorist attacks that had occurred in the Middle East, admittedly distant from the U.S. Instead the petitioners’ claims centered on Arab Bank’s financial support of terrorism.¹⁴⁷ Petitioners do not assert, as respondents allege, that Arab Bank themselves committed the killings abroad.¹⁴⁸ Rather, they assert that these acts were “facilitated by a foreign corporation,” and that some of the officials who worked at Arab Bank “allowed the Bank to be used to transfer funds to terrorist groups in the Middle East, which in turn *enabled or facilitated criminal acts of terrorism.*”¹⁴⁹

The Court is indeed correct in noting that there is a minor connection between the actual terrorist attacks and the alleged conduct at issue—but that is exactly the flaw in the Court’s reasoning, since the terrorist attacks were not what was brought into issue by the petitioners. What was brought into issue was the assistance Arab Bank and its members provided that led to a chain of actions eventually building up to those terrorist attacks on petitioners and their families.¹⁵⁰ The Court clearly stated the grievance in its own terms, having noted that what petitioners actually attempted to prove was not that Arab Bank committed the “terrorist attacks at issue,”¹⁵¹ but that Arab Bank “helped the terrorists receive the moneys in part by means of currency clearances and bank transactions” through electronic transfers.¹⁵²

It appears that the Court conflated these allegations of improper money handling by human agents of Arab Bank with the terrorist attacks in and of

144. *Id.* at 1425 (Sotomayor, J., dissenting).

145. *Id.* at 1394, 1406–07 (majority opinion).

146. *Id.* at 1406. The Court stated that there was a “relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States.” *Id.*

147. *Id.* at 1394.

148. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1393 (2018).

149. *Id.* (emphasis added).

150. *Id.*

151. *Id.* at 1406.

152. *Id.* at 1393.

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themselves, as demonstrated by Justice Kennedy’s opinion which noted that the petitioners “allege that they or their family members were injured by terrorist attacks in the Middle East over a 10-year period.”¹⁵³ Almost immediately after this sentence, the Court wrote yet again that “[most] of petitioners’ allegations involve conduct that occurred in the Middle East”¹⁵⁴—a repetitive phrase that seemingly detracts from the actual allegations at hand. To the contrary, the claim at issue involved conduct that occurred in the United States, *prior* to the attacks in the Middle East.¹⁵⁵

If the claim, as stated, revolved around Arab Bank’s illicit handling of money, then it is difficult to see how petitioners’ allegations were in any matter attenuated. Petitioners claimed that Arab Bank used its New York branch to (1) clear “dollar-denominated transactions” through a Clearing House Interbank Payments System (“CHIPS”), and (2) to commit money laundering for a Texas-based charity¹⁵⁶ that is allegedly affiliated with Hamas.¹⁵⁷ Further, petitioners claimed that Arab Bank’s New York branch had been helping to transfer funds from the accounts of the Texas charity to “bank accounts of terrorist-affiliated charities in the Middle East.”¹⁵⁸ Again, the claim focused not on the actual terrorist attacks, but the illegal financial activities that took place in the United States; particularly in New York and Texas. The conduct that occurred in the Middle East was facilitated by the happenings in New York and Texas.

The events in *Filartiga*,¹⁵⁹ in comparison, had an even less substantial connection to the United States than those in the instant case. There, the plaintiffs were permitted to bring their claims under the ATS even though all of the parties involved were Paraguayan citizens.¹⁶⁰ The crimes at issue were the torture and murder of the plaintiffs’ family member—heinous acts that occurred within the Republic of Paraguay.¹⁶¹ The plaintiffs brought their case against the defendant when the parties were residing in the U.S.,¹⁶² and used the ATS to bring causes of action under both tort law (wrongful death statutes) and international laws of human rights.¹⁶³

153. *Id.* at 1394.

154. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1394 (2018).

155. *Id.*

156. *The Holy Land Foundation for Relief and Development. Id.* at 1395.

157. *Id.*

158. *Id.*

159. 630 F.2d 876 (2d Cir. 1980).

160. *Id.* at 878.

161. *Id.*

162. *Id.* at 878–89.

163. *Id.* The international law claims included claims under the U.N. Charter, the Universal Declaration on Human Rights, the U.N. Declaration Against Torture, the American Declaration of the Rights and Duties of Man and others. *Id.*

Analyzing the claim under step-one of the *Sosa* analysis, torture is clearly a violation of a norm universally recognized by the civilized world.¹⁶⁴

After analysis of the ATS, the court in *Filartiga* decided that the torture the decedent had suffered fell directly within a violation of the law of nations as required by the ATS, despite the fact that the heinous act did not occur within the United States.¹⁶⁵ Federal jurisdiction was allowed in accordance with the ATS, and the plaintiffs prevailed on their claim, despite the tenuous substantive connection to the United States in that case.¹⁶⁶ The only substantive connection to the U.S. was the fact that each party was domiciled in the U.S.¹⁶⁷ The court in *Filartiga* assuaged other worries with regard to jurisdiction by noting that jurisdiction in the U.S. is granted if the case is grounded “upon statutes enacted by Congress or upon the common law of the United States.”¹⁶⁸ The ATS became a part of U.S. common law upon adoption of the Constitution, authorized by Article III of the Constitution.¹⁶⁹

If the upheld precedent of *Filartiga* were to be decided by today’s Supreme Court, it may very well not have passed the absurd rigor of the test of sufficient connection to the U.S., if even illegal actions occurring within the U.S. are not sufficient enough. Additionally, a reexamination of the text of the ATS demonstrates that there is no need for the alleged tort or violation of the law of nations to have occurred within the borders of the U.S.—the only requirement is that the alleged act occurred and was violative.¹⁷⁰

B. The Court was Incorrect in Suggesting that the TVPA Demonstrates that the ATS is Not Meant to Include Corporations

The Court narrows in on Jordan and Arab Bank’s positions as foreign connections and “counterterrorism partners” to the U.S., and note that the instant case has put a strain upon America’s relationship with the two.¹⁷¹ However, it would be in the best interests of both nations as counterterrorism activists to resolve suits to shut down corporations that are engaging in terrorist acts, either as a whole or through their human agents.¹⁷²

164. See *supra* notes 53–57 and accompanying text.

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

166. *Id.* at 885.

167. *Id.* 885–86.

168. *Id.*

169. *Id.*

170. 28 U.S.C. §1350 (1948). Again, the ATS simply reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Nothing is noted about location within these thirty-three words. *Id.*

171. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406–07 (2018).

172. *Id.*

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The Court gave too much deference to the international community when deciding the immediate case. It ironically noted that the American legal system has often held corporations liable for the conduct of their “human employees,” but stated that corporate entities may not be subject to law of nations violations in the same way.¹⁷³ Instead the Court explained that while corporations *should* be subject to liability if their agents act criminally, the U.S. will not allow liability through the ATS, since the international community had not yet done so.¹⁷⁴

However, it is arguable that the international community has already agreed to hold corporate entities accountable. As explained above, the U.S. is a member of the International Convention for the Suppression of the Financing of Terrorism.¹⁷⁵ The treaty reads:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [terrorist acts, and each party to this Convention is required] to take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has [violated the Convention].¹⁷⁶

In other words, all international members of the Treaty are expected to hold corporations liable for using and collecting funds for terrorism.¹⁷⁷ The next step is to go through the *Sosa* test and assess whether terrorist financing is a violation of a norm universally recognized. It is true that corporations are legal entities run by many individual human agents—the *Jesner* majority even suggested that petitioners go after the individual members of Arab Bank who had caused their grievances.¹⁷⁸ However, it likely would not be efficient to bring these claims as class suits against individual members of the corporation—the named defendants likely would not have pockets deep enough to satisfy a judgment against them. Additionally, the court suggested that the individual claims be brought under the TVPA¹⁷⁹ enacted by Congress in 1991.¹⁸⁰

173. *Id.* at 1402.

174. *Id.*

175. See note 131, 132 and accompanying text.

176. Dec. 9, 1999, Art. 2, S. Treaty Doc. No. 106-49, 2178 U.N.T.S. 230.

177. See *supra* text accompanying note 136.

178. *Jesner*, 138 S. Ct. at 1402, 1405.

179. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1991).

180. *Jesner*, 138 S. Ct. at 1398. (explaining that the TVPA created an express cause of action for torture victims and for extrajudicial killing in violation of international law This was done to assuage concerns about

The Court's suggestion with regard to individual suits also fails on another level—the TVPA quite clearly only applies to two certain human rights violations—“torture” and “extrajudicial killing,”¹⁸¹—neither of which are part of petitioners' actual claims in the instant case. Petitioners' claim of financing terrorist organizations does not fall within this overly narrow option, which is why petitioners had brought in the case under the ATS (which allows suits for all torts in violation of the laws of nations brought by foreigners) and the ATA (which allows for suits against corporate bodies by foreign nationals).¹⁸² In and of itself, the existence of these two laws demonstrates that Congress does not expect corporations to escape liability. Thus, the Court's posited alternatives under which petitioners can bring their claims are, at best, circular suggestions.

In 2012, the Supreme Court held in *Mohamad v. Palestinian Authority*,¹⁸³ that the term “individual,” as referenced in the TVPA includes only individual natural persons.¹⁸⁴ However, the *Mohammad* Court conducted a quick comparative analysis of the TVPA and ATS, writing that the ATS incidentally “offers no comparative value” to the TVPA.¹⁸⁵ The *Jesner* Court then is quick to revert on its prior reasoning in *Mohammad*, and instead state now that the TVPA is not only comparable with the ATS, but rather it almost wholly redefines the ATS.

C. The Court Overstepped its Bounds as the Judiciary and Enacted a Decision Meant for the Legislature, and Congressional Silence Should Not Act as a Bar to Interpretations of the ATS

The Court was correct in stating that Congress should speak on the issue and clarify what the term “alien” encapsulates within the meaning of the ATS. Ironically, however, the Court has engaged in judicial activism, by removing the question from Congress before Congress could consider it. In doing so, the Court has realized the very fears the *Sosa* court had warned of—that ATS litigation implicates serious separation of powers concerns.¹⁸⁶ The majority justified this act on their part by stating that the passing of the TVPA did enough to help petitioners with like claims.¹⁸⁷ However, the TVPA is not helpful to petitioners' claims at hand, as it is limited in applicability and facially rejects any liability for anyone other than

whether *Filartiga* was correct in “holding that plaintiffs could bring ATS actions based on modern human rights laws absent an express cause of action created by an additional statute.” However, ATS suits had still been allowed, and Congress had not done away with the ATS or stated that it was to be subsumed within the TVPA.).

181. *Id.*

182. *Id.* at 1404.

183. *Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012).

184. *Id.* at 451–52.

185. *Id.* at 458.

186. In this case, the court warned of balancing the judicial and legislative powers. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004).

187. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1404 (2018).

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“individual” persons.¹⁸⁸ Thus, the TVPA is not another valid route by which petitioners can bring their claims against Arab Bank as a corporation. The Court claimed that the passing of the TVPA was Congress’s way of stating that these sorts of suits should be limited to actions against individuals instead of private entities like corporations.¹⁸⁹

However, Congress’s passing of the TVPA cannot be considered a negation of the ATS—the TVPA is quite literally a codified note tacked onto the ATS, and merely provides a route for two very specific causes of action. The Court used the wording of the TVPA mainly to argue that the ATS applies only to “individuals” instead of corporations, but the Court appeared hesitant to argue that the actual limitations set within the TVPA also controls the meaning of the ATS. If Congress supposedly meant to narrow the entire scope of the ATS with the TVPA, then this also implies that the only violations of the law of nations allowed under the ATS would be torture and extrajudicial killing,¹⁹⁰ (against only individuals) as was present in *Filartiga*.¹⁹¹ However, *Sosa* demonstrated that many other crimes should be considered as being violative of norms, including crimes like genocide, summary execution, and possibly also the funding of terrorist organizations.¹⁹² The Court should not be able to state that the TVPA demonstrates Congress’s intentions wholeheartedly, while also picking and choosing which portions of the TVPA should apply to the Court’s understanding of the ATS.¹⁹³

The question previously left untouched in *Kiobel II* have now been answered too narrowly. The circuit split demonstrates that the issue of whether the ATS extends liability to corporations is highly divisive.¹⁹⁴ Such a narrow rule excluding all corporations from consideration is unfavorable, as it precludes any future discussion of cases such as the one the *Jesner* petitioners had brought.

Congressional silence is not to be taken as a non-answer. To the contrary, silence in itself can be an exact answer, because “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹⁹⁵ Additionally, as the dissent noted, “Congress has also never seen it necessary to immunize corporations from ATS liability even

188. Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1991).

189. *Jesner*, 138 S. Ct. at 1404.

190. These are the only two causes of action available under the TVPA. Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1991).

191. *See supra* text accompanying notes 161–163.

192. Stephens, *supra* note 52 at 5, 10.

193. Justice Sotomayor wrote in her dissent that “because Congress saw fit to permit suits only against natural persons for two specific law-of-nations violations, Congress meant to foreclose corporate liability for all law-of-nations violations.” *Jesner*, 138 S. Ct. at 1432 (Sotomayor, J., dissenting).

194. *Id.* at 1396 (majority opinion).

195. *Russello v. United States*, 464 U.S. 16, 23 (1983).

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though corporations have been named as defendants in ATS suits for years.”¹⁹⁶ If it was truly such a concern for both foreign and American corporations, it should not be doubted that the legislation would give due attention to the issue. The ATS has been used repeatedly in various fields of law in an attempt to bring corporations to justice,¹⁹⁷ and until Congress says it cannot be used for that purpose, the Court should not nullify its use.

CONCLUSION

In *Jesner*, the Supreme Court held that the ATS will not impose liability on corporate entities, even when the employees of such entities may have committed horrific crimes against humanity; that is, crimes that are looked down upon by the law of nations.¹⁹⁸ This decision is a regressive step for the nation’s highest Court and it has inadequately justified its decision on the grounds of preserving international relations. The ATS itself does not provide any specificity as to who may be considered under the term “alien,” and any further interpretation of this term has been foreclosed by this Court, unless Congress issues a clarification of the said term. The Court failed to provide a valid argument to support excluding all corporations from liability when such entities and their human agents have engaged in such violations of the law of nations. The Supreme Court should have interpreted the ATS to include corporations and left it to Congress to clarify otherwise.

196. *Jesner*, 138 S. Ct. at 1432, (Sotomayor, J., dissenting). See also *Monessen Southwestern R. Co. v. Morgan*, 486 U. S. 330, 338 (1988) (stating that “Congress’ failure to disturb a consistent judicial interpretation of a statute may provide some indication that ‘Congress at least acquiesces in, and apparently affirms [that interpretation].’” (quoting *Cannon v. U. of Chicago*, 441 U.S. 677, 703 (1979))).

197. The ATS has been used not only to address human rights violations, but corporate destruction of the environment as well; it was one of the initial claims in a litigation against Chevron for oil pollution in Ecuador. See generally *Jota v. Texaco Inc.*, 157 F.3d 153 (2d Cir. 2002).

198. *Jesner*, 138 S. Ct. at 1407.