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Ending Alien Tort Statute Exceptionalism: Corporate Liability in the Wake of Jesner v. Arab Bank and Implications for U.S. Private Military Contractors

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ENDING ALIEN TORT STATUTE EXCEPTIONALISM: CORPORATE LIABILITY IN THE WAKE OF *JESNER v. ARAB BANK* AND IMPLICATIONS FOR U.S. PRIVATE MILITARY CONTRACTORS

"Clearly abuses occurred at the prison at Abu Ghraib."[1] The U.S. Army's report on human rights violations at the Abu Ghraib prison in Iraq, commonly referred to as the Fay report, accounts in graphic detail specific incidents involving private military contractors ("PMCs")[2] and members of the U.S. military.[3] Disturbing photos of this abuse surfaced in the media in 2004, making the infamous prison near Baghdad virtually synonymous with abuse[4] and calling into question the United States' moral standing in the world.[5]

1. MAJOR GENERAL GEORGE R. FAY AND LIEUTENANT GENERAL ANTHONY R. JONES, U.S. DEPT. OF THE ARMY, AR 15–6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE, at Executive Summary 3 (2004), *available at* http://www.washingtonpost.com/wp-srv/nationi/documents/fay_report_8-25-04.pdf [https://perma.cc/L4NR-L77C] [hereinafter Fay Report].

2. The term "private military contractor" ("PMC") connotes a firm that provides surrogate military services to a government or sovereign. Andrew L. Pickens, *Defending Actions Against Corporate Clients of Private Security Companies*, 19 U. PA. J. BUS. L. 601, 603 (2017). The U.S. government regularly outsources military functions to these private sector entities. *Id.* PMCs are now a fact of modern warfare. *Id.* Not only to PMCs dominate the battlefield, they operate in a "twilight zone" where accountability and oversight give way to "profit, efficient and political expediency." Thomas B. Harvey, *Wrapping Themselves in the American Flag: The Alien Tort Statute, Private Military Contractors, and U.S. Foreign Relations*, 53 ST. LOUIS U. L.J. 247, 253 (2008).

3. To give a brief snapshot of the abuses, Incident #3 in the Fay Report recounts that on October 25, 2003, three detainees "were stripped of their clothing, handcuffed together nude, placed on the ground, and forced to lie on each other and simulate sex while photographs were taken." Fay Report, *supra* note 1, at 72. *See also* Atif Rehman, *The Court of Last Resort: Seeking Redress for Victims of Abu-Ghraib Torture Through the Alien Tort Claims Act*, 16 IND. INT'L & COMP. L. Rev. 493 (2006).

4. RJ Vogt, *CACI Sanctions Bid Says Abu Ghraib Prisoner Withheld Info*, LAW 360 (June 22, 2018), https://advance.lexis.com/document?crid=53f36eda-6b65-40b3-8eb2-dc8ed76d3300&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5SMG-21V1-DY33-B0FX-00000-00&pdcontentcomponentid=122080&pdalertresultid=994577661&pdalertprofileid=d7055815-a473-4a89-8918-405d8b334cd7&pdmfid=1000516&pdisurlapi=true&cbc=0 [https://perma.cc/JVF3-X9WZ].

5. Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES MAG. (May 23, 2004), https://www.nytimes.com/2004/05/23/magazine/regarding-the-torture-of-others.html?pagewanted=all&src=pm [https://perma.cc/7YEZ-SA6Y].

INTRODUCTION

Legal actions implicating violators of human rights in U.S. federal courts typically result from claims brought under the Alien Tort Statute ("ATS") or the Torture Victims Protection Act ("TVPA").[6] The TVPA, enacted in 1992 as a statutory note to the ATS, provides a cause of action for both United States nationals and aliens (non U.S. citizens) for extrajudicial killing and for torture committed under color of foreign law.[7] While the TVPA has a detailed legislative history and creates a substantive cause of action, the ATS's legislative history is largely unknown and the statute is jurisdictional in nature.[8] Enacted by the First Congress, the ATS is deceptively simple: it permits alien plaintiffs to bring suit in U.S. district courts for violations of international law.

The ATS has several jurisdictional predicates.[9] At the outset, a court must assure itself that: (1) the plaintiff is an alien (non U.S. citizen); (2) the complaint pleads a violation of the law of nations; (3) the presumption against the extraterritorial application of the ATS does not bar the claim; (4) customary international law ("CIL") recognizes the asserted liability alleged by plaintiffs (e.g., aiding and abetting, conspiracy); and (5) if the international law violation requires state action, the defendant is a state actor or acted under "color of law."[10] In *Jesner v Arab Bank*,[11] the Supreme Court added another jurisdictional predicate. The Court was expected to decide whether the ATS categorically forecloses corporate liability.[12] Rather than resolving this categorical question, the Court opted for a narrower jurisdictional restriction: ATS suits may not proceed against foreign (as opposed to American) corporations.[13]

This article provides a critique of the Court's analysis in *Jesner* and discusses the decision's impact on PMC litigation. Part I provides background

6. Pickens, *supra* note 2, at 610.

7. Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)) [hereinafter TVPA]; Ekaterina Apostolova, Comment, *The Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640, 641 (2010).

8. Apostolova, *supra* note 7, at 642. *See also* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) ("This old but little used section is a kind of legal Lohengrin; . . . no one seems to know whence it came.").

9. Balintulo v. Ford Motor Co., 796 F.3d 160, 165–66 (2d Cir. 2015).

10. *See id.*

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

12. Amy Howe, *Argument analysis: Corporate liability for violations of international law on shaky ground*, SCOTUSBLOG (Oct. 11, 2017, 3:01 PM), http://www.scotusblog.com/2017/10/argument-analysis-corporate-liability-violations-international-law-shaky-ground/ [https://perma.cc/XR9W-WKMB]. The central issue posed in oral arguments was how to frame the role of international law: should the Court look at whether there is a consensus that financing terrorism violates a norm of international law, or instead at whether there is a consensus that corporations can be held liable for such violations? *Id.*

13. Jesner v. Arab Bank, PLC, 138 S.Ct. 1386, 1396 (2018).

into the ATS and the viability of ATS suits against corporations leading up the *Jesner* decision. In particular Part I focuses on the source of confusion over the proper role of international law in ATS suits and the resulting circuit split created by the Second Circuit.

In Part II, this article makes four observations about the Court's analysis that suggest the Court was motivated, above all else, by a desire to end the *Jesner* litigation.[14] First, the Court could have resolved the case on narrower grounds by remanding to address the issue of extraterritoriality or by deciding the availably of the norm at issue—financing terrorism—rather than the much broader issue of the availability of corporate liability.[15] Second, Justice Kennedy's plurality opinion perpetuated a misunderstanding of the role of international law by requiring international consensus of the enforcement mechanism, i.e. corporate liability, rather than the international norm allegedly violated.[16] Third, Justice Kennedy failed to explain why the Court's reliance on separation-of-powers concerns or the plurality's reliance on an analogy to the TVPA foreclosed foreign, but not domestic, corporate liability.[17] Finally, the five conservative justices expressed a willingness to close the door entirely to ATS suits absent new legislation.[18]

In Part III, this article proceeds to analyze *Al Shimari v. CACI*, an ATS case brought against a PMC, and argues that *Jesner* should not affect the viability of such cases in the near term. Courts may disregard *Jesner*'s erroneous application of international law and its extension of deference to the political branches by continuing to provide a forum for suits against U.S. defendants, including PMCs. However, this article cautions that suits against PMCs face several unique hurdles, as demonstrated by the *Al Shimari* litigation. Finally, in Part IV, this article embraces the need for a legislative solution given the Court's willingness to foreclose ATS liability in the future.

PART I: ATS BACKGROUND

A. Alien Tort Statute

The Alien Tort Statute states in its entirety that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only,

14. *Id.* at 1399 ("The question whether foreign corporations are subject to liability under the ATS should be addressed; for, if there is no liability for Arab Bank, the lengthy and costly litigation concerning whether corporate contacts like those alleged here suffice to impose liability would be pointless.").

15. *See infra* Section II.A, *A.The Court Could Have Decided Jesner on* Narrower Grounds.

16. See *infra* Section II.B, *B.Perpetuation of a Misunderstanding of International* Law.

17. See *infra* Section II.C, *C.Failure to Distinguish Between Domestic and* Foreign Corporations.

18. See *infra* Section II.D, *D.Willingness to Overturn ATS Precedent:* Closing *The Door Sosa* Kept Open.

committed in violation of the law of nations or a treaty of the United States."[19] Notably, it says nothing about the identity of the defendant. The ATS was only upheld as a basis for jurisdiction in two reported cases prior to 1980.[20] In 1980, the Second Circuit revived the ATS in *Filártiga v. Pena-Irala*,[21] holding that the ATS provided federal subject matter jurisdiction for a violation of the law of nations—in that case, torture by a state official against a detainee.[22] The court in *Filártiga* first reasoned that the enactment of the ATS was authorized by Article III because "the law of nations forms an integral part of the common law."[23] Proceeding to the question of jurisdiction, the court found little doubt that torture violated the law of nations, reasoning that "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind."[24]

The Supreme Court took its first look at the ATS in *Sosa v. Alvarez-Machain*.[25] The Court noted that the ATS arose out of foreign relations concerns.[26] The ATS was needed to address certain violations of international law for which foreign nations might hold the U.S. responsible for an injury to a foreign citizen.[27] For example, an assault against an ambassador impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war.[28] The Court in *Sosa* found that the history of the ATS supports two propositions. First, although the ATS is a jurisdictional statute creating no new causes of action, the ATS was not "stillborn."[29] Rather, the statute was intended to have practical effect the moment it became law.[30] Second, Congress

19. 28 U.S.C.A. § 1350 (West 2012).

20. *See* Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795); Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961). *See also* Vasundhara Prasad, *The Road Beyond Kiobel: The Fifth Circuit's Decision in Adhikari v. Kellogg Brown & Root, Inc. and Its Implications for the Alien Tort Statute*, 59 B.C.L. REV. E-SUPPLEMENT 369, 390 n.19 (2018).

21. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

22. *Id.* at 878. "This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations." *Id.* at 887.

23. *Id.* at 886. The court reasoned that although the only express reference to the "law of nations" in the U.S. Constitution is contained in Article I, sec. 8, cl. 10, which grants to the Congress the power to "define and punish . . . offenses against the law of nations," the Supreme Court has long held that international law is part of U.S. domestic law. *See id.* at 886–87 (citing The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law.")).

24. *Id.* at 890.

25. 542 U.S. 692 (2004).

26. *Id.* at 716.

27. *Id.* at 715–19 (The Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished.").

28. *Id.* at 715. Specifically, in the *Marbois* incident of May 1784, a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia. *Id.* The incident put pressure on the Continental Congress to provide a civil remedy to aliens. *Id.*

29. Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004).

30. *Id.* at 724.

intended the ATS to enable federal courts to hear claims in a limited category defined by the law of nations and recognized at common law.[31]

The Court articulated this limited category through a two-step test. First, the Court identified the types of international norms giving rise to ATS claims [hereinafter, "Step I"]. Only claims of a "specific, universal, and obligatory" nature are recognized under the ATS."[32] Justice Souter concluded that the judiciary ought to be free to consider certain violations of the law of nations today and federal courts should not "avert their gaze entirely from any international norm intended to protect individuals."[33] The Court in *Sosa* qualified Step I by announcing several practical considerations, which may require the Court to give deference to other courts or decision makers, [hereinafter, "Step II"].[34] For example, the exhaustion principle might require the claimant to exhaust any remedies available in the domestic legal system.[35] The political question doctrine may also necessitate judicial restraint.[36] The Court noted a concern raised by the Government of South Africa that apartheid cases brought in the U.S. interfere with the policy embodied by South Africa's Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid."[37] Accordingly, conduct which rises to a violation of an international norm under Step I may nevertheless be nonjusticiable under a variety of practical considerations.

B. Corporate Liability under the ATS

Thirty years after reviving the ATS in *Filártiga*, the Second Circuit took a major step towards nullifying the statute when it created a bar to corporate liability in *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*).[38] The Supreme

31. *Id.* at 712. The Court rejected Justice Scalia's argument that Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) closed the door to judicial recognition of international norms. *Id.* at 729 ("[T]he door is still ajar subject to vigilant doorkeeping.").

32. *Id.* Judge Posner explained the shortcomings of this standard in *Flomo*:

> [L]ike so many statements of legal doctrine, this one is suggestive rather than precise; taken literally it could easily be refuted. No norms are truly "universal"; "universal" is inconsistent with "accepted by the civilized world"; "obligatory" is the conclusion not the premise; and some of the most widely accepted international norms are vague, such as "genocide" and "torture."

Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1016 (7th Cir. 2011).

33. Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004).

34. *Id.* at 732–33.

35. *Id.* at 733 n.21.

36. *Id.*

37. *Id.*

38. 621 F.3d 111, 145 (2d Cir. 2010) ("[I]mposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*. Because corporate liability is not recognized as a

Court granted certiorari in 2013 to address the circuit split on corporate liability created by the Second Circuit, but ultimately chose to address a different issue.[39] The Court reheard the case on the issue of extraterritorial application of the ATS and determined that the presumption of extraterritoriality applied to the ATS: "Where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[40] ATS claims for actions that occur abroad perpetrated by foreigners against foreign victims—the so-called "foreign cubed"[41] cases—must be dismissed.[42]

By choosing not to address corporate liability in *Kiobel II*, the Court left the Second Circuit's *Kiobel I* precedent intact. This lead to an increasingly lopsided circuit split on the issue of corporate liability, with the Second Circuit "swimming alone."[43] The *Kiobel I* decision is important because it broke with every other circuit, but also because of the impassioned debate between Judges Leval and Cabranes regarding the proper source of law for ATS enforcement.[44] The debate, relating to identification of an international norm under Step I, stemmed from the proper interpretation of the oft-cited footnote 20 in *Sosa*, which stated, "[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."[45] Justice Souter compared two cases in footnote 20.[46] Both cases contemplated that

'specific, universal, and obligatory' norm, it is not a rule of customary international law that we may apply under the ATS.") (citation omitted).

39. *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel II*), 569 U.S. 108, 114 (2013).

40. *Id.* at 124–25.

41. *Kiobel II* "was a 'foreign cubed' case (foreign plaintiffs, foreign defendant, and foreign conduct). Doe I v. Cisco Sys., Inc., 66 F. Supp. 3d 1239, 1246 (N.D. Cal. 2014).

42. *Kiobel II*, 569 U.S. at 1245. To rebut the presumption of extraterritoriality, ATS cases must typically meet one of the following requirements: (1) the alleged tort occurred 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, including a distinct interest in preventing the U.S. from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind. Milena Sterio, *Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act*, 50 CASE W. RES. J. INTL. L. 127, 128 (2018) (citing *Kiobel II*, 569 U.S. at 127).

43. All the other circuits to consider the issue ruled or assumed that such cases can go forward in U.S. courts. *See* Al Shimari v. CACI Premier Tech., Inc. (*Al Shimari III*), 758 F.3d 516, 530–31 (4th Cir. 2014); Doe v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014); Doe v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011), *aff'd in part, rev'd in part*, 527 App'x 7 (D.C. Cir. 2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017–1021 (7th Cir. 2011); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008).

44. Judge Leval disagreed with the Judge Cabranes' majority opinion, concurring only in the judgment dismissing the case. Kiobel I, 621 F.3d 111, 152 (2d Cir. 2010).

45. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.20 (2004).

46. *Id.*

certain forms of conduct violated international law only when done by a State and not when done by a private actor acting independently of a State.[47]

Judge Cabranes interpreted *Sosa*'s footnote 20 as requiring courts to look to international law to determine the scope of liability for a particular type of private actor, which may be different depending on whether the perpetrator is a natural person or a judicial entity such as a corporation.[48] In reaching that conclusion, Judge Cabranes relied on the fact that international criminal tribunals have consistently limited their jurisdiction to natural persons.[49] In dissent, Judge Leval noted that if read in context, the passage in footnote 20 confers a different meaning.[50] Far from implying that natural persons and corporations are treated differently for purposes of civil liability under ATS, footnote 20 implied that that they are treated identically.[51] Judge Leval argued that the majority's requirement that a particular form of civil remedy be universally adopted "misunderstands how the law of nations functions."[52] According to Judge Level, international human rights law ("IHRL") "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."[53]

Justice Kennedy acknowledged this debate between Judges Leval and Cabranes in *Jesner v. Arab Bank*.[54] There, citizens of Israel accused Arab Bank of financing terrorism by distributing funds to Palestinian terrorist groups whereby Arab Bank cleared relevant transactions through its New York subsidiary.[55] The district court dismissed the ATS claims against Arab Bank on the sole ground that, under Second Circuit precedent, "plaintiffs cannot bring claims against corporations under the ATS."[56] On appeal, the Second Circuit conceded that *Kiobel II* "cast[s] a shadow" on circuit precedent and noted that *Kiobel II* "appears to reinforce Judge Leval's reading of *Sosa*, which derives

47. *Id.* In Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794–95 (D.C. Cir. 1984) (Edwards, J., concurring), the D.C. Circuit found insufficient consensus that torture by private actors violates international law. However, in Kadic v. Karadzic, 70 F.3d 232, 241–42 (2d Cir. 1995), the Second Circuit concluded that genocide was generally accepted as violating the laws of nations regardless of whether done by a State or by a private actor.

48. *Kiobel I*, 621 F.3d at 164–65 (Leval, J., concurring).

49. *Id.* at 132–37.

50. *Id.*

51. *Id.* at 165.

52. *Id.* at 175.

53. *Kiobel I*, 621 F.3d at 152.

54. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399 (2018) ("The dispute centers on a footnote in *Sosa*.").

55. *Id.* at 1393.

56. In re Arab Bank, PLC Alien Tort Statute Litigation, 808 F.3d 144, 148 (2d Cir. 2015).

from international law only the conduct proscribed, leaving domestic law to govern the available remedy."[57]

Still, the Second Circuit insulated its panel decision, declining to rehear the case *en banc*.[58] Judge Pooler dissented in the decision not to rehear the case noting that customary international law "does not contain general norms of liability or non-liability applicable to actors."[59] The Second Circuit's refusal to depart from its lone precedent in *Kiobel I* highlighted an "intra-circuit split," and reinforced the need for resolution by the Supreme Court.[60] The Supreme Court granted certiorari on April 3, 2017, to determine whether the ATS categorically forecloses corporate liability.[61]

PART II: *JESNER*'S FRACTURED OPINION

As in *Kiobel II*, the Court in *Jesner* dodged the corporate liability question for which it granted certiorari, albeit only partially.[62] In a fractured opinion, Justice Kennedy garnered a five-member majority for only three parts of the opinion, which expressly refused to extend the ATS to foreign corporations.[63] The five justices who voted to extend immunity to foreign corporations reasoned that separation-of-powers and foreign relations concerns mandated deference to the political branches.[64] Section II.A and Part III discuss how *Jesner*'s expansion of separation of powers was unnecessary because the well-established extraterritoriality and political question doctrines better address the foreign policy issues in *Jesner*. Ultimately, the flawed and conflicting reasoning supporting *Jesner*'s outcome suggests that the majority was motivated, above all, to end the *Jesner* litigation. In the following sections, this article discusses

57. *Id.; Jesner*, 138 S.Ct. at 1395 ("[T]he courts of the Second Circuit deemed that broader holding to be binding precedent. . . Since the Court of Appeals relied on its *Kiobel* holding in the instant case, it is instructive to begin with an analysis of that decision.").

58. In re Arab Bank, PLC Alien Tort Statute Litigation, 822 F.3d 34, 35 (2d Cir. 2016).

59. *Id.* at 42.

60. Beth Van Schaack, *The Inconsequential Choice-of-Law Question Posed by Jesner v. Arab Bank*, 24 ILSA J. INTL. & COMP. L. 359 (2018). Under Second Circuit practice, an *en banc* decision is needed to overturn the corporate immunity holding in Kiobel I. *Id.* at 360, n.6 (citing Jones v. Coughlin, 45 F.3d 677, 679 (2d Cir. 1995) (per curiam) (holding that a decision by a panel of the Second Circuit "is binding unless and until it is overruled by the Court *en banc* or the Supreme Court").

61. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 822 F.3d 34 (2d Cir. 2016), *cert. granted*, 85 U.S.L.W. 3466 (U.S. Apr. 3, 2017) (No. 16-499). According to the International Law Scholars Amicus Brief in *Jesner*, the question for which the Court granted certiorari in *Jesner* "rests on a fundamental misunderstanding of how international law works." Brief of International Law Scholars as Amici Curiae in Support of Petitioners at 1, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 2859943, at *1.

62. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018).

63. *Id.* at 1386, 1394–98, 1402–03, 1406–07.

64. *Id.* at 1408.

the Court's choice to bar foreign corporate liability despite the availability of at least two narrower grounds for deciding the case; the misunderstanding of international law perpetuated by Justice Kennedy's plurality; the failure to analytically distinguish between U.S. and foreign corporations; and the Court's willingness to depart from its ATS precedent.

A. The Court Could Have Decided Jesner *on Narrower Grounds*

After previewing the history of the ATS and the Court's decisions in *Sosa* and *Kiobel II*, Justice Kennedy set the stage for dismissal on extraterritoriality grounds.[65] Justice Kennedy noted that petitioners are foreign nationals who were injured or killed by terrorist acts committed abroad over a ten-year period.[66] The only connection to the U.S. is an "elaborate" banking system known as CHIPS that allowed Arab Bank to clear dollar-denominated transactions through its New York subsidiary.[67] Justice Kennedy acknowledged that the clearance activity is "an entirely mechanical function" subject to substantial regulations.[68]

Although the Court acknowledged the problems with "foreign cubed" ATS suits[69] and the tool available to dismiss those cases, extraterritoriality,[70] the Court recharacterized this issue as a concern "unique" to foreign corporations.[71] Writing for a plurality, Justice Kennedy defended the Court's decision not to remand the case on extraterritoriality grounds, because "it is not the question on which the Court granted certiorari, nor is it the question that has divided the Courts of Appeals."[72] Ironically, the Court did not fully answer that question.[73]

Although the Court granted certiorari on the question of corporate liability, lower courts would have benefited from guidance on extraterritoriality.[74] Both

65. *Id.* at 1393.

66. *Id.*

67. *Jesner*, 138 S. Ct. at 1394.

68. *Id.*

69. *See id.* ("Modern ATS litigation has the potential to involve large groups of foreign plaintiffs suing foreign corporations the United States for alleged human-rights violations in other nations.").

70. *Id.* at 1398 (quoting Kiobel II, 569 U.S. 108, 124–25 (2013)) ("[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.").

71. *Id.* at 1407.

72. *Jesner*, 138 S. Ct. at 1398–99.

73. *Id.* The question on which the Court granted certiorari and the question that divided the Courts of Appeals was whether the ATS *categorically* forecloses corporate liability, regardless of whether the corporation is foreign or domestic.

74. *See* Note, *Clarifying* Kiobel's *"Touch and Concern" Test*, 130 HARV. L. REV. 1902, 1903 (2017) ("[T]here are many proposals for clarifying *Kiobel*'s 'touch and concern' test[.]"); Vasundhara Prasad, *The Road Beyond Kiobel: The Fifth Circuit's Decision in Adhikari v. Kellogg Brown & Root, Inc. and its Implications for the Alien Tort Statute*, 59 B.C.L. REV. E. SUPP. 369, 370 (2018) (discussing uncertainty caused as to the test's proper interpretation).

the U.S. Government and Arab Bank argued that the case should be dismissed under the doctrine of extraterritoriality.[75] In declining to meaningfully address extraterritoriality, Justice Kennedy conceded that the Court's corporate liability holding was based in large part on a desire to end the lengthy litigation with Arab Bank.[76]

Applying the extraterritoriality doctrine in *Jesner* would have avoided the unnecessary extension of immunity to foreign corporations who commit torts on American soil. To overcome the presumption of extraterritoriality without a U.S. defendant, ATS plaintiffs must either allege that the tort occurred on American soil or that the defendant's conduct substantially and adversely affected an important American national interest.[77] Justice Sotomayor provided an example of a tort committed on American soil by "a [foreign] corporation posing as a job-placement agency that actually traffics in persons, forcibly transporting foreign nationals to the United States for exploitation and profiting from their abuse."[78] Permitting only individual liability in this case would not remedy the harm here where the violations stemmed directly from corporate policy and practice.[79]

The Court could also have avoided the corporate liability question by remanding *Jesner* to determine whether financing terrorism is a "clear and unambiguous" violation of the law of nations.[80] Justice Kennedy assumed that "individuals who knowingly and purposefully facilitated banking transactions to

75. Brief for Respondent at 18, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 3668990, at *18 ("Under *Kiobel II*, it should be clear that this case does not touch and concern the United States. And it would be particularly appropriate for this Court to resolve the extraterritoriality question because the Second Circuit has already indicated that it considers the clearing of dollar-denominated transactions sufficient to give rise to ATS jurisdiction."); Brief for the United States as Amicus Curiae Supporting Neither Party at 5, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 2792284, at *5 ("This Court should vacate the decision below, which rests on the mistaken premise that a federal common-law claim under the ATS may never be brought against a corporation. The particular claims in this case, however, present significant extraterritoriality questions that warrant direct consideration by the court of appeals on remand.").

76. *Id.* at 1399.

> The question whether foreign corporations are subject to liability under the ATS should be addressed; for, if there is no liability for Arab Bank, the lengthy and costly litigation concerning whether corporate contacts like those alleged here suffice to impose liability would be pointless. In addition, a remand to the Court of Appeals would require prolonging litigation that already has caused significant diplomatic tensions with Jordan for more than a decade. So it is proper for this Court to decide whether corporations, or at least foreign corporations, are subject to liability in an ATS suit filed in a United States district court.

Id.

77. *See* Kiobel II, 569 U.S. 108 (2013).

78. *Jesner*, 138 S.Ct. at 1435.

79. *Id.*

80. *See Id.* at 1397. Justice Sotomayor would have remanded *Jesner* to determine whether financers of terrorism are "common enemies of all mankind." *Id.* at 1427.

aid, enable or facilitate . . . terrorist acts would themselves be committing crimes under . . . international-law prohibitions."[81] Rather than applying *Sosa*'s framework to the unsettled norm[82] at issue—financing terrorism—Justice Kennedy disposed of the much broader issue of foreign corporate liability,[83] extending immunity under the ATS to foreign corporations who violate international norms arising to the universal recognition of *jus cogens*, like slavery and genocide.[84]

B. Perpetuation of a Misunderstanding of International Law

Writing for a plurality, Justice Kennedy approved of Judge Cabranes' interpretation of *Sosa*'s footnote 20 in *Kiobel I* and likewise concluded that corporate liability is a question of international law and international law precludes corporate liability.[85] Without resolving either point definitively, Justice Kennedy found "at least sufficient doubt" to justify exercising judicial restraint under *Sosa*'s Step II.[86]

In her forceful dissent, Justice Sotomayor squarely addressed the plurality's misconception of these two points.[87] To the first point, Sotomayor reasoned that "enforcement is not a question with which customary international law is concerned:"[88]

> *Sosa* consistently used the word "norm" to refer to substantive conduct. [*Sosa*'s caution against recognizing] "private claims under federal common law for violations of a norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted" . . . would make little sense if "norm" encompassed enforcement mechanisms like

81. *Id.* at 1397.

82. *See Jesner*, 138 S. Ct. at 1429 (Sotomayor, J., dissenting) ("[Arab Bank's augment that it was not the direct cause of plaintiffs' injuries] is a critique of the imposition of liability for financing terrorism, not an argument that ATS suits against corporations generally necessarily cause diplomatic tensions.").

83. *See id.* at 1431 (Sotomayor, J., dissenting) ("The majority, however, prefers to use a sledgehammer to crack a nut.").

84. *See* Ursula Tracy Doyle, *The Cost of Territoriality: Jus Cogens Claims Against Corporations*, 50 CASE W. RES. J. INTL. L. 225, 227 (2018) ("The jus cogens norm prohibits genocide, torture, and other egregious conduct. It surpasses all other international law norms, protects basic values, commits every State and allows no derogation.").

85. *Jesner*, 138 S.Ct. at 1400. Giving "considerable force and weight to the position articulated by Judge Cabranes," Justice Kennedy determined that there is an "equally strong argument" that petitioners in *Jesner* cannot demonstrate a "specific, universal, and obligatory norm of liability for corporations." *Id.*

86. *Id.* at 1391 ("[T]here is at least sufficient doubt on the point to turn to Sosa's second question: whether the Judiciary must defer to Congress to determine in the first instance whether that universal norm has been recognized and, if so, whether it should be enforced in ATS suits.").

87. *Id.* at 1420–25.

88. *Id.* at 1420 (internal citations omitted).

> corporate liability." Unlike "the prohibition on genocide," "corporate liability" cannot be violated.[89]

International law scholars and all but one circuit to address the issue agree.[90]

Regarding the second point, even assuming international law controls the specific form of liability ATS plaintiffs seek, international law does not prohibit corporate liability.[91] Those who contend such a prohibition exists point to the absence of corporate liability in the handful of international tribunals established to respond to human rights catastrophes.[92] Justice Kennedy lists *inter alia*, the Charter for the Nuremberg Tribunal, the Statute of the International Criminal Tribunal for the Former Yugoslavia, the Statute of the International Tribunal for Rwanda and the Rome Statute of the International Criminal Court.[93] However, by assuming that no norm of corporate liability exists based on the absence of corporate liability in international tribunals, the *Jesner* plurality failed to consider that "[n]o international tribunal has been created and endowed with the jurisdiction to hold natural persons civilly (as opposed to criminally) liable."[94]

The debate over corporate liability in international tribunals reveals that a court can always find "sufficient doubt" that that an enforcement mechanism has achieved "universal, specific, and obligatory" status under *Sosa*'s Step I.[95] By

89. *Id*.

90. *See supra*, cases cited at note 43; *see also* Jack L. Goldsmith & Curtis A. Bradley, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) ("It is well accepted that international law does not itself speak to whether or how it applies within particular domestic regimes, but rather leaves this issue to be determined by domestic law."). *See also* STEVEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 161 (Alfred A. Knopf 2015) ("As a technical matter, the ATS cases make clear that, when federal courts apply the statute, they do not directly apply international law. Rather they apply American law—namely, federal common law, which picks up some but not all international legal norms.").

91. *See* Beth Van Schaack, *The Inconsequential Choice-of-Law Question Posed by Jesner v. Arab Bank*, 24 ILSA J. INTL. & COMP. L. 359, 360–61 (2018) ("Although contentious, this choice-of-law debate proves to be inconsequential when it comes to the availability of corporate tort liability, given that both bodies of law point in the same direction and hand victory, at least in this round, to the plaintiffs. In other words, regardless of whether courts look to U.S. law or to international law, the ATS supports corporate tort liability.").

92. Kiobel I, 621 F.3d 11, 136 (2d Cir. 2010).

93. *Jesner*, 138 S.Ct. at 1423–24.

94. *Id.* at 1423. Judge Leval articulated this inconsistent reasoning best in his concurrence in *Kiobel I*:

> One of the main problems with the majority's theory is its incoherence resulting from the fact that it treats the absence of any international law precedent for imposition of damages on corporations as barring such an award under the ATS, while acknowledging that damages are properly awarded against natural persons notwithstanding the very same absence of international law precedent for such awards.

Kiobel I, 621 F.3d at 184 n.41; s*ee also*, Lindsey E. Wilkinson, P*iercing the Chocolate Veil: Ninth Circuit Allows Child Cocoa Slaves to Sue Under the Alien Tort Statute in Doe I v. Nestle USA*, 63 VILL. L. REV. TOLLE LEGE 20, 45 (2018).

95. *See supra* note 32 and accompanying text.

accepting the Second Circuit's reasoning that the jurisdiction of international tribunals supports corporate immunity under international law, *Jesner* opened the door to a holding that conspiracy and aiding and abetting liability are similarly precluded by international law.[96]

C. Failure to Distinguish Between Domestic and Foreign Corporations

Justice Kennedy's opinion offered several arguments that apply equally to foreign and domestic corporations and therefore do not support a holding limited to foreign corporate immunity under the ATS. For example, Justice Kennedy argued that the text of the ATS does not evidence Congress's intent for the statute to confer jurisdiction over claims against corporations;[97] that international law does not recognize corporate liability;[98] that judicial recognition of corporate liability violates separations of powers;[99] and that the Torture Victims Protection Act is limited to individuals.[100]

The text of the ATS itself says nothing about the type of defendant that may be sued under the ATS. In fact, it says nothing about enforcement of the prohibited conduct.[101] Nevertheless, writing for the Court, Justice Kennedy reasoned that the language of the ATS does not support an exception to the Court's "general reluctance" to create new private causes of action.[102] Justice Kennedy determined that the foreign-policy and separation-of-powers concerns inherent in ATS litigation counsel against mandating "a rule that imposes liability upon artificial entities like corporations."[103] Still writing for the Court, Justice Kennedy suggested that a proper application of *Sosa* may "preclude courts from ever recognizing any new causes of action under the ATS" before abruptly limiting the Court's holding to foreign corporations.[104] The Court did not explain what other "new causes of action" might fail under this "proper application of *Sosa*."

96. *See* Note, *Alien Tort Statute—Foreign Corporate Liability*—Jesner v. Arab Bank, Plc, 132 HARV. L. REV. 397, 404 (2018) (reasoning that ATS plaintiffs post-*Jesner* may no longer be able to argue that accomplice liability is merely an "ancillary question").

97. *Jesner*, 138 S.Ct. at 1402–1403.

98. *Id*. at 1400–1402.

99. *See id.* at 1402–03; Ursula Tracy Doyle, *The Cost of Territoriality: Jus Cogens Claims Against Corporations*, 50 CASE W. RES. J. INTL. L. 225, 226 (2018) (noting that the TVPA argument "would also apply, of course, to U.S. corporations").

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

101. *Id.* at 1421 (Sotomayor, J., dissenting) ("The text of the ATS also reflects this distinction between prohibiting conduct and determining enforcement. . . . The phrase 'of the law of nations' modifies 'violation,' not 'civil action.'").

102. *Id.* at 1402–03.

103. *Id.*

104. *Id.* at 1403. ("But the Court need not resolve that question in this case. Either way, absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.").

Like the Court's selective reliance on separation-of-powers concerns, the plurality's erroneous application of international law does not support the distinction the Court drew between foreign and domestic corporations. Justice Kennedy reframed the issue in *Jesner* by asking whether the Court has authority to extend ATS liability to new private causes of action without express authorization from Congress.[105] To that end Justice Kennedy first asked, "whether the law of nations imposes liability on corporations," and then, "whether [the Court] has the authority and discretion . . . to impose liability on a corporation without a specific direction from Congress to do so."[106] Neither question suggests that the answer depends on whether the ATS defendant is a U.S. or foreign corporation.

With regard to the TVPA, the plurality argued that the lack of corporate liability in the TVPA was "all but dispositive of the present case."[107] Justice Kennedy reasoned that the TVPA provides a logical statutory analogy to an ATS common-law action and rejected attempts to distinguish the TVPA.[108] The TVPA limits liability to an "individual" acting under color of law of any foreign nation.[109] In addition to numerous other problems with this statutory analogy,[110] it does not support a distinction between U.S. and corporate defendants.

Justice Gorsuch's concurrence provided the lone instance of a clear distinction between domestic and foreign corporations, arguing that the ATS requires diversity-of-citizenship under Article III.[111] Justice Gorsuch reasoned that although the text of the ATS did not expressly call for a U.S. defendant, "it likely would have been understood to contain such a requirement."[112] Since the ATS was enacted "in the shadow of the Constitution," ATS suits must fit under one of the nine Cases and Controversies enumerated in Article III.[113] Federal question jurisdiction is not available, according to Justice Gorsuch, because ATS

105. *Jesner*, 138 S.Ct at 1394.

106. *Id.*

107. *Id.* at 1404.

108. *Id.* at 1403–04.

109. *Id.* at 1404.

110. *Jesner*, 138 S.Ct. at 1432 (Sotomayor, J., dissenting) ("The plurality's [TVPA analogy] ignores the critical textual differences between the ATS and TVPA, as well as the TVPA's legislative history, which emphasizes Congress' intent to leave the ATS undisturbed."). *See also* William J. Aceves, *Correcting an Evident Error: A Plea to Revise Jesner v. Arab Bank, Plc*, 107 GEO. L.J. ONLINE 63 (2018) ("[T]he placement of a statutory note in the U.S. Code by the Office of Law Revision Counsel ("OLRC") does not have any substantive impact on the law's meaning, interpretation, or application.").

111. *Jesner*, 138 S.Ct. at 1415. Justice Gorsuch noted that the reason he would dismiss *Jesner* was "[n]ot because the defendant happens to be a corporation instead of a human being." *Id.* at 1412.

112. *Id.* at 1415.

113. *Id.*

suits do not "arise under" federal law.[114] Therefore, because the ATS requires an alien plaintiff, unless one of the parties is a diplomat, "an American defendant [is] needed for an ATS suit to proceed."[115]

Although Justice Gorsuch's diversity-of-citizenship argument draws a formal distinction between domestic and foreign defendants, it strips the ATS of its role in resolving cases of any importance.[116] Having established that the ATS requires diversity-of-citizenship, Justice Gorsuch embraced the argument advanced by Professors Belia and Clark that the ATS filled a jurisdictional gap in the First Judiciary Act related to the amount in controversy requirement: the ATS provides redress for "personal injuries that U.S. citizens inflicted upon aliens resulting in less than $500 in damages."[117] While this amount effectively foreclosed tort actions at the time,[118] it is hard to imagine that victims of human rights abuses would seek damages less than the amount in controversy requirement today. Accordingly, Justice Gorsuch's formalistic approach ignores the ATS's evolution over the past four decades and the realities of human rights litigation.

D. Willingness to Overturn ATS Precedent: Closing The Door Sosa *Kept Open*

The Court in *Sosa* held that "the door [to judicial recognition of actionable international norms] is still ajar subject to vigilant doorkeeping and thus open to

114. *Id.* at 1416 (Gorsuch, J., concurring) (reasoning that the law of nations is part of general common law, "but *not* part of federal law.") (emphasis in original) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 739–740 (2004)) (opinion of Scalia, J.)). Justice Scalia's concurrence in *Sosa* criticized the majority for coming to the opposite conclusion. *Sosa*, 542 U.S. at 746 n.* ("[A] federal-common-law cause of action of the sort the Court reserves discretion to create would "arise under" the laws of the United States, not only for purposes of Article III but also for purposes of statutory federal-question jurisdiction."). However, the majority did not expressly decide this issue, and the Court noted that some common law claims derived from the law of nations may be brought under the ATS, but not the federal question statute, 42 U.S.C. § 1331, lending some support to Justice Gorsuch's argument that ATS suits do not arise under federal law. *Id.* at 731 n.19.

115. *Jesner*, 138 S.Ct. at 1415.

116. Justice Alito, while embracing Gorsuch's opinion, apparently acknowledged that Justice Gorsuch's diversity-of-citizenship theory would render the ATS superfluous:

> Because this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS. And since such a suit may generally be brought in federal court based on diversity jurisdiction, 28 U.S.C. § 1332(a)(2), it is unclear why ATS jurisdiction would be needed in that situation.

Id. at 1410 n.* (Alito, J., concurring).

117. *Id.* at 1417 (Gorsuch, J., concurring) (quoting Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 509 (2011)); *see* Michael L. Jones, *Domesticating the Alien Tort Statute*, 84 GEO. WASH. L. REV. ARGUENDO 95, 99 (2016).

118. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 900 (2006).

a narrow class of international norms today."[119] Despite the court's narrow formal holding in *Jesner*, five justices would either close the door to corporate liability entirely or limit the ATS to U.S. defendants. Writing for the Court, Justice Kennedy suggested that "a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS."[120] Three justices—Kennedy, Roberts, and Thomas—would have foreclosed ATS liability for all corporations based on the lack of corporate liability in the TVPA[121] and on Judge Cabranes' argument that international law governs corporate liability.[122]

Justices Alito and Gorsuch would expressly overturn *Sosa*. Justice Gorsuch "would end ATS exceptionalism" and refuse invitations to create new forms of legal liability.[123] Moreover, Justice Gorsuch would eliminate liability for all foreign defendants under his diversity-of-citizenship theory. Agreeing with Justice Gorsuch's reasoning, Justice Alito questioned whether *Sosa* was correctly decided.[124] Justice Alito would permit ATS suits to proceed only where doing so would "materially advance the ATS's objective of avoiding diplomatic strife."[125]

The Court's failure to unite around a single rationale for granting immunity to foreign corporations under the ATS suggests the conservative justices were motivated, above all else, by a desire to end the *Jesner* litigation. In dissent, Justice Sotomayor noted that Justice Gorsuch's questioning of well-settled law in *Sosa* was outside the scope of the issue of corporate liability.[126] In response to Justice Gorsuch's argument that the ATS was originally intended for a small set of suits against U.S. defendants, Justice Sotomayor reasoned that Justice Gorsuch's requirement of a U.S. defendant in ATS suits would overturn *Sosa*, which involved an ATS suit between two citizens of Mexico.[127]

As for the conservative justices' reliance on foreign relations concerns necessitating deference to the political branches, Justice Sotomayor pointed to the lack of empirical evidence supporting those "alarmist conjectures."[128] In sum, Justice Sotomayor accurately observed that the majority provided no support for the "unique problems" created by foreign corporations.[129]

119. *Sosa*, 542 U.S. at 729.
120. *Jesner*, 584 U.S. at 1403.
121. *Id.* at 1403–05.
122. *Id.* at 1399–1402.
123. *Id.* at 1413.
124. *Id.* at 1409.
125. *Jesner*, 584 U.S. at 1410.
126. *Id.* at 1427.
127. *Id.* at 1428 ("[*Sosa*] forecloses the argument the concurrence now makes, as *Sosa* authorized courts to recognize private claims under federal common law for violations of "certain international law norms.").
128. *Id.* at 1436.
129. *Id.*

PART III: *JESNER*'S IMPACT ON PMC LITIGATION

Recent lower court decisions have followed *Jesner*'s formal holding, dismissing claims against foreign corporations,[130] while choosing not to apply *Jesner*'s separation-of-powers analysis to bar suits against domestic defendants.[131] Still, the fact that U.S. corporations are seeking to dismiss ATS claims in response to *Jesner* demonstrates the confusion created by the Court's analysis.[132] In rejecting an invitation to extend *Jesner*'s holding to U.S. corporations, the court in *Al Shimari* highlighted the redundancy of *Jesner*'s separation-of-powers reasoning given the well-established extraterritoriality and political question doctrines.

Although ATS plaintiffs have been successful in limiting *Jesner* to its formal holding, the *Al Shimari* litigation illustrates that these plaintiffs still face an uphill battle. In addition to the extraterritoriality and political question doctrines, PMCs have several other defenses available to thwart ATS litigation. These doctrines and defenses underscore the impropriety of *Jesner*'s extension of separation-of-powers.

A. Rejecting Jesner*'s Broad Separation-of-Powers Holding*

Two months after the Court decided *Jesner*, the district court in *Al Shimari v. CACI* declined an invitation to extend *Jesner*'s holding to a PMC incorporated in the U.S.[133] This line of cases, originally filed in 2008, alleges that the plaintiffs, Iraqi citizens, were abused and tortured by employees of CACI, a PMC incorporated in Virginia, while detained as suspected enemy combatants at Abu Ghraib prison in Iraq.[134] Plaintiffs alleged that CACI's employees worked with military personnel to abuse plaintiffs, engaging in torture; cruel, inhuman, or degrading treatment; and war crimes.[135]

CACI moved to divest the court of subject matter jurisdiction for two independent reasons based on the "test" established in *Jesner*.[136] According to CACI's proposed two-part test, (1) separation-of-powers concerns inherent in the ATS preclude creation of private rights of action and (2) ATS claims may

130. *See* Kaplan v. C. Bank of the Islamic Republic of Iran, 896 F.3d 501, 505 (D.C. Cir. 2018) (affirming dismissal of ATS claims brought against foreign bank).

131. *See* Al Shimari v. CACI Premier Tech., Inc., 320 F.Supp.3d 781, 788, 2018 WL 3118183 (E.D. Va. June 25, 2018).

132. *See* Brill v. Chevron Corp., 15-CV-04916-JD, 2018 WL 3861659, at *4 (N.D. Cal. Aug. 14, 2018) (leaving for another day the question of whether *Jesner*'s holding on foreign corporations should be extended to a domestic corporation such as Chevron).

133. *Al Shimari*, 320 F.Supp.3d at 788.

134. The factual background, detailing the abuses suffered by the Al Shimari plaintiffs is described in detail in *Al Shimari*, 300 F. Supp. 3d at 762–71; *see also supra* notes 1–4. On December 10, 2018, the court denied CACI's Motion in Limine to Exclude the Fay Report.

135. *Al Shimari*, 300 F. Supp. 3d at 762–71.

136. *Al Shimari*, 320 F.Supp.3d at 782.

not proceed where they do not further the ATS's objective of preventing friction between the U.S. and foreign nations.[137] CACI argued that *Jesner* requires courts to undertake an "independent inquiry" before allowing an ATS claim to procced and that plaintiffs have the burden to overcome *Jesner*'s two-part test.[138]

The court rejected CACI's interpretation of *Jesner*'s holding,[139] but went on to determine that even under this proposed analysis, the plaintiffs nevertheless made the required showing.[140] In reaching this decision, the court reasoned that the Fourth Circuit had already addressed *Jesner*'s separation-of-powers concerns in its rulings on extraterritoriality and the political question doctrine.[141] In its 2014 decision addressing extraterritoriality under *Kiobel II*, the Fourth Circuit found that allowing claims to proceed against CACI does not impermissibly interfere with the political branches.[142] The ATS does not feed international conflict between U.S. law and laws of foreign nations because the ATS is purely jurisdictional and applies customary international law, which is "necessarily recognized by other nations as being actionable."[143] Further, litigation of the claims in the case does not require "unwarranted judicial interference in the conduct of foreign policy," because the U.S. does not "tolerate acts of torture, whether committed by U.S. citizens or by foreign nationals."[144]

The Fourth Circuit's 2016 decision addressing the political question doctrine addressed any remaining separation-of-powers concerns articulated in *Jesner*.[145] "The political question doctrine derives from the principle of separation of powers and deprives courts of jurisdiction over controversies which revolve around policy choices and value determinations constitutionally committed to Congress or . . . to the executive branch."[146] The political question doctrine "is a narrow exception to the judiciary's general obligation to decide cases properly brought before the courts."[147] Applying the political question doctrine to the violations of international law at issue, the Fourth Circuit rejected the district court's finding that CACI's acts were based on military judgement

137. *Id.*

138. *Id.*

139. *Id.* at 784, n.4 ("[T]he better reading of *Jesner*'s interpretation of *Sosa* appears to be that the federal courts should abstain from exercising jurisdiction under the ATS in the exceptional case when the defendant presents a clear justification to do so, as the Arab Bank did in *Jesner*.").

140. *Id.* at 783–88.

141. *Al Shimari*, 320 F.Supp.3d at 785–86.

142. *Id.* at 785 (citing Al Shimari III, 758 F.3d 516, 529–30 (4th Cir. 2014)).

143. *Id.* (quoting *Al Shimari III*, 758 F.3d at 530).

144. *Id.* (quoting *Al Shimari III*, 758 F.3d at 530).

145. *Id.* at 785–86.

146. *Al Shimari*, 320 F.Supp.3d at 786–87 (quoting Al Shimari v. CACI Premier Tech., Inc. (*Al Shimari IV*), 840 F.3d 147, 154 (4th Cir. 2016)).

147. *Id.* at 786 (quoting *Al Shimari IV*, 840 F.3d at 154).

and expertise unsuitable for scrutiny by a court.[148] The court concluded that "the separation of powers rationale underlying the political question doctrine does not shield the contractor's actions from judicial review."[149]

Finally, the court in *Al Shimari* determined that the presence of an American defendant in ATS suits nullifies the foreign relations concerns articulated in *Jesner*.[150] ATS suits involving foreign plaintiffs suing an American corporate defendant fully align with the original goals of the ATS: "to provide a federal forum for tort suits by aliens against Americans for international law violations."[151] Accordingly, the court found that the exercise of jurisdiction is consistent with the purposes of the ATS and does not conflict with either the holding or reasoning in *Jesner*.[152]

B. An Uphill Battle for ATS Plaintiffs

Since Abu Ghraib victims filed suit against CACI in June 2008, the case has survived claims that it presented a nonjusticiable political question, that the defendants were immune from suit, that the plaintiffs' claims were preempted by the Federal Tort Claims Act ("FTCA"), that the plaintiffs' claims were barred by the statute of limitations, and that the plaintiffs' claims failed to state plausible allegations of conspiracy or aiding and abetting.[153] These represent only some of the hurdles ATS suits must survive and underscore the impropriety of *Jesner*'s expansion of separation-of-powers to justify its holding.

The political question doctrine presents a unique hurdle in ATS suits against PMCs because an "ATS plaintiff must establish why the court should treat a PMC's actions as state actions yet simultaneously avoid implying the existence of any political questions."[154] The six-factor political question test established in *Baker v. Carr*,[155] accords great deference to the executive branch views on the justiciability of cases involving foreign affairs.[156] Complicating matters for ATS plaintiffs, the executive branch has not displayed consistent views regarding the ATS.[157] In *Filártiga*, the Justice Department intervened on behalf of the Filártigas, which reflected the Carter administration's view on the

148. *Id.* (citing *Al Shimari IV*, 840 F.3d at 155–58).

149. *Id.* (quoting *Al Shimari IV*, 840 F.3d at 158).

150. *Id.* at 787.

151. *Al Shimari*, 320 F.Supp.3d AT 787.

152. *Id.*

153. Al Shimari v. CACI Premier Tech., Inc., 300 F. Supp. 3d 758, 771–76 (E.D. Va. 2018).

154. Jenny S. Lam, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1489 (2009).

155. 369 U.S. 186 (1962).

156. *Id.* at 211–12.

157. *Compare Filartiga v. Pena Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (United States filed an amicus brief in support of the plaintiff) *with Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (United States supported dismissal).

importance of human rights.[158] *Sosa* represented a reversal in the government's position on the ATS.[159] The George W. Bush Justice Department filed amicus briefs arguing that ATS cases should be heard only where Congress has, by separate act, expressly given permission to file suit.[160] Most recently, in *Jesner*, the U.S. Government took a middle position, urging the Court to remand the case to let the Second Circuit address the issue of extraterritoriality.[161] The U.S. Solicitor General, Brian Fletcher, argued on behalf of the U.S. Government against a categorical rule barring corporate liability.[162]

Like the political question doctrine, the presumption against extraterritorial application of the ATS presents a difficult hurdle in suits against PMCs. The appropriate application of the touch and concern test has recently given rise to a circuit split between the Fourth Circuit in *Al Shimari* and the Fifth Circuit in *Adhikari v. Kellogg Brown & Root, Inc.*, another case involving ATS claims brought against a U.S. PMC for torts committed in Iraq.[163] As noted above, before the Fourth Circuit for the third time, the *Al Shimari* court held that the plaintiffs' claims for abuse and torture at the Abu Ghraib detention center in Iraq touched and concerned the territory of the U.S. with sufficient force to receive jurisdiction under the ATS.[164] While the Fourth Circuit employed a broad, fact-based inquiry taking into account all pertinent facts underlying the plaintiffs' claims, the Fifth Circuit in *Adhikari* took a restrictive approach looking only at the conduct that was in violation of international law and the location of that conduct.[165] This restrictive approach has the potential to immunize PMCs that confine their illegal conduct to foreign countries.[166]

In addition to the presumption against extraterritoriality and the political question doctrine, ATS plaintiffs may have to overcome challenges based on

158. Rehman, *supra* note 3, at 505.

159. *Id.*

160. *Id.* at 504–05. *But see* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1431 (2018) ("Notably, the Government's position that categorically barring corporate liability under the ATS is wrong has been consistent across two administrations led by Presidents of different political parties.").

161. Milena Sterio, Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act, 50 Case W. Res. J. Int'l L. 127, 134 (2018).

162. Howe, *supra* note 12; *see also* Brief for the United States as Amicus Curiae Supporting Neither Party at 15, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1431 (2018) No. 16-488, 2017 WL 2792284, at *15.

163. Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 190–91 (5th Cir. 2017).

164. Al Shimari III, 758 F.3d 516, 520 (4th Cir. 2014).

165. Vasundhara Prasad, *The Road Beyond Kiobel: The Fifth Circuit's Decision in Adhikari v. Kellogg Brown & Root, Inc. and Its Implications for the Alien Tort Statute*, 59 B.C. L. REV. E-SUPPLEMENT 369, 385–86 (2018).

166. *See Adhikari*, 845 F.3d at 197.

forum non conveniens ("FNC"),[167] comity, and exhaustion.[168] Under a challenge based on FNC, for example, ATS claimants must show that the alternative forum, such as Iraq or Afghanistan, provides a remedy so clearly unsatisfactory or inadequate that it essentially provides no remedy at all.[169]

Finally, ATS plaintiffs may have to overcome claims of immunity by PMCs based on FTCA preemption or the government contractor defense. The government contractor defense presents an untested[170] obstacle to holding PMCs accountable. The defense originated in *Boyle v. United Technologies Corp.*, where the Supreme Court found that state tort law "had to give way to 'uniquely federal interests' in procuring equipment for the military."[171] One commentator argued that the "uniquely federal interests" in insulating federal contractors from state tort law do not weigh in favor of insulating federal contractors from federal law under the ATS.[172] Since violations of IHRL will presumably violate official U.S. policies, ATS claimants can often establish state action without implication of the discretionary judgements or official policies of the U.S. Government.[173] *Al Shimari* supports this approach.[174]

167. FNC allows a court to dismiss a case, in its discretion, when "an alternative forum has jurisdiction to hear [a] case and (2) trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or . . . the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" Lam, *supra* note 158, at 1480 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (internal quotation omitted)).

168. *Kiobel II* analyzed the presumption against extraterritoriality in connection with related limitations such as exhaustion, forum non conveniens ("FNC"), comity, and the practice of courts giving weight to the views of the Executive Branch. Kiobel II, 569 U.S. 108, 133 (2013) (Breyer, J., concurring).

169. Lam, *supra* note 154, at 1482.

170. The defense has not yet been extended to cover PMCs violation the law of nations. *Id.* at 1485 (citing Boyle v. United Tech. Corp., 487 U.S. 500, 504 (1988)); *see* Al Shimari v. CACI Premier Tech., 300 F. Supp. 3d 758, 787 n.32 (E.D. Va. 2018) (reserving the issue of derivative immunity as a government contractor for summary judgement).

171. Lam, *supra* note 154, at 1485 (quoting *Boyle*, 487 U.S. at 504). In *Boyle*, the Court found that the FTCA, which allows individuals to sue the U.S. Government for torts committed by persons acting on behalf of the federal government, precluded liability against government contractors for design defects in military equipment. *Boyle*, 487 U.S. at 504.

172. Lam, *supra* note 154, at 1486–87.

173. *Id.* at 1487.

174. Al Shimari v. CACI Premier Tech., 300 F. Supp. 3d 758, 781 n.27 (E.D. Va. 2018). In *Al Shimari*, the court rejected CACI's argument that much of the alleged conduct involved "practices that were expressly permitted by the executive branch" because "the memoranda authorizing these [extreme interrogation] techniques were rescinded by the executive branch in December 2003," and regardless, memoranda written by the executive branch cannot overcome domestic judicial, executive, and military authority to the contrary, in addition to corroborating international law sources. *Id.* In a concurring opinion overturning the district court's dismissal of the case on political question grounds, Judge Floyd confirmed that "it is beyond the power of even the President to declare [torture] lawful." Al Shimari IV, 840 F.3d 147, 162 (4th Cir. 2016) (Floyd, J., concurring).

PART IV: LEGISLATIVE SOLUTION

In *Jesner*, the Court declined to extend ATS liability to foreign corporations without express authorization from Congress.[175] Justice Kennedy's plurality opinion found this holding necessary because of the possibility that permitting such liability would allow other nations to hale U.S. corporations into foreign courts for violations of the law of nations.[176] The final part of Justice Kennedy's plurality opinion described Congress's possible responses to *Jesner*.[177] Justice Kennedy characterized the decision to preclude foreign corporate liability under the ATS as a matter of first impression—the First Congress provided a federal remedy only for a narrow category of international-law violations committed by individuals.[178] Accordingly, "[t]he political branches can determine, referring to international law to the extent they deem proper," (1) whether to impose liability upon foreign corporations and, conversely, allow other countries to hold U.S. corporations liable; (2) whether to subject such liability to "limitations or preconditions" based on the unavailability of "neutral judicial safeguards" in other countries; and (3) whether corporate liability should be "limited to cases where a corporation's management was actively complicit in the crime."[179]

Justice Kennedy's suggestions to Congress involved questions of comity and direct (as opposed to indirect) liability. Comprehensive legislation could do much more, especially with regard to PMCs. Legislation could clarify a host of frequently litigated issues like the "touch and concern test," immunity for defense contractors, FTCA preemption, comity, exhaustion, and the statute of limitations. A recent article discussing the need for clarity in defending lawsuits against PMCs emphasized the need for a comprehensive legislative solution to the "current patchwork of laws" governing PMC liability.[180] In a democracy, "the state should have a monopoly on the legitimate use of violence in the interest of public order."[181] However, PMCs act as an extension of the state, and reliance on PMCs is increasing.[182] There are many advantages to comprehensive PMC legislation including greater legal predictability in the contractor industry, increased business efficiency, and greater comfort on the part of the public.[183] Further, given that PMCs are often populated by alumni of the U.S. military and are headquartered in the U.S., legislation would improve international

175. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018).

176. *Id.* at 1407.

177. *Id.* at 1407–08.

178. *See Id.* at 1408 ("[J]udicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.").

179. *Id.* at 1407–08.

180. *See* Pickens, *supra* note 2, at 641–42.

181. *Id.* at 640.

182. *Id.* at 640–41.

183. *Id.*

confidence in U.S. policy.[184] A plan for oversight would indicate that the U.S. government is aware and responsible.[185]

Calls for legislative action affecting PMCs target many different institutions including U.S. military law, U.S. criminal law, International Human Rights Law, International Criminal Law, and the ATS.[186] Amending the ATS is the most logical way to ensure the viability of claims against PMCs, especially considering that the plurality opinion in *Jesner* turned on the lack of corporate liability under the TVPA. An express cause of action for violations of international law, brought by aliens against PMCs, would satisfy the *Jesner*'s concerns over separation-of-powers while leaving the ATS intact.[187]

CONCLUSION

Jesner's fractured reasoning behind granting ATS immunity to foreign (but not domestic) corporations suggests the conservative justices were motivated, above all else, by a desire to end the *Jesner* litigation. Justice Sotomayor concluded her dissent by taking aim at the Court's leniency towards corporations. She warned that corporate immunity under the ATS "undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose."[188] As in *Citizens United* and *Hobby Lobby*, *Jesner* allows corporations "to take advantage of the significant benefits of the corporate form and enjoy fundamental rights . . . without having to shoulder attendant fundamental responsibilities."[189] The Court's fractured opinion resulted from the conflict between a corporation friendly Court and a statute that does not tolerate corporations who abuse their power.[190]

184. *See id.* at 642.

185. Pickens, *supra* note 2, at 642.

186. *See generally* Angela Snell, *The Absence of Justice: Private Military Contractors, Sexual Assault, and the U.S. Government's Policy of Indifference*, 2011 U. ILL. L. REV. 1125 (2011).

187. The Legislative history of the TVPA makes clear that the ATS "remain[ed] intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." H.R. REP. NO. 102-367, at 4 (1991).

188. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1437 (2018).

189. *Id.* (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014)); *see* Milena Sterio, *Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act*, 50 CASE W. RES. J. INT'L L. 127, 134 (2018) (noting that the business community is united against extending ATS liability to corporations).

190. "Multinational companies have faced dozens of suits accusing them of playing a role in human rights violations, environmental wrongdoing and labor abuses. Exxon Mobil Corp., Coca-Cola Co., Pfizer Inc., Unocal Corp., Chevron Corp., Daimler AG and Ford Motor Co. have all been sued under the Alien Tort Statute." Greg Stohr, *Company Exposure to Human-Rights Suits Gets U.S. High Court Look*, BLOOMBERG LAW (Apr. 3, 2017), https://www.bloomberglaw.com/product/blaw/document/ONU5L76K50XV?bc=W1siU2VhcmNoIFJlc3VsdHMiLCIvcHJvZHVjdC9ibGF3L3NlYXJjaC9yZXN1bHRzL2ZmY2ZlYTU3Mjc0NWYyN2YyOWM3NzU1NGUyNWU2ZjBhIl1d—5db33e6d1aa015f94 [https://perma.cc/FKU8-QA5Q].

While the *Al Shimari* litigation supports the viability of ATS claims against PMCs in the near term, the two-century old statute stands on shaky ground.[191] The conservative justices demonstrated a willingness not only to construe the Court's ATS precedent narrowly, but to overturn its precedent altogether. As the federal judiciary increasingly reflects the ideology of the Court's most conservative justice,[192] ATS plaintiffs can no longer rely on U.S. courts to carry the torch of enforcing international human rights law. The Court may have exercised restraint in limiting *Jesner*'s formal holding to foreign corporations, but ATS plaintiffs should not expect mercy in the next ATS decision. Congress must protect the ATS and ensure that no corporation is exempt from the law of nations.

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191. *See* Samuel Moy, *Time to Pivot? Thoughts on Jesner v. Arab Bank*, LAWFARE (Apr. 25, 2018, 1:55 PM), https://lawfareblog.com/time-pivot-thoughts-jesner-v-arab-bank [https://perma.cc/A3B8-MPKA] (arguing that the lesson from *Jesner* is that the human rights movement "must pivot in the ruins").

192. *See* Linda Greenhouse, *Is Clarence Thomas the Supreme Court's Future?*, NEW YORK TIMES (Aug. 2, 2018), https://www.nytimes.com/2018/08/02/opinion/contributors/clarence-thomas-supreme-court-conservative.html (noting that judges are increasingly willing to follow Justice Thomas's lead in rethinking precedent and constitutional doctrine).

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