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PERSPECTIVE

ATS ruling narrows the judicial role in international law

By Kristin A. Linsley

The U.S. Supreme Court's decision in *Jesner v. Arab Bank* caught many by surprise. 2018 DJDAR 3627 (April 24, 2018). The court's holding — that foreign corporations cannot be sued in U.S. courts for international-law violations absent authorization from Congress — departed from the near-unanimous views of the lower courts. And the court's rationale, clarified by separate opinions by Justices Samuel Alito and Neil Gorsuch, can only be read as dramatically narrowing federal courts' discretion to recognize any new international law rights without congressional action.

At issue in *Jesner* was the reach of the Alien Tort Statute, passed in 1789 to allow foreigners to sue for international-law violations as a way of avoiding diplomatic conflict. It creates federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Despite its modest beginnings, lower courts had used the statute to create a body of international human rights law for claimed violations occurring outside the United States. A much-cited decision, *Filartiga v. Pena-Irala*, involving acts of torture by a Paraguayan official, was the first such case, followed by other cases recognizing a range of new international-law norms.

The first Supreme Court case on the subject was *Sosa v. Alvarez-Machain*. Sosa held that the ATS was jurisdictional only, but nonetheless read it to allow courts to enforce a handful of international-law norms already recognized as actionable in 1789. More controversially, the court went on to say that courts could recognize *new* norms that, in the court's words, have the same degree of universal recognition as "historical paradigms familiar when [the ATS] was enacted."

After *Sosa*, this question — whether a proposed norm was sufficiently well-accepted in international law — occupied most of the lower courts' attention.

But in a less-quoted passage, *Sosa* cautioned that even with well-established norms, courts must carefully consider whether a *judicial* remedy is warranted, rather than one established by Congress. The Supreme Court supported this point with a detailed discussion of Congress' constitutional role to define and punish international-law violations, and the judiciary's lack of institutional competence or authority to perform that role or address the attendant foreign policy concerns. But this second step of *Sosa* — and its separation of powers and foreign affairs rationale — was widely ignored by the lower courts, many of which simply asked whether a recognized norm was shown and, if so, allowed the ATS claim to proceed.

New York Times News Service

Activists gather outside the Supreme Court as justices hear arguments in Jesner v. Arab bank, Oct. 11, 2017.

The Supreme Court addressed the ATS again in *Kiobel v. Royal Dutch Petroleum* — where the 2nd U.S. Circuit Court of Appeals, applying the first step of *Sosa*, had held that international law did not support extending liability for human rights violations to corporations. The court granted certiorari but affirmed on another ground — that the ATS does not apply extraterritorially. That ruling left intact the 2nd Circuit's corporate liability precedent, which that court continued to apply — including in *Jesner*, a case involving claims against a Jordanian bank.

When the Supreme Court took up *Jesner*, many assumed that it would overturn the 2nd Circuit's corporate liability ruling or at least tell that court to reconsider the case under *Kiobel*. But of course, it takes only four justices to grant cert, and five to decide the case — so whatever the thinking was behind the grant, the result was not as anticipated. And what certainly was not anticipated is that the court would not only affirm the 2nd Circuit but significantly reduce the scope of judicial lawmaking discretion under *Sosa*. But that is exactly what it seems to have done.

The Supreme Court's judgment was announced by Justice Anthony Kennedy — widely viewed in this area, as in others, as the "swing" vote — but only parts of his opinion are joined by five justices and thus constitute an opinion of the court. The overriding difference among the various opinions is the degree to which the justices are inclined to preserve *Sosa* — and, frankly, all of the opinions in the majority leave *Sosa* much diminished.

Interestingly, two issues that were central to both the *Jesner* briefing and the general academic discussion over corporate liability after *Sosa* are largely relegated to a debate between Justice Kennedy's three-member plurality and Justice Sonia Sotomayor's four-member dissent, specifically: (1) whether corporate liability is a question of international law, such that an international consensus is required under step one of *Sosa*, or just a means of enforcement or "form of liability" to be addressed under domestic law, and (2) if international law governs, whether there is an international consensus recognizing corporate liability for human rights violations.

The dissent argues that international law creates norms, or "substantive prohibitions," but that corporate liability is a mere "enforcement question" to be left to individual nations, "which may act to impose liability collectively through treaties or independently via their domestic legal systems." The plurality disagrees, noting that international law defines the substance of norms *and* the actors bound by them, and distinguishes between state and non-state

actors, and natural and artificial persons. And despite the "singular achievement" of modern international law in extending the Law of Nations to individuals, the international community has not done the same for corporations, as shown by the charters of international human rights tribunals extending liability only to natural persons — a point that "counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law."

Despite the extensive briefing in *Jesner* on these issues — whether corporate liability is governed by international law and whether an international consensus supports such liability — the five-justice majority ultimately declines to resolve either one, concluding that even if *both* questions went the plaintiffs' way, courts still should not create a remedy against foreign corporations under the ATS. The court revives the much-neglected second step of Sosa, reiterating that any new judicially created claims, even for established international law norms, are subject to "vigilant doorkeeping," and further notes that the decision to create new causes of action, even under domestic law, is normally left to Congress, which can weigh the policy interests presented by new substantive liabilities.

These judicial restraint principles, the court continues, apply to extending liability to corporations. In the context of judicially created liability for constitutional violations, the court had refused to recognize corporate liability, noting that such a "marked extension" of the law is "for Congress, not us, to decide." And the ATS is "no exception," given its foreign policy and separation of powers implications: "The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign policy concerns" — and the fact that the ATS implicates such concerns mandates a "high bar." Judicially created ATS suits, far from avoiding diplomatic friction, have produced protests from foreign nations. Indeed, the court notes, "[t]here is an argument that foreign policy and separation of powers concerns would preclude courts from ever recognizing new causes of action" under the ATS — but in any event, these concerns make it inappropriate to extend the ATS to foreign corporations.

Three separate opinions by justices in the majority add more force to the court's holding. In addition to Justice Kennedy's plurality, Justices Alito and Gorsuch, both joined by Justice Clarence Thomas, openly question whether *Sosa* was correctly decided. (Notably, neither Alito nor Gorsuch was on the Supreme Court when *Sosa* was decided.) Justice Alito points out that the premise underlying *Sosa* — that Congress meant to authorize courts to recognize new rights as a matter of general common law — is no longer viable after the court's repudiation of general common law in the 1930s. Justice Gorsuch goes even further, stating that courts should categorically decline to create new causes of action under the ATS — so that even if Sosa remains in place, "the analysis *Sosa* requires should come out the same way in virtually every case."

Piecing these opinions together, two key points emerge.

First, corporate liability aside, *Sosa*'s authorization for courts to recognize and enforce new international-law norms took a serious beating and may not have survived in any cognizable form. As noted, lower courts has seen step one of *Sosa* as a license to entertain claims for well-established international-law norms. Courts had ignored *Sosa*'s step two, which suggested judicial caution before recognizing new *causes of action*. In *Jesner*, the Supreme Court revived step two, making clear that Congress, not the courts, has primary responsibility for creating remedies for international-law violations. And three members of the majority — Thomas, Alito and Gorsuch — expressed serious doubt that courts *ever* may recognize new causes of action. Reading these opinions together, one can only conclude that *Sosa*'s core holding has little continuing viability, at least in the sense that it had been read broadly to authorize courts to recognize and enforce new international-law norms. This is so whether the proposed extension is a new norm, or a domestic question of enforcement: either way, it is for Congress, not the courts, to decide.

Second, despite the justices' emphasis on foreign corporations, their reasoning appears to foreclose ATS liability for *any* corporations. Much of the court's rationale applies equally to domestic entities, including statements that creating liability for artificial entities — even in judicially-created areas of law — is "for Congress, not us, to decide," and that the ATS "is no exception." The plurality's unqualified statements that there is no international consensus on corporate liability for human rights violations — and that Congress' decision *not* to include corporate liability in its most analogous enactment, the Torture Victims Protection Act, is "all but dispositive in the present case" — explicitly apply to domestic entities. And although the majority's discussion of diplomatic concerns focuses on *foreign* corporations — as it logically would, given that the defendant is a Jordanian bank, and Jordan had lodged a strong objection to the case — the same concerns exist when domestic corporations are sued for "aiding and abetting" violations by a foreign nation within that nation's territory, a common model for ATS cases. In such cases, as in *Jesner*, the implicated nation often protests that such suits offend the nation's sovereignty — so similar diplomatic concerns arise.

It remains to be seen how lower courts will read *Jesner*. Advocates undoubtedly will argue that it decides only the narrow question of liability for foreign corporations, and we may see some of the same resilience among lower courts that occurred after *Sosa*. But the message seems much clearer this time: Courts should not be in the business of creating new international-law causes of action under the ATS, but should leave such law-making to Congress.

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