Developments in the Field

Corporate Liability Under the US Alien Tort Statute: A Comment on Jesner v Arab Bank

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I. INTRODUCTION

In two decisions five years apart, the US Supreme Court tried to answer whether corporations are subject to suits for human rights violations under the Alien Tort Statute (ATS). In both decisions, the Court failed to answer that question, instead imposing other limitations on the ATS cause of action that disposed of the two cases. In 2013, the Supreme Court applied the presumption against extraterritoriality in Kiobel v Royal Dutch Petroleum, limiting the ATS cause of action to claims that ‘touch and concern the territory of the United States’. In 2018, the Court held in Jesner v Arab Bank that ‘foreign corporations may not be defendants in suits brought under the ATS’, leaving open the possibility of suits against US corporations.

Jesner arose from terrorist attacks in Israel, the West Bank and Gaza. Victims and their families, who were not US citizens, brought suit under the ATS. They alleged that Arab Bank had knowingly funnelled millions of dollars through its New York branch to finance attacks and reward the families of suicide bombers, arguably satisfying Kiobel’s ‘touch and concern’ requirement. The district court dismissed the suit based on circuit precedent holding that corporations may never be sued under the ATS, and the Court of Appeals for the Second Circuit affirmed. The US Supreme Court splintered. Justice Kennedy wrote a broad opinion that might have foreclosed corporate liability under the ATS entirely, but

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4 Victims and their families who were US citizens brought suit under the Antiterrorism Act (ATA), which allows US nationals to recover triple damages for injuries caused by international terrorism. See 18 USC §2333. In the ATA suit, the district court found that Arab Bank knowingly provided financial services to terrorists. Linde v Arab Bank 97 F Supp 3d 287, 331–335 (EDNY 2015), but on appeal the Second Circuit overturned the jury’s verdict, holding that financial services by themselves were not enough to constitute international terrorism under the Act. Linde v Arab Bank 882 F3d 314, 325–328 (2d Cir 2018).

5 Jesner v Arab Bank 808 F3d 144 (2d Cir 2015).
only Chief Justice Roberts and Justice Thomas joined this opinion in full. Justices Alito and Gorsuch joined only those parts of Kennedy’s opinion that were limited to foreign corporations. Justice Sotomayor, joined by Justices Ginsburg, Breyer and Kagan, dissented and would have permitted ATS suits against both US and foreign corporations.

This piece examines Jesner’s implications for corporate liability under the ATS. Part II looks at corporate liability under customary international law, which was discussed extensively in Justice Kennedy’s plurality opinion and in Justice Sotomayor’s dissent. Part III then discusses Jesner’s limitation of the ATS cause of action to exclude suits against foreign corporations. Part IV turns to Jesner’s implications for suits against US corporations, concluding that such suits face substantial barriers even if they are still technically permitted.

II. CORPORATE LIABILITY UNDER CUSTOMARY INTERNATIONAL LAW

The ATS gives US federal courts jurisdiction over ‘any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’ The ATS thus requires a violation of international law as a precondition for any claim. In Sosa v Alvarez-Machain, the US Supreme Court recognized an implied cause of action under the statute for violations of modern international law norms that are as generally accepted and specifically defined as the eighteenth century paradigms Congress had in mind when it enacted the provision in 1789. In footnote 20 of the Sosa opinion, the Court added: ‘A related consideration is whether international law extends the scope of liability for a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.’ From the examples the Court cited, it is clear that footnote 20 meant to distinguish norms that require state action (e.g., torture) from norms that do not (e.g., genocide). However, footnote 20 opened the door to an argument that international law does not extend liability for human rights violations to corporations at all.

The US Court of Appeals for the Second Circuit walked through that door in Kiobel v Royal Dutch Petroleum. Relying heavily on provisions in the charters of international criminal tribunals that limit their jurisdiction to natural persons, the Second Circuit concluded that ‘[t]he concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance as a norm.’ The Supreme Court granted review in Kiobel but resolved the case on the alternative ground that, because ‘all the relevant conduct took place outside the United States’, the claims did not ‘touch and concern the territory of the United States ... with sufficient force to displace the presumption against extraterritorial application.’

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8 Ibid 732 (note 20).
9 Kiobel v Royal Dutch Petroleum 621 F3d 111 (2d Cir 2010).
10 See ibid 132–137.
11 Ibid 149.
Jesner provided a second chance to answer the corporate liability question, but again the Supreme Court could not muster a majority. Like the Second Circuit, Justice Kennedy framed the question as ‘whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights’, and like the Second Circuit, Justice Kennedy found reason to answer negatively in ‘the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach.’ However, this reasoning confuses limits on the jurisdiction of particular international tribunals with the substantive content of international law norms. The instruments establishing international criminal tribunals typically limit their jurisdiction to particular offences (e.g., genocide), to offences occurring in particular places (e.g., the former Yugoslavia after 1991), and to particular defendants (e.g., natural persons). The provision in the Statute of the International Criminal Tribunal for the former Yugoslavia limiting its jurisdiction to ‘natural persons’ does not show that the prohibition against genocide is inapplicable to corporations any more than the provision limiting jurisdiction to violations ‘committed in the territory of the former Yugoslavia since 1991’ shows that the prohibition against genocide is inapplicable at other times and in other places.

In dissent, Justice Sotomayor articulated the proper relationship between norms of international human rights law and the mechanisms created for their enforcement: ‘Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international-law norms and remedy their violations to states, which may act to impose liability collectively through treaties or independently via their domestic legal systems.’ Justice Sotomayor pointed out that relying on limits in the charters of international criminal tribunals ‘confuses the substance of international law with how it has been enforced in particular contexts.’ Regarding the substance of international law, she noted that although some norms of human rights law distinguish between state actors and non-state actors, none appears to distinguish between natural and juridical persons.

Justice Sotomayor’s discussion of corporate liability under customary international law won four votes at the Supreme Court, while Justice Kennedy’s received just three. In the end, even Kennedy seemed to back away from his observations on this subject, concluding that ‘the Court need not resolve ... whether international law imposes liability on corporations.’ As I observed shortly after Jesner was decided, ‘[t]his makes Justice Kennedy’s mistaken approach to international law nothing more than dictum in a

14 Ibid 1400.
16 Ibid art 1.
17 Jesner v Arab Bank 138 S Ct 1386, 1420 (2018) (J Sotomayor, dissenting). I disclose that I wrote the Brief of International Law Scholars as Amici Curiae on which Justice Sotomayor relied in her dissent.
18 Ibid 1423.
20 Jesner v Arab Bank 138 S Ct 1386, 1402 (opinion of J Kennedy).
plurality opinion.21 Instead of holding that corporations in general could not be sued under the ATS,22 the Supreme Court held only that foreign corporations could not be sued under the ATS.

III. EXCLUDING FOREIGN CORPORATIONS FROM THE ATS CAUSE OF ACTION

Apart from the statement of the facts and the history of the ATS, the only parts of Justice Kennedy’s opinion that commanded a majority of the Supreme Court were expressly limited to suits against foreign corporations. In Part II-B-1 of his Jesner opinion, Kennedy invoked ‘separation-of-powers concerns that counsel against courts creating private rights of action’.23 He explained that ‘[t]he political branches, not the Judiciary, have the responsibility and the institutional capacity to weigh foreign-policy concerns.’24 In light of these concerns, Justice Kennedy concluded, ‘absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.’25 In Part II-C, Kennedy invoked the possibility of ‘foreign-relations tensions’, noting the frictions with Jordan that litigation against Arab Bank had caused and previous objections by foreign governments to ATS litigation.26 He observed that ‘foreign corporate defendants create unique problems.’27 Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.28

Justices Alito and Gorsuch each wrote concurring opinions. Justice Alito emphasized foreign relations: ‘Creating causes of action under the Alien Tort Statute against foreign corporate defendants would precipitate exactly the sort of diplomatic strife that the law was enacted to prevent.’29 He expressly distinguished and reserved the question of liability for US corporations under the ATS.30 Justice Gorsuch adopted the theory of Professors Anthony Bellia and Bradford Clark that the ATS was originally intended to grant jurisdiction only when the defendant is a US citizen.31 Gorsuch explained:

22 In support of excluding corporations from the ATS cause of action, Justice Kennedy also invoked the fact that Congress had limited the express cause of action found in the Torture Victim Protection Act (TVPA), 28 USC §1350 note, to natural persons. Jesner v Arab Bank 138 S Ct 1386, 1403–1405 (2018) (opinion of J Kennedy). This part of Kennedy’s opinion also received only three votes, with Justices Alito and Gorsuch declining to join it.
24 Ibid.
25 Ibid (emphasis added).
27 Ibid 1407.
28 Ibid.
29 Ibid 1408 (J Alito, concurring).
30 Ibid 1410 (note *) (‘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.’).
It is one thing for courts to assume the task of creating new causes of action to ensure our citizens abide by the law of nations and avoid reprisals against this country. It is altogether another thing for courts to punish foreign parties for conduct that could not be attributed to the United States and thereby risk reprisals against this country.  

In sum, Jesner’s holding is expressly limited to excluding foreign corporations from liability under the ATS, and the reasoning of the two members of the Court (Justices Alito and Gorsuch) who provided the fourth and fifth votes necessary for the majority opinion distinguishes between foreign and US defendants. That is not to suggest that Justices Alito and Gorsuch would necessarily favour applying the ATS cause of action to US corporations in a future case. In another part of his concurring opinion, Justice Gorsuch expressed doubts about Sosa’s holding that federal courts have discretion to recognize causes of action for certain modern customary international law norms. Justice Alito shared those doubts. However, for the moment, Jesner preserves the possibility of suits against US corporations under the ATS.

IV. BARRIERS TO ATS SUITS AGAINST US CORPORATIONS

Although ATS suits against US corporations remain technically possible outside the Second Circuit, there are three substantial barriers to bringing such suits successfully. First, US corporations frequently do business abroad through subsidiaries incorporated under foreign law. After Jesner, the foreign subsidiaries of US parent companies are not liable to suit under the ATS. This means that the plaintiffs must either convince the court to attribute the tortious conduct of the subsidiary to the parent company or find tortious conduct on the part of the parent itself. US courts have been reluctant to pierce the corporate veil in ATS cases. In Balintulo v Ford Motor Co., for example, plaintiffs argued that the US parent company could be held directly liable based on its control of subsidiaries in South Africa, but the Second Circuit said that doing so ‘would ignore well-settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities.’ Noting that US courts pierce the corporate veil ‘only in extraordinary circumstances,’ the court rejected the claim because the complaints did not suggest that the parent’s ‘control over its subsidiaries differed from that of most companies headquartered in the United States with subsidiaries abroad.’

33 Ibid 1412–1414.
34 Ibid 1409 (J Alito, concurring). It is worth noting that Judge Kavanaugh, the nominee to replace Justice Kennedy on the Supreme Court, has taken the view that ‘the ATS does not apply to claims against corporations’. Doe v Exxon Mobil Corp., 654 F3d 11, 81 (DC Cir 2011) (J Kavanaugh, dissenting).
36 Although US courts have tended to conflate direct liability by the parent company with piercing the corporate veil, the two theories of liability are distinct, as courts in other countries have recognized. See Ekaterina Aristova, ‘Tort Litigation Against Transnational Corporations in the English Courts: The Challenge of Jurisdiction’ (2018) 14 Utrecht Law Review 6 (discussing English cases).
38 Ibid.
Second, ATS claims against corporations frequently allege not that a company violated human rights norms directly but rather that it aided and abetted violations by foreign governments. While US courts have generally held that aiding and abetting claims may be brought under the ATS, they have divided on the required mens rea standard. Some courts have held that corporations may be held liable for aiding and abetting only if they acted with the ‘purpose’ of providing substantial assistance to the human rights violation.39 Others have held that ‘knowledge’ of the substantial assistance is sufficient for liability.40 The purpose standard may be difficult to satisfy in suits against US corporations, although one court has suggested that it may be met when ‘the defendants obtained a direct benefit from the commission of the violation of international law’.41

Third, ATS claims against US corporations must satisfy Kiobel’s requirement that they ‘touch and concern the territory of the United States’.42 Three circuits have held that the US nationality of the defendant may be considered in determining whether the ‘touch and concern’ test has been satisfied but is not sufficient by itself.43 Two circuits have held that only the location of the conduct matters.44 Most cases applying the ‘touch and concern’ test to corporations have found that the test was not satisfied, but a few have gone the other way. In Al-Shimari v CACI Premier Technology, the Fourth Circuit allowed an ATS suit to proceed against a US military contractor for torture at Abu Ghraib prison in Iraq, citing the US nationality of the corporation and its contract for interrogation services with the US government.45 In two other cases, the Second Circuit held that the use of financing transactions in New York to aid and abet human rights violations abroad was sufficient to satisfy the ‘touch and concern’ test.46 The foreign banks sued in those cases would no longer be subject to liability under the Supreme Court’s decision in Jesner. It is possible that a US bank would be subject to liability, except, of course, that in the Second Circuit (which covers New York) US corporations are not subject to suit under the ATS.

V. CONCLUSION

In Jesner, the US Supreme Court avoided the erroneous conclusion that customary international law norms of human rights law do not apply to corporations. Instead, the Court placed yet another limitation on the ATS cause of action, holding that foreign

39 See Aziz v Alcolac 658 F.3d 388, 401 (4th Cir 2011); Presbyterian Church of Sudan v Talisman Energy 582 F.3d 244, 257-59 (2d Cir 2009).
40 See Doe v Drummond Co. 782 F3d 576, 609 (11th Cir 2015); Doe v Exxon Mobil Corp. 654 F.3d 11, 39 (DC Cir 2011). See also Doe v Nestle USA 766 F3d 1016, 1023–1024 (9th Cir 2015) (noting the question without resolving it).
41 Doe v Nestle USA 766 F3d 1016, 1024 (9th Cir 2015).
43 Doe v Drummond Co. 782 F3d 576, 596 (11th Cir 2015); Mujica v Airscan 771 F3d 580, 594 (9th Cir 2014); Al-Shimari v CACI Premier Technology 758 F3d 516, 527 (4th Cir 2014).
44 Adhikari v Kellogg Brown & Root 845 F3d 184, 197 (5th Cir 2017); Mastafa v Chevron Corp. 770 F3d 170, 188 (2d Cir 2014).
45 Al-Shimari v CACI Premier Technology 758 F3d 516, 530–531 (4th Cir 2014).
46 Licci by Licci v Lebanese Canadian Bank 834 F3d 201, 217 (2d Cir 2017); Mastafa v Chevron Corp. 770 F3d 170, 190 (2d Cir 2014).
corporations are not subject to liability. Technically, *Jesner* preserves the possibility of ATS suits against US corporations. However, as a practical matter, such suits will have to show: (i) that the US corporation, not just its foreign subsidiary, violated customary international law; (ii) if the claim is for aiding and abetting, that the US corporation had the requisite *mens rea*; and (iii) that there was sufficient conduct in the US to satisfy *Kiobel*’s ‘touch and concern’ test. So, while corporations continue to be subject to customary international law norms of human rights law, the prospects of holding them liable for violating those norms in US courts have faded nearly to vanishing point.