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Reining In Abusive Alien Tort Statute Cases

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Jesner v. Arab Bank PLC[1] was the second time in a decade that the U.S. Supreme Court had agreed to decide whether corporations can be liable for violations of international law under the Alien Tort Statute, 28 U.S.C. §1350. In a fractured opinion that garnered two substantive concurring opinions and a 34-page dissent,[2] the court answered only part of that question, holding that foreign corporations cannot not be sued under the ATS, but did not resolve whether that same prohibition applied to domestic corporations.

The ATS is relatively terse, providing that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Supreme Court in Sosa v. Alvarez-Machain[3] — the court's 2004 decision addressing the ATS for the first time — held that the ATS merely grants federal courts jurisdiction to hear cases alleging violations of international law. But, to avoid the oddity of a jurisdictional grant without any accompanying cause of action, Sosa interpreted the ATS as authorizing federal courts, under narrowly prescribed and limited circumstances, to recognize causes of action under federal common law for violations of the law of nations.[4] The court ultimately rejected the plaintiff's contention that the ATS authorized a suit to enforce the norm against arbitrary detention because that norm was not sufficiently accepted in international law.[5] In so doing, the court cautioned against judicial activism. The judiciary "ha[d] no congressional mandate to seek out and define new and debatable violations of the law of nations" — and urged "great caution" before recognizing any violation of the law of nations.[6] The 90 pages of opinions in Jesner grappled essentially with Sosa's legacy.

The facts in Jesner are relatively straightforward. The petitioners alleged they were roughly 600 victims, and family members of victims, of terrorist attacks occurring between 1995 and 2005 in Israel, the West Bank and Gaza.[7] They sued respondent Arab Bank, a Jordan-based multinational financial corporation that has a federally chartered branch in New York, alleging that the bank violated the law of nations when it financed those terrorist attacks through financial transactions processed in its New York branch.[8] The petitioners obtained a favorable verdict at trial, but on appeal, the U.S. Court of Appeals for the Second Circuit reversed, concluding that the ATS

did not permit suits against corporations.[9]

In a 5-4 decision by Justice Anthony Kennedy, and joined by Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito and Neil Gorsuch, the court affirmed the Second Circuit's decision, as applied to foreign corporations.[10] The court began its analysis by assuming, without deciding, that the underlying conduct (acts of terrorism and individuals facilitating bank transactions in order to assist terrorism) violate international-law prohibitions.[11] From there, the five-justice majority agreed on only two short sections of Justice Kennedy's opinion as the basis for its holding that foreign corporations cannot be sued under the ATS.[12]

First, the court expressed its "general reluctance to extend judicially created private rights of action," explaining that Congress is the best-equipped branch to balance the costs and benefits of creating any new liability or remedy.[13] Indeed, the court noted that it had relied on this outlook to reject corporate liability in the context of so-called Bivens actions for damages for violations of the constitution by federal officers.[14] But the court explained that this cautious posture should extend with greater force in the context of the ATS, which also implicates foreign policy concerns largely consigned to Congress and the executive.[15] The court recognized that "there is an argument that a proper application of Sosa would preclude courts from ever recognizing any new causes of action under the ATS," but concluded that it need not reach that far to resolve this case.[16] Notably, this portion of the court's opinion appeared to expand on Sosa's emphasis on restraint: Whereas Sosa discussed exercising restraint before recognizing a particular international-law norm, the Jesner majority focused on the propriety of a particular application of an international law norm (here, foreign corporate liability).

Second, the court explored the adverse foreign relations implications of ATS claims against foreign corporations.[17] The court accepted the United States' assertion that this litigation against Arab Bank "'caused significant diplomatic tensions' with Jordan, a critical ally in one of the world's most sensitive regions," and explained that sovereigns in many other ATS cases have appeared before the court to object to ATS litigation.[18] In light of these repeated concerns, the court concluded that "foreign corporate defendants create unique problems" that the "courts are not well suited" to resolve in the absence of legislation.[19] Accordingly, the court held "that foreign corporations may not be defendants in suits brought under the ATS."[20]

The separate opinions from the justices in the majority demonstrated a range of analytical approaches, all of which were hostile toward an expansive reading of the ATS. Justice Kennedy, Chief Justice Roberts and Justice Thomas — in the sections of Justice Kennedy's opinion that represented a plurality of the court[21] — analyzed the question of corporate liability more broadly under the two-step rubric laid out in Sosa, looking first as to whether there was an international norm imposing liability on corporations, and then whether it would be a proper exercise of judicial discretion to do so.[22] After noting that various international treaties do not allow for corporate liability, Justice Kennedy explained that there was sufficient doubt on the issue of corporate liability that this was a policy decision best left to Congress, and not the courts.[23]

Justices Alito and Gorsuch both issued concurring opinions that articulated alternative reasons why foreign corporations should not be liable under the ATS. Justice Alito began his analysis by questioning whether Sosa was correctly decided in light of the fact that there is no general federal common law crafted by the federal judiciary, the legislative function having been given to Congress.[24] But accepting that Sosa allows courts to identify international norms, Justice Alito proposed a narrow principal: "Federal courts should decline to create federal common law causes of action under Sosa's second step whenever doing so would not materially advance the ATS's objective of avoiding diplomatic strife."[25]

Because, in his view, corporate liability would not do so — indeed, it has created diplomatic strife — recognizing corporate liability was not an appropriate use of federal common law.[26]

Justice Gorsuch's concurrence identified two different grounds for affirmance. First, like the majority, Justice Gorsuch explained that properly applied, Sosa would preclude courts from ever recognizing a new cause of action.[27] But, unlike the majority, Justice Gorsuch's decision embraced this ultimate logic, and argued that courts should exercise "the wisdom of restraint" and decline to extend the ATS.[28] Second, pointing to the ATS' original enactment as part of the 1789 Judiciary Act and contemporaneous interpretations of the diversity-jurisdiction provisions, Justice Gorsuch argued that the ATS must have a domestic defendant.[29]

Justice Sonia Sotomayor dissented, joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Elena Kagan. She argued that a straightforward application of Sosa shows that corporations can be ATS defendants: International law does not concern itself with enforcement of international norms, which is left to domestic law, and under U.S. domestic law, corporate liability is a given.[30] As to the asserted foreign policy concerns, Justice Sotomayor was unconvinced that the corporate form itself was tied to diplomatic friction.[31]

The most obvious takeaway from Jesner is that non-U.S. corporations no longer need fear ATS liability. But tucked within the decision's holding and its various concurring opinions are other key points. For instance, Justice Kennedy's plurality opinion provides a clear articulation of why U.S. corporate liability should not survive analysis under the Sosa rubric. Jesner's core holding also suggests that the conduct of a non-U.S. corporation cannot be imputed to a domestic affiliate — under agency or alter ego theories — because then non-U.S. corporation has no ATS liability as a matter of law. Finally, because the Jesner majority went beyond Sosa's basic inquiry into the acceptance of the international law norm itself and, instead, addressed a particular application of an international-law norm (liability of non-U.S. corporations), it is an open question as to what other applications of particular international law norms ought not be recognized.

While Jesner may have left some ATS questions open to further debate, the clear thrust of the majority and concurring opinions is on restraint and deference to Congress. As Justice Kennedy put it, "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the Context of the ATS."[32] As a result, the court has clearly given practitioners and lower courts a framework for resolving these opinion issues, and that is a narrow and limited scope of ATS liability, with the ball being squarely in Congress' court for any expansions.

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[1] 584 U.S. ___, slip op. (2017).

[2] Justice Thomas issued a third concurrence, which consisted of one paragraph noting his agreement with concurring opinions issued by Justices Alito and Gorsuch.

[3] 542 U.S. 692 (2004).

[4] Id. at 724-25.

[5] Id. at 732-38.

[6] Id. at 728.

[7] Jesner, slip op. at 3 (opinion of the court)

[8] Id.

[9] Id. at 4-6.

[10] Id. at 27.

[11] Id. at 2.

[12] Id. at 18-19, 25-27 (Parts II-B-1, II-C). The majority also agreed to the sections outlining the procedural history and history of the ATS. See id. at 3-11 (Part I).

[13] Id. at 18.

[14] Id. at 18-19.

[15] Id. at 19.

[16] Id. at 19.

[17] Id. at 25-27.

[18] Id. at 26.

[19] Id. at 26.

[20] Id. at 27.

[21] Parts II-A, II-B-2, II-B-3, and III.

[22] Id. at 11-12 (opinion of Kennedy, J.).

[23] Id. at 18.

[24] Id. at 3 (Alito, J., concurring in part and concurring in the judgment).

[25] Id. at 4.

[26] Id. at 5.

[27] Id. at 4 (Gorsuch, J., concurring in part and concurring in the judgment).

[28] Id.

[29] Id. at 7.

[30] Id. at 2-3 (Sotomayor, J., dissenting).

[31] Id. at 1.

[32] Id. at 19 (majority opinion).