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18th century law set to undergo legal challenge before Supreme Court

On April 3, the U.S. Supreme Court granted certiorari in *Jesner v. Arab Bank*, to review the 2nd U.S. Circuit Court of Appeals law that the Alien Tort Statute categorically forecloses corporate liability for international human rights violations.

This case will settle the circuit split between the 2nd Circuit and the 4th, 5th, 7th, 9th, 11th and D.C. Circuits. *Jesner* — in which the plaintiffs seek restitution on behalf of family members killed, captured or injured from terrorist attacks from the defendant bank that allegedly financed the responsible terrorist organizations — is what Harvard Law School professor Laurence Tribe calls a "key case to watch."

The heart of the issue in *Jesner* is liability under the alien statute. The statute is a U.S. federal law originating from 1789 that provides U.S. District Courts with jurisdiction over tort claims brought by non-U.S. citizens that arise from actions "committed in violation of the laws of nations or a treaty of which the U.S. is a party."

In other words, any non-U.S. citizen can file suit in federal court, for tort damages — that occurred outside the U.S. — in violation of international law — as long as the alleged perpetrator is served within the U.S.

The statute's scope has expanded from its origins in the 1700s, where it dealt with diplomatic relations and piracy, to now include human rights violations. This expansion, as a consequence of a growth in international law, or the "law of nations," is the catalyst behind the looming question of corporate liability.

The first case brought under the statute was *Filartiga v. Peña-Irala* (1980). There, a father brought a human rights violation action against a Paraguayan officer who had tortured and killed his son. Although the torture and death occurred in Paraguay, the father served the perpetrator in the U.S. — thus suit under the statute was proper.

The court held that the "law of nations" was violated by the torture and found for the father. *Filartiga* was the case that set in motion the debate concerning the statute's scope of liability.

The Supreme Court directly addressed the statute in *Sosa v. Alvarez-Machain* (2004). There, the court held that the statute does not create a new cause of action, but rather, it is "only jurisdictional." While this decision helped shape the general context of liability, it still left the specific question of corporate liability unanswered.

Then, in *Kiobel v. Royal Dutch Petroleum* (2013), the high court granted certiorari to determine corporate liability under the statute. There, plaintiffs — Nigerian nationals — were victims of atrocities committed by the Nigerian military.

The atrocities all occurred within Nigeria. The plaintiffs filed a tort suit against the defendants alleging that the defendants aided and abetted in the commission of the atrocities and, because the defendants had corporate locations within the U.S., plaintiffs argued that the statute should provide jurisdiction.

The court sidestepped the issue of corporate liability, and instead, resolved *Kiobel* on the presumption against extraterritoriality. Chief Justice John G. Roberts Jr. stated, "[o]n these facts, all the relevant conduct took place outside the United States. And even 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."

While *Kiobel* narrowed the issue, it also opened the question: To bring suit in the U.S. against a corporation for an international human rights violation, how much contact with the U.S. is necessary? Hopefully, *Jesner* will provide the answer.

TULLY'S LAW

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Jesner is actually comprised of five lawsuits that arose from a series of terrorist attacks in Israel, the West Bank and the Gaza Strip. Plaintiffs are foreign nationals who are seeking restitution under the tort statute.

They allege that the defendant, Arab Bank, from its New York branch, knowingly acted as a "paymaster" for Hamas, and other international terrorist organizations, by collecting, soliciting and transferring money for distribution of "martyrdom payments."

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According to the plaintiffs, the money, allegedly in the hundreds of millions of dollars, was used to finance, reward and incentivize the families of the "martyrs." However, the plaintiff's case was dismissed on the grounds that, in the 2nd Circuit, the statute categorically forecloses corporate liability.

On appeal, the 2nd Circuit stood firm in the face of the circuit split and affirmed the district court's order. However, the panel observed that *Kiobel* "seem[ed] to suggest that the court was less than satisfied" with "our approach" which "appears to swim alone against the tide." Despite this, the panel followed its precedent and rationalized its decision by stating that it would wait for reversal either "en banc or by the Supreme Court of the United States." Petition for writ of certiorari was filed on Oct. 5, 2016.

In opposition to the petition, Arab Bank presented a wide array of arguments. The bank attacked the petition on the grounds of causation stating that "[plaintiffs] do not allege any link between the [b]bank's activities and the specific attacks that caused their injuries." Further, the bank argued that there has never been a "single instance of a corporation being held liable by an international tribunal under customary international law."

The bank pointed to the Nuremberg Trials and explained that even against the "most nefarious corporate enterprise known to the civilized world" the Allies "declined to impose corporate liability under international law."

Finally, the bank argued that there is no "universal international consensus about the meaning of [terrorism]" and that several of the organizations plaintiffs labeled as "terrorist fronts" are "receiv[ing] funding or support from the U.S. [g]overnment." However, the strength of these arguments was to no avail. Four months later, the petition was granted.

Jesner is now poised to settle the circuit split and decide whether the tort statute provides for, or forecloses, corporate liability for international human rights violations. In light of the recent high court seat change, and the elevating tensions across the globe, the precedent set by this decision will have far-reaching implications for international corporations.

The author thanks Michelle Miner and Nicholas Robinson for their contributions to this column.