RECENT DEVELOPMENT

Jesner v. Arab Bank: Crime or Punishment—Differing Interpretations of the Alien Tort Statute

I. OVERVIEW

Over a ten-year period, six thousand foreign nationals were injured or killed in terrorist attacks in the Middle East.[1] Those foreign nationals filed five Alien Tort Statute (ATS) suits against Arab Bank, a Jordan-based international bank.[2] Plaintiffs alleged the attacks were funded in part by Arab Bank.[3] Plaintiffs alleged Arab Bank used its New York office to clear transactions through the Clearing House Interbank Payment System (CHIPS), and those funds were used to benefit terrorists.[4] Plaintiffs also alleged Arab Bank laundered money for the Holy Land Foundation for Relief and Development (HLF), a Texas-based charity plaintiffs believe has ties to Hamas.[5] Plaintiffs alleged Arab Bank took money from HLF and distributed it to "terrorist-affiliated" charities in the Middle East.[6]

While this case was pending in district court, the Supreme Court decided an unrelated case that evaluated whether corporations can be held liable under ATS claims.[7] The Court declined to answer the question in

1. Jesner v. Arab Bank, 138 S. Ct. 1386, 1394 (2018).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 1395.
6. *Id.*
7. *Id.*

that case.[8] The District Court, basing its opinion on the unrelated Supreme Court decision, dismissed the plaintiffs' claims.[9] Plaintiffs appealed to the United States Court of Appeals for the Second Circuit.[10] The Second Circuit, relying on its own opinion regarding the unrelated case, affirmed the decision of the lower court.[11] Plaintiffs appealed again, and the Supreme Court granted certiorari. While deciding this case, the Supreme Court answered the question posed by the prior, unrelated case.[12] The Supreme Court of the United States *held* that courts may not impose Alien Tort Statute liability on foreign corporations without direction from Congress. *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1408 (U.S. 2018).

II. BACKGROUND

A. Law of Which Nations: Causes of Action Under the Alien Tort Statute

The ATS provides jurisdiction for "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."[13] The Supreme Court has held that the statute only grants jurisdiction.[14] The statute does not provide for any specific causes of action.[15] However, that does not mean that the ATS was meant to be "placed on a shelf" until Congress creates causes of action.[16]

Legal scholars have reached the conclusion that the ATS was only meant to apply to a small set of causes of action.[17] Those causes of action were meant to be those available at common law.[18] Originally, three criminal offenses existed under the law of nations: "violation of safe conducts, infringement upon the rights of ambassadors, and piracy."[19] However, the common law did provide the potential of personal liability for those offenses.[20] Eventually, courts became aware that common law

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1396, 1408.
13. Alien Tort Statute, 28 U.S.C. § 1350 (2012).
14. Sosa v. Alvarez Machain, 524 U.S. 692, 714 (2004).
15. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1663 (2013).
16. *Sosa*, 524 U.S. at 719.
17. *Id.* at 720.
18. *Id.* at 712.
19. *Id.* at 715.
20. *Id.* at 724.

actions are created and not discovered; this realization made courts reluctant to create new causes of action under the ATS.[21] However, the court also acknowledges that federal common law still exists, to a certain extent, in the realm of foreign relations.[22]

There are three methods to recognize a cause of action under the ATS.[23] The first method, found in *Filartiga v. Pena-Irala*, requires that courts evaluate international law as it evolves over time.[24] Under this method, the relevant question is: "Who are today's pirates?"[25] In *Filartiga*, the court observed that "the torturer has become—like the pirate and slave trader before him . . . an enemy of all mankind."[26] The analogy to pirates and slave traders is important because a person could be tried for those offenses in any nation; the comparison implies that a tort action for torture should also be tried everywhere.[27]

The second method recognizes a cause of action when an alien has a claim that would qualify for diversity jurisdiction under domestic law.[28] This method is less difficult to apply than the *Filartiga* method, because the domestic law is used as the standard.[29] Another difference is this method allows for less severe offenses than the *Filartiga* method.[30]

The petitioners in *Kiobel v. Royal Dutch Petroleum Co.* argued that another doctrine applies: the transitory torts doctrine.[31] That doctrine allows persons to recover for a cause of action that took place in another state if there is a substantial belief that the cause of action also exists in that place.[32]

It is important to note that none of these methods require ATS plaintiffs to find a specific suit under the law of nations.[33] The *Filartiga*

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21. *Id.* at 725.
22. *Id.* at 730.
23. Tel-Oren v. Libyan Arab Republic, 726 F.3d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring).
24. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).
25. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1671 (Breyer, J., concurring) (2013).
26. *Filartiga*, 630 F.2d at 890.
27. *Tel-Oren*, 726 F.3d at 781 (Edwards, J., concurring).
28. *Id.* at 785.
29. *Id.* at 787.
30. *Id.*
31. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013).
32. *Id.*
33. *Tel-Oren*, 726 F.3d at 787 (Edwards, J., concurring).

method only requires an international law norm.[34] The other method is based on domestic law suits.[35]

B. Extraterritoriality and the Alien Tort Statute

The major flaw in the domestic tort method to find causes of action is that it ignores the reason behind the ATS: to keep the United States out of international confrontations.[36] To remedy this, the Supreme Court held in *Kiobel* that courts do not have jurisdiction over ATS cases when the conduct occurred exclusively outside the United States.[37] The Supreme Court applied the "presumption against extraterritoriality" to the ATS.[38] The "presumption against extraterritoriality" requires the court not to apply a statute to events that take place in foreign states if the statute does not clearly state it applies to events that take place in foreign states.[39] The Court in *Kiobel* stressed that Congress did not indicate that the United States should be a venue for the enforcement of international norms under the ATS.[40] In *Filartiga v. Pena-Irala*, the Second Circuit came to a similar conclusion by acknowledging that it is not unusual for a court to review an extraterritorial claim, but stressing that there was personal jurisdiction in the case at bar.[41]

C. Corporate Liability Under the Alien Tort Statute

Corporate liability for international human rights violations began after the Second World War when Farben was held complicit in Nazi human rights violations and made to pay reparations.[42] Since the Nuremberg trials, no other international tribunal has acknowledged corporate liability for international law violations; the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court all limit liability to natural persons.[43]

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34. Sosa v. Alvarez Machain, 524 U.S. 692, 732 (2004).
35. *Tel-Oren*, 726 F.3d at 785 (Edwards, J., concurring).
36. *Id.* at 788.
37. *Kiobel*, 133 S. Ct. at 1664.
38. *Id.* at 1669.
39. *Id.* at 1664.
40. *Id.* at 1668.
41. Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).
42. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011).
43. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 136 (2d Cir. 2011).

Courts first addressed the question of whether international law allows for tort liability of corporations in a footnote of *Sosa v. Alvarez Machain*.[44] The note questioned whether international law imposed liability on private actors, individuals, or corporations, because previous precedents evaluated whether a consensus existed before imposing liability to private actions.[45] According to *Doe v. Exxon Mobil Corp.*, there is no reason to conclude Congress meant to limit ATS liability to natural persons because corporate tort liability was an accepted principle of United States law at the time the ATS was passed.[46] Futhermore, the law of nations, as shown in numerous international treaties, does not distinguish between natural persons and corporations.[47] *Flomo v. Firestone Natural Rubber Co.* similarly finds that corporate tort liability is common internationally.[48] The court in *Flomo* also found if plaintiffs had to show that civil liability is an international norm, then no ATS suits would be successful. Conversely, the Second Circuit, in its *Kiobel* decision, noted that corporate liability is not accepted among a significant consensus of nations.[49] It also noted no corporation has ever been held criminally or civilly liable for a violation of international human rights.[50]

III. THE COURT'S DECISION

In the noted case, the Supreme Court of the United States relied on the *Sosa* decision, which created a two-part test to determine whether a new cause of action can be created under the ATS, in determining that it would be improper to extend liability to a foreign corporation without express direction from Congress.[51] The Court also relied on the Second Circuit's *Kiobel* decision to determine whether corporate liability is an international norm.[52] The Court also held that expanding the ATS to allow corporate liability for foreign businesses could have negative consequences for foreign relations; therefore, the court put this issue in the hands of the legislative and executive branches.[53]

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44. Sosa v. Alvarez Machain, 524 U.S. 692, 732 n.20 (2004).
45. *Id.*
46. Doe v. Exxon Mobil Corp., 654 F.3d 11, 47 (D.C. Cir. 2011).
47. *Id.* at 48.
48. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1019 (7th Cir. 2011).
49. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2011).
50. *Id.* at 148.
51. Jesner v. Arab Bank, 138 S. Ct. 1386, 1408 (2018).
52. *Id.* at 1400.
53. *Id.* at 1407.

The Court applied the *Sosa* decision's first question as whether corporate liability is a universally accepted international norm.[54] The Court acknowledged that human rights are a collective international interest but found that there is no norm for corporate liability because all international tribunals only apply liability to natural persons.[55] In addition to the history of international tribunals, the Court examined the International Convention for the Suppression and Financing of Terrorism (Convention).[56] The Convention requires that each state that signed on must hold liable legal entities that finance terrorism; liability may be criminal, civil, or administrative.[57] Because other forms of liability are available, the Court held the Convention neither requires nor allows courts to apply corporate tort liability without Congress.[58]

Next, the Court evaluated the second prong of the *Sosa* test: what are the consequences of creating the new cause of action?[59] The Court deferred to precedent where it continuously held that creating new causes of action is better done by the legislature.[60] Moreover, the Court held that the noted case and similar cases disrupt the international harmony Congress intended the ATS to bring about.[61] This finding is based on several amici stating that finding liability in this case would negatively affect the relationship between the United States and Jordan.[62] Additionally, Justice Alito, in his concurring opinion, emphasized the increased chance of international friction that could occur as a significant reason that the Court should not allow corporate liability under the ATS.[63]

Justice Gorsuch's concurring opinion shifted the discussion from precedent and the potential effects of applying corporate liability to the utility of the ATS.[64] He first argued that ATS suits require domestic defendants, and the noted case should be dismissed for lack of subject

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54. *Id.* at 1400; *see* Sosa v. Alvarez Machain, 524 U.S. 692, 732 (2004).
55. *Jesner*, 138 S. Ct. at 1400.
56. *Id.* at 1401.
57. International Convention for the Suppression and Financing of Terrorism art. 5, Dec. 9, 1999, 2178 U.N.T.S. 232.
58. *Jesner,* 138 S. Ct. at 1401.
59. *Id.* at 1402; *see Sosa*, 524 U.S. at 732.
60. *Jesner*, 138 S. Ct. at 1402; *see* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) ("[T]he legislature is in a better position to consider . . . imposing a 'new legal liability.'").
61. *Jesner*, 138 S. Ct. at 1406.
62. *Id.* at 1406-07.
63. *Id.* at 1410 (Alito, J., concurring).
64. *Id.* at 1417 (Gorsuch, J., concurring).

matter jurisdiction.[65] Justice Gorsuch also argued that other constitutional provisions grant jurisdiction for the three traditional causes of action under the law of nations rendering the ATS useless in the present day.[66] Piracy has jurisdiction under the clause granting jurisdiction for "all maritime contracts, torts and injuries" as well as the statute granting prize jurisdiction.[67] Infringement upon the right of ambassadors is covered by the provision that grants original jurisdiction in all cases involving ambassadors.[68]

Justice Sotomayor used her dissent to readdress the first prong of the *Sosa* test and showed that the majority erred in applying it.[69] She argued that the crux of the *Sosa* inquiry is whether the offense being sued under violates a norm of international law.[70] Those norms govern behavior but do not need to reach a consensus on how to regulate it.[71] That position is clear in the text of the statute.[72] The text of the ATS is clear—the law of nations applied to the violation, not the civil action.[73] Justice Sotomayor also argued the majority misapplied the test on corporate liability; accordingly, the proper question is whether there is reason to distinguish between a corporate and natural person for these issues.[74]

IV. ANALYSIS

The Court's decision is heavily influenced by the doctrine of judicial restraint.[75] After the determination that federal common law does not exist, courts are less likely to create or find causes of actions.[76] The Court recognized that potential implications for foreign relations should make courts wary of finding new causes of action in international law.[77] The Court followed its own precedent in allowing the legislature to decide whether a new cause of action would benefit the public.[78] The Court based

65. *Id.* at 1414-15.
66. *Id.* at 1417-18.
67. *Id.* at 1418.
68. *Id.*
69. *Id.* at 1419 (Sotomayor, J., dissenting).
70. *Id.* at 1419-20.
71. *Id.* at 1420.
72. *Id.* at 1421.
73. 28 U.S.C. § 1350.
74. *Jesner*, 138 S. Ct. at 1425 (Sotomayor, J., dissenting).
75. *Id.* at 1407-08; *see* Sosa v. Alvarez Machain, 524 U.S. 692, 725 (2004).
76. *Sosa*, 524 U.S. at 645.
77. *Jesner*, 138 S. Ct. at 1399.
78. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

its conclusion of its inability to apply corporate tort liability entirely on silence from Congress and the international community, strongly implying that the Court felt it would be improper to make a determination on its own.[79]

Moreover, Justice Gorsuch's concurring opinion discusses other provisions granting federal jurisdiction on certain international law claims related to the *Correctional Service Corp. v. Malesko* decision where the Court held that expanding available claims of action only occurred when there is no other option for relief.[80] The Court narrowed the precedent of *Sosa v Alvarez Machain* by construing the international norm to have to apply to the enforcement procedure instead of the violations, despite the opinion in *Sosa* clearly stating otherwise, thus limiting the power to expand causes of action under *Sosa*.[81]

There is a danger that courts may exercise judicial restraint to limit a statute because they believe Congress should not have passed it.[82] Though Justice Gorsuch's concurring opinion, when he noted all the original international law claims exist without the ATS, at a glance appears to be such a circumstance, he is merely illustrating that judicial interpretation lacks the precision to deal with foreign policy concerns.[83] However, it is important the justices remember that judge-made abstention rules require judges not to address certain issues on certain cases but does not require them to dismiss the party as a whole.[84]

V. CONCLUSION

The Court's decision to exercise judicial restraint when creating new causes of action in international law is understandable, especially considering the significance of the relationships the United States has with foreign nations.[85] Creating new causes of action in the sphere of international law without careful consideration could be damaging to the

79. *Jesner*, 138 S. Ct. at 1408.

80. *Id.* at 1418; *see also* Corr. Serv. Corp. v. Malesko, 122 S. Ct. 515, 523 (U.S. 2001) (noting that *Bivens* should not be extended "into any new context").

81. *Jesner*, 138 S. Ct. at 1398; *see also Sosa*, 524 U.S. at 732.

82. *See* Tel-Oren v. Libyan Arab Republic, 726 F.3d 774, 789 (Edwards, J. concurring) (noting that a judge may not construe a statute out of existence because he does not believe Congress should have passed it).

83. *Jesner*, 138 S. Ct. at 1419 (Gorsuch, J., concurring).

84. *Tel-Oren*, 726 F.3d at 789 (Edwards, J., concurring).

85. *Jesner*, 138 S. Ct. at 1407.

United States' ability to function on the international stage.[86] However, using judicial restraint as a pretext to render statutes useless is an improper use of judicial power. Accordingly, the Court should weigh its reluctance to create new causes of action carefully against the goal of the statute or constitutional provision it is interpreting.

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86. *Id.* at 1406.

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