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The Supreme Court Considers Whether Companies Can Be on the Hook for Human Rights Violations Under the Alien Tort Statute

Attorneys
Michael R. Littenberg
Nicholas M. Berg
G. David Rojas
Grant Hodges

Last Monday, the U.S. Supreme Court agreed to address the question of whether companies can be liable in federal court for human rights violations under a 1789 law. Most appeals courts that have considered this question found that corporations can be liable for torts under the Alien Tort Statute. In *Jesner et al. v. Arab Bank, PLC*, the Supreme Court will review a ruling by the Second Circuit, the lone dissenting circuit.

Suing Entities that Finance Terrorism

The *Jesner* case concerns a Jordan-based bank accused of providing banking services to various terrorist groups through its New York branch. The plaintiffs—approximately 6,000 individuals affected by terrorist attacks in Israel and Palestine—claim that the bank "served as the 'paymaster' for Hamas and other terrorist organizations, helping them identify and pay the families of suicide bombers and other terrorists." In 2005, the U.S. Treasury Department and the Office of the Comptroller of the Currency concluded that the bank had failed in implementing money-laundering and terrorist-financing controls and fined the bank $24 million. The bank also lost at trial in a related case involving claims filed under the Anti-Terrorism Act by U.S. victims.

Now that certiorari has been granted, the parties will submit briefing over the next few months, likely completed near the beginning of the Supreme Court's next term (which starts in October). After briefing is complete, oral argument follows within a few weeks. The Court typically issues its decision within a few months of the oral argument.

The Supreme Court previously sidestepped the question of corporate liability in *Kiobel v. Royal Dutch Petroleum Co.* in 2013 and denied certiorari on the question in *Nestlé U.S.A. v. Doe* in 2016. Now that the Supreme Court is squarely addressing the question in *Jesner*, the case is widely expected to have far-reaching implications for U.S.-connected corporations who conduct business in high-risk jurisdictions abroad.

A Modern Take on a 228-Year-Old Statute

Passed by the first Congress in 1789, the Alien Tort Statute is a brief federal provision that simply states that district courts have 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 Alien Tort Statute, part of the Judiciary Act of 1789, is a historical mystery. As Judge Henry Friendly of the Second Circuit has written, "no one seems to know whence it came." The Alien Tort Statute remained largely dormant between its passage and the latter half of the 20th century. The statute had only been employed 21 times between 1789 and 1980, with only two courts upholding jurisdiction.

The Alien Tort Statute found a new life in the Second Circuit's 1980 decision, *Filártiga v. Peña-Irala*, which held that an official's torture of an alien in detention violates international human rights norms such that the Alien Tort Statute confers jurisdiction. Following in the footsteps of *Filártiga*, courts have since recognized that the Alien Tort Statute provides a vehicle for them to adjudicate substantive rights that are universally accepted by international law. Since then, the Alien Tort Statute has been the basis for a wide range of lawsuits under the "law of nations."

Typically, successful cases under the Alien Tort Statute involve war crimes, crimes against humanity, or other substantial violations of international norms.

The U.S. Supreme Court first analyzed the Alien Tort Statute in detail in 2004. Prior to *Sosa v. Alvarez-Machain*, some courts had interpreted the Alien Tort Statute to create a federal tort addressing violations of the law of nations. The *Sosa* Court rejected this, narrowing the scope of the Alien Tort Statute to confer jurisdiction only over actions under the law of nations that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [certain] 18th-century paradigms."

Who Is Subject to the Alien Tort Statute?

In the early period of its enforcement, the Alien Tort Statute was primarily asserted against former government officials, acting under color of authority, for human rights violations. This was expanded in another Second Circuit decision, *Kadic v. Karadzic*, which, in 1995, recognized that the Alien Tort Statute is not confined to state action that violates international norms (*e.g.*, genocide and war crimes). Moreover, for violations that require official action (*e.g.*, state-sanctioned torture), non-state actors can violate international law by acting in concert with state actors.

In the years since *Kadic*, courts have further expanded *its* reasoning to include non-natural persons, such as corporations, starting with *Doe v. Unocal Corp*, an influential Central District of California decision from 1997. With *Kiobel* and now *Jesner*, the Supreme Court faces a circuit split on this question, with several circuits finding that the Alien Tort Statute permits corporate liability and only one reaching the opposite conclusion. Ironically, it is the Second Circuit—the same circuit that initiated the line of modern Alien Tort Statute cases in *Filártiga* and expanded the statute beyond official state action in *Kadic*—that is alone in limiting the statute to individuals. As the Second Circuit wrote in its order under review in *Jesner*, "there is a growing consensus among [its] sister circuits" that the Alien Tort Statute "may allow for corporate liability" and its decision in *Kiobel* "appears to swim alone against the tide."

The Bottom Line

As mentioned above, *Jesner* will be the second case in five years in which the Supreme Court has granted review from the Second Circuit to consider the scope of the Alien Tort Statute. In *Kiobel*, the Supreme Court ruled that the statute presumptively did not apply to wholly extraterritorial conduct. In that case, the plaintiffs were citizens of Nigeria who claimed that various foreign oil-exploration companies cooperated with the Nigerian government to suppress resistance to oil development in the country. The Supreme Court's ruling barred the plaintiffs' claims because they were based entirely on events that occurred abroad, but did not address the underlying issue of corporate liability.

Resolving the issue of U.S. corporate liability for potential violations of international norms could have a significant impact on the burgeoning field of corporate social responsibility-related litigation. The number of claims being brought and the jurisdictions in which they are being filed is on the increase, both in the United States and abroad. The increase in NGO and grass-roots activism and greater sensitivity to human rights issues generally, coupled with the greater ease with which potential violations can be investigated, documented and communicated in the internet, social media and smart-phone era, is increasing litigation risk. In addition, litigation risk is increasing as a result of new CSR legislation and the increase in corporate CSR disclosures.

Although a few circuits have already held that corporations can be liable under the Alien Tort Statute, the majority have not yet addressed this question. If the Supreme Court decides that corporate liability exists under the Alien Tort Statute, we could see a significant expansion of litigation across the country by plaintiffs' firms, NGOs, and others to file suit against corporations for perceived human rights violations. Accordingly, companies should watch for the Supreme Court's decision in *Jesner*. And, although companies cannot insulate themselves against the risk of claims

for human rights violations, companies can mitigate that risk through thoughtful compliance programs that take human rights issues and the related litigation risk into account.

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