The Supreme Court deals the death blow to US Human Rights Litigation

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On April 24, the Supreme Court of the United States released its decision in *Jesner v Arab Bank* (available here; see also the pre-decision analysis by *Hannah Dittmers* linked here and first thoughts after the decision of *Amy Howe* here) and, in a 5:4 majority vote, shut the door that it had left ajar in its *Kiobel* decision. Both cases are concerned with the question whether private corporations may be sued under the Alien Tort Statute (ATS).

In *Kiobel*, the Court rejected the application of the ATS to so-called *foreign-cubed* cases (cases in which a foreign plaintiff sues a foreign defendant for acts committed outside the territory of the US), but left the door open for cases that *touch and concern the territory of the US* (see also the early analysis of *Kiobel* by *Trey Childress* here). In *Jesner v. Arab Bank*, the majority now held that – in any case – "foreign corporations may not be defendants in suits brought under the ATS" (p. 27).

The respondent in the present case, Arab Bank, PLC, a Jordanian financial institution, was accused of facilitating acts of terrorism by maintaining bank accounts for jihadist groups in the Middle East and allowing the accounts to be used to compensate the families of suicide bombers. The petitioners further alleged that Arab Bank used its New York branch to clear its dollar-transactions via the so-called Clearing House Interbank Payment System (CHIPS) and that some of these transactions could have benefited terrorists. Finally, the petitioners accused Arab Bank of laundering money for a US-based charity foundation that is said to be affiliated with Hamas.

As in *Kiobel*, the facts of the case barely *touch and concern* the territory of the United States. The Court therefore held that "in this case, the activities of the defendant corporation and the alleged actions of its employees have insufficient

connections to the United States to subject it to jurisdiction under the ATS" (p. 11). However, in order to overcome the divided opinions between the Courts of Appeals and to provide for legal certainty, the Supreme Court decided to answer the question of corporate liability under the ATS, but limited its answer to the applicability of the ATS to *foreign* corporations only. *Justice Kennedy*, who delivered the opinion of the majority vote, therefore based his reasoning on a cascade of three major arguments that rely on the precedents in *Sosa* and *Kiobel*.

First, the Court referred to the historic objective of the ATS, which was enacted "to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen" (p. 8 f.). Thus, the goal of the Statute's adoption was to avoid disturbances in foreign relations and not to create them by alienating other countries. This was the main concern with the present case "that already ha[d] caused significant diplomatic tensions with Jordan for more than a decade" (p. 11).

Second, the Court emphasized the "strictly jurisdictional" character of the ATS and asked for a proper cause of action to impose liability on corporations in accordance with the test established in the *Sosa*-decision. The *Sosa*-test allows for the recognition of a cause of action for claims based on international law (p. 10), but requires the international legal provision to be "specific, universal and obligatory" (p. 11 f.). The majority concluded that it could not recognize such a norm as almost every relevant international law statute (e.g. the Rome Statute and the statutes of the ICTY and the ICTR) excludes corporations from its jurisdictional reach and, accordingly, limits its scope of application to individuals.

Thirdly, even if there was a legal provision justifying corporate liability in international law, the Supreme Court found that US courts should refrain from applying it without any explicit authorization from Congress. In this way, the Supreme Court upheld the separation-of-powers doctrine stating that it is the task of the legislature, not the judiciary, to create new private rights of action, especially when these pose a threat to foreign relations. From this reasoning, courts are required to "exercise 'great caution' before recognizing new forms of liability under the ATS" (p. 19). In doing so, courts should not create causes of action out of thin air but by analogous application of existing (and therefore Congress-approved) laws. However, neither the Torture Victim Protection Act (TVPA) nor the Anti-Terrorism Act (as the most analogous statutes) are applicable

because the former limits liability to individuals whereas the latter provides a cause of actions to US-citizens only (thus being irreconcilable with the ATS, which is available only for claims brought by "*an alien*"; see p. 20-22).

Justice Sotomayor, who wrote a 34-page dissent, criticized the majority for absolving "corporations from responsibility under the ATS for conscience-shocking behavior" and argues that "[t]he text, history, and purpose of the ATS, as well as the long and consistent history of corporate liability in tort, confirm that tort claims for law-of-nations violations may be brought against corporations under the ATS" (*Sotomayor*, p. 1). However, the dissenting opinion could not prevail over the conservative majority.

Thus, for now, *Jesner v Arab Bank* has rendered human rights litigation against foreign corporations before US courts impossible. However, in contrast to this post's title, the decision is not necessarily the end of the *US human rights litigation*. The ATS is still applicable if the defending corporation has its seat in the territory of the US. Moreover, the Court emphatically calls upon Congress to provide for legislative guidance. "If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate" (p. 27 f.). It remains to be seen whether Congress answers this call.