THE INCONSEQUENTIAL CHOICE-OF-LAW QUESTION POSED BY JESNER V. ARAB BANK

Beth Van Schaack[*]

In *Jesner v. Arab Bank*,[1] the United States (U.S.) Supreme Court has taken up the question of whether victims of human rights abuses can sue corporations and other legal entities for violations of the law of nations under the Alien Tort Statute (ATS).[2] In *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), the Second Circuit ruled that they cannot because—by its analysis—international law does not affirmatively provide for corporate tort liability.[3] By contrast, all the other circuits to consider the issue have ruled or assumed that such cases can go forward in U.S. courts,[4] yielding a decidedly lopsided circuit split.[5] Indeed, the Second Circuit itself is now

---

* Beth Van Schaack is a Fellow with the Center for Advanced Study in the Behavioral Sciences at Stanford University and was the Leah Kaplan Visiting Professor in Human Rights at Stanford Law School (2014–2017). She submitted an amicus curiae brief on behalf of Nuremberg Scholars to the Supreme Court in the *Jesner* Case. Thanks go to Andrea Donahue (SLS '18) for her consistently excellent research assistance with both the amicus brief and this submission.

1. In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144 (2d Cir. 2015); *see also* Jesner v. Arab Bank, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/jesner-v-arab-bank-plc/ (last visited Oct. 29, 2017).

2. The First Congress enacted the ATS as part of the Judiciary Act of 1789, which created the federal court system; it states that "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." Alien's Action for Tort, 28 U.S.C. § 1350 (2006).

3. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"), *aff'd on other grounds*. *See also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) ("*Kiobel II*").

4. *See, e.g.*, In re Arab Bank, 808 F.3d at 151 ("[O]n the issue of corporate liability under the ATS, *Kiobel I* now appears to swim alone against the tide."); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014); Doe v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014), *aff'd in part, rev'd in part*, 527 App'x 7 (D.C. Cir. 2013); Doe v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1315 (11th Cir. 2008).

5. There is some irony to the fact that the Second Circuit now stands as the only circuit to hold firm to this conclusion. In an era when its judges were less hostile to ATS litigation, it was the Second Circuit that launched the corporate cases in the first place. In Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995), the defendant Radovan Karadžić argued that he could not be sued for many of the causes of action alleged because he was a private citizen. Curiously, he also argued—in an inconsistent alternative—that he was head of state of the self-proclaimed Republika Srpska and was thus entitled to immunity. In an opinion evincing a sophisticated understanding of international law, the Second Circuit concluded that some causes of action under international law require a showing of state action as an element of the offense—such as the prohibition against torture—whereas others are undifferentiated and apply equally to non-state actors—such as the prohibitions against genocide and crimes against humanity. *Id.* at 239–40. Indeed, U.S. courts have also made clear that still other international rules are oriented towards non-state actors, such as the prohibitions on terrorism and piracy. S*ee* Ali Shafi v.

subject to an intra-circuit split, with subsequent panels "grudgingly" following *Kiobel I*, while urging their brethren to abandon an increasingly isolated position.[6]

Inherent to the dispute at hand is an *a priori* choice-of-law issue: Should courts look to international law or federal common law to resolve the question presented? While the Supreme Court established that international law provides the elements of plaintiffs' substantive cause of action in *Sosa v. Alvarez-Machain*,[7] the Court did not specify which body of law governs ancillary rules of decision[8]—such as the standards for aiding and abetting liability[9] or the rules governing statutes of limitation, damages, standing, personal jurisdiction, and the like.[10] As such, some judges have looked to federal common law (or to U.S. choice-of-law rules) to answer these questions that go beyond the strict contours of the plaintiff's cause of action.[11] Although contentious, this choice-of-law debate proves to be inconsequential when it comes to the availability of corporate tort liability, given that both bodies of law point in the same direction and hand victory,

---

Palestinian Auth., 642 F.3d 1088, 1096 (D.C. Cir. 2011) ("[P]iracy in violation of the law of nations is by definition perpetrated by nonstate actors.") (citing United States v. Smith, 18 U.S. 153, 163, n.h (1820)). By recognizing that some international law prohibitions govern private actors, the Second Circuit effectively opened the door to suits against corporate entities.

6. In connection with the denial of *en banc* review in *Jesner*, several Second Circuit judges indicated their disappointment that the Circuit "yet again missed an opportunity to correct the panel's majority opinion" in *Kiobel I*. In re Arab Bank, Plc Alien Tort Statute Litigation, 822 F.3d 34, 40–41 (2d Cir. 2016) (Pooler, J., dissenting from the denial of rehearing *en banc*). Subsequent Second Circuit panels have considered themselves bound by *Kiobel I* per Second Circuit practice. *See* Jones v. Coughlin, 45 F.3d 677, 679 (2d Cir. 1995) (*per curiam*) (holding that a decision by a panel of the Second Circuit "is binding unless and until it is overruled by the Court *en banc* or the Supreme Court").

7. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (holding that the ATS enables "federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law").

8. *See* Doe v. Unocal Corp., 395 F.3d 932, 965–66 (9th Cir. 2002) (Reinhardt, J., concurring), *vacated by* Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003) (making a distinction between the underlying tort of summary execution alleged to have been committed by the Burmese military from the "ancillary legal question" of the corporate defendant's liability as an accessory). That case settled while the *en banc* review was pending.

9. *See, e.g.*, Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 64 (2008) (arguing that the aiding and abetting standard is a conduct-regulating norm that should be governed by customary international law under *Sosa* in contradistinction to other secondary rules of decision governed by domestic law).

10. Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 52 (2003) (noting disagreement around how to identify the body of law that should answer "such nuts and bolts questions").

11. *See, e.g.*, Khulumani v. Barclay National Bank Ltd., 504 F.3d 254, 284 (2d Cir. 2007) (*per curiam*) (Hall, J., concurring); Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007).

at least in this round, to the plaintiffs. In other words, regardless of whether courts look to U.S. law or to international law, the ATS supports corporate tort liability.

By way of background, in *Sosa*, the Supreme Court ended a longstanding academic debate by characterizing the ATS as "in terms only jurisdictional."[12] Nonetheless, it found that the statute provides a "limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789."[13] The Court then set out the methodology to be employed to determine which causes of action are actionable under the ATS: claims brought under the ATS must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms," such as piracy, offenses against ambassadors, or violations of safe conduct.[14] The choice-of-law exercise presented by *Jesner* turns in part on how courts should construe an enigmatic footnote in *Sosa*.[15] There, the Court noted that whether an international norm satisfies this test gives rise to a "related consideration": "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[16]

Corporate defendants and their supporters contend that international law speaks to the question of who or what kind of actor can violate international law. Accordingly, it is argued, the footnote dictates that the international law delict invoked by the plaintiff must itself be specifically addressed to corporate defendants.[17] This is the position adopted by the *Kiobel I* majority, which ruled that international law must affirmatively extend liability to "a particular class of defendant[s], such as corporations,"[18] and that corporate liability did not meet the *Sosa* standard because "[n]o corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international

12. *Sosa*, 542 U.S. at 712.

13. *Id.*

14. *Id.* at 694, 725. *See also id.* at 732 (reaffirming standard).

15. *Id.* at 732.

16. *Sosa*, 542 U.S. at 732.

17. Brief for Respondent On Writ of Certiorari to the United States Court of Appeals for the Second Circuit, 15, 21, Jesner v. Arab Bank, PLC, 137 S.Ct. 1432 (2017) (No. 16–499) http://www.scotusblog.com/wp-content/uploads/2017/08/16-499-bs.pdf (last visited Jan. 25, 2018) [hereinafter Jesner].

18. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 127 (2d Cir. 2010) ("*Kiobel I*"), *aff'd on other grounds*.

law of human rights."[19] This camp makes much of the fact that there are few international fora that assert jurisdiction—criminal or civil—over legal persons for breaches of international law and point in particular to the unsurprising fact that none of the international criminal tribunals convened from Nuremberg onward has exercised criminal jurisdiction over corporations for international law violations.[20]

By contrast, plaintiffs and their supporters interpret footnote 20 to be making a distinction between private actors and state actors—given that some international law norms require a showing of state action as a constitutive element of the offense[21]—rather than suggesting that there are different classes of private actors that may not be amenable to suit for any cause of action at all. They argue that, in any case, the question of which private actors may be subject to tort liability should be resolved according to standard domestic law tort principles, on the theory that while international law addresses substantive standards of conduct, it leaves procedural modes of enforcement to individual states.[22] In *Kiobel I*, Judge Leval urged this approach in his concurrence, reasoning that international law contains less developed liability rules and so "leaves the manner of enforcement . . . almost entirely to individual nations."[23] Reasoning that ATS cases are—at base—tort cases,[24] plaintiffs often argue that default federal common law rules governing the tort liability of corporations and

19. *Id.* at 148.

20. Jesner, *supra* note 17, at 24–26.

21. For example, the conventional prohibition against torture requires a showing that the prohibited acts are "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. *See* Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995); *see also* Ali Shafi v. Palestinian Auth., 642 F.3d 1088, 1096 (D.C. Cir. 2011).

22. An analogy can be drawn to choice-of-law rules in diversity actions in the United States. *See* Hanna v. Plumer, 380 U.S. 460, 471–72 (1965) (discussing importance of differentiating between rules that modify substantive rights and those that affect the administration of remedies in the context of choice-of-law determinations in federal diversity cases); *see also id.* at 475 (Harlan, J., concurring) (arguing courts should consider whether "the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation").

23. *Kiobel I*, 621 F.3d at 152 (Leval, J., concurring).

24. *See* Richard Herz, *Symposium: It's Just a Tort Case*, SCOTUSBLOG (July 27, 2017, 2:24 PM), http://www.scotusblog.com/2017/07/symposium-just-tort-case/.

other legal entities should apply[25] absent compelling reasons for departure.[26]

The Second Circuit's observation about the lack of corporate liability before international criminal courts is, of course, largely true,[27] although there are some important exceptions. Starting with the World War II (WWII) era, defendants overlook the fact that the Nuremberg Tribunal did exercise a form of enterprise liability by declaring certain Nazi organizations to be criminal.[28] By contrast, today's ad hoc international criminal tribunals for the former Yugoslavia, Rwanda, Sierra Leone, East Timor, and Cambodia only assert criminal jurisdiction over natural persons

---

25. Plaintiffs also point out that the same result is reached with a strictly textual read of the ATS, which identifies the class of plaintiffs who can sue but not the class of defendants that can be sued, implying that there are no limits on the latter.

26. In addition to being amenable to tort liability as a matter of course, corporations can conceivably be charged for many international crimes codified in U.S. law. For example, Title 18's prohibitions on torture, war crimes, and recruiting child soldiers encompass legal persons in addition to natural persons. *See, e.g.*, Foreign Relations Authorization Act, Fiscal years 1994 & 1995, 18 U.S.C. § 2340 (1994) ("Whoever outside the United States commits or attempts to commit torture shall . . . ."); War Crimes, 18 U.S.C. § 2441(a) (2006) (holding accountable "whoever . . . commits a war crime"); 18 U.S.C. § 2442 (2008) (applying to "whoever knowingly . . . ."); Words Denoting Number, Gender, and So Forth, 1 U.S.C. § 1 (2012) (defining "whoever" to include "corporations, companies, associations, firms, partnerships . . . as well as individuals").

27. There is no international tribunal dedicated to holding *either* corporations or natural persons *civilly* liable for international law violations. The International Court of Justice exercises civil jurisdiction, but only over claims between states. *See* Statute of International Court of Justice, 1945 I.C.J, ch.II, at art. 34 (Oct. 24) [hereinafter I.C.J.]. Likewise, the human rights treaty bodies call states to account, although signatories do have obligations not only to "respect" human rights but also to "ensure" that individuals within their territories and jurisdiction enjoy those rights, which allows states to be held liable for insufficiently preventing or responding to harm caused by non-state actors, including corporations. *See* Human Rights Committee, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, General Comment No. 31 [80], ¶ 8, 18th Sess., U.N. Doc. CCPR/C/21/Rev. 1/Add.13 (May 26, 2004) ("[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.").

28. *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 501 (1st ed. 1992) (discussing criminal indictment of Nazi organizations). The World War II-era tribunals also prosecuted corporate principals for international crimes and dissolved a number of corporations that participated in or benefited from such criminality in order to pay reparations to victims. In *obiter dicta*, the tribunals made clear that they considered corporations to be capable of violating international law and to being held accountable for doing so. *See generally* Brief for Nuremberg Scholars as Amici Curiae Supporting Petitioners, Jesner v. Arab Bank, No. 16-499 (U.S. June 27, 2017), http://www.scotusblog.com/wp-content/uploads/2017/07/16-499-tsac-Nuremberg-Scholars-rev.pdf.

given the terms of their constitutive statutes.[29] In dicta, however, these tribunals have on occasion indicated that they consider legal persons—such as paramilitary organizations and business entities—to be capable of violating international law.[30] For example, the International Criminal Tribunal for Rwanda clearly considered *Radio Télévision Libre des Mille Collines* to be responsible for instigating genocide, although it could only convict individual principals of the organization due to constraints contained within its statute.[31]

Drafters of the treaty establishing the permanent International Criminal Court (ICC) considered empowering the ICC to prosecute corporations involved in international crimes in connection with a proposal tabled by France.[32] However, as explained in an amicus curiae brief by the former head of the United States delegation to the treaty drafting negotiations,[33] states could not reach consensus on how such liability would operate and what penalties would follow a finding of guilt, particularly given the high degree of variation within national systems, the fact that imprisonment would be the primary form of punishment available to the Court, and the short time allotted for the negotiations.[34] As a result, the ICC can exercise jurisdiction only over natural persons per Article 25.[35] During the negotiations, there was no consideration given to corporate *civil* liability, given that such a concept was outside the scope of the project to construct an international *criminal* court.[36] In the process by which the ICC

---

29. *See, e.g.*, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 6, May 25, 1993, 32 I.L.M. 1192.

30. The International Court of Justice recognizes that corporations can have an "independent and distinct legal personality" under international law. *See* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2007 I.C.J. 582, at 605 (May 24); Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, at 33–39 (Feb. 5) (looking to municipal (domestic) law to determine Belgium's standing to sue on behalf of Belgian shareholders of a corporation injured during the Spanish Civil War). The U.S. Supreme Court has cited *Barcelona Traction* in a case involving expropriation claims arising under international law brought by a corporation. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 623, 630 (1983).

31. Nahimana et al. v. The Prosecutor, Case No. ICTR 99-52-A, Judgement, ¶ 498 (Int'l Crim. Trib. for Rwanda Nov. 28, 2007) (discussing RTLM's instigation of genocide).

32. *See* Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 CHINESE J. INT'L L. 43, 43 (2013) (discussing French proposal).

33. Brief for Ambassador David J. Sheffer, Northwestern University Pritzker School of Law, as Amicus Curiae In Support of the Petitioners, 8–10, Jesner v. Arab Bank, PLC, 137 S.Ct. 1432 (June 26, 2017), http://www.scotusblog.com/wp-content/uploads/2017/07/16-499-tsac-davidjscheffer.pdf [hereinafter Sheffer].

34. *Id.*

35. *See* Rome Statute of the International Criminal Court, A/CONF.183/9, art. 25, ¶ 1 (July 17, 1998).

36. Sheffer, *supra* note 33, at 10.

and other international criminal tribunals were established, there was never a question of whether corporate liability—civil or criminal—was legally available to states; the decision to exclude reference to corporate liability was based upon logistical and policy concerns, rather than the existence of any legal impediment. Nonetheless, as states have ratified the treaty that created the ICC, they have incorporated a range of international crimes into their domestic legal frameworks and made them applicable to corporate entities in addition to natural persons.[37]

The Special Tribunal for Lebanon offers an interesting counterexample of an international court asserting criminal jurisdiction over legal entities. Although devoted to prosecuting acts of terrorism under Lebanese law, it recently held that it had inherent jurisdiction over juridical persons accused of contempt—specifically media outlets that released the names of protected witnesses—because the operative provision (Rule 60 *bis*) applied to all "persons."[38] That conviction was confirmed by the Appeals Chamber, which issued an exhaustive and erudite survey of international and domestic law that concluded that corporate liability, both civil and criminal, is a general principle of law,[39] one of the sources of international law recognized by the International Court of Justice[40] and the United States Supreme Court.[41] Further, the African Union has recently promulgated a draft statute for an African Court of Justice and Human Rights, not yet in force, that would include a penal chamber with jurisdiction over legal persons (Article 46C), upon "proof that it was the policy of the corporation to do the act which constituted the offense."[42]

The absence of international criminal jurisdiction over corporations does not signify that international law does not govern corporate conduct. Bilateral[43] and multilateral treaties increasingly govern corporate conduct or

---

37. *See, e.g.*, W. Cory Wanless, *Corporate Liability for International Crimes Under Canada's Crimes Against Humanity and War Crimes Act*, 7 J. INT'L CRIM. JUST. 201 (2009).

38. New TV S.A.L. & Ms. Karma Al Khayat, 2 Oct. 2014, Case No. STL 14-05/PT/AP/AR126.1, ¶¶ 36–42 (Leb.).

39. *Id.* ¶¶ 51–67.

40. I.C.J., *supra* note 27, at art. 38.

41. First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983); *see also id.* at 628–29 (holding that "the principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies").

42. *See* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 27, 2014, A.U. Doc. No. Assembly/AU/Dec.529 (XXIII).

43. *See* Tara Van Ho, *International Legal Personality of Corporations: How Investment Law Answers the Supreme Court Question in Jesner*, JUST SECURITY (Oct. 2, 2017), https://www.justsecurity.org/45543/international-legal-personality-corporations-investment-law-answers-supreme-courtquestion

empower and/or oblige their signatories to implement a full range of remedies for corporate breaches. Most importantly for the *Jesner* case is the International Convention for the Suppression of the Financing of Terrorism. This treaty explicitly states at Article 5 that, "[e]ach State Party . . . shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, . . . committed an offen[s]e" in violation of the Convention, including by funding terrorist activities.[44] At Article 18, the treaty also requires member states to prohibit the "illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission" of acts in violation of the treaty.[45] Upon ratification, the United States implemented this treaty with the passage of the Anti-Terrorism Act,[46] invoked in the *Jesner* case by the U.S. citizen plaintiffs who prevailed in their action at trial following the severance of their case from that of the alien plaintiffs.[47] In the immediate aftermath of the attacks of September 11th, the United Nations (U.N.) Security Council, in an effort sponsored by the United States government, adopted a binding resolution obliging all states to implement the suite of terrorism treaties already in existence, including the Terrorist Financing Convention, by *inter alia* criminalizing acts of terrorism and terrorist financing within their domestic legal systems.[48] The terms of the Terrorist Financing Treaty are now effectively binding on all U.N. member states by virtue of their U.N. Charter obligations to implement Chapter VII resolutions.[49]

Treaties addressed to other international and transnational law violations also mandate the imposition of corporate liability and a range of penalties, reflecting the role business entities play in perpetrating and enabling these violations. Examples include treaties devoted to combating

---

-jesner/ (noting that international investment law delineates international rights and responsibilities for corporations, which, as a matter of public international law, are distinct from their shareholders).

44. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 197 (adopted by the General Assembly in Resolution 54/109 of 9 Dec. 1999).

45. *Id.* at art. 18. *See also* Council of Europe Convention on the Prevention of Terrorism art. 10, May 16, 2005, C.E.T.S. No. 196.

46. Civil Remedies, 18 U.S.C. § 2333 (2016).

47. The case is Linde v. Arab Bank PLC, 97 F. Supp. 3d 287, 298–99 (E.D.N.Y. 2015). A jury found for the plaintiffs in *Linde*; the bank settled before the district court could set damages. Elements of the settlement are before the Second Circuit. *See* Nate Raymond & Joseph Ax, *Arab Bank Settles U.S. Litigation Over Attacks by Militants*, REUTERS (Aug. 14, 2015, 3:11 PM), https://uk.reuters.com/article/uk-arab-bank-jo-settlement-hamas/arab-bank-settles-u-s-litigation-over-attacks-by-militants-idUKKCN0QJ21A20150814.

48. S.C. Res. 1373 ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

49. U.N. Charter art. 25.

transnational organized crime,[50] human and other forms of trafficking,[51] and bribery.[52] Some of these treaties place enforcement obligations on states; others impose international obligations on legal entities themselves.[53] Likewise, a treaty dedicated to crimes against humanity being drafted by the U.N. International Law Commission envisions corporate liability for breaches.[54] Together, these international instruments attest to the fact that international law contains no categorical bar to the exercise of domestic jurisdiction over corporations when they commit violations of international law. Accordingly, states are free to adopt a variety of responses to corporate malfeasance, including criminal sanctions and civil suits, such as those proceeding under the ATS. As such, the fact that most international war crimes tribunals do not assert criminal jurisdiction over legal entities is not dispositive of the question presented in *Jesner*.

The choice-of-law decision is thus inconsequential. Whether domestic law or international law governs the question presented in *Jesner* should land the Court in the same place: Corporate tort liability is a standard feature of domestic law and there is nothing in international law that would prevent the United States from providing a tort remedy for corporate breaches of international law under the ATS. That said, preserving corporate liability will not result in an immediate win for the plaintiffs in *Jesner*. There are a number of other grounds upon which this case could be resolved for defendants, including on prudential political question or comity grounds.[55] Furthermore, the *Kiobel II* presumption against

---

50. *See, e.g.*, United Nations Convention Against Transnational Organized Crime, annex, 1 art. 10(2), Nov. 15, 2000, T.I.A.S. 13127, 2225 U.N.T.S. 209 (indicating that "[s]ubject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative." *See also* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 2(14), Mar. 22, 1989, 1673 U.N.T.S. 57 (defining "person" to include legal persons).

51. *See* Council of Europe Convention on Action Against Trafficking in Human Beings art. 22, May 16, 2005, C.E.T.S. 197 ("Each Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention.").

52. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 2, Nov. 21, 1997, S. Treaty No. 105-43, 2802 U.N.T.S. 285 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.").

53. *See* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1020 (7th Cir. 2013) (listing treaties).

54. *See* Sean Murphy, *Corporate Liability and Crimes Against Humanity*, JUST SECURITY (Oct. 24, 2017), https://www.justsecurity.org/46242/corporate-liability-crimes-humanity/.

55. The fact that this case involves the ever-controversial Middle East should not prompt the Court to craft an overly broad rule of corporate immunity; rather, the Court should leave it for the lower

extraterritoriality remains to be considered and particularly the question of whether automated transactions that route through the United States touch and concern this country with sufficient force to displace the presumption against extraterritoriality.[56] An overly broad and categorical rule of corporate immunity, without basis in domestic or international law, is a poor vehicle to address any such concerns that might be raised by this litigation. Rather, the Court should continue to leave the door open to corporate liability under the ATS[57] and remand to allow the lower courts to address remaining arguments as to why plaintiffs should, or should not, recover for the proven harm that has befallen them on account of the Arab Bank's actions.[58]

courts to consider the unique facts of the case, and particularly the importance of the U.S.-Jordan bilateral relationship, through a case-specific application of such principles.

56. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) ("*Kiobel II*").

57. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) (holding that "the judicial power [under the ATS] should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.").

58. *See* Raymond & Ax, *supra* note 47.