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Patrick C. Reed
CUNY Bernard M. Baruch College

Weissman Center for International Business
Zicklin School of Business, Baruch College/CUNY

Baruch COLLEGE
The City University of New York

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Human Rights Litigation Against Corporations After *Jesner v. Arab Bank*

Patrick C. Reed*

Editor's Note

Globalization has undoubtedly brought many benefits, but also some important costs. International companies may be operating in countries where basic human rights are not protected. As companies engage more deeply in these countries, there is growing pressure for businesses to respect human rights wherever they are operating.[1]

Two main approaches to applying corporate responsibility to respect human rights internationally are emerging.[2] The first approach is based on civil liability. Here the goal is to redress wrongs and promote accountability by pursuing litigation against corporations in tort law for violations of human rights. The second approach is based on corporate transparency. Here the goal is to promote accountability through public reporting of corporate management practices and due diligence measures.

The following paper by Dr. Patrick Reed explores issues of corporate civil liability for human rights violations. The paper analyzes the recent U.S. Supreme Court ruling in *Jesner v. Arab Bank* where the Court rejected federal subject-matter jurisdiction over corporate defendants under the Alien Tort Statute. The paper then moves beyond the Supreme Court ruling to identify potential legal exposure for corporations outside the Alien Tort Statute. As Dr. Reed notes in the paper's conclusion: "Being a corporation is not and should not be a defense to civil liability for torts committed in violation of international law by corporate employees acting within the scope of their employment."

For readers who are interested in questions related to the transparency approach, the Weissman Center's CSR-Sustainability Monitor® provides ongoing analysis of the quality of corporate social responsibility reports issued by Global Fortune 500 companies across eleven elements, including human rights and assurance. The 2018 edition is now available at www.csrsmonitor.org.

[1] *Business and Human Rights: From Principles to Practice* (Dorothée Bauman-Pauly et al. eds. 2016)

[2] See, e.g., *Die Durchsetzung menschenrechtlicher Sorgfaltspflichten von Unternehmen: Zivilrechtliche Haftung und Berichterstattung als Steuerungsinstrumente* (Markus Krajewski et al. eds. 2018)

* Fellow, Weissman Center for International Business, Zicklin School of Business, Baruch College, City University of New York. Of Counsel, Simons & Wiskin. Adjunct Professor, Department of Law, Baruch College, CUNY, and St. John's University School of Law. The author thanks John Burgess and Lene Skou for their comments on earlier drafts.

In its April 2018 decision in *Jesner v. Arab Bank*,[1] the Supreme Court held in a five-to-four decision that federal district courts lack jurisdiction under the Alien Tort Statute (ATS) if the defendant is a corporation. The ATS gives district courts jurisdiction over a "civil action by an alien for a tort ... committed in violation of the law of nations,"[2] or international law in modern terminology. The issue of ATS jurisdiction over corporate defendants has arisen because ATS lawsuits have been filed against multinational corporations for alleged violations of international human rights law. In *Jesner*, the Supreme Court majority viewed the key issue as judicial restraint versus activism. Using this perspective, the majority ruled that a court needs to exercise great caution before creating a new cause of action under the ATS, and therefore Congress should decide whether corporations can be defendants in federal court in this type of case.

This commentary offers a prediction. Since the ATS only governs federal district courts' subject-matter jurisdiction, *Jesner* may well shift future litigation over alleged corporate violations of international human rights from federal courts to state courts. The state court cases may well generate a future legal debate over the substantive issue that *Jesner* left open. This is whether international law includes a norm of corporate civil liability for torts committed by corporate employees while acting within the scope of their employment: the principle known in legal terminology as *respondeat superior*, which is a fundamental of US law.[3] In state court cases, the issue will not involve the court's subject-matter jurisdiction, but the application of choice-of-law rules to determine the governing substantive law.

If state courts reach the issue of corporate *respondeat superior* in international law, this commentary suggests that corporations will be held liable. This is because international law includes general principles of law recognized in the world's domestic legal systems. In fact, the International Court of Justice ruled in a case involving corporate personality for purposes of international law that "whenever [international] legal issues arise concerning ... the treatment of companies ..., as to which... international law has not established its own rules, it has to refer to the relevant rules of municipal [i.e., domestic] law."[4] Corporate civil liability for torts committed by employees, as opposed to corporate criminal liability, appears to be a legal principle with worldwide recognition in domestic legal systems.

Origins of ATS Litigation

The ATS is applicable if a non-US plaintiff is seeking compensatory monetary damages for a "tort" that is "committed in violation of [international law]." Although international law mostly governs legal relations among States, it imposes some legal duties on individuals, in the sense that the rules are capable of being violated by individuals. The ATS, which was originally enacted in 1789, was probably intended mainly to provide a civil remedy for assaults on foreign diplomats. Piracy and violations of safe-conducts were the other kinds of conduct by individuals that violated eighteenth century international law.

The ATS was used rarely from 1789 until the late 1970s. Then plaintiffs began to use it in lawsuits seeking damages for violations of modern international human rights law, such as torture. In the seminal 1980 case, *Filártiga v. Peña-Irala*,[5] the Second Circuit Court of Appeals held that the ATS affords jurisdiction over an action by Paraguayan plaintiffs against a Paraguayan police official temporarily living in the United States for torturing and killing a member of the plaintiffs' family.

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[1] 584 U.S. ___, No. 16-499 (Apr. 24, 2018).

[2] 28 U.S.C. § 1350.

[3] Restatement (Third) of Agency § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment") (stating US law); *accord, e.g.,* Philadelphia, W. & B. R.R. v. Quigley, 62 U.S. 202 (1858) ("[F]or acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances.").

[4] Barcelona Traction, Light and Power Co. (Belgium v. Spain), Judgment, I.C.J. Reports 1970, at 33-34 ¶ 38.

[5] 630 F.2d 876 (2d Cir. 1980).

The Supreme Court considered the ATS for the first time in 2004, in *Sosa v. Alvarez- Machain*.[6] *Sosa* held that the ATS is only a jurisdictional statute giving federal courts power to hear the case, but does not create a private cause of action. This means that there is no tort called, for example, intentional violation of international law. A plaintiff bringing an ATS lawsuit would have to identify some more specific cause of action. In addition, *Sosa* held that the plaintiff's cause of action would need to be based on an international law norm that is "specific, universal, and obligatory," like the eighteenth century examples of piracy, assaults on diplomats, and violations of safe-conducts. *Sosa* added that, even if the international law norm was specific, universal, and obligatory, courts should exercise caution before creating a new cause of action.

Before an ATS lawsuit reaches the merits of whether the defendant violated international law, the case may well raise other preliminary issues besides whether the district court has subject matter jurisdiction. These include whether the court has personal jurisdiction over the defendant and whether the court should decline to hear the case under the doctrine of *forum non conveniens* (inconvenient forum). In 2014, the Supreme Court dismissed an ATS lawsuit for lack of personal jurisdiction over a foreign corporation.[7] The Court held that even though the district court had personal jurisdiction over a foreign parent corporation's US subsidiary, it lacked personal jurisdiction over the foreign parent corporation itself in a suit based on acts committed by a non-US subsidiary outside the United States.

Corporate Defendants in ATS Litigation

Beginning in the 1990s, plaintiffs began to file ATS lawsuits against corporations for human rights violations or complicity in these violations. In addition to seeking compensation for victims, these cases sought "to focus [public attention] on international law abuses by corporations and thereby contribute to an ongoing movement to hold corporations accountable for human rights abuses."[8] In the first case, *Doe v. Unocal*,[9] a group of Burmese villagers alleged that Unocal had been complicit in human rights violations by the Burmese military in connection with Unocal's construction of a pipeline in Burma. The case was settled on undisclosed terms. Other ATS suits against corporations followed. The kinds of human rights violations alleged in these cases included corporate management's alleged complicity in torture and extrajudicial killing committed by members of the police or military who were providing security services to the company, or corporate management's allegedly aiding and abetting the use of child slave labor on plantations. Although "few ATS cases have required corporations to compensate plaintiffs," they achieved "symbolic resonance" and "the business community has strongly opposed the corporate-defendant cases."[10]

Sosa reinforced the understanding that the international law norms that can support an ATS claim derive mainly from international criminal law. As the Second Circuit Court of Appeals explained, "because customary international law imposes individual liability for a limited number of international crimes—including war crimes, crimes against humanity (such as genocide), and torture—[courts] have held that the ATS provides jurisdiction over claims in tort against individuals who are alleged to have committed such crimes."[11]

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[6] 542 U.S. 692 (2004).

[7] Daimler AG v. Bauman, 571 U.S. ___ (2014).

[8] Beth Stephens, "Human Rights Litigation in U.S. Courts against Individuals and Corporations from 1789 to the Present," in *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* 179, 180 (Lara Blecher et al. eds. 2014). For broader conceptual discussions of human rights advocates' views on corporate responsibilities in international human rights law, see other chapters in the same book, notably including Ralph G. Steinhardt, "Multinational Corporations and Their Responsibilities under International Law," *id.* at 27-50 (chapter 2).

[9] 963 F. Supp. 880 (C.D. Cal 1997) (denying initial motions to dismiss claims against the corporate defendant); *see* Stephens, *supra* note 8, at 188.

[10] Stephens, *supra* note 8, at 180.

[11] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2nd Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013) (affirming on the ground that the ATS does not afford "extraterritorial" subject-matter jurisdiction where all the relevant conduct to place outside the United States).

The derivation of ATS claims from international criminal law led, in turn, to a two-to-one decision of the Second Circuit Court of Appeals in 2010 that ATS jurisdiction does not extend to corporate defendants.[12] The Second Circuit majority noted that the international criminal laws forming the basis for ATS tort lawsuits impose criminal liability only on natural persons. For corporations, however, "international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations."[13]

The Supreme Court's Decision in *Jesner*

The issue of ATS jurisdiction over corporate defendants reached the Supreme Court in *Jesner v. Arab Bank*.[14] The plaintiffs in this case alleged that senior corporate management knowingly allowed the bank to engage in transactions that financed or facilitated terrorism. A five-Justice majority of the Court held that corporations may not be defendants in lawsuits invoking ATS jurisdiction. Three of the five Justices concluded that "the Court need not resolve ... whether international law imposes liability on corporations," because "there is sufficient doubt on the point."[15] All five majority Justices agreed that the decisive question was whether judicial restraint should stop the Court from creating a new judge-made cause of action or rule of liability making corporations subject to ATS jurisdiction. The majority declined to create such a rule, saying that Congress should decide the question.

The four-Justice dissenting opinion urged that "international law determines what substantive conduct violates the law of nations," but "it leaves the specific rules of how to enforce international law norms and remedy their violation to states."[16] As for prudential considerations on creating a new cause of action, the dissent urged that the overriding consideration was that "[i]mmunizing corporations that violate human rights from liability under the ATS undermines the system of accountability for law-of-nations violations that the First Congress endeavored to impose."[17]

Corporate Liability in Future Cases Outside the ATS

The ATS is significant because it gives federal district courts subject-matter jurisdiction over lawsuits by foreign plaintiffs against foreign defendants asserting a claim not based on a federal statute. In contrast, federal question jurisdiction is not available because the claims in ATS cases have not been based on federal statutes. Federal diversity jurisdiction is not available because it does not include actions by foreign plaintiffs against foreign defendants. As a result of *Jesner*, lawsuits by foreign plaintiffs against foreign corporations for alleged violations of international law cannot be heard in federal district courts.

Nevertheless, the issue of ATS subject-matter jurisdiction is simply "whether ... a federal court could hear a case that would normally have been a matter for state courts only."[18] Nothing in *Jesner* stops foreign plaintiffs from bringing lawsuits against

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[12] *Id.* "Prior to 2010 corporate-defendant decisions unanimously accepted that corporations were subject to suit under the ATS to the same extent as natural persons." Stephens, *supra* note 8, at 190.

[13] 621 F.3d at 120.

[14] 584 U.S.___,No. 16-499, Slip Op. (Apr. 24, 2018).

[15] Slip Op. at 17-18. Justice Kennedy wrote the Court's majority opinion, joined by Chief Justice Roberts and Justice Thomas and in part by Justices Alito and Gorsuch. Only Chief Justice Roberts and Justice Thomas joined the quoted part of Justice Kennedy's opinion. In their separate concurring opinions, Justices Alito and Gorsuch contended that the Court should not create new causes of action under the ATS under any circumstances. For this reason, they did not need to evaluate the competing arguments on whether international law imposes liability on corporations.

[16] Jesner v. Arab Bank, 584 U.S. ___, No. 16-499, Dissenting Slip Opinion at 3 (Apr. 24, 2018) (Sotomayor, J., dissenting); *see also id.* at 32 ("international law establishes what conduct violates the law of nations, and specifies whether ... the alleged conduct must be undertaken by a particular type of actor," but domestic law "determines whether corporations may ... be held liable in tort for law-of-nations violations."). Justice Sotomayor wrote the dissenting opinion, which Justices Ginsburg, Breyer, and Kagan joined.

[17] *Id.* at 34.

[18] Alfred P. Rubin, "U.S. Tort Suits by Aliens Based on International Law," 18 Fletcher F. World Aff. 65, 66 (1994).

foreign corporations in state courts alleging torts committed in violation of international human rights law. In state courts, the cases would face the same preliminary issues noted above of personal jurisdiction over the defendant and *forum non conveniens*. Assuming that these preliminary issues are overcome, then "the choice-of- law rules of the forum would decide the issue of which body of law should be applied to the dispute: United States law; the [foreign] law of ... the place [where] the events [occurred] [or] the nationality of the defendant ...; international law; or some other legal order."[19]

Assuming that international law is chosen as the applicable governing law, the court would reach the issue of whether international law includes a norm of corporate civil liability for torts committed by employees while acting within the scope of their employment. Since the Supreme Court majority did not examine the issue in depth, the discussion that follows refers to the majority and dissenting opinions in the 2010 Second Circuit decision and the dissenting Supreme Court opinion.

As discussed earlier, the two Second Circuit majority judges said no to corporate liability in international law because, in part, international criminal law "has steadfastly rejected the notion of corporate liability for international crimes ...."[20] The basis for this conclusion is that international criminal tribunals, including the Nuremberg War Crimes Tribunal and the International Criminal Court, have limited their jurisdiction to natural persons and consciously omitted jurisdiction over corporations. International criminal law on this point reflects, in turn, that the domestic legal systems of some countries (unlike the United States[21]) do not or did not traditionally impose criminal liability on corporations. Still, this strand of the Second Circuit majority's analysis is unpersuasive. The dissenting Second Circuit judge supplied the effective rebuttal that the absence of "*criminal* liability on corporations" has "no bearing on civil compensatory liability."[22]

The Supreme Court and Second Circuit dissenting opinions offered a different analysis, but it is not completely persuasive either. They said that while international law provides the applicable standard of conduct, it leaves enforcement and civil liability to individual States to determine in their domestic law. This approach has reasonable justification because some treaties, rather than establishing international criminal liability for specified conduct, require the States that are parties to the treaty to adopt domestic laws imposing criminal liability for the conduct, thereby leaving enforcement to individual States. One shortcoming in the approach is that many treaties of this kind do not expressly leave civil liability to individual States or require States to impose civil liability. Instead, they are completely silent on civil liability. Furthermore, since the substantive legal duty is derived from international law, arguably the rules imposing liability on particular parties should also be derived from international law, as the Second Circuit majority said.

An even more persuasive approach, therefore, examines whether international law includes a norm of corporate civil liability for employees' torts. This approach ultimately reinforces the dissenting opinions' conclusion that corporate civil liability applies. The Second Circuit majority examined international law partially, but its analysis was incomplete and wrong. The Second Circuit majority reviewed treaties and customary international law reflected in state practice, as well as decisions of international tribunals. It concluded that "no international tribunal has ever held a corporation liable for a violation of the law of nations" and "[n]o corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights."[23]

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[19] *Id.*

[20] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2nd Cir. 2010), *aff'd on other grounds,* 569 U.S. 108 (2013).

[21] N.Y. Cent. & Hud. R.R. v. United States, 212 U.S. 481 (1909). For an illuminating history of corporate personality in US constitutional law, see Adam Winkler, *We The Corporations: How American Businesses Won Their Civil Rights* (2018).

[22] *Kiobel*, 621 F.3d at 151 (Leval, J., dissenting).

[23] *Id.* at 120 & 147.

Resort to General Principles of Law

The flaw in the Second Circuit majority opinion is that international law, in addition to treaties and customary law, includes "general principles of law recognized by [world] nations."[24] The majority considered general principles of domestic law on corporate criminal liability.[25] The majority also correctly noted that "[g]eneral principles are a secondary source of international law, resorted to for developing international law interstitially in special circumstances."[26] The majority erred because it failed to consider this source of law on corporate civil liability.

The Second Circuit majority, as well as the dissenting Supreme Court Justices and Second Circuit judge, did not discuss the 1970 decision of the International Court of Justice (ICJ) in *Barcelona Traction, Light and Power Co.*[27] This case concerned corporate personality for purposes of international law: specifically, whether corporate shareholders could disregard the corporate entity and assert their own property interest in corporate assets. If so, the shareholders' home State would have standing to bring an international claim on their behalf. The ICJ acknowledged that international treaty and customary law lacked any legal rules governing corporate personality. Under the circumstances, the ICJ explained that "international law is called upon to recognize institutions of municipal law," including "recogniz[ing] the corporate entity as an institution created by States ...."[27] This recognition "in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law."[29] In doing so, "[i]t is to rules generally accepted by municipal legal systems which recognize the limited [liability] company ..., and not to the municipal law of a particular State, that international law refers."[30]

The point of *Barcelona Traction* is that since international law includes general principles of law recognized in world legal systems, it fills gaps in international treaty and customary law on issues such as corporate personality by referring to general principles of domestic law governing the issue. Applying the *Barcelona Traction* reasoning to corporate civil liability, international law should refer to general principles of domestic law on corporate civil liability to fill the gaps in international law. This reasoning is subtly different from the idea in the Supreme Court and Second Circuit dissents that international law leaves the determination of corporate civil liability to the domestic law of individual states. International law does not leave the question to individual states to determine, it refers to general principles of domestic law to supply the answer under international law.

In any event, referring to general principles of law as a gap-filling source of international law reaches the same conclusion as the dissenting opinions on corporate civil liability, thereby reinforcing that conclusion. The Second Circuit dissent emphasized that "the imposition of civil liability on corporations ... is practiced everywhere in the world."[31] Elsewhere

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[24] Statute of the International Court of Justice, art. 38(1)(c). The ICJ Statute uses the term "civilized" nations, but today all nations are considered civilized. This paper's discussion of corporate civil liability as a general principle of law in world legal systems that is incorporated into international law parallels the argument presented in the Brief of Amici Curiae of Comparative Law Scholars and Practitioners in Support of Petitioners, *Jesner v. Arab Bank*, No. 16-499 (U.S. June 27, 2017) [hereinafter Amicus Brief of Comparative Law Experts].

[25] *Kiobel*, 621 F.3d at 141 n.43.

[26] *Id.* (quoting Restatement (Third) of Foreign Relations Law).

[27] Barcelona Traction, Light and Power Co. (Belgium v. Spain), Judgment, I.C.J. Reports 1970. The Amicus Brief of Comparative Law Experts, *supra* note 24, did discuss *Barcelona Traction*.

[28] *Barcelona Traction*, at 33 ¶ 38.

[29] *Id.* at 33-34 ¶ 38.

[30] *Id.* at 37 ¶ 50.

[31] *Kiobel*, 621 F.3d at 152 (Leval, J., dissenting) (also explaining that imposing civil liability on corporations "serves perfectly the objective of civil liability to compensate victims for the wrongs inflicted on them"); *accord* Amicus Brief of Comparative Law Experts, *supra* note 24, at 11-24 (concluding based on a survey of numerous countries that "[c]orporate liability for torts is a general principle recognized by legal systems around the world ....").

the dissent added that "unlike the case with corporate criminal liability, which does not exist in many nations of the world, it is the worldwide practice to impose civil liability on corporations."[32] Although these statements do not specifically say corporate civil liability for torts committed by corporate employees, they appear to include it. And the Second Circuit majority opinion did not appear to disagree with these statements. Accordingly, corporate civil liability for torts committed by employees in the course of their employment, as opposed to corporate criminal liability, appears to be a legal principle with worldwide recognition in domestic legal systems. As such, it is a norm included in international law and should apply when the employees' tort is in violation of international law.

Conclusion

Lawsuits against corporations for alleged human rights violations raise difficult issues. The difficult issues include, notably, which lawsuits if any between foreign parties based on events in foreign countries should be heard in US courts, and what kind of conduct by corporate employees represents "complicity" in human rights violations. This commentary does not address these issues. Instead, assume that it is appropriate for a given court to hear the case, and assume that corporate employees are found to have committed torts in violation of international law in the course of their employment. The issue is whether the corporate employer is subject to civil liability for its employees' torts under the doctrine of *respondeat superior.* This is not a difficult issue, in this commentator's opinion. Being a corporation is not and should not be a defense to civil liability for torts committed in violation of international law by corporate employees acting within the scope of their employment.

[32] *Kiobel*, 621 F.3d at 169 (Leval, J., dissenting).

Weissman Center for International Business, Director:
Terrence F. Martell, Ph.D.
Saxe Distinguished Professor of Finance

Project Editor:
Lene Skou
Weissman Center Deputy Director

Design and Layout:
Rachael Cronin

For more information about this report contact the

Weissman Center for International Business

Zicklin School of Business, Baruch College/CUNY
(646) 312-2070

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