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Corporate Liability for Human Rights Violations: The Future of the Alien Tort Claims Act

Milena Sterio[*]

Introduction

In October 2017, the United States Supreme Court will entertain oral arguments in *Jesner v. Arab Bank*, a case involving the scope of corporate liability for human rights abuses under the Alien Tort Claims Act ("ATCA").[1] In *Jesner*, a group of terrorist attacks victims in Israel, Gaza, and the West Bank have sued a Jordan-based bank, alleging that the bank supported and financed terrorism through maintaining accounts for known terrorists, accepting donations that it knew would be used to fund terrorism, and distributing so-called "martyrdom payments" to families of suicide bombers.[2] The bank has denied any wrong-doing and has emphasized its self-described role as an active and leading partner in socio-economic development in the Middle East.[3] The legal issue before the Supreme Court is not whether the plaintiffs' allegations are true, but instead whether the bank, as a corporate entity, can be sued in United States' court at all, under the ATCA.

The issue of corporate liability under the ATCA was already litigated in *Kiobel v. Royal Dutch Petroleum Co.*[4] In *Kiobel*, however, the Supreme Court did not ultimately determine whether corporations can be held liable under the ATCA.[5] Instead, the Court determined that the ATCA was presumptively territorial, and that the plaintiffs in *Kiobel* could not overcome the presumption of territoriality.[6] Thus, the Court held that cases brought under the ACTA had to "touch

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1. Amy Howe, *An Introduction to the Alien Tort Statute and Corporate Liability: In Plain English*, SCOTUSBLOG (Jul. 24, 2017), http://www.scotusblog.com/2017/07/introduction-alien-tort-statute-corporate-liability-plain-english/ [https://perma.cc/86UU-43QT].
2. *Id.*
3. *Id.*
4. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).
5. *Id.* at 1669.
6. *Id.*

and concern" the United States in order to proceed under this Act and that the alleged conduct in *Kiobel* did not sufficiently concern United States' interests.[7]

Kiobel left many questions unanswered. First, circuit courts have been split as to how to interpret the territoriality requirement under the ATCA.[8] In this regard, the holding of ATCA cases typically fall into one of three categories: (1) that the alleged tortious conduct had to have occurred within the United States, (2) that only relevant/some tortious conduct had to have taken place on American soil, or (3) that the presence of American parties to the litigation may be sufficient to overcome the presumption of territoriality.[9] Second, *Kiobel* did not address the issue of applicable law, namely whether domestic or international law should apply to the issue of whether corporations can be sued under the ATCA?[10] Those in favor of corporate liability prefer the application of domestic law, which may lead to an easier conclusion that corporations can be sued and held liable under the Act, while those opposed to corporate liability may prefer the application of international law, under which it is uncertain whether corporations may incur civil liability.[11] Lastly, *Kiobel* did not answer the most fundamental issue: whether corporations may be sued under the ATCA, and if so, under what circumstances?[12]

This Paper will address these complex legal issues in light of and in the context of the *Jesner* case. In Part I, this Paper will provide a brief overview of the *Jesner* case. In Part II, this Paper will outline the *Kiobel* case and its holding. In Part III, this Paper will discuss *Kiobel*'s shortcomings, including the vagueness of its "touch and concern" test and its failure to specify which law – international or domestic – applies to the issue of corporate liability under the ATCA. In Part IV, this paper will then propose other remedies to address corporate misbehavior and complicity in the violation of human rights, including criminal liability and lawsuits against corporate officers. In sum, this paper will conclude that the ATCA may not be the best vehicle to address corporate violations of human rights (although, in the author's humble opinion, the Supreme Court will most likely decide for the plaintiffs in the *Jesner* case, and in favor of corporate liability under the ATCA).

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7. *Id.*
8. *Id.*
9. *See Kiobel*, 133 S.Ct. at 1671.
10. *See generally Kiobel*, 133 S.Ct.,(failing to answer the question of whether domestic or international law should be used in ATCA cases).
11. *See infra* Part III.
12. *See generally Kiobel*, 133 S.Ct., (failing to answer the question of whether corporations may be sued under the ATCA).

I. *JESNER V. ARAB BANK*

Jordan's Arab Bank was founded in Jerusalem nearly a century ago.[13] As of today, it has over 600 branches on five continents.[14] In light of its work with the U.S. Agency for International Development, as well as other organizations, such as Oxfam, Save the Children, and Catholic Relief Services, Arab Bank has described itself as "an active and leading partner in the socio-economic development" of the Middle East.[15] Both the United States' and the Israeli governments have worked with the bank - the former has characterized it as a "constructive partner" in the efforts to prevent terrorism financing and the latter has used Arab Bank as a conduit to transfer taxes collected for the Palestinian Authority.[16]

Despite this seemingly positive image of Arab Bank, a group of plaintiffs has recently sued the bank in United States' federal court.[17] The plaintiffs, a group of victims of terrorist attacks committed in Israel, the West Bank, and Gaza between 1995 and 2005, allege that Arab Bank aided and abetted terrorist activity, by maintaining accounts for known terrorists, accepting donations that would be used to fund terrorism, and distributing millions of dollars to families of suicide bombers (so-called "martyrdom payments").[18] The plaintiffs' law suit was filed under the ACTA - a federal law, enacted as part of the Judiciary Act of 1789, which gives federal courts 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."[19] It is unclear as

13. Howe, *supra* note 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *See* Complaint at *1-2, Jesner v. Arab Bank, PLC, No. CV 06 3869, 2006 WL 4807223 (E.D.N.Y. Aug. 9, 2006) (listing the parties' names).

18. *Id.* at *38.

19. 28 U.S.C.A. § 1350 (West 1948); *See generally,* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 447 (2011) (discussing the history and meaning of the ATS); Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 509, 509 (2012) (explaining debates over the ATS and the reliance by participants in those debates on a 1795 opinion by U.S. Attorney General William Bradford); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588 (2002) (detailing the history of the ATS); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 870 (2007) (analyzing the Court's Sosa decision within the context of its Erie decision and considering several areas of likely debate concerning the ATS); William S. Dodge, *The Constitutionality of the Alien Tort*

to why ATCA was enacted; Judge Friendly famously stated that "no one seems to know whence it came," and described this act as a "kind of a judicial Lohengrin," after the mythical German knight who suddenly arrives by boat pulled by swans.[20]

ATCA remained dormant until 1980, when two Paraguayan citizens filed a lawsuit in United States' federal court under this act, alleging that a Paraguayan police official tortured their son and brother to death.[21] This case, *Filartiga v. Pena-Irala*, effectively resurrected the ATCA and established the precedent that United States' courts will hear cases involving violations of international law norms committed against alien plaintiffs.[22] In the three decades following *Filartiga*, plaintiffs began to increasingly rely on the ATCA to bring suits against foreign defendants and government officials, but also large multinational corporations, for their role in aiding and abetting human rights violations committed by foreign governments.[23] In light of such increasing reliance on the ATCA, since *Filartiga*, the Supreme Court has twice weighed in to limit the scope and reach of the ATCA.[24] In *Sosa v. Alvarez-Machain*, the Supreme Court held that the ATCA is purely a jurisdictional statute which does not

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Statute: Some Observations on Text and Context, 42 VA. J. INT'L L. 687, 689 (2002) (arguing, among other things, that "the Framers wanted to give the federal courts jurisdiction over suits involving the law of nations"); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 466 (1997) (discussing Filartiga, "[t]he break-through ATCA case"); Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 112 (2004) (noting a debate concerning the ATS: whether it merely grants jurisdiction or allows suits to be brought on the basis of "customary international law"); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 353 (2011) (challenging the common perception that the ATS "imposes liability on private corporations for violations of customary international law"); Thomas H. Lee, *The Safe Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 830 (2006) (advancing the "safe-conduct theory," which posits a new role for the ATS—it would permit redress of common law torts that private actors commit so long as there is a U.S. nexus); Carlos M. Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AM. J. INT'L L. 531, 531 (2012) (observing that most scholarly debate on customary international law has focused on litigation over the ATS).

20. IIT v. Vencap Ltd., 519 F.2d 1001, 1015 (2nd Cir. 1975).
21. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2nd Cir. 1980).
22. *Id.* at 888-89.
23. Howe, *supra* note 1.
24. *Id.*

provide plaintiffs with a cause of action.[25] Instead, the Supreme Court held that causes of action for lawsuits filed under the ATCA must be found under the common law, formulated by judges.[26]The Supreme Court then held that the common law as of 1789, when the ATCA was enacted, would have contained a narrow set of violations of the law of nations, including violations of safe-passage guarantees, violations of the rights of ambassadors, and piracy.[27] Thus, according to the *Sosa* Supreme Court majority, claims brought under the ATCA should proceed only if they allege such 18th century-recognized causes of action and if they are widely accepted as a violation of international norms.[28] The Court further specified its holding by cautioning that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of "allowing litigants to rely on that norm.[29] In addition, the Court held that courts considering claims filed under the ATCA should take into account not only whether international law recognizes the allegedly violated norm, but also whether international law would allow a particular defendant to face liability "if the defendant is a private actor such as a corporation or individual."[30] In *Sosa*, the Court ultimately held that the plaintiff's cause of action, alleging arbitrary detention as a violation of customary international law, should not be recognized under the ATCA because the prohibition on arbitrary detention had not reached the status of a customary norm of law, sufficiently accepted and universal under international law.[31]

Post-*Sosa*, federal courts hearing ATCA claims faced uncertainty.[32] The *Sosa* holding did not clarify which types of claims could be potentially recognized as providing a valid cause of action under the ATCA.[33] In addition, the *Sosa* holding left open the issue of corporate liability for aiding and abetting in human rights abuses: could corporations face liability under the ATCA, or should this

25. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
26. *Id.* at 724.
27. *Id.* at. 715, 724-25.
28. *Id.* at 725.
29. *Id.* at 732-33.
30. *Id.*
31. *Id.* at 738.
32. Roger P. Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1096-97 (2014).
33. *Id.* at 1096-97.

statute be interpreted as confining lawsuits thereunder as against private defendants only.[34] This issue was raised in the second ATCA-related Supreme Court case, *Kiobel v. Royal Dutch Petroleum Co.*[35] Section II below will discuss the *Kiobel* case in detail, and it will explain how the *Kiobel* case left several questions unanswered, including the issue of corporate liability under the ATCA.[36] Because lower courts have been reaching conflicting results on this issue, the Supreme Court (presumably) granted certiorari in *Jesner.* [37]

Jesner plaintiffs allege that Arab Bank "violated the law of nations insofar as it financed terrorism, and also insofar as it directly and indirectly engaged in genocide and crimes against humanity."[38] According to the plaintiffs, when ACTA was enacted it was "unquestionable" that corporations could face liability in tort law, and this has remained true until today.[39] Thus, according to the plaintiffs, the ACTA should be interpreted to include corporations as potential defendants.[40] While the text of the ATCA limits plaintiffs to "aliens," the statute does not contain a similar limitation as to defendants.[41] Moreover, plaintiffs interpret the history and purpose of the ATCA to support their argument that this statute applies to corporations.[42] They argue that Congress passed the Judiciary Act of 1789 to ensure, inter alia, that federal courts had jurisdiction over lawsuits alleging violations of the law of nations, such as, for example, an assault on a foreign diplomat.[43] According to the plaintiffs, there is no reason to believe that Congress wanted to avoid foreign relations problems created by individuals but not by corporations.[44] In addition, plaintiffs argue that it is important to hold corporations liable in order to compensate victims and deter future ATCA violations.[45] In cases involving the offense of terrorism financing, plaintiffs argue that

34. *Id.*

35. *Kiobel*, 133 S.Ct. at 1669.

36. *See infra* Part II.

37. George Rutherglen, *Jesner v. Arab: Closing the Door to Human Rights in Federal Court?*, JUST SECURITY (Oct. 5, 2017, 9:30 AM), https://www.justsecurity.org/45632/jesner-v-arab-bank-plc-closing-door-human-rights-federal-court/ [https://perma.cc/4MJ3-ALVS].

38. Howe, *supra* note 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

"corporate liability is the only meaningful option" because, even if a plaintiff can correctly identify the individuals involved in the actual wrongdoing, "securing jurisdiction and collecting judgment against them would be even more difficult."[46] Various amicus briefs have been filed supporting the plaintiffs, including a bipartisan brief by Senators Graham and Whitehouse.[47] The Senators allege that Arab Bank "used its U.S. office to launder funds for Hamas" and that, if other defendants like Arab Bank cannot be sued under the ATCA in federal court for their U.S.-based transactions, this will create "a dangerous gap that terrorists and their funders may exploit."[48]

Jesner Bank has countered the plaintiffs' arguments by relying on *Sosa*. The Bank argues that, in light of *Sosa*, the plaintiffs' case can go forward only if plaintiffs can show "that corporate liability is universally recognized in international law."[49] Jesner Bank argues that plaintiffs have failed to establish an international law norm on corporate liability because plaintiffs have failed to "point the Court to a single instance of a corporation being held liable by an international tribunal under customary international law."[50] The Bank also highlights a potential discrepancy that extending ATCA liability to corporations would create: under United States' law, corporations do not face liability in similar areas of the law, such as private lawsuits seeking damages for civil rights violations, under the Supreme Court 1972 *Bivens* holding.[51] Moreover, Jesner Bank dismisses the Senators' argument that not extending the ATCA's reach to corporate behavior would create a "gap" which future terrorists could exploit.[52] The Bank suggests that other remedies to combat terrorism are available, such as criminal law, federal regulations, and sanctions regimes.[53]

46. *Id.*

47. *Id.*

48. Brief of United States Senators Sheldon Whitehouse and Lindsey Graham as Amici Curiae Supporting Petitioners at 5-6, Jesner v. Arab Bank, 2017 WL 2822776 (No. 16-499).

49. Howe, *supra* note 1.

50. *Id.*

51. *Id; see* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (stating implied actions to enforce constitutional guarantees against federal actions are not available against corporations); *see also* Anton Metlitsky, *Symposium: A Federal-Common-Law Approach to Corporate Liability Under the Alien Tort Statute*, SCOTUSBLOG, July 26, 2017, available at http://www.scotusblog.com/2017/07/symposium-federal-common-law-approach-corporate-liability-alien-tort-statute/)[https://perma.cc/JB66-9W2K].

52. Howe, *supra* note 1.

53. *Id.*

According to the Bank, such other remedies are more appropriate because they allow prosecutors and regulators discretion to exercise judgment in "an area fraught with foreign policy considerations."[54] The Bank argues that private plaintiffs do not typically exercise the same discretion and judgment.[55] Jesner Bank is supported through amicus briefs by the U.S. Chamber of Commerce and other business groups.[56] These groups argue that ATCA lawsuits have run rampant over the past decades.[57] They also highlight that allowing corporate liability under the ATCA would create an imbalance that Congress certainly did not intend with a similar federal law, the Torture Victims Protection Act (TVPA), which allows American plaintiffs to sue individuals only.[58] As such, they argue extending the ATCA to corporations would allow aliens to sue private individuals and corporations, while the TVPA would continue to limit American citizens' lawsuits to individual defendants.[59] While it is not surprising that the business community seems united against extending ATCA liability to corporations, this "imbalance" argument is important and will most likely be addressed in the near-future *Jesner* holding.[60]

The federal government has taken a middle-ground position in its amicus brief to the Supreme Court.[61] The government has rejected the Bank's argument that corporations should never face liability under the ATCA.[62] However, the government has argued that this particular lawsuit should not go forward because the allegation that Jesner Bank

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Brief for the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Neither Party at 6-7, Jesner v. Arab Bank, PLC (2017) (No. 16-499); *see also* Metlitsky, *supra* note 51 (noting that the TVPA does not allow plaintiffs to sue corporations) ("The relevant statute here is the Torture Victim Protection Act, which was enacted by Congress under the ATS to create an express cause of action for certain human-rights norms (i.e., torture and extrajudicial killing). In creating that cause of action, Congress determined that only natural persons, not corporations, could be liable, as the Supreme Court held in *Mohamad v. Palestinian Authority.*").

60. *See generally* Howe, *supra* note 1.

61. *Id.*

62. Brief for the United States of America as Amici Curiae Supporting Neither Party at 5, Jesner, et al. v. Arab Bank, PLC (2017) (No. 16-499) ("This Court should vacate the decision below, which rests on the mistaken premise that a federal commonlaw claim under the ATS may never be brought against a corporation.").

may have routed foreign transactions in dollars through U.S. branches does not constitute enough of a nexus and connection with the United States per *Kiobel*.[63] It is interesting to note that Jesner Bank itself made a similar argument to the Supreme Court last year, in order to prevent the court's review.[64] The Bank argued that the Court should not address the issue of corporate liability under the ATCA in this particular case because the plaintiffs' claims "do not have a sufficient nexus to the United States to be litigated in U.S. courts."[65] The Supreme Court rejected this argument when it granted certiorari on the very issue of corporate liability under the ATCA (although the court will certainly address, in its future holding, issues related to the required territorial nexus between the claims and the United States).[66] Section II below will discuss the previously-mentioned *Kiobel* case and its requirement of territorial connection between ATCA claims and the United States.

II. *Kiobel v. Dutch Royal Petroleum*

In *Kiobel*, plaintiffs were former residents of Ogoniland, Nigeria, who filed a lawsuit under the ATCA in United States federal court against Royal Dutch Petroleum Company, Shell Transport and Trading Company, and their joint subsidiary, Shell Petroleum Development Company of Nigeria.[67] Plaintiffs alleged that they began protesting against the environmental effects of the oil companies' activities in the Ogoniland region, and that, as a consequence, the defendants recruited the Nigerian government to crush demonstrations by carrying out acts of violence, such as rape and murder, and by looting property.[68] The plaintiffs' complaint alleged that defendants "aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for the attacks."[69] Plaintiffs alleged that defendants violated the law of nations – a required

63. *Id.* at 25.

64. Brief in Opposition at 2, Jesner, et al. v. Arab Bank, PLC (2016) (No. 16-499) ("If the Court were to grant certiorari in this case, it would be Kiobel all over again: the Court would quickly discover that there is no need to reach the question of corporate liability because Petitioners' ATS claims do not have a sufficient nexus to the United States to be litigated in U.S. court.").

65. *Id.*

66. Howe, *supra* note 2.

67. *Kiobel*, 133 S.Ct. at 1662.

68. *Kiobel*, 133 S.Ct. at 1662.

69. *Kiobel*, 133 S.Ct. at 1662.

element of an ATCA-based complaint - by aiding and abetting the Nigerian government in committing the following acts: (1) extrajudicial killings, (2) crimes against humanity, (3) torture and cruel treatment, (4) arbitrary arrest and detention, (5) violations of the right to life, liberty, security, and association, (6) forced exile, and (7) property destruction.[70] The district court dismissed some of the claims but upheld the second, third, and fourth claims; in addition, the district court certified its order for interlocutory appeal.[71] In contrast, the Second Circuit Court of Appeals dismissed the plaintiffs' entire complaint by holding that "the law of nations does not recognize corporate liability."[72]The Second Circuit's holding was criticized on various points, including on the argument that it misinterpreted part of the Nuremberg precedent.[73] As a result, the Supreme Court granted certiorari, originally on the issue of corporate liability under the ATCA.[74] However, upon hearing oral arguments, the Court directed the parties to submit briefs on an additional issue – "[w]hether and under what circumstances the [ATCA] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[75]

The Supreme Court thus changed the legal issue that it had originally agreed to address in *Kiobel*. By requesting parties to prepare briefs and arguments on the issue of whether a corporation may be sued under the ATCA for acts committed abroad (which may have violated the law of nations), the Supreme Court avoided directly addressing the issue of corporate liability under the ATCA.[76] "Rather than address whether corporations may be sued at all under the ATS, the Court decided to address whether corporations may be sued under the ATS for acts committed outside the territory of the United States."[77] Thus, in *Kiobel*, the Supreme Court determined that the issue was not "whether petitioners … stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign."[78]

70. *Kiobel*, 133 S.Ct. at 1663.

71. *Kiobel*, 133 S.Ct. at 1663.

72. *Kiobel*, 133 S.Ct. at 1663.

73. Michael Kelly, *Atrocities by Corporate Actors: An Historical Perspective*, 50 CASE W. RES. J. INT'L L. (2018).

74. *Id.*

75. *Kiobel*, 133 S.Ct. at 1663.

76. Kelly, *supra* note 73.

77. *Id.*

78. *Kiobel*, 133 S.Ct. at 1664.

The Court then held that in analyzing any congressional statute, a presumption against extraterritorial application is generally applied. This presumption is applied because it "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[79] This presumption, according to the *Kiobel* decision, also applies to causes of action under the ATCA. The presumption against extraterritorial application may be overcome if the statute in question manifests a "clear indication of extraterritoriality."[80] According to the Court, the language of the ATCA did not indicate such clear extraterritoriality intent, and nothing in the statute's historical background suggested that Congress had intended for the statute to have such extraterritorial application.[81] The Court reached this determination by analyzing the three well-recognized law of nations offenses in 1789: violation of safe conducts, infringement of the rights of ambassadors, and piracy.[82] According to the Court, the first two offenses were defined as taking place within the forum nation and as such could not support the argument that Congress must have intended the ATCA to have an extraterritorial reach.[83] Piracy, according to the Court, is a unique offense because it is not committed within the territory of any particular nation, and the application of the ATCA to pirates does not demonstrate a clear intent by Congress to apply this statute extraterritorially for any other offenses.[84] Thus, the Court determined that "the presumption against extraterritoriality applies to claims under the ATS" and that "nothing in the statute rebuts that presumption."[85]

The Court then applied the presumption against extraterritoriality to the facts in *Kiobel*. In this case, the defendants' alleged violations of the law of nations occurred abroad. The Court held that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[86] According to the Court, for claims against multinational corporations, which may be present in many different countries, "mere corporate presence" in

79. *Kiobel*, 133 S.Ct. at 1664, (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

80. *Kiobel*, 133 S.Ct. at 1665, (quoting Morrison v. National Australia Bank Ltd., 561 U.S. 247, 265 (2010)).

81. *Kiobel*, 133 S.Ct. at 1661, (citing Sosa, 542 U.S. at 723-34).

82. *Kiobel*, 133 S.Ct. at 1671, (citing Sosa, 542 U.S. at 715).

83. *Kiobel*, 133 S.Ct. at 1666-67.

84. *Kiobel*, 133 S.Ct. at 1667.

85. *Kiobel*, 133 S.Ct. at 1669.

86. *Kiobel*, 133 S.Ct. at 1669.

the United States does not suffice.[87] The Court thus affirmed the Second Circuit's dismissal of the plaintiffs' lawsuit, not on the ground that corporations may never be sued under the ATCA, but because the "touch and concern" territoriality nexus with the United States was not present in the *Kiobel* facts and allegations.[88] In *Jesner*, the Supreme Court may be attempting to clarify the issue of potential corporate liability under the ATCA, which *Kiobel* left open. Section III below will discuss the most important issues left unanswered by *Kiobel*, as well as the implications of such issues on the *Jesner* case.

III. KIOBEL AND QUESTIONS LEFT UNANSWERED

The *Kiobel* opinion has been criticized on different grounds. This Section will focus on two common criticisms: *Kiobel*'s reliance on the presumption against extraterritoriality and the majority opinion's failure to explain how this presumption may be overcome, and *Kiobel*'s failure to explain which laws – international or domestic – should govern the issue of corporate liability under the ATCA.[89] This Section will also discuss *Kiobel*'s implications on *Jesner* and it will predict how the Supreme Court may apply *Kiobel*'s framework to *Jesner*.

A. Presumption Against Extraterritoriality: Failure to Explain How It May be Overcome

Kiobel failed to explain what factors would potentially displace the presumption of territoriality regarding the ATCA, and what factors would need to be present in future cases in order to justify the extraterritorial application of this statute.[90] Both Justice Kennedy and Justice Breyer wrote concurring opinions in which they challenged the majority opinion's reliance on the presumption of territoriality.[91] Justice Kennedy pointed out that the Court left a "number of significant questions" open regarding the future scope and interpretation of the ATCA.[92] On the other hand, Justice Breyer noted that the Court's reliance on the presumption against extraterritoriality "offers only limited help in deciding the question presented, namely, 'under what circumstances the [ATCA] … allows courts to recognize a cause of action for violations of the law of

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87. *Kiobel*, 133 S.Ct. at 1669.

88. *Kiobel*, 133 S.Ct. at 1669.

89. *Kiobel*, 133 S.Ct. at 1672-73.

90. *Kiobel*, 133 S.Ct. at 1672-73.

91. *Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., concurring); *Kiobel*, 133 S.Ct. at 1672-73 (Breyer, J., concurring).

92. *Kiobel*, 133 S.Ct. at 1669 (Kennedy, J., concurring).

nations occurring within the territory of a sovereign other than the United States.'"[93] Justice Breyer further argued that although the majority opinion made clear that an ATCA claim would have to "touch and concern the territory of the United States…. With sufficient force to displace the presumption," the majority opinion "leaves for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'"[94] Instead, Justice Breyer proposed a different framework for recognizing future causes of action under the ACTA. According to Justice Breyer, jurisdiction should exist under the ATCA where "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American interest in preventing the United States from becoming a safe harbor (free or civil as well as criminal liability) for a torturer or other common enemy of mankind."[95]

In sum, although *Kiobel* explicitly held that ATS claims must "touch and concern the territory of the United States" with "sufficient force" in order to overcome ATCA's presumption of territoriality, commentators and lower courts have been left wondering as to what exactly constitutes such "touch and concern" connection with the United States.[96] Despite the *Kiobel* holding, one commentator has argued that the ATCA still "has the potential to provide a foreigner with a civil remedy from a U.S. court based upon a variety of customary international law violations committed by a foreign national and occurring in the territory of a sovereign other than the United States."[97] Moreover, since *Kiobel*, lower courts have reached conflicting results regarding claims brought under the ATCA.[98] One scholar has summarized the lower courts' decisions when interpreting the ATCA and the *Kiobel* mandate to apply the presumption against extraterritoriality as follows.[99] One set of courts have interpreted *Kiobel* to require that the presumption of extraterritoriality may only be overcome if the law of nations violation occurs in the United

93. *Kiobel*, 133 S.Ct. at 1673 (Breyer, J., concurring).

94. *Kiobel*, 133 S.Ct. at 1673.

95. *Kiobel*, 133 S.Ct. at 1671.

96. *See, e.g.,* Paul L. Hoffman, *Kiobel v. Royal Dutch Petroleum Co.: First Impressions*, 52 COLUM. J. TRANSNAT'L L. 28, 35 (2013) (stating it is unclear that foreign corporations with more extensive United States connections would pass the presumption).

97. Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from Kiobel's "Touch and Concern" Test*, 66 HASTINGS L. J. 443, 446-447 (2015).

98. *Id.* at 455-56.

99. *Id.*

States.[100] Another set of courts interpret *Kiobel* to require that only relevant conduct, and not the law of nations violation itself, occur in the United States.[101] A third group of courts have decided that *Kiobel* allows U.S. citizenship or residency to displace the presumption against extraterritoriality.[102] A fourth set of courts have reached the opposite conclusion and have held that U.S. citizenship or residency is not sufficient to displace the presumption.[103] Finally, a fifth set of courts have interpreted *Kiobel* as acknowledging that only Congress can displace a statute's presumption against extraterritoriality.[104] Some courts have heard ATCA cases without even addressing the *Kiobel* "touch and concern" test.[105] According to one scholar, these conflicting lower court opinions "show the need for a coherent test to determine when the presumption against the extraterritorial application of a statute should be displaced."[106]

The differing approaches taken by lower courts in ATCA litigation post-*Kiobel* clearly demonstrate the necessity for a unified approach – which the Supreme Court will hopefully provide in *Jesner.* Until then, the unsettled issues regarding the "touch and concern" standard and the presumption against extraterritoriality are likely to contribute to forum shopping, where savvy plaintiffs will continue to bring cases in ATSA-friendly districts and circuits. It may be that the Supreme Court forecloses corporate liability under the ATCA altogether in *Jesner*, but in this author's opinion, it is much more likely that the Supreme Court will clarify *Kiobel* and allow a limited number of ATCA lawsuits against corporations.

B. Applicable Law (Domestic or International) to the Issue of Corporate Liability Under the ATCA

Another question left unanswered by *Kiobel* was one of applicable law: which law, domestic or international, applies to the issue of corporate liability under the ATCA.[107] In other words, to determine whether corporations can be sued for human rights violations, does one look to American tort law or to international law? Some scholars have argued that the ATCA is a conduct-regulating statute which incorporates universal norms of the law of nations; thus, according to

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 456.

105. *Id.* at 456-58.

106. *Id.* at 456.

107. Alford, *supra* note 32, at 1100.

this argument, ATCA is a universal jurisdiction statute.[108] In this vein, scholars argue that "[w]hen states exercise universal jurisdiction, they do not apply solely national law to conduct beyond their borders but an international law that already applied to the conduct when and where it occurred."[109]

Thus, pursuant to this argument, the relevant law to query regarding the issue of corporate liability for aiding and abetting in human rights abuses under a universal jurisdiction statute like the ATCA would be international law.[110] In other words, as a conduct-regulating statute, the ATCA, refers to the law of nations and incorporates law of nations norms as to liability, it may be argued that the only relevant question for ATCA claims is whether such claims "was whether the conduct-regulating rule of decision in ATS suits— however it is conceptualized—accurately reflects extant rules of international law, including as to the scope of liability."[111] Thus, when it comes to the existence of corporate liability under the ATCA, the only relevant inquiry is whether existing international law norms authorize such liability.[112]

Similarly, another scholar has argued toward the application of international law to the issue of corporate liability under the ATCA, stating

> [t]o me, it has always seemed that any questions affecting the substance of a case against an ATS defendants should be governed by international law, as the ATS' text seems to demand. The temptation to fill in the many gaps left by international law with U.S. common law is strong, but the ATS clearly sought to ask US courts to apply international law.[113]

If one accepts the argument that the issue of corporate liability under the ATCA should be governed by international, not domestic law, one may conclude against extending ATCA liability to corporations because international law does not contain clear and universally

108. *See* Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in* Kiobel *and Beyond*, 44 GEO. J. INT'L L. 1329, 1332 (2013).

109. *Id.* at 1330-34.

110. *Id.* at 1333.

111. Anthony J. Colangelo, Kiobel*: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65, 67 (2013).

112. *Id.* at 70.

113. Julian Ku, *The Unattractive Question is Back: SCOTUS (Again) Considers Corporate Liability Under the Alien Tort Statute,* OPINIO JURIS (April 3, 2017), http://opiniojuris.org/2017/04/03/unattractive-question-back-scotus-considers-corporate-liability-alien-tort-statute/ [https://perma.cc/EJQ6-26C2].

accepted norms on civil liability for corporations.[114] In other words, because the *Sosa* case already limited the ability of federal courts to recognize as actionable norms under the ATCA to those norms that are sufficiently uniform, definite and accepted under international law, it may be argued that U.S. courts should not be embracing novel causes of action against corporations when international law does not uniformly establish civil liability for corporations for aiding and abetting in human rights violations.[115] If, however, the issue of corporate liability under the ATCA is to be determined under domestic law, then an analysis of American federal law would lead one to conclude that corporations may face liability in civil lawsuits, given that "[u]nder federal common law, corporations are typically liable for torts."[116] As a result, the application of this law would almost certainly favor the plaintiffs on this question."[117]

The *Kiobel* majority never reached a definite conclusion on this issue of applicable law.[118] Instead, in *Kiobel*, the Supreme Court seemed to distinguish between conduct-regulating norms, which for an ATCA claim are found in the law of nations, and causes of action and remedies, which are to be determined by the law of the forum.[119] "The law of nations creates liability for universal jurisdiction violations, and the ATS supplies the form of remedy.[120] In *Kiobel*, the Supreme Court found that although the ATCA – the conduct-regulating statute – was jurisdictional in nature and incorporated the law of nations, the relevant cause of action under the ATCA was domestic and determined by the law of the forum.[121] It may be that the *Kiobel* majority would have answered the issue of corporate liability under the ATCA under the law of the forum/domestic law, if this issue had actually been addressed. However, because the *Kiobel* majority ultimately determined that the case should be dismissed on extra-territoriality grounds, the issue of applicable law remained

114. *See* Daniel Price, *Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute?*, 8 SETON HALL CIR. REV. 43, 55 (2011) (discussing Judge Cabranes' majority opinion in *Kiobel*).

115. *See generally* Kevin Golden, *License to Kill? Corporate Liability Under the Alien Tort Claims Act?*, 1 IN THE BALANCE 37, 44 (2012).

116. Ku, *supra* note 113.

117. *Id.*

118. Alford, *supra* note 32, at 1100.

119. *See* Colangelo, *supra* note 108, at 1332.

120. *Id.* at 1344.

121. *See* Colangelo, *supra* note 111, at 67 (discussing the questions presented for re-argument in *Kiobel*).

unanswered.[122] It may be that this issue will ultimately be resolved in *Jesner*.

C. *Implications for Jesner*

In *Jesner*, the Supreme Court granted certiorari on the issue of corporate liability under the ATCA, presumably to clarify post-*Kiobel* confusion.[123] It is worth noting that the Court adopted the plaintiffs' formulation of the issue: "[w]hether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability."[124] By doing this, the Court may have signaled that it will likely side with the plaintiffs (it would be difficult to imagine that the Court would hold that corporations are always and categorically exempt from liability under the ATCA).[125] Moreover, the fact that the Court granted certiorari on the issue of corporate liability under the ATCA, which the Court had avoided in *Kiobel*, may signal that the Court is willing to tackle this issue directly and that it is willing to seriously entertain the plaintiffs' argument.[126] With these two points in mind, it is this author's opinion that the Court will likely side with the plaintiffs, but that it will strictly limit corporate liability under the ATCA to a narrow set of circumstances.

If the Court were to decide that corporations may be sued under the ATCA post-*Kiobel*, it will have to clarify that *Kiobel* does not foreclose corporate liability altogether under this statute. In addition, the Court will have to determine, assuming that it does not want to overturn *Kiobel* a mere four years after it was decided, that the presumption against extraterritoriality has been overcome in *Jesner*. In order to do this, the Court may have to explain in more detail how plaintiffs in an ATCA case may overcome the presumption against extraterritoriality, and what factors in particular are necessary in order to overcome that presumption. *Jesner* may thus turn into an application and clarification of *Kiobel* – a way for the Supreme Court to resolve post-*Kiobel* circuit court splits relating to the ambiguity of the *Kiobel* "touch and concern" test.[127] If *Jesner* were to do this, it would be a welcome development in Supreme Court jurisprudence.

How likely is it that the Supreme Court will decide in favor of plaintiffs in the *Jesner* case? In *Jesner*, the law of nations violation of

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122. *See* Alford, *supra* note 32, at 1097 (explaining the Supreme Court's decision in *Kiobel*).

123. Jesner v. Arab Bank, PLC, 137 S. Ct. 1432 (2017).

124. Jesner v. Arab Bank, PLC, 808 F.3d 144 (2017).

125. *Id.* (explaining that the Supreme Court will decide whether ATCA categorically forecloses corporate liability).

126. *Id.*

127. *Kiobel*, 133 S.Ct. at 1669.

terrorism took place in Israel, West Bank, or Gaza.[128] However, Arab Bank is being sued for having aided and abetted terrorist activity through particular financing operations.[129] This law of nations violation (aiding and abetting terrorism) presumably took place at different Arab Bank locations and branches.[130] If plaintiffs can demonstrate that a sufficient number of such financing operations took place in Arab Bank's United States branches, this may constitute enough relevant conduct that would "touch and concern" the United States and thus displace the presumption against extraterritoriality.[131] The Court may also focus on the alleged violation of the law of nations itself, aiding and abetting terrorism, and may decide that deterring terrorism and terrorism financing sufficiently "touches and concerns" the United States because of a global American national security interests in preventing terrorist activity.[132] This kind of ruling would focus on terrorism as a particularly grave offense under the law of nations and would disallow other types of ATCA claims where plaintiffs allege other human rights violations. Under these circumstances, the Court would thus establish a narrow precedent for future ATCA cases against corporate defendants, by allowing only cases involving terrorism and terrorism-like violations of the law of nations, within a paradigm where United States' national security interests are concerned.

If the Supreme Court were to decide in favor of the respondents in *Jesner* and to hold that corporations are indeed categorically exempt from liability under the ATCA, this would not necessarily imply that no remedies would be available in American courts against corporations which aid and abet in human rights violations.[133] The section below will briefly outline other potential remedies against corporate misbehavior.

128. Howe, *supra* note 1.

129. *Id.*

130. *Id.*

131. *See generally Kiobel*, 133 S. Ct. at 1669 (Breyer, J., concurring) (explaining *Kiobel*'s "touch and concern" test).

132. *See generally Kiobel*, 133 S. Ct. at 1669 (Breyer, J., concurring) (discussing the existence of ATS jurisdiction when there is an important national interest).

133. *See* CHARLES DOYLE, CONG. RESEARCH SERV. R43293, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW (2013) (discussing instances when corporations may be held criminally liable).

IV. Other Remedies for Corporate Human Rights Violations

If the Supreme Court decides in favor of the respondents in the *Jesner* case, this will bring to end federal court litigation under the ATCA against corporate defendants. Corporations would not, however, be completely immune from liability in the United States.[134] Instead, corporations could still face criminal liability in United States' courts, and corporate officers themselves could continue to face civil lawsuits for their individual roles in aiding and abetting human rights abuses.[135]

First, it is well established in United States' law that corporations may face criminal liability for various misdeeds.[136] Under federal law, corporations and other legal entities may be criminally liable for the crimes of their employees and agents.[137] Corporations face criminal liability for violations of regulatory offenses, such as the Federal Food, Drug, and Cosmetic Act, economic offenses, crimes in violation of the

134. *See id.* (detailing the Supreme Court view that corporations should be held responsible for their agents and are not immune).

135. *See id.* at 4 ("As a general rule, '[c]orporations may be held liable for specific intent offenses based on the 'knowledge and intent' of their employees.").

136. *See id.* at 3 (discussing instances when corporations are held liable for criminal offenses).

137. *See id*; *See also* United States v. Agosto-Vega, 617 F.3d 541, 552-53 (1st Cir. 2010) (holding a corporation liable for the criminal acts of its agent); United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1118 (D.C. Cir. 2009) (holding a corporation's intent is dependent on the wrongful intent of their employees); United States v. Singh, 518 F.3d 236, 249 (4th Cir. 2008) (recognizing a corporation's liability is dependent on the wrongful acts of their employees with the intent to benefit the corporation); United States v. Jorgensen, 144 F.3d 236, 249 (4th Cir. 2008) (finding that all the officers, agents, and employees were acting within the scope of his or her employment when the criminal act was committed); United States v. Investment Enterprises, Inc., 10 F.3d 263, 266 (5th Cir. 1993) (citing United States v. Bi-Co Paxers, Inc., 741 F.2d 730, 737 (5th Cir. 1984)); United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2nd Cir. 1989) (holding that an extensive compliance program does not immunize the corporation from liability); United States v. Gold, 743 F.2d 800, 822-23 (11th Cir. 1984) (finding that a corporate defendant is guilty if it can be found beyond a reasonable doubt that acts and omission committed are done by company employees within the scope of their employment); United States v. Beusch, 596 F.2d 871, 877-78 (9th Cir. 1979) (finding jury instructions saying that corporations are liable for the acts of an agent even if it's contrary to corporation's instructions proper); United States v. Carter, 311 F.2d 934, 941-42 (6th Cir. 1963) (acknowledging that corporations may be convicted of a crime through the conduct of its agents and employees).

securities laws, as well as common law crimes, such as prostitution.[138] Under "federal law, corporate criminal liability is ordinarily confined to offenses (a) committed by the corporation's officers, employees, or agents; (b) within the scope of their employment; and (c) at least in part for the benefit of the corporation."[139] The Model Penal Code, as well as numerous state statutes, provide for corporate criminal liability in case of significant misdeeds by senior corporate officers.[140] Thus, under United States' law, corporations, even if exempt from ATCA liability, would continue to face the possibility of criminal prosecution directed at the corporate entity itself.

Under international criminal law, corporations have not traditionally faced criminal liability.[141] The Nuremberg tribunal famously declined to prosecute the Farben and Krupp corporations and instead focused on prosecuting their corporate officers.[142] When the Rome Statute of the International Criminal Court was negotiated, the decision was made to exclude corporate liability from the statute – despite proposals to the contrary.[143] The statutes of other ad hoc tribunals, such as the Yugoslavia and Rwanda tribunals, also did not extend criminal responsibility to corporations.[144] However, more recently, international criminal law has been evolving to consider the concept of corporate criminal responsibility.[145] In addition, the Special Tribunal for Lebanon recently held contempt proceedings against a corporation,[146] and the new Malabo Protocol extended the jurisdiction

138. *See* Doyle, *supra* note 133, at 1.

139. *Id.* at 3.

140. *Id.* at 3-4.

141. Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L. L. 955, 955 (2008).

142. *See* U.N. War Crimes Comm'n, Law Rep. of Trials of War Criminals: Volume X, at 52, 151 (1949) (discussing the Farben and Krupp findings).

143. *See* Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 (3) NETH. INT'L. L. REV. Neth. 333, 334-35 (2009) (discussing the arguments made for and against the adoption of corporate liability into the Rome Statute).

144. *See id.* at 357-58 (noting that the tribunals focused primarily on the most responsible individuals and left lesser offenders to national mechanisms).

145. Int'l Comm'n of Jurists, *Corporate Complicity & Legal Accountability Volume 1: Facing the Facts and Charting a Legal Path*, at 1 (2008).

146. *See* Special Tribunal of Lebanon, Al Jadeed S.A.L. & Ms Khayat , https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05 [https://perma.cc/YS5A-U4ZR] (Last visited Nov. 11, 2017) (outlining the procedural holdings in the case against Al Jadeed S.A.L. and Ms. Khayat).

of the proposed African Court of Justice and Human and Peoples Right to corporations.[147] Thus, it may be argued that even under international criminal law, the concept of corporate criminal responsibility is an emerging norm. As the Appeals Chamber of the Special Tribunal for Lebanon held in the contempt case, "[c]orporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.".[148] In sum, corporations may face criminal liability under domestic law in the United States, and they may, in the near future, also face liability under international criminal law within future ad hoc tribunals.

Imposing criminal responsibility on corporations may be preferable to allowing lawsuits under the ATCA.[149] First, criminal prosecutions are initiated by prosecutors who often exercise tremendous discretion before initiating a potentially difficult corporate case.[150] In the case of foreign corporations, prosecutors could arguably exercise additional discretion to ensure that United States' foreign relations were not undermined. Private plaintiffs bringing lawsuits under the ATCA typically do not have foreign relations-based concerns and almost all scholars have recognized that ATCA lawsuits

147. Several scholars and international bodies are in favor of extending criminal liability to corporations. *See generally* Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q. 624 (2009); *see also* B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* 46 (1993) (arguing that corporations are in some ways even "better endowed than individuals" to be held responsible and punished); s*ee also* SPECIAL TRIBUNAL FOR LEBANON, *Al Jadeed S.A.L. & Ms Khayat (STL-14-05),* https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-05 [https://perma.cc/X6NY-96QM] (The Special Tribunal for Lebanon held contempt proceedings against a media company); *see also* Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), Art. 46C, https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf [https://perma.cc/B88X-BUS3] (The Malabo Protocol extends criminal liability to corporations).

148. In the case against New TV S.A.L and Al Khayat, Case No. STL-14-05, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 67 (Oct. 2, 2014) (Special Trib. for Lebanon).

149. *See* James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121, 154 (2014) (stating that the turn to criminal justice offers "both nuance and a greater degree of precision" than that in ATS litigation).

150. *See id.* at 184 (detailing the system of legal opportunities which influence prosecutorial discretion).

have significant potential to disrupt foreign relations.[151] Thus, criminal prosecutions against foreign corporations which may have aided and abetted in human rights abuses may be beneficial over privately-initiated lawsuits under the ATCA.

Second, corporations, if convicted in a criminal trial, may face stiff penalties and reputational harm.[152] Although ATCA plaintiffs have been, in some instances, able to collect significant damages from corporate defendants, damages in a private lawsuit produce much less reputational and financial harm than criminal penalties.[153] In addition, some ATCA plaintiffs have settled their cases against corporations, and in these instances, damages paid by the relevant corporation remain unknown and typically do little to harm the corporation's reputation.[154] Finally, criminal prosecutions against corporations for human rights violations may lead toward the drafting of more stringent legislation and regulations concerning corporations, which may ultimately lead toward improving corporate behavior.

Third, in addition to prosecuting corporations in the criminal system, corporate officers themselves may face both civil and criminal liability.[155] Even if the *Jesner* court were to foreclose corporate liability under the ATCA, the statute could remain to be used against individual corporate officers as defendants. In addition, corporate officers could face criminal liability in United States' courts, if plaintiffs can demonstrate that corporate officers somehow individually committed or contributed toward the commission of human rights violations.[156] While individual corporate officers' pockets may be less deep than those of multinational corporations and this

151. *See* Howe, *supra* note 1.

152. *See* Doyle, *supra* note 133, at 21 ("A corporation operated for criminal purposes or by criminal means should be fined at a level sufficient to strip it of all of its assets").

153. *See* Stewart, *supra* note 149, at 179-180 (discussing the "expressive function" of criminal law).

154. According to a 2009 report, several ATCA cases have resulted in settlements where plaintiffs have been able to collect judgment. *See Alien Tort Statute Cases Resulting in Plaintiff Victories*, THE VIEW FROM LL2 (Nov. 11, 2009) https://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/ [https://perma.cc/D8TA-8PNG].

155. *See* Stewart, *supra* note 149, at 142 (noting that some jurisdictions begin with cases against corporate officers and resort to the corporation only when those cases fail).

156. *See* Wolfgang Kaleck & Miriam Saage-Maa, *Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges*, 8 J. INT'L CRIM. JUST. 699, 703 (2010) (explaining that several cases against individual officers have been brought before civil and criminal courts in the U.S.).

option less attractive to ATCA plaintiffs, ATCA-based lawsuits against corporate officers combined with criminal prosecutions against corporations would go a long way toward deterring future corporate human rights violations.[157] This general outcome may benefit ATCA plaintiffs as a class of individuals having suffered human rights violations, with a significant interest in preventing and deterring future abuses.[158]

CONCLUSION

While it remains uncertain how the Supreme Court will decide in *Jesner*, the case will hopefully clarify *Kiobel*'s uncertainties with respect to the presumption of extraterritoriality, and with respect to the issue of applicable law.[159] It is this author's opinion that in light of the way in which the Supreme Court formulated the legal issue, and in light of the fact that the Court granted certiorari only four years post-*Kiobel*, the Court will more likely rule in favor of the plaintiffs/petitioners. If the Court were to rule in favor of the plaintiffs/petitioners, it will most likely issue a narrow holding which will limit future ATCA cases against corporations to only certain types of claims (like terrorism) and to corporations with significant nexus to the United States. Furthermore, if the Court were to rule in favor of extending ATCA liability to corporations, it is likely that the Court would decide that the issue of corporate liability itself should be governed by domestic law, as opposed to international law. Finally, even if the Court were to rule in favor of the defendants/respondents, foreclosing corporate liability under the ATCA, corporations could still face judicial scrutiny in the United States. Corporations would continue to face criminal liability in United States' courts (which may be preferable to private lawsuits under the ATCA), and corporate officers themselves would continue to face both civil and criminal

157. *See* Mordechai Kremnitzer, *A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 J. INT'L CRIM. JUST. 909, 915 (2010) (arguing that the impact of criminal prosecution on a corporation's good name is "graver" and "…adds to the deterrent effect").

158. *See Developments in the Law - International Criminal Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2041 (2001) (explaining that judgments would have a "general deterrent effect" by incentivizing corporations to internalize liability considerations).

159. *See* Transcript of Oral Argument at 27, Jesner v. Arab Bank, PLC, No. 16-499 (U.S. Oct. 11, 2017) (counsel for the U.S. acknowledging that the Second Circuit had not reached the extraterritoriality question because "…it relied on its rule that a corporation can never be a defendant in an Alien Tort Statute.").

liability.[160] It is thus this author's opinion that despite the relatively high likelihood that the Supreme Court will decide in favor of plaintiffs/petitioners, it would be preferable to limit corporate liability under the ATCA. International law does not contain a universal norm on civil corporate liability, and criminal prosecutions against corporations and judicial processes directed against corporate officers may deter future corporate misbehavior better than an ATCA-based private lawsuit, without disrupting United States' foreign relations.[161]

160. *See* Stewart, *supra* note 149, at 142 (describing the ATS as similar to other "safety net[s]" allowing the prosecution of individuals when a corporation is immune).

161. *See* Daniel Prince, *Corporate Liability For International Torts: Did The Second Circuit Misinterpret The Alien Tort Statute?*, 8 SETON HALL CIR. REV. 43, 57 (2012) (noting that corporate liability has not "ripened into a specific, universal, obligatory norm of international law").