NOTES

THE LIABILITY OF CORPORATE DIRECTORS, OFFICERS, AND EMPLOYEES UNDER THE ALIEN TORT STATUTE AFTER *JESNER V. ARAB BANK, PLC*

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The Supreme Court's 2018 Jesner v. Arab Bank, PLC *decision caused uncertainty for future and ongoing Alien Tort Statute (ATS) litigation in federal courts. In holding that foreign corporations are not subject to liability under the ATS, the Court foreclosed one avenue human rights plaintiffs have sought to use for the past few decades to garner attention, and in some cases receive significant monetary settlements, for the abuses. Further, the Court's decision cast doubt on whether domestic corporations remain subject to the ATS given the weight the Court placed on separation of powers concerns in its decision. While foreign corporations, and perhaps domestic corporations, can no longer be haled into federal court using the ATS, both the* Jesner *Court and commentators suggest that plaintiffs are not without a remedy—the corporate officials responsible for the human rights violations remain liable.*

This Note argues that suits against corporate officers, directors, and employees raise complicated choice of law issues the Court has avoided addressing in ATS suits against corporations, but courts will be forced to address in suits against individual corporate officials. The Note finds that the choice of law determination on ancillary liability issues will prove outcome determinative in these cases given the different liability laws for corporate officials in different jurisdictions. This factor will create significant uncertainty for courts and litigants about whether cases against corporate officers, directors, and employees can be brought under the ATS, as the Court's current ATS jurisprudence provides little direction for resolving choice of law issues in ATS cases. The Note proposes that federal courts require the applicable choice of law inquiry to yield the conclusion that U.S. law (state or federal) controls all aspects of the case beyond the substantive allegation of a violation of the law of nations for any suit against a corporate official to be cognizable using the ATS.

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INTRODUCTION

When the Supreme Court held in *Jesner v. Arab Bank, PLC* that foreign corporations cannot be held liable under the Alien Tort Statute (ATS), Justice Kennedy justified the decision by writing: "If the Court . . . [held] that foreign corporations have liability for international-law violations, then plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities."[1] After all, Kennedy noted, "plaintiffs still can sue the individual corporate employees responsible."[2] The Second Circuit made the same point as Justice Kennedy in its *Kiobel v. Royal Dutch Petroleum Co.* opinion foreclosing ATS liability for corporations, both foreign and domestic. The court specified that its holding did not "limit[] or foreclose[] suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation."[3]

However, the expected suits against individual corporate officers, directors, and employees after *Jesner* raise a host of issues for ATS plaintiffs and courts. Because foreign corporations can no longer be found liable using the ATS, and significant doubt exists about whether domestic corporations can be sued under the statute,[4] plaintiffs have little choice but to sue individual corporate officers, directors, and employees to invoke ATS jurisdiction.[5] While few such cases have been brought in the past, that is already beginning to change.[6] As a practical

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1. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405 (2018).

2. Id.

3. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 122 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013).

4. While the Court only held that foreign corporations could not be sued under the ATS, a debate has ensued about whether any corporation could be sued under the ATS post-*Jesner*. In a concurring opinion, Justice Alito claimed that "[b]ecause this case involves a foreign corporation, we have no need to reach the question whether an alien may sue a United States corporation under the ATS." *Jesner*, 138 S. Ct. at 1410 n.* (Alito, J., concurring). Some scholars have emphasized that while the Court did not foreclose suing domestic corporations, there are a host of reasons suggesting that corporate defendants will be able to use *Jesner* to try to limit the ATS to suits against individuals. See infra notes 55–59 and accompanying text. This Note does not take a position in the debate and instead focuses only on ATS jurisdiction over individual corporate directors, officers, and employees.

5. See Chimène Keitner, ATS, RIP?, Lawfare (Apr. 25, 2018), https://www.lawfareblog.com/ats-rip [https://perma.cc/VQ8U-VZBF]; see also infra text accompanying notes 55–60.

6. See Doe v. Drummond Co., 782 F.3d 576, 580 (11th Cir. 2015) (describing plaintiffs' ATS allegation that corporate officials supported a paramilitary group that committed international law violations); Aragon v. Che Ku, 277 F. Supp. 3d 1055, 1061 (D. Minn. 2017) (describing plaintiffs' ATS claim alleging both corporations and the CEOs of the corporations engaged in forced labor in violation of international law); In re Chiquita Brands Int'l, Inc., 190 F. Supp. 3d 1100, 1104 (S.D. Fla. 2016) (describing plaintiffs' ATS

matter, given current indemnification policies, corporations may end up paying judgments in these cases anyway.[7] However, suits against corporate officers, directors, and employees raise a thicket of complicated legal issues—including choice of law,[8] personal jurisdiction,[9] and standards for aiding and abetting liability[10]—that are not as complicated in cases against corporations. And these issues are in addition to the restrictions in ATS suits previously articulated by the Court.[11]

This Note addresses one of those complicated issues that is likely to be outcome determinative in suits against corporate officers, directors, and employees: choice of law. Choice of law issues in ATS cases have always been present and engender significant debate when they arise.[12] Rather than making conclusive judgments about what substantive law governs ATS cases, scholars and courts often avoid the question, or claim the debate is "inconsequential" and that the result would be the same under international law, domestic law, or foreign law.[13] However, as this

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claim against corporate officers alleged to have knowingly helped a paramilitary organization commit international law violations by providing funding); see also infra section I.C.2. Plaintiffs are already beginning to proceed with suits originally filed against foreign corporations before *Jesner* by dropping the corporations from the suit and instead suing the foreign corporation's directors. See, e.g., Nahl v. Jaoude, 354 F. Supp. 3d 489, 495 n.2 (S.D.N.Y. 2018) ("Unlike the Previous Complaint, the Proposed Complaint no longer names corporate entities . . . as Defendants, presumably because Plaintiffs have no viable ATS claim against such entities.").

7. Dan A. Bailey, Bailey Cavalieri, Director and Officer Indemnification 2 https://baileycav.com/site/assets/files/1431/director_and_officer_indemnification.pdf [https://perma.cc/L4WY-2VPA] (last visited Jan. 18, 2019) (noting that in the United States, indemnification statutes exist in all states that either permit or require indemnification of the corporation when officers and directors are sued in their individual capacities for actions taken on behalf of the corporation).

8. See infra Part II.

9. See Amy Howe, An Introduction to the Alien Tort Statute and Corporate Liability, SCOTUSblog (July 24, 2017), http://www.scotusblog.com/2017/07/introduction-alien-tort-statute-corporate-liability-plain-english/ [https://perma.cc/75KU-5LQM] (noting that plaintiffs arguing for corporate liability claim such liability is the only way to achieve accountability for violations given the difficulties of establishing jurisdiction, getting judgments, and deterring future violations in suits against individuals).

10. See infra section II.C.2.

11. These include limiting when courts can create causes of action, Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004), applying the presumption against extraterritoriality to the ATS, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013), and categorically excluding foreign corporations from suit, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018).

12. Beth Stephens, Judith Chomsky, Jennifer Green, Paul Hoffman & Michael Ratner, International Human Rights Litigation in U.S. Courts 36 (2d ed. 2008) (noting "what body of law governs particular issues "is among the most unsettled" ATS issues, and because "[f]ederal common law crafts rules by choosing among multiple sources of law . . . international law, federal statutory law, federal common law, state law, and foreign law may all govern one or more . . . issues").

13. See, e.g., Jennifer M. Green, Corporate Torts: International Human Rights and Superior Officers, 17 Chi. J. Int'l L. 447, 452 (2017) ("Under international and domestic

Note shows, choice of law issues in ATS suits against individual corporate officials will often prove outcome determinative.[14] This factor, when combined with the Supreme Court's other limitations on ATS jurisdiction, creates significant uncertainty for courts and litigants about whether cases against corporate officials for human rights violations can be brought under the ATS.[15] This Note proposes a solution to clarify the legal standard in such cases that will benefit both litigants and courts: U.S. courts should permit ATS suits against corporate officials only if the applicable choice of law inquiry yields the conclusion that U.S. law (state or federal) controls all aspects of the case beyond the substantive allegation of a violation of the law of nations.[16]

Part I provides a brief history of ATS jurisprudence and addresses the current law surrounding the liability of corporate officials in the ATS context. Part II addresses the significant choice of law problems courts will face in transnational ATS suits against corporate officials, directors, and employees. Part II further shows that choice of law may prove outcome determinative on the ancillary issues in ATS cases against corporate officers, and that current ATS jurisprudence provides courts little guidance on how to resolve choice of law issues. Part III provides a possible solution to the problem, arguing that courts should require the choice of law inquiry to yield U.S. law applies to the ancillary aspects of ATS cases against corporate officials for ATS jurisdiction to vest at all.

I. THE ALIEN TORT STATUTE AND CORPORATE OFFICER LIABILITY

This Part briefly examines the history of ATS litigation through *Jesner v. Arab Bank, PLC*. Then, this Part discusses the secondary liability standards under which corporate officers could be held liable under the ATS for substantive international law violations. Next, this Part reviews cases brought against individual corporate directors and officers under the ATS to provide background on the approaches that plaintiffs are

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law, corporate officers can and should be held liable under a superior responsibility standard for human rights violations that constitute torts . . . ."); Beth Van Schaack, The Inconsequential Choice-of-Law Question Posed by *Jesner v. Arab Bank*, 24 ILSA J. Int'l & Comp. L. 359, 361 (2018) (declaring that "regardless of whether courts look to U.S. law or to international law, the ATS supports corporate tort liability").

14. See infra section II.C.

15. See infra section II.D.2.

16. There is a minority view that the ATS refers only to the identity of the alien plaintiff and not the substantive law at all. See Thomas H. Lee, The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations, 89 Notre Dame L. Rev. 1645, 1652 (2014) [hereinafter Lee, Three Lives] (explaining that "[t]he words 'in violation of the law of nations or a treaty of the United States' were necessary to specify which aliens could sue, not to specify the body of law that originated the claim" (citations omitted) (quoting 28 U.S.C. § 1350 (2012))). For a detailed explanation of that view, see generally Thomas H. Lee, The Safe-Conduct Theory of the Alien Tort Statute, 106 Colum. L. Rev. 830, 871–900 (2006) [hereinafter Lee, Safe Conduct].

likely to pursue in suing individual corporate officials for their involvement in the commission of human rights abuses.

A. *Alien Tort Statute Litigation Pre-*Jesner

The ATS was originally enacted as part of the Judiciary Act of 1789, the statute that established the federal courts and created their respective jurisdictions.[17] The ATS provides U.S. district courts "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."[18] Recent scholarship has demonstrated that the statute was understood, at the time it was passed, to provide a "credibly neutral forum" in federal courts for businesspeople from Europe to litigate disputes "for which the United States bore responsibility under contemporaneous international law . . . in cases of property damage or personal injury."[19] However, the statute was rarely invoked until the late twentieth century.[20]

In 1980, plaintiffs alleging human rights abuses abroad successfully invoked the ATS in *Filartiga v. Pena-Irala*, a landmark decision of the Second Circuit.[21] Paraguayan citizens Joel and Dolly Filartiga sued Pena-Irala, a Paraguayan citizen and police inspector general who was in Brooklyn after overstaying his visa, for wrongfully causing the death of their son and brother (respectively) in Paraguay by torture.[22] The court found that the law of nations includes a "clear and unambiguous" prohibition on state-sponsored torture and permitted the plaintiffs to proceed with their case.[23] This marked the first time a court used the ATS in so-called "'foreign-cubed suits': suits by foreigners against other foreigners based on acts in a foreign country."[24]

The Second Circuit's holding led to other human rights plaintiffs seeking redress under the ATS in federal courts. In the years following *Filartiga*, U.S. courts found jurisdiction under the ATS over claims involving "genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, and crimes against humanity."[25] The majority of these claims

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17. See Jennifer K. Elsea, Cong. Research Serv., RL32118, The Alien Tort Statute: Legislative History and Executive Branch Views 4–5 (2003).

18. 28 U.S.C. § 1350.

19. Lee, Three Lives, supra note 16, at 1646.

20. See Lee, Safe Conduct, supra note 16, at 832 n.6 (listing the cases in which the ATS appeared in a decision prior to the 1980s, and noting that district courts only found jurisdiction in two of the cases).

21. 630 F.2d 876, 887 (2d Cir. 1980).

22. See id. at 878–79.

23. See id. at 884.

24. See Lee, Three Lives, supra note 16, at 1647 (describing how the ATS was "recast . . . [to give] a congressional license for aliens to bring lawsuits in U.S. federal courts alleging international human rights claims occurring anywhere in the world").

25. Elsea, supra note 17, at 15–16 (citations omitted).

were brought under customary international law—the "law of nations" prong of the ATS—which forced American courts to face seemingly intractable problems of norm identification and any such norm's status as federal law.[26]

In the Supreme Court's first ATS case in 2004, *Sosa v. Alvarez-Machain*,[27] the Court ratified *Filartiga*'s core holding of authorizing suit for customary international law violations but sought to place limitations on ATS suits. Before *Sosa*, there was significant debate among courts and commentators as to whether the ATS authorized a federal cause of action.[28] The Court held that the ATS was jurisdictional and did not create a cause of action, but that the First Congress must have assumed that the statute would have some effect, even without a future specification of a federal cause of action.[29] Accordingly, the Court concluded that, by enacting the ATS, Congress intended to allow aliens to sue in federal district court for "violation[s] of safe conducts, infringement of the rights of ambassadors, and piracy."[30] The Court reasoned that the ATS would be available for violations of the "present-day law of nations" if plaintiffs can show their claim "rest[s] 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 we have recognized."[31]

Sosa created a two-step test for courts to determine whether it would be appropriate to recognize a cause of action in ATS cases. First, courts were directed to "ensure that the contemplated cause of action reflects an international law norm that is "'specific, universal and obligatory.'"'"[32] This required courts to limit ATS jurisdiction to cases involving "violations of . . . international law norm[s]" that are as specific and universally accepted as "the historical paradigms familiar when § 1350 was enacted."[33] Then, "if a suitable norm is identified, federal courts should

26. See Lee, Three Lives, supra note 16, at 1665–66 (describing the typical ATS cases brought after *Filartiga*, which involved suing U.S. corporations over human rights violations by repressive regimes done at the behest, and for the benefit, of the corporations' subsidiaries in developing countries).

27. 542 U.S. 692 (2004).

28. See, e.g., Kenneth C. Randall, Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. Int'l L. & Pol. 1, 34–38 (1985) (describing the origins of the debate over whether the ATS creates a cause of action). In the famous case igniting the debate, *Tel-Oren v. Libyan Arab Republic*, Judge Robert Bork referred to the ATS as only jurisdictional and believed a federal cause of action needed to attach for a case to proceed. See 726 F.2d 774, 804 (D.C. Cir. 1984) (Bork, J., concurring). Judge Harry Edwards disagreed and argued that the ATS itself creates a federal cause of action to sue under the "law of nations." See id. at 777 (Edwards, J., concurring).

29. *Sosa*, 542 U.S. at 713, 719.

30. See id. at 724–25.

31. Id. at 725.

32. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1409 (2018) (Alito, J., concurring) (quoting *Sosa*, 542 U.S. at 732).

33. *Sosa*, 542 U.S. 732.

decide whether there is any other reason to limit 'the availability of relief.'"[34] This second step requires plaintiffs to have "exhausted any remedies available in [their] domestic legal system" and enables courts to consider "case-specific deference to the political branches."[35] As a result, while *Sosa* affirmed the ability of federal courts to create causes of action in ATS cases, the decision placed significant limitations on this ability that would become important in later cases.

The most significant limitation the Supreme Court placed on ATS jurisdiction prior to *Jesner*, however, came from its limitation on the extraterritorial application of the ATS in *Kiobel v. Royal Dutch Petroleum Co.* in 2013.[36] In the decade leading up to *Kiobel*, human rights groups sought to extend ATS suits to international corporations.[37] The result was a significant curtailment of the statute's use by the Supreme Court. Nigerian plaintiffs living in the United States sued Royal Dutch Petroleum Company and Shell Transport and Trading Company, as well as their joint Nigerian subsidiary, under the ATS for violations of the law of nations in Nigeria.[38] The companies, which were conducting oil exploration in Nigeria, were accused of aiding and abetting attacks on plaintiffs' villages by Nigerian police and military forces by "providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use [the plaintiffs'] property as a staging ground for attacks."[39] The Court concluded that the suit could not be brought under the ATS.[40] The Court found that the "presumption

34. *Jesner*, 138 S. Ct. at 1409 (Alito, J., concurring) (quoting *Sosa*, 542 U.S. at 733 n.21).

35. *Sosa*, 542 U.S. at 733 n.21.

36. 569 U.S. 108, 117 (2013) (declaring "[t]he principles underlying the presumption against extraterritoriality . . . constrain courts exercising their power under the ATS," and requiring that the presumption be applied in ATS cases).

37. This approach had three clear advantages for ATS plaintiffs. First, ATS litigation against corporations brought the possibility of obtaining significant monetary judgments for plaintiffs, something the earlier ATS litigation against governmental actors failed to produce. See Michael J. Bazyler, Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World 180 (2016) (describing how "the ATS plaintiffs' bar was not satisfied with . . . paper judgments," and so began targeting multinational corporations to try to get monetary awards). Second, suing corporations provided the possibility of curtailing human rights abuses perpetrated by foreign governments with the help of international corporations. Cf. Doug Cassel, Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts, 6 Nw. U. J. Int'l Hum. Rts. 304, 305–06 (2008) (listing the ATS cases brought against corporations for actions "allegedly aiding and abetting human rights violations"). Third, corporations "may possess a great deal of economic leverage over target countries," so forcing corporations to comply with international human rights norms through litigation has the potential to "signal" to governmental regimes the importance of complying. See Robert Knowles, A Realist Defense of the Alien Tort Statute, 88 Wash. U. L. Rev. 1117, 1175 (2011).

38. *Kiobel*, 569 U.S. at 111–13.

39. Id. at 113.

40. Id. at 124.

against extraterritoriality," the canon of statutory interpretation that congressional statutes are presumed to only apply in the United States unless there is evidence to the contrary in the legislation, "applies to claims under the ATS."[41] Plaintiffs seeking to use the ATS were required to prove that their claims "touch and concern" U.S. territory.[42] Since "all the relevant conduct took place outside the United States" in *Kiobel*, the plaintiffs could not overcome the "presumption against extraterritoriality."[43] The "touch and concern" test closed the door on many ATS suits being brought in American courts for international human rights violations without connections to the United States.[44] Moreover, the scholarship that followed *Kiobel* and suggested ways to overcome the presumption has largely not been followed by courts.[45] *Kiobel*'s "touch and concern" test thus became the most significant limitation placed on the ATS pre-*Jesner*.

B. Jesner*'s Categorical Exclusion of Foreign Corporations*

Multinational corporations remained in the crosshairs of ATS litigation post-*Kiobel*, albeit with a strong presumption that the ATS did not apply to claims arising from conduct outside of the United States. Then, the Supreme Court dealt its final, and some suggest fatal, limitation on ATS human rights litigation in *Jesner*.[46] Arab Bank was accused of financing terrorist attacks in the Middle East by groups such as Hamas.[47] Little dispute exists that the conduct alleged to violate the law of nations in the case happened in the Middle East, not in the United States. To satisfy *Kiobel*'s "touch and concern" test, plaintiffs made two allegations of conduct that occurred in the United States. First, plaintiffs claimed that the money used to fund terrorist groups came through the New York

41. Id.

42. Id. at 124–25.

43. Id. at 124.

44. See, e.g., Julian G. Ku, *Kiobel* and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute, 107 Am. J. Int'l L. 835, 835 (2013) (describing *Kiobel*'s significance as the Supreme Court's "reject[ion] [of] decades of lower-court precedent and widespread scholarly opinion [in holding] that the ATS excluded cases involving purely extraterritorial conduct").

45. Numerous pieces of scholarship following *Kiobel* suggested ways the presumption against extraterritoriality could be rebutted that extended beyond sufficient domestic conduct. See, e.g., Sarah H. Cleveland, After *Kiobel*, 12 J. Int'l Crim. Just. 551, 555 (2014) (arguing that "claims involving conduct on US territory, perpetrators who are US nationals or domiciled in the United States, and other suits implicating important US national interests, including piracy and the United States' important interest in denying safe haven" can still be brought under the ATS post-*Kiobel*). However, in *RJR Nabisco, Inc. v. European Community*, the Court clarified that the relevant conduct must occur in the United States to overcome the presumption against extraterritoriality in ATS cases. See 136 S. Ct. 2090, 2101 (2016).

46. 138 S. Ct. 1386 (2018).

47. Id. at 1394.

branch of Arab Bank by way of dollar-denominated transactions.[48] Second, plaintiffs claimed that the "New York branch was used to launder money for . . . a Texas-based charity . . . [alleged to be] affiliated with Hamas."[49] In a 5-4 decision, the Supreme Court held that the ATS cannot be used to get jurisdiction over foreign corporations.[50]

The Court applied the two-step *Sosa* test discussed above but declined to make a definitive conclusion on the first step.[51] The Court noted the significant debate over whether corporate liability should be determined by international or domestic law, and whether international law includes a "specific, universal, and obligatory" norm that corporations can be held liable for human rights violations.[52] Instead, the Court decided the case could not move forward on *Sosa*'s second step, which the Court rewrote to ask: "[W]hether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS."[53] Given the separation of powers concerns with creating a cause of action that would enable plaintiffs to sue foreign corporations under the ATS, the Court held that foreign corporations are categorically immune from ATS suits "absent further action from Congress."[54]

While the Court's holding was limited to foreign corporations, Justice Kennedy's majority opinion suggests further limitations that may exclude domestic corporations from ATS suits. First, Kennedy writes in dicta that "the international community has not yet taken th[e] step" to recognize corporate liability for human rights violations, "at least in the specific, universal, and obligatory manner required by *Sosa*."[55] Therefore,

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48. Id.

49. Id. at 1395.

50. Id. at 1407.

51. Id. at 1402.

52. Id.

53. Id. It should be noted that *Sosa*'s second step was originally formulated by the Court as requiring "an element of judgment about the practical consequences of making [the] cause [of action] available to litigants in the federal courts." Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 (2004). The Supreme Court's formulation of *Sosa*'s second step in *Jesner* is closer to the "case-specific deference to the political branches" mentioned in a *Sosa* footnote. Id. at 733 n.21. Justice Kennedy's move to make deference to Congress the main element of the inquiry in *Jesner* suggests a shift toward judicial minimalism on ATS cases aimed at encouraging Congress to amend the ATS to give courts further guidance. This is supported by the remainder of Justice Kennedy's opinion. See *Jesner*, 138 S. Ct. at 1402–07 (detailing the separation of powers concerns with extending a cause of action to sue foreign corporations and declaring that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations").

54. See *Jesner*, 138 S. Ct. at 1403, 1408.

55. Id. at 1402. However, commentators have pointed out that Kennedy's claim that international law does not currently recognize such a norm is only dicta in *Jesner*, and in a part of the opinion that received only three votes, with Justices Alito and Gorsuch

even though U.S. corporations "are often subject to liability for the conduct of their human employees," this does not mean those corporations are subject to the same liability as a matter of international law, which would make it difficult to sue *any* corporation using the ATS.[56] Second, Kennedy's opinion evinces a strong reticence to creating new causes of action using the ATS, which would be required to hold any corporation, foreign or domestic, liable for violations of the law of nations.[57] Lower courts have already used *Jesner*'s skepticism toward creating new causes of action to dismiss ATS cases, as well as other cases, post-*Jesner*.[58] Third, since foreign subsidiaries of U.S. corporations are now exempt from ATS liability, ATS plaintiffs will be forced to "find tortious conduct on the part of the parent itself," which due to *Kiobel*'s "touch and concern" test, must occur in the territorial United States.[59] This will be difficult in the vast majority of ATS cases, as both the harm and most direct violations of international law usually occur overseas. Due to the doubts raised in *Jesner* as to whether corporations can be sued at all, commentators have

declining to join. See William S. Dodge, Corporate Liability Under the US Alien Tort Statute: A Comment on *Jesner v. Arab Bank*, 4 Bus. & Hum. Rts. J. 131, 134–35, 134 n.22 (2019) (noting that Justices Alito and Gorsuch wrote separate concurrences and declined to join any part of Kennedy's opinion that went beyond limiting suits to foreign corporations).

56. See *Jesner*, 138 S. Ct. at 1402.

57. See id. at 1402–03 (describing the Supreme Court's "general reluctance to extend judicially created private rights of action" in recent cases, and arguing that "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS"); see also Supreme Court Holds Foreign Corporations Cannot Be Liable Under the Alien Tort Statute, Business Litigation Reports, Quinn Emmanuel (Oct. 2018), https://www.quinnemanuel.com/the-firm/news-events/article-october-2018-supreme-court-holds-foreign-corporations-cannot-be-liable-under-the-alien-tort-statute/ [https://perma.cc/9N7W-VRH9] [hereinafter Foreign Corporations Not Liable] (noting that "courts may rely on *Jesner* to construe the ATS and other federal statutes conservatively to avoid improperly creating or extending judicially-created private rights of action").

58. See, e.g., Kirtman v. Helbig, No. 4:16-cv-2839-AMQ, 2018 WL 3611344, at *5 (D.S.C. July 27, 2018) (declining to create a new *Bivens* cause of action in part because "[t]he Court has clearly expressed its 'general reluctance to extend judicially created private rights of action'" (quoting *Jesner*, 138 S. Ct. at 1402)), aff'd per curiam, 764 F. App'x 288 (4th Cir. 2019); Nahl v. Jaoude, No. 15 Civ. 9755 (LGS), 2018 WL 2994391, at *5 (S.D.N.Y. June 14, 2018) (declining to "extend[] ATS liability to money laundering" because money laundering is not a violation of international law and *Jesner* cautions against creating new causes of action).

59. See Dodge, supra note 55, at 135–36; see also Doe v. Nestle, 906 F.3d 1120, 1127 (9th Cir. 2018) (remanding an ATS suit "to allow plaintiffs to amend their complaint" in light of the Supreme Court's decision in *Jesner* "to specify whether . . . conduct that took place in the United States is attributable to the domestic corporations in th[e] case").

suggested that suits against individual corporate officials are likely to become more common post-*Jesner*.[60] This is where we turn next.

C. *ATS Liability for Corporate Officials: International Law and Pre-*Jesner *ATS Litigation*

Given *Jesner*'s limitations on corporate liability, including exempting foreign corporations from ATS liability and the possibility that corporations cannot be sued at all, this section examines the law surrounding individual corporate officials' liability under the ATS in their individual capacities. Section I.C.1 shows there is some evidence of an international law norm that corporate officers can be held liable for human rights violations, which will enable plaintiffs to bring claims against the officials under the ATS. Section I.C.2 will detail the ATS cases against individual corporate officials that have been brought so far.

1. *Evidence of an International Norm.* — The idea of holding individual corporate actors—whether directors, officers, or other employees—liable for human rights violations has some basis in international law. While there is no question that individuals who directly commit the violations can be held liable, liability for defendants further removed from the tortious acts is a more complicated question. Two doctrines are relevant here: superior or command responsibility and aiding and abetting.

According to superior responsibility under the Rome Statute, the treaty establishing the International Criminal Court (ICC), superiors can be held "responsible for crimes . . . committed by subordinates under [their] effective authority and control, as a result of [their] failure to exercise control properly over such subordinates."[61] In the corporate officer context, superior responsibility would make corporate officers liable for international law violations committed by employees of a corporation even if they did not know the violations were being committed.

However, there is not a sufficiently defined international norm for holding corporate officers liable for international law violations under the doctrine. Professor Jennifer Green has studied the application of superior responsibility to the corporate context and suggests the doctrine

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60. See Foreign Corporations Not Liable, supra note 57 (suggesting that the Court's reluctance to apply human rights norms to corporations in *Jesner* will lead to litigation against individual members of a corporation's management).

61. Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). Professor Jennifer Green defines the superior responsibility doctrine as "conduct-focused": "whether superiors demonstrated a culpable failure to take reasonable steps to prevent or punish international crimes of those under their control." Green, supra note 13, at 479. Green finds that tribunals today considering culpability under the superior responsibility doctrine ask "whether a superior (1) has 'effective control' over subordinates, (2) knew or had reason to know about the alleged violation, and (3) failed to take measures to prevent the abuse or punish the perpetrator." Id. at 485.

has already been applied to corporate officers for international law violations.[62] She presents two instances in which superior responsibility has been used. First, Green highlights its use during the Nuremburg Military Trials to hold industrialist defendants liable for international law violations.[63] Second, she notes that the International Criminal Tribunal for Rwanda found that "corporate officials with effective control over their subordinates" could be found liable when they "'knew or had reason to know' subordinates were about to commit crimes and failed to prevent or punish acts inciting genocide."[64] These two instances are likely insufficient for the "specific, universal, and obligatory" international norm required by *Sosa*. As Justice Kennedy notes in his *Jesner* opinion, the Rome Statute's drafters "considered, but rejected, a proposal to give the International Criminal Court jurisdiction over corporations," which suggests the norm for holding corporations, and their officers, liable under the superior responsibility doctrine does not yet meet the *Sosa* standard.[65] Moreover, the superior responsibility doctrine has never been extended by a court to corporate officers in an ATS case because it is generally used in the military, not corporate, context.[66] Therefore, there does not seem to be an international law norm sufficiently definite to hold directors and officers liable in their individual capacities under the superior responsibility doctrine.

Evidence of an international norm for holding individual corporate officials liable for aiding and abetting the commission of human rights violations does exist. Aiding and abetting is the more common form of secondary liability used in ATS cases, especially in the corporate context.[67] One prominent historical example of aiding and abetting

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62. Green, supra note 13, at 478–79.

63. Id. at 481–82.

64. Id. at 487 (quoting Nahimana v. Prosecutor, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 484 (Int'l Crim. Trib. for Rwanda Nov. 28, 2007)).

65. See Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1401 (2018). Kennedy also cites both the Nuremberg and Rwanda cases directly in *Jesner* in an attempt to determine whether there is an international norm for corporate liability and does not consider them sufficient authority on that question either. See id. at 1400–01. Therefore, this calls into question using evidence only from past war crimes tribunals to determine whether a sufficient international norm has been violated, at least to meet the *Sosa* standard.

66. See Green, supra note 13, at 501 ("[N]o court, in any jurisdiction, has ever extended the doctrine of superior responsibility in ATS . . . cases to the corporate officers of private companies . . . because command responsibility is a military doctrine." (internal quotation marks omitted) (quoting Giraldo v. Drummond Co., No. 2:09-CV-1041-RDP, 2013 WL 3873960, at *4 (N.D. Ala. July 25, 2013), aff'd sub nom. Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015))).

67. See Cassel, supra note 37, at 305–06 (listing cases brought against corporations for aiding and abetting human rights violations). While aiding and abetting has been used to hold individual corporate actors responsible for human rights violations in ATS cases, whether the requisite mens rea for aiding and abetting is "knowledge" or "purpose" is disputed. See id. at 308–15.

liability for corporate officials comes from the Nuremberg trials.[68] In the *Zyklon B Case*, a business owner and employee were sentenced to death for selling the toxin to concentration camps and thereby guilty of aiding and abetting the mass murder committed by the Nazis.[69] In that case, "knowledge" of the concentration camps' intentions for using the Zyklon B was enough to convict the individuals.[70] The Second Circuit applies a higher standard for aiding and abetting human rights violations. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, a Second Circuit panel adopted "purpose" as the mens rea for aiding and abetting human rights violations, which the court said is the "standard . . . under international law."[71] However, the opinion does not cite any source of international law for the "purpose" standard.[72] While there may be a debate about the mens rea standard for aiding and abetting human rights violations, it is clear that sufficient international consensus exists that corporate officials aiding and abetting human rights violations is against international law.

Evidence from international criminal tribunals helps establish that individual corporate actors, whether directors, officers, or employees, can be held liable for human rights violations under the doctrine of aiding and abetting but not under superior responsibility. Given the evidence, courts will likely have an easier time deciding whether a "specific, universal, and obligatory" international norm applies to individual corporate actors to satisfy *Sosa* step one because the question of whether "individuals" can be held liable for human rights violations is more settled than that of corporations.[73] However, it is important to be aware of the limitations on this secondary liability, as the corporate officials must act with a "knowledge" or "purpose" mens rea to be held liable. As the next section shows, this conclusion aligns with the approach taken by courts that have decided the question in the ATS context.

2. *History of ATS Cases Against Individual Corporate Officials.* — While there are few ATS suits against individual corporate officials, courts that have considered the issue have allowed cases to proceed under the current doctrine. The ability to sue individual, nongovernmental actors for "law of nations" violations has been recognized since at least the Sec-

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68. See Matthew Lippman, War Crimes Trials of German Industrialists: The "Other Schindlers," 9 Temp. Int'l & Comp. L.J. 173, 181 & n.79 (1995).

69. See Zyklon B Case: Trial of Bruno Tesch & Two Others, 93, 94, 102 (Brit. Mil. Ct., Hamburg, Ger., 1946); see also Cassel, supra note 37, at 308 (describing the case); Lippman, supra note 68, at 181–82 (same).

70. See Zyklon B Case at 101; Cassel, supra note 37, at 308.

71. 582 F.3d 244, 247 (2d Cir. 2009).

72. See id. But see Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 276 & nn.10–11 (2d Cir. 2007) (Katzmann, J., concurring) (describing the "purpose" mens rea for accomplice liability as "entirely consistent" with several sources of international law).

73. See Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399, 1402 (2018).

ond Circuit's decision in *Kadic v. Karadzic*.[74] The defendant in that case, one of the three presidents of the Bosnian-Serb Republic, which was not a state, claimed that the alleged war crimes could not have violated international norms because those "norms bind only states and persons acting under color of a state's law, not private individuals."[75] The Second Circuit disagreed.[76] The court cited historical examples including piracy, slavery, and war crimes to show that courts have held that law of nations violations can be committed by individuals.[77] The court also cited a 1790s Executive Branch opinion by Attorney General Bradford that said the ATS could be applied to private individuals who violate the law of nations,[78] as well as the *Restatement (Third) of Foreign Relations Law*, to conclude that individuals can be held liable for violations of international law.[79] *Kadic* has been used in later cases to state definitively that individuals, even if not acting under state authority, can be held liable for law of nations violations, and are therefore not exempt from ATS jurisdiction.[80]

In the few ATS cases in which plaintiffs have sued individual corporate officers, the officials have been sued using secondary liability theories, such as aiding and abetting human rights violations, similar to those used to sue corporations. One example is the ongoing litigation against Chiquita Brands for allegedly paying millions of dollars to a paramilitary group in Colombia to drive antigovernment guerillas out of the jungle where Chiquita's bananas were growing.[81] After having their complaint against Chiquita Brands as a corporation dismissed, plaintiffs amended their complaint to allege that company executives in the United States

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74. 70 F.3d 232, 236 (2d Cir. 1995).

75. Id. at 239.

76. See id. ("[C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.").

77. Id.

78. Id. at 239–40 (citing Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795)). The Attorney General was responding to the question whether American citizens could be held liable under the ATS for "aiding the French fleet to plunder British property off the coast of Sierra Leone in 1795." Id. at 239. The opinion answers the question affirmatively:

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . .

1 Op. Att'y Gen. at 59.

79. *Kadic*, 70 F.3d at 240 (citing Restatement (Third) of Foreign Relations Law of the United States pt. II, introductory note (1986)).

80. See, e.g., Aragon v. Che Ku, 277 F. Supp. 3d 1055, 1063 (D. Minn. 2017) (citing *Kadic* as authority for holding individuals liable for ATS claims, and noting that the "[d]efendants have not identified any legal authority, either binding or persuasive, that warrants a different conclusion"); Al Shimari v. CACI Premier Tech., Inc., 263 F. Supp. 3d 595, 605 (E.D. Va. 2017) (noting that individuals can be found guilty of war crimes).

81. In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 190 F. Supp. 3d 1100, 1104 (S.D. Fla. 2016).

planned and helped implement the payments to the paramilitary group that subsequently committed human rights violations.[82] Plaintiffs asserted their ATS claims using a wide range of theories, including "aiding and abetting, conspiracy, agency and command responsibility theories of secondary liability."[83] The district court dismissed the case against the individual corporate officers, although not because the corporate officers could not have been found liable under the ATS.[84] Instead, the court found that the tortious acts failed to meet the *Kiobel* "touch and concern" standard.[85]

Another example is *Doe v. Drummond Co.*, in which the Eleventh Circuit found that individual corporate officials could be held liable under the ATS.[86] Plaintiffs alleged that the officials "aided and abetted, conspired with, and entered into an agency relationship with" a paramilitary organization in Colombia to keep guerillas away from defendants' mining operations and railroad line.[87] Similar to the *Chiquita* case, the plaintiffs alleged the individual corporate officials provided "material support" to the paramilitary group that enabled the group to commit extrajudicial killings.[88] Whereas the district court rejected the theory of superior liability in ATS cases,[89] the Eleventh Circuit said the theory could be used to sue the officials.[90] However, the Eleventh Circuit also dismissed the claims on "touch and concern" grounds.[91]

Besides the *Chiquita* and *Drummond* cases, there are few other precedents that address individual corporate officer liability under the ATS.[92] In *Aragon v. Che Ku*, a district court permitted an ATS suit to go

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82. See id.

83. Id.

84. See id. at 1112.

85. Id.

86. 782 F.3d 576, 583–84 (11th Cir. 2015); see also Green, supra note 13, at 500–02 (explaining the *Drummond* case history).

87. *Drummond*, 782 F.3d at 579–81.

88. Id. at 580.

89. Green, supra note 13, at 501 (noting that the district court concluded, "no court, in any jurisdiction, has ever extended the doctrine of superior responsibility in ATS . . . cases to the corporate officers of private companies . . . because command responsibility is a military doctrine" (internal quotation marks omitted) (quoting Giraldo v. Drummond Co., No. 2:09-CV-1041-RDP, 2013 WL 3873978, at *4 (N.D. Ala. July 25, 2013))).

90. See *Drummond*, 782 F.3d at 584.

91. Id. at 598–601.

92. One reason for this may be that the Torture Victim Protection Act (TVPA), a close analogue to the ATS, provides a cause of action against individuals and not corporations for similar human rights allegations. See 28 U.S.C. § 1350(2)(a) (2012); Mohamad v. Palestinian Auth., 566 U.S. 449, 455–56 (2012) (holding that the term "individual" in the TVPA does not include entities like corporations). Courts have construed the TVPA to apply to "aiding and abetting" the commission of the specific human rights allegations the TVPA targets. See In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 190 F. Supp. 3d 1100, 1119 (S.D. Fla. 2016); see also Green, supra note 13, at

forward when plaintiffs alleged law of nations violations for forced labor on the part of the corporations and their executive officers.[93] Other ATS suits have alleged that individual corporate employees committed violations of international law and used this as the basis for permitting ATS liability. In *Al Shimari v. CACI Premier Technology, Inc.*, the district court denied a motion to dismiss in a case involving individual employees of a government contractor who are alleged to have tortured prisoners at the Abu Ghraib prison in Iraq.[94] The difference between these cases and other ATS suits involving individual corporate executives is that these corporate officials were accused of more than "aiding and abetting" or some other form of secondary liability—these individuals were accused of violating international law norms as principals.

While courts appear willing to permit suits against individual corporate officials to be brought under the ATS, this seems to be a relatively new aspect of ATS litigation.[95] As this Note has discussed, the Supreme Court's *Jesner* decision makes it likely that ATS cases will now name individual corporate officers, directors, and employees as defendants.[96] And this creates a host of new legal problems that this Note addresses next.

II. THE CHOICE OF LAW PROBLEM IN CASES AGAINST CORPORATE OFFICERS, DIRECTORS, AND EMPLOYEES

Choice of law issues have always been present in ATS cases, but courts and commentators often avoid the question or claim the debate is "inconsequential" because the cases would come out the same under

500. However, the TVPA only covers human rights violations when an individual acts "under actual or apparent authority, or color of law, of any foreign nation," and only covers violations of "torture" and "extrajudicial killing." 28 U.S.C. § 1350(2)(a). Other human rights violations are not covered under the TVPA but may permit jurisdiction under the ATS.

93. 277 F. Supp. 3d 1055, 1059–60 (D. Minn. 2017). The employees in the case accused the executives of numerous labor violations and "extract[ing] uncompensated labor from Plaintiffs and, through threats and intimidation, prevent[ing] Plaintiffs from leaving their employment for many years." Id. at 1068.

94. 300 F. Supp. 3d 758, 762–66 (E.D. Va. 2018).

95. See Green, supra note 13, at 502–03 (arguing that the "standards used in these decisions contribute to [a growing] international body of law imposing liability on superior officers, regardless of whether they are a state or non-state actor").

96. See supra notes 55–60 and accompanying text; see also Jonathan Hacker, Matt Kline, Anton Metlitsky & Dimitri D. Portnoi, Supreme Court Further Limits Alien Tort Suits Against Corporations, O'Melveny (Apr. 26, 2018), https://www.omm.com/resources/alerts-and-publications/alerts/supreme-court-further-limits-alien-tort-suits-against-corporations/ [https://perma.cc/J8UJ-VL3M] (pointing to Justice Kennedy's opinion, which compares the ATS to the TVPA, a statute that does not allow suits against corporations, and the concurrences by Justices Alito and Gorsuch that suggest overruling *Sosa v. Alvarez-Machain* to "hold that the ATS does not extend to modern international human rights law").

international law, domestic law, or foreign law.[97] While this may be a convenient conclusion, it creates problems for courts and litigants when new Supreme Court decisions like *Sosa*, *Kiobel*, and *Jesner* are decided and the entire landscape of ATS litigation changes.

The Supreme Court provided no guidance on the ATS choice of law question in *Jesner*. The Court's decision did not even resolve a question that has raised significant issues in ATS litigation ever since parties began bringing suits against corporations—"whether international law or federal common law governs whether corporations can be sued under the ATS."[98] While this question may be moot after the Court's *Jesner* decision, the question of what law governs whether individual corporate officials can be held liable under the ATS remains relevant and unresolved.

This Part will address the significant ATS choice of law problems that will arise in the post-*Jesner* era on the question of liability for individual corporate officials—directors, officers, employees, contractors, etc.—given the likely increase in these suits post-*Jesner*.[99] Section II.A introduces a hypothetical based on past ATS cases to help identify the choice of law problems in suits against corporate officials. Section II.B discusses the current unclear framework for deciding what law applies to ancillary issues in these cases. Section II.C explains how choice of law on the ancillary issues will often prove outcome determinative, which creates further problems for courts. Section II.D examines how the Supreme Court's current ATS jurisprudence may cause lower courts to dismiss even meritorious ATS suits against corporate officials instead of conducting the complicated choice of law analysis. This Part concludes by arguing that courts and plaintiffs need a clearer standard for determining when ATS suits should be permitted to proceed.

A. *Corporate Officer Liability Hypothetical*

ATS choice of law indeterminacy is likely to confuse plaintiffs, defendants, and courts in ATS litigation post-*Jesner*, especially in the context of suits against corporate officials. Consider this hypothetical: A

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97. See supra note 13.

98. Keitner, supra note 5. In *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit found that corporations could not violate customary international law and therefore were not liable under the ATS. See 621 F.3d 111, 120 (2d Cir. 2010), aff'd, 569 U.S. 108 (2013). However, the Supreme Court in *Jesner* limited its holding to foreign corporations, despite many portions in Justice Kennedy's opinion suggesting it will be difficult to sue any corporation under the ATS going forward. See supra notes 55–59 and accompanying text. If customary international law is the law determining whether corporations could be held liable, the answer would appear to be a clear no. However, the Court reaches the same result in *Jesner* without explaining what law governs the question, thereby providing little guidance to courts considering choice of law issues even on the threshold question of "whether" a party can be liable at all.

99. See supra notes 55–60 and accompanying text.

security guard in an oil field in the Middle East murders a few non-American civilians who were from a village near the oil field. It is unclear why the individuals were on the property, but now it is too late to determine. The security guard was employed by a corporation organized under foreign law that the oil field's owner, the foreign subsidiary of a U.S. energy conglomerate, hired to patrol the property. The security company, recently hired by the energy conglomerate's foreign subsidiary to replace another contractor, was known for aggressive tactics against trespassers, including a supposed "shoot to kill" policy for trespassers. The U.S. energy company's headquarters in Texas is alleged to have directed the subsidiary to hire this more aggressive security company after smugglers were accused of stealing oil.

The victims' families sue under the ATS in a U.S. district court in Texas. Since the suit is in the Fifth Circuit, corporate liability remains a possibility.[100] However, because of *Jesner*'s many limitations on corporate liability,[101] plaintiffs' lawyers include the corporate officers of the energy company in the complaint. Plaintiffs' lawyers argue the complaint satisfies *Kiobel*'s "touch and concern" test, as the alleged tortious conduct—aiding and abetting in assassination by telling the corporation to hire the aggressive security company—occurred at the corporate headquarters of the oil conglomerate in the United States.[102] Moreover, the lawyers argue the relevant conduct leading to the substantive "law of nations" violation, the decision to hire this aggressive security company, also occurred in the United States.[103] If plaintiffs' "touch and concern" argument is accepted, plaintiffs' attorneys are confident that the case will move forward as the assassination of civilians violates the law of nations. Given that other cases against individual corporate officials were dismissed on "touch and con-

100. While the Supreme Court did not decide the issue of domestic corporate liability in *Jesner*, the Second Circuit has continued to hold that corporations are not amenable to suit under the ATS. See Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 49 n.6 (2d Cir. 2014) ("[T]he Supreme Court's decision in *Kiobel* did not disturb the precedent of this Circuit that corporate liability is not presently recognized under customary international law and thus is not currently actionable under the ATS." (citations omitted)). The Second Circuit is currently the only circuit that has considered the issue post-*Kiobel* and held that the ATS prevents suits against domestic U.S. corporations. See Alyssa Martin, Note, Swimming Upstream: The Second Circuit Continues to Fallaciously Fight the Tide Against Corporate Liability Under the Alien Tort Statute, 11 Liberty U. L. Rev. 605, 608–14 (2016) (describing the circuit split the Second Circuit created on the issue of domestic corporate liability under the ATS post-*Kiobel*).

101. See supra notes 55–59 and accompanying text.

102. For a detailed breakdown of *Kiobel*'s "touch and concern" test, see supra notes 38–45 and accompanying text.

103. Under the dicta in *RJR Nabisco, Inc. v. European Community*, the conduct alleged to violate the "law of nations" must be the same conduct used to determine whether *Kiobel*'s "touch and concern" test is satisfied. See 136 S. Ct. 2090, 2101 (2016).

cern" grounds,[104] the attorneys would seem to be right. However, there are significant choice of law barriers they have failed to consider. These issues are addressed below.

B. *The Unclear Framework for Deciding Ancillary Choice of Law Issues Relevant to Cases Against Corporate Officials*

ATS cases against corporate officers, directors, and employees require courts to consider whether, even if a substantive violation of the law of nations has occurred, corporate officials can be held liable, and under what law that determination should be made. In ATS cases, courts and commentators have identified two layers requiring choice of law consideration. First, courts ask whether the substantive conduct alleged violates the law of nations, which is what provides a court jurisdiction over an ATS case.[105] There is significant disagreement among commentators about what law determines whether such a violation has occurred.[106] However, that debate is not as relevant to the question whether *individuals* can be held liable as it is to corporate liability, because the question of liability for human rights violations is more settled for individuals than it is for corporations.[107] Assuming corporate officials committed the substantive violation, courts ask the second question: What law governs the

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104. See, e.g., Doe v. Drummond Co., 782 F.3d 576, 598 (11th Cir. 2015) (finding that while some "funding and policy decisions" were made by the executives in the United States, the planning, collaboration, and execution occurred in Colombia, so the presumption against extraterritoriality was not displaced); In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 190 F. Supp. 3d 1100, 1112 (S.D. Fla. 2016) (dismissing the amended ATS complaint adding Chiquita corporate executives on extraterritoriality grounds because the allegations "are premised on the same underlying tortious conduct committed by [paramilitary] members on Colombian soil allegedly acting in collaboration with high-level Chiquita executives operating from within the United States"); see also supra section I.C.2.

105. See Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (describing the requirement that in ATS cases, there must be a "violation[] of . . . [an] international law norm" of the same "definite content and acceptance among civilized nations [as] the historical paradigms familiar when [the ATS] was enacted"); Doe I v. Unocal Corp., 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring) (separating the question of whether an international law violation has occurred from the question of third-party liability); see also Stephens et al., supra note 12, at 36–38 (describing all ATS cases as involving a question of whether there has been "a violation of international law, with a cause of action based in federal common law").

106. See Anthony J. Bellia Jr. & Bradford R. Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 445, 539–40 (2011) (describing the debate over "whether 'the law of nations' referenced in the statute constitute[s] a form of federal common law," and acknowledging this is one of "two . . . contested aspects of the ATS's original meaning" that the Supreme Court has not expressly considered).

107. See Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399–1402 (2018) (finding "sufficient doubt" on the question of whether "there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law"); see also supra section I.C.1.

ancillary aspects of the case, such as scope of liability, tort law, and the standards for aiding and abetting liability?[108] This is where courts answer *whether* corporate officials can be held liable for the substantive violation.

The ATS literature rarely discusses ancillary choice of law issues, but such issues become extremely important in cases against corporate officials. The little scholarship that does exist on ancillary choice of law issues in the ATS context focuses on a single footnote in *Sosa* dealing with the scope of liability.[109] The footnote says there is a debate about "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*."[110] That is, while the threshold jurisdictional issue in ATS cases deals with substantive violations of the "law of nations," it is unclear what law determines the enforcement of the international law norms in cases in which the ATS provides jurisdiction.[111] This becomes a particular problem when an act alleged to have been committed by a corporate official in the United States resulted in a human rights violation suffered on foreign soil. Should the scope of liability be determined by international law, U.S. federal common law, U.S. domestic state law (in the state where the alleged conduct that led to the foreign harm occurred), or the domestic law of the country where the harm occurred?

Choice of law principles provide no clear guide for courts on this question, which will result in significant uncertainty for plaintiffs and de-

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108. The "ancillary question" approach was advocated by Judge Stephen Reinhardt, who argued that international law determines "whether a violation has occurred" under the ATS but that "[t]he statute is silent . . . as to what body of law applies to ancillary issues that may arise, such as whether a third party may be held liable in tort for a governmental entity's violation of the law of nations." See *Unocal*, 395 F.3d at 965 (Reinhardt, J., concurring).

109. See generally Jon E. Crain, Note, Scope of Liability Under the Alien Tort Statute: The Relevance of Choice of Law Doctrine in the Aftermath of *Kiobel v. Royal Dutch Petroleum*, 32 Pace L. Rev. 543, 546, 557–65 (2012) (arguing that courts need to recognize the choice of law issues in ATS cases and should adopt federal common law to determine "scope of liability," as this is most consistent with "the underlying purpose of the ATS"). Others have argued the rule of decision in ATS cases should be international law, which would govern the scope of liability issue discussed in this Note. See generally Richard A. Conn, Jr., Note, The Alien Tort Statute: International Law as the Rule of Decision, 49 Fordham L. Rev. 874 (1981) (arguing that international law as the rule of decision in ATS cases accords with "policy considerations," "practicality," and "the statute's inference that international law is the proper rule for redressing international law violations"). And still others have argued that the original understanding of the ATS was that forum or state law would govern. See Philip A. Scarborough, Note, Rules of Decision for Issues Arising Under the Alien Tort Statute, 107 Colum. L. Rev. 457, 467–68, 489–90 (2007).

110. *Sosa*, 542 U.S. at 732 n.20 (emphasis added).

111. See, e.g., Sarei v. Rio Tinto, 671 F.3d 736, 770 (9th Cir. 2011) (Reinhardt, J., concurring) (arguing that domestic law, not international law, governs standards for corporate liability in ATS cases, and noting that international law does not provide guidance on the matter), vacated, 569 U.S. 945 (2013).

fendants in ATS cases against corporate officials. Courts may apply the "most significant relationship" method from the *Restatement (Second) of Conflict of Laws*,[112] which is the main approach followed in the United States today and also the approach typically followed by federal courts when not sitting in diversity.[113] However, this approach is difficult when many of the factors in the analysis, such as "the place where the injury occurred" and "the place where the conduct causing the injury occurred,"[114] point to the application of the laws of multiple sovereigns. When the contacts in the maritime context create this uncertainty, courts apply the law of the place where the alleged wrong occurred.[115] However, as discussed above, the place of the wrong may be difficult to ascertain in ATS cases against individual corporate officials when their acts occurred in the United States, but the harm was carried out by employees overseas, and the harm was felt overseas.[116] Moreover, this approach contradicts the traditional tort principle of *lex loci delicti*, which says the law of the place where the harm occurred governs.[117] This old territorial choice of

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112. See Restatement (Second) of Conflict of Laws §§ 6, 145 (1971); Roger P. Alford, Human Rights After *Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation, 63 Emory L.J. 1089, 1102 (2014) ("A majority of states have adopted some version of the *Restatement (Second)* approach, applying the law of the jurisdiction that has the most significant relationship to the dispute."). The approach requires a consideration of seven factors:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(2).

Then, the "contacts" relevant are to be considered: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Id. § 145.

The court then is supposed to consider certain "presumptions," and depending on how "seriously" the courts take the presumptions, they often apply the law of the place of the injury (*lex loci delicti*) "to limit the debilitating legal uncertainties that result if individuals carry their domiciliary law wherever they go." See Alford, supra, at 1103–04.

113. See Christopher A. Whytock, Myth of Mess? International Choice of Law in Action, 84 N.Y.U. L. Rev. 719, 728 (2009).

114. See Restatement (Second) of Conflict of Laws § 145(2)(a)–(b).

115. See Reino de España v. Am. Bureau of Shipping, Inc., 691 F.3d 461, 467 (2d Cir. 2012) (applying U.S. law when the factors pointed to several different jurisdictions because the domicile of defendants and the place of the wrongful act clearly favor the application of American law).

116. See supra section II.A.

117. See Alford, supra note 112, at 1104 ("The focus of [the *lex loci delicti*] approach is on the territory, not relationships. . . . Under this traditional approach . . . '[t]he place of wrong is in the state where the last event necessary to make an actor liable for an alleged

law approach may no longer be dominant in the United States, but some U.S. states continue to use it.[118] In addition, many countries still use the idea of *lex loci delicti*, or some hybrid version, to determine which law to apply to a tort.[119] And, even if a U.S. federal court typically follows a different choice of law approach, courts may still apply the territorial approach for public policy reasons including international comity and the potential harm to business interests.[120] Therefore, choice of law principles do not provide a clear answer about what law governs ancillary issues beyond the threshold ATS jurisdictional question.

As a result, in a case against an individual corporate officer alleged to have aided and abetted the violation of human rights in another country from within the United States, as in the hypothetical discussed earlier in this Part,[121] it is not clear what law the court should apply to determine *whether* that individual can be held liable, or the scope of their liability. This is further complicated by the Supreme Court's current ATS jurisprudence and differing legal standards based on what law is applied. This is where we turn now.

C. *Differing Legal Standards for Ancillary Issues Can Make Choice of Law Outcome Determinative*

The unclear legal framework for deciding choice of law in ATS cases against corporate officers is a problem because what country's law applies to the ancillary issues can prove outcome determinative. In the past, courts and commentators have said choice of law would not make a difference in ATS suits because foreign law, domestic law, or international law would all lead to the same result.[122] However, as this section shows, the choice of law question can be outcome determinative in ATS cases against corporate officials. This is because the possible sources of law have different legal standards on the ancillary issues that will determine

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tort takes place.'" (second alteration in original) (quoting Restatement of Conflict of Laws § 377 (Am. Law Inst. 1934))).

118. See id. at 1104 (noting that only ten states in the United States follow the *lex loci delicti* approach today).

119. See Symeon C. Symeonides, Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should, 61 Hastings L.J. 337, 398–403 (2009) ("In contrast to the traditional American system . . . international law (PIL) systems . . . have been far less categorical in choosing between the places of conduct and injury. Although these systems follow the *lex loci delicti* rule, they differ from the American system (and among themselves) in localizing the *delict*.").

120. See, e.g., Spinozzi v. ITT Sheraton Corp., 174 F.3d 842, 846 (7th Cir. 1999) (applying Mexican law to an injury incurred by a plaintiff from Illinois at a hotel in Mexico, as doing otherwise would "impose potentially debilitating legal uncertainties on businesses that cater to a multinational clientele").

121. See supra section II.A.

122. See supra note 13.

whether the corporate officers, directors, and employees can be held liable.

1. *Director and Officer Liability for Corporate Torts.* — Suing directors, officers, and employees will force courts to reconcile different countries' tort and corporate law regimes, which will prove outcome determinative in ATS cases.[123] This is a particular problem in the corporate-official context, as federal courts will be asked to find standards at the intersection of two areas typically governed by state law in the United States.[124]

Federal courts have already struggled with what law to apply to determine ATS liability for corporations in the tort context. One court applied the forum law of respondeat superior to determine corporate liability for torts committed overseas, but only after a lengthy and complicated discussion justifying its reasons.[125] Another court applied foreign law because the state choice of law rules indicated that was proper, and, as a result, the court dismissed claims that could have been brought under domestic law.[126] A third court refused to apply foreign law for public policy reasons, as Burmese law did not recognize forced labor claims.[127] Still, some courts and commentators claim that international law governs the standards for corporate tort liability under the ATS, although problems arise when international law lacks standards on the particular

123. See Douglas M. Branson, Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation, 9 Santa Clara J. Int'l L. 227, 230 (2011) (arguing that in ATS cases involving multinational corporations, the "first questions plaintiffs are likely to encounter involve piercing the corporate veil, enterprise liability, joint venture, agency, and choice of law" before getting to the question of whether a corporation can be held liable under the ATS).

124. See P. John Kozyris, Corporate Wars and Choice of Law, 1985 Duke L.J. 1, 9 (noting that in the United States corporate law remains a state law domain, and "if anything, the trend is away from, rather than toward, uniformity"); Barbara Kritchevsky, Tort Law Is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation, 60 Am. U. L. Rev. 71, 75 (2010).

125. Estate of Alvarez v. Johns Hopkins Univ., 275 F. Supp. 3d 670, 688–92 (D. Md. 2017) (describing the court's reasons for applying respondeat superior, including that other courts used domestic liability standards in ATS cases, the doctrine was recognized at the time the ATS was created, and applying the standard "fulfill[ed] federal common law objectives of uniformity").

126. Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857, 858 (E.D. Va. 2013) (dismissing the common law tort claims because Iraqi law provided the contractor immunity from suit for the actions), vacated and remanded sub nom. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014). After the case went back to the district court, another judge found the contractor was not immune under Iraqi law. See Al Shimari v. CACI Premier Tech., Inc., 300 F. Supp. 3d 758, 790 (E.D. Va. 2018). This disagreement between judges on the same court about the interpretation of Iraqi law further shows the problems courts encounter in discerning foreign law.

127. See Simon Baughen, Human Rights and Corporate Wrongs 155 (2015) (describing the holding in *Doe v. Unocal*, an unreported Superior Court of California case from 2003).

issues.[128] U.S. courts have struggled to determine what law applies to corporate tort liability.

This problem only gets worse in the corporate officer and director context, as there are significantly different standards for when corporate officials are liable for torts even when the corporation itself would be liable. In the United States, "agency principles . . . normally impose[] vicarious liability upon the corporation but not upon its officers or owners."[129] Thus, a corporate officer or director is not automatically liable for a tort the corporation is liable for; typically, the official must have participated in causing the wrong to be liable.[130] However, the extent of the participation necessary for liability is determined by state corporate law, with different states providing vastly different standards.[131] The transnational context of most ATS cases further complicates matters for courts in cases against officers and directors, as foreign jurisdictions use varying standards for corporate officer liability for torts committed by the corporation.[132] Under Dutch law, "severe personal blame" can make a corporate director liable for torts committed by employees of the corporation.[133] In Brazil, directors and officers can be held personally liable for their own negligence in operating the corporation that causes a tortious injury to a third party, a standard unknown in U.S. law.[134] Israel has a similar standard to the United States, imposing vicarious liability on corporations for torts committed by directors and officers directly in addition to holding the directors and officers personally liable, but has recently added "causing harm by conduct which involves extreme bad

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128. See Andrew J. Wilson, Beyond *Unocal*, *in* Transnational Corporations and Human Rights, 43, 58–59 (Oliver de Schutter ed., 2006) (noting one argument made for applying domestic law rather than international law "is that international law simply fails to provide any guidance on third-party liability, and federal law must fill in the gaps").

129. Meyer v. Holley, 537 U.S. 280, 282 (2003).

130. See, e.g., Landsport Corp. v. Fixco Corp., No. 3:05-CV-237-J-12MCR, 2006 WL 1539781, at *1 (M.D. Fla. May 31, 2006) (noting that in the United States, "as a general rule, a corporate officer does not incur personal liability for the corporation's torts merely by virtue of being an officer, and is not liable for torts committed by the corporation, unless he or she has participated in the wrong").

131. See Martin Petrin, The Curious Case of Directors' and Officers' Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law, 59 Am. U. L. Rev. 1661, 1667 (2012) (describing the three approaches that have been used by U.S. courts to determine corporate officer liability for torts: participation in the commission of the tort, breach of a personal duty, and piercing the corporate veil).

132. See, e.g., 36 European Ctr. of Tort and Ins. Law, Tort and Insurance Law: Directors' & Officers' (D&O) Liability 922–29 (Simon Deakin, Helmut Koziol & Olaf Riss eds., 2018) (describing the different standards used in a variety of European countries, the United States, Brazil, and Turkey).

133. See id. at 923–24.

134. See id. at 926 (describing that in Brazil, a corporation's "[d]irectors are held personally liable for their negligence or willful misconduct . . . [as well as] for damage caused to third parties under *special legislation* (consumer, labour, and environmental law) irrespective of wrongdoing or abuse on their part . . . .").

faith" as a new reason for personal liability.[135] Moreover, countries around the world are increasingly adopting civil liability for corporate officers and directors for corporate torts.[136] Due to different standards for director and officer liability for corporate torts around the world, what law applies to the ancillary liability issues in ATS cases will prove outcome determinative.

2. *Aiding and Abetting Liability Standards.* — Another area in which courts will be confronted with choice of law questions that will be outcome determinative in cases of corporate officer, director, and employee liability is the ancillary issue of aiding and abetting liability.[137] In the hypothetical discussed earlier in this Part, plaintiffs alleged that the corporate executives in Texas aided and abetted the law of nations violation by hiring an aggressive security company that had a "shoot to kill" order for trespassers.[138] The executives themselves are not alleged to have committed the law of nations violation. Rather, plaintiffs are trying to hold them civilly liable as accomplices, similar to how plaintiffs have attempted to hold corporations liable in the past.[139] What mens rea must the corporate executives have had with regard to the actual law of nations violation—the assassination of civilians—to be held liable?

Adopting the mens rea standards used by courts in past ATS cases to hold corporations liable for aiding and abetting violations provides no clear answer. If international law applies to the question of corporate liability, the precise mens rea is unclear, although U.S. federal courts have either applied a purpose or knowledge standard. There is currently a circuit split on the issue, with some circuits applying a "purpose"

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135. See id. at 234–35.

136. See, e.g., Kevin M. LaCroix, A Guide to Directors' Duties and Liabilities in Europe, Legal Newsroom, LexisNexis (Oct. 9, 2015), https://www.lexisnexis.com/legalnewsroom/corporate/b/blog/posts/a-guide-to-directors-duties-and-liabilities-in-europe [https://perma.cc/QF64-L9Q3] (describing how the global financial crisis caused increasing scrutiny of directors and officers, which has resulted in countries in Europe adding to directors' duties including on environment, health and safety, competition, data protection, and antibribery issues); Saudi Arabia: Officers and Directors Liability Under the New Companies Law, Dentons (May 19, 2016), https://www.dentons.com/en/insights/alerts/2016/may/19/saudi-arabia-officers-and-directors-liability-under-the-new-companies-law [https://perma.cc/U97K-GTRQ] (describing the new civil and criminal penalties for officers and directors under Saudi Arabia's New Companies Law).

137. Cf. Van Schaack, supra note 13, at 360 (noting that aiding and abetting liability is one of the ancillary rules of decision the Supreme Court has not addressed in the ATS context).

138. See supra text accompanying note 102.

139. See Charles Ainscough, Comment, Choice of Law and Accomplice Liability Under the Alien Tort Statute, 28 Berkeley J. Int'l L. 588, 588 (2010) (noting the trend of plaintiffs trying to hold corporations liable under the ATS as accomplices because "while few companies directly commit acts that amount to international crimes, there is a significant risk that companies will face allegations of 'complicity' in such crimes").

standard[140] while other circuits apply a "knowledge" standard.[141] However, some circuits have reached the conclusion that "knowledge" is the appropriate mens rea by applying federal common law, not international law.[142] And there is the issue of foreign law if the choice of law analysis suggests another country's law should apply. As the Ninth Circuit observed, "what is a crime in one jurisdiction is often a tort in another jurisdiction," with the difference often being "purpose" required for a criminal violation and "knowledge" required for aiding and abetting a tort violation.[143] Therefore, in the corporate liability context, the mens rea for aiding and abetting the substantive law of nations violation has proven outcome determinative given the different standards applied by courts.

The aiding and abetting issue gets even more complex for courts in the context of liability for individual corporate officers, directors, and employees. For a substantive law of nations violation to have occurred, an individual executive must have had at least a "knowledge" mens rea.[144] However, customary international law may not be the law that governs the ancillary question of *whether* a corporate official can be held *personally liable* for the violation. The choice of law rules U.S. courts use may yield state law, federal law, or foreign law, a determination which raises a myriad of potential problems for courts. Perhaps "knowledge" is sufficient for a law of nations violation, but another country's law suggests "purpose" is necessary for an individual corporate officer to be held liable as the violation would typically yield criminal penalties and jail time in the country. The law a court applies will determine the outcome of the case for the official. Consider more fundamental differences be-

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140. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (noting that an "international consensus" exists on purposely aiding and abetting human rights violations, but "no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law").

141. See Doe v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011) (concluding that "knowledge" is the mens rea under customary international law); *Talisman*, 582 F.3d at 259 (looking to whether there was an "international consensus" on the "purpose" or "knowing" mens rea, and concluding the consensus only exists on "purpose"); Ryan S. Lincoln, Comment, To Proceed with Caution: Aiding and Abetting Liability Under the Alien Tort Statute, 28 Berkeley J. Int'l L. 604, 610 (2010).

142. See Cabello v. Fernandez-Larios, 402 F.3d 1148, 1158–60 (11th Cir. 2005) (applying federal common law to determine the appropriate mens rea). In a Ninth Circuit opinion that applied international law to determine the mens rea for aiding and abetting liability, Judge Reinhardt wrote a concurrence in which he agreed "knowledge" was the appropriate mens rea but argued that the majority should have used federal common law to reach that result because it is an "ancillary issue." See Doe I v. Unocal Corp., 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring) ("[T]he ancillary legal question of Unocal's third-party tort liability should be resolved by applying general federal common law tort principles, such as agency, joint venture, or reckless disregard.").

143. See *Unocal*, 395 F.3d at 949.

144. See supra section I.C.1.

tween the U.S. approach to corporate officer liability and that taken by other jurisdictions. The United States is unique in holding corporations criminally liable for the actions of their officers, directors, and employees, in part because of strong due process protections for individuals.[145] Should that factor into the choice of law consideration when a corporate officer aided and abetted a violation for the benefit of the corporation? These differences may make the choice of law determination on aiding and abetting issues outcome determinative.

Now that the differences in the substantive law on the ancillary issues have been shown, the next section addresses the other consideration that will impact federal courts' analysis of the choice of law question: the Supreme Court's limitations on what ATS cases can be brought.

D. *The Supreme Court's Limitations on ATS Suits Further Complicate Choice of Law*

While this Part has mainly addressed the ancillary aspects of ATS cases, the threshold jurisdictional question of whether the ATS applies to the case at all, and the Supreme Court's limitations on that question, also impact the choice of law analysis. This section discusses the impact of the jurisdictional question in two respects. Section II.D.1 describes how *Kiobel*'s "touch and concern" test significantly limits the conduct ATS plaintiffs incorporate into their pleadings. Section II.D.2 describes the ATS separation of powers concerns that support federal courts dismissing ATS suits rather than engaging in complicated choice of law analyses.

1. Kiobel*'s "Touch and Concern" Test Essentially Requires Plaintiffs to Plead U.S. Conduct.* — The choice of law inquiry in ATS cases against corporate directors, officers, and employees is made especially difficult by the limitations on where the alleged conduct must occur under ATS case law. Regardless of the choice of law approach taken by a jurisdiction, transnational tort cases require courts to determine the relevant conduct for each allegation and then engage in a choice of law analysis based on where the conduct leading to that injury occurred ("the place of the wrong").[146] Therefore, when the relevant conduct crosses national borders and the jurisdictions have different laws governing liability for the torts, the choice of law analysis can become outcome determinative.

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145. See Edward B. Diskant, Note, Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure, 118 Yale L.J. 126, 129–31 (2008) (explaining how the significant procedural protections afforded to criminal defendants in the United States explains why American corporations, but not their directors, officers, or lower-level employees, are found criminally liable).

146. See Jessica Freiheit, Choice of Law Issues: Selecting the Appropriate Law, Proskauer (2018), https://www.proskauerguide.com/litigation/7/V [https://perma.cc/BQ4D-TG4E].

Current Supreme Court ATS jurisprudence has placed significant barriers on plaintiffs with regard to where the relevant conduct must be alleged to have occurred. The application of the presumption against extraterritoriality to the ATS in *Kiobel*[147] will have a significant impact on the choice of law determination in suits against corporate officials because the canon makes it difficult to allege the relevant conduct occurred anywhere outside the United States. The ambiguity of the "touch and concern" test caused some commentators after *Kiobel* to suggest that there were cases where foreign conduct could overcome the presumption, such as in cases involving a U.S. domiciliary or "important [U.S.] national interests."[148] However, the various doctrinal tests courts have developed to determine whether ATS suits alleging foreign harm sufficiently "touch and concern" the United States have all required U.S. domestic conduct.[149] Essentially, to survive a motion to dismiss under the ATS, plaintiffs must allege conduct that violates the law of nations *and* the "relevant conduct" resulting in that violation must have occurred in the United States.[150] Therefore, plaintiffs need to allege sufficient domestic conduct to overcome the presumption against extraterritoriality even when all of the harm occurred overseas. As a result, ATS cases involving corporate officers, directors, and employees and foreign harm will require courts to engage in complicated and unpredictable choice of law analyses when the conduct and injury occur in different countries.

2. Jesner*'s Separation of Powers Concerns Complicate the Choice of Law Determination.* — The Supreme Court's strong separation of powers reasoning in *Jesner* further complicates matters for ATS plaintiffs, as the Court's opinion seems reticent to allow ATS suits in general. Recall that

147. See Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013); see also section I.A.

148. See, e.g., Cleveland, supra note 45, at 553, 555 (detailing foreign conduct that may still be able to overcome the presumption against extraterritoriality after *Kiobel*).

149. See, e.g., Doe v. Nestle, 906 F.3d 1120, 1125 (9th Cir. 2018) (asking first "whether th[e] case involves 'a domestic application of the statute, by looking to the statute's "focus"'" and second, whether "the conduct relevant to the statute's focus occurred in the United States" (quoting RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016))); Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 197 (5th Cir. 2017) (requiring domestic conduct "that violates international law" to overcome the "touch and concern" inquiry); Balintulo v. Ford Motor Co., 796 F.3d 160, 167 (2d Cir. 2015) (using a two-step jurisdictional analysis for ATS claims alleging foreign conduct that considers first, "whether th[e] 'relevant conduct' sufficiently 'touches and concerns' the United States," and second, "whether that same conduct states a claim for a violation of the law of nations" (quoting Mastafa v. Ford Motor Co., 770 F.3d 170, 186 (2d Cir. 2014))); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 528 (4th Cir. 2014) (requiring "a fact-based analysis" to the "touch and concern" inquiry for ATS claims). For a breakdown of circuit courts' applications of the "touch and concern" test when the question has been addressed, see generally Note, Clarifying *Kiobel*'s "Touch and Concern" Test, 130 Harv. L. Rev. 1902, 1909–11 (2017) [hereinafter Clarifying *Kiobel*] (noting that a "circuit split" has developed regarding the "touch and concern" test).

150. See supra note 103.

the *Jesner* majority chose not to decide the case on *Sosa* step one grounds, which would have required the violation of a definitive international norm for the suit to be cognizable under the ATS.[151] Instead, Justice Kennedy's opinion focused on a newly clarified *Sosa* step two: "whether it is prudent and necessary" for the Court "to direct its enforcement in" the case.[152] And Kennedy emphasized that even if a norm was violated, *Sosa* step two still requires considering judicial discretion and deference to the political branches to determine whether liability should exist in the context.[153] Kennedy's opinion suggests to lower courts that any questions about whether liability attaches in a case should be resolved by dismissal given separation of powers concerns.

Without a clear rule for resolving the choice of law difficulties in ATS cases against individual corporate officers, directors, and employees, courts are likely to dismiss even meritorious suits early in the litigation on separation of powers grounds. When faced with complicated transnational cases where choice of law will be outcome determinative, courts find other avenues to dismiss the case rather than conducting the analysis.[154] Moreover, the choice of law problem has confused courts adjudicating ATS claims in the past, resulting in unpredictable judgments based on what law the court ends up deciding to apply.[155] The problem is exacerbated by *Kiobel*'s requirement that sufficient conduct occur in the United States, making choice of law a required consideration in ATS cases where harm occurred exclusively in another country.[156] Rather than engage in complicated choice of law analyses, courts may use *Jesner*'s sep-

151. See Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018).

152. Id. It should be noted that *Sosa*'s second step was originally formulated by the Court differently than how Kennedy articulates it in *Jesner*. For a discussion of how Kennedy's *Jesner* version more aligns with the deference to the political branches suggested in a *Sosa* footnote, see supra note 53.

153. *Jesner*, 138 S. Ct. at 1399 ("[E]ven assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority . . . .").

154. See, e.g., Reino de España v. Am. Bureau of Shipping, Inc., 691 F.3d 461, 468 (2d Cir. 2012) (affirming the district court's dismissal when the laws of five different jurisdictions were proposed to govern liability because the court did not think that U.S. law, the law one party requested be applied, would have found the facts in the case sufficient for that party to win).

155. See, e.g., Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002) (applying international law after declaring that Burmese law, the law of the place of the injury, was "invalid" because it was not "identical to the *jus cogens* norms of international law"). In a concurrence, Judge Reinhardt agreed that international law determines "whether a violation has occurred" under the ATS but concluded that "federal common law" should be used "to resolve ancillary legal issues" in the case. See id. at 965 (Reinhardt, J., concurring).

156. See supra section II.D.1.

aration of powers language to dismiss transnational ATS cases against corporate officers, directors, and employees.

The potential choice of law confusion in cases against corporate officials, and the likely dismissal of more ATS suits on separation of powers grounds, requires courts to articulate a clear test for when ATS cases will be permitted. A possible solution courts could adopt is discussed below.

III. RESOLVING THE CHOICE OF LAW PROBLEM: APPLY U.S. LAW

The difficult choice of law questions in ATS cases involving corporate officers, directors, and employees can be resolved by courts applying U.S. law to all aspects of the case beyond the threshold jurisdictional question. This Part proposes that the Supreme Court's current ATS jurisprudence suggests that if it would be inappropriate to apply U.S. law to an ATS case under general choice of law principles, the suit should be dismissed under *Kiobel*'s "touch and concern" test and *Sosa* step two. Even if courts apply this approach, questions will remain about using federal common law or state substantive law for some of the "ancillary" questions in ATS cases. However, this is a far easier task for courts to engage in than trying to ascertain foreign law and its application.

The Part proceeds in three sections. Section III.A establishes that *Sosa*, *Kiobel*, and *Jesner* suggest the choice of law inquiry should always yield U.S. law to allow a suit to proceed under the ATS. Section III.B discusses how taking such an approach creates a more judicially manageable standard for courts and clarifies pleading standards for ATS plaintiffs. Section III.C responds to potential objections.

A. *Current ATS Jurisprudence Suggests U.S. Law Must Apply*

The Supreme Court has significantly limited the ATS's application in the Court's three ATS decisions.[157] The most significant limitation on the ATS, when the Court applied the "presumption against extraterritoriality" to the statute,[158] combined with the categorical exclusion of foreign corporations as ATS defendants in *Jesner*[159] and the Court's hesitancy toward transnational litigation in general,[160] suggests that plaintiffs can

157. See supra sections I.A–.B.

158. See Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013).

159. See Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018).

160. See Pamela K. Bookman, Litigation Isolationism, 67 Stan. L. Rev. 1081, 1088–1108 (2015) (describing how over the last few decades, the Supreme Court has increasingly engaged in "transnational litigation avoidance" and dismissed transnational cases on grounds including personal jurisdiction, forum non conveniens, abstention, and the presumption against extraterritoriality for reasons including separation of powers, international comity, and convenience for defendants); see also Rebecca J. Hamilton, *Jesner v. Arab Bank*: Supreme Court of United States on Corporate Liability Under the

only use the ATS if U.S. law would apply to the ancillary issues in the dispute. Therefore, courts should consider using general choice of law principles[161] to determine whether U.S. law can appropriately be applied to the ancillary issues in the case and use this determination to establish whether ATS cases against corporate directors, officers, and employees can proceed.

The required application of the presumption against extraterritoriality to the ATS suggests that there must be a significant U.S. nexus for the ATS to be utilized by plaintiffs such that it would be reasonable for a court to apply U.S. law to any aspect of the dispute. In *Kiobel*, the Supreme Court held that to overcome the "presumption against extraterritoriality" in ATS cases, plaintiffs must prove their claims "touch and concern" U.S. territory.[162] Moreover, in *RJR Nabisco, Inc. v. European Community*, the Supreme Court suggested in dicta that in ATS cases, to overcome the presumption against extraterritoriality, the "conduct relevant to the statute's focus" must have occurred in the United States.[163] This reticence toward applying the ATS to cases involving foreign conduct and harm suggests that, at the very minimum, to overcome the presumption against extraterritoriality, ATS plaintiffs must show that U.S. law could be applied to the case.

This can be illustrated by applying the "most significant relationship" test, the dominant choice of law approach today,[164] to past ATS cases in which courts applied the presumption against extraterritoriality to decide whether to dismiss the cases. The "most significant relationship" test considers factors like the "relevant interests of [the interested] states" and the "protection of justified expectations," as well as "contacts" including: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship . . . between the parties is centered."[165] Now, consider the *Kiobel* case itself. Since "all the relevant

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Alien Tort Statute, 112 Am. J. Int'l L. 720, 725 (2018) (finding the Court's *Jesner* decision "consistent with the Court's growing hostility toward transnational litigation in general").

161. By "general choice of law principles," I mean the current dominant "most significant relationship" approach found in the *Restatement (Second) of Conflict of Laws*. See Restatement (Second) of Conflict of Laws §§ 6, 145 (1971); see also Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987) (noting that when explicit choice of law rules are not included in the federal statute, federal courts apply the *Restatement (Second) of Conflict of Laws* to resolve the choice of law question, as it is "a source of general choice-of-law principles"). For a discussion of the "most significant relationship" test, see supra note 112.

162. *Kiobel*, 569 U.S. at 124–25.

163. See 136 S. Ct. 2090, 2101 (2016).

164. See Alford, supra note 112, at 1102.

165. Restatement (Second) of Conflict of Laws §§ 6(2)(a), 6(2)(d), 145(2)(a)–(d); see also supra note 112.

conduct took place outside the United States" in *Kiobel*, the "presumption against extraterritoriality" was not overcome.[166] But *Kiobel* could also be looked at from a choice of law perspective. Using the "most significant relationship" test, a court could not find the United States had the "most significant relationship" to the dispute. The alleged "law of nations" violations—Shell and its Nigerian subsidiary's supposed aiding and abetting of attacks on plaintiffs' villages—all occurred in Nigeria.[167] Moreover, while Shell's American headquarters is in Texas,[168] the corporation would not have expected to be sued in American courts, never mind having American law applied, for aiding and abetting torts that occurred in Nigeria. This differs from a case like *Al Shimari v. CACI Premier Technologies, Inc.*, in which the Fourth Circuit found the allegations sufficiently touched and concerned the United States to overcome the presumption against extraterritoriality.[169] There, the employees who committed the alleged torts were employed directly by a company headquartered in Virginia, and the corporate executives were alleged to have known about the torture in the Iraqi prison and did nothing to stop it.[170] In *CACI*, a court could reasonably find that U.S. tort law should apply because the United States has the "most significant relationship" to the dispute given the alleged U.S. conduct (U.S. corporate executives doing nothing about the torture and the fact the employees were hired at company headquarters in Virginia). *CACI* may not *require* that U.S. law applies, but it is at least reasonable it could be applied.[171] As *Kiobel* and *CACI* illustrate, a choice of law analysis should yield U.S. law to overcome the presumption against extraterritoriality in ATS cases.

Jesner's additions to the two-step *Sosa* test also suggest the choice of law inquiry should yield U.S. law for ATS cases to proceed. Foreign policy, comity, and separation of powers concerns are likely to cause courts to dismiss cases under *Sosa* step two when plaintiffs ask courts to create an ATS cause of action and apply foreign law.[172] Recall that under step two, even "if a suitable norm is identified, federal courts . . . decide

166. *Kiobel*, 569 U.S. at 124.

167. Id. at 113–14.

168. Shell Trading (US) Company, Shell, https://www.shell.us/business-customers/trading/shell-trading-us-company.html [https://perma.cc/DPP3-VM5G] (last visited Oct. 11, 2019).

169. 758 F.3d 516, 530 (4th Cir. 2014).

170. See id. at 528–29.

171. The *CACI* plaintiffs actually brought claims under Iraqi tort law. See Al Shimari v. CACI Premier Tech., Inc., 300 F. Supp. 3d 758, 790 (E.D. Va. 2018). But it is this Note's view that American tort law could also have been applied to the case given the U.S. contracts and U.S. conduct. *CACI* shows the choice of law difficulties courts encounter as parties in ATS cases bring in foreign law when it will benefit their case. See id. However, there are no clear rules on when foreign law should govern ATS liability. See supra sections II.B–.C.

172. See supra text accompanying notes 32–35.

whether there is any other reason to limit 'the availability of relief.'"[173] This requires plaintiffs to "exhaust[] any remedies available in [their] domestic legal system" and courts to consider "case-specific deference to the political branches."[174] In *Jesner*, the Supreme Court reiterated the importance that separations of powers concerns play in determining whether an ATS case should proceed and said that under step two, a court must consider "whether it is prudent and necessary to direct its enforcement" in an ATS case.[175] If the "most significant relationship" choice of law test were to yield foreign law as proper in an ATS case, *Sosa* step two would counsel courts against adjudicating the case. It would be neither "prudent" nor "necessary" for a federal court to adjudicate a tort case better left to the laws of other countries and the courts that apply those laws every day.[176] This is especially true when foreign policy concerns enter the picture.[177] *Jesner*'s strong separation of powers holding suggests that when the "most significant relationship" test yields foreign law, *Jesner*'s gloss on *Sosa* step two implies that courts should not adjudicate the case under the ATS.

B. *Easier for Courts, and Clearer for Plaintiffs*

Requiring that the choice of law inquiry yield U.S. law would also make it easier for courts to determine whether ATS cases should move beyond the motion to dismiss stage and create a clearer pleading standard for ATS plaintiffs. In cases involving corporate officers and directors, such an approach is likely to create a more judicially manageable standard and lead to more predictable results.

First, the "most significant relationship" test creates a clearer pleading standard for ATS plaintiffs: Plaintiffs must allege a sufficient U.S. nexus that would yield U.S. law under the "most significant relationship" test and would need to allege violations of U.S. law. The Supreme Court's current ATS jurisprudence does not make clear how significant the U.S. nexus must be for an ATS suit to proceed past the motion to dismiss

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173. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1409 (2018) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004)).

174. *Sosa*, 542 U.S. at 733 n.21.

175. See *Jesner*, 138 S. Ct. at 1402.

176. While no ATS case has yet been dismissed for this reason, foreign sovereigns have submitted amicus briefs asking the Supreme Court to dismiss ATS cases. See, e.g., Brief for the Hashemite Kingdom of Jordan as Amicus Curiae Supporting Respondent at 4, *Jesner*, 138 S. Ct. 1386 (No. 16-499), 2017 WL 3726004 (asking the Supreme Court to dismiss the ATS claims against Arab Bank because "[i]t would be a direct affront to Jordan's sovereignty for a U.S. court to subject a Jordanian national to suit based on alleged conduct halfway around the world that caused wholly foreign injuries").

177. See id. at 3 (noting the *Jesner* ATS litigation "has been a recurring source of concern in the U.S.–Jordan relationship for more than a decade").

stage.[178] *Jesner* is an example of this problem: The plaintiffs alleged that transactions through a New York branch of a Jordanian bank benefitted a terrorist group and enabled a charity affiliated with the group to launder money.[179] However, the Supreme Court explicitly chose not to decide the case using the presumption against extraterritoriality, despite the alleged harm all occurring in the Middle East.[180] This shows how nebulous the *Kiobel* "touch and concern" test has proven for courts, and even for the Supreme Court.[181] Applying the "most significant relationship" choice of law inquiry to the ATS context would put plaintiffs on notice as to the level of domestic conduct that must be alleged for a suit to be cognizable under the ATS. Plaintiffs would need to show that the United States has a significant interest in the dispute, such as a significant U.S. policy interest in holding the officials liable.[182] If the injury occurred in another country, plaintiffs must plead sufficient U.S.-based conduct caused the harm, such as planning or negligence by the corporate officials.[183] Incorporating general choice of law principles into the "touch and concern" inquiry and requiring it to be reasonable for U.S. law to apply will help channel courts' analysis of whether the presumption against extraterritoriality is overcome.

Second, saying the choice of law inquiry must produce U.S. law provides courts with a judicially manageable standard to determine whether the ATS can be used in a particular case. In many ATS cases, plaintiffs assert claims under U.S. state law, federal common law, and foreign law as a

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178. See Clarifying *Kiobel*, supra note 149, at 1902 (describing the "touch and concern" test as "mysterious" and noting it has caused a circuit split due to its ambiguity). Since the "touch and concern" test was promulgated in a case in which no U.S. contacts were even alleged, the Court did not need to elaborate on the sufficient conduct to overcome the presumption against extraterritoriality. See supra note 43 and accompanying text.

179. *Jesner*, 138 S. Ct. at 1394–95.

180. See id. at 1406 ("The Court of Appeals did not address, and the Court need not now decide, whether these allegations are sufficient to 'touch and concern' the United States under *Kiobel*."); see also Chinmayi Sharma, Summary: Supreme Court Rules in *Jesner v. Arab Bank*, Lawfare (Apr. 27, 2018), https://www.lawfareblog.com/summary-supreme-court-rules-jesner-v-arab-bank [https://perma.cc/VGY9-QV25] (noting the Supreme Court's specific objection to deciding the case on "touch and concern" grounds). Justice Sotomayor noted in her *Jesner* dissent that she would remand the case to the Second Circuit to address whether the presumption against extraterritoriality was overcome in the case. See *Jesner*, 138 S. Ct. at 1436 (Sotomayor, J., dissenting).

181. See Clarifying *Kiobel*, supra note 149, at 1910–11 (describing the *Kiobel* "touch and concern" circuit split).

182. See Restatement (Second) of Conflict of Laws § 6(2)(c) (1971) (requiring consideration of "the relative interests of . . . [interested] states in the determination of the particular issue").

183. See id. § 145(2) (a)–(b) (requiring consideration of certain "contacts" including "the place where the injury occurred" and "the place where the conduct causing the injury occurred").

way to maximize the number of potential bases for recovery.[184] Courts struggle to determine what country's law should apply, and even if courts settle on the source of substantive law, the application itself can be difficult as foreign courts have often not considered the issue.[185] In the current ATS era, in which the presumption against extraterritoriality applies to ATS cases, there seems to be little reason for courts to continue trying to apply foreign law in the cases. Take *Estate of Alvarez v. Johns Hopkins University*, in which plaintiffs alleged "nonconsensual medical experimentation" by U.S.-based scientists on Guatemalan citizens.[186] Plaintiffs brought claims under Guatemalan and Maryland law even when undisputed U.S.-based conduct caused the injuries.[187] This required the court to engage in an analysis of the differences between Guatemalan and Maryland tort law and even use federal common law to determine whether an ATS statute of limitations exists.[188] Given the clear domestic conduct in the case, there was little reason for the court to ever consider the laws of three different legal systems to reach its decision. Instead, U.S. law, either state law or federal law, could have been applied to all aspects of the case beyond the threshold jurisdictional question. Courts applying the "most significant relationship" test and requiring that the test lead to the application of U.S. law would make it easier for courts to analyze ATS cases.

C. *Potential Objections*

There are at least three potential objections to resolving the choice of law problem in favor of applying U.S. law in the ATS context. First, such an approach may enable foreign corporate officials to evade ATS liability. Second, egregious human rights violations will go undeterred despite connections to the United States because the choice of law inquiry will often yield foreign law if the actual effects are not felt in the United States. Third, resolving the issue in favor of U.S. law does not

184. See, e.g., Estate of Alvarez v. Johns Hopkins Univ., 205 F. Supp. 3d 681, 692 n.15 (D. Md. 2016) (noting that plaintiffs' counsel said during oral argument, "it's not that we . . . contend that Guatemalan law is better for any plaintiff than the ATS, but at the same time we are not abandoning our claims under Guatemalan law").

185. See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 683 (S.D.N.Y. 2006) (finding that Mauritian law allowed "veil piercing," but borrowing a definition of the concept from English law because the court had trouble applying the law to this case since it appeared that Mauritian courts had never considered the issue), aff'd, 582 F.3d 244 (2d Cir. 2009).

186. 205 F. Supp. 3d at 683.

187. See id. at 683, 692–93. During the "Guatemala Study," the subject of the litigation, Guatemalans were exposed to various sexually transmitted diseases as part of experiments conducted on behalf of the U.S. government and planned by scientists at Johns Hopkins University and other U.S. institutions and foundations. Id. at 684–86. The U.S. government has admitted to, and apologized for, initiating the study. Id. at 683.

188. See id. at 688–97.

consider that many state choice of law rules would require the use of foreign law, so applying the test in the ATS context makes little sense when state corporate and tort laws are relied on in cases. These three objections are addressed in turn.

While the approach suggested by this Note may erase ATS liability for foreign corporate officials given the "most significant relationship" test's considerations, it is not clear that it is possible under the Supreme Court's current ATS jurisprudence to apply the ATS to these officials anyway. In *Jesner*, one of Justice Kennedy's justifications for excluding foreign corporations from ATS liability was that "plaintiffs still can sue the individual corporate employees responsible."[189] If the conduct the foreign corporate officers engage in that is alleged to violate international law all occurs on foreign soil, and the harm also occurs on foreign soil, the "most significant relationship" test would almost certainly require foreign law, and not U.S. law, to apply.[190] Thus, the foreign corporate officials could not be held liable under the approach suggested in this Note. However, this is not a change from the Court's current ATS limitations. While the foreign corporate official is not categorically immune from liability under *Jesner*,[191] it is unclear how plaintiffs could argue that such an individual's actions "touch and concern" the United States barring very specific circumstances that tie the corporate official, and their conduct, to the United States.[192] The reason for excluding this foreign corporate official from liability is not the "most significant relationship" test or *Jesner*. Instead, it is the Supreme Court's decision to apply the presumption against extraterritoriality to the ATS in *Kiobel*.[193] Justice Kennedy's suggestion in *Jesner* that foreign corporate employees can still be sued is suspect. Since the presumption against extraterritoriality is applied to the ATS, using the "most significant relationship" test would not make foreign corporate officials any less liable in the ATS context.

Another objection to applying the "most significant relationship" test to the ATS is that human rights violations will go undeterred despite a connection to the United States because the choice of law inquiry will often yield foreign law if the actual effects of the violations are not felt in

189. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405 (2018).

190. Foreign law would likely apply because the "contacts" in the dispute are all overseas: The injury occurred overseas and the conduct leading to the injury occurred overseas. See supra note 183 and accompanying text.

191. See *Jesner*, 138 S. Ct. at 1405 (noting the Court's holding does not preclude plaintiffs from "su[ing] the individual corporate employees responsible for a violation of international law under the ATS").

192. See, e.g., Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 528–29 (4th Cir. 2014) (listing the reasons that employees of a U.S. corporation could be held liable under the ATS for violations of international law committed in Iraq).

193. See Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013).

the United States. However, the *Restatement (Second) of Conflict of Laws* inquiry does not preclude U.S. law applying when the harm is only felt overseas.[194] While "the place where the injury occurred" is one consideration, it is only one factor in a much longer test that also includes the "contacts" and state interests involved.[195] For example, applying the "most significant relationship" approach to the *Alvarez* case suggests U.S. law would apply even though the harm was felt only in Guatemala. In the case, plaintiffs alleged the following about doctors at Johns Hopkins University:

> [The doctors] were performing medical research of the type they were employed by Hopkins to do, were motivated, at least in part by a purpose to serve Hopkins as an institution, their involvement occurred at least in part on Hopkins' premises, and aiding nonconsensual human experimentation could not be unexpected by Hopkins because Hopkins decisionmakers knew and planned the Experiments and Hopkins doctors had in the past participated in ethically unsound human experiments . . . .[196]

Applying the "most significant relationship" test to these facts, U.S. law would likely apply if the doctors were sued under the ATS. The doctors were employed by an American university and conducted their work in the United States.[197] The doctors would expect they would be sued in the United States given these contacts.[198] And both the United States and the State of Maryland have an interest in international law violations not being planned and executed on their soil.[199] As *Alvarez* shows, the choice of law approach suggested by this Note would not preclude cases in which U.S. conduct is alleged but only foreign injury occurs.

A third objection is that state choice of law rules may not use the "most significant relationship" conflicts test, so applying the test in the ATS context in general, and the corporate officer context in particular, makes little sense when the substantive law relied on for ancillary issues is derived from state corporate and tort law. While the "most significant relationship" test is the most common conflict of law approach used by American states, it is not the only approach.[200] A particular problem is

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194. See Restatement (Second) of Conflict of Laws § 6 (1971).

195. See id. §§ 6, 145; supra note 112.

196. Estate of Alvarez v. Johns Hopkins Univ., 275 F. Supp. 3d 670, 694 (D. Md. 2017).

197. See Restatement (Second) of Conflict of Laws § 145(2)(b)–(c) (requiring consideration of contacts including "the place where the conduct causing the injury occurred" and "the domicil, residence, nationality, place of incorporation and place of [b]usiness of the parties" when determining which country has the "most significant relationship" to the dispute).

198. See id. § 6(2)(d) (requiring consideration of "the protection of justified expectations").

199. See id. § 6(2)(c) (requiring consideration of "the relative interests of [interested] states in the determination of the particular issue").

200. See supra notes 112–120 and accompanying text.

when the state in which the conduct alleged to violate international law occurred uses the territorial *lex loci delicti* approach, applying the law of the place where the harm occurred.[201] While this is the minority approach today, it is still used by ten states.[202] This has become an issue in ATS cases. For example, in the *Alvarez* case discussed above, one of the reasons for plaintiffs' citation of Guatemalan law was that Maryland uses *lex loci delicti* to determine which substantive law to apply, and the injury alleged occurred in Guatemala, not the United States.[203] However, the ATS is a special federal statute used in a very particular context.[204] Thus, it makes little sense for state choice of law rules to govern whether international law violations can be brought under the ATS. Applying state substantive law to determine ancillary issues in the ATS context is very different from applying fifty different sets of state procedural rules that could impact the statute's application. One way to remedy this issue may be to prioritize applying federal law when available, including looking to other areas of federal common law or analogous federal statutes when the ATS is silent, an approach taken by both the district court in *Alvarez*[205] and the Supreme Court in *Jesner*.[206] Only when federal common law or analogous statutes are silent, or for issues like corporate law that are typically governed by state law, should courts look to state law in ATS cases. This is an issue beyond the scope of this Note and presents an avenue for further research. To summarize, state choice of law rules that indicate foreign law should apply to the ancillary issues will not alter what law is applied to the ATS jurisdictional question given the statute's special status.

CONCLUSION

The Supreme Court's broad holding in *Jesner* categorically denying ATS liability for foreign corporations struck many practitioners and commentators by surprise and has already impacted ATS litigation. If *Jesner* is anything like *Kiobel* or *Sosa* before it, a whole new class of ATS

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201. See Alford, supra note 112, at 1104.

202. Id. at 1104 n.69.

203. See Estate of Alvarez v. Johns Hopkins Univ., 275 F. Supp. 3d 670, 706 (D. Md. 2017).

204. See Lee, Safe Conduct, supra note 16, at 882 (describing the ATS as a "special right" conferred upon aliens to sue in U.S. courts).

205. See *Alvarez*, 275 F. Supp. 3d at 689 ("It is not inappropriate for federal courts to fill in the gaps of the ATS by analogy to other areas of federal common law."); id. at 711 (using the federal TVPA as an analogue to the ATS in the wrongful death context because "[t]he ATS is silent on wrongful death actions").

206. See Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403–05 (2018) (explaining how Congress's choice to expressly provide liability only for individuals in the TVPA and for both individuals and corporations in the Anti-Terrorism Act counsels that "Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include foreign corporations").

cases using creative litigation strategies will be brought in the next few years. *Jesner*'s holding, and the strong separation of powers language in the decision, will likely cause human rights plaintiffs in future ATS cases to sue individual corporate officers, directors, and employees, regardless of whether the corporation is foreign or domestic. As this Note has shown, these cases are difficult to resolve under the Supreme Court's current ATS jurisprudence and will require courts to contend with complicated choice of law issues to determine whether corporate officials can be found liable under the ATS. Federal courts should consider using the "most significant relationship" test and require it to be reasonable to apply U.S. law to provide litigants and courts a clearer standard in these ever-complicated transnational ATS cases.