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An Exception to Jesner: Preventing U.S. Corporations and Their Subsidiaries from Avoiding Liability for Harms Caused Abroad

Luke D. Anderson

AN EXCEPTION TO *JESNER*: PREVENTING U.S. CORPORATIONS AND THEIR SUBSIDIARIES FROM AVOIDING LIABILITY FOR HARMS CAUSED ABROAD

INTRODUCTION

In the mid-1990s, the Union Oil Company of California (Unocal) partnered with Total S.A. and the government and military of Myanmar to extract and transport natural gas from the Yadana gas field.[1] Unocal established two wholly-owned subsidiaries in Myanmar to hold its interest in the project.[2] Local villagers alleged that the Myanmar military—which provided security and built structures (such as helipads) for the project—used forced labor in connection with the project.[3] Other villagers claimed that the military subjected them to murder, rape, and torture to ensure compliance among conscripted workers.[4] The villagers brought claims in the United States under the Alien Tort Statute alleging that Unocal, through its foreign subsidiaries, aided and abetted the military in the crimes in Myanmar.[5] Following an extended journey through the courts, the Ninth Circuit Court of Appeals held that Unocal could be liable under the Alien Tort Statute and remanded the case to the district court for further proceedings.[6] Unocal settled with the villagers in 2003.[7]

In 2018, the U.S. Supreme Court in *Jesner v. Arab Bank, PLC* held that no foreign corporation may be sued under the Alien Tort Statute (ATS).[8] The Supreme Court also recently held in *Kiobel v. Royal Dutch Petrol. Co.* that the ATS includes a "presumption against extraterritoriality," limiting claims to those that "touch and concern" the United States.[9] Together, these holdings greatly limit the reach of the ATS, including in the case described above.

The ATS is a jurisdictional statute providing noncitizens subject matter jurisdiction in federal district court for actions in tort alleging violations of "the

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[1] Doe v. Unocal Corp., 395 F.3d 932, 937 (9th Cir. 2002), *vacated, reh'g, en banc*, 395 F.3d 978 (9th Cir. 2003).

[2] *Unocal*, 395 F.3d at 937.

[3] *Id.* at 939.

[4] *Id.* at 939–40.

[5] *Id.*

[6] *Id.* at 962–63.

[7] *Doe v. Unocal*, EARTH RTS. INT'L, https://earthrights.org/case/doe-v-unocal/ (last visited Feb. 12, 2019).

[8] 28 U.S.C. § 1350 (1948); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

[9] Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2013).

law of nations or a treaty of the United States."[10] The ATS was little used for many years following its passage in 1789.[11] However, following *Filártiga v. Peña-Irala*, decided in 1980, the number of suits involving the ATS quickly increased.[12] By the early 2000s, the Supreme Court began to limit the application of the ATS.[13] Suits limiting the ATS include *Sosa v. Alvarez-Machain*, *Kiobel*, and most recently, *Jesner*.[14] Following *Kiobel* and *Jesner*, the ATS includes a "presumption against extraterritorial application," and no suits may be brought against foreign corporate defendants.[15] These barriers greatly limit the ability of victims of human rights violations to find justice. Critically, the barriers imposed by *Kiobel* and *Jesner* mean that any human rights violations that occur abroad will have to significantly "touch and concern" the United States for a suit to invoke proper jurisdiction—even with an American defendant—and no abuses by foreign corporations can be tried under the statute.[16] This Comment argues that either the courts or Congress should create an exception under the ATS for foreign corporate subsidiaries of domestic corporations. This exception would help realize one goal the ATS was originally enacted to achieve: to find Americans (or in this case, the entities they control) liable for acts committed abroad in violation of the law of nations.[17] Such an exception will help improve

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[10] 28 U.S.C § 1350.

[11] *Jesner*, 138 S. Ct. at 1397.

[12] *See id.* at 1398; Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

[13] *Jesner*, 138 S. Ct. at 1398.

[14] *Id.* at 1386; *Kiobel*, 569 U.S. 108; Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[15] *Jesner*, 138 S. Ct. 1386; *Kiobel*, 569 U.S. at 125.

[16] *Jesner*, 138 S. Ct. 1386; *Kiobel*, 569 U.S. at 124–25. It is not entirely clear what conduct satisfies the "touch and concern" requirement in *Kiobel*. However, it is clear that if "all relevant conduct [takes] place outside the United States," mere corporate presence is insufficient to establish jurisdiction. *Kiobel*, 569 U.S. at 124–25.

[17] Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUM. RTS. L. REV. 158, 189–190 (2014).

> Many events leading up to the enactment of the ATS involved U.S. citizens violating aliens' rights . . . . There is also an opinion by the first Attorney General concerning an American who led a French fleet in attacking and plundering a British slave colony in Sierra Leone. Attorney General William Bradford's 1795 opinion clarified that although the United States did not have criminal jurisdiction over the matter, which he acknowledged was a violation of the law of nations, the ATS provided federal jurisdiction for a civil remedy against Americans who had taken part in the attack. Moreover, one of the primary drafters of the First Judiciary Act, William Paterson, opined that the law of nations provided the substantive law for domestic remedies of international law violations, using the example of a U.S. citizen enlisting in the British Army to fight the French in violation of the United States' position of neutrality . . . . These latter two examples also demonstrate that the founders were not only concerned with remedying violations that occurred within the United States, but also with any violation perpetrated against an alien by a U.S. citizen, even if occurring abroad.
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> *Id.*

American soft power abroad and hold human rights violators liable for their wrongs.[18]

Part I of this Comment gives a brief overview of the history of the ATS, including the reasons for its passage and its interpretation over the first two centuries of its existence. It also discusses the recent increase in ATS cases along with the Supreme Court's recent jurisprudence. Part II examines recent ATS cases involving corporate liability and the path that led to *Jesner*. Part IV includes arguments for and against liability for foreign corporations in domestic courts, both from American and foreign jurisdictions. Part IV also discusses liability for international law violations in foreign states and the legal theories used to find liability. Finally, the proposed exception to the holding of *Jesner* is set forth in Part III, and Part IV is the conclusion.

I. ALIEN TORT STATUTE BACKGROUND

The Alien Tort Statute, passed as part of the Judiciary Act of 1789, gives 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."[19] The ATS is jurisdictional and does not create an independent cause of action.[20] However, "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action."[21] When the ATS was passed, Congress was "probably" focused on three offenses: "violation of safe conducts, infringement of the rights of ambassadors, and piracy[,]" which were offenses addressed by the common law of England.[22] As such, the ATS was little used for most of the nineteenth and twentieth centuries.[23] More recently, additional "clear and unambiguous" violations of international law have been recognized as protected by the ATS.[24] The "recognition . . . that certain acts constituting crimes against humanity are in violation of basic precepts of international law" led to an increase in ATS cases.[25]

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18 *See infra* Section III.A.2.
19 28 U.S.C. § 1350 (1948); *Sosa*, 542 U.S. at 724.
20 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).
21 *Id.*
22 *Id.* at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *68 (1769)).
23 Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 114 (2013).
24 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1397 (2018).
25 *Id.*

The "modern line of cases" began in 1980 with *Filártiga*.[26] In *Filártiga*, the Second Circuit Court of Appeals found there was jurisdiction under the ATS in a case seeking damages for alleged torture.[27]

The Supreme Court in *Sosa* considered whether the ATS can support suits based on causes of action beyond those considered when the statute was passed.[28] The Court noted that "[f]or two centuries [the Supreme Court has] affirmed that the domestic law of the United States recognizes the law of nations."[29] Additionally, the First Congress "assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 [ATS] jurisdiction."[30] The only congressional response to federal courts' exercise of this judicial power was to explicitly affirm jurisdiction in cases of torture through the passage of the Torture Victim Protection Act of 1991 (TVPA), published as a note to the ATS.[31] Additionally, legislative history of the TVPA "includes the remark that § 1350 should 'remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.'"[32] Furthermore, "Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute."[33]

Since *Sosa*, new claims under the ATS are evaluated under the standard that they must be based on norms "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" recognized at the time the ATS was passed.[34] Explaining the level of specificity required, the Court has held that any new causes of action must be "violations of international law norms that are 'specific, universal, and obligatory.'"[35]

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[26] *Sosa*, 542 U.S. at 725.

[27] *Jesner*, 138 S. Ct. at 1398 (citing Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980)); Filártiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980) (holding that the ATS provides jurisdiction for an act universally acknowledged as against the law of nations).

[28] *Sosa*, 542 U.S. at 713–14.

[29] *Id.* at 729–730 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction"); The Nereide, 13 U.S. 388, 423 (1815) ("[T]he Court is bound by the law of nations which is part of the law of the land")).

[30] *Id.* at 730 (referring to the ATS as 28 U.S.C. § 1350 (1948)).

[31] *Id.* at 728.

[32] *Id.* (quoting H.R. REP. NO. 102-367, pt. 1, at 3 (1991)).

[33] *Id.* at 725.

[34] *Id.*

[35] Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 117 (2013) (citing *Sosa*, 542 U.S. at 732 (2004)).

In recent years, the Court has limited the ATS. Perhaps the most notable case before *Jesner* is *Kiobel v. Royal Dutch Petrol. Co*.[36] In 2013, the Court ruled on *Kiobel*, in which Nigerian nationals sued foreign corporations, alleging the corporations aided and abetted the Nigerian government's commission of crimes against the law of nations in Nigeria.[37] In *Kiobel*, the Court held that any claims under the ATS must "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[38] The presumption against extraterritoriality is that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[39] In *Kiobel*, the Court held that the case could not be maintained when "all the relevant conduct took place outside the United States,"[40] and that "mere corporate presence" in the United States is insufficient to rebut the presumption against extraterritoriality.[41]

The Court did not, in *Kiobel*, consider whether the ATS provides jurisdiction for a suit against a corporation.[42] It is notable that *Kiobel* does not bar suits by a foreign national against foreign corporations.[43] The Court instead reached its holding by requiring that there must be some relevant conduct within the United States.[44]

The Court did take this step in *Jesner*.[45] In 2018, the Court barred all suits by a foreign national against a foreign corporation under the ATS.[46] This, in effect, bars suits against foreign subsidiary corporations of U.S. domestic corporations, unless there is a case for veil-piercing,[47] and the suit is brought

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36 *See Kiobel*, 569 U.S. 108.

37 *Id.* at 111–12.

38 *Id.* at 125.

39 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

40 *Kiobel*, 569 U.S. at 125.

41 *Id.* at 133.

42 *Id.* at 114. Although the Supreme Court granted certiorari to consider the question of whether the law of nations recognizes corporate liability, it did not decide the question. Instead, the Court based its decision on whether the ATS "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Id.*

43 *Id.* at 124–25 (holding that "mere corporate presence" is not enough to overcome the presumption against extraterritoriality, but not barring suits against corporations explicitly).

44 *Id.*

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

46 *Id.*

47 John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKELEY BUS. L.J. 1 (2010). Business owners (including corporate owners of subsidiaries) generally enjoy limited liability in relation to their companies' contracts, torts, and other liabilities. *Id.* at 3. "Piercing the corporate veil is a common law legal doctrine used to break rules of traditional limited liability for owners, and to hold shareholders accountable as though the corporation's action was the shareholders' own." *Id.* at 4. Veil piercing is heavily litigated, and there is no clear set of criteria or factors that will lead to a corporation's veil

directly against the domestic corporation.[48] Suits of this type have been largely unsuccessful.[49]

II. CORPORATE LIABILITY AND THE ALIEN TORT STATUTE

A. Cases Pre-Jesner

Recently, the courts of appeals have split over whether a corporation is a suitable defendant in an Alien Tort Statute lawsuit.[50] "[T]he Courts of Appeals for the Seventh, Ninth, and District of Columbia Circuits . . . held that corporations can be subject to suit under the ATS."[51] Conversely, the Second Circuit held that the ATS does not apply to corporations at all, but only to natural persons.[52]

The Ninth Circuit allowed a suit against a corporation to proceed in *Doe v. Unocal Corp*.[53] The plaintiff in *Doe* alleged that the subsidiary of a domestic corporation aided and abetted human rights abuses in connection with an oil

being pierced. *Id.* Certain findings from Matheson's empirical analysis that are particularly relevant are:

> Courts pierce twice as often to hold individual persons liable than they do to hold entities . . . . Entity plaintiffs are almost twice as likely as individual plaintiffs to successfully pierce the corporate veil. Courts are more likely to pierce to enforce a contract claim than to award recovery to a tort claimant.

Id. This demonstrates how unlikely it is that a court will pierce the veil in an Alien Tort Statute case. Factors courts consider when piercing the corporate veil include the presence of fraud/misrepresentation, owner exerting direct control or dominance over company, owner comingling of funds with the company's, undercapitalization of the enterprise, nonfunctioning/nonexistence of directors/officers/managers, principles of fairness, and overlap between the owner and company (including sharing common offices, business activities, employees, and officers/directors). *Id.* at 12–13. While there are relevant trends in veil piercing, as discussed in Matheson's article, veil piercing suits are largely unpredictable, and it is an unreliable method to find liability. *Id.* at 4. Matheson's article provides an excellent analysis of when and why courts of different levels pierce the corporate veil. *See generally id*.

[48] Alert Memorandum, Cleary Gottlieb Steen & Hamilton, Supreme Court Rules Foreign Corporations Not Liable Under Alien Tort Statute 5 (Apr. 25, 2018), https://www.clearygottlieb.com/-/media/files/alert-memos-2018/supreme-court-rules-foreign-corporations-not-liable-under-alien-tort-statute.pdf.

[49] *Id.*

[50] *See* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017–21 (7th Cir. 2011); Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1020–22 (9th Cir. 2013); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 40–55, 397 (D.C. Cir. 2011), *vacated*, 527 Fed. Appx. 7 (D.C. Cir. 2013). *But see* Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 120 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2012).

[51] *Jesner*, 138 S. Ct. at 1396 (citing *Flomo*, 643 F.3d at 1017–21; *Doe I*, 766 F.3d at 1020–22; *Doe VIII*, 654 F.3d at 40–55).

[52] *Jesner*, 138 S. Ct. at 1395 (citing *Kiobel*, 621 F.3d at 120).

[53] Doe v. Unocal Corp., 395 F.3d 932, 945–55 (9th Cir. 2002), *vacated, reh'g, en banc*, 395 F.3d 978 (9th Cir. 2003).

project in Myanmar.[54] The Ninth Circuit did not consider that Unocal was not amenable to suit because of its status as a corporation.[55] Many more cases involving plaintiffs suing corporations, which comprised "[the] majority of the ATS claims filed," followed the decision of the Ninth Circuit, although most were settled or failed on other grounds.[56]

Flomo v. Firestone Nat. Rubber Co. was brought in the Seventh Circuit by twenty-three Liberian children against Firestone, which, though a subsidiary, operates a rubber plantation in Liberia.[57] The principal issue on appeal was "whether a corporation or any other entity that is not a natural person . . . can be liable under the Alien Tort Statute."[58] Judge Posner noted that "[a]ll but one of the cases at our level hold or assume . . . that corporations can be liable."[59] Judge Posner discussed historical examples of corporate liability (namely holding companies criminally liable for complicity in Nazi war crimes) and noted that "corporate tort liability is common around the world."[60] In sum, the Seventh Circuit Court of Appeals is satisfied that the ATS can support corporate liability.[61]

Plaintiffs in *Doe I v. Nestle USA* alleged that Nestle and other corporations aided and abetted child slavery in the Ivory Coast.[62] In its analysis, the Ninth Circuit Court of Appeals first looked to whether a corporation could be liable under the ATS.[63] The court held that corporations can be liable under the ATS,

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[54] *Unocal*, 395 F.3d at 936.

[55] *Id.* at 945.

[56] Jodie A. Kirshner, *Why Is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 274 (2012); *see, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 310 (2d Cir. 2007) (declining to "determine whether the plaintiffs have adequately pled a violation of international law sufficient to avail themselves of jurisdiction under the ACTA," and not reaching the issue of whether a corporation can be liable under the ATS); Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008); Abdullahi v. Phizer, Inc., 562 F.3d 163, 191 (2d Cir. 2009) (reversing and remanding district court's dismissal for lack of ATS jurisdiction; settled for $75 million in 2009); Chowdhury v. Worldtel Bangl. Holding, Ltd., Case No. 08 Civ. 1659 (BMC), 2009 WL 9053203, 2009 U.S. Dist. LEXIS 131483 (E.D.N.Y. Sept. 15, 2009) (jury finding defendants liable under the ATS and TVPA), *rev'd in part, aff'd in part*, Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42 (2d Cir. 2014).

[57] Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011).

[58] *Id.* at 1015.

[59] *Id.* at 1017 (citing Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); *Abdullahi*, 562 F.3d at 174; Sarei v. Rio Tinto, PLC, 550 F.3d 882, 831 (9th Cir. 2008) (en banc) ("The outlier is the split decision in *Kiobel* . . . ."); Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192, 1193, 1195 (D.C. Cir. 2004); Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 91–92 (2d Cir. 2000); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999).

[60] *Flomo*, 643 F.3d at 1019.

[61] *Id.* at 1021.

[62] Doe I v. Nestle USA, 766 F.3d 1013, 1016 (9th Cir. 2014).

[63] *Id.* at 1021.

reaffirming its analysis in *Sarei v. Rio Tinto, PLC*.[64] This involved a "norm-by-norm analysis of corporate liability."[65] For norms that apply to "states, individuals, and groups," the court found that the norm was universal and thus applicable to corporations.[66] The court did not find it necessary that a tribunal had enforced that norm against a corporation, only that the norm was applicable to all actors.[67] In *Doe I*, the court concluded "that the prohibition against slavery is universal and may be asserted against the corporate defendants in this case."[68]

The D.C. Circuit also found that corporations can be liable under the ATS in *Doe VIII v. Exxon Mobil Corp*.[69] Citing its own precedent, *Herero People's Reparations Corp. v. Deutsche Bank*, the court found that corporations are not immune from liability under the ATS.[70]

The Second Circuit suggested in *Khulumani v. Barclay Nat'l Bank* that corporations are suitable defendants under the ATS.[71] However, the defendants in that case did not raise the issue, so the court did not specifically decide the question.[72] However, in 2010 the same court found that corporations are not amenable to suit under ATS.[73] In *Kiobel*, the Second Circuit found that there must be a norm that corporations are liable under international customary law for ATS liability to apply.[74] As the Second Circuit could not find such a norm, it held that corporations cannot be liable under the ATS.[75]

B. Jesner v. Arab Bank

The circuit split discussed in Section III.A led to *Jesner v. Arab Bank, PLC* reaching the Supreme Court to determine whether the Alien Tort Statute can be applied to corporations without a specific direction from Congress.[76] The Court

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64 *Id.* (citing *Sarei*, 550 F.3d at 831).

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 1022.

69 Doe VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 Fed. Appx. 7 (D.C. Cir. 2013).

70 *Id.* at 57; Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192 (D.C. Cir. 2004).

71 Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 282–83 (2d Cir. 2007).

72 *Khulumani*, 504 F.2d at 282–83 (Katzmann, J., concurring)), *aff'd*, 569 U.S. 108 (2012).

73 *Id.*

74 *Id.* at 120.

75 *Id.*

76 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1394 (2018) (plurality opinion) ("The question here is whether the Judiciary has the authority, in an ATS action, to make that determination and then to enforce that liability [on corporations] in ATS suits, all without any explicit authorization from Congress to do so . . . the Court must also ask whether it has authority and discretion in an ATS suit to impose liability on a corporation

held in a plurality opinion that foreign corporations are not amenable to suit under the ATS.[77]

In *Jesner*, petitioners brought claims against Arab Bank, a foreign corporation, for allegedly, through its officials, allowing the bank to be used to transfer funds to terrorists through its New York City office.[78] It was alleged that these funds were used for terrorist activities that caused death or injury to the petitioners.[79] It was also alleged that the corporation should be liable for allowing its human agents to use the corporation to violate international law.[80] The Court assumed those who committed the acts of terror and those who "knowingly and purposefully facilitated banking transactions to aid, enable, or facilitate the terrorist acts would themselves be committing crimes under the same international-law prohibitions."[81]

The plaintiffs in *Jesner* were 6000 foreign nationals alleging that terrorist acts committed in the Middle East over a ten-year period injured them or their family members.[82] They alleged that the bank helped finance attacks, allowed known terrorists and terrorists groups to maintain accounts with the bank, and "allowed [those] accounts to be used to pay the families of suicide bombers."[83] The defendant was Arab Bank, "a major Jordanian financial institution with branches throughout the world."[84] Arab Bank accounts for "between one-fifth and one-third of the total market capitalization of the Amman Stock Exchange."[85]

Jesner reached the Supreme Court on appeal from the Second Circuit.[86] Following its ruling in *Kiobel*, the Second Circuit dismissed *In re Arab Bank* (the case which became *Jesner* on appeal) on its precedent that corporations may not be sued under the ATS.[87]

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without a specific direction from Congress to do so."); *see also supra* Section III.A.

77 *Jesner*, 138 S. Ct. at 1403.

78 *Id.* at 1393.

79 *Id.*

80 *Id.*

81 *Id.* at 1394.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.* (quoting Brief for the Hashemite Kingdom of Jordan as Amicus Curiae Supporting Respondent at 2, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499, 2017 WL 3726004, at *2).

86 *Id.* at 1395.

87 *Id.* (citing *In re* Arab Bank, PLC., 808 F.3d 144 (2d Cir. 2015)).

When deciding *Jesner*, the Supreme Court refused to answer whether "corporate liability is a question governed by international law or whether [international] law imposes liability on corporations."[88] However, the Court did question whether any corporation can be held liable under the ATS, suggesting that there is no international law norm meeting the "specific, universal, and obligatory" requirements set out in *Sosa* necessary to find corporations liable for international law violations.[89] In refusing to answer this question, the Court suggested it was a question better suited for the political branches to answer.[90]

Furthermore, the Court questioned whether, under its reading of *Sosa*, any new causes of action could be recognized under the ATS.[91] Despite these reservations, throughout its opinion the Court specifically limited the holding of *Jesner* to bar suits against only foreign corporations.[92]

In *Jesner*, the Court is concerned that if foreign corporations can be held liable for international law violations under the ATS, then foreign states could potentially apply the Court's ruling as a norm of international law to hold U.S. corporations liable in foreign jurisdictions.[93] Recently, other countries have begun to find that domestic corporations and their foreign subsidiaries are potentially liable for harms they cause abroad.[94] These moves suggest that the potentially developing norm or trend, if it can be called such, is not to find *entirely* foreign corporations liable for harms caused abroad, but to find only foreign corporate *subsidiaries* of domestic corporations (and their local parent corporations) liable.[95]

There are three concurrences in *Jesner* by Justices Thomas, Alito, and Gorsuch.[96] Joining in the opinion of the Court, Justice Thomas noted that courts should not create new causes of action under the ATS, particularly if there is a

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88 *Id.* at 1393.

89 *Id.* at 1402 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004)).

90 *Id.* at 1402–06.

91 *Id.* at 1403.

92 *Id.*

93 *Id.* at 1405.

94 *See* Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-339 of March 27, 2017 Relating to the Duty of Care of Parent Companies and Instructing Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017; Choc v. Hudbay Minerals Inc. (2013), 116 O.R. 3d 674, 684 para. 32 (Can. Ont. Super. Ct. J.); Rb. Den Haag 30 januari 2013, NJF 2013, ECLI:NL:RBDHA:2013:BY9854 m.nt. (Akpan/Royal Dutch Shell PLC) (Neth.); Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 (Eng.).

95 *See* Law 2017-339 of March 27, 2017; *Hudbay*, 116 O.R. 3d 674; Rb. Den Haag ECLI:NL:RBDHA:2013:BY9854 (Akpan); *Lungowe* [2017] EWCA (Civ) 1528.

96 *Jesner*, 138 S. Ct. at 1408–19.

risk of international strife.[97] Justice Gorsuch was particularly concerned with the separation of powers principles.[98] He highlights that "when confronted with a request to fashion a new cause of action, 'separation-of-power principles are or should be central to the analysis.'"[99] Justice Gorsuch discusses the nationality of the parties and reviews the history of the ATS.[100] He finds that, while it is not stated in the statute, the ATS as originally understood requires an American defendant for jurisdiction.[101] In his concurrence, Justice Alito also noted that new causes of action should not be created under the ATS because of the separation-of-powers doctrine.[102] Justice Alito went so far as to suggest that the Court decided *Sosa* wrongly and that no new causes of action should be created under the ATS unless they "materially advance the ATS's objective of avoiding diplomatic strife."[103]

Justice Sotomayor dissented and was joined by Justices Ginsburg, Breyer, and Kagan.[104] In her dissent, Justice Sotomayor first criticized the plurality for "fundamentally [misconceiving] how international law works" by asking whether there is an international law norm for corporate liability.[105] Although *Sosa* requires international consensus for the existence of a substantive prohibition, Justice Sotomayor did not find that *Sosa* demands the same consensus with regard to the enforcement of those prohibitions, as customary international law is not directly concerned with the enforcement of violations.[106] International law, instead, leaves the remedy for violations of international law norms to individual states.[107]

As an example, Justice Sotomayor compared the international law norm of prohibition of genocide with the "so-called norm" of corporate liability.[108] In *Sosa*, the Court used the word "norm" when referring to violations.[109] A norm, thus, must be a prohibition that can be violated.[110] Justice Sotomayor noted that it is difficult to violate a norm of corporate liability, and therefore, in her view,

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97 *Id.* at 1408 (Thomas, J., concurring).
98 *Id.* at 1413 (Gorsuch, J., concurring).
99 *Id.* (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017)).
100 *Id.* at 1414–19 (Gorsuch, J., concurring).
101 *Id.* at 1415 (Gorsuch, J., concurring).
102 *Id.* at 1408 (Alito, J., concurring).
103 *Id.* at 1410 (Alito, J., concurring).
104 *Id.* at 1419 (Sotomayor, J., dissenting).
105 *Id.*
106 *Id.* at 1420 (Sotomayor, J., dissenting).
107 *Id.*
108 *Id.* at 1420–21 (Sotomayor, J., dissenting).
109 *Id.* at 1420.
110 *Id.*

this is not the kind of norm that is important under international law.[111] Under Justice Sotomayor's interpretation, a norm does not consider who can be liable, but instead refers to an action that is prohibited.[112] Committing genocide is an action, and its prohibition is a norm of international law; the questions of who can be liable and what is the remedy for the harm are issues for states.[113]

This same distinction is reflected in the ATS: "[t]he statutory text . . . requires only that the alleged conduct be specifically and universally condemned under international law, not that the civil action be of a type that the international community specifically . . . practices or endorses."[114] Accordingly, Justice Sotomayor argued that the relevant question was "whether there is any reason . . . to distinguish between a corporation and a natural person who is alleged to have violated the law of nations."[115] She concluded that "international law provides no such reason" for such a distinction, "[n]or does domestic law."[116] For at least 200 years, under U.S. domestic common law, corporations have consistently been held liable for actions in tort.[117]

Justice Sotomayor also highlighted that the ATS clearly limits the class of plaintiffs but does not do the same for defendants.[118] Looking at the rest of the same section of the Judiciary Act of 1789 as the ATS, she found that Congress did limit the range of defendants for other types of suits, suggesting that Congress intentionally did not limit the range of defendants for the ATS.[119] Further, the ATS undisputedly establishes jurisdiction over ships for piracy, which are not natural persons.[120] In 1907, "the Attorney General acknowledged that corporations could be held liable under the ATS."[121]

Using language similar to that in *Sosa* and other Supreme Court precedents, Justice Sotomayor rebutted the presumption that the ATS was created to be static and therefore could not allow any new causes of action.[122] She pointed to the

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111 *Id.* at 1420–21.

112 *Id.* at 1421–22 (Sotomayor, J., dissenting).

113 *Id.* at 1420, 1423 (Sotomayor, J., dissenting).

114 *Id.* at 1421.

115 *Id.* at 1425.

116 *Id.*

117 *Id.* (citing Phila., Wilmington, & Balt. R.R. v. Quigley, 62 U.S. 202, 210 (1859); Chestnut Hill & Spring House Tpk. v. Rutter, 4 Serg. & Rawle 6, 17 (Pa. 1818)).

118 *Id.* at 1426 (Sotomayor, J., dissenting).

119 *Id.*

120 *Id.* at 1427 (Sotomayor, J., dissenting).

121 *Id.* at 1426–27 (citing 26 Op. Att'y Gen. 250, 252 (1907)).

122 *Id.* at 1428 (Sotomayor, J., dissenting); Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) ("[T]he reasonable inference from the historical materials is that the statute was intended to have practical effect the

fact that Congress based liability in the ATS on "the law of nations" and "treaties of the United States," neither of which are static bodies of law.[123]

Finally, Justice Sotomayor strongly condemned foreclosing all liability for foreign corporations.[124] She characterized this foreclosure as "us[ing] a sledgehammer to crack a nut" because other means are available to limit liability, such as exhaustion doctrine, *forum non conveniens*, reasons of international comity, or a State Department request.[125] In multiple recent ATS cases, under two administrations affiliated with different parties (Obama and Trump), the executive branch has expressly urged the Court to recognize ATS liability for corporations.[126] Justice Sotomayor found it notable that Congress "has . . . never seen it necessary to immunize corporations . . . even though corporations have been named as defendants in ATS suits for years."[127] In fact, two members of Congress (one current and one former) advised the Court specifically against such a holding.[128]

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moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action . . . .").

[123] *Jesner*, 138 S. Ct. at 1427 (Sotomayor, J., dissenting) (quoting 28 U.S.C. § 1350 (1948)).

[124] *Id.* at 1430–31 (Sotomayor, J., dissenting).

[125] *Id.* ("Courts can also dismiss ATS suits for a plaintiff's failure to exhaust the remedies available in her domestic forum."). *Forum non conveniens* is a doctrine allowing a court, even with proper jurisdiction, to dismiss a claim. Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 100 (2d Cir. 2000). First, courts must determine if an adequate alternative forum exists. *Wiwa*, 226 F.3d at 100 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981)). Next, the courts must balance a set of factors "involving the private interests of the parties . . . and any public interests at stake." *Id.* The burden is on the defendant, and "the plaintiff's choice of forum should rarely be disturbed." *Id.* (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)). Factors to be considered include: access to evidence and witnesses; practical problems including expense; local interest in the dispute; administrative burden on the court; and the difficultly a court may have in applying foreign laws. *Gulf Oil Corp.*, 330 U.S. at 508–09.

[126] *Jesner*, 138 S. Ct. at 1431 (Sotomayor, J., dissenting). "This Court should vacate the decision below, which rests on the mistaken premise that a federal common-law claim under the ATS may never be brought against a corporation[.]" *Id.* at 1431 (Sotomayor, J., dissenting) (quoting Brief for United States as Amicus Curiae Supporting Neither Party at 5, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 2792284, at *5). "Courts may recognize corporate liability in actions under the ATS as a matter of federal common law." *Id.* at 1431 (Sotomayor, J., dissenting) (quoting Brief for United States as Amicus Curiae Supporting Petitioners at 7, Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2011) (No. 10-1491), 2011 WL 6425363, at *7). "[T]he United States told the Court that it saw no 'sound reason to categorically exclude corporate liability' . . . [and] not providing a remedy against a corporate defendant actually would raise 'the possibility of friction[.]'" *Id.* at 1431 (Sotomayor, J., dissenting) (quoting Oral Argument at 29, 33, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 4551614, at *29, 33).

[127] *Jesner*, 138 S. Ct. at 1431–32 (Sotomayor, J., dissenting).

[128] *Id.* (citing Brief of U.S. Sen. Sheldon Whitehouse et al. as Amici Curiae at 7–11, Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) (No. 16-499), 2017 WL 2822776, at *7–11; Brief of Former U.S. Sen. Arlen Specter et al. as Amici Curiae at 17–18, Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2011) (Nos. 10-1491, 11-88), 2011 WL 6813568, at *17–18).

C. How Will These Changes Affect Future Litigations?

One significant impact of *Jesner* may be that corporations can avoid liability for violations of international law norms abroad through the use of foreign subsidiaries.[129] Liability of a parent corporation for the actions of its subsidiaries is rare: the corporate veil is pierced in parent–subsidiary relationships in only 20.56% of cases.[130] Corporations already derive significant liability benefits from parent–subsidiary relationships, severely limiting the ability of victims to obtain remedies.[131] Victims are often faced with considerable hurdles within the country hosting a subsidiary to find remedies, which is frequently a major reason why a remedy is sought under the ATS.[132]

After *Kiobel* and *Jesner*, it seems that liability under the ATS for violations of international law by corporations will only be found if: (1) the corporate defendant is a domestic U.S. corporation; and (2) any relevant actions violating international law took place within the United States, thus avoiding *Kiobel*'s "presumption against extraterritoriality."[133] As a result, U.S. multinational corporations will be able to avoid liability in the United States for human rights violations committed abroad by establishing foreign subsidiary corporations, which cannot be defendants in ATS litigation.[134] Due to technicalities of the corporate form, domestic corporations will be able to avoid liability even when subsidiaries are wholly owned by American corporations and share directors and executives.

It does not seem likely that a foreign corporation being the subsidiary of an American corporation will satisfy the "touch and concern" requirement of *Kiobel*, thus preventing a court from piercing the corporate veil.[135] Furthermore, because of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, it was unlikely that a litigant could plead sufficient facts prior to discovery to show that a human rights violation—perpetuated by a subsidiary overseas—touches and concerns the United States in relation to the parent.[136] *Jesner* will only increase the existing hurdles to bringing a suit.

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129 Alert Memorandum, *supra* note 48, at 5.

130 Matheson, *supra* note 47, at 15; *see supra* note 47.

131 Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1775 (2015); Skinner, *supra* note 17, at 163; *see also supra* note 47.

132 Skinner, *supra* note 131, at 1800; Skinner, *supra* note 17, at 163.

133 *Jesner*, 138 S. Ct. 1386; *Kiobel*, 569 U.S. at 125, 133.

134 *Jesner*, 138 S. Ct. at 1407.

135 *Kiobel*, 569 U.S. 108.

136 Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); *see also*

The effects of *Jesner* and other recent ATS cases become apparent when looking at the case of the Myanmar villagers against Unocal.[137] While Unocal is a domestic U.S. corporation, its subsidiaries are not.[138] If *Jesner* had been the law at the time, the villagers would have been barred from bringing suit directly against Unocal's subsidiaries in Myanmar, even though both subsidiaries are wholly owned.[139] Any suit now must be against the subsidiaries indirectly through their parent, Unocal.[140] After *Kiobel*, *Twombly*, and *Iqbal*, the villagers would now be required to plead sufficient facts—prior to discovery—that Unocal took actions violating international law in the United States.[141] Only then would the villagers be able to move to pierce the corporate veil to find the subsidiaries liable for their actions.

III. ARGUMENTS FOR AND AGAINST JURISDICTION

Many arguments have been made against ATS liability.[142] These arguments are centered around foreign relations, hindrance to foreign investment, the sanctity of corporate limited liability, and the political questions raised by ATS suits.[143] However, allowing ATS liability could, in fact, be a benefit for both foreign relations and foreign investment. In particular, by allowing ATS suits, the United States could increase its soft power and influence by holding human rights violators responsible for their actions. Part III aims to dissect the various policy reasons behind the arguments for and against jurisdiction. Section III.A discusses potential foreign relations implications of ATS lawsuits. Section III.B assesses the impacts on foreign investment. Finally, Section III.C addresses the

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Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDU. 744 (2016); David N. Anthony & Timothy J. St. George, *"Plausibility" Pleading After* Twombly *and* Iqbal, PRAC. LITIGATOR, July 2010, at 9. The cases *Twombly* and *Iqbal* had a significant impact on pleading requirements. Together, these cases create a plausibility standard based on the context of the case. *See Iqbal*, 556 U.S. at 663–64 ("Determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense."). "Post-*Iqbal* there is arguably a need for allegations closer to the level of 'proof' previously reserved for summary judgment." Bartholomew, *supra*, at 753. Claimants must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A complaint must "plead sufficient factual content to allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct." Anthony & St. George, *supra*, at 10. In cases where a defendant is seeking to fulfill the touch-and-concern requirement of *Kiobel*, it will be very difficult to plead sufficient facts, as much of the information may be proprietary and held by the companies themselves.

137 Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

138 *Id.*

139 *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); *Unocal*, 395 F.3d 932.

140 *See Jesner*, 138 S. Ct. 1386.

141 *See* Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2013); *Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

142 *See, e.g.*, *Jesner*, 138 S. Ct. at 1405–08.

143 *See id.*

political question doctrine and whether defining corporate ATS liability is the job of the courts or Congress.

Courts and legislatures in other jurisdictions have considered these questions. Recent cases in foreign jurisdictions have suggested that their courts may be more amenable than U.S. Courts to hearing cases based on the actions of a domestic corporation abroad, a foreign corporation, or a domestic corporation's foreign subsidiaries.[144] Since at least 2012, some scholars suggest that the European Union is growing more tolerant of claims based on foreign acts, while "the United States is growing less tolerant of extraterritorial adjudication."[145] Countries including France, England, Canada, and the Netherlands have used various theories of liability for hearing cases arising extraterritorially.[146] It is notable that in the cases discussed below, all of the alleged tortious actions took place in a foreign country.

A. Foreign Relations

1. Foreign Protests of ATS Suits

A major criticism of ATS lawsuits is that lawsuits against foreign defendants give rise to diplomatic strife.[147] In *Jesner*, for example, Jordan objected on the grounds that the litigation was an affront to its sovereignty.[148] In numerous cases alleging that corporations participated in or abetted apartheid in South Africa, the South African government objected on the basis that those cases were interfering with its Truth and Reconciliation Commission.[149] In a suit against a mining company, Papua New Guinea objected on the grounds that "the litigation had 'potentially very serious social, economic, legal, political and security implications' for Papua New Guinea and would impair its relations with the United States."[150] Other countries such as the United Kingdom, Switzerland, and

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144 *See* Choc v. Hudbay Minerals Inc. (2013), 116 O.R. 3d 674 (Can. Ont. Super. Ct. J.); Rb. Den Haag 30 januari 2013, NFJ 2013, ECLI:NL:RBDHA:2013:BY9854 m.nt. (Akpan/Royal Dutch Shell PLC) (Neth.); Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 (Eng.).

145 Kirshner, *supra* note 56.

146 *See* Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-339 of March 27, 2017 Relating to the Duty of Care of Parent Companies and Instructing Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017; *Hudbay*, 116 O.R. 3d 674; Rb. Den Haag ECLI:NL:RBDHA:2013:BY9854 (Akpan); *Lungowe* [2017] EWCA (Civ) 1528.

147 *Jesner*, 138 S. Ct. at 1398.

148 *Id.* at 1407.

149 Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

150 Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (citing Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1199 (9th Cir. 2007)), *vacated*, 527 Fed. Appx. 7 (D.C.

Germany "have complained that the ATS improperly interferes with their rights to regulate their citizens and conduct in their own territory."[151] This was a major concern of the Court when deciding *Kiobel*, and the Court again recognized this concern when deciding *Jesner*.[152]

In her dissent in *Jesner*, Justice Sotomayor recognized that "none of those objections [were] about the availability of corporate liability as a general matter."[153] This suggests that there is nothing inherently offensive to other states in finding a corporation liable for human rights violations. Protesters—including the European Commission, South Africa, Germany, and the United Kingdom—were concerned instead about exhaustion of foreign remedies, interference with internal judicial process, and suits by foreign plaintiffs against foreign defendants for conduct taking place entirely on foreign soil.[154] Furthermore, governments objecting to ATS litigation may change course depending on the local administration in power.[155] For example, in South Africa, after the Mbeki Administration objected to ATS litigation as an infringement on the Truth and Reconciliation Commission's work, the next administration, led by Joseph Zuma, "reversed course and supported . . . ATS litigation."[156]

There is a concern that plaintiffs will sue under the ATS using an aiding and abetting theory to "use corporations as surrogate defendants to challenge the conduct of foreign governments."[157] While this may be a valid concern, it could be limited by the political question doctrine—especially when the country in question is an ally of the United States.[158] Additionally, as suggested by Justice

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Cir. 2013).

151 *Doe VIII*, 654 F.3d at 78.

152 *Jesner*, 138 S. Ct. at 1398; Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124 (2013).

153 *Jesner*, 138 S. Ct. at 1430 (Sotomayor, J., dissenting).

154 *Id.*

155 Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1162 (2011).

156 *Id.* (citing Letter from Jeffrey Thamsanqa Radebe, Minister of Justice & Constitutional Dev., S. Afr., to the Honorable Shira Scheindlin, U.S. Dist. Court for the S. Dist. of N.Y., *available at* https://viewfromll2.files.wordpress.com/2009/12/radebeletter.pdf).

157 *Jesner*, 138 S. Ct. at 1404.

158 Political question doctrine tells us that the courts should not adjudicate claims involving "policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986). The case *Baker v. Carr* set out a series of factors used to determine whether a claim constitutes a political question. 369 U.S. 186, 217 (1962). Some relevant factors include:

> the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Sotomayor, State Department requests—or simple reasons of international comity—could be a means to limit liability when it is necessary.[159]

Other countries, such as France, England, Canada, and the Netherlands, have begun to develop their own theories of liability, demonstrating that there is not universal resistance to finding corporations, or their subsidiaries, liable for their actions abroad.[160] These countries follow three broad rationales for liability: due diligence in France, duty of care in England and Canada, and the plurality of the defendants doctrine in the Netherlands.[161]

France has followed a due diligence approach, recently enacting a bill that "create[s] a presumption of parent company liability for subsidiaries' torts abroad that the parent corporations can overcome if they engage in human rights 'due diligence' regarding acts of those subsidiaries."[162] A similar law is under consideration by the Swiss Parliament.[163] The French law establishes a statutory duty of care for parent companies with regard to their subsidiaries' actions.[164] The law sets out certain actions that satisfy the due diligence requirement and overcome the presumption of liability.[165] Parent companies are required to evaluate the risk for violations; enact procedures for regular monitoring and evaluation of subsidiaries, subcontractors, and suppliers; and take actions to mitigate risks or prevent serious harm.[166] If they cannot rebut liability, parent companies are liable to "repair the damage that the performance of those obligations would have prevented."[167]

Id.

159 *Jesner*, 138 S. Ct. at 1430–31 (Sotomayor, J., dissenting).

160 *See* Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétésmères et des entreprises donneuses d'ordre [Law 2017-339 of March 27, 2017 Relating to the Duty of Care of Parent Companies and Instructing Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017; Choc v. Hudbay Minerals Inc. (2013), 116 O.R. 3d 674 (Can. Ont. Super. Ct. J.); Rb. Den Haag 30 januari 2013, NJF 2013, ECLI:NL:RBDHA:2013:BY9854 m.nt. (Akpan/Royal Dutch Shell PLC) (Neth.); Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 (Eng.).

161 *See* Law 2017-339 of March 27, 2017; *Hudbay*, 116 O.R. 3d 674; Rb. Den Haag ECLI:NL:RBDHA:2013:BY9854 (Akpan); *Lungowe* [2017] EWCA (Civ) 1528.

162 Skinner, *supra* note 131, at 1826; Law 2017-339 of March 27, 2017; *see also* Skinner, *supra* note 17, at 260.

163 Dalia Palombo, *Parent Company Liability for Human Rights Abuses in the UK? We Need Clarity*, OXFORD HUM. RTS. HUB (July 24, 2018), http://ohrh.law.ox.ac.uk/parent-company-liability-for-human-rights-abuses-in-the-uk-we-need-clarity.

164 Law 2017-339 of March 27, 2017; Skinner, *supra* note 17, at 260–61; Skinner, *supra* note 131, at 1826.

165 Law 2017-339 of March 27, 2017.

166 *Id.*

167 *Id.*

Similarly, courts in England and Canada have begun to use a duty of care analysis when considering the liability of a domestic parent for actions of a foreign corporate subsidiary.[168] In both countries, cases are currently proceeding against domestic corporations for the actions of their subsidiaries.[169]

In England, the *Lungowe v. Vedanta Res. PLC* litigation has been ongoing since 2015.[170] Zambian citizens brought a suit against the U.K. corporation, Vedanta Resources, and against its subsidiary in Zambia, KCM.[171] KCM, owned primarily by Vedanta Resource Holdings Limited, operates the Nchanga mines in Zambia.[172] Significantly, while Vedanta owns 79.42% of KCM, the Government of Zambia holds the remaining 20.58%.[173] The claimants filed suit against Vedanta and KCM, alleging personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land arising out of alleged pollution and environmental damage caused by the Nchanga copper mines.[174] KCM is being sued directly for "causes of action in negligence, nuisance, the rule in *Rylands v. Fletcher*, trespass, and liability under the Zambian statutes."[175] Meanwhile, the claim against Vedanta is for negligence in its duty of care to ensure KCM's operations did not harm local communities.[176] Plaintiffs allege Vedanta had a duty of care because of the high level of control it exercised over its subsidiary, KCM.[177]

Vedanta filed an unsuccessful motion claiming that the court lacked jurisdiction, reasoning that jurisdiction should not be found in a case in which "non-EU claimants are using the existence of the claim against an EU domiciled party as a device to ensure that their *real* claim, against another defendant, is litigated in this jurisdiction rather than in the natural forum."[178] Defendants Vedanta and KCM claimed that the entire focus of the lawsuit is in Zambia and

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168 *See* Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 (Eng.); Choc v. Hudbay Minerals Inc. (2013), 116 O.R. 3d 674 (Can. Ont. Super. Ct. J.).

169 *See Lungowe* [2017] EWCA (Civ) 1528; *Hudbay*, 116 O.R. 3d 674.

170 *Lungowe* [2017] EWCA (Civ) 1528 [1].

171 *Id.*

172 *Id.* [10]–[11].

173 *Id. See infra* Section III.A.2.

174 Lungowe v. Vedanta Res. PLC [2016] EWHC (TCC) 975 [1] (Eng.).

175 *Lungowe* [2017] EWCA (Civ) 1528 [26]; Rylands v. Fletcher [1868] UKHL 1, (1868) 3 LRE & I. App. (HL) 330 (appeal taken from Eng.) (UK) ("The person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.").

176 *Lungowe* [2017] EWCA (Civ) 1528 [20].

177 *Id.*

178 *Id.* [33] (emphasis added).

any alleged torts occurred there, not in the United Kingdom.[179] This motion echoes the concern that ATS claims would "improperly interfere[] with [countries'] rights to regulate their citizens and conduct in their own territory" by claiming that the United Kingdom is taking over the authority properly vested in the Zambia.[180] While a parent company's duty of care for its subsidiary's actions abroad has not been explicitly decided, it has been suggested that this case "has made it clear that U.K.-based parent companies may be found liable for human rights violations committed by their foreign subsidiaries."[181]

In Canada, the Ontario Superior Court of Justice allowed a claim for human rights abuses committed abroad to proceed based on a "novel duty of care."[182] In *Choc v. Hudbay*, Guatemalan plaintiffs brought a suit against Hudbay Minerals Inc. and its wholly-owned Guatemalan subsidiary, CGN.[183] Claimants pled two theories: direct liability for a parent corporation "in negligence for its own actions and omissions in another country" and liability for a foreign subsidiary's actions under an agency theory, based on piercing the corporate veil.[184] While this case has not yet been decided on the merits, the court has allowed the claim based on piercing the corporate veil to proceed to trial.[185]

In the Netherlands, the Hague Court of Appeal found jurisdiction over Dutch corporation Royal Dutch Shell's (RDS) wholly-owned foreign subsidiary, SPDC, in a suit for liability for oil pollution in the Niger Delta.[186] In *Akpan v. Royal Dutch Shell PLC*, the plaintiffs alleged that SPDC negligently caused or failed to prevent a number of oil spills in 2005 and 2006 and that RDS acted negligently by not preventing its subsidiary's negligence.[187] The District Court of the Hague found RDS liable for not taking measures to prevent sabotage and

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179 *Id.* [40] (citing *Lungowe* [2016] EWHC (TCC) 975 [93]).

180 Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part); *see also Lungowe* [2017] EWCA (Civ) 1528 [40] (citing *Lungowe* [2016] EWHC (TCC) 975 [93]).

181 Viren Mascarenhas & Kayla Winarsky Green, *Landmark UK Case Takes a Stand: Parent Companies May Be Liable for Their Subsidiaries' Alleged Human Rights Abuses*, KING & SPALDING: ENERGY NEWSL. (Feb. 7, 2018), https://www.kslaw.com/blog-posts/landmark-uk-case-takes-a-stand-parent-companies-may-be-liable-for-their-subsidiaries-alleged-human-rights-abuses.

182 Choc v. Hudbay Minerals Inc. (2013), 116 O.R. 3d 674, para. 75 (Can. Ont. Super. Ct. J.).

183 *Id.* para. 4.

184 *Id.* para. 50.

185 *Id.* para 49.

186 Cees van Dam, *Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case*, ROTTERDAM SCH. MGMT. (Jan. 14, 2016), https://www.rsm.nl/fileadmin/Images_NEW/Sites/Chair_IBHR/Publications/Van_Dam_-_Preliminary_judgments_Dutch_Shell_case.pdf (citing Hof Den Haag 18 december 2015, ECLI:NL:GHDHA:2015:3587 m.nt. (Shell Petrol. Dev. Co. of Nigeria/Akpan) (Neth.)).

187 *Id.*

ordered the subsidiary SPDC to pay damages to a Nigerian farmer whose land and water were damaged by the oil spills.[188]

RDS and SPDC appealed the district court's judgment.[189] One question on appeal was the district court's finding of jurisdiction over both RDS and SPDC.[190] The court upheld the ruling that jurisdiction had been proper.[191] The appellate court found that it was undisputed that there is jurisdiction over RDS "on the basis of the Brussels I Regulation. Article 2 . . . that persons domiciled in a Member State shall be sued in the court of that Member State[,] and [A]rticle 60 holds that a company is domiciled at the place where it has its statutory seat."[192] The court found jurisdiction over SPDC based on the plurality of defendants doctrine.[193] This doctrine, found in Article 7(1) of the Dutch Code of Civil Procedure, allows a court to "hear a case against a defendant that is not within its jurisdiction provided the claim is in such a way related to the claim of [a] defendant over which the court does have jurisdiction [and] that reasons of efficiency justify a joint hearing."[194] The appellate court found it important that the defendants were part of the same business group.[195] Additionally, the court was receptive, although cautious, to the possibility that a parent may be liable for the torts of its subsidiaries.[196] This aligns with the district court's recognition of the "international trend to hold parent companies of multinationals liable in their own countries for the harmful practices of their foreign []subsidiaries."[197] Although it was important that the parent and subsidiary were sued together, the district court found that even if the claims against RDS were dismissed, it would retain jurisdiction over SPDC.[198]

These three cases, along with the French Law 2017-399, demonstrate that other countries are not universally opposed to holding foreign subsidiaries of

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188 *Id.*; Donald Robertson et al., *Emerging Trend: Multinationals Being Sued in Their Home Countries for Harmful Practices of Their Foreign Operations*, LEXOLOGY (Mar. 21, 2013), https://www.lexology.com/library/detail.aspx?g=4dd2c1fb-ad2d-417d-aafd-05296931a858 (originally published on the law firm Herbert Smith Freehills's website).

189 van Dam, *supra* note 186, ¶ 07.

190 *Id.*

191 *Id.* ¶¶ 10–11.

192 *Id.* ¶ 10. The Brussels I Regulation is an EU law regulating the jurisdiction of courts of member countries. Parliament and Council Regulation 1215/2012, 2012 O.J. (L 351/1).

193 Robertson et al., *supra* note 188 (citing Rb. Den Haag 30 januari 2013, NJF 2013, ECLI:NL:RBDHA:2013:BY9854 m.nt. (Akpan/Royal Dutch Shell PLC) (Neth.)).

194 van Dam, *supra* note 186, ¶ 11.

195 *Id.* ¶ 12.

196 *Id.* ¶¶ 14–17.

197 Robertson et al., *supra* note 188.

198 *Id.* (citing Rb. Den Haag ECLI:NL:RBDHA:2013:BY9854 (Akpan)).

domestic corporations liable for their wrongdoing. Most ATS concerns in this arena are related to exhaustion of foreign remedies, potential interference with internal judicial processes, and a flood of suits by foreign plaintiffs against foreign defendants for conduct taking place entirely on foreign soil.[199] By limiting the exception to *Jesner* and *Kiobel* to actions taken by subsidiaries of American corporations, instead of entirely foreign corporations, many of these concerns can be alleviated.

2. Responsibility to Hold Human Rights Violators Responsible

Providing a forum to hold U.S. corporations or their wholly-owned subsidiaries liable for their violations of international law abroad can be a benefit to U.S. foreign policy. Despite the Supreme Court's focus on foreign protests, foreign governments have rarely opposed ATS litigation, suggesting that the benefits of ATS suits outweigh their costs.[200] Following cases in England, Canada, and the Netherlands, it appears that foreign courts are beginning to follow the "international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign subsidiaries."[201] ATS litigation benefits both the United States' and other nations' soft power because it signals compliance with human rights law and international law.[202] Signaling compliance with the law "is generally in a state's interest . . . because it signals [the state] has characteristics that make it an appealing[,] cooperative partner."[203] Additionally, because ATS litigation places much of the cost of lengthy international law cases on U.S. courts, it benefits other states and provides them a cheap way to signal compliance.[204]

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[199] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1430 (2018) (Sotomayor, J., dissenting).

[200] Knowles, *supra* note 155, at 1170.

[201] Robertson et al., *supra* note 188; *see also* Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-339 of March 27, 2017 Relating to the Duty of Care of Parent Companies and Instructing Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017; Choc v. Hudbay Minerals Inc. (2013), 116 O.R. 3d 674 (Can. Ont. Super. Ct. J.); Rb. Den Haag ECLI:NL:RBDHA:2013:BY9854 (Akpan); Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 (Eng.).

[202] Knowles, *supra* note 155, at 1170–75; *see generally* JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS (Public Affairs 2009). "Soft power" is power that a country can use to obtain its desired outcomes without threat. *Id.* at 5. Countries may follow another's lead for reasons such as "admir[ation for] its values, [a desire to] emulat[e] its example, [or] aspir[ations] to its level of prosperity and openness." *Id*. Soft power is derived from cooperation instead of coercion; it lies in "the ability to shape the preferences of others." *Id*. This can help to shape the long-term course of society and politics in a subtler way than "hard power" (the use of force), and perhaps with more sticking power as it relies on the changing of opinion and attitudes. *Id.*

[203] Knowles, *supra* note 155, at 1169.

[204] *Id.* at 1175 ("ATS litigation actually enables cheaper signaling for them as well because the target nations do not have to pay the often high costs of bringing human rights violators to justice.").

Importantly, permitting ATS litigation against human rights violators helps the United States shape international human rights common law.[205] Many human rights issues are litigated for the first time through the ATS, giving the United States a chance to act as a "norm definer" in international law.[206] This role as "norm definer" would be lost without the ATS, decreasing American influence internationally.[207] For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) cited an ATS case when recognizing the "universal revulsion against torture."[208] When the Second Circuit decided in *Kadić v. Karadžić* that genocide and war crimes do not require state action, its reasoning was relied upon by the ICTY to impose liability for crimes against humanity.[209] ATS litigation has been relied upon in cases in the United Kingdom (including important cases such as the infamous *Pinochet* litigation of the former Chilean dictator), France, and Switzerland.[210] The National Commission on Human Rights in India has relied upon the ATS as an "example for the development of domestic legal remedies for human rights violations," and U.N. special rapporteurs have recognized the ATS "as a model for establishing national remedies for human rights abuses."[211] Even if the United States loses its status as the leading superpower and American influence declines, American norms and values will still be protected because the United States will continue to influence customary international law on human rights abuses though ATS litigation.[212]

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[205] *Id.* at 1124.

[206] *Id.* at 1171 (citing David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 889–90 (2003)).

[207] *Id.*

[208] Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment of the Trial Chamber, ¶ 147 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (citing Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)).

[209] Kadić v. Karadžić, 70 F.3d 232 (2d Cir. 1995); Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 976 (2004) (citing *Kadić*, 70 F.3d 232; Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment of the Trial Chamber, ¶ 655 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997)).

[210] Cleveland, *supra* note 209, at 977–78 (citing R v. Bow St. Metro. Stipendiary Magistrate (*Ex parte* Pinochet Ugarte) (*Pinochet III*) [1999] UKHL 1, [2000] 1 AC 147 (HL) 198 (Lord Browne-Wilkinson; Lord Hope of Craighead) (prosecuting the former Chilean dictator, Augusto Pinochet); *Swiss Court Allows Gypsies to Sue IBM over Alleged Holocaust Link*, TALLAHASSEE DEMOCRAT (June 22, 2004) (URL link is defunct)).

[211] Cleveland, *supra* note 209, at 978 (citing Sadar Patel Bhawan, Case No. 1/97/NHRC ¶ 23 (Nat'l Human Rights Comm'n Aug. 4, 1997) (India)); *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law: Note by the High Commissioner for Human Rights*, U.N. ESCOR, Human Rights Comm'n, 59th Sess., Provisional Agenda Item 11, ¶ 114, U.N. Doc. E/CN.4/2003/63 (Dec. 27, 2002) (offering the ATS as an example for states to "provide remedies for violations occurring outside their territory"); *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict: Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, U.N. ESCOR, Human Rights Comm'n, 50th Sess., Provisional Agenda Item 6, at app., ¶ 52, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (applauding the ATS for providing a forum for redress when foreign fora are inadequate)).

[212] Knowles, *supra* note 155, at 1173.

ATS litigation for human rights violators can improve the reputation of the United States abroad.[213] There is evidence that these suits improve the United States' reputation in regions like Africa and Latin America.[214] For example, a study in Africa concluded that "'the ATS has enhanced the image of the United States as a purveyor of human rights'" and "many Africans 'have a sincere appreciation for the United States as a place where they can seek justice against those who would otherwise never be challenged in their own countries.'"[215] Furthermore, litigation against corporate defendants for acts committed abroad, especially when the corporation or corporate parent is American, might be seen as a response or limit on neocolonialism.[216] Improving the reputation of the United States abroad can also have national security benefits. For example, by improving its reputation abroad and lowering anti-American sentiment, it can be easier for the United States to open or operate overseas military bases.[217]

Other states have considered their responsibility to hold human rights violators liable for their actions when deciding whether to hold domestic or foreign corporations liable for actions taken abroad. In the *Lungowe* case in England, claimants argued that the parent company, Vedanta, failed to meet its duty of care over its subsidiary, KCM, leading to human rights violations.[218]

In determining whether a duty of care existed, the English courts sought to assign liability to those responsible for the harms.[219] The trial court in *Lungowe* specifically considered the ability to hold the actual perpetrators of harms liable when upholding jurisdiction.[220] The judge acknowledged that claimants may be suing the parent solely to find jurisdiction over the subsidiary.[221] However, evidence that Vedanta was seen as "the real architect" of the harm was persuasive when finding jurisdiction.[222] Additionally, the court recognized that

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213 *Id.* at 1161.

214 *Id.*

215 *Id.* (quoting HARRY AKOH, HOW A COUNTRY TREATS ITS CITIZENS NO LONGER EXCLUSIVE DOMESTIC CONCERN: A HISTORY OF THE ALIEN TORT STATUTE LITIGATIONS IN THE UNITED STATES FOR HUMAN RIGHTS VIOLATIONS COMMITTED IN AFRICA 1980–2008, at 248 (2009)).

216 Knowles, *supra* note 155, at 1161 ("Lawsuits against MNCs are unlikely to provoke resentment or allegations of neocolonialism in such contexts because MNCs are themselves viewed by much of the population as foreign, and sometimes even hostile, elements, particularly if they aid and abet human rights abuses.").

217 *Id.* at 1170 (citing Ryan M. Scoville, *A Sociological Approach to the Negotiation of Military Base Agreements*, 14 U. MIAMI INT'L & COMP. L. REV. 1, 3–4 (2006)).

218 Lungowe v. Vedanta Res. PLC [2016] EWHC (TCC) 975 [1].

219 *See* Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528; *Lungowe* [2016] EWHC (TCC) 975.

220 *Lungowe* [2016] EWHC (TCC) 975 [75]–[82].

221 *Id.* [75].

222 *Id.* [78].

Vedanta could liquidate its subsidiary if it lost in court abroad, whereas a direct suit in England removed this risk.[223]

Courts also consider access to justice issues, and are more likely to hear a case when claimants can establish "a real risk that they would not obtain substantial justice" in the nation where the tort occurred.[224] The most recent *Lungowe* appeal, decided in claimants' favor, turned on this issue.[225] The difficulty in finding justice in the nation where the tort occurred may be due to poverty, structural deficiencies, and the ability of the subsidiary to manipulate the system to delay proceedings and make them too costly.[226] These risks are especially prevalent in cases in which the tort occurred in a country with minimal access to justice.[227] When considering the responsibility to hold human rights violators liable, the potential difficulty in finding justice abroad was a significant factor for the English judges.[228]

In a duty of care analysis, the Canadian court in *Choc v. Hudbay* considered both the proportion of responsibility among the defendant parent and subsidiaries and its responsibility to find wrongdoers liable.[229] In *Hudbay*, the plaintiffs claim that Hudbay was negligent in failing to prevent harms committed by security personnel it hired.[230] The plaintiffs claimed that "security personnel working for Hudbay's subsidiaries, who were allegedly under the control and supervision of Hudbay, the parent company, committed human rights abuses . . . . [including] a shooting, a killing[,] and gang-rapes."[231] To be found negligent, plaintiffs must prove that Hudbay owed them a duty of care.[232] As there is not yet an established duty of care that applies to this situation, the court must find a novel duty of care, applying the Anns Test.[233] The Anns Test requires:

> (1) that the harm complained of is a reasonably foreseeable consequence of the alleged breach; (2) that there is sufficient proximity between the parties that it would not be unjust or unfair to

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223 *Id.* [79].

224 Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 [131].

225 Vedanta Res. PLC v. Lungowe [2019] UKSC 20 [88]–[102].

226 Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 [118]–[135]; *see* Lubbe v. Cape PLC [2000] UKHL 41 (appeal taken from Eng.) (UK).

227 Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 [118]–[135]; *see* Lubbe v. Cape PLC [2000] UKHL 41 (appeal taken from Eng.) (UK).

228 *Lungowe* [2017] EWCA (Civ) 1528 [118]–[135]; *see Lubbe* [2000] UKHL 41.

229 Choc v. Hudbay Minerals Inc. (2013), 116 O.R. 3d 674 (Can. Ont. Super. Ct. J.).

230 *Id.* para. 52.

231 *Id.* para. 4.

232 *Id.* para. 55.

233 *Id.* paras. 54–56.

> impose a duty of care on the defendants; and, (3) that there exist no policy reasons to [negate] or otherwise restrict that duty.[234]

Taking the facts pled as true, the court found a prima facie duty of care.[235] First, factors such as Hudbay's knowledge that "violence was frequently used by security personnel" and had been previously used in evictions requested by Hudbay, as well as that security personnel were "unlicensed, inadequately trained[,] and in possession of unlicensed and illegal firearms" were sufficient to establish foreseeability, if proven at trial.[236] Second, proximity requires that the plaintiff and defendant have a relationship such that the defendant "may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs."[237] Third, the test involves examining factors such as "expectations, representations, reliance, and the property or other interests involved."[238]

Statements from Hudbay committing to respect human rights in the communities and the establishment of a mining project causing the forced evictions of plaintiffs were sufficient to establish proximity, if proven at trial.[239] The fact that there were competing public policy interests was insufficient to prevent a prima facie finding of a duty of care.[240] Importantly, some of these interests mirror certain arguments for and against ATS liability.[241] While one concern was about exposing domestic corporations with foreign subsidiaries to expanded liability, the other was the responsibility of courts to provide redress for communities affected by a corporation's actions when torts occur away from the corporation's home.[242]

Because *Hudbay* has not yet been decided on the merits, it is unknown if such a duty will be established.[243] If established, however, the implications may be significant. Such a duty could broaden exposure to liability for "Canadian corporations doing business abroad, not only in the natural resources sector[,] but also in various other sectors, including banking, manufacturing, retailing[,]

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234 *Id.* para. 57 (citing Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263 (Can.)).

235 *Id.* paras. 58–70.

236 *Id.* paras. 63–65.

237 *Id.* para. 66 (quoting Cooper v. Hobart, [2001] 3 S.C.R. 537 (Can.)).

238 *Id.* (quoting *Cooper*, 3 S.C.R. 537).

239 *Id.* paras. 69–70.

240 *Id.* para. 74.

241 *See id.* paras. 72–73; *infra* Part IV.

242 *Id.* paras. 72–73.

243 Grahame Russell, *This Is How Hard It Is, 8 Years into the Hudbay Minerals/CGN Lawsuits Seeking Justice for Rape, Murder, & Repression in Guatemala*, RTS. ACTION (July 14, 2018), https://mailchi.mp/rightsaction/this-is-how-hard-it-is-8-years-into-the-hudbay-mineralscgn-lawsuits.

and telecommunications."[244] The "practical implication[] of [allowing the lawsuit to continue] . . . is that the defendants must now proceed with complex and costly litigation."[245] Since the court's ruling in 2013, discovery has continued into 2018.[246]

French law also supports the goal of holding perpetrators of wrongs liable for their actions.[247] In establishing a due diligence requirement for parent companies, Law 2017-399 would find parent companies liable for their subsidiaries' actions when they do not meet the requirements set forth in the statute, including monitoring of subsidiaries and taking action to mitigate risk.[248] When a parent company has not taken these steps, the parent company may be statutorily liable.[249] However, when these steps are taken but harm still occurs, the presumption of liability shifts to the subsidiary that caused the harm in question.[250] Law 2017-399 seeks to promote actions by parent companies to prevent harm and find liable those who do not.[251]

B. Impacts on Foreign Investment and Corporate Limited Liability

The plurality in *Jesner* expressed concern that if the United States subjects foreign corporations to liability, other nations will be more likely to find liability for American corporations abroad.[252] The Supreme Court suggests this will cause a massive liability risk to American corporations for their employees' and subsidiaries' conduct around the world.[253] Such a liability risk could "hinder global investment in developing economies, where it is most needed."[254]

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244 Jeremy Fraiberg et al., *Ontario Court Gives Green Light to International Human Rights Tort Claims in Choc v. Hudbay Minerals Inc.*, OSLER: RES.: CROSS-BORDER MKTS. (July 26, 2013), https://www.osler.com/en/resources/cross-border/2013/ontario-court-gives-green-light-to-international-h.

245 Sean E.D. Fairhurst & Zoe Thoms, *Post*-Kiobel v. Royal Dutch Petroleum Co.*: Is Canada Poised to Become an Alternative Jurisdiction for Extraterritorial Human Rights Litigation?*, 52 ALTA. L. REV. 389, 404 (2014).

246 Russell, *supra* note 243. In January 2020, the Superior Court of Justice allowed plaintiffs in a related case to amend their lawsuit and add new claims. CHOC V. HUDBAY MINERALS INC. & CAAL V. HUDBAY MINERALS INC. (Jan. 2020), http://www.chocversushudbay.com/. As of January 2020, each of the three related cases are proceeding. *Id*.

247 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-339 of March 27, 2017 Relating to the Duty of Care of Parent Companies and Instructing Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017.

248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.*

252 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405 (2018) (plurality opinion).

253 *Id.*

254 *Id.* (quoting Brief for United States as Amicus Curiae at 20, Am. Isuzu Motors, Inc. v. Ntsebeza, 553

Business owners (including corporate owners of subsidiaries) generally enjoy limited liability in relation to their companies' contracts, torts, and other liabilities.[255] "Allowing individuals to seek remedy from parent[] corporations for minor harms might be so onerous for corporations that it deters them from creating or investing in subsidiaries in host countries that could benefit from the enterprise's presence[,]" and these suits may limit "the free flow of trade and investment."[256]

When seeking to bring suits against a parent for the torts of its subsidiary, foreign courts have considered the limited liability provided by the corporate structure.[257] For example, in *Lungowe*, the parent argued that the real claim was against its subsidiary and that Vedanta was included simply to find jurisdiction over the subsidiary.[258] Discussing a parent company's possible duty of care for the torts of its subsidiaries, the English court noted that, although there have been no reported cases in which a parent company was held to owe a duty of care to a person affected by the action of a subsidiary, "[that] does not render such a claim unarguable."[259]

Contrary to the statements of the court in *Lungowe*, there have been cases in which claims by employees of a subsidiary have succeeded against the parent company.[260] Following rulings in three prior cases, the *Lungowe* court found that there are situations in which a corporation could be liable for torts committed by its subsidiaries abroad.[261] When considering whether the parent has assumed a duty of care to those directly affected by operations of the subsidiary, the English courts consider factors similar to veil-piercing:

> (1) The starting point is the three-part test of foreseeability, proximity[,] and reasonableness. (2) A duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary, in certain circumstances. (3) Those circumstances may arise where the parent company (a) has taken direct responsibility for devising a material health and safety

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U.S. 1028 (2008) (No. 07-919)).

255 Matheson, *supra* note 47, at 3.

256 *Jesner*, 138 S. Ct. at 1436 (Sotomayor, J., dissenting) (quoting Brief for United States as Amicus Curiae at 12–16, 20, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (No. 07-919)); Gwynne Skinner, *supra* note 131, at 1811.

257 *See e.g.*, Choc v. Hudbay Minerals Inc. (2013), 116 O.R. 3d 674 (Can. Ont. Super. Ct. J.).

258 Lungowe v. Vedanta Res. PLC [2016] EWHC (TCC) 975 [51]–[52] (Eng.).

259 Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 [88] (Eng.).

260 *See e.g.*, Chandler v. Cape PLC [2012] EWCA (Civ) 525 (Eng.) (holding that the parent company assumed a duty of care to ensure the health and safety of the subsidiary's employees).

261 *Lungowe* [2016] EWHC (TCC) 975 [44] (citing Andrew Sanger, *Crossing the Corporate Veil*, 71 CAMBRIDGE L.J. 478 (2012)).

> policy the adequacy of which is the subject of the claim, or (b) controls the operations which give rise to the claim.[262]

These factors do not require that the parent has absolute control over the operations of the subsidiary.[263] Instead, the courts should consider "what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, [and] what action was taken and not taken."[264]

The French law has created a specific exception to corporate limited liability in regard to subsidiaries' actions abroad.[265] By creating a statutory duty, French companies must ensure their subsidiaries do not violate human rights norms.[266] While this exception goes beyond the one proposed in this Comment because it establishes liability for the corporate parent, it demonstrates that exceptions to corporate limited liability should exist when necessary to prevent human rights violations.

The proposal put forth in this Comment differs in that it does not ask the United States to allow jurisdiction over corporate parents directly, or over all foreign corporations, but only those owned by American companies. The United States should not protect its corporations and grant them immunity when their subsidiaries engage in egregious human rights violations. The protections in *Sosa* also limit the impact of these litigations.[267] It is unlikely that any claims under the ATS would be considered "minor," as norms of international law meeting the *Sosa* criteria must be "specific, universal, and obligatory."[268] Additionally, any violations of these obligatory international law norms are likely to cause harm outweighing any economic benefit to the local communities.[269]

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262 *Lungowe* [2017] EWCA (Civ) 1528 [83].

263 *Id.* [77] (citing *Chandler* [2012] EWCA (Civ) 525).

264 *Id.* [76] (quoting *Lubbe* [2000] UKHL 41 [20]).

265 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-339 of March 27, 2017 Relating to the Duty of Care of Parent Companies and Instructing Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017.

266 *Id.*

267 Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

268 *Id.*

269 Skinner, *supra* note 131, at 1811.

C. Political Question

The plurality in *Jesner* argued that the question of corporate liability is a political one and therefore should be left to the political branches.[270] Taking separation-of-powers principles into account, the Court stated that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns."[271] It may be the case that Congress is best placed to enact an exception which allows for suits against foreign subsidiaries of domestic parents.

However, proponents of ATS litigation have provided strong reasons for why the Court has power to create an exception. As highlighted by Justice Sotomayor in her dissent, the political branches in the past have urged the courts to reach "exactly the opposite conclusion of the one embraced by the majority."[272] For example, in *Kiobel*, the executive department specifically stated that "[c]ourts may recognize corporate liability in actions under the ATS as a matter of federal common law."[273] During oral arguments for *Jesner*, the United States suggested that "foreclosing the ability to recover from a corporation actually would raise 'the possibility of friction.'"[274] Members of Congress have also advised the Court specifically against the holdings in *Jesner* and *Kiobel*.[275] Furthermore, Justice Sotomayor notes that Congress has consistently failed to immunize corporations from ATS liability, despite numerous suits brought against corporations over the years.[276] The Court, in the past, used this rationale to suggest that, in failing "to disturb a consistent judicial interpretation of a statute," Congress "at least acquiesces in, and apparently affirms," that interpretation.[277]

When established, it was undisputed that the ATS applied to both natural and legal persons.[278] The ATS undisputedly establishes jurisdiction over ships for piracy, which are not natural persons.[279] When the ATS was enacted, ships,

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[270] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018) (plurality opinion).

[271] *Id.* at 1403 (citing Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 116–17 (2013)).

[272] *Id.* at 1431 (Sotomayor, J., dissenting).

[273] *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioners at 7, Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2013) (No. 10-1491)).

[274] *Id.*

[275] *Id. at* 1431–32 (Sotomayor, J., dissenting) (citing Brief of U.S. Sen. Sheldon Whitehouse et al. as Amici Curiae at 7–11; then citing Brief of Former U.S. Sen. Arlen Specter et al. as Amici Curiae at 17–18, Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2013) (No. 10-1491)).

[276] *Id.* at 1432.

[277] *Id.* at 1432 (citing Monessen Sw. Ry. v. Morgan, 486 U.S. 330, 338 (1998)).

[278] *Id.* at 1426.

[279] *Id.*

which are juridical entities, were commonly held to be liable for piracy.[280] In other parts of the Act that became the ATS, Congress specifically limited permitted classes of defendants, something it did not do when drafting the ATS.[281] This suggests that Congress acted purposefully when not limiting the range of defendants in the ATS.[282]

Justice Sotomayor also rejects the idea that because the Torture Victim Protection Act of 1991 (TVPA) is limited to individual defendants, the Court should extrapolate this limitation to the ATS.[283] The TVPA was designed to expand the ATS, not limit it.[284] The congressional record shows that both the House and Senate viewed the TVPA as a supplement, to allow both aliens and Americans a "clear and specific remedy . . . for torture and extrajudicial killing[,]" but the ATS "has other important uses and should not be replaced."[285] In other statutes, such as the Antiterrorism Act of 1990, Congress specifically provided for corporate liability (for foreign and domestic corporations).[286] Taken together, these statutes suggest that Congress finds that corporate liability is a question that should be determined norm-by-norm, not with broad strokes.[287]

IV. PROPOSAL

This Comment proposes an exception to the limitations on the ATS imposed by the Supreme Court in *Kiobel* and *Jesner*. Combined, these limitations mean that almost no harms to aliens caused by corporations will be judiciable in U.S. courts.[288] Actions taken by U.S. corporations overseas are unlikely to overcome *Kiobel*'s presumption against extraterritoriality.[289] *Jesner* establishes a wholesale bar on any suits against foreign corporations, even if those corporations are wholly owned by and run by a U.S. company.[290] If a foreign corporation violates an alien's human rights in the United States, the ATS provides no remedy against the corporation. The only remedy is against

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280 *Id.* (citing The Marianna Flora, 24 U.S. 1 (1826); then citing Harmony v. United States, 43 U.S. 210 (1844)).

281 *Id.*

282 *Id.* (quoting Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")).

283 *Id.* at 1432–33 (Sotomayor, J., dissenting).

284 *Id.* at 1432.

285 *Id.* at 1432–33 (quoting H.R. REP. NO. 102-367, pt. 1, p. 3 (1991)).

286 *Id.* at 1433.

287 *Id*.

288 *See supra* Section III.C.

289 *See* Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 125 (2013).

290 *Jesner*, 138 S. Ct. 1386.

individuals who are "less likely to be able to fully compensate successful ATS plaintiffs."[291] Without corporate accountability, "institution-wide disregard for human rights . . . . will persist unremedied."[292]

For that reason, the ATS should include an exception for foreign subsidiaries of domestic corporations. Accounting standards are instructive when determining the ownership level necessary for this exception to apply.[293] Requiring a subsidiary be wholly owned would allow corporations to split off a small percentage of ownership to avoid liability. Instead the exception should be based on control, using the definition of a majority-owned subsidiary set forth in SEC regulations.[294] Under these regulations, a majority-owned subsidiary is one in which the parent (or the parent's other majority-owned subsidiaries) controls more than 50% of outstanding voting shares.[295]

This exception addresses the foreign policy concerns of bringing a purely foreign corporation into U.S. courts for violations that have occurred purely overseas, causing harm to only foreign victims. The ATS was originally enacted, in part, to find Americans liable for acts committed abroad in violation of the law of nations.[296] The fact that a subsidiary is owned by an American corporation

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[291] *Id.* at 1435 (Sotomayor, J., dissenting).

[292] *Id.* Justice Sotomayor gives the example of a foreign corporation:

> posing as a job-placement agency that actually traffics in persons, forcibly transporting foreign nationals to the United States for exploitation and profiting from their abuse. Not only are the individual employees for the business less likely to be able to fully compensate successful ATS plaintiffs, but holding only individual employees liable does not impose accountability for the institution-wide disregard for human rights. Absent a corporate sanction, that harm will persist unremedied.

Id.

[293] *See* WILLIAM J. CARNEY, CORPORATE FINANCE 8 (Univ. Casebook Series, 3d ed. 2015). "Where a corporation owns 50% or more of the voting power of another corporation, it is deemed to have the power to control its affairs." *Id.*

[294] 17 C.F.R. § 210.1-02(n) (2018).

[295] *Id.*

[296] Skinner, *supra* note 17, at 189–90 ("Many events leading up to the enactment of the ATS involved U.S. citizens violating aliens' rights . . . . There is also an opinion by the first Attorney General concerning an American who led a French fleet in attacking and plundering a British slave colony in Sierra Leone. Attorney General William Bradford's 1795 opinion clarified that although the United States did not have criminal jurisdiction over the matter, which he acknowledged was a violation of the law of nations, the ATS provided federal jurisdiction for a civil remedy against Americans who had taken part in the attack. Moreover, one of the primary drafters of the First Judiciary Act, William Paterson, opined that the law of nations provided the substantive law for domestic remedies of international law violations, using the example of a U.S. citizen enlisting in the British Army to fight the French in violation of the United States' position of neutrality . . . . These latter two examples also demonstrate that the founders were not only concerned with remedying violations that occurred within the United States, but also with any violation perpetrated against an alien by a U.S. citizen, even if occurring abroad.").

should be enough evidence under *Kiobel*'s "touch and concern" requirement.[297] This finding can be made without disturbing the political question doctrine—at least to allow a suit to proceed to discovery. However, there is an argument that creating such liability (at least for the purposes of jurisdiction) automatically creates a new cause of action that is beyond the capacity of the courts, and thus would require a statute.[298]

In many cases, foreign subsidiaries share the name of the domestic corporation, share members of their boards, and function as local bases for management and logistics, while remaining integrated with the global supply chain and marketplace.[299] Regardless of these shared characteristics, plaintiffs in suits against these corporations will rarely succeed in meeting the stringent requirements to pierce the corporate veil. Even if the requirements are met, much of the information needed to do so will only be available during discovery, and not before.[300] In federal courts, it seems that veil piercing cannot be maintained as an independent cause of action, but instead is a "means of imposing liability on an underlying cause of action."[301] This is why an exception allowing suits to proceed to discovery is necessary.

Allowing an exception for suit directly against foreign subsidiaries helps limit liability for major American corporations. The proposed exception does not allow suits against parents in the first instance for the acts of their subsidiaries. Instead of imposing liability against the parent for acts of their subsidiaries, liability will be imposed against the subsidiary only. This will incentivize parent corporations to ensure that their subsidiaries respect human rights while protecting themselves and their other subsidiaries unrelated to the suit from potentially multibillion-dollar lawsuits.

This will, in effect, create a "due diligence" requirement similar to the French statute.[302] Parent corporations will be incentivized to take measures to protect against human rights violations by their subsidiaries, including

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297 Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 124–25 (2013).

298 *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1413–14 (2018) (Gorsuch, J., concurring).

299 *See e.g.*, Doe v. Unocal Corp., 395 F.3d 932, 937 (9th Cir. 2002).

300 Elizabeth S. Fenton, *Trends in Piercing the Corporate Veil*, A.B.A. (July 31, 2013), http://apps.americanbar.org/litigation/committees/businesstorts/articles/summer2013-0713-trends-in-jurisprudence-piercing-the-corporate-veil.html.

301 *See e.g.*, Peacock v. Thomas, 516 U.S. 349, 354 (1996) (quoting 1 C. KEATING & G. O'GRADNEY, FLETCHER CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 41 (perm. ed. 1990)).

302 Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-339 of March 27, 2017 Relating to the Duty of Care of Parent Companies and Instructing Companies], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017.

monitoring and evaluation. However, unlike the French statute, liability will not be automatic.[303] This proposal also differs from the Dutch approach, in which jurisdiction is based on the nationality of the parent through a group liability approach that almost disregards the corporate form entirely (viewing the corporation and its subsidiary as a single group).[304] The exception will also have an effect similar to the duty of care theory suggested by the English and Canadian courts.[305] However, an exception of this kind will help protect the parent company while still allowing judgments against the subsidiary.

The proposed exception does require a rule to ensure that the parent does not decapitalize the subsidiary to avoid payment following a judgement, a concern of the English court in *Lungowe*.[306] Although such a rule must be limited in scope to avoid interfering with legitimate interests, veil-piercing may provide an example. The rule could be based on the traditional veil-piercing analysis because undercapitalization is a factor in veil-piercing. Alternatively, or additionally, there could be a provision allowing a plaintiff to sue the parent to enforce the judgment against its subsidiary. However, this requirement should be narrow to ensure that liability is not, in effect, transferred to the parent. Judgments should be reasonable based on the subsidiary's size, not the size of the corporate parent.

For example, consider Parent Company A, worth $50 billion, that owns and operates a mine through wholly-owned Subsidiary B. Subsidiary B, including the mine it owns, is worth $500 million. If Subsidiary B is engaging in human rights abuses at the mine, such as the use of slave labor, a remedy should not exceed $500 million, even though Parent Company A is worth $50 billion. This constraint will help limit the risks of a parent corporation operating a subsidiary in other states while still protecting the limited liability of corporate structure. This proposal differs from others proposed in response to the *Kiobel* limitations in that it suggests that the subsidiary be the target of the suit, not the parent.[307]

A hurdle to this proposal is the limit to personal jurisdiction set out in *Goodyear Dunlop Tire Operations v. Brown* and *Daimler AG v. Bauman*.[308]

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303 *Id.*

304 Robertson et al., *supra* note 188 (citing Rb. Den Haag 30 januari 2013, NJF 2013, ECLI:NL:RBSGR:2013:BY9854 m.nt. (Akpan/Royal Dutch Shell PLC) (Neth.)).

305 *See* Lungowe v. Vedanta Res. PLC [2017] EWCA (Civ) 1528 (Eng.); Choc v. Hudbay Minerals Inc. (2013), 116 O.R. 3d 674 (Can. Ont. Super. Ct. J.).

306 Lungowe v. Vedanta Res. PLC [2016] EWHC (TCC) 975 [79] (Eng.).

307 *See e.g.*, Law 2017-339 of March 27, 2017 (Fr.); Skinner, *supra* note 17, at 258–61.

308 Daimler AG v. Bauman, 571 U.S. 117 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

Suits against a foreign subsidiary for actions abroad will not satisfy a specific jurisdictional test unless there is evidence that the acts were specifically directed or otherwise connected to the jurisdiction of suit.[309] A suit under the exception proposed would be somewhat opposite to the suit in *Daimler*, in which the jurisdictional hook was much more tenuous.[310] In *Daimler*, the claims were brought against a foreign parent based on the actions of a foreign subsidiary; the only connection to the United States was another domestic subsidiary.[311] Instead of suing the foreign parent based on the connections of the U.S. subsidiary, under the proposed exception the foreign subsidiary would be sued based on the connections of the U.S. parent. A limited exception to *Daimler* can, and should, be found by implementing this proposal. The corporate parent derives significant benefit from the corporate structure and its subsidiary overseas, both legally, in terms of limited liability, and economically. Foreign subsidiaries will naturally be directed, at least in part, from the corporate headquarters of the parent. The forum of the domestic corporate parent is a suitable location for personal jurisdiction over the subsidiary.

In applying the proposed exception to the Myanmar villagers' suit against Unocal for aiding and abetting serious crimes through its wholly-owned subsidiary, the effect of this proposal becomes clear. This proposal allows a suit against the subsidiaries directly for their role in the forced labor, rape, and murder inflicted on the villagers.[312] It would no longer be necessary to attempt corporate veil-piercing or seek to tie the parent to alleged crimes. Instead, those who committed or participated most closely in the crimes can be held accountable for their actions.

CONCLUSION

The ATS has evolved throughout its history—from little use during its first 190 years, to becoming a popular tool to seek remedy for human rights violations, to the severe limitations that the Supreme Court recently imposed.[313]

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309 *See Daimler*, 571 U.S. 117; *Goodyear*, 564 U.S. 915. The Court held in *Goodyear* that "the exercise of general jurisdiction was only appropriate when a corporation's 'affiliations with the state are so continuous and systematic as to render them essentially at home in the forum State.'" Matthew H. Adler & Frank H. Griffin, *BNSF v. Tyrrell: The Other International Shoe Has Dropped*, PEPPER HAMILTON LLP (June 7, 2017), https://www.pepperlaw.com/publications/bnsf-v-tyrrell-the-other-international-shoe-has-dropped-2017-06-07/ (quoting *Goodyear*, 564 U.S. at 918).

310 *Daimler*, 571 U.S. 117 (suit was brought against a foreign parent for torts of a foreign subsidiary based on the connection of a domestic U.S. subsidiary to the forum).

311 *Id.*

312 *See* Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

313 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108,

While it is arguable that the United States should not become the world's forum for litigating human rights disputes that involve only foreign parties acting abroad, when human rights abuses involve American interests, the United States should be involved.[314] The recent limitations on the ATS in *Kiobel* and *Jesner* greatly limit the ability of foreign plaintiffs to find even U.S. corporations liable for harms they might cause. The hurdles are even more difficult to overcome when harms are caused by subsidiaries of U.S. corporations. U.S. corporations derive significant benefits from their foreign subsidiaries, and much of the money they earn flows back into the United States.[315] Because of this, the United States should not create a loophole that allows these subsidiaries to escape liability for violations of international law. The proposed exception to hold foreign subsidiaries liable under the Alien Tort Statute will close this loophole.

LUKE D. ANDERSON*

124–25 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[314] *See supra* Section III.C.

[315] *See e.g.*, Kate Linebaugh, *How Firms Tap Overseas Cash*, WALL STREET J. (Mar. 28, 2013), https://www.wsj.com/articles/SB10001424127887323361804578388522312624686. Sonoco's foreign subsidiaries held 93% of its cash in 2012. *Id.* GE uses its overseas funds to invest in "business operations like manufacturing facilities." *Id.* In the year ending in October 2010, HP borrowed $6 billion from its subsidiaries overseas, using alternating loans between two subsidiaries. *Id.* The average balance throughout the 2011 fiscal year was $1.6 billion. *Id.* While foreign profits are taxed when they are returned to the United States directly, HP set up a "system under which it borrowed from one foreign subsidiary . . . then tapped funds from a different foreign subsidiary" and alternated between them, avoiding IRS rules while utilizing funds earned abroad. *Id.*

* Executive Notes and Comments Editor, *Emory International Law Review*, Volume 34; J.D. Candidate, Emory University School of Law (2020); Bachelor of Arts, *cum laude*, in International Studies, Centre College (2014). The author would like to thank Professor Laurie Blank for her advice and guidance with writing this Comment. The author would also like to thank the Emory International Law Review Editorial Board for its help throughout the publication process.