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.
law of nations or a treaty of the United States.” The ATS was little used for many years following its passage in 1789. However, following Filártiga v. Peña-Irala, decided in 1980, the number of suits involving the ATS quickly increased. By the early 2000s, the Supreme Court began to limit the application of the ATS. Suits limiting the ATS include Sosa v. Alvarez-Machain, Kiobel, and most recently, Jesner. Following Kiobel and Jesner, the ATS includes a “presumption against extraterritorial application,” and no suits may be brought against foreign corporate defendants. 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. 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. Such an exception will help improve

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.

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.
21 Id.
22 Id. at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *68 (1769)).
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

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) (“It 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.
In recent years, the Court has limited the ATS. Perhaps the most notable case before Jesner is Kiobel v. Royal Dutch Petrol. Co.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{38} The presumption against extraterritoriality is that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”\textsuperscript{39} In Kiobel, the Court held that the case could not be maintained when “all the relevant conduct took place outside the United States,”\textsuperscript{40} and that “mere corporate presence” in the United States is insufficient to rebut the presumption against extraterritoriality.\textsuperscript{41}

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

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

\textsuperscript{36} See Kiobel, 569 U.S. 108.
\textsuperscript{37} Id. at 111–12.
\textsuperscript{38} Id. at 125.
\textsuperscript{40} Kiobel, 569 U.S. at 125.
\textsuperscript{41} Id. at 133.
\textsuperscript{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.
\textsuperscript{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).
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{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. Suits of this type have been largely unsuccessful.

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. “[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.” Conversely, the Second Circuit held that the ATS does not apply to corporations at all, but only to natural persons.

The Ninth Circuit allowed a suit against a corporation to proceed in Doe v. Unocal Corp. 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.


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).

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

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. The Ninth Circuit did not consider that Unocal was not amenable to suit because of its status as a corporation. 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.

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. 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.” Judge Posner noted that “[a]ll but one of the cases at our level hold or assume . . . that corporations can be liable.” 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.” In sum, the Seventh Circuit Court of Appeals is satisfied that the ATS can support corporate liability.

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

54 Unocal, 395 F.3d at 936.
55 Id. at 945.
57 Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011).
58 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).
59 Flomo, 643 F.3d at 1019.
60 Id. at 1021.
61 Doe I v. Nestle USA, 766 F.3d 1013, 1016 (9th Cir. 2014).
reaffirming its analysis in *Sarei v. Rio Tinto, PLC*. This involved a “norm-by-norm analysis of corporate liability.” For norms that apply to “states, individuals, and groups,” the court found that the norm was universal and thus applicable to corporations. 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. In *Doe I*, the court concluded “that the prohibition against slavery is universal and may be asserted against the corporate defendants in this case.”

The D.C. Circuit also found that corporations can be liable under the ATS in *Doe VIII v. Exxon Mobil Corp.* 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.

The Second Circuit suggested in *Khulumani v. Barclay Nat’l Bank* that corporations are suitable defendants under the ATS. However, the defendants in that case did not raise the issue, so the court did not specifically decide the question. However, in 2010 the same court found that corporations are not amenable to suit under ATS. 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. As the Second Circuit could not find such a norm, it held that corporations cannot be liable under the ATS.

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

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.
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.” 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. In refusing to answer this question, the Court suggested it was a question better suited for the political branches to answer.

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

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. Recently, other countries have begun to find that domestic corporations and their foreign subsidiaries are potentially liable for harms they cause abroad. 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.

There are three concurrences in *Jesner* by Justices Thomas, Alito, and Gorsuch. 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.
91 Id. at 1403.
92 Id.
93 Id. at 1405.
96 *Jesner*, 138 S. Ct. at 1408–19.
risk of international strife.\textsuperscript{97} Justice Gorsuch was particularly concerned with the separation of powers principles.\textsuperscript{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.”\textsuperscript{99} Justice Gorsuch discusses the nationality of the parties and reviews the history of the ATS.\textsuperscript{100} He finds that, while it is not stated in the statute, the ATS as originally understood requires an American defendant for jurisdiction.\textsuperscript{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.\textsuperscript{102} Justice Alito went so far as to suggest that the Court decided \textit{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.”\textsuperscript{103}

Justice Sotomayor dissented and was joined by Justices Ginsburg, Breyer, and Kagan.\textsuperscript{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.\textsuperscript{105} Although \textit{Sosa} requires international consensus for the existence of a substantive prohibition, Justice Sotomayor did not find that \textit{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.\textsuperscript{106} International law, instead, leaves the remedy for violations of international law norms to individual states.\textsuperscript{107}

As an example, Justice Sotomayor compared the international law norm of prohibition of genocide with the “so-called norm” of corporate liability.\textsuperscript{108} In \textit{Sosa}, the Court used the word “norm” when referring to violations.\textsuperscript{109} A norm, thus, must be a prohibition that can be violated.\textsuperscript{110} Justice Sotomayor noted that it is difficult to violate a norm of corporate liability, and therefore, in her view,
this is not the kind of norm that is important under international law.\textsuperscript{111} Under Justice Sotomayor’s interpretation, a norm does not consider who can be liable, but instead refers to an action that is prohibited.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{115} She concluded that “international law provides no such reason” for such a distinction, “[n]or does domestic law.”\textsuperscript{116} For at least 200 years, under U.S. domestic common law, corporations have consistently been held liable for actions in tort.\textsuperscript{117}

Justice Sotomayor also highlighted that the ATS clearly limits the class of plaintiffs but does not do the same for defendants.\textsuperscript{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.\textsuperscript{119} Further, the ATS undisputedly establishes jurisdiction over ships for piracy, which are not natural persons.\textsuperscript{120} In 1907, “the Attorney General acknowledged that corporations could be held liable under the ATS.”\textsuperscript{121}

Using language similar to that in \textit{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.\textsuperscript{122} She pointed to the

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\item Id. at 1420–21.
\item Id. at 1421–22 (Sotomayor, J., dissenting).
\item Id. at 1430, 1423 (Sotomayor, J., dissenting).
\item Id. at 1421.
\item Id. at 1425.
\item Id.
\item 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)).
\item Id. at 1426 (Sotomayor, J., dissenting).
\item Id.
\item Id. at 1427 (Sotomayor, J., dissenting).
\item Id. at 1426–27 (citing 26 Op. Att’y Gen. 250, 252 (1907)).
\item 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

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 difficulty a court may have in applying foreign laws. Gulf Oil Corp., 330 U.S. at 508–09.


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. 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. Corporations already derive significant liability benefits from parent–subsidiary relationships, severely limiting the ability of victims to obtain remedies. 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.

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.” 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. 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. 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. 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 Subsidaries’ 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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137 Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
138 Id.
140 See *Jesner*, 138 S. Ct. 1386.
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. 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.” Countries including France, England, Canada, and the Netherlands have used various theories of liability for hearing cases arising extraterritorially. 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. In *Jesner*, for example, Jordan objected on the grounds that the litigation was an affront to its sovereignty. 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. 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.” Other countries such as the United Kingdom, Switzerland, and

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145 Kirshner, supra note 56.


147 Jesner, 138 S. Ct. at 1398.

148 Id. at 1407.


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.” This was a major concern of the Court when deciding *Kiobel*, and the Court again recognized this concern when deciding *Jesner*.

In her dissent in *Jesner*, Justice Sotomayor recognized that “none of those objections [were] about the availability of corporate liability as a general matter.” 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. Furthermore, governments objecting to ATS litigation may change course depending on the local administration in power. 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.”

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.” 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. Additionally, as suggested by Justice

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151 Doe VIII, 654 F.3d at 78.
153 Jesner, 138 S. Ct. at 1430 (Sotomayor, J., dissenting).
154 Id.
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

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159 Jesner, 138 S. Ct. at 1430–31 (Sotomayor, J., dissenting).
162 Skinner, supra note 131, at 1826; Law 2017-339 of March 27, 2017; see also Skinner, supra note 17, at 260.
164 Law 2017-339 of March 27, 2017; Skinner, supra note 17, at 260–61; Skinner, supra note 131, at 1826.
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. In both countries, cases are currently proceeding against domestic corporations for the actions of their subsidiaries.

In England, the Lungowe v. Vedanta Res. PLC litigation has been ongoing since 2015. Zambian citizens brought a suit against the U.K. corporation, Vedanta Resources, and against its subsidiary in Zambia, KCM. KCM, owned primarily by Vedanta Resource Holdings Limited, operates the Nchanga mines in Zambia. Significantly, while Vedanta owns 79.42% of KCM, the Government of Zambia holds the remaining 20.58%. 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. 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.” Meanwhile, the claim against Vedanta is for negligence in its duty of care to ensure KCM’s operations did not harm local communities. Plaintiffs allege Vedanta had a duty of care because of the high level of control it exercised over its subsidiary, KCM.

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.” Defendants Vedanta and KCM claimed that the entire focus of the lawsuit is in Zambia and

170 Lungowe [2017] EWCA (Civ) 1528 [1].
171 Id.
172 Id. [10]-[11].
173 Id. See infra Section III.A.2.
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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{182} In \textit{Choc v. Hudbay}, Guatemalan plaintiffs brought a suit against Hudbay Minerals Inc. and its wholly-owned Guatemalan subsidiary, CGN.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{186} In \textit{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.\textsuperscript{187} The District Court of the Hague found RDS liable for not taking measures to prevent sabotage and

\textsuperscript{179} Id. [40] (citing Lungowe [2016] EWHC (TCC) 975 [93]).
\textsuperscript{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]).
\textsuperscript{183} Id. para. 4.
\textsuperscript{184} Id. para. 50.
\textsuperscript{185} Id. para 49.
\textsuperscript{187} Id.
ordered the subsidiary SPDC to pay damages to a Nigerian farmer whose land and water were damaged by the oil spills.\textsuperscript{188}

RDS and SPDC appealed the district court’s judgment.\textsuperscript{189} One question on appeal was the district court’s finding of jurisdiction over both RDS and SPDC.\textsuperscript{190} The court upheld the ruling that jurisdiction had been proper.\textsuperscript{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.”\textsuperscript{192} The court found jurisdiction over SPDC based on the plurality of defendants doctrine.\textsuperscript{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.”\textsuperscript{194} The appellate court found it important that the defendants were part of the same business group.\textsuperscript{195} Additionally, the court was receptive, although cautious, to the possibility that a parent may be liable for the torts of its subsidiaries.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{198}

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


\textsuperscript{189} van Dam, supra note 186, ¶ 07.

\textsuperscript{190} Id.

\textsuperscript{191} Id. ¶ 10–11.

\textsuperscript{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).

\textsuperscript{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.).)

\textsuperscript{194} van Dam, supra note 186, ¶ 11.

\textsuperscript{195} Id. ¶ 12.

\textsuperscript{196} Id. ¶¶ 14–17.

\textsuperscript{197} Robertson et al., supra note 188.

\textsuperscript{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

200 Knowles, supra note 155, at 1170.
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 “admiration for] its values, [a desire to] emulate[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 through ATS litigation.\(^{212}\)

\(^{205}\) 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)).


\(^{210}\) 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)).


\(^{212}\) Knowles, supra note 155, at 1173.
ATS litigation for human rights violators can improve the reputation of the United States abroad. There is evidence that these suits improve the United States’ reputation in regions like Africa and Latin America. 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.”

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. 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.

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.

In determining whether a duty of care existed, the English courts sought to assign liability to those responsible for the harms. The trial court in Lungowe specifically considered the ability to hold the actual perpetrators of harms liable when upholding jurisdiction. The judge acknowledged that claimants may be suing the parent solely to find jurisdiction over the subsidiary. However, evidence that Vedanta was seen as “the real architect” of the harm was persuasive when finding jurisdiction. 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)).
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
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[,]...
and telecommunications.” The “practical implication[] of [allowing the lawsuit to continue] . . . is that the defendants must now proceed with complex and costly litigation.” Since the court’s ruling in 2013, discovery has continued into 2018.

French law also supports the goal of holding perpetrators of wrongs liable for their actions. 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. When a parent company has not taken these steps, the parent company may be statutorily liable. However, when these steps are taken but harm still occurs, the presumption of liability shifts to the subsidiary that caused the harm in question. Law 2017-399 seeks to promote actions by parent companies to prevent harm and find liable those who do not.

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. The Supreme Court suggests this will cause a massive liability risk to American corporations for their employees’ and subsidiaries’ conduct around the world. Such a liability risk could “hinder global investment in developing economies, where it is most needed.”

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.
248 Id.
249 Id.
250 Id.
251 Id.
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{257} For example, in \textit{Lungowe}, the parent argued that the real claim was against its subsidiary and that Vedanta was included simply to find jurisdiction over the subsidiary.\textsuperscript{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.”\textsuperscript{259}

Contrary to the statements of the court in \textit{Lungowe}, there have been cases in which claims by employees of a subsidiary have succeeded against the parent company.\textsuperscript{260} Following rulings in three prior cases, the \textit{Lungowe} court found that there are situations in which a corporation could be liable for torts committed by its subsidiaries abroad.\textsuperscript{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:

\begin{enumerate}
\item 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
\end{enumerate}

\begin{footnotes}
255 Matheson, supra note 47, at 3.
258 \textit{Lungowe} v. Vedanta Res. PLC [2016] EWHC (TCC) 975 [51]–[52] (Eng.).
259 \textit{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).
\end{footnotes}
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

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]).   

266 Id.
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.\(^\text{270}\) 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.”\(^\text{271}\) 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.”\(^\text{272}\) 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.”\(^\text{273}\) 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.’”\(^\text{274}\) Members of Congress have also advised the Court specifically against the holdings in Jesner and Kiobel.\(^\text{275}\) Furthermore, Justice Sotomayor notes that Congress has consistently failed to immunize corporations from ATS liability, despite numerous suits brought against corporations over the years.\(^\text{276}\) 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.\(^\text{277}\)

When established, it was undisputed that the ATS applied to both natural and legal persons.\(^\text{278}\) The ATS undisputedly establishes jurisdiction over ships for piracy, which are not natural persons.\(^\text{279}\) When the ATS was enacted, ships,
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

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.
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

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.

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.
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

299 See e.g., Doe v. Unocal Corp., 395 F.3d 932, 937 (9th Cir. 2002).
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 judgment, 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*.\(^{308}\)

\(^{303}\) *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.)).


\(^{306}\) *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.

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.\textsuperscript{309} A suit under the exception proposed would be somewhat opposite to the suit in \textit{Daimler}, in which the jurisdictional hook was much more tenuous.\textsuperscript{310} In \textit{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.\textsuperscript{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 \textit{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.\textsuperscript{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.

\textbf{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.\textsuperscript{313}

\textsuperscript{309} See \textit{Daimler}, 571 U.S. 117; \textit{Goodyear}, 564 U.S. 915. The Court held in \textit{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, \textit{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 \textit{Goodyear}, 564 U.S. at 918).

\textsuperscript{310} \textit{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).

\textsuperscript{311} Id.

\textsuperscript{312} See Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

\textsuperscript{313} \textit{Jesner} v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); \textit{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. 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. 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.

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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.*

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