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"PIERCING THE JURISDICTIONAL VEIL":

Holding Corporations Accountable for Human Rights Violations After Kiobel and Daimler

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"Piercing the Jurisdictional Veil": Holding Corporations Accountable for Human Rights Violations After *Kiobel* and *Daimler*

By: Carolina Nuche*

I. Introduction

Multinational corporations ("MNCs") are committing human rights violations and circumventing legal consequences.[1] Due to the serious concerns surrounding the human rights violations committed by MNCs, the United Nations felt the need to create the "UN Guiding Principles on Business and Human Rights" ("Guiding Principles").[2] These guidelines were created in hopes of providing guidance to countries and MNCs "to prevent, address, and remedy human rights abuses."[3] The Guiding Principles assert three general propositions: (1) "countries' existing obligations to respect, protect, and fulfill human rights and fundamental freedoms; (2) the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and (3) the need for rights and obligations to be matched to appropriate and effective remedies when breached."[4]

This article addresses issues concerning the third proposition – the lack of available remedy for victims of human rights violations. Primarily, this article focuses on the jurisdictional barriers that have been implemented by the United States Supreme Court ("SCOTUS"). Cases such as *Daimler v. Bauman* ("*Daimler*") and *Kiobel v. Dutch Royal Petroleum* ("*Kiobel*") have significantly limited how and when victims of human rights violations can bring suit against MNCs. Part II of this article addresses the historical background of personal jurisdiction and, more specifically, how the court has opted to continuously limit general jurisdiction. Part III of this article addresses the controversy and ramifications encircling SCOTUS' trend of decisions to not allow suits against the MNCs unless they meet an outdated set of qualifications. Part III also analyzes how SCOTUS' decisions affect victims of human rights violations, why SCOTUS has chosen to avoid subjecting MNCs to personal jurisdiction, and how SCOTUS' analysis is unreasonable given the complex nature of MNCs. Part IV proposes the legislative branch step in

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[1] *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013); *see also* Ma Ji, *Multinational Enterprises' Liability for the Act of Their Offshore Subsidiaries: The Aftermath of Kiobel and Daimler*, 23 MICH. ST. INTL L. REV. 397, 398 (2015) (discussing the difficulty in holding MNCs liable for the tortious acts of their offshore subsidiaries and reality that national courts, international norms, and MNCs' internal codes of conduct cannot legally and effectively hold MNCs liable for their offshore subsidiaries' tortious acts); Lincoln Caplan, *Corporate Abuse Abroad, a Path to Justice Here*, N.Y. TIMES (March 3, 2012), http://www.nytimes.com/2012/03/04/opinion/sunday/corporate-abuse-abroad-a-path-to-justice-here.html?_r=0. (addressing the controversy encircling the *Kiobel* decision by United States Supreme Court and arguing why the United States has a social responsibility to provide remedy for victims).

[2] *See Guiding Principles on Business and Human Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.; *UN Guiding Principles*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTER (last visited Apr. 10, 2016), http://business-humanrights.org/en/un-guiding-principles (describing the purpose Guiding Principles on Business and Human Rights were created for).

[3] BUS. & HUMAN RIGHTS RESOURCE CTR. *supra* note 2.

[4] U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM'R, *supra* note 2, at 1.

formulating a law providing for an exception to the general jurisdiction standard from which SCOTUS has refused to stray, thus allowing MNCs to avoid liability. Part V concludes that although SCOTUS has chosen to hide behind an outdated jurisdictional view, the United States ("U.S.") has a responsibility to provide a remedy for victims of human rights violations.

II. Background

"Many corporations are . . . structured through a tangled and impenetrable web of subsidiaries that leaves plaintiffs without an effective remedy."[5] Many foreign plaintiffs[6] are filing suits against these MNCs due to alleged human rights violations committed by these corporations in their home country.[7] However, due to lack of relief available in their home country, these plaintiffs are seeking justice in other countries such as the U.S. and England.[8] In the globalized and technologically-advanced world we live in, corporations are able to conduct business across borders and become complex entities that hire employees around the world.[9]

Initially in the U.S., both foreign and domestic plaintiffs chose to bring suit in the U.S. under the Alien Tort Statute, establishing a basis for human rights violations.[10] "The Alien Tort Statute ('ATS') provides federal district courts with jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the U.S."[11] However, based on recent decisions by the SCOTUS, the scope of the ATS has been significantly limited.[12]

Although these decisions do not directly affect a foreign corporation's ability to be subject to personal jurisdiction in the U.S. (unless the wrongs committed fall within the scope of the ATS) it is in keeping with the SCOTUS' recent trend of limiting the available remedies and potential suits that victims request to bring against MNCs.[13]

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[5] Lauren Carasik, *Supreme Court ruling shields corporations from accountability*, ALJAZEERA AMERICA (Feb. 20, 2014, 10:00 AM), http://america.aljazeera.com/opinions/2014/2/supreme-court-daimlerbaumanhumanrightsargentina.html (explaining that recent Supreme Court decisions have significantly favored large MNCs).

[6] When writing "foreign plaintiffs" throughout this paper, I refer to plaintiffs who are not citizens of the United States.

[7] *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013); Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846 (2011).

[8] *See* Perlette Michele Jura, Francisco Aninat & Dylan Mefford, *Disparate Treatment of the Corporate Citizen: Stark Differences Across Borders in Transnational Lawsuits*, 15 BUS. LAW INT. 85, 86 (May 2014) (discussing the burden lawsuits brought by foreign plaintiffs against MNCs have on the United States court system).

[9] *See, e.g.*, Carasik, *supra* note 5. ("A global company such as Daimler, whose subsidiaries operate in 40 countries and all U.S. states, is simply 'too big' to be confined to one home state.")

[10] *See, e.g Kiobel*, 133 S. Ct. 1659 (2013); *Daimler*, 134 S. Ct. 746 (2014); *Goodyear*, 131 S. Ct. 2846 (2011); Doe I v. Unocal Corp., 395 F. 3d 932 (9th Cir. 2002); *see also* Richard Meeran, *Tort Litigation Against MNCs for Violation of Human Right: An Overview of the Position Outside the United States*, 3 CITY UNIV. OF HONG KONG L. REV. 1, 2 (2011); Jura, et. al., *supra* note 8 at 86 (discussing the burden lawsuits brought by foreign plaintiffs against MNCs has on the United States court system); Sif Thorgeirson, *Doors closing on judicial remedies for corporate human rights abuse*, OPENDEMOCRACY, (Jan. 26, 2015), https://www.opendemocracy.net/openglobalrightsopenpage/sif-thorgeirsson/doors-closing-on-judicial-remedies-for-corporate-human-rig (explaining how the Alien Tort Statute was once an option for plaintiffs suing MNCs but is no longer a viable options due to recent decisions by the United States Supreme Court).

[11] 8 U.S.C. § 1350 (2012).

[12] *See, e.g., Kiobel,* 133 S. Ct. 1669 (2013) (holding that a plaintiff cannot file suit unless her claim touches and concerns the territory of the United States).

[13] *See Kiobel,* 133 S. Ct. 1659 (2013); *Daimler,* 134 S. Ct. 746 (2014); *Goodyear*, 131 S. Ct. 2846 (2011).

SCOTUS continuously uses lack of personal jurisdiction as justification for limiting liability for multi-national corporations.[14] Recent decisions by SCOTUS even limit when courts can subject complex multi-national corporations with subsidiaries in the U.S. to personal jurisdiction.[15] Therefore, by limiting the choice of law available to plaintiffs as well as protecting MNCs by providing a shield through an outdated standard of personal jurisdiction, SCOTUS has left most victims without the ability to receive an appropriate remedy.[16] When should the U.S. have jurisdiction over these companies? When should the U.S. have jurisdiction over MNC's? To answer this question, one must first analyze how the law of personal jurisdiction has evolved with respect to exercising personal jurisdiction against MNC's.[17]

A. Personal Jurisdiction

The U.S.'s courts must have personal jurisdiction over both the plaintiff and the defendant in order to hear a claim.[18] A court can establish personal jurisdiction in either one of two ways: specific jurisdiction or general jurisdiction.[19] In regards to MNCs, specific jurisdiction is typically

[14] *See Daimler*, 134 S. Ct. at. 751 (2014) (ruling that California could not exercise personal jurisdiction over Daimler); *see also* Goodyear, 131 S. Ct. 2846, 2851 (2011) (declaring that a court can only assert general jurisdiction over out-of-state corporations where "their affiliations with the forum are continuous and systematic as to render them at home").

[15] *See Daimler*, 134 S. Ct. 746 (2014); *Goodyear*, 131 S. Ct. 2846 (2011).

[16] *See* Roger P. Alford, *Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 Emory L.J. 1089, 1091 (2013-2014) (describing how the decision in *Kiobel* affected foreign plaintiffs attempting to sue MNCs in the U.S.).; Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies or Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 Colum. Hum. Rts. L. Rev. 158, 163-64 (2014-2015)(describing several possible remedies for victims of human rights violations after the decision in the *Kiobel* decision.).

[17] *See infra* Part II.A.

[18] *See e.g*, *Personal Jurisdiction*, CORNELL UNIVERSITY LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/personal_jurisdiction (last visited Feb. 26, 2016) (defining what personal jurisdiction is and the constitutional right parties in a case have under the United States court system).

[19] *See e.g General/Specific Jurisdiction Test*, USLEGAL.COM, http://civilprocedure.uslegal.com/jurisdiction/generalspecific-jurisdiction-test/ (last visited Feb, 26, 2016) (explaining the different ways a court can find that it has personal jurisdiction over a litigant). "Depending on the relationship between the contacts and the claim brought against a party, the necessary contacts that the party must have for a state to assert personal jurisdiction may vary. The defendant may be sued on any claim, if there is general jurisdiction over the defendant. If the defendant is served with the process while physically in the state, or if s/he is domiciled in the state, a general jurisdiction exists. In the case of corporations, general jurisdiction exists only if the defendant has its principal place of business in the state, or if the corporation is incorporated in the state, or if the corporation carries on a continuous and systematic part of its business in the state. Specific jurisdiction exists when a state is alleged to have jurisdiction over a defendant because the defendant's activities in that state gave rise to the claim. In specific jurisdiction, the defendant's contacts with the forum states are more limited. However, the claim involved must arise out of those contacts." *Id. See also* Carasik, *supra* note 2. "General jurisdiction requires a finding that a defendant's contacts with a given state are so extensive that a plaintiff can sue the defendant in that state for any claim, including activities that occurred elsewhere. specific jurisdiction is more limited, allowing a plaintiff to sue in a state's courts only when the claim arise out of the defendant's conduct within that state.

not controversial and easy to identify.[20] The main issue regarding MNCs, is generally whether U.S.' courts can assert general jurisdiction over MNCs.[21]

i. *Helicopteros & Goodyear*: *Corporations and Personal Jurisdiction*

In 1984, the Supreme Court upheld,[22] in principle, general jurisdiction as a means of finding personal jurisdiction over a MNC.[23] In *Helicopteros Nacionales de Colombia v. Hall*, there was no way to find specific jurisdiction to subject Helicopteros to personal jurisdiction because "the cause of action [did] not arise out of or relate to the foreign corporation's activities in the forum state."[24] Nevertheless, SCOTUS determined that there was another way a court can establish personal jurisdiction over a foreign corporation – general jurisdiction.[25]

In order to subject a foreign corporation to general jurisdiction, SCOTUS determined that the MNC must have "continuous and systematic general business contacts" within the forum state.[26] Determining that this was the applicable standard to subject MNCs to personal jurisdiction, SCOTUS held in *Helicopteros* that the contacts with Texas were insufficient and therefore there was no general jurisdiction over Helicopteros.[27] Interestingly, in his dissenting opinion, Justice Brennan presented preliminary concerns with limiting the contacts sufficient to subject MNCs to general jurisdiction, writing:

> [T]he Court relies on a 1923 decision in Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 43 S.Ct. 170, 67 L.Ed. 372, without considering whether that case retains any validity after our more recent pronouncements concerning the permissible reach of a State's jurisdiction. By posing and deciding the question presented in this manner, I fear that the Court is saying more than it realizes about constitutional limitations on the potential reach of a state's jurisdiction. In particular, by relying on a precedent whose premises have long been discarded, and by refusing to consider any distinction between controversies that "relate to" a defendant's contacts with the forum and causes of action that "arise out of" such contacts, the Court may be placing severe limitations on the type and amount of contacts that will satisfy the constitutional minimum.[28]

[20] *See, e.g., Kiobel,* 133 S. Ct. 1659 (2013); *Daimler,* 134 S. Ct. 746 (2014); *Goodyear*, 131 S. Ct. 2846 (2011); *Doe I,* 395 F.3d 932 (2002); *See also* Walter H. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic,* 56 KAN. L. REV. 609, 609-10 (2009).
[21] *Kiobel*, 133 S. Ct. at 1659.
[22] *See, e.g.*, Perkins v. Benguet Consol. Mining Co., 72 S. Ct. 413 (1952); *see also Daimler*, 134 S. Ct 746, 755-56 The court's decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.") (quoting *Goodyear*, 131 S. Ct. 2856); *Daimler*, 134 S. Ct 746, 755-56 ("The defendant in Perkins, Benguet, was a company incorporated under the laws of the Philippines, where it operated gold and silver mines. Benguet ceased its mining operations during the Japanese occupation of the Philippines in World War II; its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities.
[23] Helicopteros Nacionales de Columbia v. Hall, 466 S. Ct. 408 (1984).).
[24] *Id.* at 415.
[25] *Id.* at 415-16.
[26] *Id.* at 416-17.
[27] *Id.* at 416-18.
[28] *Id.* at 419-20 (dissent).

Justice Brennan's foreshadowing became a present reality in 2011, when SCOTUS made it even more difficult to subject MNCs to general jurisdiction.[29]

In *Goodyear Dunlop Tires Operation, S.A. v. Brown*, SCOTUS held "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them *essentially at home* in the forum State."[30] As Justice Brennan's dissenting opinion in *Helicopteros* predicted, SCOTUS chose to limit the methods and forms of subjecting MNCs to general jurisdiction.[31] In *Goodyear*, Goodyear Luxembourg Tires, SA, Goodyear Lastikleri, and Goodyear Dunlop Tires France were named as defendants as indirect subsidiaries of Goodyear USA, an Ohio corporation also named as a defendant in the suit.[32] Although the corporate structure had continuously become more complicated and required a new analysis determinative of which contacts subject giant corporations to general jurisdiction, SCOTUS chose to continue the application of the original outdated analysis of general jurisdiction under *Perkins*, a case that was decided in 1952.[33]

ii. *Daimler AG v. Bauman*

In a more recent decision, *Daimler A.G. v. Bauman*, SCOTUS was faced with a MNC, with subsidiaries in the U.S., and once again chose to not subject the MNC to personal jurisdiction.[34] According to plaintiff's complaint, Daimler's Argentinian subsidiary Mercedes-Benz Argentina, collaborated with state security forces to kidnap, detain, torture, and kill some of its employees.[35] In *Daimler,* Argentinian residents filed a cause of action against the German MNC under the Alien Tort Statute[36] ("ATS") and Torture Victim Protection Act[37] ("TVPA").[38] The plaintiffs asserted that there was jurisdiction over Daimler due to the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey.[39]

Using *Helicopteros* and *Goodyear* as the support for its opinion, SCOTUS ruled "to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate . . . would sweep beyond the 'sprawling view of general jurisdiction' we rejected in *Goodyear*."[40] Justice Ginsburg, writing for SCOTUS, held that "due process did not permit exercise of general jurisdiction over the corporation in California."[41] Justice Ginsburg even acknowledged

[29] Goodyear v. Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853-54 (2011).
[30] *Goodyear*, 131 S. Ct. at 2851 (emphasis added).
[31] *Id.* at 2856.
[32] *Id*. at 2851-52.
[33] *Id.* at 2856.
[34] Daimler AG v. Bauman, 134 S. Ct. 746 (2014).
[35] *Id.* at 750-751.
[36] *See infra at* Part II.B.
[37] Torture Victim Protection Act, 28 U.S.C. § 1350 (1992). "An Act to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." Torture Victim Protection Act, 28 U.S.C. § 1350 (1992).
[38] *Daimler*, 134 S. Ct. at 751. *See also* Carasik, *supra* note 1.
[39] *Daimler*, 134 S. Ct. at 751.
[40] *Id.* at 760.
[41] *Id.* at 762.

SCOTUS's reluctance to find general jurisdiction over a MNC stating "[a]s this Court has increasingly trained on the 'relationship among the defendant, the forum, and the litigation . . . general jurisdiction has come to occupy a less dominant place in the contemporary scheme.'"[42] As SCOTUS continued to limit the scope of general jurisdiction, plaintiffs used other forms to bring suit against MNCs.[43]

B. The Alien Tort Statute and *Kiobel* – Avoiding Jurisdiction at Whatever Cost

The ATS had been one of the main forms of legislation that human rights victims cite in order to bring suit against foreign defendants.[44] However, as more plaintiffs brought suit claiming jurisdiction under the ATS, courts started limiting the geographical boundaries of the ATS.[45] "As regards to personal jurisdiction, the basic question is whether ATS litigation should be viewed any differently from litigation in other areas . . . [and] [t]he answer has been almost uniformly that the same standards apply."[46]

The ATS was first passed as a section of the Judiciary Act of 1789.[47] As it was written, the Act afforded district courts "cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all the causes where an alien sues for a tort only in violation of the law of nations or a treaty of the U.S."[48] Nevertheless, for decades, it remained relatively dormant and unused.[49] The first major case that had the ATS at its crux was *Filartiga v. Pena-Irala*.[50] In *Filartiga*, citizens of Paraguay who were in the U.S. seeking permanent political asylum, filed suit against other citizens of Paraguay who were in the U.S. on a visitor's visa, for wrongfully causing the death of their son, allegedly by torturing him.[51] The trial court originally dismissed the case for lack of subject matter jurisdiction.[52] On appeal, Appellants contended that there was federal jurisdiction under the ATS.[53] The U.S. Court of Appeals for the Second Circuit held, "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations," and

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[42] *Id.* at 758.

[43] *See, e.g.*, *Daimler*, 134 S. Ct. at 748 (although the discussion and analysis by the court in *Daimler* was centered on subjecting the defendant to personal jurisdiction, the suit was brought under the ATS and the court did not discuss the issue of extraterritoriality under the ATS until *Kiobel*); *Kiobel*, 569 U.S. 108, 112 (2013); *Doe I*, 395 F.3d 932, 943 (9th Cir. 2002).

[44] *Id. See* Kedar S. Bhatia, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT'L L. REV. 447, 449-450 (2013) (discussing the power the ATS originally had prior to *Kiobel*).

> "Modern interpretation of the [ATS] gives it an expensive reach; the statute opens domestic courts to plaintiffs alleging violation of a potentially unlimited number of customs that comprise the law of nations. Due to its breadth, the statute has been touted as a powerful took for advancing human rights interests around the world."

Bhatia, *supra*..

[45] *Kiobel*, 569 U.S. at 108; *See also* Skinner, *supra* note 15, at 159.

[46] Richard M. Buxbaum, David D. Caron, *The Alien Tort Statute: An Overview of the Current Issues*, 28 BERKELEY JOURNAL OF INTERNATIONAL LAW 511, 513 (2010) (analyzing the controversy and uncertainty surrounding the Alien Tort Statute and its applicability); *See also* Daimler, 134 S. Ct. at 749.

[47] Buxbaum & Caron, *supra* note 46, at 513.

[48] *Id.* (quoting Act of Sept. 24, 1789, ch. 20, §9).

[49] Bhatia, *supra* note 39.

[50] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); Bhatia, *supra* note 42, at 452.

[51] *Filartiga*, 630 F.2d at 876.

[52] *Id.*

[53] *Id.* at 880.

therefore falls within the federal jurisdiction granted by the courts under the ATS.[54] In the court's opinion, Judge Kaufman stated: "[o]ur holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[55]

Although the ATS was originally favored by U.S. courts to subject MNCs to jurisdiction, it has become a recent trend to limit when and how the ATS can be applied to grant jurisdiction against these MNCs.[56]

In *Kiobel*, Nigerian citizens domiciled in the U.S. filed suit in federal court under the ATS, "alleging that certain Dutch, British, and Nigerian corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria."[57] The question presented to SCOTUS "was whether and under what circumstances courts may recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the U.S. under the ATS."[58] In his opinion, Chief Justice Roberts held that there is a presumption of extraterritoriality which provides that, "when a statute gives no clear indication of an extraterritorial application [of U.S. law], it has none"[59] and "reflects the presumption that the U.S. law governs domestically but does not rule the world."[60]

Essentially, SCOTUS significantly limited the scope of ATS and made it much more difficult for plaintiffs to file suits under the ATS establishing that "there is no indication that the ATS was passed to make the U.S. a uniquely hospitable forum for the enforcement of international norms."[61] As a result, SCOTUS, once again, successfully limited the liability of multi-national corporations through limiting the scope of the ATS.[62]

III. Accepting Social Responsibility and The Death of General Jurisdiction

As our world becomes more globalized, the U.S. has continuously asserted and projected that we are a leading country in a world that continues to become more interconnected and complex.[63] However, in regards to holding MNCs liable for human rights violations, the U.S. has opted to take a back seat and limit its own involvement in providing relief for plaintiffs who are unable to find relief in their home countries.[64] The U.S. is clearly separating itself from its previous

[54] *Id.*
[55] *Id.* at 890.
[56] *See, e.g.*, *Kiobel*, 569 U.S. at 108; *Daimler*, 134 S. Ct. at 746; *Goodyear*, 564 U.S. at 915; *Doe I*, 395 F.3d at 932.
[57] *Kiobel*, 569 U.S. at 108.
[58] *Id.*
[59] *Id.* at 115 (quoting *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010)).
[60] *Id.* (quoting *Microsoft Corp. v. AT & T Corp*., 550 U.S. 437, 454. (2007)).
[61] *See Kiobel*, 569 U.S. at 108. *See also* Carasik, *supra* note 5; Jura, et al., *supra* note 8, at 91 (explaining the limits *Kiobel* created for plaintiffs trying to file suit in the United States under the ATS).
[62] *Id.*
[63] *See* Marion Smith, *What is America's Role in the World?*, THE HERITAGE FOUNDATION (Nov. 16, 2010), http://www.heritage.org/global-politics/report/what-americas-role-the-world; *United States of America country profile*, BBC (last updated Jan. 10, 2012), http://news.bbc.co.uk/2/hi/americas/country_profiles/1217752.stm.
[64] *See, e.g.*, *Kiobel*, 569 U.S. at 108; *Daimler*, 134 S. Ct. at 746; *Goodyear*, 564 U.S. at 915; Skinner, *supra* note 15, at 164; Alford, *supra* note 15, at 163-164.

viewpoint, no longer leading the fight against human rights violations, and using jurisdictional barriers to do so.[65]

The reality is the "courts, entrenched in antiquated notions of common law, continue to dash hopes for financial recovery, further insulating those with the deepest pockets."[66] SCOTUS continues to restrict access to legal mechanism against MNCs by maintaining a pro-business jurisprudence.[67] SCOTUS needs to reassess whether MNCs should be entitled to the same rights as individuals without facing the same risk of liability in the U.S. in order to finally provide victims with the judicial remedy they are entitled to.[68]

A. The Modern Corporation Protected by an Outdated Jurisdictional Approach

MNCs contribute to the global economy in an exorbitant way.[69] As Justice Brennan said in his dissenting opinion in *Helicopteros*:

> The vast expansion of our national economy during the past several decades has provided the primary rationale for expanding the permissible reach of a State's jurisdiction under the Due Process Clause. By broadening the type and amount of business opportunities available to participants in interstate and foreign commerce, our economy has increased the frequency with which foreign corporations actively pursue commercial transactions throughout the various States."[70]

However, the Supreme Court refuses to accommodate and modify the general jurisdiction approach to be in keeping with the complex globalized corporate system that our society is faced with today. Moreover, MNCs have become complex entities with numerous sub-parts entangled in the consumer trade of numerous countries.[71] Yet, SCOTUS has consistently held that MNCs must "essentially be at home" in order to be subject to personal jurisdiction in the U.S.[72] While specific jurisdiction has "been cut loose for *Pennoyer*[73]…we have declined to stretch general jurisdiction beyond limits traditionally recognized."[74] The unwillingness of the court to expand

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[65] *Id.*

[66] Naomi Jiyoung, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT'L L. 255, 260 (2013).

[67] *See, e.g., Kiobel*, 569 U.S. at 108; *Daimler*, 134 S. Ct. at 746; *Goodyear*, 564 U.S. at 915; *see also* Charles W. "Rocky" Rhodes, Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C.D. L. REV. 207, 212 (2014-2015) (analyzing the evolution of personal jurisdiction cases in the U.S. arguing that the court has completely shifted the balance of power between MNCs and plaintiffs who wish to sue them).

[68] *See* Skinner, *supra* note 15, at 167; Chilenya Nwapi, *Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor*, 30 UTRECHT J. OF INT'L AND EUR. L. 24, 24-5 (2014) (arguing that in the world we live in today a jurisdiction by necessity statute should be implemented in the United States to ensure these MNCs are facing liability and the victims have a jurisdiction where their voices can be heard).

[69] Ji, *supra* note 1, at 401. " The operations of [MNCs] across state borders are an increasingly important part of global economic activity. [MNCs] are involved in 80 percent of global trade. Of more than 100,000 [MNCs], the overwhelming majority are based in the advanced economies of developed countries with many developing countries with many developing countries playing host to their 900,000 subsidiaries*." Id.*

[70] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 419-20 (1984).

[71] *See supra* note 67 and accompanying text.

[72] *See, e.g., Goodyear*, 564 U.S. at 915; *Daimler*, 134 S. Ct. 746 at 751.

[73] *Pennoyer v. Neff*, 95 U.S. 714 (1877) is the casebook case establishing the doctrine of personal jurisdiction as being subject to the Due Process Clause of the Fourteenth Amendment.

[74] *Daimler*, 134 S. Ct. at 756.

and evolve with the general jurisdiction standard has created "an archaic doctrine rarely useful in the modern world."[75]

In today's globalized economy, with massive companies dipping their hands into almost every country's economic system, companies are essentially at home, worldwide.[76] For example, Apple Inc. ("Apple") in regards to its famous product, the iPhone, which contains hundreds of parts, has an estimated 90 percent of goods that are manufactured abroad. Its "[a]dvanced semiconductors have come from Germany…memory from…Japan, display panels and circuitry from Korea and Taiwan, chipsets from Europe and rare metals from Africa and Asia . . . [a]nd…put together in China."[77] However, Apple is incorporated in California and is a prime example of how far-reaching and complex these MNCs have become.[78] Not only does Apple sell its products worldwide, but it also has countless employees around the world manufacturing and building their products.[79] Yet, SCOTUS, with its decision in *Daimler*, would only be able to subject Apple to general personal jurisdiction in California.[80]

Another prime example is Goodyear Tire & Rubber Company ("Goodyear"). Goodyear's corporate structure has not changed significantly since the SCOTUS's holding in *Goodyear*, which limited the application of general jurisdiction.[81] Goodyear is one of the world's largest tire companies employing over 66,000 people.[82] Furthermore, Goodyear has approximately twenty-three subsidiaries in the U.S. alone, and 143 subsidiaries internationally.[83] Although Goodyear has more than 100 subsidiaries worldwide, these subsidiaries' principal place of business and place of incorporation do not fall within the U.S. Under the general jurisdiction standard that Justice Ginsburg reinforced in *Daimler*, none of Goodyear's subsidiaries could be subject to general jurisdiction in the U.S.[84]

One of the primary reasons companies create subsidiaries is to avoid liability.[85] The parent corporation is an entire separate legal entity from its subsidiaries which lends support and

[75] Judy M. Cornett & Michael H. Hoffheimer, *Good-bye Significant Contacts: General Jurisdiction After* Daimler A.G. v. Bauman, 76 OHIO ST. L.J. 101, 125 (2015).
[76] *See, e.g.,* Ji, *supra* note 1, at 401-02 (explaining the complex structure of Apple Inc. and how the global network production of MNCs is primarily based upon the transnational activities of such companies).
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Daimler*, 134 S. Ct. 746 at 751.
[81] *See* Goodyear, 564 U.S. at 915.
[82] *See Goodyear Announces New Organizational Structure*, GOODYEAR CORPORATE (Dec. 1, 2015) (explaining the current complex corporate structure of Goodyear and its subsidiaries worldwide), https://corporate.goodyear.com/en-US/media/news/goodyear-announces-new-organizational-structure.html. Goodyear announced that it is going to combine its North American and Latin American businesses into one American unit. *Id.*
[83] Securities and Exchange Commission: Exhibit 21: Subsidiaries of the Registrant (2001) http://www.sec.gov/Archives/edgar/data/42582/000095015202001645/l92979aex21pdf.pdf. (listing the numerous subsidiaries Goodyear has worldwide). It should be noted that Goodyear owns over 50% of stock in every subsidiary. *Id.*
[84] *Daimler*, 134 S. Ct. at 746 (2014).
[85] *See* Skinner, *supra* note 15, at 258 (arguing that it is unfair that MNCs are receiving tax and other benefits from their subsidiaries while being able to avoid liability when said subsidiaries commit human rights violations abroad); Todd W. Noelle, *At Home in the Outer Limits:* DaimlerChrysler v. Bauman *and the Boundaries of General Jurisdiction*, 9 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 17, 40 (2013) (emphasizing that even several justices of SCOTUS have voiced concern that MNCs could hide behind domestic distributors to avoid liability).

reasoning to the SCOTUS's decision to not subject subsidiaries or parent corporations set up abroad to general jurisdiction in the U.S.[86] Nevertheless, it is recognized under international law that, at times, it is necessary to "lift the corporate veil" when appropriate for jurisdictional purposes.[87]

> [T]he law, confronted with economic realities, has had to provide protective measure and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes.[88]

It does not seem reasonable to allow these companies to enter the market in our country, sell its products to our citizens, yet not face liability when violating human rights abroad. Regardless, "[h]uman rights practitioners have had only limited success in piercing the corporate veil and in overcoming limited liability of parent companies."[89] Although finding general jurisdiction for MNCs is not the same as finding MNCs legally liable, the same policy has shaped the SCOTUS's approach to avoid subjecting said MNCs with subsidiaries worldwide to personal jurisdiction.[90] The *Daimler* decision coupled with the complexities associated with the corporate structure of MNCs limits the liability of the parent company, creating one of the largest barriers victims of corporate human rights abuses face.[91]

B. Protection of MNCs before Protection of Human Rights

The U.S. claims to be an advocate of human rights and not tolerate such inhumane activity, yet they are unwilling to subject MNCs to liability for wrongs they have committed.[92] SCOTUS has turned its back on the original position of the court that we as a country have an obligation to provide a remedy to those injured by the acts of its corporate citizens.[93] This belief has been a part of our nation's history since its birth, as provided by "the founders of the United States' [recognition] of this obligation by enacting the [ATS] in the first place."[94]

While Justice Ginsburg's opinion in *Daimler* reiterates SCOTUS's concern with causing a burden on corporations, she fails to express any concern for the hardships the decision would have on injured individuals who are victims of human rights violations.[95] Although SCOTUS

[86] *Id.*
[87] *See* Skinner, *supra* note 15, at 215.
[88] Skinner, *supra* note 15, at 215-16 (quoting Case Concerning the Barcelona Traction, Light and Power Co. (*Belgium v. Spain*) 1970 I.C.J. 3, 39-39, ¶¶ 56, 58 (Feb. 5, 1970)) (noting the limited liability of a parent company is municipal law applicable as international law).
[89] *See* Skinner, *supra* note 15, at 217.
[90] *See* Daimler AG v. Bauman, 134 S. Ct. 746, 761-62 (2014).
[91] *See* Skinner, *supra* note 15, at 213; *see also Daimler,* 134 S. Ct. 746 (2014).
[92] Skinner, *supra* note 15, at 188; *see also* 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 as often as the questions of right depending upon it are duly presented for their determination.").
[93] Skinner, *supra* note 15.
[94] *Id.* at 188.
[95] *See Daimler*, 134 S. Ct. 746, 761-62.

previously only put limits on general jurisdiction, in *Daimler* there was a clear disapproval of general jurisdiction as a form of personal jurisdiction in its entirety.[96] The U.S. decision in *Daimler* is a game-changer by "advancing the policy goal of giving corporations the power to limit states where they must answer legal claims [in which] the Court shrinks the places of general jurisdiction against many large corporations to one or two states."[97] The hard line rule created in *Daimler* – a corporation is only subject to general jurisdiction in its place of incorporation or principal place of business, except in exceptionally rare occasions – creates a new era in which SCOTUS allows vested rights for MNCs and cloaks MNCs with unprecedented immunities that were never suggested in earlier decisions.

There are many policy reasons SCOTUS and scholars have argued in support of the assertion that the U.S. should not subject MNCs to a broader application of general jurisdiction.[98] Justice Ginsburg, in *Daimler* stated, "[s]uch exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants 'to structure their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'"[99] Moreover, Justice Ginsburg asserts that, "[c]onsiderations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands."[100]

However, Justice Ginsburg is putting all "out-of-state defendants" into one general category, yet MNCs cannot be, for jurisdictional purposes, considered the same as a single individual citizen. In *Daimler*, Justice Sotomayor in her concurring opinion writes, "[i]n recent years, Americans have grown accustomed to the concept of [MNCs] that are supposedly 'too big to fail'; today the Court deems Daimler 'too big for general jurisdiction.'"[101] SCOTUS has supported the assertion that if MNCs choose to take advantage of the benefits and protections of a State in which it operates then the State has a right to exercise jurisdiction over said MNCs; yet, in *Daimler*, SCOTUS completely diverts from this original assertion and analyzes Daimler's in-state contacts in relation to its contacts abroad, holding that the in-state contacts are insufficient.[102]

The U.S. is currently more concerned with the positive economic effect MNCs have on the global economy than with protecting individuals from these MNCs violating human rights. "Many

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[96] *See* Cornett & Hoffheimer, *supra* note 73, at 105; *see also* Rhodes & Robertson, *supra* note 65, at 228; *Daimler*, 134 S. Ct. 746, 757-58.

[97] Cornett & Hoffheimer, *supra* note 73, at 105-06.

[98] *See Daimler*, 134 S. Ct. 746, 761-63; *see also* Parlette Michele Jura, Francisco Anitat, and Dylan Mefford, *Disparate Treatment of the Corporate Citizen: Stark Differences Across Borders in Transnational Lawsuits*, 15 BUS. L. INT'L 85, 94 (arguing that the U.S. has been burdened by suits filed by foreign plaintiffs and even though recent cases have limited plaintiffs' ability to continue bringing suit in the U.S. more needs to be done to help mitigate the influx of transnational suits.).

[99] *See Daimler*, 134 S. Ct. at 761-62, (quoting Burger King Corp, 471 U.S. 462, 472).

[100] *Id.* at 763 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316)(quoting Milliken v. Meyer, 311 U.S. 457, 463). Arguments that the Court hold in regards to international rapport include: expressing concern that unpredictable applications of general jurisdiction based on activities of U.S. – based subsidiaries could discourage foreign investors; acknowledging that "doing business" basis for general jurisdiction has led to "international friction"; "'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.'" *Id.* at 763 (quoting U.S. Brief 2).

[101] *Id.* at 764 (Sotomayor, S. concurring) (concurring opinion).

[102] *Id.* at 767-68.

[MNCs] have grown into entities of such 'astonishing magnitude' that, in terms of economic power, they fully measure up to individual countries."[103] Our global economy and the strength of these MNCs provide a necessity for a powerful country to step in, i.e. the U.S., to hold these MNCs accountable for human rights violations.

Some globally recognized MNCs suspected of human rights violations include but are not limited to: Chevron, Coca-Cola Company, Nestle USA, and Wal-Mart.[104] Many of these MNCs have significant connections with the U.S., yet may only have subsidiaries incorporated in the U.S. with the parent-company committing human rights violations abroad, or vice-versa.[105] This results in these MNCs avoiding liability for human rights violations committed abroad.[106] However, as discussed by economist Joseph Stiglitz[107] in an amicus brief for the court in *Kiobel*, "… lawsuits can be an efficient way to enforce human rights in countries where court systems and other means of policing violations are ineffective."[108] Regardless of this logical conclusion, the current trend of SCOTUS is to "shift the risk of loss from MNCs to the individuals harmed by their actions,"[109] with MNCs able to structure themselves into a tangled and impenetrable web of subsidiaries, leaving plaintiffs without an effective remedy.[110] With SCOTUS limiting general jurisdiction in such a manner that makes general jurisdiction effectively useless in holding these MNCs accountable for human rights violations, other avenues must be explored to ensure these MNCs are subject to liability and face penalty for these crimes.

IV. A Law Creating General Jurisdiction for MNCs Committing Human Rights Violations.

General jurisdiction has become such a limited and inapplicable concept that it is practically non-existent when applied to a large MNC's liability. The decision in *Daimler*, as voiced by Justice Sotomayor, will now allow the largest MNCs to escape general jurisdiction by virtue of the volume of their activity outside of any particular state's jurisdiction.[111] However, potential civil liability would give corporations the incentive to implement policies and regulations changing their code of conduct and ensuring due diligence is carried out when ensuring that the MNCs and their subsidiaries are not committing human rights violations abroad.[112]

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[103] Nwapi, *supra* note 66, at 25.
[104] *See* Global Exchange, *The 14 Worst Corporate Evildoers*, INTERNATIONAL LABOR RIGHTS FORUM (Dec. 12, 2005), http://www.laborrights.org/in-the-news/14-worst-corporate-evildoers..
[105] *See, e.g.*, *Daimler*, 134 S. Ct. at 746; *Goodyear*, 131 S. Ct, at 2853-54; *see also* Skinner, *supra* note 15, at 164, 166.
[106] *Id.*
[107] Joseph E. Stiglitz is a professor of economics at Columbia University with "extensive expertise in economic theory and global development." *See* Brief of Joseph E. Stiglitz as Amicus Curiae in Support of Petitioners at 1, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 11-88 and 10-1491), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_stiglitz.authcheckdam.pdf.
[108] Lincoln Caplan, *Corporate Abuse Abroad, a Path to Justice Here*, THE NEW YORK TIMES (March 3, 2012), http://www.nytimes.com/2012/03/04/opinion/sunday/corporate-abuse-abroad-a-path-to-justice-here.html?_r=0; *see also* Stiglitz, *supra* note 104.
[109] *Daimler*, 134 S. Ct. at 773 (Sotomayor, S. concurring) (concurring opinion).
[110] Carasik¸ *supra* note 5, at 11; *see also Daimler*, 134 S. Ct. at 773 (Sotomayor, S. concurring) (concurring opinion); Ji, *supra* note 1, at 399.
[111] *Daimler*, 134 S. Ct. at 763-64 (Sotomayor, S. concurring) (concurring opinion); Cornett & Hoffheimer, *supra* note 73, at 141.
[112] *See* Caplan, *supra* note 105.

We can no longer accept the assertion that by simply implementing a more complex corporate structure, MNCs can completely avoid liability even though the parent-corporation or one of its subsidiaries is committing human rights violations. The country hosting these MNCs have done a notoriously poor job of regulating and ensuring that these MNCs comply with legal standards and not violate an individual's human rights.[113] While judicial systems in developing countries continue failing victims of human rights violations, "[t]he United States and…other developed countries are not fulfilling their international and legal obligations to provide remedies for harm[s] suffered at the hands of [MNCs]…."[114] Developing countries provide legislative and judicial remedies that are inadequate.[115]

It is time for the U.S. to protect human rights over protecting MNCs. Although SCOTUS has refused to amend general jurisdiction to ensure these MNCs are held accountable for their actions, the legislative branch should step in and uphold the only plausible and ethical position – human rights violations are intolerable and MNCs must face liability. This article proposes a law requiring MNCs conducting business in the U.S. and allegedly committing human rights violations to accede to personal jurisdiction in the U.S. This law may initially create a burden on the judicial system, yet the burden would shift to MNCs once they realize they can no longer avoid liability for their illegal conduct, e.g. human rights violations. Furthermore, implementing such a law would provide an immediate remedy for current and future victims who have been unable to attain justice, while forcing corporations to reassess their policies and regulations.

Author Gwynne L. Skinner ("Skinner"), and other scholars have proposed many potential solutions to provide access to judicial remedy.[116] Skinner proposes possible solutions including: enactment of a jurisdiction by necessity statute or requiring that U.S. MNCs and MNCs doing substantial business in the U.S. submit to the jurisdiction of U.S. courts, if the host country's judiciary is not stable or fair.[117] Although each of these remedies can attain similar goals as the one set out in this article, the solution proposed here is somewhat of a hybrid of the options Skinner and other scholars have analyzed.

This article proposes an efficient and ideal solution – creating a statute that carves out an exception to the unjust and outdated general jurisdiction standard SCOTUS further limited in *Daimler*. A jurisdiction by necessity statute would require determination as to when a U.S. court should consider that there is no other forum in which the dispute may be adjudicated or in which the plaintiff may reasonably be expected to initiate suit. Allowing for such a determination gives too much deference to SCOTUS, for they would determine when there is no other forum. As seen in recent SCOTUS cases discussed above, there is a high probability that SCOTUS would simply hold there is in fact another forum the plaintiff may file suit in and dismiss the claim altogether.[118]

[113] *See* Skinner, *supra* note 15, at 163.
[114] *Id.* at 164
[115] *See* Skinner, *supra* note 15.
[116] *Id.* at 247-64; *see also* Noelle, *supra* note 82, at 36-41; Cornett & Hoffheiner, *supra* note 73, at 167.
[117] *See* Skinner, *supra* note 15, at 253, 255.
[118] *See, e.g., Daimler*, 134 S. Ct.; *see also* Cornett & Hoffheimer, *supra* note 73, at 167 (arguing "that the Court has moved too far, too fast towards restricting general [] jurisdiction" and even if such restriction produces economic benefits, it does allow for SCOTUS to impede on a state's authority "to require legal entities present and active in their territories to answer lawsuits against them").

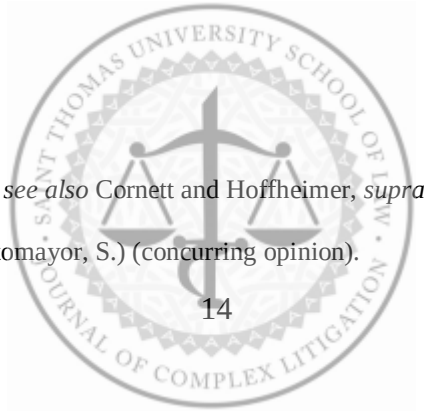
Forcing U.S. MNCs or MNCs doing substantial business in U.S. to submit to the jurisdiction of U.S. courts if the host country's judicial system is not stable or fair, again leaves SCOTUS with too much deference to determine what is considered a stable and fair judicial system. Since Justice Ginsburg has continuously been concerned with maintaining peaceful ties with foreign countries and fears impeding on their sovereignty, chances of the court holding a foreign countries judicial system as unstable and unfair is highly unlikely.[119] In *Daimler*, SCOTUS even used international relations as a means of defending its decision.[120]

If the legislative branch were to pass a law simply creating an exception to the general jurisdiction standard created by SCOTUS, it would provide notice to MNCs doing business in the U.S. MNCs would be put on notice that if they wished to conduct business within the U.S. and were suspected of committing human rights violations, said MNCs and their subsidiaries would be subject to suit in the U.S. The law could define what constitutes conducting business as any form of business in which a company enters into U.S. markets. Essentially, if MNCs are subject to comply with the laws of the U.S., then those MNCs are conducting business within the context of this law and will be subject to jurisdiction in regards to causes of action in violation of human rights.

V. Conclusion

In an age where MNCs have become as powerful as countries and so complicated as to render them almost completely shielded from liability, something needs to be done to address the crisis involving human rights violations.[121] SCOTUS has continuously chosen to protect MNC's rights and shift the burden onto victims of human rights violations.[122] It is essential that the U.S. accept social responsibility as a leading country in the world and take the stance that although these corporations are a major part of the growth and development of the global market, it is intolerable to allow said MNCs to commit human rights violations.

Although some may argue that creating a statute shaping an exception to general jurisdiction will open the doors to an influx of suits, this will only be a temporary setback. The costs and burden associated with this approach will shift to the MNCs who are committing these human rights violations. MNCs will have no choice but to comply with international law, protect human rights, and no longer exploit developing countries. Furthermore, the creation of such a law may pressure other countries to come forward and take an initiative to provide remedies for victims of human rights violations. Our society cannot claim to stand for individual rights and freedoms while unwilling to hold MNCs accountable for disregarding human rights. The judicial branch has failed to protect individuals who have been victims of human rights violations by MNCs. Therefore, it is necessary for the legislative branch to step in and ensure that these victims are able to obtain an adequate remedy, and to force MNCs, regardless of their complex corporate structures, to be cognizant that such atrocities will not be tolerated within the U.S.



[119] *See Daimler*, 134 S. Ct. at 763.
[120] *See Daimler*, 134 S. Ct.
[121] *See* Skinner, *supra* note 15, at 265; *see also* Cornett and Hoffheimer, *supra* note 73, at 167; Noelle, *supra* note 82, at 41; Ji, *supra* note 1, at 434-35.
[122] *See Daimler*, 134 S. Ct. at 773 (Sotomayor, S.) (concurring opinion).