MULTINATIONAL CORPORATIONS' RESPONSIBILITY FOR TORTIOUS AND HUMAN RIGHTS VIOLATIONS: A COMPARATIVE STUDY

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ABSTRACT

Many legal systems make it hard for the victims of human rights violations of multinational corporations to have access to their judicial systems. Multinational corporations are so powerful that they can form our lives and also escape liabilities for the damages caused by their activities. The limited liability theory of corporate law enables the parent company of a corporate group to enjoy privileges and avoid its responsibilities for human rights violations. Recently, litigators and human rights activists are trying to hold multinational corporations liable by expanding some well-established, but infrequent applicable theories such as "piercing the corporate veil" theory. Courts in the United Kingdom and the United States take different approaches to address this issue. This article provides a comparative study of these two legal systems legislation and judicial precedents and the amount of their success to hold parent companies liable for the tortious and human rights violations of their subsidiaries.

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I. INTRODUCTION

A crucial time within the progress of transnational corporate regulations was the end of the first decade of the twenty-first century.[1] The decade began with a neoliberal revolution culmination which centered on financialization, liberalization, privatization, and deregulation.[2] Corporate groups were free to choose their global translation mechanisms.[3] They could move beyond the borders and follow whatever business model that best suited them, as such there were few regulatory limitations on them.[4]

In 2010, the liberalization and unification of the global economy were the focus of international economic policy, today we are witnessing increasing national security concerns from both political and economic points of view, as well as the demand to defend "national champions."[5] We also see the return of States as the controlling authorities of industries, especially within the financial area.[6]

Multinational enterprises (MNEs) play a predominant role with their international subsidiaries in the world economy.[7] MNEs also manage agreements with their offshore subsidiaries to boost their global activities.[8] In recent decades, a multinational corporation's

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1 Peter Muchlinski, *The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in A Post-Financial Crisis World*, 18 IND. J. GLOBAL LEGAL STUD. 665, 666 (2011).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id*.

7 Ma Ji, *Multinational Enterprises' Liability for the Acts of Their Offshore Subsidiaries*: *The Aftermath of Kiobel and Daimler,* 23 MICH. ST. INT'L L. REV. 397, 398 (2015).

8 *Id.* at 398.

influence as a participant in international trade and investment, is seen as an epidemic development. Corporations do their business activities through numerous business structures, including wholly-owned subsidiaries, partially-owned subsidiaries, and affiliated corporations.[9] The vast majority of over 100,000 MNEs are located in developed countries' industrialized economies, with many developing countries hosting 900,000 of their subsidiaries.[10]

MNEs play a vital role in the international economy, with an eighty percent contribution to the global business,[11] and they are the driving force behind economic globalization. The global production network is focused mostly on the transnational activities of such corporations. "About 60 percent of global trade, which today amounts to more than $20 trillion, consists of trade in intermediate goods and services that are incorporated at various stages in the production process of goods and services for final consumption."[12]

MNEs historically include companies in different countries, which have influence over one another and share expertise and capital between each other.[13] According to this conventional view, multinational corporations are a group of entities incorporated and residing in different countries, are subject to various legal regimes and have contractual and commercial relationships with each other.[14]

In addition, corporate law has assumed that each incorporated entity of a corporate group is independent and distinct of its shareholders.[15] The principle of separate legal entity was introduced to limit individual shareholders' liability enabling them to invest, and encourage

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9 Dr. Kiarie Mwaura, *Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil*, 11 J. INT'L BUS. L. 85, 85 (2012).

10 Robert D. Hormats, *The Continuing Importance of Investment in the Global Economy* (April 20-23, 2012), http://webplus.nankai.edu.cn/picture/article/33/61/08/b3d1d25f4786a98063814141b26e/74a64f0b-d603-4298-97dc-b0479578569f.pdf.

11 U.N. Conf. on Trade and Dev. (UNCTAD), *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, 134 (2013) [Hereinafter UNCTAD].

12 *Id.* at 122.

13 Organization for Economic Co-operation & Development [OECD], OECD Guidelines for Multinational Enterprises, art. 2, (June 21, 1976), 15 I.L.M. 9.

14 Dalia Palombo, *Chandler v. Cape: An Alternative to Piercing the Corporate Veil Beyond Kiobel v. Royal Dutch Shell,* 4 BRIT. J. AM. LEGAL STUD. 453, 454 (2015).

15 Jodie A. Kirshner, *A Call for the Eu to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses*, 13 NW. J. INT'L HUM. RTS. 1, 6 (2015).

corporations to make productive use of their resources.[16] However, each company's corporate group is owned by other units within the same group and, these corporate owners, within such multinational corporations, are subject to the limited liability doctrine of corporate law.[17]

With its focus on the complete legal distinction between the shareholder and the corporation, this model offers the shareholder an opportunity to avoid responsibility for wrongs committed by the company.

Human rights advocates and radical scholars contend that multinational corporations are powerful and can affect our lives, but inevitably avoid legal responsibility for the harm that they can induce by creating multiple and complicated chains of subsidiaries.[18] The impediment of separate legal personality enables entities within a corporate group to enjoy the privileges of limited shareholder liability and, thus, helps parent companies to avoid the responsibility for violations of human rights.[19] This may occur, for example, when a corporate group employs an undercapitalized foreign subsidiary to operate a risky business that poses risks to human rights.[20] On the other hand, in countries with weak or inadequate judicial systems, the limited liability of shareholders prevents victims from seeking a remedy from a company's subsidiary for their breach of international human rights norms.[21]

Considering all these facts, "multinational companies have eluded territorial jurisdiction in several ways. First, they have distributed actions that collectively amount to illegality across separate entities in different countries so that each has operated within the law. Second, they have carried out harmful conduct in countries other than where its effects are felt. Alternatively, companies have partitioned their assets, shifting money within the corporate group, so that no

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16 Reinier H. Kraakman, *The Economics Functions of Corporate Liability, i*n CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES LEGAL, ECONOMIC AND SOCIOLOGICAL ANALYSES ON CORPORATE SOCIAL RESPONSIBILITY 178 (Klaus J. Hopt & Gunther Teubner eds., 1985).

17 Kirshner, *supra* note 15, at 6.

18 Elisabet Fura-Sandström, *Business and Human Rights: Who Cares?, in* LIBER AMICORUM LUZIUS WILDHABER: HUMAN 159 (Lucius Caflisch, Luzius Wildhaber eds., 2007).

19 Mwaura, *supra* note 9, at 85.

20 *Id.*

21 Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 WASH. & LEE. L. REV. 1768, 1770 (2015).

funds are recoverable in the territorial jurisdiction. Companies have also acted in cooperation with the ruling government of the host country, and they have threatened to withhold future patronage to pressure the regime not to pursue accountability."[22]

Regulating corporate conduct, therefore, needs legal liability beyond national borders and across corporate groups. Without exercising judicial authority outside of territorial jurisdictions, no single legal system has the power to place responsibility on multinational companies. Recently, litigators have sought to hold multinational corporations liable when a human rights violation occurs. Their objective was to establish a precedent, holding a multinational corporation responsible for violations of human rights perpetrated in a developed country by its subsidiary.[23]

The logic of corporate law externalizes the burden of liability away from the controlling shareholder by isolating it from liability, except in sporadic situations where it can be proved that the shareholder was directly involved in the action leading to the damages. "Piercing the corporate veil" is the only exception to the limited liability principle. It is exceptional in its power to go through corporate formalities and limited liability shields to get access to the assets of the shareholders. Despite many forms of scholarly literature about this theory, many analysts and legislators—and some judges—have moved away from either adopting enterprise liability or other approaches that result in piercing the corporate veil.[24]

Currently, corporate law only permits piercing the corporate veil in cases of violations of the corporate structure. This excludes many tort cases, in which the parent is not actively engaged in the activity leading to the damage, but rather is aware of it or ought to be so informed of it so as not to fail the prevention of consequential damage. In these circumstances, the only possible way to hold the parent responsible, is by proving that the parent was in control of the activities that resulted in damages, subsequently ordering for compensation of claims.[25]

Current practice in both common law and civil law jurisdictions show a growing inclination among lawyers and NGOs to bring such claims against parent companies in their home countries. It also

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22 Kirshner, *supra* note 15*,* at 5.

23 Palombo, *supra* note 14*,* at 454–55.

24 Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CAL. L. REV. 195, 199 (2009).

25 Muchlinski, *supra* note 1*,* at 685.

established an effort to bend domestic legislations to control multinational enterprise global activities.[26]

II. PIERCING THE CORPORATE VEIL

In the context of corporate law, a parent corporation that enjoys the protections of limited liability cannot be held liable for its subsidiary's acts.[27] The corporation is separated by a corporate veil from its individuals and shareholders; therefore, because they are regarded as two independent entities, a parent corporation cannot be held liable for the actions of its subsidiary. The theory that is strongly rooted in United States (US) law and many other countries prevents a company's shareholders from being financially liable to victims of the company's acts and debts above their investment in the company.[28] In limited cases, where a parent is seen to control the subsidiary to the degree that the subsidiary is only an alter ego of the parent, as well as an instrument of the parent for some illegal purposes, the protection of limited liability can be removed—this act is known as "piercing the corporate veil."[29]

The first section of this article describes the origins and definition of the limited liability doctrine, which has been rooted for decades in the corporate legal systems of the US and United Kingdom (UK), two leading traditional legal systems. This article then proceeds to discuss the doctrine of piercing the corporate veil as a special exemption to the limited liability doctrine and its infrequent application in these two legal systems. It further examines theories that courts usually use to pierce the corporate veil, and the factual uncertainty and ambiguity of such theories in these two legal systems. In the second part, the article discusses the UK and the US mechanisms which hold the foreign subsidiaries' parent company liable for human rights violations and the barriers that victims will face within these two legal systems with regard to seeking remedies from the parent companies. This article focuses on the multinational corporations' responsibilities. By evaluating two leading legal systems' judicial and legislative precedents, a comparative study about the efforts and the amount of their success in

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26 Larry Catá Backer, *Governing Corporations: Corporate Social Responsibility and the Obligations of States: Reviewing Jennifer A. Zerk, Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, 26 BERKELEY J. INT'L L. 503, 504 (2008).

27 Salomon v. Salomon, [1897] AC 22 (HL) 51 (UK).

28 Skinner, *supra* note 21, at 1772.

29 *Id.* at 1773.

holding parent companies responsible for the subsidiaries' tortious and human rights violations is brought to the forefront.

In conclusion, by addressing several international law efforts to provide guidelines for countries to regulate corporate responsibility, this article offers some recommendations to harmonize the responsibilities of parent-subsidiary relationships with regard to preserving human rights.

A. *Limited Liability of Parent Corporations*

Limited liability was part of English common law for centuries in the form of "entity law," which considered corporations separate juridical entities with their rights and obligations distinct from those of their shareholders.[30] Limited liability was introduced in 1830 when Massachusetts codified the limited liability of shareholders for corporate debts.[31] Subsequently, through their corporate law rules, states began adopting limited liability to encourage investment in corporations, as well as to support business and economic activities.[32] Initially, corporations were not permitted to hold shares in companies until 1888, when the state of New Jersey allowed corporations to own shares in other corporations and corporate ownership of stock.[33]

After this movement, the doctrine of limited liability continued to apply to parent corporations, as shareholders, for the actions of their subsidiaries. As they arose, the concept of limited liability that was established in the US from 1885 was applied to corporate groups.[34] Thus, the doctrine limits the liability of corporate parents, as well as individual shareholders. [35]

In the UK, where the Limited Liability Act of 1855 was enacted to protect individual investors rather than corporations, similar changes have been observed. [36] Therein, it can be seen that corporate groups still use a concept that was not initially introduced to protect themselves from liability.

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30 Phillip Blumberg, *The Increasing Recognition of Enterprise Liability Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV., 297 (1996).

31 *Id.*

32 Phillip Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 595-96 (1986).

33 *Id.* at 605.

34 Mwaura, *supra* note 9*,* at 91.

35 Blumberg, *supra* note 32, at 603-08.

36 *Id.*

In the late 1800s and early 1900s, an improvement can be seen in the parent-subsidiary structure as a result of the shift of corporate ownership of corporate stock[37] companies operating subsidiaries to increase their financing options; to prevent the difficulties of qualifying the parent corporation as a foreign entity in a specific state or purchasing physical assets; to reduce taxes and to secure privileges of limited liability.[38]

While the original principles of limited liability were exclusively for contract claims and not for tortious actions, today, under contract or tort claims, the subsidiary will enjoy the protection of the limited liability doctrine of corporate law.[39] In the history of US corporate law, the concept of limited liability for corporate torts began[40] with this assumption that it was necessary for a corporation's economic and investment success.[41] The law was widely implemented in the United States following the case of the New York Supreme Court of Judicature in 1835, which conferred limited liability for torts.[42] For the next fifty years, the rule was quickly adopted throughout the United States.[43]

Regardless of whether it was originally tended to limit liability for torts, the general rule today is that limited liability excludes individual and corporate shareholders from financial consequences of their subsidiary's torts, even though individuals may be left without a remedy.

B. *Piercing the Corporate Veil of Parent Companies*

In most legal systems it is however accepted to look behind the corporate structure and consider a set of companies as one, and to hold them liable for a culpable action.[44]

The absence of specific corporate rules to decide when a court may disregard the separate entity rule within a corporate group, creates gaps that enables corporations to use the corporate framework to evade

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37 William Douglas & Carol Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929).

38 *Id.*

39 Blumberg, *supra* note 32, at 600.

40 Daniel R. Kahan, Note*, Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1098-101 (2009).

41 Dearborn, *supra* note 24, at 202-03.

42 *See* Kahan, *supra* note 40, at 1098-99.

43 *See id.* at 1100-01.

44 Littlewoods Mail Order Stores Ltd. v. Inland Revenue Comm'rs, [1969] 1 WLR 1241 [1254] (UK).

liability. This allows corporate groups to invest in very risky schemes and to undercapitalize the subsidiaries operating in those risky areas to reduce the group's exposure to liability.[45] Therefore, social costs are externalized to other non-shareholder actors, hence, the risk of failure does not pose a threat to any corporate actor.[46]

As a result of the separate corporate entity structure that companies enjoy, corporate groups could transfer capital between companies to ensure that the subsidiaries engaged in risky operations are undercapitalized to minimize the risk of loss in the case of human rights or tortious liability.[47] Courts are hesitant to pierce the corporate veil in order to hold companies liable when they use a corporate structure in such a way.[48]

The separate legal entity doctrine creates significant procedural hurdles for claimants suing the foreign subsidiaries or parent companies.[49] To defend against unjust effects of limited liability, courts in some jurisdictions have established factors that, if plaintiffs can prove them, can overcome limited liability and hold shareholders, including corporate parents, liable for damages. This is generally referred to as "piercing the corporate veil."

Under US law, courts use varying formulations to pierce the corporate veil that vary in tort or contracts.[50] In contracts cases, the corporate veil can usually be pierced if: (1) the corporate subsidiary is under the dominant control of the corporate shareholder,[51] or (2) the shareholder of the corporation has committed an unlawful, fraudulent or engaged in otherwise "improper conduct" that caused injustice.[52] However, in tort cases, in which parties do not participate in a consensual relationship, the court initially considers the parent's degree of control over the subsidiary or subsidiary's extent of capitalization.[53]

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45 Henry Hansman & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1882-83 (1991).

46 *See* John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1838-40 (1987).

47 Mwaura, *supra* note 9, at 96.

48 *Id.*

49 *See* Phillip Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 498 (2002).

50 *See* PHILIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 136-38 (1993).

51 *See* United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985).

52 F. HODGE O'NEIL & ROBERT THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 1.10 (3d ed., 1997).

53 *See Jon-T Chemicals*, Inc., 768 F.2d, at 692-93.

The courts generally "pierce the corporate veil" only in exceptional circumstances when the separate corporate entity is used to avoid a statute or an obligation, to commit fraud, or to commit a crime.[54] Some courts go further and say that they will pierce the corporate veil to prevent an injustice.[55] The Delaware Supreme Court indicated the corporate veil could be lifted when it was "in the interest of justice," if it were "fraud," "contravention of law or contract," a "public wrong," or where "equitable considerations among the members of the corporation require it."[56] Another decision also ruled that the veil would be lifted if the parent actually had control over the subsidiary and if the parent's conduct was "morally culpable" and caused the injuries.[57]

However, some courts have disregarded all efforts to theorize the veil piercing and followed a "laundry list" approach to describe the reasons[58] to justify it, including gross undercapitalization, non-compliance with corporate formalities, nonpayment of dividends, insolvency of the corporation, siphoning of corporation money, non-functioning of corporate officers and directors, and the absence of corporate records.[59] Other courts highlight the relationship between the parent and the subsidiary to pierce the corporate veil by recognizing various aspects in the parent-subsidiary relationship, including parental voting control to the shared use of common business resources.[60]

While insufficient capitalization or the depletion of corporate capital has led to veil-piercing in some cases, courts have been reluctant to pierce the corporate veil when the subsidiary is well-capitalized and operates on a regular basis.[61] Some courts have stated that a showing of fraud is not required to cause a veil-piercing,[62] however, some

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54 O'NEAL & THOMPSON, *supra* note 52, at § 1.10.

55 *Id.*

56 Pauley Petroleum, Inc. v. Cont'l Oil Co., 239 A.2d 629, 633 (Del. 1968).

57 Amfac Foods, Inc. v. Int'l Sys. & Controls Corp., 654 P.2d 1092, 1100 (Ore. 1982).

58 Carte Blanche (Singapore) Pte. Ltd. v. Diners Club Int'l, 2 F.2d 24 (2d Cir. 1993).

59 De Witt Truck Bros. v. W. Ray Flemming Fruit Co., 540 F.2d 685–87 (4th Cir. 1976).

60 *See* United States v. Jon-T Chems., Inc., 768 F.2d at 691-92 (5th Cir. 1985); *contra* O'Berry v. McDermott, Inc., 712 S.W. 2d 206 (Tex. App. 1986); *but see* Am. Trading & Prod. Corp. v. Fischback & Moore, 311 F. Supp. 412 (N.D. Ill. 1970).

61 *See* Amfac Foods, Inc. v. Int'l Sys. & Controls Corp., 630 P.2d 868 (Ore. Ct. App. 1981); Francis O. Day Co. v. Shapiro, 267 F. 2d 669, 672 (D.C. Cir. 1959).

62 *See* Nat'l Marine Serv. v. Thibodeaux & Co., 501 F.2d 940, 942 (5th Cir. 1974).

forms of deception should be involved; for example, incorporation of an entity specifically to avoid paying a creditor has been found as grounds for piercing the corporate veil.[63]

On the other hand, the corporation's public representations are an essential consideration when it comes to piercing the corporate veil. Corporations that exist within many other corporations—and whose identities and functions are confusing—tend to be subject to specific scrutiny.[64] When the subsidiary has held itself out to the public as a parent company's department, the corporate veil has been pierced.[65] Thus, veil-piercing has been discouraged as corporations are seen to be independent entities in public.[66]

As showcased, veil-piercing jurisprudence in the US lacks the degree of clarity and predictability that contemporary businesses require, and the formulated doctrinal principles are "often characterized by ambiguity, unpredictability, and even a seeming degree of randomness."[67]

It is difficult to predict whether the corporate veil would be pierced. The justification that courts pierce the corporate veil to "do justice,"[68] assumes that this is a field of law in which courts are not restricted by laws and can impose the remedies that they deem to be reasonable based on their own judgment. However, by examining the actual outcome of the cases independently from the reasons expressed in the rulings, it has been observed that judges have decided piercing-veil cases in a strongly disciplined and systematic manner.

Generally, it has been found that courts pierce the corporate veil where a company: has not met corporate formalities;[69] is the "alter ego" of its shareholders;[70] is substantially undercapitalized,[71] intermingled funds and or operations of the business and the shareholder;[72] misrepresentation or wrongdoing; the independence of the

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63 *See* Castleberry v. Branscum, 721 S.W.2d 270 (Tex. 1986).

64 *See* Francis O. Day Co. v. Shapiro, 267 F.2d 669, 672 (D.C. Cir. 1959).

65 *See* Kissun v. Humana, Inc., 479 S.E.2d 751, 753 (Ga. 1997).

66 *See* Ioviero v. Ciga Hotels, 475 N.Y.S.2d 880 (N.Y. Sup. Ct. 1984).

67 Stephen M. Bainbridge*, Abolishing Veil Piercing*, 26 J. CORP. L. 479, 507 (2001).

68 *See, e.g.*, LFC Mktg. Grp., Inc. v. Loomis, 8 P.3d 841, 845–46 (Nev. 2000).

69 *See* Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379, 387 (1999) [hereinafter Thompson].

70 *See, e.g.*, Keffer v. H.K. Porter Co., 872 F.2d 60, 65.

71 Thompson, *supra* note 69.

72 *See, e.g.*, Cancun Adventure Tours, Inc. v. Underwater Designer Co., 862 F.2d 1044, 1047-48 (4th Cir. 1988).

board of directors of a subsidiary; the existence of shared decision-making, policies, and policymakers between the parent and subsidiary; and whether the parent and subsidiary share directors and officers, are all among the considerations that the courts also weigh when deciding to pierce the corporate veil.[73]

These factors vary from state to state, but the veil may typically be pierced, resulting in liability for a parent corporation, where the parent misuses the separate enterprise entity form for wrongful reasons and controls the subsidiary to the degree that the subsidiary is a mere instrument of the parent.[74] In a recent study, scholars have found that the true reason for the court to pierce the corporate veil has always been to achieve one of the three policy justifications: "(1) achieving the goals of a given regulatory or statutory scheme; (2) avoiding fraud or misrepresentation by shareholders trying to receive a credit; and (3) encouraging the benefit of bankruptcy by removing favoritism among claimants to the cash flows of a firm."[75]

Some may claim that the current doctrine of "piercing the corporate veil" is sufficient to keep the parent company liable. However, many have argued that the test is vague and inconsistently enforced by the courts.[76] The test is generally challenging to fulfill and impossible to satisfy without showing that the parent controlled the subsidiary.[77]

Although there have been a few occasions where domestic courts have pierced the corporate veil to extend liability to a parent holding corporation, veil piercing within corporate groups remains a minor exception for attributing liability to UK holding companies for acts of their foreign subsidiaries. The view was that acceptance of the piercing doctrine would make the United Kingdom a less attractive legal environment for companies.[78]

UK courts generally will pierce the corporate veil in very infrequent circumstances,[79] such as where the controlling shareholders use

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73 Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1064 (1991) [hereinafter Robert Thompson].

74 *See* Stephen M. Bainbridge, *Abolishing LLC Veil Piercing,* 2005 U. ILL. L. REV. 77 (2005); Robert Thompson, *supra* note 73, at 1039. *See also* Thompson, *supra* note 69; Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 CONN. L. REV. 619 (2005) [*hereinafter Piercing the Veil*]..

75 Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil,* 100 CORNELL L. REV. 99, 113 (2014).

76 *See* Dearborn*, supra* note 24*,* at 204; *see also* Robert Thompson, *supra* note 73, at 1047-70.

77 Dearborn, *supra* note 24*,* at 209.

78 Mwaura, *supra* note 9*,* at 107.

79 GEOFFREY MORSE ET AL., PALMER'S COMPANY LAW 1519 (25th ed., 1992).

the corporate form for unlawful or improper purposes.[80] In this respect, the UK courts have generally pierced the corporate veil when: the corporate parent used a subsidiary to gain a legal advantage to which it would not have been entitled to,[81] where a shareholder has formed a company to avoid legal obligations,[82] and where evidence shows that a network of companies has been used to hide or dispose of money gained by fraud.[83] In the case of *In Re A Company*, the company had engaged in fraud and controlled a network of foreign companies and trusts that were used as a means of disposing of assets.[84] The court pierced the corporate veil and enjoined the shareholders from disposing of corporate stock, interests in trusts, or the corporate or trust assets.[85] In justifying the rationale, the court indicated that "the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficiency of the corporate structure under consideration."[86]

However, some courts seem very reluctant to pierce the corporate veil of related companies and have insisted on companies separate legal personalities by imposing the principle declared within *Salomon v. Salomon & Co*.[87] As defined by the court in *Acatos & Hutcheson v. Watson*:

> English law insists on recognition of the distinct legal personality of companies unless the relevant contract or legislation requires or permits a broad interpretation to be given to references to members of a group of companies or the legal personality is a mere facade or sham or unlawful device.[88]

In the case of *Salomon*, a group of companies acted as a single consolidated mining division and the parent laid out the general business policy of the subsidiary. The Court of Appeals declined to pierce the subsidiary's corporate veil to resolve a dispute regarding the

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80 *Id.* at 2224.

81 Merchandise Transp. Ltd. v. British Transp. Comm'n, [1962] 2 EWHC (QB) 173 (Eng.).

82 Jones v. Lipman, [1962] 1 WLR 832 (Eng.).

83 Re A Company, [1985] 205 BCLC 333 (Eng.).

84 *Id.*

85 *Id.*

86 *Id.*

87 *See* Acatos & Hutcheson v. Watson, [1995] 1 BCLC 218 (UK).

88 *See id.*

jurisdiction of a foreign parent company.[89] In the leading judgment of *Prest v. Petrodel Resources Ltd.*, Lord Sumption ruled that "recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse."[90] Accordingly, in English court cases, a wider concept can be found that a corporate veil could be pierced only to prevent the breach of corporate legal personality. While this approach by the United Kingdom Supreme Court has changed the emphasis from definitions such as "facade" to rationalize veil piercing, it does not offer practical guidance to prospective judgments.

III. PIERCING THE CORPORATE VEIL OF MULTINATIONAL CORPORATIONS IN NATIONAL COURTS

Even though it has been unsuccessful in the United States to prosecute companies based on the Alien Tort Statute or customary international law, scholars in the United Kingdom have already begun to discuss whether UK courts must be prepared to create a cause of action based on customary international law against UK corporations. However, not only in the United States, but also in the United Kingdom, suing multinational corporations based on a mixture of tort law and customary international law may likely be ineffective.[91]

A. *Piercing the Multinational Corporation Veil in the UK*

Since the case of *Salomon v. Salomon* in England, litigators have sought methods to pierce the corporate veil in order to hold parent companies liable for their subsidiaries' tortious actions. A parent company may be liable for its subsidiary's tortious act by a duty of care that it owes to the plaintiffs who have sustained damages due to the negligence of the subsidiary.[92] Originally, this duty stems from the separate legal entity, the limited liability, and the parent corporation's liability for the subsidiary's obligations; concepts which are standard principles of corporate law regarding corporate groups.[93] In order to

89 *See* Adams v. Cape Indus. Plc, [1990] 2 W.L.R. 657 (UK).

90 Prest v. Petrodel Resources Ltd., [2013] UKSC 34 (UK).

91 Palombo, *supra* note 14, at 461-63.

92 Richard Meeran, *Liability of Multinational Corporations: A Critical Stage in the UK, in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 251, 261 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

93 David S. Bakst, *Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive,* 19 B.C. INT'L & COMP. L. REV. 323 (1996).

hold the parent company liable, the court would consider several factors including the absence of proper oversight over the subsidiary, the failure to warn of a known risk, the undertaking of dangerous conduct, and the manufacture of defective products that the subsidiary then markets or distributes.[94]

The parent company is directly liable when it engages in the subsidiary's tortious activity. On the other hand, the parent is indirectly responsible when it initiates, and the subsidiary implements and conducts instructors as the parent's "agent" or "alter ego."[95] This would result in the rejection of the parent and subsidiary's corporate separation by "piercing the corporate veil" and making the parent company liable for corporate obligations. When there is an explicit agreement that provides the parent company's liability for the tortious act of its subsidiary, an agency relationship may be proven.[96] This means that the subsidiary is presumably operating on the parent company's behalf, and the parent would be bound by any contracts entered into by the subsidiary.[97] There is also a "fraud" exception applicable if a subsidiary has been initially incorporated to evade the current responsibility of the parent company or to manipulate for any other fraudulent purposes.[98] The court can pierce the corporate veil in "special circumstances" when the subsidiary is a "façade" to abuse the corporate forms and conceal the realities.[99] However, many uncertain meanings of the words "facade" or "special circumstances" have contributed to the reluctance of the English courts to recognize jurisdiction over the parent companies. The rejection of the corporate distinction between parents in the United Kingdom, resulted from the "piercing veil" doctrine first introduced in *Salomon v. Salomon & Co.*[100]

1. *Agency Theory*

By referring to the parent's functional control over subsidiary's actions, a plaintiff may claim the agency relationship. This implied agency relationship can be shown by demonstrating that the parent

94 UNCTAD, Transnational Corporations in World Development: Third Survey, U.N. DOC. ST/CTC/46, at 230. 1983).

95 Binda Sahni, *The Interpretation of The Corporate Personality of Transnational Corporations*, 15 WIDENER L.J. 1, 7 (2005).

96 *See* Adams v. Cape Indus. Plc, [1990] 2 W.L.R. 545–49 (UK).

97 *See* J. J. Fawcett, *Jurisdiction and Subsidiaries,* J. BUS. L. 16, 20 (1985) (UK).

98 *See* Jones v. Lipman, [1962] 1 WLR 832 at 837–38 (Eng.).

99 *Id.*

100 Salomon v. Salomon & Co. [1897] AC 22 (HL) (UK).

company: (1) regarded the profits of the subsidiary company as its own, (2) assigned individuals to the subsidiary to operate on its behalf, (3) was the trading venture's "head and brain," (4) decided the amount of capital to be allocated for investments and business strategies, (5) made profits based on its expertise and direction, and (6) was in actual and constant control.[101]

In *Adams v. Cape Indus*., the court held it was not a misuse of the corporate structure when the subsidiary was incorporated to restrict the potential liability of the parent company.[102] The court held that although the primary reason was not to beat the creditors, abuse of the corporate form occurred by an existing corporate subsidiary and resulted in a facade.[103] In *Adams*, the court abstained from enforcing a default judgment of the United States against a British parent company by arguing that the parent company was not accountable for the debts of a US subsidiary.[104] In this case, Cape Industries PLC (Cape) tried to reduce its liability by initiating liquidation claims against a North American Asbestos Corporation (NAAC) and created the Continental Productions Corporation (CPC) and Associated Mineral Corporation (AMC) companies to replace NAAC's marketing activities.[105] Cape financed CPC, and its managing director was the former managing director of NAAC, but it was not a subsidiary,[106] AMC was a subsidiary incorporated in Liechtenstein.[107] It was present in the United States and was acting as the Cape's agent.[108]

The court ruled that, because CPC was not a subsidiary, it was not a part of the corporate community,[109] either because it maintained control over its activities or because it was not an agent or member of a single economic entity.[110] It carried out its daily affairs, entered into business contracts to purchase asbestos for itself, and recruited its staff.[111] The court acknowledged that Cape and AMC maintained an agency relationship.[112] Yet, since AMC was not based in the United

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101 O. Kahn-Freund, *Corporate Entity,* 3 MOD. L. REV. 226, 227 (1939).
102 Adams v. Cape Indus. Plc, [1990] 2 W.L.R. 544 (UK).
103 *Id.*
104 *Id.* at 493.
105 *Id.* at 477–78.
106 *Id.* at 493.
107 *Id.* at 479.
108 *See* Adams v. Cape Indus. Plc, [1990] 2 W.L.R. 479 (UK).
109 *See id.* at 549.
110 *Id.*at 545.
111 *Id.* at 545–46.
112 *Id.* at 543.

States and was not involved in managing the CPC asbestos plant, this was not a facade.[113]

Thus AMC maintained its corporate independence and did not act as an alter ego of, or by, the parent company's inappropriate or illegitimate purpose.[114] These conclusions highlighted the court's presumption that forming a corporation within a group of companies to reduce corporate liability was a proper application of limited liability. The court stated:

> We do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate [group] structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law.[115]

The judicial recognition that the *Salmon* principles may have superseded the interest of equity was also of importance. The appeal court declared:

> If a company chooses to arrange the affairs of its group in such a way that the business carried on in a particular foreign country is the business of its subsidiary and not its own, it is, in our judgment, entitled to do so. Neither in this class of case nor in any other class of case is it open to this court to disregard the principle of *Salomon* merely because it considers it just to do so.[116]

This approach legalized but did not affirm the denial of tort victims' compensation. A subsidiary is subject to the current case law, which approves the agency relationship and accepts that the subsidiary enters into contracts on behalf of the parent.[117] By definition, subsidiaries have an independent legal identity and negotiate contracts,

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113 *Id.* at 549.

114 Adams v. Cape Indus. Plc, [1990] 2 W.L.R. 474 (UK).

115 *Id.* at 544.

116 *Id.* at 537.

117 Fawcett, *supra* note 97, at 24.

usually for their own interests.[118] The enterprise doctrine could resolve these differences by a broader notion of agency which is focused on the economic reality of the control relationship between the parent and the subsidiary.[119] Even then, if the subsidiary entered into contracts on its own, it will be attributed as operating under the parent's control.[120]

2. *Duty of Care Theory*

The case of *Chandler* is revolutionary in that it may form the basis for human rights litigators seeking to hold a multinational corporation responsible for its subsidiary's human rights violations. Although *Chandler* is not framed in terms of human rights, it is an extreme case as it places tort law at the service of the human rights cause.[121] *Chandler* creates a cause of action in tort that represents an essential alternative to either piercing the corporate veil or a cause of action based on customary international law.[122] To pierce the corporate veil, *Chandler* is creating an alternative direct liability framework. In *Chandler*, English courts clearly describe the direct duty of care that holding companies have toward their subsidiaries' employees.[123] The duty of care of a holding company is classified as *direct* since the holding company has a direct duty towards the employees of its subsidiary and responds directly to them.[124] It is not necessary to question whether or not the subsidiary itself is responsible for its employees. In order to decide if the holding company has violated its duty of care, the court must only recognize the parent company's actions of failure to act.[125]

Chandler provides a cause of action against multinational companies incorporated in the United Kingdom for abuses perpetrated in developed countries by their foreign subsidiaries.[126] In the sense of the parent, subsidiary, and employee relationships, the Court of Appeals in *Chandler* clarified the significance of foreseeability and proximity. The parent company has a direct duty of care towards its subsidiary's employees based on *Chandler* when:

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118 *Id.* at 24.
119 *Id.* at 24-25.
120 *Id.*
121 *Id.*
122 *Id.*
123 Palombo, *supra* note 14, at 463.
124 *Id.*
125 *Id.*
126 *Id.*

> [. . .(1)] the business of the parent and the subsidiary are in a relevant respect the same;
>
> (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
>
> (3) the subsidiary's system of work is unsafe and the parent company knew, or ought to have known; and
>
> (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purpose of 4 it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between companies widely. The court may find that element 4 is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[127]

For many reasons, the *Chandler* duty of care test is innovative.[128] First, the definition of the *assumption of responsibility* was revisited by the Court of Appeals. Traditionally, assumption of responsibility implies that a person assumes responsibility for a matter and is responsible thereafter.[129] The Court of Appeals, however, reinterpreted in *Chandler* the principle of assumption of responsibility.[130] The court sees the parent company's liability as a legal duty that occurs when the parent company knows or ought to know that the subsidiary is damaging its employees.[131] The parent company's overall control over the operations of the subsidiary appears to result in the recognizing or being in a position where it ought to know that the subsidiary was performing risky activities.[132] Although Cape Holding was wholly owned

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127 Chandler v. Cape Plc [2012] EWCA 525, 1313 (Eng.).

128 Palombo, *supra* note 14*,* at 464.

129 *Id.*

130 *Id.*

131 Chandler v. Cape Plc [2012] EWCA 535, 1308-09 (Eng.).

132 *See* Martin Petrin, *Assumption of Responsibility in Corporate Groups: Chandler v. Cape plc*, 76 MOD. L. REV. (2013); Palombo, *supra* note 14, at 466 (citing Vijay Ganapathy, *Stretching the Boundaries of Duty of Care*, J. PERS. INJ. L., 28, (2013)).

by its subsidiary, in this case, the court points out that it is not necessary to determine whether the parent company has assumed responsibility for its subsidiary.[133] It is enough that the parent company "[h]as a practice of intervening in the trading operations of the subsidiary."[134] Hence, if we determine that the holding company has some overall control, the parent company has a direct duty of care towards its subsidiary employees.

Second, *Chandler*'s presence of a direct relationship between the employees and the parent company is no longer needed.[135] The Court of Appeals found that the parent company was liable because it controlled its subsidiary's operations.[136] The definition of proximity is reinterpreted by *Chandler*, which is no longer the pre-tort relationship between the parties intended to be plaintiffs and the defendants, but rather the relationship between the holding company and its subsidiary.[137] The parent company's obligation does not derive from its conduct towards the employees of the subsidiary, but from its "omission to take steps or [g]ive advice"[138] to the subsidiary in breach of its duty of care. Therefore, to establish a duty of care, a direct relationship between the holding company and the employee seems to no longer be necessary.[139]

In this situation, it is clear that the duty of care does not arise from the relationship between the employee and the holding company because there were not relevant relationships between them. The duty of care instead stems from the relationship between the subsidiary and the holding company.[140] Hence, the *Chandler* test will not apply to the third parties.[141] *Chandler* founded that the duty of care derives from the parent company and subsidiary relationship rather than that of the employer or employee.[142]

The precedent of the House of Lords confirmed *Chandler's* liberal reading in *Lubbe*, the first and only case of the House of Lords where the majority declared the possibility of making a multinational

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133 Chandler v. Cape Plc [2012] EWCA 535, 1313 (Eng.).

134 *Id.*

135 Palombo, *supra* note 14, at 465.

136 Chandler v. Cape Plc [2012] EWCA 535, 1313. (Eng.).

137 *Id.* at 1311-13.

138 *Id.* at 1313.

139 Palombo, *supra* note 14, at 465–66.

140 *Id.*

141 Chandler v. Cape Plc [2012] EWCA 535, 1311-13 (Eng.); Lubbe v. Cape Plc [2000] (HL) 41 (UK).

142 Palombo, *supra* note 14, at 465-66.

parent company liable for the torts committed by its international subsidiary.[143] In this case, Lubbe and other employees worked for Cape, a South African subsidiary of a United Kingdom holding corporation. Asbestos materials seriously injured the employees and other third parties.[144] They sued the holding company in the United Kingdom for its subsidiary's breach of direct duty of care toward tort victims. Certain plaintiffs were not employees in this case, but were third parties who were victims of asbestos. In particular, Lord Bingham of Cornhill described the *Lubbe* claim as "not against the defendant as the employer of that plaintiff . . . [but] [r]ather . . . [a]gainst the defendant as a parent company."[145] The House of Lords did not discuss the basic issue of corporate law and settled the case based on conflict of law grounds; it has already recognized that a holding company may have a direct duty of care to the tort victims of its subsidiary, including both employees and third parties, in such unique circumstances, without making distinction between the plaintiffs.[146] Therefore, while *Chandler* does not provide a direct duty of care to third parties, human rights litigators have cause to argue that this direct duty of care should be extended to any victim of human rights.[147]

Although *Chandler* does not clearly state that multinational corporations have a duty of care, there are reasons to believe that such a duty exists.[148] The House of Lords has already established the grounds for the direct duty of care of the parent company towards the subsidiary's employees in *Lubbe*.[149] In addition, in *Newton-Sealey*, an international factor was included in the corporate structure since the parent company was incorporated in the United Kingdom and the subsidiary was based in New Jersey.[150] One of the applicant's essential claims was that the court should not apply unjust New Jersey law to the British parent company.[151]

Therefore, in the absence of a statement in *Chandler* by the Court of Appeals, separating the case from *Newton-Sealey* and *Lubbe* on the

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143 Lubbe v. Cape Plc. [2000] (HL) 41 (UK).

144 *Id.*

145 *Id.*

146 *Id.*

147 Palombo, *supra* note 14, at 467.

148 *Id.* at 469.

149 *Id.*

150 Newton-Sealey v. ArmorGroup Services Ltd. [2008] EWHC (QB) 233 (Eng.).

151 Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 AM. J. INT'L L. 846 (2013); Newton-Sealey v. ArmorGroup Services Ltd. [2008] EWHC (QB) 233 (Eng.); Lubbe v. Cape Plc. [2000] (HL) 41 (UK).

grounds that Cape's parent and subsidiary companies were both incorporated in the United Kingdom, litigators in the field of human rights try to extend *Chandler* to any holding company incorporated in the United Kingdom with subsidiaries, whether domestic or international.[152]

There are many explanations for assuming that *Chandler* has extraterritorial applicability.[153] All previous cases relating to the duty of care of a holding company, including the House of Lords' leading decision in *Lubbe*, concern multinational companies, and there is no reason to believe that *Chandler* is not applicable to all multinational companies which comply with the *Chandler* test.[154] The proximity between the holding and subsidiaries has little to do with the geographical proximity, but rather has to do with whether or not the holding company's business is closely related to the activities of the subsidiary, so that the holding company is aware of, or should be aware of, the activities carried out by the subsidiary and their future consequences.[155]

The Hague District Court considered the applicability of *Chandler* to third parties and concluded that third parties do not comply with the *Chandler* test because they are not proximate to the parent company.[156] *Chandler* has never been applied to a third-party tort victim by any English court.[157] There are many reasons, however, to believe that *Chandler* applies to third parties, as the duty of care appears to no longer rely on the relationship between the employer and employee, but instead on the relationship between the subsidiary and the holding company,[158] as can be interpreted from the *Chandler's* requirement of proximity.[159]

The UK courts have also heard many such cases against domestic parent companies in the tort claims related to human rights violations.[160] In *Sithole v. Thor*, by reviewing the parent company's failure to prevent mercury poisoning among employees at a mining

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152 Palombo, *supra* note 14, at 468.

153 *Id.* at 468.

154 *Id.*

155 Nicola Jägers, Katinka Jesse & Jonathan Verschuuren, *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, 1 AM. J. OF INT'L L. 36-41 (2014).

156 Chandler v. Cape Plc [2012] EWCA 525 (Eng.).

157 Palombo, *supra* note 14, at 469.

158 *Id.* at 476.

159 Chandler v. Cape Plc [2012] EWCA 525 (Eng.).

160 Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*, NEW L. J. 1706, 1706-07 (1998).

subsidiary in South Africa, the English Court of Appeals established its jurisdiction.[161] Similarly, the case of *Connelly v. RTZ* has indicated that British courts would exercise jurisdiction over domestic parent companies where foreign subsidiaries, which caused damages abroad, have enforced the parent company's policies.[162] In *Guerrero v. Monterrico Metals*, the English High Court also found jurisdiction over the alleged assault, torture, and detention of protestors by Peruvian police at a subsidiary mining site in Peru.[163] The court concentrated on the parent company's duty to prevent harm.[164] In *Motto & Ors v. Trafigura*, because a British arm of the metals and energy corporation chartered the ship that brought the waste to Africa, the English High Court took jurisdiction over the claims of 30,000 people from the Ivory Coast for disease, arising from exposure of radioactive waste.[165]

B. *Piercing the Multinational Corporation Veil Based on the US Alien Tort Statute*

One of the United States legal attempts to hold the parent company responsible for the violations committed by its subsidiary was to interpret the U.S. Alien Tort Statute (ATS) as referring to customary international law and its applicability to multinational corporations. This attempt was only marginally successful after the US Supreme Court ruled in favor of Royal Dutch Petroleum in *Kiobel v. Royal Dutch Petroleum* and against the human rights victims.[166]

US litigators have argued that the ATS extends to multinational corporations and, through the term *law of nations,* refers to customary international law. Hence, multinational corporations should be held responsible for breaches of customary international law committed by their subsidiaries in developing countries.[167]

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161 Sithole v. Thor Chemicals Holdings Ltd., [1999] 09 LS Gaz R 32, CA, (The Digest) 236 (Eng.).

162 Connelly v. RTZ [1997] (HL) 30 (UK); Lubbe v. Cape Plc [2000] (HL) 41 [2000] 4 (All Eng. Rep.) 268, 271-72 (UK).

163 Guerrero v. Monterrico Metals [2009] EWHC (QB) 2475 (Eng.).

164 *Id.*

165 Motto v. Trafigura Ltd. [2001] EWCA (Civ) 1150 (Eng.).

166 Palombo, *supra* note 14*,* at 455.

167 William S. Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. J. INT'L L. 1045 (2012); Tyler Giannini & Susan Farbstein, *Will Kiobel be Just an Aberration?,* 160 U. PENN. L. REV. 100 (2011).

Although ATS claims were initially made against individuals,[168] 200 ATS cases have been brought against transnational corporations since the 1990s for their roles, usually vicarious, in breaching customary international human rights norms in countries hosting business activities.[169] Thus, although its effectiveness has sometimes been questioned, the ATS has been an indispensable legislation for non-citizens pursuing remedies for harm caused by breaches of international law norms by MNEs.[170]

The Supreme Court ruled in *Sosa v. Alvarez*[171] that the ATS is a jurisdictional act which does not constitute a cause of action based on customary international law.[172] It does, however, entitle claimants to bring a suit before the court for a breach of customary international law on the basis of a common law cause of action, irrespective of where the breach occurred or the nationality of the defendant. The arguments put forward against multinational companies were therefore based, in part, on breaches committed under common law torts, but also under violations of customary international law.[173] The Court found that the ATS was a statute of jurisdiction; hence, federal courts must use their authorities of common law to distinguish claims for violations of international law norms that are clearly established and universally accepted as serious international law violations, *i.e.*, customary international law.[174]

Although in some cases involving private persons, this approach was successful,[175] when determining the question of whether customary international law and the ATS are applicable to foreign corporations, the US Court of Appeals for the Second Circuit and the United States Supreme Court in *Kiobel* both ruled in favor of the multinational company.[176]

Several doctrines have been established by American case law, making it impossible to bring lawsuits involving international defendants. First, International defendants must have "minimum contacts" to

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168 *See* Richard M. Buxbaum & David D. Caron, *The Alien Tort Statute: An Overview of the Current Issues*, 28 BERKELEY J. INT'L L. 511, 513 n. 5 (2010).

169 Skinner, *supra* note 21, at 1801.

170 *Id.* at 1863.

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

172 *Id.* at 724.

173 *Id.* at 725.

174 *See* Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618 (S.D.N.Y. Mar. 31, 2004).

175 *See, e.g.,* Sarei v. Rio Tinto, 671 F.3d 736, 744 (9th Cir. 2011).

176 *See Kiobel*, No. 02 Civ. 7618.

meet the provisions of personal jurisdiction with the forum state.[177] Second, where there is an alternative venue that is more closely related to the case, the *forum non-convenience* doctrine could prohibit a case from going to federal court.[178] Third, in fact, the doctrine of "non-justiciability" complicates the application of the ATS. A judge may dismiss a case based on this doctrine concerning a "political" issue.[179]

1. *ATS Jurisdictional Limitations*

In *Kiobel*, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian companies under the ATS. They alleged that because of their violations of the laws of nations in Nigeria, the companies aided and helped the Nigerian government. A two-step decision was made by the Second Circuit Court and the Supreme Court of the United States.[180] Procedurally speaking, the Second Circuit first denied the complaints' claim because it found that under the ATS, companies could not be held liable.[181] Then, the Supreme Court ruled in favor of the multinational corporation based on the presumption against extraterritoriality, that the ATS should only refer to breaches occurring within United States territory.[182] Ultimately, the Supreme Court held that ATS allegations of violations of customary international law, that arise oversees, are protected by a presumption against extraterritoriality. The Supreme Court held that plaintiffs could "overcome the presumption by showing that a claim "touch[es] and concern[s]" the United States' territory with enough force; however, a business' presence in the United States is not alone sufficient to overcome the presumption."[183]

In January 2014, the Supreme Court maintained in *Daimler AG v. Bauman* that the strict general jurisdiction criterion could also be met by ATS litigation.[184] An additional challenge was created by the Supreme Court for those who might seek a remedy in US courts against transnational corporations. In *Daimler AG v. Bauman,* the

177 International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

178 Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 59-60 (2013).

179 *See* Ugo Mattei & Jeffrey Lena, *U.S. Jurisdiction over Conflicts Arising Outside of the United States: Some Hegemonic Implications*, 24 HASTINGS INT'L & COMP. L. REV. 381, 385-86 (2001).

180 Ma Ji, *supra* note 7*,* at 414.

181 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

182 *Id.* at 108 (2013).

183 *Id.* at 119, 124-25.

184 Daimler AG v. Bauman, 134 U.S. 746 (2014).

Supreme Court ruled that the courts do not assert general personal jurisdiction over an enterprise that is not headquartered or within its jurisdiction based on the due process, even though the company did substantial business there directly or through a subsidiary.[185]

The Court noted that general personal jurisdiction could only be exercised in a country or state where the company is effectively "at home," but it added that a court could determine the actions of a company in its entirety in assessing the home of a company, looking both nationally and internationally, taking into account that a company cannot be at home in many countries.[186] Thus, *Bauman* restricts the ability of victims of human rights abuses overseas to pursue lawsuits against corporations in the US courts, which are not headquartered or have their principal places of business in the United States; however, as practiced for years, participate in a substantial and continuous activity in the United States.[187]

A foreign parent company is subject to a state jurisdictional authority for "minimum contacts" with the United States.[188] "Minimum contacts" is defined by the parent company's business presence by way of its operations and sufficient nexus.[189] The parent company would not avail itself to the state jurisdiction based on a fact that it is the only shareholder of the subsidiary company.[190] The parent company's engagement in that jurisdiction should be a "continuous and systematic general business" presence.[191]

The Eleventh Circuit determined in *Doe v. Drummond Co.*,[192] that US corporate status was relevant to the *Kiobel*'s "touch and concern" test since the extraterritorial application could be alleviated or inapplicable, provided that the court would not be requiring foreign citizens to defend themselves in US courts.[193] The complainant brought an action in *Drummond* on behalf of more than 100 Colombian people killed in an armed conflict with a Colombian paramilitary organization, Autodefensas Unidas de Colombia, and filed a case against some defendants, including a coal mining company based in

185 *Id.* at 761-62.
186 *Id.*
187 Borchers, *supra* note 178, at 46.
188 *Int'l Shoe Co.*, 326 U.S. at 310.
189 Bank of Am. v. Whitney Cent. Nat'l Bank, 261 U.S. 171, 173 (1923).
190 *See* Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 337-38 (1925).
191 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984).
192 Doe v. Drummond Co., 782 F.3d 576, 583, 584 (11th Cir. 2015).
193 *Id.* at 593-94.

Alabama.[194] The ATS claim alleged that US citizens outside of the United States, aided and abetted or contributed to violations of human rights.[195] The court recognized that relying on both direct and indirect liability theories, the plaintiffs could make charges against companies.[196] While the court considered defendant's US citizenship and corporate status, US interests included in the claims, and alleged US actions were significant in determining the claims "touch and concern" the United States, however, the court found that the factors were not sufficient to displace the presumption against extraterritoriality.[197]

The complainants appear to focus on ATS as a remedy for human rights violations. In October 2018, the Ninth Circuit ruled that Nestlé and Cargill employees could sue the corporations under the ATS for slavery labor claims.[198] While the lawyer of the plaintiffs claimed that these allegations "touch and concern" the United States, where the headquarters of Nestlé was in the United States, Nestlé claimed that the lawsuit was barred because the emphasis was on an accident that occurred in the Ivory Coast, not the allegation of aiding and abetting that happened in the United States.[199] Thus, the appellate judges' decision in favor of the plaintiffs suggests that the circuit split is likely to proceed with respect to the dual issues of whether a particular tort is actionable under the ATS and suitable defendants under the ATS are domestic entities.

The court also reduced the corporate responsibility under the statute in *Jenser*, the most recent Supreme Court decision concerning the ATS. The petitioners, victims wounded or killed in overseas terrorist attacks, tried to make the Arab Bank, a Jordanian organization with a branch in New York, responsible for its role in facilitating or causing said terrorist attacks.[200] The majority framed its consideration on assessing if international law demonstrated a norm—such as the norm established in *Sosa*—making corporations liable for human rights abuses, and weighing if Congress would be the best authority to decide on a corporate liability issue.[201] Ultimately, the majority looked at ATS's terminology and intent to reject corporate responsibility, arguing that under ATS, foreign claimants could not sue foreign

194 *Id.*
195 *Id.*
196 Imperial Chem. Indus. v. Comm'n, Case 48/69, 18 E.C.R. 619, at 628 (1972).
197 *Id.*
198 David S. Bakst, *supra* note 93, at 342.
199 *Id.* at 344.
200 Jesner v. Arab Bank, PLC., 138 U.S. 1386, 1386 (2018).
201 *Id.*

companies.[202] Notably, the Court failed to directly bar the ability to raise lawsuits against domestic companies for foreign human rights abuses.[203] The majority opinion of the Supreme Court in *Jesner* greatly restricted foreigners' right to bring lawsuits against corporate defendants because, under the ATS, the majority ruled that foreign companies are not eligible defendants.[204] The majority refrained from determining conclusively whether domestic companies were acceptable defendants.[205] Corporate civil liability, however, allows foreign employees to bring cases under ATS against parent companies.

The *Kiobel* concerns of extraterritorial application are not applicable to suits against domestic parent companies because traditional definitions of tort liability relate the parent corporation to its subsidiaries' overseas actions. The dissent, however, criticized the majority for categorically absolving the foreign corporations' liability under the ATS.[206] The dissent argued that the first section of *Sosa* was misapplied by the majority when the majority questioned if there was "a specific, universal, and obligatory norm of corporate liability."[207] In comparison, "norm-specific first step" of *Sosa* focuses on fundamental international law norms that prohibit such conduct.[208] The dissent described the inquiry as to whether the statute demonstrates any justification to differentiate between corporations and a natural person who supposedly violated the norm of nations, rather than whether the international law demonstrated a specific and universal standard of corporate responsibility.[209] The Circuit is divided over ATS jurisdiction, and an ongoing dispute over whether the ATS generally extends to all individuals and legal persons is followed by post-*Kiobel* litigation.[210] The Circuit courts diverged over how to define the ATS's scope after the court foreclosed the right of the plaintiffs to bring a lawsuit against a foreign company because the company lacks adequate connections to US soil.[211] The question at hand was if companies may be

202 *Id.*

203 *Id.*

204 *Id.* at 1399.

205 *Id.*

206 *Jesner*, 138 U.S. at 1386.

207 *Id.*

208 *Id.* at 1420.

209 *Id.*

210 *See* Heather Cohen, *The Drafters Knew Best: Corporate Liability and the Alien Tort Statute*, OPINIO JURIS (Sept. 14, 2017), http://opiniojuris.org/2017/09/14/the-drafters-knew-best-corporate-liability-and-the-alien-tort-statute.

211 *See* Skinner, *supra* note 21, at 197-200.

defendants under the ATS. It is not clear, however, whether companies are subject to lawsuits under the ATS and how MNEs can be held responsible for the actions of their offshore subsidiaries after *Kiobel,* as such necessitating more discussion.[212]

The Court of Appeals for the Fourth Circuit ruled in *Al Shimari v. CACI Premier Technology, Inc.*,[213] that the ATS provided a cause of action even when the actions happened on a foreign soil because: (1) the alleged torture happened in a U.S. government-operated military facility and was committed by U.S. civilians hired by the defendant; (2) the defendant was a U.S. corporation; (3) the U.S. Department of the Interior provided a performance contract for the defendant's to execute interrogations at Abu Ghraib.[214] The court observed that further litigation would still not intervene with the international policy due to granting jurisdiction under the ATS since the political branches had already stated that the United States would not tolerate acts of torture.[215]

There are other legal challenges to bring a lawsuit against multinational corporations to hold them liable for their role in human rights violations abroad, in addition to the restrictions raised earlier. The doctrines of forum non-convenience, conflict of law and choice of law, unsettled standards relating to vicarious liability, litigation costs, and the inability of prevailing claimants to recover attorney fees are other procedural legal obstacles. There are also several practical obstacles to the investigation, collection of evidence, and securing visas to allow victims and witnesses to come to the United States to testify. For cases of human rights brought under state tort law, which may be the only open forum available for some cases after *Kiobel*, statutes of limitations, choice of law, and forum non-convenience may raise far more severe challenges than they do under federal law.[216]

In sum, if the ATS was to hold MNEs liable for their offshore subsidiaries' actions, it should be applied under the presumption against the extraterritorial application referred in *Kiobel* and the personal jurisdiction clause referred in *Daimler.*[217] Furthermore, it could displace presumption against extraterritorial application by binding the parent company to the subsidiaries' actions by modes of tort

212 Ma Ji, *supra* note 7, at 416.
213 Al Shimari v. CACI Premier Tech., Inc., 758 F.3d, 516 (2014).
214 *See id.* at 529-31.
215 *Id.* at 530.
216 Skinner, *supra* note 21, at 159–63.
217 Ma Ji, *supra* note 7, at 417.

liability, which could displace presumptions against extraterritorial application. Theories of superior or agency liability, the duty of care or control, prevent companies from being free of responsibility for acts within their supply chains.[218] It would encourage caution to avoid ignorant operating procedures by directly connecting companies to their subsidiaries failures and instead provide an appropriate avenue to plaintiffs seeking remedies from parent companies.[219] Provided that making domestic parent corporations responsible for their foreign subsidiary's commissions or omissions would not mean either implication of the *Kiobel* presumption against extraterritoriality or unduly surprise the corporate defendants. Courts should consider domestic parent corporations as appropriate defendants for human rights abuses under the ATS.

2. *ATS Substantive Limitations*

The most critical substantive obstacle is the limited liability doctrine of a parent company, especially in conjunction with the dynamic nature of transnational entities, making it possible for those corporations to operate internationally through subsidiaries to externalize the risks and gain the benefits.

The Court of Appeals for the Second Circuit ruled in *Filartiga v. Pena-Irala*,[220] that when a foreign citizen sued for a breach of the law of nations, the ATS permitted federal jurisdiction.[221] The court looked at different international agreements in applying the edge of the law of nations to confirm the universal conviction of torture. Lastly, the court declared that the law of nations "may be ascertained by consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[222] The court adapted a jurisdictional standard for the law of nations which stated that: "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law

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218 *See Kiobel*, 621 F.3d 111 at 297.

219 *See* Brian Seth Parker, *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1, 26 (2012).

220 Filartiga v. Pena-Irala, 630 F.2d, 876 (1980).

221 *Id.* at 887.

222 *Id.* at 880.

violation within the meaning of the statute."[223] Finally, given that the modern international law and the international community prohibited torture, the court found that torture fits inside the law of nations.[224]

In *Sosa v. Alvarez-Machain,* the Supreme Court ruled that the ATS action must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the [eighteenth century] paradigms we have recognized" in determining whether the courts should consider new, enforceable international norms in an ATS lawsuit.[225] *Alvarez-Machain* cited two international agreements, "the Universal Declaration of Human Rights" and "the International Covenant on Civil and Political Rights (ICCPR)," attempted to demonstrate that the prohibition against arbitrary arrest considered as binding customary international law.[226] Nevertheless, none of these agreements generated enforceable commitments for the United States[227] and there was not a binding international law or binding customary norm.[228] Finally, the Court ruled that the simple unlawful detention for less than one day, followed by a lawful transfer to authorities, did not infringe the international law norm.[229]

While the *Sosa* precedent requires an international consensus on the violated norm, it does not require an international consensus on corporate liability.[230] The dissent looked at States' collective and individual enforcement actions to infer that corporations are subject to certain international law obligations recognizing that various international agreements compel State parties to hold companies liable for certain actions.[231]

In *Kiobel,* the court first challenged the governing law to decide whether corporate responsibility is governed by international or domestic law. It then determined the corporate liability based on international law by considering tribunals, international treaties, and academic works.[232] The Second Circuit held that all adjectives, and substantive principles of liability, must find their roots in the norms of

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223 *Id.* at 888.
224 *Id.* at 884.
225 *Alvarez-Machain*, 542 U.S 642 at 725.
226 *Id.* at 735.
227 *Id.* at 734-35.
228 *Id.* at 736.
229 *Id.* at 738.
230 *Id.*
231 *Alvarez-Machain*, 542 U.S at 642.
232 Ma Ji, *supra* note 7, at 397.

international law.[233] In addition, the Second Circuit Court in *Kiobel* applied such requirements only to those that are "specific, universal and obligatory" by extending *Sosa*.[234] The court found that no specific and universal rules provide that companies can held liable within any ATS context.[235]

Finally, the court considered a few aiding and abetting outliers that fell well short of "specific, universal and obligatory," ended ATS corporate and MNEs liability.[236] Therefore, at least in the Second Circuit, only individuals are covered by international law norms and ATS liability.[237]

However, US parent companies should reasonably anticipate the risk of their violations within their supply chains, based on the recent domestic and international drive for regulatory disclosure and due diligence. Hence, the parent companies should be held liable for breaches when they ignore the duty of care that is owed to the employees within their supply chains. Corporate social responsibility for international corporations, of which the United States is a member, is effectively trending and topically at the forefront.[238] Domestically, under some circumstances, the United States has previously expressed a tendency to hold corporations liable for human rights violations.[239]

The United Nations Guiding Principles on Business and Human Rights serves as an indication of a common body of necessary rights but whose breaches are likely to fail the *Sosa* test to become actionable tort offense under the ATS.[240] The narrow *Sosa* standard prohibits ripe claims from being considered by US courts and prohibits serious violations from gaining jurisdiction.

It is worth referring here to the latest decision in *Doe v. Unocal Corp*. of the Superior Court of California, County of Los Angeles.[241] In an earlier judgment the court ruled that the parent and its subsidiary companies were not alter egos and the corporate veil was

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233 *Id.*

234 *Kiobel*, 621 F.3d 111 at 141.

235 Ma Ji, *supra* note 7, at 397.

236 *Id.* at 415.

237 *Id.*

238 *Sustainable Development Goals*, U.N., https://sustainabledevelopment.un.org/sdgs (last accessed Apr. 19, 2019).

239 Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 224 (2008).

240 *See* Skinner, *supra* note 21, at 1815.

241 Doe I v. Unocal Corp., Nos. BC 237 980, BC 237 679 (Sup. Ct. Cal. Sept. 14, 2004).

maintained.[242] Nonetheless, the court ruled that trial could continue under other indirect liability paths, including agency or enterprise theories.[243] It clarified that agency and alter ego responsibility were distinct terms,[244] and the former allowed the claimant to argue that the parent retained a lower degree of control that did not dissolve the separate identity of the subsidiary.[245] The case was settled, and the court's premise remained untested.[246]

IV. EXPANDING PIERCING THE CORPORATE VEIL DOCTRINE TO HOLD MNES LIABLE UNDER ATS

A. *Standard of Control*

In *Sinaltrainal v. Coca-Cola Co.*, plaintiff labor leaders were reportedly imprisoned against their will, tortured, and some of them were executed in retaliation for previous labor activism in Colombia.[247] The bottlers, one of whom was Bebidas y Alimentos de Urab, collaborated with militia forces.[248] Four thousand Colombian trade unionists have been killed since 1986.[249] The plaintiffs tried to hold Coca-Cola Colombia and its parent, Coca-Cola Co. liable, as a US entity.[250] Coca-Cola Colombia had contracts with the bottlers.[251] The court held that the contracts only gave Coca-Cola the right to secure the trademark, not a day-to-day power that could allow ATS to reach up to the corporate chain and hold the parent liable.[252]

In *Amoco Cadiz,* the United States District Court for the Northern District of Illinois found the parent company, Standard Oil Company (Standard), liable for the negligence of its two subsidiary companies, Amoco Transport Company (Transport) and Amoco International Oil

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242 Doe II v. Unocal Corp., Nos. BC 237 980,-BC 237 679, at 3. (Sup. Ct. Cal. Sept. 14, 2004).

243 *Id.* at 6.

244 *Id.* at 3.

245 *Id.* at 7.

246 *Id.*

247 Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1258 (11th Cir. 2009).

248 *Id.* at 1257-58.

249 *Id.* at 1265.

250 *Id.* at 1257.

251 *Id.* at 1259.

252 *Id.* at 1259, 1270.

Company (AIOC)[253] for the oil pollution in French waters.[254] The court ordered three companies to compensate the Republic of France.[255] In deciding the case, the court applied the duty of awareness and due diligence of the subsidiaries to the parent company holding the Standard liable.[256] The cornerstone of this conclusion was that Standard was a parent corporation of a multinational company.[257] Two subsidiaries were wholly owned by the parent company[258] and were under the control of the parent company in such a manner that they were part of Standard's "mere instrumentalities."[259] Standard was engaged in the exploration, production, refining, transportation, and selling petroleum products through subsidiaries.[260] Standard was also responsible for the corporation's tortious actions.[261]

The judgment of the court, finding the parent company liable, was based on the multinational corporation's realities. A parent company may be directly involved in its subsidiary's negligence by its participation in the wrongdoings or indirectly through exercising managerial control over the corporate group.[262] The court applied the duty of awareness and due diligence of the subsidiaries to the parent company to hold Standard liable.[263] The basis of the court's judgment holding Standard liable for the negligence of two subsidiaries was based on the fact that the subsidiary's activities were actively controlled by the parent company. While "piercing the corporate veil" was not explicitly expressed by the court, the decision finding the corporate liable on the grounds of control, suggests the real piercing of the corporate veil.

One may infer from the opinions of some cases, such as *Coca-Cola* and *Amoco,* that daily or weekly control obtained through a contract is adequate for ATS purposes. If MNEs have a detailed contract with their subsidiaries and control their subsidiaries with such a detailed contract, the corporate veil piercing may extend to keep

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253 *In re* Oil Spill by Amoco Cadiz off Coast of France, No. 376, 1984 U.S. Dist. LEXIS 17480, at *136 (N.D. Ill. Apr. 18, 1984).

254 *Id.* at 136.

255 *Id.* at 139.

256 *Id.* at 135-36

257 *Id.* at 136.

258 *Id.*

259 *In re Oil Spill*, LEXIS 17480, at *136.

260 *Id.* at 135-36.

261 *Id.*

262 Muchlinski, *supra* note 1, at 325.

263 *Id.*

multinational corporations liable for the tortious activities of their offshore subsidiaries.

B. *The Standard of Operation*

In *United States v. Bestfoods,* whether the subsidiary was either an "owner" of the site or a "operator" of the individual who committed the violations, the court ruled that the parent is responsible for Superfund cleanup costs.[264] It is a federal question as to who decides who is an "operator" with courts borrowing veil-piercing regulations from state laws.[265]

Justice Souter stated in Bestfood that "[t]he questions is not whether the parent operates the subsidiary, but rather whether it operates the facility which the subsidiary owns."[266] The parent operated the facilities, whether it controlled, managed, or carried out decisions in compliance with environmental laws or operations related to the leakage or disposal of hazardous waste.[267] Many of the parent's actions are essentially an exercise of its democratic rights, such as nominating directors, engaging in strategic planning in the long term, naming principal officers, and having shared directors and officers.[268] Operation of the subsidiary is lawful and any method of operation of the subsidiary facility is lawful, and does not give rise to direct liability, such as monitoring the performance of the subsidiary, oversight of the funding and capital budget decisions of the subsidiary, and articulation of general policies and procedures is permissible and should not give rise to direct liability.[269]

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), a parent company may be responsible for a subsidiary's polluting facilities.[270] Section 9607(a)(2) of CERCLA states that any person who owns or operates a facility where a dangerous substance is released is strictly liable for all cleanup costs by the government.[271]Therefore, there were limited

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264 United States v. Bestfoods, 524 U.S. 51 (1998).

265 *Id.* at 55.

266 *Id.* at 68.

267 *Id*. at 66-67.

268 *Id.* at 69-70.

269 Lynda Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 (2) WASH. U. L.Q. 223, 281 (1994).

270 42 U.S.C. §§ 9601-9657 (1982).

271 42 U.S.C. § 9607(a)(2) (2000).

cases in which the parent corporation could be held personally liable. The parent may be found liable if the parent sends his workers to engage in regular or weekly operational decisions or tries to influence such decisions.[272] In this respect, under the ATS, *Bestfoods* could instruct tribunals when to pierce the corporate veil. If a multinational corporation sends its employees to directly engage its offshore subsidiary's the daily or weekly operational decisions, the doctrine of piercing the corporate veil could apply. [273]

C. *The Agency Standard*

Agencies come in various sizes and forms; "[o]ne may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose."[274] For example, a subsidiary may be the agent of its parent for claims arising from where the subsidiary operates, but not its agent for claims arising elsewhere in order to uphold veil-piercing claims. Several courts use principal-agent theories "[w]hen a court finds that a subsidiary corporation exists solely to carry out the owner's agenda, having no independent reason for its own existence, then the corporation is found to have been the mere agent or instrumentality of the owner."[275] The corporation is disregarded, and the particular owner or the parent company is left responsible.[276] In order to invoke the theory, there must be "such domination of finances, policies, and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own, and is but a business conduit for its principal."[277]

Bauman v. Daimler Chrysler Corp., a recent ATS opinion by the Ninth Circuit Court of Appeals, shows what kind of facts may suggest an agency relationship.[278] Monitoring the subsidiary's performance, monitoring the financial decisions of the subsidiary, and articulating general policies and procedures are necessary for the parent.[279] The

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272 Ma Ji, *supra* note 7, at 430.

273 *Id.*

274 2A C.J.S. Agency § 43 (West 2014).

275 ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 39 (3rd ed. 2009).

276 *Id.* at 49.

277 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43 (West 2014).

278 Bauman v. Daimler Chrysler Corp., 579 F.3d 1088 (9th Cir. 2009), *reh'g granted and vacated*, 603 F.3d 1141 (9th Cir. 2010).

279 *Id.* at 1095.

Ninth Circuit introduced a two-step procedure to determine if a parent has strayed beyond this accepted boundary, and the subsidiary has become the parent agent.[280] First, the agent-subsidiary must be of such significance to the parent company that the parent corporation would perform significantly comparable services if it did not have a representative.[281] Second, the parent must be allowed to control the subsidiary, but it does not need to exercise control.[282] On the basis of the "General Distributor Agreement" and the precise details in the case, the court held that, for general jurisdictional purposes, the wholly-owned US company, which acted as the general distributor in the German automakers in the United States, was the agent of the manufacturer.[283] In addition, the exercise of personal jurisdiction over German automobile manufacturer was compatible with fair play and substantial justice.[284]

The Supreme Court asserted, however, that the analysis of the agency theory relied on by the Ninth Circuit was erroneous.[285] The Ninth Circuit asserted: "Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist."[286] The agency theory of the Court might subject international corporations to general jurisdiction as long as they have an in-state subsidiary that would go beyond the "sprawling view of general jurisdiction" that was rejected in *Goodyear*.[287]

However, the Supreme Court has not yet analyzed whether, on the grounds of the contracts of its in-state subsidiary, a foreign company can be entitled to the general jurisdiction of a court.[288] This suggests that, for personal jurisdiction, the Supreme Court did not dispute the applicability of the principal-agent doctrine. As long as the agency's interpretation is correct, the principal-agent theory may also

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280 *Id.* at 1094.

281 Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1127, 1135 (9th Cir. 2003).

282 Bauman, *supra* note 278 at 1095.

283 Bauman v. Daimler Chrysler Corp., 644 F.3d 909, 914-17 (9th Cir. 2011), *rev'd*, Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

284 *Id.* at 930.

285 *Daimler*, 134 U.S. at 759.

286 Bauman v. Daimler Chrysler Corp., 676 F.3d 774, 777 (9th Cir. 2011) (citing *Bauman*, 644 F.3d at 922).

287 Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 929 (2011).

288 Ma Ji, *supra* note 7, at 432.

be used to have personal jurisdiction even though it is impossible.[289] The Supreme Court declared in a footnote in *Daimler* that an "[a]gency relationship[] . . . may be relevant to the existence of *specific* jurisdiction."[290] Furthermore, "the commission of some single or occasional acts of the corporate agent in a state" can sometimes "be deemed sufficient to render the corporation liable to suit" on related claims.[291] Thus, the principal-agent rule may be used to place liability on multinational corporations for their offshore subsidiaries actions.

A big advantage of the agency theory is that it can cross several layers and make the great-grandparent corporation liable for the great-grandchild subsidiary's actions.[292] The court will look at the comprehensive agreement between them on a case-by-case basis and decide whether it should use this theory.[293]

A possible challenge in defining "agency relationship" in ATS litigations is the endogenous relationship between a parent and a foreign subsidiary.[294] Corporate attorneys, mindful of this factor, warn their clients to prevent liabilities. The subsidiaries will still be sued directly if the parent company tries to control its relationship with the subsidiaries. Therefore, as long as the subsidiaries are not undercapitalized, in an otherwise inefficient manner, the company loses little from preventing the control.[295] And if the subsidiaries are undercapitalized, it falls into veil-piercing considerations.[296]

In all, control, daily or weekly, or the principal-agent theory, could be possible ways to hold MNEs liable for offshore subsidiaries' acts. As for which theory to apply to pierce the corporate veil, would work on a case-by-case basis.[297]

V. CONCLUSION

MNEs play an important role in the global economy with their international subsidiaries. Today, it is crucial to understand how best to hold MNEs liable for their international subsidiaries tortious acts.

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289 *Id.*

290 Daimler, *supra* note 283.

291 *International Shoe Co*., 326 U.S. 310.

292 Ma Ji, *supra* note 7, at 433.

293 *Id.*

294 Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2207–08 (2012).

295 *Id.* at 2208.

296 *Id.*

297 Ma Ji, *supra* note 7, at 417-35.

National courts, international norms and internal codes of conduct of MNEs cannot lawfully and efficiently hold MNEs responsible for their offshore subsidiaries' tortious actions.[298] Multinational corporations are under direct duties based on some multilateral conventions that impose liability on corporations.[299] Tortious actions of the subsidiary in breach of international human rights law and environmental severe violations are lines that may help to decide when parent companies can be held liable for acts of subsidiaries. For States, binding international legal "norms" establish, modify, or cancel duties for States.[300] Binding legal norms are taken mainly from conventions, such as treaties signed by States, or customary international law, composed of principles that are not codified, but are still the result of "general and consistent practice of [S]tates followed by them from a sense of legal obligation."[301] States often practice customary international rules and they regard certain rules to be binding.[302]

The Guiding principles were approved by the U.N. Human Rights Council in 2011.[303] Although the Guiding Principles are not compulsory, they can be considered as persuasive to all of the U.N members of the U.N. Human Rights Council[304] and some of these principles may become compulsory by making their way into a trade and human rights treaty when adopted by countries.[305] In addition, at some stage, the obligations of the treaty will be established as customary international law and become obligatory for countries.[306]

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298 *Id.* at 398.

299 *See* INT'L LABOUR ORG., *Ratifications of C105 - Abolition of Forced Labour Convention, 1957 (No. 105)*, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250 (last visited June 1, 2019).

300 *See* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES (2d ed., 1997).

301 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987).

302 *See* Villiger, *supra* note 300, at 58.

303 G.A. Res. 17/4 (June 16, 2011). *See* John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of Special Representative of the Secretary General, U.N. Doc A/HRC/17/31, annex (Mar. 21, 2011).

304 *See* William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 GEO. J. INT'L L. 445, 511 (2014).

305 Ruggie, *supra* note 303.

306 *Id.*

Pillar Two of the guiding principles discusses the due diligence of businesses and businesses' due diligence responsibility to ensure that all entities in the corporate group identify human rights risks, engage actively with impacted communities, and secure disclosures of due diligence.[307] Principle 14 repeats the General Principle that all enterprises, irrespective of their size, industry, operational context ownership and structure, are bound the enterprises' responsibility to respect human rights.[308]

When read in full, it seems straightforward that, while not explicitly specified, the Guiding Principles mandate countries where parent corporations are based on ensuring that complaints achieve a remedy for damages incurred by subsidiaries when they cannot seek a remedy in their own countries otherwise.[309] Although such a remedy can include a procedure that satisfies specific requirements, it is apparent from the Guiding Principles that a remedy must also provide an immediate path to securing a judicial remedy.[310]

The Organization for Economic Co-operation and Development (OECD) launched its Guidelines for Multinational Enterprises[311] in 2011, which encourages the business partners, including suppliers and subcontractors, to apply corporate conduct principles that are in compliance with the Guidelines.[312] Although the Guidelines are not legally binding, the Investment Committee of the OECD promotes adopting these recommendations by member countries, one of which is the United States.[313] In 2018, forty-eight countries implemented and committed to endorsing the introduction of the OECD Due Diligence Guidelines; the first government supported corporate due diligence standard for all businesses which concerns human rights risks in global supply chains.[314]

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307 *See id.* at princs. 17-21.

308 *See id.* at princ. 14.

309 *See id.* at princs. 1-31.

310 *See* Ruggie, *supra* note 305 at princ. 29.

311 OECD, OECD Guidelines for Mulitnational Enterprises (2011), http://www.oecd.org/corporate/mne/48004323.pdf.

312 *Id.* at 41.

313 *See Members and Partners,* OECD.org, http://www.oecd.org/about/membersandpartners (last visited June 1, 2019) (listing thirty-seven Member countries, ranging from advanced to emerging countries); *see also* OECD GUIDELINES, *supra* note 313, at 9.

314 *Countries Commit to Step Up Efforts to Drive More Responsible Business Conduct Through New OECD Instrument*, OECD.ORG (May 30, 2018), http://www.oecd.org/investment/mne/countries-commit-to-step-up-efforts-to-drive-more-responsible-business-conduct-through-new-oecd-instrument.htm.

The UN has recently commissioned an open-ended intergovernmental working group to establish a treaty covering the human rights and business enterprises' convergence.[315] In 2018, the Permanent Mission of Ecuador released the Zero Draft, a legally binding instrument to control businesses and other enterprises' transnational operations.[316] Within the framework of legal responsibility, Article 10(6) of the Zero Draft specifically indicates that those with transnational business operations are responsible for violations of human rights that occur in the context of their business operations, including "to the extent risk ha[s] been foreseen or should have been foreseen of human rights violations within its chain of economic activity."[317] Such a treaty would serve the purpose of ensuring that victims of international business human rights violations have sufficient access to justice and remedies for harms that they incur while working.[318]

Therefore, in high-risk countries with corrupt or non-functioning judiciaries, where injured individuals and populations have no means to seek remedies against the subsidiary, a normative argument can be made that those parent companies should be held liable for harm by subsidiaries operating abroad that violate international human rights norms.[319]

As previously mentioned, the adverse effect of limited liability on victims of torture and human rights varies greatly from its effects on contractual actors, such as creditors. Although when money is lent to a company, the risk and potential losses are often passed on to the creditors. They are always in a more advantageous position than involuntary creditors because they come into the contractual arrangements knowingly and with a complete understanding of the risks involved. They have a voluntary relationship with an enterprise under

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315 Fourth Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. HUMAN RIGHTS COUNCIL: OFF. HIGH COMM'R, https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx.

316 U.N. Office of the High Comm'r for Human Rights, Zero-Draft, Legally Binding Instrument to Regulate, in International Human Rights, the Activities of Transnational Corporations and Other Business Enterprises, art. 2, ¶ 1 (July 16, 2018) [hereinafter U.N. Zero-Draft to Regulate Transnational Corporations], https://www.ohchr.org/documents/hrbodies/hrcouncil/wgtranscorp/session3/draftlbi.pdf.

317 *Id.* at art. 10, ¶ 6(c).

318 *Id.* at art. 2, ¶ 1.

319 Skinner, *supra* note 21, at 1811-13.

which they gain a guarantee that all potential claims be fulfilled.[320] They can negotiate to curb the limited liability doctrine for intra-group securities or cross-guarantees.[321] Therefore, they can incorporate protective provisions in the contracts and charge excessive interest rates and cost premiums at times, thus mitigating the detrimental impact of limited liability. As a consequence, it is deemed insufficient to pierce the corporate veil to protect voluntary creditors until their intention to enter into a contractual relationship with the company has been manipulated by misrepresentation or fraud. Potential tort defendants, by contrast, are usually unable to foresee the risk of damages to them, nor pursue preventive compensatory steps. Actual victims include employees and consumers who have been harmed in the process of the business or members of the general public who have sustained an environmental or product-related injury.[322] The choice to determine the most suitable tortfeasor to hold liable could be hard, while a contract creditor may be able to ensure that the parent company secures the obligations of an offending subsidiary.[323] Therefore, claimants of tort and human rights are deemed worthy of legal protection because they can neither oversee the corporation's activities nor have contracts to avoid future risks. As a consequence, shifting the company's social risks to them is considered an inefficient way of allocation.[324]

The OECD confirmed that:

> The question of parent company responsibility cuts across various fields of law. It is related to the legal structure of the enterprise on one side and its economic behavior on the other. Parent companies and subsidiaries are constituted as distinct legal entities. The principle of limited liability is linked to this concept. It means that obligations are not transmitted from one corporate body to another and, therefore, each company is liable only to the extent of its assets. Economically speaking, however, parent companies and subsidiaries appear as a group and may act as a single economic entity with unified management. In this context the

320 Companies & Securities Advisory Committee, Australia (CASAC), *Corporate Groups Final Report* ¶ 4.3 (May, 2000), http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2000/.

321 *Id.* ¶ 4.2.

322 *Id.* ¶ 4.2.

323 *Id.* ¶ 4.3.

324 Larry Catá Backer, *Multinational Corporations As Objects and Sources of Transnational Regulation*, 14 ILSA J. INT'L & COMP. L. 499, 504 (2008).

> subsidiary, although independent in a formal sense, is bound by the instructions of the parent and has to follow the overall policy of the Group. Decisions of central management may conflict with the concerns of minority shareholders, creditors and employees of the subsidiary and affect the interests of competitors, consumers, and governments. The protection of these interests may result in substantial departure from the principle of limited liability and the 'piercing the corporate veil' of the companies.[325]

Corporate law does not resolve the issue of multinationals corporations adequately. Multilateral and bilateral trade and investment agreements, major corporations and governments and governmental agreements, privatization of governmental functions for private companies, and reforms in domestic laws have all led to a legal atmosphere in which large international companies came more effectively to distribute funds and operations across borders.[326] In this way, "law becomes a factor in the production of profit-like labor and capital-to be assessed (and on account of which) business decisions will be made."[327]

For decades, litigators in the US and the UK have sought to pierce the corporate veil to hold parent corporations liable for the human rights violations of their subsidiaries. As discussed in depth, most of the lawsuits under the Alien Tort Statute against parent corporations to keep them responsible for the human rights abuses and tortious acts of their subsidiaries were ineffective because of the procedural and substantive obstacles. Such hurdles will make claims to hold multinational corporations responsible for the offshore subsidiaries' tortious actions even more challenging. In addition, as demonstrated in the recent *Daimler* case, the United States courts seem to have reverted to the original territorial restrictions. Although there are some theories that courts can use to pierce the corporate veil to hold parent companies liable under ATS, there are still many uncertainties in their application. Even under extremely exceptional situations, piercing the corporate veil exceptions accepted by *Prest* and *Adams* in the UK would be applied to cases of human rights abuses. However, *Chandler* is an example of corporate responsibility in current corporate law, which

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325 OECD (1980), *International Investment and Multinational Enterprises: Responsibility of Parent Companies For Their Subsidiaries*, 3.

326 Backer, *supra* note 324, at 504.

327 *Id.*

imposes a direct duty of care for the parent corporation toward the subsidiary's employee.

The Hague District Court in the *Akpan* case, which took place in the Netherlands and involved environmental violations by Royal Dutch Shell against a Nigerian farmer, referred to in *Chandler*.[328] The court interprets *Chandler* in *Akpan* as a human rights case that permits human rights victims to sue multinational corporations that violated human rights by their international subsidiaries.[329] *Akpan* extends *Chandler* to third-party victims in an international context.[330] In the Netherlands, with collaboration with Milieudefensie (Friends of the Earth Netherlands), Shell Nigeria and Royal Dutch Shell PLC, its parent company, have begun actions against oil pollution victims from Shell's facilities.[331] The plaintiff alleges that, as the operator of the related plants in the Niger Delta, Shell Nigeria is liable for the pollution.[332] At the same time, Royal Dutch Shell is the parent corporation, and is thus responsible on the part of its subsidiary for the environmental damages. According to the plaintiffs, this principle of responsibility is supported by other legal frameworks, particularly US and English law, as well as Dutch law and international soft law, such as the OECD Guidelines on Multinational Enterprises and the U.N. Global Compact and Global Reporting Initiative.[333] On December 30, 2009, the Civil Court of the Hague decided that the plaintiffs were entitled to bring the case before a Dutch court.[334] This is the first time a Dutch court has recognized a jurisdiction over an international direct liability claim.[335]

The laws of most Member States of the EU allow jurisdiction only where there is evidence that corporations have violated their corporate status to "pierce the corporate veil" and connect those actions of the foreign subsidiaries to their parent companies domiciled in the

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328 Akpan v. Royal Dutch Shell Plc., District Court of the Hague, 30 Jan. 2013, LJN BY 9854 / HA ZA 09-1580 (Neth.).

329 Palombo, *supra* note 14, at 468.

330 *Id.*

331 *See Factsheet for The People of Nigeria Versus Shell: The Course of the Lawsuit*, MILIEUDEFENSIE (Dec. 2009), http://www1.milieudefensie.nl/english-/publications/The% 20course%20of%CC20the% 20lawsuit.pdf.

332 *Id.*

333 Muchlinski, *supra* note 1, at 689-90.

334 Oruma v. Royal Dutch Shell PLC (Nigeria v. Neth.), Judgment, (Dec. 30, 2009).

335 Muchlinski, *supra* note 1, at 689; Palombo, *supra* note 14, at 460-61.

Member States.[336] Otherwise, most Member States of the EU rules do not permit direct control over foreign subsidiaries or jurisdiction over foreign subsidiaries of foreign parent companies.[337]

Lawmakers should amend limited liability statutes and propose eliminating the prohibition of liability for parent corporations with wholly-owned subsidiaries operating overseas, especially when the subsidiary is accused of violating human rights and operating in a corrupt, inefficient, or non-independent region. It is entirely appropriate for corporations earning tax and other benefits from their use of wholly-owned subsidiaries to be held liable while their wholly-owned subsidiaries are engaged in human rights abuses.[338] This strategy would not only act as a disincentive for corporations to hide behind the corporate veil in order to violate human rights. However, it would also assure that victims are not left uncompensated of corporate violations.

Without those amendments, the corporate law rules, and those procedural obstacles, the defense of human rights victims will be negatively affected as business costs will be shifted their way. There is a presumption based on national laws or precedents, like international treaties and conventions, which can be extraterritorially applicable. The national courts are, in practice, unwilling to enforce such rules once an international case can reach them. In this respect, there is a need for exclusive reforms at the international and national levels to hold multinational corporations responsible for their extraterritorial activities in some significant tort and human rights violations.

336 Jodie A. Kirshner*, A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses*, 13 N.W. J. INT'L HUM. RTS. 1, 17-18 (2015).

337 *Id.* at 17.

338 Skinner, *supra* note 21, at 1780.