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## Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law

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# Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law

Gwynne Skinner\*

## *Abstract*

*The doctrine of limited liability of shareholders often prevents victims harmed by a corporation's foreign subsidiary's violation of international human rights norms from obtaining a remedy when that subsidiary operates in a country that has a weak or ineffective judicial system. This is because victims are often unable to obtain a remedy in these countries, and the doctrine almost always prevents victims from seeking a remedy from the parent corporation. Given this problem, in what situations should parent corporations be liable for the tortious activities of their foreign subsidiaries? This Article discusses the circumstances where imposing liability on parent corporations is justified and provides a specific statutory recommendation for such liability. The Article outlines the three primary solutions various authors and practitioners have advocated thus far to address the problem—the enterprise liability approach, the due diligence approach, and the*

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*direct parental duty-of-care approach—and addresses the limitations of each of these proposed solutions. The Article then recommends a different, primarily statutory, approach: that Congress or states (or both) should enact legislation disregarding limited liability of parent corporations for claims of customary international human rights violations and serious environmental torts where a parent corporation takes a majority interest or creates a subsidiary as part of unified economic enterprise that operates in a “high-risk host country,” i.e., one that has a weak, ineffective, or corrupt judicial system, and victims cannot obtain an adequate judicial remedy for such harms in the host country. This proposed solution moves away from the current notion that a parent corporation should only be liable where it has some actual control over the subsidiary, toward parent corporate liability where the parent benefits financially from the subsidiary’s actions at the expense of unconsenting, third parties—typically members of the community where the subsidiary operates.*

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### *I. Introduction*

The doctrine of limited liability of shareholders, which prevents shareholders of a corporation from being financially liable to victims for the actions and debts of that corporation beyond the level of their investment,<sup>1</sup> is deeply ingrained into the law of the United States,<sup>2</sup> as well as many other countries.<sup>3</sup> After

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1. See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1039 (1991)

A fundamental principle of corporate law is that shareholders in a corporation are not liable for the obligations of the enterprise beyond the capital that they contribute in exchange for their shares. A corollary of this principle is that the corporation is an entity separate from its shareholders, directors, or officers. Such limited liability was not always the rule in American law, but it has been accepted in most American jurisdictions since the mid-nineteenth century.

2. See William Douglas & Carol Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193–94 (1929) ("Limited liability is now accepted in theory and in practice. It is ingrained in our economic and legal systems. The social and economic order is arranged accordingly. Our philosophy accepts it."); see also Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CAL. L. REV. 195, 199 (2009) ("This governing principle of the parent-subsidiary relationship has influenced corporate law throughout the fifty states, and most practitioners, judges, and commentators take it for granted.").

3. See Dearborn, *supra* note 2, at 198 (providing examples of international companies arranged to protect shareholders via limited liability); Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 595–96 (1986) [hereinafter Blumberg, *Limited Liability*] (describing how limited liability spread throughout continental Europe in the early 1800s).

states began allowing corporations to own shares of other corporations in the 1880s, the doctrine of limited liability began applying to parent corporations, as shareholders, for acts of their subsidiaries.<sup>4</sup> Thus, the doctrine limits liability of corporate parents as well as individual shareholders.<sup>5</sup> Of course, in limited situations where a parent is shown to control the subsidiary to the extent that the subsidiary is a mere alter ego of the parent and the parent uses the subsidiary for some wrongful purpose, the protection of limited liability can be removed—an act referred to as “piercing the corporate veil.”<sup>6</sup> Where a plaintiff does not

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4. See Blumberg, *Limited Liability*, *supra* note 3, at 604

Over the historical period in which these dramatic changes occurred, the form of the business firm has changed remarkably. Limited liability triumphed at a time when corporations were simple, when one corporation could not acquire and own the shares of another. Limited liability meant protection for the ultimate investor. Long after corporations were firmly established, corporations generally were first granted the power to acquire and own shares of other corporations. Major business rapidly changed form with the emergence of complex multi-tiered corporate structures that included a parent corporation and numerous affiliated corporations collectively conducting the business of the group.

5. See *United States v. Bestfoods*, 524 U.S. 51, 61–64 (1998) (acknowledging that shareholder protection applies to parents of subsidiaries); *Anderson v. Abbott*, 321 U.S. 349, 361–62 (1944) (“Normally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. Limited liability is the rule, not the exception . . .” (citations omitted)); *Burnet v. Clark*, 287 U.S. 410, 415 (1932) (“A corporation and its stockholders are generally to be treated as separate entities . . .”); see also *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir. 1998)

Parents of wholly owned subsidiaries necessarily control, direct, and supervise the subsidiaries to some extent, but unless there is a basis for piercing the corporate veil and thus attributing the subsidiaries’ torts to the parent, the parent is not liable for those torts, and cannot be served under the tort provision of the long-arm statute.

(citations omitted); Blumberg, *Limited Liability*, *supra* note 3, at 604 (“Limited liability no longer meant protection for the ultimate investor alone. It also meant protection for the parent corporation against liability for the obligations of its subsidiaries, even if they were conducting essential parts of a single, unitary business.”).

6. See *Bestfoods*, 524 U.S. at 62 (noting the “equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced . . . when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes . . . on the shareholder’s behalf”); *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 18 (2d Cir. 1996)

succeed in piercing the veil, or cannot otherwise establish that the parent is directly liable to third persons harmed through the parent's own actions or through the use of the subsidiary as an agent to carry out its own policies or decisions,<sup>7</sup> the principle is that a parent corporation will not be held liable to victims for the acts of its subsidiary, no matter how egregious.<sup>8</sup>

With regard to business-related human rights and environmental abuses, such limits on parent liability for a subsidiary's illegal and harmful actions are not problematic as long as victims can identify the subsidiary causing the harm and can obtain a remedy in the country where the subsidiary is located and operates (host country).<sup>9</sup> The problem lies where

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In making this determination [to pierce the corporate veil], courts look to a variety of factors, including the intermingling of corporate and personal funds, undercapitalization of the corporation, failure to observe corporate formalities . . . , failure to pay dividends, . . . and the inactivity of other officers and directors.

(citations omitted); *see also* Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir. 1979) (explaining that alter-ego liability exists when the corporation is used "to achieve fraud, or when the corporation has been so dominated by an individual or another corporation (usually a parent corporation), and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own").

7. *See infra* Part VI.C.3 (describing limitations in the duty-of-care approach to tort liability).

8. *See* IDS Life Ins. Co. v. SunAmerica Life Ins. Co., 136 F.3d 537, 540 (7th Cir. 1998) ("[U]nless there is a basis for piercing the corporate veil and thus attributing the subsidiaries' torts to the parent, the parent is not liable for those torts . . ."). It is possible, however, that the parent could be liable under an agency theory of liability. Under agency theory, a principal is liable for the acts of its agent: "Under the law of both New York and Georgia, principals may be held liable for torts committed by their agents when such agents act within the scope of their agency." Bigio v. Coca-Cola Co., 675 F.3d 163, 175 (2d Cir. 2012) (establishing that the agency relationship differs from state to state); *see also* Doe v. Exxon Mobil Corp., 573 F. Supp. 2d 16, 30 (D.D.C. 2008) (finding Exxon Mobil could be liable under an agency theory, but rejecting other theories of liability); Bowoto v. Chevron Texaco Co., 312 F. Supp. 2d 1229, 1246–47 (N.D. Cal. 2004) (refusing to pierce the veil, but holding that the case could proceed under agency law). The case eventually went to trial, and the jury ultimately rejected all claims against the company, with the Ninth Circuit affirming the trial court's decisions on a variety of matters. *See* Bowoto v. Chevron Corp., 621 F.3d 1116, 1122 (9th Cir. 2010) (explaining that because the statute mentions individuals it did not cover corporations), *cert. denied*, 132 S. Ct. 1968 (2012)).

9. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 749 (2014) (describing how, typically, victims are not able to seek a remedy for a subsidiary's conduct in the United States due to lack of personal jurisdiction over the separate subsidiary). Of course, a court must have personal jurisdiction over the defendant to hear

victims cannot do so.<sup>10</sup> Unfortunately, victims of tortious conduct by companies in countries with ineffectual or corrupt government and judicial systems often face many obstacles in obtaining a remedy in the country where the companies operate.<sup>11</sup>

Sometimes the companies engaging in the alleged tortious conduct are the wholly or majority-owned subsidiaries of corporations of more developed countries, including U.S. corporations.<sup>12</sup> Under current U.S. law, even where the subsidiary engages in the most serious type of tortious conduct and the victims are unable to obtain a remedy in the host country, there is little opportunity to circumvent limited liability and obtain redress from the U.S. parent, even though the parent gains immense benefits from having a subsidiary operate in a foreign nation.<sup>13</sup>

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the case. *See* *Burnham v. Superior Court*, 495 U.S. 604, 629 (1990) (noting that a court must have personal jurisdiction over the defendant to hear the case); *Kulko v. Superior Court*, 436 U.S. 84, 101 (1978) (same).

10. *See infra* Part III (detailing how victims of violations of human rights norms have been unable to obtain remedies in the host countries).

11. *See infra* Part III (same).

12. *See, e.g.*, cases cited *infra* note 99 (listing ATS cases where most of the parent corporations are U.S. corporations).

13. For a discussion of such benefits, see *infra* Part IV.A. Moreover, bringing a claim in the United States against the subsidiary (or, for that matter, a non-U.S. parent corporation with substantial and continuous business activity in the United States)—such as a transitory tort claim or a claim for violation of customary law under the Alien Tort Statute (ATS) (28 U.S.C. § 1350 (2012))—is typically not possible due to lack of personal jurisdiction over the subsidiary (or the foreign parent). *See generally* *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (analyzing general personal jurisdiction). In *Bauman*, the Supreme Court essentially held that courts cannot assert general personal jurisdiction over a corporation consistent with due process when it is not headquartered or incorporated within its jurisdiction, even if the corporation does significant business there directly or through a subsidiary. *See id.* at 761 (explaining the limits of general personal jurisdiction). The Court rejected the argument that the economic activities of a parent's wholly-owned subsidiary could be attributed to the parent company for purposes of general personal jurisdiction. *See id.* at 761–62 (considering *International Shoe* and *Goodyear*). Moreover, the Court reaffirmed that general personal jurisdiction can only be asserted in a country or state where the corporation is essentially “at home,” but opined that in determining a corporation's home, a court must appraise a corporation's activities in their entirety, looking both nation- and worldwide, and noting that a corporation cannot be at home in several locations. *See id.* at 762 n.20 (“A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.”). The Court



In addition, the U.S. Supreme Court erected a new barrier in human-rights litigation brought under the Alien Tort Statute (ATS)<sup>14</sup> in 2013. In *Kiobel v. Dutch Royal Shell*,<sup>15</sup> the Court held, for the first time in decades of ATS litigation, that the presumption against a statute's extraterritorial application<sup>16</sup> (created in the absence of Congress stating that the statute applies extraterritorially) applies to claims of customary international law violations brought under the ATS.<sup>17</sup> Thus, even if the problem of limited liability is addressed, such as through piercing the corporate veil, victims of extraterritorial human rights violations still are unlikely to be able to hold the parent corporation accountable for a remedy in U.S. courts. Therefore, for victims to be able to seek a remedy in U.S. courts against a parent corporation for harms created by a subsidiary's actions, both limited liability and the obstacle created by *Kiobel* will need to be addressed.<sup>18</sup> The solution advocated by this Article does so.

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previously held that a court may assert general jurisdiction over corporations to hear any and all claims against them when their affiliations with the state are so "continuous and systematic" as to render them essentially at home in the forum state. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011) (explaining that the party must first attempt to pierce the corporate veil). Thus, *Bauman* greatly limits the ability of victims of human rights abuses abroad to bring cases against businesses that, although they may not be headquartered or have their principal places of business in the United States, engage in significant and continuous activity in the United States, as had been the practice for years.

14. 28 U.S.C. § 1350 (2012).

15. 133 S. Ct. 1659 (2013).

16. The presumption against extraterritoriality is the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). In applying this principle, courts "assume that Congress legislates against the backdrop of the presumption against extraterritoriality." *Id.*

17. See *Kiobel*, 133 S. Ct. at 1669 (denying claims under the ATS).

18. Non-ATS claims, such as garden-variety tort claims under state law, are not limited by *Kiobel*, but courts analyzing these claims will probably be influenced by *Kiobel* and adopt a similar approach, or more likely, dismiss the claims under forum non conveniens grounds, as often occurs in such cases. In fact, forum non conveniens has already been a significant barrier to victims in cases brought under state tort law for acts occurring abroad. See Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Corporate Accountability for Violations of International Human Rights Norms by Transnational Corporations in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS.

As the above indicates, in many situations of tortious conduct by a corporate subsidiary, victims are left in a quandary. Even though the parent corporations, as shareholders, receive great economic and tax benefits from their foreign subsidiaries' activities,<sup>19</sup> they are able externalize the risks of their operations through their subsidiaries—such as environmental risks and violations of international human rights law—and avoid liability, leaving victims with no remedy.<sup>20</sup>

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L. REV. 158, 203–13 (2014) (explaining that when courts apply *forum non conveniens* in cases brought against transnational businesses, they “dismiss the cases expecting that they will be filed in the host countries where the violations or harm occurred”); *see also* Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 17–20 (2013) (noting that *forum non conveniens* is the “initial battle-ground in state court human rights cases”); Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1, 34–35 (2014) (highlighting that courts are not likely to utilize *forum non conveniens* when a case involves an American citizen against a foreign defendant). For additional cases where state courts have declined jurisdiction over cases involving foreign plaintiffs where the court found that an alternative forum was available, *see generally* Martin J. McMahon, *Forum Non Conveniens Doctrine in State Court as Affected by Availability of Alternative Forum*, 57 A.L.R. 4th 973 § 11[b]. For those cases where state courts declined jurisdiction even where the court also found that an alternative forum was unavailable, *see generally id.* § 12[b]. The doctrine of *forum non conveniens* allows courts to dismiss a case, even where it can assert jurisdiction, on the basis that another jurisdiction is ostensibly more “convenient” for the parties and witnesses. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (“The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”).

19. *See* Daniel Chow, *Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries*, 51 VA. J. INT'L L. 785, 816–17 (2011) (describing advantages of low labor costs and lenient regulatory regimes); Christopher H. Hanna, *Corporate Tax Reform: Listening to Corporate America*, 35 J. CORP. L. 283, 298–99 (2009) (describing significant tax advantages of foreign subsidiaries, such as the tax advantages of deferral of income earned by a foreign subsidiary); Christopher H. Hanna, *The Real Value of Tax Deferral*, 61 FLA. L. REV. 203, 231–33 (2009) [hereinafter Hanna, *Real Value*] (describing additional tax-related benefits of foreign subsidiaries, such as advantageous accounting rules); J. Clifton Fleming, Jr., *Worse Than Exemption*, 59 EMORY L.J. 79, 84–85 (2009) (describing how foreign subsidiaries provide U.S. resident corporations with “overly generous tax benefits” and providing examples); J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX REV. 437, 538 (2008) (describing how foreign subsidiaries provide advantages over domestic competitors in the United States).

20. Several scholars have written about how limited liability of parent

To be sure, great economic benefit inures to host countries through the economic activity of subsidiaries created or purchased by U.S. companies (within the category of investment referred to as foreign direct investment).<sup>21</sup> Such investment often results in increased wages, import of technology, developments and investment in infrastructure, and even a decrease in poverty.<sup>22</sup> However, where those subsidiaries cause or are

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corporations externalizes risks and creates barriers for victims of transnational torts to access judicial remedies. See, e.g., Jodie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259, 264 (2012) (describing how multinational companies use and abuse the corporate form to protect them from liability); 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, 88–89, 96, 101–05 (2012) (noting how transnational corporations use the separation between parent corporations and subsidiaries to limit the liability of parent corporations for illegal actions of subsidiaries); Douglas M. Branson, *Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227, 243 (2011) (discussing corporations' attempts to purposefully limit liability of parent corporations); Elizabeth Barrett Ristroph, *How Can the United States Correct Multi-National Corporations' Environmental Abuses Committed in the Name of Trade?*, 15 IND. INT'L & COMP. L. REV. 51, 53–54 (2004) (noting that “a plaintiff injured by the subsidiary's actions will have a difficult time” holding the parent corporation liable in U.S. courts); John M. Brown, *Parent Corporation's Liability Under CERCLA Section 107 for the Environmental Violations of Their Subsidiaries*, 31 TULSA L.J. 819, 823 (1996) (noting that under corporate law, parent corporations are not generally liable for subsidiaries' violations).

21. See, e.g., *Foreign Direct Investment*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/fdi.asp> (last visited Nov. 12, 2015)

The investing company may make its overseas investment in a number of ways—either by setting up a subsidiary or associate company in the foreign country, by acquiring shares of an overseas company, or through a merger or joint venture. The accepted threshold for a foreign direct investment relationship, as defined by the OECD, is 10%. That is, the foreign investor must own at least 10% or more of the voting stock or ordinary shares of the investee company.

(on file with the Washington and Lee Law Review).

22. See David Shea Bettwy, *Human Rights and Wrongs of Foreign Direct Investment: Addressing the Need for an Analytical Framework*, 11 RICH. J. GLOBAL L. & BUS. 239, 243, 249–51 (2012) (noting that FDI produces socio-economic benefits, environmental benefits, and human rights benefits); Antoine Bouët, *Trade and Investment in Latin America and Asia: Perspectives from Further Integration*, 34 J. POL'Y MODELLING 193, 204 (2012) (“The new FDI modeling framework reveals that Latin American countries benefit from an increase in FDI inflows. Except for Central America, all regions in Latin

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America increase GDP when foreign investment is introduced in the model, and even more so when the FTA includes BITs.”); Guillermo Emiliano Del Toro, *Foreign Direct Investment in Mexico and the 1994 Crisis: A Legal Perspective*, 20 HOUS. J. INT’L L. 1, 86–87 (1997)

FDI brings the following benefits to host countries: (1) it provides a source of foreign finance after the breakdown of commercial bank lending; (2) it contributes to development, transferring technology and know-how, as well as promoting a more efficient share of risk than other means of attracting capital; (3) the creation of jobs; (4) the creation of welfare; (5) it substitutes for financial aid, loans, and portfolio investment as a means of attracting capital and finally (6) the creation of growth.

Matthias Görgen, *Foreign Direct Investment (FDI) in Land in Developing Countries* 9, 21 (Deutsche Gesellschaft für Technische Zusammenarbeit, Division 45–Agriculture, Fisheries and Food) (Dec. 2009) (suggesting that FDI in land can enhance economic development and reduce poverty by initiating growth in the local economy, increasing productivity on agricultural land, improving market access for farmers in rural areas, and improving infrastructure by building roads or investing in transportation and communication); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1317–19 (2008) (noting that FDI may improve local human rights practices because host countries cater to investors that value country conditions that promote human rights because investors value stability, transparency, and market economies that encourage the free movement of goods and people); Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT’L L. 131, 139 (2013) (stating that benefits of FDI for a capital-importing country include access to new technologies, opportunities for technology transfer, expanded tax base, reduced dependence on foreign aid, access to new sources of financing for development, and support for local business suppliers); ORGANISATION FOR COOPERATION & ECONOMIC DEVELOPMENT (OECD), *FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMISING BENEFITS, MINIMISING COSTS* 5 (2001), <http://www.oecd.org/investment/investmentfordevelopment/1959815.pdf> (“The overall benefits of FDI for developing country economies are well documented. . . .”); Álvaro Pereira, *Legal Stability Contracts in Colombia: An Appropriate Incentive for Investments? Historical Causes and Impact Analysis of Law 963 of 2005*, 12 RICH. J. GLOBAL L. & BUS. 237, 242–44 (2013) (stating that FDI is “the most effective engine for development” because it is a good source of financial resources, new jobs, and technologies); Akinori Tomohara & Sadayuki Takii, *Does Globalization Benefit Developing Countries? Effects of FDI on Local Wages*, 33 J. POL’Y MODELLING 511, 516, 520 (2011) (finding that foreign direct investment benefits workers employed by local establishments in a host developing country, by creating wages above the market-based wage that would otherwise prevail); Eric Burt, Note, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U. J. INT’L L. & POL’Y 1015, 1021 (1997) (stating that host countries may benefit from FDI through the injection of capital, the introduction, transfer, or “spillover” of technology, the introduction of advanced management skills, increased host country employment, increased competition in the host country market, and increased foreign exchange earnings); Ann-Christin Gerlach &

involved in even the most egregious torts, the harm is absorbed by vulnerable populations.<sup>23</sup> Given this juxtaposition, there is increasing recognition that it is unfair that corporations receive tax and other benefits from their use of wholly-owned subsidiaries while being able to avoid liability when those wholly-owned subsidiaries engage in human rights violations, regardless of the fault of the parent company.<sup>24</sup>

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Pascal Liu, *Resource-seeking Foreign Direct Investment in African Agriculture: A Review of Country Case Studies* 4 (FAO Commodity & Trade Policy Research, Working Paper No. 31, 2010), [http://www.fao.org/fileadmin/templates/est/PUBLICATIONS/Comm\\_Working\\_Papers/EST-WP31.pdf](http://www.fao.org/fileadmin/templates/est/PUBLICATIONS/Comm_Working_Papers/EST-WP31.pdf) (stating that benefits of FDI for host countries can be economic, such as employment creation, higher productivity, improved access to finance and markets for smallholders, technology transfer, and enforcement of production standards); Michael Klein, et al., *Foreign Direct Investment and Poverty Reduction* (World Bank Policy Research, Working Paper No. 2613, 2001), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=632682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632682) (suggesting that “FDI is a key ingredient for successful economic growth in developing countries” and offering an index of studies that have measured the effects of FDI on poverty reduction).

23. See Mwaura, *supra* note 20, at 85–86 (explaining how victims of human rights abuses often absorb the costs of those abuses).

24. See, e.g., *id.* at 88–89, 96, 101–05 (discussing the benefits corporations gain from human rights abuses committed by subsidiary companies); Dearborn, *supra* note 2, at 205–07, 211–12 (noting the large benefits corporations gain from subsidiaries’ risky conduct while only bearing some of the costs); Ristroph, *supra* note 20, at 53–54 (noting that corporations externalize the costs of doing business while enjoying the benefits); David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 438–44 (1998) (discussing the benefits corporations receive as a result of limited liability); Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 29–39 (1994) [hereinafter Thompson, *Unpacking*] (discussing corporations’ externalization of costs to reap benefits from subsidiaries’ potentially abusive conduct); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1584–87, 1613–23, 1637–40 (1991) (same); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1883, 1892–94, 1916–19 (1991) (arguing that courts should “consider the structure of particular corporate defendants in determining the extent of their tort liability” so individual shareholders are more protected from judgment damages than large corporations, which are better able to sustain the cost); Mark J. Roe, *Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1, 39–56 (1986) (examining the practice of externalizing the risks of a subsidiary to allow the parent corporation to avoid liability as a result of actions taken by subsidiary); Blumberg, *Limited Liability*, *supra* note 3, at 576 (noting that limited liability that insulates parent

Due to this unfairness, some scholars have argued for unlimited liability of shareholders in all situations, or at least of corporate parents.<sup>25</sup> Others have advocated, quite persuasively, for an “enterprise theory” of liability where the parent should be liable for a subsidiary’s actions when it functionally controls that subsidiary.<sup>26</sup> More recently, at least one advocate has argued for enterprise liability based solely on economic control where a subsidiary benefits the parent company as part of a unified economic scheme or business.<sup>27</sup> This is a concept that the United

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corporations from liability for claims against a subsidiary “raises serious problems because it enables the enterprise to externalize its costs”); Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 70–76 (1980) (noting that corporations will externalize the risks of their actions by creating subsidiaries in order to avoid liability of actions taken by subsidiaries).

25. See *infra* Part IV (advocating for corporate liability, not individual liability); see also, e.g., Hansmann & Kraakman, *supra* note 24, at 1883, 1892–94, 1916–19 (arguing that courts should “consider the structure of particular corporate defendants in determining the extent of their tort liability” so individual shareholders are more protected from judgment damages than large corporations, which are better able to sustain the cost).

26. See, e.g., Thompson, *Unpacking*, *supra* note 24, at 12–17 (considering the theory of enterprise liability and some justifications for its use); Hansmann & Kraakman, *supra* note 24, at 1916–19 (discussing enterprise liability theory in light of arguments on whether limited liability or unlimited liability is the best regime for corporations); Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 298 (1990) [hereinafter Blumberg, *Corporate Entity*] (noting enterprise theory is emerging in areas of law dealing with corporate governance); Stone, *supra* note 24, at 1 (analyzing enterprise liability theory and noting that in some cases the theory is the best option while in others the theory would need to be reinforced by other techniques); Howard Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 157 (1976) (discussing the theory of enterprise liability for torts and suggesting that the logic of tort liability is moving toward enterprise liability). This theory was also advocated in litigation involving Unocal. See *infra* note 120 and accompanying text (discussing procedural barriers for victims harmed by U.S. corporations’ subsidiaries’ actions in areas such as human rights and the environment). For a more complete discussion of the enterprise law, especially in comparison to entity law, see generally Phillip Blumberg, *The Increasing Recognition of Enterprise Liability Principles In Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295 (1996) [hereinafter Blumberg, *Increasing Recognition*].

27. Dearborn, *supra* note 2, at 196, 252 (noting that enterprise liability theory has historically only applied where the parent behaviorally controls the subsidiary, and proposing a new test that would allow enterprise liability for human rights violations when the parent has economic control over the subsidiary).

Nations Guiding Principles for Business and Human Rights (U.N. Guiding Principles) appear to endorse.<sup>28</sup> This is a viable approach, but as discussed in this Article, the functional-control enterprise theory does not go far enough; the economic-control enterprise theory goes too far.

Still, others have recently argued for a slightly different approach that I will term the “due diligence approach”: that there should be a presumption of liability on the part of a parent corporation for extraterritorial acts of its wholly-owned subsidiary, but that the parent can overcome the presumption by showing that it had engaged in “due diligence” efforts to ensure that its subsidiary operated consistently with human rights and environmental standards and was otherwise unaware of the abuses.<sup>29</sup> At least one country, France, has pending legislation that takes a similar approach.<sup>30</sup>

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28. See John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, U.N. Doc. A/HRC/17/L.17/31 (June 16, 2011) [hereinafter *U.N. Guiding Principles*] (summarizing the special representative’s work from 2005 to 2011 regarding the increased social awareness of businesses’ impact on human rights). For additional guidance on the application of the U.N. Guiding Principles to corporations, see Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, U.N. Doc. HR/Pub/12/02 (June 2012) (explaining further the U.N. Guiding Principles and helping to interpret their original meaning and intent). See generally BUS. & HUM. RIGHTS RESOURCE CTR., <http://www.business-humanrights.org> (last visited Nov. 12, 2015) (providing information on companies’ human rights policies) (on file with the Washington and Lee Law Review); see also *infra* Part V (detailing how the U.N. Guiding Principles appear to endorse enterprise liability based on economic control where the subsidiary benefits the parent company).

29. See Lucien J. Dhooze, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 EMORY INT’L L. REV. 455, 457 (2008) (discussing transnational businesses’ duty to engage in human rights pursuant to the U.N. Guiding Principles and discussing how businesses can use their due diligence as a defense to human rights claims under the ATS); see also Yihe Yang, *Corporate Civil Liability Under the Alien Tort Statute: The Practical Implications from Kiobel*, 40 W. ST. U. L. REV. 195, 207–08 (2013) (advocating that corporations should incorporate “due diligence” mechanisms for human rights, and discussing how corporations might be able to use due diligence as a defense).

30. Proposition de loi 1524 du 6 novembre 2013 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Bill Number 1524, relating to the due diligence of parent and shareholder companies], Enregistré à la Présidence de l’Assemblée Nationale de France, Nov. 6, 2013, available at <http://www.assemblee-nationale.fr/14/propositions/pion1524.asp>; see

This approach is also viable and would be a step in the right direction. However, unlike the economic-control enterprise theory, it does not resolve the main problem of inequality and unfairness created by the great financial and tax benefits inuring to the parent at the expense of harm absorbed by third parties, nearly all of whom are likely to be non-consenting parties.<sup>31</sup>

Additionally, neither of the above approaches takes into account the additional barrier *Kiobel* created in 2013 for claims of extraterritorial violations of human rights norms brought under the Alien Tort Statute.<sup>32</sup>

Some have also argued for finding pathways to bringing suits directly against parent corporations for negligence due to some role the parent had in the harm, or simply for creating or purchasing a subsidiary engaging in an industry that is at high risk for human rights abuses in a country that the parent knew or should have known would not provide a remedy.<sup>33</sup> Although such a tort claim also presents a possible way forward, there are

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also Bill Number 1524, relating to the duty and vigilance of parent and subcontracting companies, Registered by the President of the National Assembly of France, Nov. 6, 2013, available at <http://www.accessjustice.eu/map/proposition-loi-n-1524-devoir-de-vigilance-eng.pdf> (English version of the bill); *Mandatory Human Rights Due Diligence: Developments in Europe*, CORE, <http://corporate-responsibility.org/mandatory-human-rights-due-diligence-developments-in-europe/> (last visited Nov. 12, 2015) (noting that on March 31, 2015, the French National Assembly endorsed an amended version of the bill, which will go to the French Senate in late 2015) (on file with the Washington and Lee Law Review).

31. I make this distinction because in limited liability of parent corporations for subsidiaries' *contract* breaches, the contracting parties knowingly assume the risk and have the opportunity to ensure that the subsidiary can either satisfy the contract, or, in the case of lending money, can ask for collateral or another entity to assume the risk if the subsidiary cannot pay. Most tort victims are not consenting. There might be some situations where a community does engage in a process of consenting to business activity in their community while knowing the risks, but whether all such victims knowingly accepted the risk would be a difficult proposition to confirm given various cultural dynamics, such as gender discrimination. In addition, such populations may not likely to have adequate legal counsel when giving consent or fully appreciate the risks inherent in the activities.

32. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) (limiting the application of the ATS through the presumption against extraterritoriality, and making it more difficult for noncitizens to bring claims in federal courts).

33. See *infra* Part VI.C.2 (enumerating a more expansive tort-based corporate parental duty-of-care approach).



potential problems with such a tort-based approach, such as whether or not a court will recognize that a duty is created in such situations, especially given the policies behind limited liability, and whether the corporation has violated a standard of care.<sup>34</sup>

This Article outlines the circumstances and situations where imposing liability on parent corporations is justified in order to provide victims a remedy for the harm caused by a foreign subsidiary's violations of international human rights law or gross environmental torts,<sup>35</sup> and provides a specific statutory recommendation regarding such liability. The Article proceeds as follows. In Part II, the Article briefly discusses the history of limited liability in the United States.<sup>36</sup> It describes how limited liability continued without change when corporations began owning shares in other corporations, even in the area of tort liability.<sup>37</sup> It also notes how limited liability for corporate parents has continued unabated even in the face of globalization and an explosion of transnational business, along with all the complexity caused by such changes, and even as victims of businesses' human rights abuses are left without a remedy.<sup>38</sup> This section also discusses why "piercing the corporate veil" is not a sufficient doctrine in addressing harm caused by foreign subsidiaries.

In Part III, the Article describes how host countries often do not provide victims a remedy due to corruption and ineffectual legal and judicial systems.<sup>39</sup> In light of this, it describes how limited liability has resulted in victims being left remediless.<sup>40</sup> In

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34. See *infra* Part VI.C.3 (outlining the limitations of the tort-based corporate parental duty-of-care approach).

35. The Article focuses primarily on remedies. Thus, the scope of this Article is limited to solutions for overcoming limited liability of a parent corporation in order to provide a remedy to victims. The scope of this Article does not include exploring the best ways to prevent abuses from occurring in the first place.

36. See *infra* Part II.A (explaining the historical origins of limited liability in the United States and state influence over the corporate form).

37. See *infra* Part II.B (describing the origins of limited liability).

38. See *infra* notes 90–96 and accompanying text (listing sources that discuss the idea of limited liability continuing despite the advent of globalization and international businesses).

39. See *infra* Part III (discussing the difficulties faced by victims in states that do not have ideal regulatory or judicial systems).

40. See *infra* Part III (same).

Part IV, the Article provides a normative argument as to why parents of subsidiaries should be liable for their subsidiaries' torts, especially those that violate human rights norms or involve large environmental torts, noting the host of benefits that parents receive from having part of their business enterprise be conducted by a foreign subsidiary.<sup>41</sup>

In Part V, the Article reviews how the United Nations approaches transnational businesses' obligations with respect to remedying victims of human rights violations.<sup>42</sup> These include both that business enterprises engage in human rights due diligence and that countries ensure remedies for human rights violations by subsidiaries of parent corporations (business enterprises) over which they have legal jurisdiction.<sup>43</sup>

In Part VI, the Article outlines solutions various authors and practitioners have advocated thus far to address the problem, primarily through three approaches—the enterprise liability approach, the due diligence approach, and the direct parental duty-of-care approach.<sup>44</sup> This part also addresses the limitations of each of these solutions.<sup>45</sup> This section briefly addresses what is taking place in France and Switzerland regarding holding parent corporations liable for acts of their subsidiaries.<sup>46</sup>

In Part VII, the Article recommends a different approach. It argues that, in claims involving customary international human rights violations (such as those brought under the ATS) and serious environmental torts, limited liability of parent corporations should be disregarded where that parent takes a majority interest in or creates a subsidiary as part of unified economic enterprise<sup>47</sup> that operates in a “high-risk host country,”

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41. See *infra* Part IV (arguing for parental liability for a subsidiary's torts).

42. See *infra* Part V (explaining the role of the U.N. Guiding Principles, which require parent corporations to remedy human rights harms caused by their foreign subsidiaries).

43. See *infra* Part V (same).

44. See *infra* Part VI (discussing proposed solutions).

45. *Infra* Part VI.

46. See *infra* Part VI.B.1 (showing how France and Switzerland are moving towards creating parental liability under a due diligence approach).

47. By this, I mean the business of the subsidiary the parent purchases or creates is done to further the business of the parent as part of an integrated business enterprise, rather than simply a purchase of stock as part of an investment portfolio where the subsidiary's business is unrelated to the parent's

i.e., one that has a weak, ineffective, or corrupt judicial system,<sup>48</sup> and (a) victims cannot obtain an adequate judicial remedy in the country due to such corruption, lack of a cause of action, or other judicial- or law-related reasons;<sup>49</sup> (b) victims cannot determine what entity is responsible, and thus what entity to hold accountable, given the enterprises' complex corporate structure; or (c) a subsidiary is underfunded and thus cannot pay any damages resulting from the violations. This proposed solution moves away from the current notion that a parent corporation should only be liable where it has some actual control over a subsidiary, toward parent corporate liability where the parent benefits financially from the subsidiary's actions at the expense of unconsenting, third parties—typically members of the community where the subsidiary operates.

Ideally, the creation of such parent liability should be done through a statutory enactment. The underlying claims would continue to be claims for violations of customary international law under the ATS, state torts whose facts rise to the level of violations of customary international law, or serious environmental torts. A statutory enactment would overcome the barrier created by *Kiobel*, given that through such legislation, Congress, or a state legislature would be providing for a cause of action even where the action took place abroad, and thus, there would be no presumption against extraterritoriality. In the alternative, courts could incorporate this approach in “piercing the corporate veil” analyses, as well as when considering enterprise liability and the tort-based parental duty of care.<sup>50</sup> For public policy reasons, I advocate for this approach only with regard to corporate shareholders, and not individual shareholders.

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business.

48. Whether or not a country is a “high risk” country would be a question of fact.

49. This portion of the test has much in common with how one defeats a defendant's motion to dismiss based on forum non conveniens, as well as exhaustion of remedies in the host country. The similarities are not intentional, but reflect similar notions of fairness when considering whether victims should be able to seek a remedy in a court outside of the host country, i.e., the country where the harm occurred.

50. See *infra* Part VI.A (describing enterprise liability).

Part VII concludes with a description of precedent wherein Congress has overcome limited liability through statutory enactments, and why comity and foreign policy concerns<sup>51</sup> should not prohibit this approach.<sup>52</sup>

## II. An Overview of Limited Liability

### A. History of Corporations

The history of limited liability of shareholders, including as it applies to parent corporations, has received significant scholarly attention; there is a plethora of material discussing its genesis and purpose.<sup>53</sup> I do not need to reiterate all that history here. But a few points are important to highlight for the topic of this Article. First, it is important to remember that corporate entities exist with the permission of the individual U.S. state in which they are incorporated;<sup>54</sup> they do not exist as a matter of right.<sup>55</sup>

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51. For example, the Supreme Court expressed concerns about whether U.S. courts can adjudicate cases involving extraterritorial acts of businesses consistent with foreign policy and notions of comity in *Kiobel*. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (noting possible serious foreign policy consequences); *id.* at 1671 (Alito, J., concurring) (stating that adjudicating a claim must be consistent with those “notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement”); *id.* at 1669 (noting that comity concerns led the Court to apply the presumption against extraterritoriality).

52. See *infra* Parts VII.B–D (discussing precedent and addressing comity concerns).

53. See Douglas & Shanks, *supra* note 2, at 193–94 (“Limited liability is now accepted in theory and in practice. It is ingrained in our economic and legal systems. The social and economic order is arranged accordingly. Our philosophy accepts it.”); Blumberg, *Limited Liability*, *supra* note 3, at 577–611 (detailing the history of limited liability in the Anglo-American context); see also Blumberg, *Increasing Recognition*, *supra* note 26, at 297 (“Much more recently, the centuries-old view of the corporation as a separate legal personality was reinforced by the adoption, after major political struggles, of the separate doctrine of limited liability of shareholders for corporate debts.”).

54. See Blumberg, *Corporate Entity*, *supra* note 26, at 292 (explaining that corporations are purely legal creations); Dearborn, *supra* note 2, at 203 (stating that corporations owe their existence to actions of state legislatures and state action); see also Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 981 (1970) (arguing that the major facets of the corporate form remain the same as they did during the early history of the United States).

55. See Blumberg, *Corporate Entity*, *supra* note 26, at 292–94 (“A

After our country's founding, state legislatures would approve each business's right to exist as a corporation—and the benefits that came with it—on a case-by-case basis.<sup>56</sup> Public corporations were expected to achieve some sort of public purpose or promote the public good.<sup>57</sup>

In the mid-1800s the case-by-case approach began to change.<sup>58</sup> There were so many businesses that wanted to become corporations that states began to enact statutes that allowed businesses to form corporations on a more routine basis, as long as they filed their articles of incorporations with the states.<sup>59</sup> Public corporations—those for which shares are generally available to the public<sup>60</sup>—were still required to have a public purpose.<sup>61</sup> Private corporations—those for which shares are

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corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”).

56. See Blumberg, *Limited Liability*, *supra* note 3, at 587 (noting that once the United States was founded, it broke from the traditional English rule and the incorporating power was moved to the thirteen states); E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886–1936*, 50 HARV. L. REV. 27, 28 (1936) (describing the historical roots of modern business corporation law and noting that incorporation, though sought on a case-by-case basis, was nearly always granted).

57. See Blumberg, *Limited Liability*, *supra* note 3, at 587 (citing examples of early American corporations with a public purpose, including bridges, canals, turnpikes, and financial institutions such as banks and insurance companies).

58. See *id.* at 588, 590 (stating that one cause of such change was the deterioration of relations with England due, in part, to an increase in manufacturing corporations prior to the War of 1812, “[as] American readiness to depend on European manufactured goods disappeared, and manufacturing became an increasingly important political weapon”).

59. See *id.* at 591, 593 (discussing how incorporation was granted freely within the original U.S. states); Dodd, *supra* note 56, at 28 (“Despite the fact that the privilege was available only by obtaining a special act of incorporation in each individual case, it was granted in many, perhaps in nearly all, of the instances in which it was energetically sought.”).

60. See *Public Corporation*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “public corporation” as one whose activities are available to and benefit the public).

61. See Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 46–48 (2002) (noting the debate around the early corporate form, and whether or not corporations were considered democratic entities); Thomas P. Byrne, *False Profits: Reviving the Corporation’s Public Purpose*, 57 UCLA L. REV. DISC. 25, 31 (2010) (discussing privacy protection as a way to promote public discourse and interpersonal relationships); Katherine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance:*

owned privately<sup>62</sup>—were (and continue to be) expected to refrain from actions against the public interest and to comply with all laws.<sup>63</sup> Although the number of corporations, both public and private, has grown exponentially since then,<sup>64</sup> this is still mostly the case today.<sup>65</sup>

Corporations, of course, exist to engage in economic activity, and the fiduciary obligation is to produce as much income and value for their shareholders as possible while still acting within the confines of the law.<sup>66</sup> Although several states have allowed

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*A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 313–14 (2011) (exploring the history of corporations and how state governments would task the corporations to serve specific functions intended to benefit the state economy); R. Kent Newmyer, *Justice Joseph Story's Doctrine of 'Public and Private Corporations' and the Rise of the American Business Corporation*, 25 DEPAUL L. REV. 825, 826 (1976) (analyzing the tension between the individuals who made-up the corporation and the public authority that created it).

62. See Arner, *supra* note 61, at 47 (discussing how early anti-corporation debates centered on private business corporations).

63. See *id.* at 48 (“[B]ecause corporations allowed groups to conduct business through the mechanism of self-rule and elected representatives, corporations were essentially democratic institutions.”); *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006) (finding of a duty of good faith where the corporate fiduciary acts contrary to positive law).

64. See Jackson, *supra* note 61, at 313–28 (describing the history and evolution of the corporate form).

65. See Arner, *supra* note 61, at 44–46 (noting how corporations established their place in America by the sheer volume in which municipal charters were requested and granted); see also P. Alexander Quimby, *Addressing Corporate Short-Termism Through Loyalty Shares*, 40 FLA. ST. U. L. REV. 389, 389–90 n.8 (2013)

Although the American corporation originated as a vehicle to promote the public good, that primary purpose slowly eroded and gave way to a new fixation: increasing shareholder wealth. Yet even as the goal of individual corporations has changed, the justification for their existence is still premised—at least in part—on the belief that they confer an overall benefit to society.

66. See STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 53 (2008) (“[T]he shareholder wealth maximization norm . . . indisputably is the law in the United States.”); see also David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 194 (2013) (stating that the idea of corporate primacy is considered foundational and concrete); Jackson, *supra* note 61, at 312 (“In popular theory and practice, corporate governance in America is almost always stated in terms of maximizing shareholder wealth.”). For cases discussing this “shareholder primacy” doctrine, see *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (choosing to act as a for-profit corporation binds the directors to the fiduciary duties and standards of that model, which includes “maximiz[ing]

the formation of certain corporations that serve a specific social purpose, even where it might mean that less value or income is produced for shareholders,<sup>67</sup> such corporations are few and are not the subject of this Article.

### *B. Origin of Limited Liability*

Hand-in-hand with corporate formation came limited shareholder liability—the notion that shareholders are only liable for the amount of money invested; the rest of their assets are protected.<sup>68</sup> Limited liability existed as part of English common law for centuries in the form of “entity law,” which viewed corporations as separate juridical entities with their rights and responsibilities distinct from those of their shareholders.<sup>69</sup> After much debate, limited liability was decisively adopted in 1830 when the leading industrial state at the time—Massachusetts—enacted a statute codifying limited liability of shareholders for corporate debts.<sup>70</sup> States began adopting limited liability along with incorporation statutes to encourage investment in corporations, and thus, business and economic activity.<sup>71</sup>

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the economic value of a for-profit Delaware corporation for the benefit of its stockholders”); *Katz v. Oak Industries, Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) (showing that directors have an obligation to maximize the interests of a corporation’s stockholders even if it is done “at the expense” of others, so long as it is within the law); *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (finding that a Board of Directors may make decisions benefiting other stakeholders of the corporation so long as “there are rationally related benefits accruing to the stockholders”); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (asserting that a business is created primarily to generate stockholder profit and the purpose of the directors is to achieve that end); Yosifon, *supra* note 66, at 198 (noting that some well-known scholars do not believe that shareholder maximization as corporate policy exists).

67. Twenty-six states allow for some type of corporate formation that has a social purpose. For a list of such states and statutory information, see generally BENEFIT CORPORATION, <http://www.benefitcorp.net/> (last visited Nov. 12, 2015) (on file with the Washington and Lee Law Review).

68. See BAINBRIDGE, *supra* note 66, at 79 (detailing the origins of limited liability and how it protects shareholders assets).

69. See Blumberg, *Increasing Recognition*, *supra* note 26, at 297 (citation omitted) (describing how the doctrine of limited liability of shareholders for corporate debts was codified by Massachusetts in 1830).

70. See *id.* (same).

71. See *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) (finding that states

However, corporations were originally not allowed to own shares in other corporations.<sup>72</sup> It was not until 1888 when New Jersey began allowing corporations to own shares in other corporations that corporate ownership of stock began.<sup>73</sup> Thus, both investment in corporations and the limited liability that went along with it only applied to natural persons until the late 1800s.<sup>74</sup>

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may choose to limit the liability of corporations' stockholders); Blumberg, *Limited Liability*, *supra* note 3, at 604 ("[Limited liability] was intended to stimulate economic activity by encouraging widespread investment in corporate shares. Such investment would result from protecting investors against liability to corporate creditors and by limiting their risk to the loss of their investment in the corporation."); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 95–97 (1985) (describing purpose and advantages of limited liability); *see also* PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 56–59 (1993) [hereinafter Blumberg, MULTINATIONAL CHALLENGE] (providing background on the emergence of corporate groups and limited liability); *see also generally* Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148 (1992) ("The intention of the original American proponents of legislative policy of limited liability was that the corporate form be used in the interest both of economic expansion and democracy."); STEPHEN PRESSER, PIERCING THE CORPORATE VEIL § 1:12 (2014) (contending that the corporate entity benefits greatly through limited liability and damage to that doctrine through various tools such as piercing the veil can hinder the intended function, and benefit, of limited liability).

72. *See* Blumberg, *Limited Liability*, *supra* note 3, at 604 ("Limited liability triumphed at a time when corporations were simple, when one corporation could not acquire and own shares of another."); Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C. L. REV. 687, 698 (1998) (stating that historically at common law, a corporation could not acquire stock in other corporations).

73. *See* Blumberg, *Limited Liability*, *supra* note 3, at 605, 607 (recounting the historical roots of corporate ownership of shares in other corporations); Dearborn, *supra* note 2, at 203 (noting that New Jersey was the first state to allow corporations chartered in the state to own stock in other corporations); Kirshner, *supra* note 20, at 263 ("Intercorporate stock ownership originally was outlawed . . . . The first holding company act, which allowed corporations to buy and hold stock in other corporations, was not adopted until 1888."); Philip Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 494–95 (2002) [hereinafter Blumberg, *Human Rights*] ("Until New Jersey radically revised its corporation laws in 1890, corporations were not allowed to own shares of other corporations and thereby form corporate groups unless expressly authorized by the legislature.").

74. *See* Blumberg, *Limited Liability*, *supra* note 3, at 603–08 (elaborating on the historical background of American limited liability for corporations).



Due to this change in corporate ownership of corporate stock, the late 1800s and early 1900s saw an increase in the use of the parent-subsidary structure.<sup>75</sup> As two well-known corporate scholars noted in 1929, businesses began utilizing subsidiaries in the early 1920s for a variety of reasons: to increase financing options; to escape the difficulty, and sometimes impossibility, of qualifying the parent corporation as a foreign corporation in a particular state; to avoid complications involved in the purchase of physical assets; to retain the goodwill of an established business unit (i.e., the parent); to avoid taxes; to avoid cumbersome management structures; and to reap benefits of limited liability.<sup>76</sup>

Today, the limitation on liability extends to the subsidiary's actions whether its liabilities lie in contract or in tort, although the latter developed later.<sup>77</sup> In fact, original conceptions of limited liability were for contract claims only and not for tort actions.<sup>78</sup> Many scholars claim that limited liability was never meant to apply to tort claims.<sup>79</sup> Some have made a persuasive case that limited liability for tortious behavior was not originally intended due to the fact that individuals and communities might suffer such torts but be left without a remedy, whereas limited liability for contracts does not result in the same sort of injustice.<sup>80</sup> Only

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75. See Douglas & Shanks, *supra* note 2, at 193 (noting a recent increase in use of the "subsidiary-parent structure").

76. See *id.* (explaining reasons for using subsidiaries).

77. See Dearborn, *supra* note 2, at 202 (noting that from the inception of limited liability, opponents have focused on liability in contract, not tort).

78. See Blumberg, *Limited Liability*, *supra* note 3, at 600 (remarking that tort liability was actively excluded from statutes imposing statutory liability for corporate debts); Leebron, *supra* note 24, at 1566–67 ("[T]he doctrine of limited liability has its origins in quite a different time and circumstance, when the protection of contractual creditors, not tort victims, was the overwhelming countervailing concern.").

79. See Thompson, *Unpacking*, *supra* note 24, at 4 (acknowledging that owners of closely held businesses or corporations regularly escape liability for torts); Leebron, *supra* note 24, at 1567 (seeking to establish the "valid justifications for limited liability and the implications of those justifications for limiting the tort liability of investors").

80. See Thompson, *Unpacking*, *supra* note 24, at 2 ("Indeed, some believe that corporate law undercuts tort law and represents a nineteenth-century relic that should be swept away in the face of current tort learning."); Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT'L L. 113, 136 (2013) (reasoning

the other member of the contract—who stands to benefit if the contract is completed and thus takes a knowing risk—is hurt when the subsidiary company cannot pay a contractual debt. When a subsidiary engages in a tort that harms non-consenting individuals or communities, and those individuals or communities cannot obtain a remedy from the subsidiary, then they are left without a remedy—all without their consent.<sup>81</sup> In this way, limited liability moves risks to non-consenting parties in a way that limited liability for contract does not.<sup>82</sup> Thus, these scholars argue, limited liability could not have been intended to limit liability for torts.<sup>83</sup>

But limited liability for corporate torts came to be fairly early on in the country's history,<sup>84</sup> apparently under the assumption that as with contracts, limited liability for torts was necessary for economic investment and activity.<sup>85</sup> Professor Daniel Kahan credits an 1835 case of the New York Supreme Court of Judicature (then the highest court in New York) as conferring limited liability to torts.<sup>86</sup> Over the next fifty years, the rule was quickly adopted throughout the United States.<sup>87</sup> The Supreme

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that limited liability can encourage unreasonable risk-taking that leads to tortious harm of third parties who are unable to protect themselves from injury by corporate negligence, unlike creditors who are able to contract).

81. See Daniel R. Kahan, Note, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1090 (2009) (showing how limited liability for shareholders protects the shareholders' assets, but still allows those harmed by the corporation's actions to seek a remedy from the corporation's own assets).

82. See *id.* at 1089–91 (discussing contractual limited liability).

83. See *supra* notes 77–83 and accompanying text (explaining purposes of limited liability in contract versus tort).

84. See Kahan, *supra* note 81, at 1098–101 (recounting the beginnings of tort limited liability, starting in the late 1700s and gaining momentum in the mid-nineteenth century).

85. See Dearborn, *supra* note 2, at 202–03 (describing how extending limited liability to tort creditors is “essential to the functioning of the modern corporate economy”).

86. See Kahan, *supra* note 81, at 1098–99 (“[A]ny person or persons having any demand against the said corporation, may sue any stockholder or stockholders, in any court having cognizance thereof, and recover the same with costs . . . .” (quoting *Heacock & Lockwood v. Sherman*, 14 Wend. 58, 60 (N.Y. Sup. Ct. 1835))

87. See *id.* at 1100–01 (noting the cognizable impact the *Heacock* decision had on other courts because New York was, and remains, a leader in the

Court confirmed the rule in 1885 in *Chase v. Curtis*.<sup>88</sup> Professor Kahan notes that by that time, there was “no doubt that a tort was not a ‘debt’ for which shareholders could be liable absent other legislation.”<sup>89</sup>

Thus, regardless of whether it was originally tended to limit liability for torts, there is no question that the general rule now is that limited liability does protect shareholders—including corporate shareholders—from financial consequences of their subsidiaries’ torts, even where individuals may be left without a remedy.

*C. The Growth of Transnational Corporations Has Not Affected  
Limited Liability of Parent Corporations*

Transnational business, including the number of parent corporations and subsidiaries, has grown exponentially over the last forty years as developing countries have campaigned to attract transnational business, resulting in reduced red tape and regulations.<sup>90</sup> In 1970, there were approximately 7,000 transnational corporations (TNCs) in the world; that number grew to 30,000 by 1990, to 63,000 by 2000, and to 82,000 by

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development of corporate law).

88. See *Chase v. Curtis*, 113 U.S. 452, 462–64 (1885) (affirming limited liability for torts).

89. See Kahan, *supra* note 81, at 1101 (noting one exception, California, whose statutes and constitution used a more comprehensive construction that included both “liabilities” and “debts,” allowing plaintiffs to recover from shareholders for torts).

90. See Ramon Torrent & Federico Lavopa, *Strengthening Enforcement of Core Labour Rights: Can a New Investment Agreement Model Help Multinational Corporations Be More Socially Responsible?*, in CORPORATE SOCIAL RESPONSIBILITY IN LATIN AMERICA: A COLLECTION OF RESEARCH PAPERS FROM THE UNCTAD VIRTUAL INSTITUTE NETWORK 101, 105 (2010) (citing Rhys Jenkins, *Corporate Codes of Conduct. Self-Regulation in a Global Economy*, 2 TECH., BUS. & SOC’Y 1, 1 (2001)) (describing the major shift in the “will and ability” of developing countries to control the activities of multinational corporations (MNCs), and the emphasis on attracting them over regulating them).

2009.<sup>91</sup> Today, there are more than 100,000 multinational corporations with over 900,000 foreign affiliates.<sup>92</sup>

The United Nations Conference on Trade and Development notes that it is difficult to compile data on transnational corporations due to complexities and categorizations of holding companies, and the fact that a subsidiary can be owned by multiple parent corporations.<sup>93</sup> The current World Investment Report discusses Foreign Direct Investment (FDI) to indicate growth and health of the world economy.<sup>94</sup> According to the 2014 report,

FDI outflows from developing countries also reached a record level. Transnational corporations (TNCs) from developing economies are increasingly acquiring foreign affiliates from developed countries located in their regions. Developing and transition economies together invested \$553 billion, or 39 per cent of global FDI outflows, compared with only 12 per cent at the beginning of the 2000.<sup>95</sup>

These statistics demonstrate a rather large jump in the globalization of companies. Such growth brings with it complex legal structures and complex problems. Even with this large increase in the numbers of transnational corporations and FDI, which has arguably led to an increase in business activity in host countries at the expense of communities, limited liability has continued unabated.<sup>96</sup> As this Article notes, given the enormous tax and financial benefits parent corporations receive as a result

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91. U.N. Conference on Trade and Development, *World Investment Report 2009: Transnational Corporations, Agricultural Development and Production*, xxi, U.N. Doc. UNCTAD/WIR/2009 (July 2009).

92. Damiano de Felice, *Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities*, 37 HUM. RTS. Q. 511, 517 (2015).

93. *Transnational Corporations Statistics*, U.N. CONF. ON TRADE & DEV., <http://unctad.org/en/Pages/DIAE/Transnational-Corporations-Statistics.aspx> (last visited Nov. 12, 2015) (on file with the Washington and Lee Law Review).

94. See generally U.N. Conference on Trade and Development, *World Investment Report 2014 Overview: Investing in the SDGs: An Action Plan*, U.N. Doc. UNCTAD/WIR/2014 (2014).

95. *Id.* at ix.

96. See generally *id.* (discussing growth of TNCs and FDI).

of their subsidiaries economic activity in host countries, many have started to question limited liability of parent corporations.<sup>97</sup>

#### *D. Piercing the Corporate Veil Is Difficult*

Perhaps due to the unfairness and dire consequences of limited liability, courts in various states have set forth tests where, if plaintiffs can satisfy certain factors, they can overcome limited liability and hold the shareholders, including corporate parents, liable for damages, commonly referred to as “piercing the corporate veil.”<sup>98</sup> Piercing the corporate veil, as well as its vague and oftentimes inconsistent application, has received significant scholarly attention.<sup>99</sup>

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97. See *supra* note 19 and accompanying text (discussing the tax benefits and advantages of foreign subsidiaries).

98. See Dearborn, *supra* note 2, at 203–04 (outlining the idea of “piercing the corporate veil,” which is the “state common-law exception to a state statutory grant of limited liability”); see also *supra* note 6 and accompanying text (defining “piercing the corporate veil”).

99. See generally Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. ILL. L. REV. 77 (2005); Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001); J. William Callison, *Rationalizing Limited Liability and Veil Piercing*, 58 BUS. LAW. 1063 (2003); Thomas K. Cheng, *Form and Substance of the Doctrine of Piercing the Corporate Veil*, 80 MISS. L.J. 497 (2010); Dante Figueroa, *Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America*, 50 DUQ. L. REV. 683 (2012); Franklin A. Gevurtz, *Piercing Piercing: An Attempt to Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 OR. L. REV. 853 (1997); Mark R. Hinkston, *Piercing the Corporate Veil*, 79 WIS. L. REV. 12 (2006); Rebecca J. Huss, *Revamping Veil Piercing for All Limited Liability Entities: Forcing the Common Law Doctrine into the Statutory Age*, 70 U. CIN. L. REV. 95 (2001); Mark J. Loewenstein, *Veil Piercing to Non-Owners: A Practical and Theoretical Inquiry*, 41 SETON HALL L. REV. 839 (2011); Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99 (2014); Jonathan A. Marcantel, *Because Judges Are Not Angels Either: Limiting Judicial Discretion by Introducing Objectivity into Piercing Doctrine*, 59 U. KAN. L. REV. 191 (2011); John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091 (2009); John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKELEY BUS. L.J. 1 (2010); Douglas C. Michael, *To Know a Veil*, 26 J. CORP. L. 41 (2000); David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305 (2007); David Millon, Response, *The Still-Elusive Quest to Make Sense of Veil-Piercing*, 89 TEX. L. REV. 25 (2009); Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L.

The tests vary from state to state, but generally speaking, the veil can be pierced, resulting in liability for a parent corporation, where the parent misuses the separate corporate form for wrongful purposes and controls the subsidiary to the extent that the subsidiary is a mere instrument of the parent.<sup>100</sup> Courts look to a variety of factors, such as: whether there was a misrepresentation or wrongful conduct; whether there was an intermingling of funds; whether there was a failure to follow corporate formalities; whether there was undercapitalization of the subsidiary; the independence of the subsidiary's board of directors; the existence of common decision-making, common policies, and common policymakers between the parent and subsidiary; and whether the parent and subsidiary share directors and officers.<sup>101</sup>

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529 (2007); Dana M. Muir & Cindy A. Schipani, *The Intersection of State Corporation Law and Employee Compensation Programs: Is it Curtains for Veil Piercing?*, 1996 U. ILL. L. REV. 1059 (1996); Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81 (2010); Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89 (2013); Geoffrey Christopher Rapp, *Preserving LLC Veil Piercing: A Response to Bainbridge*, 31 J. CORP. L. 1063 (2006); Douglas G. Smith, *Piercing the Corporate Veil in Regulated Industries*, 2008 B.Y.U. L. REV. 1165 (2008); Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637 (2005); John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 B.U. L. REV. 445 (2004); Thompson, *supra* note 1; Robert B. Thompson, *Piercing the Veil: Is the Common Law the Problem?*, 37 CONN. L. REV. 619 (2005); Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379 (1999); Jeffrey K. Vandervoort, *Piercing the Veil of Limited Liability Companies: The Need for a Better Standard*, 3 DEPAUL BUS. & COM. L.J. 51 (2004); Gregory Bell, Comment, *Veil Piercing and LLCs: Supporting the Case for a Meaningful, Legislated Standard*, 52 S. TEX. L. REV. 615 (2011); Eric Fox, Note, *Piercing the Veil of Limited Liability Companies*, 62 GEO. WASH. L. REV. 1143 (1994); Richmond McPherson & Nader Raja, *Corporate Justice: An Empirical Study of Piercing Rates and Factors Courts Consider When Piercing the Corporate Veil*, 45 WAKE FOREST L. REV. 931 (2010) (presenting empirical study of the frequency that courts pierce the corporate veil).

100. See *supra* note 99 and accompanying text (noting a multitude of academic articles recognizing problems associated with piercing the corporate veil); see also *supra* notes 5–6 and accompanying text (citing cases that applied limited liability of shareholders to parent corporations).

101. See *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 18 (1996) (listing factors considered in deciding whether to pierce the veil, including “intermingling of corporate and personal funds, undercapitalization of the corporation, failure to observe corporate formalities . . . and the inactivity of other officers and directors” (citation omitted)); *supra* note 5 and accompanying

Some might argue that the current doctrine of “piercing the corporate veil” is sufficient, and that parent companies should only be liable where that test is satisfied. However, many have documented that the test is vague and inconsistently applied by courts.<sup>102</sup> Although it remains an option, the test is typically very difficult to satisfy, and impossible to satisfy without showing that the parent controlled the subsidiary.<sup>103</sup> As described in more detail below, victims of subsidiaries’ violations of human rights norms and environmental disasters have typically not been able to pierce the corporate veil.<sup>104</sup>

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text (citing cases that applied limited liability to parent corporations); Thompson, *supra* note 1, at 1064 (noting in his empirical study that lack of misrepresentation was the factor most cited by courts when refusing to pierce the veil). Thompson further notes that

the group of factors most associated with successful piercing (with the empirical results given in parentheses) included several of the tradition conclusory factors: “instrumentality” (97.33%), “alter ego” (95.58%), and “dummy” (89.74%) . . . . Factors leading less often to a piercing result were under-capitalization (73%) and failure to follow corporate formalities (67%). Still further down the success ladder were judicial citations to domination and control (57%) . . . and overlap of various sorts between the corporation and the shareholder (57%). Other commonalities were less often associated with piercing. Courts pierced only 59% of the time when they listed common offices and only half of the time for common officers. Even less important were common directors (courts pierced only 45% of the time when this factor was mentioned) and common owners (49%). These results suggest that courts are looking beyond the formal overlap of shareholders, directors, and officers to see if businesses show other signs of intertwining between the corporation and the shareholder.

*Id.* at 1064.

102. See Dearborn, *supra* note 2, at 204 (“While a member of the New York Court of Appeals, Judge Cardozo famously said that piercing is ‘enveloped in the mists of metaphor.’ Professors Easterbrook and Fischel elaborated: ‘Piercing’ seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled.” (citing *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926))); see also Easterbrook & Fischel, *supra* note 71, at 110 (evaluating courts’ application of the veil-piercing doctrine); Bainbridge, *supra* note 99, at 96 (“It seems unlikely that veil piercing even inadvertently addresses concerns over negative externalities. As our review of the doctrine demonstrated, the law of veil piercing is remarkably vague.”). For a detailed empirical review of the inconsistencies of the piercing test, see Thompson, *supra* note 1, at 1047–70 (analyzing results of veil-piercing study).

103. See Dearborn, *supra* note 2, at 208 (“If a subsidiary and a parent corporation take simple steps, like keeping adequate minutes of meetings and maintaining separate bank accounts, liability in a piercing claim is unlikely.”).

104. See generally *infra* Part III.

In my view, piercing the corporate veil is simply not an adequate solution; the piercing test does not even take into consideration the unfairness limited liability creates in certain situations, where parent corporations benefit financially at the human rights or environmental expense of an often nonconsenting community.

Parenthetically, the fact that courts have chosen to hold parent companies liable only where plaintiffs can pierce the veil by meeting specific elements, including wrongdoing, rather than considering the benefit corporations receive from subsidiaries and the harm to the victims, may be in line with fault-based notions of tort. However, it is antithetical to those more recently developed areas of tort where the focus is on who should bear the costs of harm, such as product liability,<sup>105</sup> strict liability,<sup>106</sup> and *respondeat superior* liability (the case of employers liable for acts of their employees).<sup>107</sup>

### *III. Host Countries Where Foreign Subsidiaries Operate Often Fail to Provide Adequate Remedies for Victims*

At the risk of stating the obvious, if the victims could bring a claim in their own country and obtain a remedy, there would be no need to bring a suit against a parent company in its home jurisdiction. In the ideal world, all countries would have regulatory and judicial systems sufficient to both prevent large-scale harm to individuals and communities and to provide

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105. See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 217 (4th ed. 2012) (noting that with products liability, the strictness of liability amounted to an instrument of regulatory and compensation policy); *id.* at 228 (noting that in general the manufacturer is probably in the better position to spread the cost of the defects that are not cost-effective to otherwise eliminate).

106. See *id.* at 195–96 (noting two arguments for strict liability: (1) those who injure are in the best position to broadly distribute the costs of non-negligently caused accidents and (2) those who benefit from engaging in the activity should rightly bear the costs associated with the activity and pay for any injuries).

107. See *id.* at 214 (discussing the benefits of vicarious liability, including: (1) the employer is in a better position to make the decisions that affect accident levels; (2) employees will more likely be judgment proof than employers; and (3) the loss-distribution function of strict liability plays a role in supporting this doctrine).



for a remedy in the event that businesses engage in tortious actions. Countries would ensure causes of action exist, that their judiciaries are fair, corruption-free, and functional, and that companies, including foreign-owned subsidiaries have sufficient funds to pay any award of compensation (or are otherwise insured for negligent torts). The problem is that this is often not the case in many countries where foreign-owned subsidiaries operate (host countries), which are often developing countries seeking to attract transnational business.<sup>108</sup>

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108. See Christen Broecker, Note, *"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability*, 41 N.Y.U. J. INT'L L. & POL. 159, 184–85 (2008) (indicating the plight of impoverished states whose great need for investment allows a corporation to affect those states' policies and willingness to address human rights abuses); Brittany T. Cragg, Comment, *Home is Where the Halt Is: Mandating Corporate Social Responsibility Through Home State Regulation and Social Disclosure*, 24 EMORY INT'L L. REV. 735, 751–55 (2010) (suggesting extraterritorial home-state enforcement of transnational corporation (TNC) standards, even though responsibility of monitoring TNCs normally lies with the host state, because TNCs generally have subsidiaries in developing countries and often hold more wealth, and therefore bargaining power, than the countries they are in); Erin Foley Smith, Note, *Right to Remedies and the Inconvenience of Forum Non Conveniens: Opening U.S. Courts to Victims of Corporate Human Rights Abuses*, 44 COLUM. J.L. & SOC. PROBS. 145, 156–58 (2010) (discussing difficulties human rights victims often have in bringing actions against transnational corporations in host states and the reluctance of home states to enforce human rights standards); see also Catherine Boggs, *Project Management: A Smorgasbord of International Operating Risks*, Introduction (Rocky Mountain Mineral Law Inst., Paper No. 13, 2008) (noting that companies, especially those in the extraction industry, who want to do business in developing countries are exposed to a variety of risks commonly characterized by the potential for rapidly changing political regimes, endemic corruption, governments lacking in capacity and expertise, and weak or insufficient legal institutions (citing Operating Risk in Emerging Markets, Economist Intelligence Unit (2006))); Lesley K. McAllister, *On Environmental Enforcement and Compliance: A Reply to Professor Crawford's Review of Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, 40 GEO. WASH. INT'L L. REV. 649, 679–80 (2009) (explaining that the effectiveness of law in developing countries is constrained by factors such as prioritization of economic development goals, inadequate agency resources, inadequate judicial resources, and the weakness of mobilization by the beneficiaries of environmental law); Benjamin Mason Meier, *International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent*, 20 BERKELEY J. INT'L L. 513, 532–33 (2002) (discussing how many African nations fear that "legislation, and resulting lawsuits, could have a chilling effect on beneficial research efforts" and thus have inadequate protective legislation); Skinner, *supra* note 18, at 169–73 (noting that "legislative and judicial protection in underdeveloped and often corrupt host countries is nonexistent" (quoting Samantha Evans, *The Globalization of Drug Testing: Enforcing*

First, many of these host countries do not have sufficient regulations to prevent harm; in fact, as a result of globalization, many have done away with regulations they used to have in order to attract transnational business.<sup>109</sup> Second, there is often a high level of corruption in government and business operations, as well as corruption in the judicial system.<sup>110</sup> In particular, many countries hosting subsidiaries that engage in extraction or other industries have a high potential for human rights abuses, have ineffectual and corrupt judicial systems, or no mechanism for victims harmed by businesses' actions to seek or obtain redress.<sup>111</sup> Third, sometimes there is simply not a statutory or

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*Informed Consent Through the Alien Tort Claims Act*, 19 TEMP. INT'L & COMP. L.J. 477, 479 (2005))).

109. See Skinner, *supra* note 18, at 169–73 (explaining that such “countries’ dependence on investment and inflows of capital in an atmosphere of deregulation has resulted in a race to the bottom in terms of regulation of business activities”); see also Kirshner, *supra* note 20, at 266–67 (noting that certain countries will refrain from making certain activities illegal in order to encourage foreign investment and that multinational corporations can wield their power to avoid punishment even when they engage in wrongdoing).

110. See Skinner, *supra* note 18, at 169–73 (discussing the failings of host countries in holding transnational corporations accountable for their wrongs); see also *supra* note 108 and accompanying text (citing sources describing the challenges faced by host countries, which are often developing countries).

111. See Boggs, *supra* note 108, § 3.0, (describing the challenges corporations face “in countries where bribery and corruption are endemic and appear firmly ensconced as a part of customary business practices”); Kirshner, *supra* note 20, at 266–67 (noting that many host countries often lack functioning legal systems or may not have sufficient resources to bring multinationals to justice). The fact that many host countries involved in the extraction industry have corrupt or ineffective judicial systems, and that human rights are often violated with impunity, is also confirmed by the U.S. Department of State. See *Country Reports on Human Rights Practices for 2013*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. & LAB., <http://www.state.gov/j/drl/rls/hrrpt/2013/> (last visited Nov. 12, 2015) (evaluating human-rights practices in various countries) (on file with the Washington and Lee Law Review). For example, the report for the Democratic Republic of the Congo lists “lack of an independent and effective judiciary; and impunity throughout the country for many serious abuses, including unlawful killings, disappearances, torture, rapes, and arbitrary arrests and detention” as two of the country’s three most severe human rights problems. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. & LAB., DEMOCRATIC REPUBLIC OF THE CONGO 2013 HUMAN RIGHTS REPORT 1 (2013), <http://www.state.gov/documents/organization/220312.pdf>. The report for Nigeria notes that “[i]mpunity remained widespread at all levels of government,” and notes various issues: that political leaders influenced the judiciary, particularly at the state and local levels; that understaffing, underfunding, inefficiency, and corruption continued to prevent the judiciary

common law basis to bring a claim.<sup>112</sup> Fourth, it might be that victims bring a suit against the subsidiary in the host state and receive a verdict, but are then unable to collect due to lack of funds, underfunding, or bankruptcy.

Fifth, due to the complexity of corporate structure, sometimes victims are simply unable to identify which subsidiary is operating in their area and thus, are unable to determine which entity to bring a claim against.<sup>113</sup> What can be even more confusing is that the subsidiary may be using the “logo” of the parent company, leading to confusion about the entity operating in the area and thus responsible, as has been reported to have occurred in Nigeria with Shell (trucks owned by the subsidiary had the Shell logo on the side) in *Kiobel*.<sup>114</sup> Indeed, “a classic obstacle involving litigation against transnational businesses is

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from functioning adequately; that judges frequently fail to appear for trials, often because they were pursuing other sources of income and sometimes because of threats against them; and that there was a widespread perception that judges were easily bribed and litigants could not rely on the courts to render impartial judgments. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. & LAB., NIGERIA 2013 HUMAN RIGHTS REPORT 2, 12–13 (2013), <http://www.state.gov/documents/organization/220358.pdf>. The report on Guatemala notes that “[p]rincipal human rights abuses included widespread institutional corruption, particularly in the police and judicial sectors” and “[t]he judicial system failed to provide fair or timely trials due to inefficiency, corruption, insufficient personnel, and intimidation of judges, prosecutors, and witnesses.” U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. & LAB., GUATEMALA 2013 HUMAN RIGHTS REPORT 1, 7 (2013), <http://www.state.gov/documents/organization/220657.pdf>. The report on Indonesia, known for its garment industry, provides that country-wide corruption, trafficking in persons, child labor, and failure to enforce labor standards and worker rights are issues that plague the country. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUM. RTS. & LAB., INDONESIA 2013 HUMAN RIGHTS REPORT 1 (2013), <http://www.state.gov/documents/organization/220408.pdf>.

112. See Skinner, *supra* note 18, at 227 (explaining how “[c]hoice of law” principles can “create unforeseen barriers to recovery”).

113. See *id.* at 244 (“For example, parent companies over which the courts have jurisdiction may deny any involvement in subsidiaries’ actions, yet often will not produce information regarding the subsidiaries, including information regarding their relationships to the subsidiaries.”); see also Tara van Ho, Comments at the United Nations’ Third Annual Forum on Business and Human Rights (Dec. 3, 2014) (discussing the inability victims in host countries often have in identifying the corporate entity involved in tortious conduct) (notes on file with author).

114. *Kiobel v. Dutch Royal Shell*, 133 S. Ct. 1659, 1662 (2013); see Ho, *supra* note 113 (explaining the inability victims in host countries often have in identifying the corporate entity involved in tortious conduct).

that corporate groups are organized as a network of distinct legal entities, with variable degrees of influence exercised by the parent company over its subsidiaries, sister companies, or joint ventures.”<sup>115</sup>

Sixth, victims may have legitimate fears of retaliation by the business or the members of the community if they bring a claim.<sup>116</sup> Seventh, victims may not have the ability to get the evidence they need to bring a lawsuit; bringing a lawsuit may be too costly; or they may simply be unable to find a lawyer in that country willing to bring a suit in court.<sup>117</sup> All of these factors converge to create a situation where victims are likely to have little recourse in their own countries.<sup>118</sup>

*A. Limited Liability Has Prevented Victims of Foreign  
Subsidiaries’ Violations of Human Rights Norms from Seeking  
and Obtaining a Remedy When Unable to Do So in Host Country*

Limited liability, then, only becomes a problem when victims cannot obtain a remedy against the subsidiary in their own country. In that situation, they are left with bringing suit against a parent corporation in the parent’s jurisdiction as their only form of potential remedy.<sup>119</sup> But limited liability will usually prevent any recovery. This is problematic for any harm, but especially problematic when the harm is great, such as with

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115. Skinner, *supra* note 18, at 215; *see also* Kirshner, *supra* note 20, at 266–67 (explaining how multinational corporations structure themselves to avoid a court’s jurisdiction, and how they can shift financial assets within a corporate group); Ho, *supra* note 80, at 116–17 (“At its core, state corporate law governs the formation and ‘internal affairs’ of discrete legal entities, each with limited liability. It says little about the corporate group as an economic enterprise . . .”).

116. *See* Skinner, *supra* note 18, at 172, 231–34 (discussing how the potential for “unwarranted counterclaims or retaliatory claims” can dissuade victims from litigating human rights issues).

117. *See id.* (noting how the “loser pays” system common in host countries can serve as a barrier to representation).

118. *See id.* (recognizing that “victims . . . would much rather bring cases in the host countries as long as the judiciary was fair, stable, and effective, and the victims felt safe bringing such claims”).

119. *See* Cragg, *supra* note 108, at 754–55 (explaining the two means by which “[a] home state can find liability on its [Transnational Corporations]”).

serious environmental torts or large-scale human rights violations.

These are not theoretical problems. There are many cases of victims harmed by U.S. corporations' subsidiaries' violations of human rights having some or all of their claims dismissed due to the parent corporations' limited liability.<sup>120</sup>

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120. Many advocates report that limited liability has been a significant barrier and that due to the doctrine, they have not brought claims against parent companies in the United States, even though claims against subsidiaries in host countries could not be brought nor had any chance of prevailing. See Skinner, *supra* note 18, at 165, 212–17 (noting how “the author identified the barriers and their impact on accessing judicial remedies primarily through consultations with practitioners . . . government officials, and corporate counsel in the United States, Canada, and, along with Professors Olivier De Schutter and Robert McCorquodale, [several] European countries”); Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, INT’L CORP. ACCOUNTABILITY ROUNDTABLE 29, 61, 79–80, 80 nn.483–84 (Dec. 2013), <http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf> (describing barriers to judicial remedies). Numerous cases provide examples of this difficulty. See, e.g., *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 169–70 (2d Cir. 2015) (finding that plaintiffs were unable to state a claim under the ATS even though there were alleged human rights violations in South Africa); *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 170–71 (2d Cir. 2012) (dismissing claims against Coca-Cola U.S.A. for a subsidiary’s role in Egypt’s illegal expropriation of land for failing to allege allegations to pierce the corporate veil), *cert. denied*, 133 S. Ct. 952 (2013); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 196 (2d Cir. 2010) (Leval, J., concurring) (noting claims should be dismissed against Shell for, *inter alia*, acts of its subsidiary where plaintiffs could not pierce the corporate veil in case involving numerous human rights allegations for oil exploration and production in Nigeria), *aff’d*, 133 S. Ct. 1659 (2013); *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (holding the parent oil corporation not liable in class action suit brought by Burmese citizens where the court determined parent was not alter ego of subsidiary for purposes of jurisdiction); *William v. AES Corp.*, 28 F. Supp. 3d 553, 561–63 (E.D. Va. 2014) (finding plaintiffs could not pierce the corporate veil and hold parent U.S. electricity corporation liable for actions of Cameroon subsidiary—which in some cases destroyed property, caused deaths, and engaged in cruel and inhumane degrading treatment—and dismissing case against subsidiary for lack of personal jurisdiction); *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 270, 274–75 (S.D.N.Y. 2009) (rejecting theories to pierce the corporate veil, but allowing theory of agency to proceed against some defendants, who were ultimately dismissed for failure to overcome *Kiobel*’s presumption of extraterritoriality); *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F. Supp. 2d 633, 681–86 (S.D.N.Y. 2006) (denying motion to amend complaint to allege alter ego and agency theories in case alleging genocide, crimes against humanity, and war crimes, because plaintiff did not proffer enough evidence to pierce the corporate veil between the parent corporation and certain of its subsidiaries), *aff’d*, 582 F.3d 244 (2d Cir. 2009);

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*Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1246–49 (N.D. Cal. 2004) (finding parent oil corporation could not be held liable for alleged human rights abuses in Nigeria based on alter ego theory; although the court allowed the case to proceed on agency theory, the jury ultimately found for Chevron in *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010)); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1354–55 (S.D. Fla. 2003) (finding U.S. based Coca-Cola not liable for the murder of a Columbian employee by a paramilitary group for his efforts to unionize the Coca-Cola bottling plant run by a subsidiary in Columbia because plaintiffs failed to make sufficient allegations to pierce the corporate veil or proceed on agency theory), *aff'd in relevant part*, 578 F.3d 1252 (11th Cir. 2009). Limited liability has also prevented victims from obtaining a remedy for environmental harms. *See United States v. Bestfoods*, 524 U.S. 51, 63–64 (1998) (finding “that when (but only when) the corporate veil may be pierced, may a parent corporation be charged with derivative CERCLA liability for its subsidiary’s actions”). Limited liability has additionally prevented victims from obtaining a remedy for harms caused by acts of subsidiaries in other contexts as well. *See, e.g., Se. Tex. Inns, Inc. v. Prime Hosp. Corp.*, 462 F.3d 666, 680 (6th Cir. 2006) (finding parent corporation not liable for subsidiary’s actions based on allegations of “mere breach of an underlying contract”); *Birbara v. Locke*, 99 F.3d 1233, 1239–40 (1st Cir. 1996) (deciding that parent corporation could not be held liable for subsidiary’s actions when the requirements for piercing the corporate veil were not satisfied); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459–64 (2d Cir. 1995) (finding parent corporation not liable under Delaware or New York law); *In re Birmingham Asbestos Litig.*, 997 F.2d 827, 830 (11th Cir. 1993) (explaining that parent corporations can only be held liable if the corporate veil is pierced under the doctrine of limited liability); *Radaszewski v. Telecom Corp.*, 981 F.2d 305, 311 (8th Cir. 1992) (declining to find parent corporation liable for subsidiary’s actions because doctrine of limited liability “would largely be destroyed if a parent corporation could be held liable simply on the basis of errors in business judgment”); *Edwards Co. v. Monogram Indus., Inc.*, 730 F.2d 977, 983–84 (5th Cir. 1984) (explaining that a parent corporation is not liable for wholly-owned subsidiary actions when not used for fraud or injustice); *Toumazou v. Turkish Republic of N. Cyprus*, 71 F. Supp. 3d 7, 21 (D.D.C. 2014) (explaining that “bare recitations of the requirements for alter-ego liability” are not enough alone to justify piercing the corporate veil). Similarly, there have been additional cases where limited liability has prevented recovery against a parent after a court has rejected argument that subsidiary’s employees engaging in wrongful conduct were not also employees of the parent. *See, e.g., In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.*, 683 F.3d 462, 471 (3d Cir. 2012) (finding that the parent corporation was not a joint employer of subsidiary’s employees); *Brown v. Fred’s, Inc.*, 494 F.3d 736, 739–40 (8th Cir. 2007) (following the “strong presumption that a parent company is not the employer of its subsidiary’s employees” (quoting *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993))); *Corrigan v. U.S. Steel Corp.*, 478 F.3d 718, 724–26 (6th Cir. 2007) (finding the parent corporation not liable as employer of subsidiary’s employees when requirements for piercing the corporate veil not satisfied); *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 943 (7th Cir. 1999) (finding parent corporation not liable for actions of subsidiary when parent failed to provide a strict “Chinese wall” between parent and subsidiary); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1071 (10th Cir. 1998) (finding parent corporation not liable to subsidiary

There is no question that more needs to be done to ensure that victims have protection and recourse in their own countries—the host countries. However, where that is not possible, should the victims be able to bring suit against a parent in the parent’s own jurisdiction? Given these dilemmas, what responsibility should parent companies bear for these harms? Should it matter if the parent creates the subsidiary for the sole purpose of operating in a country that the parent knows has an ineffectual or judicial system or a system that otherwise does not offer a remedy to those harmed, even by the most egregious acts (“high-risk countries”)? In relation to these questions, normative arguments for such parent liability do exist.<sup>121</sup> However, given that limited liability is so entrenched in the law, there must be compelling reasons offered to justify holding a parent corporation liable for acts of its subsidiary in situations where plaintiffs cannot pierce the corporate veil.<sup>122</sup>

#### *IV. Normative Arguments for Corporate Parent Liability*

At this time, there is no clear, binding legal obligation under either domestic or international law requiring that parent corporations be held liable for torts committed by their foreign subsidiaries, even where those torts violate international human

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employees under Title VII for claims of sexual harassment when the only basis for piercing the corporate veil was common ownership); *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 775, 777–78 (5th Cir. 1997) (rejecting claims that the “parent corporation may be held liable for the allegedly discriminatory conduct of its subsidiary” and that the parent and subsidiary were a single employer); *Marzano v. Comput. Sci. Corp.*, 91 F.3d 497, 513–14 (3d Cir. 1996) (following the presumption that the parent company is not the employer of subsidiary’s employees); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) (“The doctrine of limited liability creates a strong presumption that a parent company is not the employer of its subsidiary’s employees, and the courts have found otherwise only in extraordinary circumstances.” (citing *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 980–81 (4th Cir. 1987))).

121. See *infra* Part IV (Normative Arguments for Corporate Parent Liability).

122. See generally Robert W. Hillman, *Limited Liability in Historical Perspective*, 54 WASH. & LEE L. REV. 615 (1997) (describing the historical prevalence of limited liability and its solidified status in modern day law).

rights norms, although there is persuasive authority in the form of the U.N. Guiding Principles, as discussed *infra* in Part V.<sup>123</sup>

One could make a variety of ethical,<sup>124</sup> and thus normative, arguments as to why parent companies that benefit from subsidiaries' activities should not be able to escape liability for the subsidiaries' torts, even where a parent does not control a subsidiary. With regard to human rights violations by subsidiaries of corporations headquartered in the United States, such arguments are particularly persuasive where the parent creates or purchases a subsidiary knowing that it will operate in a country where victims of possible harm have no ability to obtain a remedy.<sup>125</sup>

*A. Parent Corporations Obtain Numerous Benefits from  
Subsidiaries' Operations While Shifting the Risks to  
Non-Consenting Third Parties*

A straight-forward, stand-alone ethical argument can be made that parent corporations should be held liable for the acts of their subsidiaries operating abroad simply where subsidiaries operate in high-risk countries and shift the costs and risks of potential human rights and environmental abuses to non-consenting individuals and communities. The benefits parent corporations receive for actions of subsidiaries are immense. They include, *inter alia*, lower production and labor costs, shareholder income and payouts and preferential tax treatment.<sup>126</sup>

First, many transnational businesses have a foreign subsidiary operating abroad in order to manufacture goods in host countries where labor, manufacturing, and regulatory costs may be lower.<sup>127</sup> Second, like individual shareholders, parent corporations receive foreign subsidiaries' income in the form of

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123. *Infra* Part V.

124. By an ethical argument, I mean a set of principles that dictates right and wrong behavior, often based on morality.

125. See, e.g., Law, *supra* note 22, at 1334–37 (discussing the relationship between human rights and economic growth).

126. See *supra* note 18 and accompanying text (citing sources discussing the advantages of having a foreign subsidiary).

127. See Chow, *supra* note 19, at 816–17 (describing advantages of low labor costs and lenient regulatory regimes).



shareholder dividends.<sup>128</sup> Moreover, U.S. corporations can use foreign subsidiaries to take advantage of the U.S. tax code and reduce taxes they pay on the income through two primary methods: deferral of income of the subsidiaries and transfer pricing manipulation.

Corporations can defer a subsidiary's income to ensure they are taxed in lower tax jurisdictions.<sup>129</sup> For example, the parent can establish and operate a subsidiary in a foreign country and keep the profits abroad, not having to include the subsidiary's income on its taxes until the income is returned to the United States, subject to certain exceptions.<sup>130</sup> Moreover, financial accounting rules allow corporations to treat the temporary tax deferral as though it is permanent as long as they assert that the deferral is indefinite, and that the parent does not intend to return the profits to the United States in the near future.<sup>131</sup>

Transfer pricing principles allow corporate parents to shift income from high tax to low tax jurisdictions through the use of a subsidiary by allowing its various entities to sell or transfer goods or services among each other.<sup>132</sup> For example, a parent corporation might seek to concentrate higher profits for goods sold in a lower tax jurisdiction, and thus, taxes on profits will be lower than if those profits were realized in a high tax

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128. See, e.g., Julie Roin, *The Grand Illusion: A Neutral System for the Taxation of International Transactions*, 75 VA. L. REV. 919, 938 (1989) ("[T]he foreign earnings of a foreign subsidiary, even one owned entirely by U.S. shareholders, are subject only to foreign income tax.").

129. See REUVEN S. AVI-YONAH, U.S. INTERNATIONAL TAXATION: CASES AND MATERIALS 192 (2002) (identifying the tax preference granted to U.S. businesses operating abroad through the deferral of U.S. tax until repatriation as having great import and noting that the privilege of deferral is deepened in accordance with the level of tax in the low tax foreign jurisdiction).

130. See Hanna, *Real Value*, *supra* note 19, at 231–32 (describing this strategy).

131. This is accomplished through the Accounting Principles Board (APB) Opinion 23. See *id.* (noting that APB 23 essentially lowers the U.S. parent's tax rate).

132. See Cym H. Lowell, *Significance of Transfer Pricing for Multinational Enterprises*, in U.S. INT'L TAX: AGREEMENTS, CHECKLISTS AND COMMENTARY ¶ 2.05, ¶ 2.05 (2015) (describing transfer pricing as "a quintessential three-way contest pitting tax administration against tax administration, in bilateral treaty-country matters, with the taxpayer often occupying the position of stakeholder in the middle").

jurisdiction.<sup>133</sup> Similarly, a parent can shift costs to itself or an entity in high-tax countries so that the costs the parent deducts will be maximized.<sup>134</sup>

These financial benefits notwithstanding, the fact that parent corporations benefit financially through the use of subsidiaries may not be enough in and of itself for policymakers to be convinced that a parent corporation, or the society or government of its home country, has an ethical obligation to provide a remedy to those harmed by a subsidiary's action, given that the law treats these subsidiaries as independent actors and that they may in fact be operating independently. Thus, a stronger ethical argument for holding a parent corporation liable exists where, in addition to the numerous financial benefits through the use of a subsidiary, harmed individuals cannot obtain a remedy against the subsidiary (or parent) in the host country. When a subsidiary of a U.S. parent corporation commits serious tort violations, non-consenting individuals and communities are left to bear all the costs. When such victims are not able to seek remedy from the host country, they are left without the ability to seek accountability or compensation for their harm. They, and they alone, absorb the cost of the harm, while the host country, the parent corporation, the U.S. government, and U.S. citizens benefit.

The U.S. public should care when communities are harmed due to acts of foreign subsidiaries while U.S. parent corporations, the U.S. government, and they themselves, indirectly through U.S. government expenditures from the tax revenue, derive such benefits. They probably would if they were more aware of the harm sometimes sustained by such communities. Why should the U.S. public care about the well-being of other societies? Because society is comprised of human beings, most of whom have a moral consciousness. Societies enact legislation that benefits others because, as a collective, human beings care about and sympathize

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133. See MICHAEL J. GRAETZ, *FOUNDATIONS OF INTERNATIONAL INCOME TAX* 400 (2003) (explaining transfer pricing).

134. See Markus Henn, *Tax Havens and the Taxation of Transnational Corporations* 6 (Friedrich Ebert Stiftung, International Policy Analysis June 2013), <http://library.fes.de/pdf-files/iez/global/10082.pdf> (providing examples of tax evasion practices).

with other people.<sup>135</sup> Humans “value the lives and happiness of other humans,” and thus there is reason to refrain from certain actions because they harm others.<sup>136</sup> The famous philosopher David Hume argued that morality was founded in sympathies, and that humans care when they see people suffering; that humans care about other people and have a vested interest in their happiness, and thus have reason to treat them with respect and kindness.<sup>137</sup> In addition, because society is made up of individuals, such individuals have reason to act in ways that benefit society and refrain from acting in ways that are harmful to society.<sup>138</sup> Another ethical argument is simply that a society needs to abide by certain rules with regard to how others are treated, or risk being treated the same way. In this way, an ethical argument arises out of a need to keep public order for individuals’ own happiness.<sup>139</sup>

Moreover, another answer lies in the same reasons the international community sees for ratifying international human rights treaties and other treaties regarding the treatment a country inflicts on its citizenry: the prevention of turmoil and upheaval that results in countries with horrific human rights

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135. See, e.g., Thurstjm, *Writing an Ethical Argument*, HUBPAGES (Oct. 10, 2012), <http://thurstjm.hubpages.com/hub/Writing-an-Ethical-Argument> (last visited Nov. 12, 2015) (“Ethical philosophers have often defined the word ethical as a word used to describe an action that we have a reason to do because we care about and sympathize with other people.”) (on file with the Washington and Lee Law Review); see also DAVID HUME, *A TREATISE OF HUMAN NATURE* 368–69 (L.A. Selby-Bigge ed., 1896) (1739) (discussing compassion generally).

136. Thurstjm, *supra* note 135.

137. See generally Mark Collier, *Hume’s Theory of Moral Imagination*, 27 HIST. PHIL. Q. 255 (2010) (discussing the “hybrid theory of sympathy” articulated by David Hume); HUME, *supra* note 135, at 619 (“[T]he happiness of strangers affects us by sympathy alone . . . which arises from the survey of all those virtues, that are useful to society . . . . These form the most considerable part of morality.”).

138. See JOHN B. STEWART, *OPINION AND REFORM IN HUME’S POLITICAL PHILOSOPHY* 124 (Princeton University Press 2014) (discussing David Hume’s theories on explaining moral behavior).

139. See P.J. PROUDHON, *GENERAL IDEAS OF THE REVOLUTION IN THE NINETEENTH CENTURY* 112 (John Beverley Robinson trans., Dover Publications 2013) (1851) (discussing the nature of the “social contract [that] is an agreement of man with man”).

abuses that in turn lead to disruptions of all societies as violence spills over borders and refugees flee.<sup>140</sup>

*B. The Greater the Harm, the Greater the Argument for Holding Parents Liable: How Much Harm Should Be Required to Hold Parent Corporations Liable?*

The greater the harm and cost to the individual or community, the stronger the ethical argument for ensuring the individuals or communities harmed are entitled to a remedy from the parent corporation (again, assuming such cannot be had in the host country), limited liability notwithstanding. The question arises, then, what should the measurement of harm be in order to remove the protection of limited liability, given the assumption that there is economic benefit to limited liability that may also benefit the community, even if not directly (but sometimes directly, such as where many in the community are directly employed). Should all harm, even minor harm satisfy removing limited liability protection? Should all torts, no matter how serious, satisfy the removal, or just certain torts?

Allowing individuals to seek remedy from parental corporations for minor harms might be so onerous for corporations that it deters them from creating or investing in subsidiaries in host countries that could benefit from the enterprise's presence. However, where the harm caused by a subsidiary's operations is significant, it is more likely to outweigh whatever economic benefits may flow to local communities. Drawing lines for such liability is not an easy task, but policymakers do make these choices and draw these lines routinely (and so do judges). One line that might serve well for determining when parent corporations should be held liable for

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140. See Executive Comm. of the High Commissioner's Programme, U.N. Refugee Agency, *Social and Economic Impact on Large Refugee Populations on Host Developing Countries*, U.N. Doc. EC/47/SC/CRP.7 (Jan. 6, 1997) (indicating the economic, ecological, and social impact refugee influx has on host countries and the international community's response); see also Michael J. Matheson, *The Twelfth Waldemar A. Solf Lecture in International Law*, 161 MIL. L. REV. 181, 188 (1999) ("The breakdown of democratic government and serious human rights abuses had caused heavy refugee flows into neighboring countries and threatened other destabilizing effects in the region.").

acts of subsidiaries are torts that violate international human rights law and serious environmental torts (many of which arguably violate international human rights law). Indeed, as discussed in more detail below, the U.N. Guiding Principles, in counseling toward parental liability, restrict such liability to torts that violate international human rights norms.<sup>141</sup>

There is disagreement, of course, over what constitutes an international human rights norm, especially those norms at the edges.<sup>142</sup> Typically, however, human rights norms are those found in customary international law and in those treaties ratified by a majority of countries. The U.N. Guiding Principles state that businesses are bound by all human rights norms contained in what is referred to as the “International Bill of Human Rights” and “International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”<sup>143</sup> The International Bill of Rights includes the Universal Declaration of Human Rights and the main treaties through which those norms have been codified: the “International Covenant on Civil and Political Rights” and the “International Covenant on Economic, Social and Cultural Rights.”<sup>144</sup> The *Restatement of the Law (Third) the Foreign Relations of the United States* lists violations of customary international law norms as including genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhumane, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights.<sup>145</sup>

Thus, a normative argument can be made that parent corporations should be responsible for harm caused by subsidiaries operating abroad that violate international human rights standards in high-risk countries (those with corrupt or nonfunctioning judiciaries) where harmed individuals and

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141. See *U.N. Guiding Principles*, *supra* note 28, at Part II.A.12 (elaborating on the “responsibility of business enterprises to respect human rights”).

142. See Ho, *supra* note 80, at 123–24 (listing emerging “soft law” norms, recognizing that they are non-binding on states).

143. *U.N. Guiding Principles*, *supra* note 28, at Part II.A.12.

144. *Id.*

145. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (AM. LAW INST. 1987).

communities have no recourse to seek remedy against the subsidiary because of (1) lack of remedial law; (2) underfunding of subsidiary;<sup>146</sup> or (3) difficulty in determining what entity to sue due to structural complexities among the enterprise (the latter being especially problematic where the logo of the parent corporation appears on equipment, such as what occurred with Shell in Nigeria).<sup>147</sup>

*C. Precedent Where Normative Arguments Have Led to Statutory Enactments*

Such normative arguments in other, similar contexts have resulted in a variety of statutes in the United States that impose legal standards not out of concern for economics or legal obligations (or at least not solely), but due to ethical principles.<sup>148</sup> For example, the Leahy Amendment prohibits the sales of arms to countries that engage in human rights violations;<sup>149</sup> the Foreign Corrupt Practices Act provides criminal penalties for businesses that engage in corruption, including for subsidiaries' actions when they engage in bribery and hide it through improper records and accounting;<sup>150</sup> and the United States provides for extraterritorial jurisdiction for certain crimes, such as sexual exploitation of children.<sup>151</sup>

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146. In fact, it is the undercapitalization of subsidiaries that seems to have influenced early courts to hold parents liable for the acts of a subsidiary more than any other factor. See Douglas & Shanks, *supra* note 2, at 214 (noting this phenomenon among courts in the early twentieth century as they developed ways in which to hold parents liable, which ultimately became the theory of piercing the corporate veil).

147. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1659–78 (2013) (discussing corporate parent responsibility for foreign subsidiaries).

148. See *infra* notes 149–151 and accompanying text (providing examples of legal standards based on ethical principles).

149. See Foreign Assistance Act of 1961, 22 U.S.C. § 2378d (2012) (preventing U.S. assistance to nations that have committed a gross human rights violation); NINA M. SERAFINA, CONG. RESEARCH SERV., 7-5700, “LEAHY LAW” HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW (2014) (providing an in depth analysis of the “Leahy Law” and related policy concerns).

150. See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2012) (prohibiting corrupt practices in foreign trade).

151. See 18 U.S.C. § 1596 (2012) (granting extraterritorial jurisdiction over

With regard to business and human rights in particular, there have been several legislative enactments in recent years to ensure that companies perform due diligence with regard to their supply chain or with regard to conflict minerals.<sup>152</sup> This includes § 1502 of the Dodd Act, requiring companies to report to the SEC efforts on due diligence on their supply chain and custody regarding conflict minerals;<sup>153</sup> a regulation that provides that those companies who do business in Burma file reports with the State Department regarding human rights;<sup>154</sup> and California's enactment of the Transparency in Supply Chains Act, where companies have to disclose efforts to ensure the elimination of human trafficking and slavery in their supply chain.<sup>155</sup> There are also various bills and legislation pending, including a federal version of California's law, entitled the Business Supply Chain Transparency on Trafficking and Slavery Act of 2014.<sup>156</sup> The same concerns that have led to such due diligence regarding supply chains and contractors should also apply to foreign subsidiaries from which U.S. parents gain enormous benefits.

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18 U.S.C. § 1591, which pertains to sex trafficking of children by force, fraud, or coercion); *id.* § 2423(c) (prohibiting citizens or lawful permanent U.S. residents from raping, sexually molesting a child, or paying a child for sex while traveling in another country); *id.* § 2423(d) (making it a crime to help arrange, induce, procure, or facilitate the travel of a person who has the intent to engage in illicit sexual conduct); *id.* § 2251(c) (making it a crime to produce child pornography in foreign countries if they import or intend to import child abuse images into the United States); *id.* § 2260(a) (same); *Citizen's Guide to U.S. Federal Law on the Extraterritorial Sexual Exploitation of Children*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-extraterritorial-sexual-exploitation-children> (last updated July 6, 2015) (last visited Nov. 12, 2015) (outlining U.S. laws that pertain to the sexual exploitation of children) (on file with the Washington and Lee Law Review).

152. See *infra* notes 153–156 (providing examples of recent legislative enactments regarding company supply chains).

153. See 17 C.F.R. § 240.13p-1 (2015) (indicating the specific requirements for reporting); *id.* §§ 240, 249b (implementing § 1502 of the Dodd–Frank Wall Street Reform and Consumer Protection Act).

154. See 31 C.F.R. § 537.530 (2015) (outlining State Department reporting requirements for new investment in Burma).

155. See CAL. CIV. CODE § 1714.43 (West 2015) (requiring certain sellers and manufacturers to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains).

156. See H.R. 3226, 114th Cong. (2015) (promoting greater transparency and company disclosures regarding steps taken to identify and address conditions of forced labor, slavery, human trafficking, and child labor within supply chains).

*V. United Nations Guiding Principles on Business and Human Rights*

As mentioned earlier, there is no binding authority as of yet requiring parent corporations to remedy the harms caused by their foreign subsidiaries' violations of human rights norms. However, there is persuasive legal authority for requirements in the form of the U.N. Guiding Principles.<sup>157</sup> As discussed herein, that parent corporations should both engage in human rights due diligence for their entire business enterprise and provide a remedy for victims harmed by their subsidiaries' actions, especially those operating in high-risk countries where the victims cannot otherwise obtain a remedy, is supported U.N. Guiding Principles for Business and Human Rights.<sup>158</sup> The U.N.'s Human Rights Council endorsed the Guiding Principles in 2011,<sup>159</sup> and thus the Guiding Principles should be seen as persuasive, if not obligatory, to all U.N. Human Rights Council members.<sup>160</sup> In addition, some of these principles may at some point find their way into a treaty regarding business and human rights,<sup>161</sup> thereby becoming obligatory for those countries that

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157. See *U.N. Guiding Principles*, *supra* note 28, at 1 (noting that the Principles do not create any new international law obligations). The very name "Guiding Principles" also signals they are not binding.

158. See *id.* (outlining United Nations principles on business and human rights).

159. *Id.*; Human Rights Council Res. 17/4, U.N. Doc. A/HRC/17/L.17/Rev.1 (June 16, 2011) (discussing human rights, transnational corporations, and other business enterprises).

160. The author could not locate any specific authority regarding the legal effect of U.N. Human Rights Council Resolutions. However, as an analogy, the U.S. Supreme Court found that the *Handbook on Procedures and Criteria for Determining Refugee Status* issued by the U.N. High Commissioner for Refugees was persuasive authority for interpreting the term "Refugee" in the U.N. Refugee Convention. See *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 439 (1987) (providing support for the United Nations handbook on determining refugee status); see also 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) (citing authority that U.N. resolutions are not binding, but can be viewed as expressions of general principles of law that are obligatory). Although it is true that resolutions of the United Nations Human Rights Council may not have the same effect as those of the United Nations General Assembly, such resolutions likely carry some persuasive, if not obligatory, effect.

161. Such a treaty is being actively discussed and promoted after the United



ratify it. Even if the United States does not ratify such a treaty, it is possible that countries where subsidiaries operate will, which might lead to arguments that parents of such subsidiaries are thus bound by any treaty.<sup>162</sup> Moreover, the obligations the treaty contains may at some point “ripen” into customary international law by which the United States will be bound.<sup>163</sup>

The U.N. Guiding Principles are divided into three “pillars”: (1) the State duty to protect human rights; (2) the corporate responsibility to protect human rights; and (3) ensuring access to remedy for victims of human rights abuses.<sup>164</sup> It is important to

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Nations Human Rights Council passed a resolution in June 2014 to establish a working group to prepare a treaty imposing international human rights legal obligations on transnational corporations. *See* Human Rights Council Res. 26/9, U.N. Doc A/HRC/26/L.22/Rev.1, ¶ 1 (June 26, 2014) (elaborating on an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights). Many think it is inevitable. *See, e.g.,* Salil Shetty, *Corporations Have Rights. Now We Need a Global Treaty on Their Responsibilities*, THE GUARDIAN (Jan. 21, 2015), <http://www.theguardian.com/global-development-professionals-network/2015/jan/21/corporations-abuse-rights-international-law> (last visited Nov. 12, 2015) (supporting the development of an international treaty on business and human rights) (on file with the Washington and Lee Law Review); Puvan Selvanathan, *The Business and Human Rights Treaty Debate: Is Now the Time?*, THE DUKE HUMAN RIGHTS CENTER AT THE KENAN INSTITUTE FOR ETHICS 1–3 (2014), <http://kenan.ethics.duke.edu/humanrights/files/2014/11/Business-and-Human-Rights-Treaty-Is-Now-the-Time.pdf> (describing the evolving obligations of businesses to respect human rights); *UN Business & Human Rights Framework: More Action Required at National and International Level to Stop Human Rights Abuses by Business*, CIDSE (Dec. 2014), <http://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/un-business-human-rights-framework-more-action-required-at-national-and-international-level-to-stop-human-rights-abuses-by-business.html> (last visited Nov. 12, 2015) (noting that “[the] process towards an international legally binding instrument, if thoughtfully developed, could provide an important additional tool to ensure that businesses respect human rights”) (on file with the Washington and Lee Law Review). In addition, this topic was actively debated at the Third Annual Forum on Business and Human Rights, December 1–3, 2014, in Geneva, Switzerland.

162. *See infra* note 163 and accompanying text (outlining ways customary international law could potentially bind the United States).

163. *See U.N. Guiding Principles, supra* note 28 (outlining the currently nonbinding United Nations principles on business and human rights); *see also* *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) (citing H.R. REP. NO. 367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 846) (explaining that the ATS “should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law”).

164. *See generally U.N. Guiding Principles, supra* note 28 (outlining United

note that the Guiding Principles, which outline obligations of both States and businesses, apply “to *all business enterprises*, both transnational and others, *regardless of their size, sector, location, ownership and structure*.”<sup>165</sup>

Pillar Two, which addresses businesses’ responsibility, primarily discusses businesses’ obligation to engage in human rights due diligence to ensure all parts of its enterprise are assessing human rights risks, effectively communicating with affected populations, and engaging in due diligence disclosures.<sup>166</sup> Principle 14 reiterates the General Principle that the responsibility of *business enterprises* to respect human rights applies to *all enterprises* regardless of their size, sector, *operational context, ownership and structure*.<sup>167</sup>

Although Principle 14 arguably applies primarily to the due diligence obligations that follow in Principles 17–22, Principle 22 of the second pillar specifically addresses remedies.<sup>168</sup> It states that where *business enterprises* identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.<sup>169</sup> Its Commentary notes: “Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights

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Nations principles on business and human rights).

165. See *id.* at princs. 17–35 (emphasis added) (offering United Nations principles on business and human rights).

166. See *id.* (defining United Nations guiding principles on business and human rights).

167. See *id.* at princ. 14 (discussing the responsibility of business enterprises to respect human rights, regardless of enterprises’ size, sector, operational context, ownership and structure). Principle 14 does note, however, that the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprises’ adverse human rights impacts. *Id.* The commentary to Principle 14 further acknowledges that how a business enterprise meets its obligations depends on its size, on the severity of the violation and harm, and the “extent to which it conducts business through a corporate group or individually.” *Id.* Yet the commentary states: “[h]owever, the responsibility to respect human rights applies fully and equally to all business enterprises.” *Id.*

168. See *id.* at princs. 15–25 (defining United Nations guiding principles on business and human rights).

169. See *id.* at princ. 22, cmts. (discussing business enterprise remediation guidelines).

requires active engagement in remediation, by itself or in cooperation with other actors.”<sup>170</sup>

The Guiding Principles, in the third pillar, also provide that States should ensure remedies, including judicial remedies, for their businesses’ human rights violations.<sup>171</sup> Although Principle 25, the first Principle in Pillar Three applies only to States where abuses occur in their territory or jurisdiction in requiring such to have effective remedies,<sup>172</sup> other sections of the Principles arguably apply to States where the parent is located.

Principle 26 of the third pillar—which discusses remedies—provides that States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical, and other relevant barriers that could lead to a denial of access to remedy.<sup>173</sup> The Commentary to Principle 26 then notes that “legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise,” *inter alia*, (1) by the way in which legal responsibility is attributed among members of a corporate group in a way that facilitates the “avoidance of appropriate accountability;” and (2) where claimants face a denial of justice in a host State and *cannot access home State courts* regardless of the merits of the claim.”<sup>174</sup>

When read in totality, it seems apparent that, although perhaps not clearly stated, the Guiding Principles require that countries where parents of business enterprises are located, such as the United States, ensure that victims receive a remedy for harm caused by any subsidiary of the business enterprise when

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170. *Id.* at princ. 22, cmts.

171. *See id.* (outlining Pillar Three of the United Nations Guiding Principles).

172. *See id.* at princ. 25 (“As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”).

173. *See id.* at princ. 26 (discussing appropriate steps States should take to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses).

174. *Id.* at princ. 26, cmts. (emphasis added).

they cannot otherwise obtain a remedy in their own countries.<sup>175</sup> Although such a remedy can include a grievance procedure that meets certain criteria, the Guiding Principles are clear that a remedy must also include ultimate resort to a judicial remedy.<sup>176</sup>

# *VI. Approaches to Holding Corporate Parents Liable for Foreign Subsidiaries' Human Rights Violations*

As discussed in the introduction, scholars and commentators have advanced primarily three approaches to holding parent corporations liable for acts of the subsidiaries where victims are not able to pierce the corporate veil or otherwise establish that the subsidiary was acting as an agent for the parent.<sup>177</sup> These approaches include enterprise liability, the due diligence approach, and the tort-based parental duty-of-care approach.<sup>178</sup>

## *A. Enterprise Liability*

One approach is enterprise liability—where an entire corporate enterprise is liable for harm that any of its subsidiaries or sibling companies caused.<sup>179</sup> In this paradigm, there is no limited liability at all for the enterprise and its various companies, including parent corporations.<sup>180</sup> Notably, some have simply argued for unlimited liability for all torts based on the fact that limited liability was never intended to apply to torts.<sup>181</sup> With

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175. See *id.* at princs. 1–31 (outlining guiding principles on business and human rights).

176. See *id.* at princ. 29, cmts. (“They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.”).

177. See *infra* Parts VI.A–C (discussing the concepts of enterprise liability, the due diligence approach, and the tort-based parental duty of care).

178. See *infra* Parts VI.A–C and accompanying text (discussing the concepts of enterprise liability, the due diligence approach, and the tort-based parental duty of care).

179. See *supra* notes 26–28 and accompanying text (discussing enterprise liability).

180. See *supra* notes 26–28 and accompanying text (discussing arguments for and against enterprise liability).

181. See Hansmann & Kraakman, *supra* note 24, at 1916–19 (discussing

unlimited liability, all shareholders, even individual shareholders, face liability for a company's acts.<sup>182</sup> This approach is distinguished from enterprise liability, where only corporate shareholders can be liable.<sup>183</sup> Because unlimited liability applies even to individual shareholders and has no restrictions whatsoever, it is, in the opinion of the author, simply too unlikely to gain traction as a policy and is not feasible. Thus, I do not explore this approach in any detail.

The notion of enterprise liability has been around for some time. It first began appearing in the literature in the early 1900s, arising initially as a tort concept that differed from the fault approach, and not necessarily addressing issues of limited liability of parent corporations.<sup>184</sup> The term "enterprise liability" is credited to Albert Ehrenzweig who used it in the book *Negligence Without Fault* in 1951.<sup>185</sup>

In 1947, there was a substantial scholarly piece by Professor Adolf Berle, Jr. concerning enterprise liability in which he argued that creditors ought to be able to recover from any member of a group of corporations that constituted an "enterprise."<sup>186</sup> There

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enterprise liability theory in light of arguments on whether limited liability or unlimited liability is the best liability regime for corporations); *infra* Part IV (advocating for corporate liability over individual liability).

182. See Leebron, *supra* note 24, at 1574–78 (considering the effect unlimited liability would have on shareholders).

183. See Thompson, *Unpacking*, *supra* note 24, at 15–16 (explaining that early enterprise liability assumed limited liability for shareholders).

184. See, e.g., Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 273 (1929) (explaining "the 'costs of affording . . . protection can be cared for as part of the costs of the enterprise, and more than all . . . the risk when it results in hurt . . . can best be borne and absorbed' by the enterprise."). For a detailed and helpful description of the early notions of enterprise liability in tort, see Edmund Ursin, *Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability*, 50 SAN DIEGO L. REV. 537 (2013).

185. ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (The Regents of the Univ. of Cal., 1951) (currently out of print), *reprinted in* 54 CAL. L. REV. 1422, 1424–25 (1966). Before 1951, Leon Green was considered to be influential in the early notions of the theory with regard to tort reform in the 1920s and 30s. See Ursin, *supra* note 184, at 559, 572–58 (discussing at length Green's role in the development of the theory).

186. See Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 344 (1947) (discussing the theory of enterprise entities and their liabilities).

have been a handful articles since—although not all discuss “enterprise liability” as that term is used in this Article—concerning whether a victim of a tort can recover from a subsidiary’s parent.<sup>187</sup>

Enterprise liability historically, and typically, requires that the parent have functional, or behavioral, control over the subsidiary but perhaps not the same amount of control required to pierce the corporate veil.<sup>188</sup> This type of enterprise liability—requiring control—has been the norm thus far in those few situations where policymakers have codified enterprise liability and in the rare circumstances where courts have imposed it,<sup>189</sup> and it is the type nearly all scholars who have discussed enterprise liability advocate.<sup>190</sup> Some statutes and various court cases have seemingly relied on this type of enterprise liability.<sup>191</sup>

Because the courts use control as a factor, it is often difficult to determine if the court is simply employing a relaxed standard of piercing the corporate veil or employing enterprise liability.<sup>192</sup>

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187. See *supra* note 24 and accompanying text (providing examples of articles discussing corporate liabilities); see also Victoria C. Dawson, *Who is Responsible When You Shop Until You Drop?: An Impact on the Use of the Aggressive Marketing Schemes of “Black Friday” Through Enterprise Liability Concepts*, 50 SANTA CLARA L. REV. 747, 765–66 (2010) (discussing the concept of enterprise liability); Virginia E. Nolan & Edmund Ursin, *Enterprise Liability Reexamined*, 75 OR. L. REV. 467, 467–68 (1996) (examining the public’s misconception of the concept of enterprise liability); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985) (discussing the concept of enterprise liability).

188. See Dearborn, *supra* note 2, at 245–48 (analyzing enterprise liability and its focus on control factors, which stem from piercing the corporate veil theory).

189. See *id.* at 231–45 (describing specific areas of law where courts have relied on enterprise liability); Blumberg, *Corporate Entity*, *supra* note 26, at 288–91 (explaining that the “piercing the veil jurisprudence” is evolving).

190. See Dearborn, *supra* note 2, at 247, 247 n.320 (noting that “there is much agreement among commentators that a ‘control’ approach is the preferred form of liability” and identifying those commentators, including Professor Blumberg, who advocate control as a factor in enterprise liability).

191. See *id.* at 231–45 (explaining instances where courts have relied on enterprise liability); Blumberg, *Corporate Entity*, *supra* note 26, 329–39 (analyzing statutory and judicial interpretations of the definition of “control”).

192. See Dearborn, *supra* note 2, at 252–54 (discussing factors used to determine corporate liability); Blumberg, *Increasing Recognition*, *supra* note 26, at 329–30 (“In most decisions, however, the attribution to a parent corporation

In nearly all cases where a court has employed enterprise liability, the court has found the parent controlled the subsidiary to some extent.<sup>193</sup> In other instances, courts have found parental liability under certain statutes to achieve the statute's regulatory goals where the statute does not otherwise prohibit it; in these instances, however, courts simply appear to apply a "looser" test of piercing of the corporate veil.<sup>194</sup>

One of the most recent articles discusses enterprise liability in the context of the subject here—violations of human rights norms by subsidiaries operating abroad.<sup>195</sup> In the Comment, Meredith Dearborn advocates for a second type of enterprise liability, general enterprise liability, which she terms "true enterprise liability,"<sup>196</sup> that does not require functional control of the subsidiary. With this type of enterprise liability, ownership of subsidiaries in an integrated economic unit could result in overcoming limited liability of a parent corporation in certain circumstances.<sup>197</sup> She would allow enterprise liability where there is an economically integrated enterprise and where there is a mass tort, a human rights violation, or environmental harm.<sup>198</sup>

### 1. *Why Enterprise Liability Is Not the Best Approach*

Although enterprise liability could be a viable approach, this Article does not adopt enterprise liability as a solution for several

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or other affiliated corporation of legal consequences arising from the acts of its subsidiary or affiliate has rested on a court's relaxation of the rigorous requirements for 'piercing the corporate veil' under traditional doctrines of entity law.").

193. See Dearborn, *supra* note 2, at 231–45 (explaining recent trends in court outcomes pertaining to corporate entities).

194. See *id.* at 234–36 (discussing that courts have imposed broad liability to corporations under the Comprehensive Environmental Response, Compensation and Liability Act because of the Act's broad legislative purpose); Blumberg, *Increasing Recognition*, *supra* note 26, at 329–35 (examining instances where courts have disregarded the corporate form to impose liability).

195. See generally Dearborn, *supra* note 2.

196. *Id.* at 247.

197. See *id.* at 252–54 (explaining that the parent corporation should be liable for its subsidiaries when the parent has economic control).

198. See *id.* at 251–52 (arguing that courts should use a two-pronged test for enterprise liability).

reasons. First, enterprise liability as typically discussed and applied requires a showing of functional, or behavioral, control over the subsidiary.<sup>199</sup> In this way it is not all that different from piercing the corporate veil.<sup>200</sup> Second, similar to piercing the corporate veil, requiring control can actually serve as a disincentive for parents to maintain due diligence over subsidiaries' actions—they will want to distance themselves as much as possible—and any approach should create an incentive for parent corporations to assess risks and do all in their power to prevent abuses.<sup>201</sup> Third, given that corporate entities are complex and that the enterprise maintains control over documents, being able to determine, let alone establish, control would prove daunting and simply too burdensome for most victims.<sup>202</sup> Fourth, there is no consistent definition of how much control a parent would need to assert over the subsidiary.<sup>203</sup> Finally, this type of enterprise liability does not take into account those situations where the parent, although not in functional control of the subsidiary, still financially benefits from the subsidiary's actions at the expense of non-consenting victims.<sup>204</sup>

Enterprise liability based simply on financial control of subsidiaries or related companies with no limitations whatsoever<sup>205</sup>—such as requiring that the subsidiary be part of an integrated business rather than simply an investment; limiting liability to certain torts; or limiting it to situations where the victims cannot otherwise obtain a remedy—is also not feasible. It is simply too broad. This approach would hold parent

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199. *See id.* at 231 (noting that enterprise liability in the United States has involved control).

200. *See id.* at 211 (providing that enterprise liability sometimes may involve horizontal piercing of the corporate veil).

201. *See id.* at 249 (describing corporate control over subsidiaries and incentives to prevent harms).

202. *See id.* at 246–51 (discussing problems with control-based enterprise liability).

203. *See id.* at 247–48 (explaining the problems that arise when examining corporate parent control).

204. *See id.* at 202 (noting that the purpose of limited liability did not include involuntary victims of corporate misconduct but victims exist nonetheless).

205. *See id.* at 251–53 (describing enterprise liability based simply on financial benefits and control).



corporations liable for subsidiaries' acts regardless of the situation or location of the subsidiary.<sup>206</sup> In being too broad, it offers a solution to situations that may not be problematic at all, such as where victims have the ability to seek redress from the subsidiary in a court in the host country where the victims live. In addition, because of its broadness, it is questionable whether this approach's benefits outweigh the risks of unanticipated economic and financial repercussions.

Enterprise liability in the situation Dearborn advocates, where the subsidiary is part of an integrated business enterprise (i.e., it exists or was created to further the parent's business goals and its business is related to the enterprise's business), and where the subsidiary is involved in a mass tort or human rights violation, is a far better solution for the reasons discussed above.<sup>207</sup> However, her approach, while sharing characteristics of the approach this Article advocates, is also too broad.<sup>208</sup> Similar to the general financial control-based enterprise liability,<sup>209</sup> it is not limited to situations where the victims cannot otherwise obtain a remedy from the subsidiary, either due to underfunding or due to the host country's ineffectual judiciary.<sup>210</sup>

Second, although unrelated to the issue of limited liability itself, neither her policy recommendations nor the broader enterprise liability solutions address the more recent limitations that the Supreme Court imposed in *Kiobel*.<sup>211</sup> *Kiobel* is a barrier to victims who seek a remedy from a corporate parent for violations by a foreign subsidiary in the host country, given that such violations would be unlikely to overcome the presumption of extraterritoriality that *Kiobel* imposed, unless the victims can

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206. *Id.*

207. See Dearborn, *supra* note 2, at 254–56 (discussing enterprise liability in mass tort or human rights violation scenarios).

208. See generally *id.*

209. See Blumberg, *Increasing Recognition*, *supra* note 26, at 300–01 (explaining that courts have adopted enterprise liability when control is accompanied by other critical factors, including financial interdependence).

210. See Dearborn, *supra* note 2, at 252 (proposing a two-pronged test based on enterprise economic control and a tort creditor requirement).

211. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (concluding that the ATS does not permit claims against corporations for acts occurring outside the United States without “sufficient force to displace the presumption against extraterritorial application”).

establish that decisions, which led to the harm, were made in the United States.<sup>212</sup> Thus, to overcome *Kiobel*, any solution will need to include a statutory enactment providing for extraterritorial effect.

### B. The Due Diligence Approach

The due diligence approach imposes a duty on parent companies to monitor the activities—especially human rights activities—of their subsidiaries, consistent with the emerging notion that parent companies have a due diligence obligation to ensure that human rights are complied with within their sphere of influence.<sup>213</sup> Some scholars and advocates have begun to argue for this approach,<sup>214</sup> and I suggested such an approach in a recent Article discussing approaches to overcoming barriers to accessing justice for U.S. corporation subsidiaries' extraterritorial human rights abuses.<sup>215</sup> As discussed above, the U.N. Guiding Principles also devote substantial space to companies' due diligence

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212. See *id.* at 1677–78 (Breyer, J., concurring) (analyzing the corporation's contact in the United States as consisting of an office in New York, owned by an affiliate company, and merely being alleged to help the wrongdoers and agreeing with the majority that holding the corporation liable would be “too much”). There has been a very recent court decision allowing cases under the ATS to proceed based on amended complaints, citing substantial allegations of funding and decision-making in the United States by a U.S. corporation. See *generally* *Doe v. Exxon*, Order, *Doe I v. Exxon Mobil Corp.*, No. 01-cv-1357 (D.D.C. July 6, 2015), ECF No. 512. For a list of the few cases the courts have thus far allowed to proceed under *Kiobel*, usually because of some activity in the United States, and a list of the numerous cases that the courts have dismissed in light of *Kiobel*, as of December 2014, see Skinner, *supra* note 18, at 199–200.

213. See *U.N. Guiding Principles*, *supra* note 28, at 17–24 (outlining United Nations principles on business and human rights); see also *supra* note 18 and accompanying text (discussing corporate liability and the Alien Tort Statute); OLIVIER DE SCHUTTER, ANITA RAMASASTRY, MARK B. TAYLOR & ROBERT C. THOMPSON, HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES 7–8 (2012), <http://icar.ngo/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf> (explaining that corporations should use human rights due diligence to address risks and that States should regulate corporations to ensure they conduct human rights due diligence).

214. See *supra* note 213 and accompanying text (providing sources discussing international accountability).

215. See Skinner, *supra* note 18, at 260–61 (arguing for adoption of enterprise liability in the United States when corporations have engaged in human rights abuses abroad).

obligations of their subsidiaries and related companies.<sup>216</sup> The Organisation for Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises also advocates for this approach.<sup>217</sup>

*1. France and Switzerland Are Moving Toward Holding Parent Corporations Liable for the Acts of Their Subsidiaries Where They Fail to Engage in Due Diligence*

At least two countries are already moving in the direction of creating liability on the part of the parent company or entire corporate enterprise for subsidiaries' extraterritorial human rights abuses in certain situations under a due diligence approach.<sup>218</sup> For example, as discussed above, a bill has been introduced in France that would create a presumption of parent company liability for subsidiaries' torts abroad that the parent corporations can overcome if they engage in human rights "due diligence" regarding acts of those subsidiaries.<sup>219</sup> It is unclear from the bill, however, exactly what types of actions constitute due diligence, other than "all necessary and reasonable measures."<sup>220</sup>

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216. See *supra* Part V (reviewing the United Nation's approach); *U.N. Guiding Principles*, *supra* note 28, at princs. 17–22 (discussing United Nations guidelines on business and human rights).

217. See ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES ON MULTINATIONAL ENTERPRISES 22 (2011) (stating that the Guidelines "extend to enterprise groups" and that "[c]ompliance and control systems should extend where possible to these subsidiaries").

218. See *Mandatory Human Rights Due Diligence: Developments in Europe*, CORE (Jan. 2015), <http://corporate-responsibility.org/mandatory-human-rights-due-diligence-developments-in-europe/> [hereinafter CORE] (last visited Nov. 12, 2015) (discussing campaigners in France and Switzerland lobbying to require corporations to conduct human rights due diligence) (on file with the Washington and Lee Law Review).

219. See Skinner, *supra* note 18, at 260–61 (explaining France's bill). On March 31, 2015, a version of the bill was approved. CORE, *supra* note 218. A provision in the original bill that would have required the company to prove that it was not in control of the activities of its subsidiaries and subcontractors was removed from the final text. *Id.* The law will now apply only to companies employing more than 5,000 people in France or 10,000 globally. *Id.*

220. See CORE, *supra* note 218 (comparing the draft bill and the final bill and noting the final bill is weaker than the draft bill).

In addition, on September 1, 2014, the Foreign Affairs Committee of Switzerland's Lower Chamber, by motion, called for Swiss companies operating abroad to institute human rights and environmental due diligence.<sup>221</sup> The motion required that Switzerland's Federal Council "draft a law to implement this requirement—if possible in the context of the upcoming stock corporation law reforms."<sup>222</sup>

The Federal Council recommended rejecting the motion on the grounds that it would require more than the current European Union regulations, which do not mandate human rights due diligence, and because it would place Switzerland at a disadvantage as a business destination.<sup>223</sup> The debate on the motion in the Lower Chamber was postponed to the 2015 spring session in Parliament.<sup>224</sup> In March 2015, the Committee's motion was narrowly defeated in the Lower Chamber.<sup>225</sup> However, a coalition in Switzerland is gathering signatures for a referendum to be submitted that, similar to the French bill, would require larger companies to engage in due diligence, risk assessment, development of measures to prevent possible human rights violations and environmental damages, and comprehensive reporting on such policies and actions.<sup>226</sup>

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221. See PUBLIC EYE, BERN DECLARATION & GREENPEACE, BUSINESS AND HUMAN RIGHTS (2015), [http://publiceye.ch/wp-content/uploads/2014/10/Factsheet\\_BusinessHuman-Rights\\_EN\\_DEF.pdf](http://publiceye.ch/wp-content/uploads/2014/10/Factsheet_BusinessHuman-Rights_EN_DEF.pdf) [hereinafter BUSINESS AND HUMAN RIGHTS] (describing developments in Switzerland to improve in corporate social responsibility).

222. *Id.*; see *Foreign Affairs Committee Motion 14.367*, THE FED. ASSEMBLY—THE SWISS PARLIAMENT, [http://www.parlament.ch/e/suche/pages/geschaefte.aspx?gesch\\_id=201436-71](http://www.parlament.ch/e/suche/pages/geschaefte.aspx?gesch_id=201436-71) (last visited Nov. 12, 2015) ("Mise en oeuvre du rapport de droit comparé du Conseil fédéral sur la responsabilité des entreprises en matière de droits humains et d'environnement.") (on file with Washington and Lee Law Review).

223. See BUSINESS AND HUMAN RIGHTS, *supra* note 221 (describing the Council's desire to appease corporations who use Switzerland as a home state).

224. *Id.*

225. See Press Release, Swiss Coal. for Corp. Justice, Swiss Parliament Motion for Mandatory Human Rights Due Diligence Narrowly Turned Down, Conservative Backlash Blocks Increased Corporate Accountability (Mar. 13, 2015), [http://www.corporatejustice.ch/media/medialibrary/2015/03/150311\\_sccj\\_press\\_release\\_-\\_swiss\\_vote\\_on\\_mandatory\\_human\\_rights\\_due\\_diligence.pdf](http://www.corporatejustice.ch/media/medialibrary/2015/03/150311_sccj_press_release_-_swiss_vote_on_mandatory_human_rights_due_diligence.pdf) [hereinafter Swiss Parliament Motion Failed] (explaining that the motion for increased corporate accountability failed on a re-vote, losing by nine votes).

226. See Press Release, Swiss Coal. of Corp. Justice, Global Business? Global

The due diligence approach is appealing because it offers something similar to the status quo of limited liability but incentivizes parent corporations to monitor closely and work with subsidiaries to prevent their engaging in or aiding and abetting human rights violations, rather than incentivizing distance to prevent an argument for piercing the corporate veil, or for enterprise liability when such liability depends on control.<sup>227</sup>

The due diligence approach would be better than what currently exists and would be a step in the right direction for the reasons stated above.<sup>228</sup> The attractiveness of the due diligence approach also lies in the fact that our society has traditionally attributed liability based on culpability; when a person or entity does what is required of them, the law typically absolves them of liability.<sup>229</sup> Due diligence, then, seems like a potentially feasible approach from a culpability point of view.

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Responsibility (Apr. 20, 2015), <http://www.corporatejustice.ch/en/media/> (last visited Nov. 12, 2015) (discussing that sixty-six organizations are collecting signatures to require Swiss companies to carry out human rights due diligence) (on file with the Washington and Lee Law Review); Press Release, Swiss Coal. of Corp. Justice, Popular Initiative for Responsible Business (Jan. 19, 2015), [http://www.corporatejustice.ch/media/medialibrary/2015/01/150119\\_sccj\\_-\\_press\\_release\\_popular\\_initiative\\_on\\_responsible\\_business.pdf](http://www.corporatejustice.ch/media/medialibrary/2015/01/150119_sccj_-_press_release_popular_initiative_on_responsible_business.pdf) [hereinafter Popular Initiative for Responsible Business] (describing the Swiss Coalition of Corporate Justice's campaign). The Popular Initiative for Responsible Business Press Release notes that a broad coalition of over 50 civil society organizations decided together to launch a popular initiative "for responsible business—for the protection of people and the environment (the responsible business initiative)." *Id.* The Coalition notes that at the heart of the initiative is mandatory due diligence regarding human rights and the environment. *Id.* It further notes that due diligence in this context includes a risk assessment, measures to prevent and eliminate possible human rights violations and environmental damage, as well as comprehensive reporting on the policies in place and the action taken. *Id.* According to its material, the duty to carry out due diligence extends through all business operations and is based on the U.N. Guiding Principles on Business and Human Rights. *Id.* Moreover, the scale and complexity of the due diligence depends on the specific risks of the corporation—small and medium-sized enterprises will remain largely unaffected by the initiative. *Id.* The text of the initiative is currently under review at the Federal Chancellery. *Id.*

227. See Skinner, *supra* note 18, at 261 (explaining that a due diligence requirement creates an incentive for parent corporations to ensure their subsidiaries respect human rights).

228. See *supra* notes 213–217 and accompanying text (describing the due diligence approach).

229. See DAN B. DOBBS, THE LAW OF TORTS § 199, §§ 1, 9 at 2–3, 16 (2001)

## 2. Limitations of the Due Diligence Approach

The due diligence approach, however, has its limitations. First, it is unclear what the standards for “due diligence” would be.<sup>230</sup> For example, France’s legislation would hold “legal persons,” such as businesses that operate abroad, liable in French courts for subsidiaries’ and subcontractors’ actions that violate fundamental rights, unless the business had engaged in actions to prevent or deter such abuses of which it “could not have been unaware.”<sup>231</sup> It did not discuss what actions are sufficient.

Second, although this approach would incentivize parent corporations to monitor closely foreign subsidiaries’ actions, such parent corporations may simply “go through the motions” and “check off boxes,” much like they do now with regard to certain procurement and supply chain regulations,<sup>232</sup> resulting in unwarranted and unfair limits to remedies. Moreover, providing

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(describing tort liability as predominantly fault based); *see generally* John C.P. Goldberg, Comment, *Inexcusable Wrongs*, 103 CAL. L. REV. 467 (1965); Alina Golanski, *Paradigm Shifts in Products Liability and Negligence*, 71 U. PITT. L. REV. 673 (2010). Of course, there is not complete agreement on this, and more recent tort law has recognized apportionment of liability not based on fault but based on social costs and who can bear the financial burden of remedy. *See, e.g.*, Abraham, *supra* note 105, at 228 (noting the manufacturer has more accountability and accessibility for accepting and spreading costs of defective products).

230. *See* Radu Mares, *Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Rights*, in THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS—FOUNDATIONS AND IMPLEMENTATION 169, 170 (Radu Mares ed., 2012) (introducing the conceptual and pragmatic questions that arise when determining a standard for due diligence).

231. *See* Bill Number 1524, *supra* note 30, at Title IVB, art. 1386–19

Any legal person will be found responsible, who in the course of his or her activities with those of his or her subsidiaries or those of his or her subcontractors, does not demonstrate having taken all necessary and reasonable measures within his or her power to prevent or deter the occurrence of damages or the risk of damages, in particular those health-related, environmental or which constitute a violation of fundamental rights and of which he or she could not have been unaware of the seriousness prior to the fact.

The provision requiring that the corporation have the burden to demonstrate it took all measures in its power was removed in the final bill that is pending. *See supra* note 219 and accompanying text (evaluating the amendments in the French bill).

232. Third United Nations Forum on Business and Human Rights, Geneva, Switz., Dec. 1–3, 2014 (notes on file with author).

for parent liability in other situations, such as the solution recommended in this Article, would have a similar effect—parents would similarly be incentivized to examine closely subsidiaries’ actions and reduce risks.<sup>233</sup> But the incentive would be real—not merely to shift a presumption, but to truly avoid liability lest having to pay a significant damage award and the bad publicity that goes along with it.<sup>234</sup>

Third, this approach does not fully address the ethical arguments outlined above as to why parent corporations should be liable for subsidiaries’ actions in certain situations, such as where the judiciary is corrupt or non-functioning, or where the victims cannot obtain a remedy.<sup>235</sup> For example, even where the parent engages in due diligence—whatever that might end up being—a subsidiary might still engage in or be involved in human rights violations and cause harm.<sup>236</sup> The harm—and potentially great harm—would still exist; the financial benefits the parent receives from having a subsidiary operate abroad would still exist; and the inability of the victims to obtain a remedy would not make any difference. In other words, the parent would still be benefiting, while externalizing the cost—in these scenarios, often great cost—to individuals or communities without their consent.<sup>237</sup> Finally, like with enterprise liability, this approach does not address the barrier that *Kiobel* erected.<sup>238</sup>

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233. See Mares, *supra* note 230, at 178 (discussing liability arising from the parent company establishing a subsidiary in a foreign country and leaving “it to its own devices in an environment riddled with risks of human rights abuses”).

234. See *id.* at 179 (noting that “only some risks of harm will be relevant,” such that the core company’s liability will still be limited in some instances, which will provide incentive for the parent to monitor its subsidiaries).

235. See *id.* at 176 (introducing the issue of vulnerability of developing countries in assigning direct liability to parent corporations).

236. See *id.* at 185 (examining the effects of the employer and contractor enterprises on parent liability).

237. See *id.* at 192 (concluding that the standard of due diligence still presents obstacles to plaintiffs attempting to recover for human rights abuses, even if the parent corporation was associated with the subsidiary’s conduct).

238. See *supra* notes 14–18, 211–212 and accompanying text (analyzing the increased difficulty for plaintiff recovery under *Kiobel*).

*C. Parent Corporation Duty-of-Care Approach*

In another somewhat recent approach, commentators and some advocates have taken the traditional idea of a parent corporation being held liable for its own breach of duties owed to third parties<sup>239</sup> and have argued that such a legal duty is created where the parent owns, creates, or allows a subsidiary to operate in a fashion that creates foreseeable harm to non-consenting third parties.<sup>240</sup>

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239. As early as 1929, Professors Douglas and Shanks noted that there were situations where, even though subsidiaries maintained their separateness from parent corporations, parent corporations were seemingly found liable in tort for acts of their subsidiaries. See Douglas & Shanks, *supra* note 2, at 205–10 (noting the circumstances under which the parent corporation is traditionally found liable for its subsidiary's tortious conduct). However, they closely reviewed the cases and noted that the liability was either due to the parent's direct role in the tort or the subsidiary was acting specifically as an agent for the parent in carrying out a decision of the parent. See *id.* (pointing to instances of the parent's agency or direct involvement in the subsidiary's conduct). In more recent cases, the courts have found that under the "third party" theory, an action for a breach of a duty of care against a parent company is available only if the employee can establish that the parent company assumed, either by express agreement or by implication, the "primary responsibility" for providing safety of others. See *Mendez-Laboy v. Abbott Labs., Inc.*, 424 F.3d 35, 37 (1st Cir. 2005) (citation omitted) (ruling that the plaintiff must show the parent or employer exerted a notable level of control over the factors leading to the injury).

240. See generally Mares, *supra* note 230 (advocating for a duty-of-care approach to hold parent corporations liable for the acts they take in creating subsidiaries in high risk environments). See also Nora Mardirossian, *Direct Parental Negligence Liability: An Expanding Means to Hold Parent Companies Accountable for the Human Rights Impacts of Their Foreign Subsidiaries* 4 (2015), <http://ssrn.com/abstract=2607592> (arguing "that parent companies with high levels of control or supervision of their subsidiaries owe a direct duty of care to those whose risk of injury is foreseeable" and that "[w]hen these parents act negligently . . . controlling the actions of their subsidiaries, they should be held directly liable"); Nicola M.C.P. Jägers & Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 BROOK. J. INT'L L. 833, 843 (2008) (noting that "plaintiffs in transnational human rights litigation may rely on . . . direct liability of the parent for an act or omission by the parent in violation of its duty to exercise due diligence in the relationship towards the subsidiary"). In this situation, the parent company's conduct and omissions defy a domestic liability standard. This mechanism has some advantages for transnational human rights litigation as it will encourage, rather than discourage "more active involvement by the parent company towards its subsidiaries." See Kirshner, *supra* note 20, at 279–81 (noting a similar approach). In addition, the possibility of this theory was discussed at length during several sessions of the Third Annual Forum on Business and Human Rights. See Third United Nations Forum on Business and



*1. The UK and Canadian Cases Regarding Corporate Parental  
Duty of Care*

The current, more modern discussion regarding a parent corporation's liability under a direct duty-of-care approach for a subsidiary's actions is based primarily on two cases: the 2012 United Kingdom case, *Chandler v. Cape PLC*,<sup>241</sup> and the 2013 Canadian case, *Choc v. Hudbay Minerals*.<sup>242</sup> Both cases are significant because for the first time courts in the United Kingdom and Canada found that apart from piercing the corporate veil or agency, parent corporations could be directly liable for their subsidiaries' actions based on the parent owing its own "duty of care" to third parties.<sup>243</sup> These cases were discussed at great length at the United Nations' Third Annual Forum for Business and Human Rights in December 2014 as offering a way forward to hold parent corporations liable when their subsidiaries cause injury abroad.<sup>244</sup> However, the reality is that, although these cases are important models when considering whether a parent is liable for acts of its subsidiaries in certain circumstances, the decisions do not suggest a duty occurs simply because a parent creates or purchases a subsidiary and knows it

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Human Rights, Geneva, Switz., Dec. 1–3, 2014 (notes on file with author).

241. See *Chandler v. Cape PLC* [2012] EWCA (Civ) 525 [80] (Eng.) (determining that a parent company may be held liable for injuries sustained by employees of a subsidiary if the parent company knew or should have foreseen that unsafe workplace conditions would cause harm).

242. See *Choc v. Hudbay Minerals, Inc.*, 2013 ONSC 1414, ¶ 75 (Can.) (ruling that the plaintiffs could pursue a claim for direct negligence against the parent corporation for human rights violations, including murder and rape, perpetrated against indigenous people at the subsidiary's mining site in South America).

243. See *id.* (noting that it is not plain and obvious that there is no negligence claim possible against the parent subsidiary, so the claim may continue to trial); *Chandler v. Cape PLC* [2012] EWCA (Civ) 525 [80] (Eng.) (concluding "the law may impose on a parent company responsibility for health and safety of its subsidiary's employees"); see also Michael Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127, 133 (2013) (noting that the UK Court of Appeal "resoundingly endorsed" parent corporation liability in *Chandler*).

244. Numerous participants in forums at the Third Annual Forum discussed these cases and the potential new "duty of care approach." Third United Nations Forum on Business and Human Rights, Geneva, Switz., Dec. 1–3, 2014 (notes on file with author).

will engage in operations that might pose a risk to third parties.<sup>245</sup> Something more is required.

*Chandler* was based on a claim against a UK parent company for injury (asbestosis contracted as result of exposure to asbestos dust) suffered by employees of a subsidiary company.<sup>246</sup> In *Chandler*, the English Court of Appeal held that in appropriate circumstances, the law may impose on a parent company a duty of care in relation to the health and safety of third parties (in that case, of its employees), and that there had been an assumption of responsibility for the health and safety of the subsidiary's employees under the facts of that case.<sup>247</sup>

The facts of the case are important in understanding the assumption of duty. The lower court, whose decision the higher court affirmed,<sup>248</sup> found that the defendant employed a scientific officer and a medical officer, who together were responsible for health and safety of all the employees within the defendant's subsidiaries; that the evidence demonstrated it was the defendant and not the subsidiary companies who "dictated policy in relation to health and safety" of the employees; that the parent company "retained responsibility for ensuring that its . . . employees . . . were not exposed to the risk of harm through exposure to asbestos"; and that the evidence conclusively showed the defendant retained "overall responsibility."<sup>249</sup>

According to the higher court, a duty could arise on the part of the parent because of its "superior knowledge about the nature and management of asbestos risks," and that "Cape could, and

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245. See *Chandler v. Cape PLC* [2012] EWCA (Civ) 525 [69] (Eng.) ("A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.").

246. See *id.* ¶¶ 1, 3 (noting the plaintiff contracted asbestosis after working for the subsidiary loading bricks at the same factory site as the asbestos production).

247. See *id.* ¶¶ 62–78 (noting that, given the parent corporation's "superior knowledge about the nature and management of asbestos risks, . . . it is appropriate to find that Cape assumed a duty of care").

248. See *id.* ¶ 79 ("Moreover, while I have reached my conclusion in my own words and following my own route, it turns out that, in all essential respects, my reasoning follows the analysis of the judge in . . . his judgment.").

249. See *id.* ¶ 31 (providing the trial court judge's reasoning for his conclusion that "[t]his was no failure in day-to-day management; this was a systemic failure of which the Defendant was fully aware").

did on other matters, give Cape Products instructions as to how it was to operate with which, so far as we know, it duly complied.”<sup>250</sup> Thus, the Court of Appeal ruled:

In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary’s employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and 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 as 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 purposes 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 the companies more 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.<sup>251</sup>

Before *Chandler*, several other UK plaintiff cases relied on the same duty-of-care theory, although *Chandler* was the first case to accept the theory in the English Court of Appeal.<sup>252</sup> As one commentator has noted, under this theory, the parent corporation may be “held liable for harm flowing from its failure to competently perform the functions it controls, or to give foreign subsidiaries sound advice on environmental, worker safety, and human rights policies.”<sup>253</sup> Broadly speaking, the theory is “that when a parent company is *directly involved in its subsidiary’s operations or exercises de facto control*, then it owes a duty of care

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250. *Id.* ¶ 78.

251. *Id.* ¶ 80 (emphasis added).

252. See Goldhaber, *supra* note 243, at 130–32 (discussing the success of precedential cases brought by local inhabitants under English common law against parent corporations in the English courts for human rights violations by subsidiary companies in comparison to claims brought under the Alien Torts Statute in the United States).

253. *Id.* at 132.

to . . . anyone affected by the subsidiary's operations."<sup>254</sup> However, such theories of liability exist only where there is "sufficient involvement in, control over and knowledge of the subsidiary operations by the parent such that there is no reason why the general principles of duty creation and negligence should not apply."<sup>255</sup> In addition, in looking at the elements, it is clear that, for there to be liability under this theory, the parent must or should have had superior knowledge of the problem at hand, and it must have been foreseeable that the subsidiary or third parties (in this case, employees) would rely on the parent's superior knowledge for the protection of the third parties.<sup>256</sup>

The significance of *Chandler* was that the court held that a parent corporation could be liable for acts of a subsidiary even where it might not have actual control over the *specific* operation at issue.<sup>257</sup> In this way, it was a groundbreaking decision because it indicates that a parent company may have a duty of care depending on the particular facts. But it is a limited decision, all the same.

The 2013 Ontario Superior Court of Justice decision in *Choc* has a similar holding.<sup>258</sup> In *Choc*, a Canadian Court found that a Canadian parent company may have owed a direct duty of care to a Guatemalan indigenous community whose rights were violated when a subsidiary of the parent company hired security forces to forcibly evict Mayan community members.<sup>259</sup> The plaintiffs in the

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254. *Id.* (emphasis added).

255. Richard Meeran, *Litigation 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).

256. *See Chandler v. Cape PLC* [2012] EWCA (Civ) 525 [80] (Eng.) (discussing parent liability where "the parent has, or ought to have, superior knowledge" and "the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge").

257. *See id.* ¶ 74 (noting that, while the parent corporation "was not responsible for the actual implementation of health and safety measures" at the subsidiary, the case arose from issues of overall omissions of care by the parent and not from non-compliance with specific health and safety procedures).

258. *See Choc v. Hudbay Materials, Inc.*, 2013 ONSC 1414, ¶ 75 (Can.) (determining that the plaintiffs may pursue a claim of direct negligence against the parent corporation for human rights abuses that the subsidiary company committed).

259. *See id.* ¶¶ 4–7, 75 (ruling that the plaintiffs made a *prima facie*

case alleged that the security personnel at Hudbay Mineral's former mining project in Guatemala engaged in numerous abuses including the killing of an outspoken critic, the shooting of another man, and rape of numerous women during the security personnel, police, and military's removal of them from their ancestral village.<sup>260</sup>

Significantly, the court rejected Hudbay Minerals' argument that the case should be dismissed because of its limited liability regarding its Guatemalan subsidiary's action.<sup>261</sup> Among other findings, the court found that plaintiffs had properly pled a direct liability case against Hudbay under local tort law.<sup>262</sup> Specifically, the court found that the plaintiffs could proceed with their case if they adequately pled a "novel" duty of care, given that they did not plead a duty of care already recognized by law.<sup>263</sup> The court set forth the three elements the plaintiffs would have to plead to adequately plead such a duty of care:

1. that the harm complained of is a reasonably foreseeable consequence of the alleged breach;
2. that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and
3. that there exist no policy reasons to negative or otherwise restrict that duty.<sup>264</sup>

The court then applied Canadian law to each of these issues.<sup>265</sup>

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showing that the parent corporation could owe a duty of care to the native people victimized by the subsidiary).

260. *See id.* ¶¶ 4–7 (discussing the basis of the human rights abuses in the consolidated claims as being various types of gross violations against the Mayan people).

261. *See id.* ¶¶ 17–23, 49 (providing that the argument for piercing the corporate veil should be allowed to proceed to trial because the plaintiffs sufficiently pled that subsidiary was an agent of Hudbay Minerals).

262. *See id.* ¶ 54 (stating that the plaintiffs sufficiently pled "all material facts to establish the constituent elements of their claim of direct negligence against Hudbay").

263. *See id.* ¶¶ 56, 58 (noting that the plaintiffs did not attempt to prove that the facts of their case fit under a duty of care already established in a certain category of cases, so it becomes "necessary to apply the test for establishing a novel duty of care" (citation omitted)).

264. *Id.* ¶ 57.

265. *See id.* ¶¶ 65, 70, 75 (concluding that the facts are sufficient to survive the defendant's motion to strike).

Under Canadian law, harm is foreseeable for purposes of duty if it is foreseeable that harm might occur in a general way and the type of damage was foreseeable.<sup>266</sup> The court found that the plaintiffs adequately pleaded foreseeability because they had pled specifically that Hudbay knew or should have known that security forces frequently used violence to evict members of the specific community; that the defendant's executives knew violence was used in previous evictions they had requested; that the executives knew there was a higher risk of extreme violence against this community; that they knew security personnel was inadequately trained and possessed illegal firearms; that they knew rape against women in Guatemala occurred at a high rate; and that they knew Guatemala's justice system had serious problems and the vast majority of violence went unpunished.<sup>267</sup> There were also very similar specific allegations regarding other incidents as well.<sup>268</sup> Thus, the court found that the plaintiffs had made very specific allegations about the level of knowledge the parent corporation and its executives had.<sup>269</sup>

Moreover, the court found that the plaintiffs had sufficiently pled proximity, which under Canadian law exists if "the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs."<sup>270</sup> The court noted that the plaintiffs pleaded that the parent corporation paid specific attention to the problems of the land conflict between its

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266. See *id.* ¶ 59 (explaining that the court first must ask whether the harm was a "reasonably foreseeable consequence of the defendant's act").

267. See *id.* ¶¶ 60–65 (describing the acts committed by the security forces during the forceful eviction of the local inhabitants).

268. See *id.* ¶¶ 63–64

These pleadings make it reasonably foreseeable that requesting the forced eviction of a community using hundreds of security personnel, as Hudbay/Skye is alleged to have done, could lead to security personnel using violence, including raping the plaintiffs . . . [and] that authorizing the use of force in response to peaceful opposition from the local community could lead to the security personnel committing violent acts, including killing . . . and seriously injuring [the victims].

269. See *id.* ¶ 65 ("The plaintiffs have pleaded facts which, if proven at trial, could establish that the harm complained of was the reasonably foreseeable consequence of the defendants' conduct.").

270. *Id.* ¶ 66 (citations omitted).

subsidiary and the Mayan village; that the CEO publicly stated that the parent did everything in its power to ensure the evictions were carried out in accordance with human rights; that the parent made public statements regarding its relationship with the Mayan villages; that the parent was directly in charge of the operations; and that it assumed direct control over the security personnel.<sup>271</sup> Based on all of this, the court found that the allegations sufficiently alleged proximity.<sup>272</sup> The court also found there was no obvious policy reason to restrict the duty.<sup>273</sup>

Similar to the UK case, this case is significant, but its application is still fairly limited given the proximity element.<sup>274</sup> In the *Choc* case, the plaintiffs alleged significant facts establishing a relationship between the parent and the community and that the parent had assumed control over security personnel.<sup>275</sup> Thus, the cases have application and promise in certain, limited situations, but they do not stand for the proposition of a general duty of care based on establishing a subsidiary in a high risk environment.

## *2. A New, More Expansive Tort-Based Corporate Parental Duty-of-Care Approach*

The scholar that appears to have taken this parental “duty of care” approach the furthest is Professor Radu Mares of the

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271. See *id.* ¶ 67 (discussing how the parent corporation’s conduct satisfies factors that indicate a relationship of sufficient proximity with the subsidiary).

272. See *id.* ¶¶ 69–70 (noting the court determined that “[b]ased on the plaintiffs’ pleadings, there were numerous expectation and representations on the part of Hudbay/Skye and the plaintiffs” that showed Hudbay/Skye was concerned with the rights and interests of the local community).

273. See *id.* ¶ 74 (“A court should be reluctant to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion stage before there is a record on which a court can analyze the strength and weaknesses of the policy arguments.” (citation omitted)).

274. See *id.* (emphasizing the proximity issue).

275. See *id.* ¶ 75 (finding that, based on satisfying the *Anns* test, plaintiffs sufficiently pleaded the elements required for a novel duty of care, that defendants breached that duty of care, that defendants’ breach caused, and that it was not plain and obvious that the complaint did not disclose a claim in negligence).

Netherlands.<sup>276</sup> Professor Mares has suggested holding a company liable for acts of its subsidiaries based on the behavior and actions of the parent in creating a subsidiary to operate in a “high risk” country—one that does not have effective legal mechanisms.<sup>277</sup> Specifically, he argues that, where a core company sets up a separate entity for the purpose of making a profit, the core company should be held responsible for the subsidiary’s torts under notions of due diligence and that doing so without due diligence creates an unreasonable risk, which should be considered an affirmative wrong under the law.<sup>278</sup> His theory would require core companies to retain some responsibility in “initial structuring and ongoing oversight.”<sup>279</sup> Mares notes that the vulnerability of rights holders in less developed countries justifies a responsibility to act where there are not effective remedies available.<sup>280</sup> Mares uses classic tort theory to justify his approach, noting that the *Restatement (Second) of Torts* supports an actor being found negligent where its actions involve “an unreasonable risk of harm to another through the foreseeable action of a third person.”<sup>281</sup> He notes that such foreseeability could occur especially with subsidiaries in the extraction industries in countries where the legal framework is weak.<sup>282</sup> He

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276. See generally Mares, *supra* note 230.

277. See *id.* at 176–78 (arguing that the core company’s decision to establish a “separated entity in a dangerous environment (poorly governed developing country)” and to let “it loose with a certain mandate (profit-making) without any checks and oversight over subsidiary activities” earns the core company responsibility under the due diligence standard).

278. See *id.* at 176–77 (discussing how the parent corporation injures the subsidiary through its own conduct when it instructs the subsidiary to commit wrongful actions).

279. See *id.* at 177 (noting that, under the due diligence approach, a “duly diligent company would be free to set up subsidiaries but should retain some responsibility” regarding the original set up, as well as the long-term supervision of the work).

280. See *id.* at 180 (explaining that the vulnerability of citizens in underdeveloped countries is not caused by poverty or the threat of harm by businesses, but by the lack of effective remedies available).

281. See *id.* at 181 (citing RESTATEMENT (SECOND) OF TORTS § 302 (AM. LAW. INST. 1965)) (providing that Section 302 applies to third party conduct, whether it is negligent or intentional).

282. See *id.* (discussing an example in the instance of setting up a mining site, in that the “undeniable fact is that setting up a mining operations does



notes that the Restatement supports liability for negligent selection of a contractor which poses foreseeable risks;<sup>283</sup> and that it supports liability for the company to take “special precautions” to maintain safety where a contractor for a “peculiar risk of harm,” i.e., abnormally dangerous activities.<sup>284</sup> He supports such liability for a subsidiary by analogy.<sup>285</sup> Professor Mares bases his approach on much of what the Guiding Principles provide for in terms of due diligence, although he criticizes them for not drawing more on negligence jurisprudence to make the case for core and parent company liability in tort for the situation he describes.<sup>286</sup>

### *3. Limitations of the Tort-Based Corporate Parental Duty-of-Care Approach*

The parental duty-of-care approach is a potential way forward for victims, and advocates should use this approach in the appropriate circumstances. Moreover, because this approach focuses on the parent’s actions rather than the subsidiary’s actions, it might be able to overcome any barrier that *Kiobel* created. But it, too, has its limitations.

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create risks of harm for local communities, risks that are more likely and severe when the legal frameworks are weak”).

283. See *id.* at 182 (“So an employer can be held liable for the actions of an independent contractor if the employer was negligent in hiring or retaining that contractor, if the employer knew, or should have known with reasonable care, that the contractor was reckless or incompetent.”).

284. See *id.* at 182–83 (noting that “special precautions” are required when “an independent contractor poses a peculiar risk of harm,” and that in “tort it seems that ‘peculiar’ risks arise out of ‘inherently dangerous’ activities” (citation omitted)).

285. See *id.* at 189 (describing the best overarching approach to parent liability as first drawing on the theories of tort using legal analogies to establish the problem of responsibility, and then allowing “specialized multistakeholder settings” to thrash out the details of standards such as reasonable care and due diligence).

286. See *id.* at 192 (concluding that developing a focused concentration on negligence jurisprudence would allow the parent company less relief from the responsibility of its subsidiary’s human rights violations because negligence jurisprudence recognizes more exceptions to the accepted standard that third parties are not liable for misconduct).

First, under the traditional duty-of-care approach, a parent will be held liable only where it is directly involved in the tort, where the subsidiary is carrying out the parent company's direction as its agent, or where the parent has assumed responsibility over the event that caused the harm.<sup>287</sup> The traditional approach does not address a situation in which the parent creates or purchases a subsidiary in a high-risk environment, gains benefits from that act, and transfers the risk to the community.<sup>288</sup>

Second, under the more recent duty-of-care theories in the United Kingdom and Canada, the parent has to have legally assumed obligations of the subsidiary, typically through its level of knowledge and involvement or apparent involvement or responsibility in the subsidiary's actions.<sup>289</sup> There has to be a fair amount of knowledge or involvement on the part of the parent for a direct duty of care to be established, albeit not the amount often required to pierce the corporate veil.<sup>290</sup> Thus, although this approach does present a way forward for victims to hold a parent liable when the parent has some direct knowledge and some level of involvement, it does not address the problem of victims left without a remedy where the parent has a more separate relationship from the subsidiary but still greatly benefits financially from the fact that it created a subsidiary in a high-risk environment.<sup>291</sup>

Third, while Professor Mares' approach is broader and shares the principles and philosophy of the solution this Article

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287. See *supra* notes 281–286 and accompanying text (discussing the parent corporation's duty of care to subsidiaries when harm is foreseeable).

288. See Mares, *supra* note 230, at 180 (pinpointing parent liability as being culpability resulting from the “the autonomy-granting decision after a subsidiary was set up, respectively the outsourcing to a contractor, with disregard to the risks of abuse posed in weakly governed host countries”).

289. See *supra* Part VI.C.1 (comparing *Choc* and *Chandler*).

290. See *Choc v. Hudbay Minerals, Inc.*, 2013 ONSC 1414, ¶ 45 (Can.) (discussing the three situations where the corporate veil may be pierced: “(a) where the corporation is completely dominated and controlled and being used as a shield for fraud or improper conduct; (b) where the corporation has acted as the authorized agent of its controllers, corporate or human; and (c) where a statute or contract requires it” (citations omitted)).

291. See Mares, *supra* note 230, at 177 (detailing the separation principle as an obstacle because the parent cannot be directly responsible merely for outsourcing per se in a developing country).

advocates, as he recognizes, his tort-based duty-of-care approach “has an uneasy co-existence with the separation of entities principle.”<sup>292</sup> He underestimates this “uneasy co-existence” given how entrenched the notions of limited liability are in the law.<sup>293</sup> In fact, the doctrine exists specifically to limit the liability of parent companies for actions of their subsidiaries; the principle recognizes that parents will create subsidiaries often for the very reason, or at least in part, to limit liability for economic activity.<sup>294</sup>

Although it is possible under tort theory to establish a duty and breach on the part of the parent for its own actions (or inactions), Mares also underestimates both the difficulty of establishing a duty of care for third party actions under traditional tort law given the traditionally narrow exceptions that apply for non-liability of third party conduct, and establishing a breach—that the actor acted in a way that was not in line with what a reasonable person (or corporation) would do.<sup>295</sup>

It is important to note that there has been a more recent *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* that is not discussed in Professor Mares’ article.<sup>296</sup> The Third Restatement’s position is that a duty exists whenever the actor’s conduct “creates a risk of physical harm,” without regard to whether the injury or harm that occurred was foreseeable,<sup>297</sup> although the Restatement continues

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292. See *id.* at 192 (concluding that the responsibility for parent companies to take action to prevent human rights abuses in subsidiary work abroad is at tension with the traditional accepted separation of entities principle, which restricts the piercing of the corporate veil).

293. See Case Comment, *F. Corporations: Perpetual Real Estate v. Michaelson Properties*, 50 WASH. & LEE L. REV. 285, 286 (1993) (“Courts have been willing to depart from the principle of the corporation as a separate entity only under certain circumstances.”).

294. See *id.* (describing the purposes of limited liability—to stimulate business investment and protect certain entities from the actions of others).

295. See RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965) (“Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”).

296. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010).

297. See *id.* § 7(a) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”); Mike Steenson, *Minnesota Negligence Law and the Restatement (Third) of Torts: Liability for*

to suggest that foreseeability is an element of whether the duty was breached.<sup>298</sup> But the Third Restatement's adoption by individual states is thus far unclear and varied.<sup>299</sup> Moreover, the law of when and how a duty is created is in flux and appears to be in turmoil.<sup>300</sup>

Examining, then, the *Restatement (Second) of Torts*, the "fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."<sup>301</sup> According to the Restatement, there are four exceptions: (1) a "[s]pecial relation may exist between the actor and the other, . . . which impose upon the actor the duty to take affirmative precautions for the aid or protection of the other;" (2) the "actor may have control of a third person, or of land or chattels, and be under a duty to exercise such control;" (3) the "actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other, as a result of which the actor is under a duty to act to prevent harm," and (4) the "actor may have committed himself to the performance of an undertaking, gratuitously or under contract, and so may have assumed a duty of reasonable care for the protection of the other, or even of a third person."<sup>302</sup>

Regarding the first exception, special relationships are specifically set forth in the Second Restatement and include common carriers, innkeepers, possessors of land open to the public, and those who take custody of another.<sup>303</sup> The second exception requires the third party to have control over the actions

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*Physical and Emotional Harms*, 37 WM. MITCHELL L. REV. 1055, 1059 (2011) (explaining the basic elements of a negligence case, specifically the duty of reasonable care as laid out in Section 7 of the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM).

298. See *Steenson*, *supra* note 297, at 1058 (noting the apparent rejection of the traditional incorporation of foreseeability into duty determinations in the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM).

299. See *id.* at 1062 ("State encounters with the Third Restatement approach to negligence cases have varied widely, from open acceptance to tight-lipped rejection.").

300. See generally *id.*

301. RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW INST. 1965).

302. *Id.* at cmt. a.

303. See *id.* § 314(A) (providing that these special relations between the parties may give rise to a duty of care).

of another; thus, only where the parent corporation has control over a subsidiary, or the subsidiary is acting as an agent of the parent, will this exception apply.<sup>304</sup> The fourth exception would apply only where the parent corporation agreed to take on a particular task, either overtly or through its conduct.<sup>305</sup> This latter situation might apply if the victims could establish that the parent corporation indeed led them to believe it undertook a responsibility for their protection.<sup>306</sup> The UK and Canadian cases appear to fall into this exception.<sup>307</sup>

The third exception could apply, as it reads, “[i]f the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.”<sup>308</sup> In addition, Section 322 of the Second Restatement might apply, as it reads,

[i]f the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.<sup>309</sup>

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304. *See id.* §§ 316–20 (stating the duty to control the conduct of third parties extends to parents in control of their children, masters in control of their servants, possessors of land or chattels in control of licensees, those in charge of persons having dangerous propensities, and persons who have been charged with custody over others).

305. *See id.* § 323 (noting that a person is liable to render services to another if physical harm results from his failure to exercise reasonable care, if “(a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking”).

306. *See id.* § 324(A) (describing that a person is liable to render services to another third-person for harm resulting from his failure to exercise reasonable care, if “(a) his failure increases the risk of harm, or (b) he performs a duty owed by the other to the third person, or (c) harm is suffered because of reliance”); *id.* at cmt. a (“The rule stated in this Section parallels the one stated in § 323, as to the liability of the actor to the one to whom he has undertaken to render services. This Section deals with the liability to third persons.”).

307. *See supra* notes 241–290 and accompanying text (analyzing the liability of parent corporations to third party human rights abuses in *Choc* and *Chandler*).

308. RESTATEMENT (SECOND) OF TORTS § 321 (AM. LAW INST. 1965).

309. *Id.* § 322.

There are, however, a few additional problems in pursuing a tort theory of parental liability. First, in determining whether a duty exists, the court will also consider public policy, such as the magnitude of the burden on the defendant in guarding against injury, and the consequences of placing that burden on the defendant.<sup>310</sup> In determining such public policy, the purpose of limited liability will likely be taken into account.<sup>311</sup> In light of this, recent “third party” cases in other contexts reveal that courts typically have held that such a duty is created only where the parent (or subsidiary) exercised control over the event that caused the harm, such as a safety measure.<sup>312</sup>

Second, even if a duty could be determined, one must still show there was negligence in the breach—whether the corporation acted in a manner a reasonable corporation would not have.<sup>313</sup> Courts have historically held that a breach of duty cannot be found when the defendant has adhered to normal business practices,<sup>314</sup> and this might be difficult to overcome where the corporation is simply engaging in the type of activity in which other corporations engage by creating subsidiaries to operate abroad.<sup>315</sup>

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310. See 65 C.J.S. *Negligence* § 202 (2015) (“Legal causation in a negligence action turns on whether a defendant’s conduct should warrant legal liability as a matter of social policy and common sense.”).

311. See *id.* § 32 (“Social policy must at some point intervene to delimit negligence liability even for foreseeable injury.” (citation omitted)).

312. See, e.g., *Parham v. Ryder Sys., Inc.*, 593 F. App’x 258, 261 (5th Cir. 2014) (per curiam) (noting that under Texas tort law, a duty of care for a negligence claim against a parent or subsidiary can only be established when the separate entity exercised control over the event that caused the harm); see also *Mendez-Laboy v. Abbott Labs., Inc.*, 424 F.3d 35, 37 (1st Cir. 2005) (noting that under the “third party” theory, an action for breach of duty of care by a subsidiary against the parent company is available only if the employee can establish that the parent company assumed, either by express agreement or by implication, the “primary responsibility” for providing industrial safety in the subsidiary (citations omitted)).

313. See *supra* note 295 (stating the standard of the reasonable man).

314. See *Texas & Pac. Ry., Co. v. Behymer*, 189 U.S. 468, 470 (1903) (“What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.” (citation omitted)); *Shandrew v. Chi. St. P., M. & O. Ry. Co.*, 142 F. 320, 325–26 (8th Cir. 1905) (citing *Behymer*, 189 U.S. at 470) (noting that the defendant company’s negligence is determined by comparison to the conduct of other prudent railway companies).

315. See *Mares*, *supra* note 230, at 178 (elaborating on the various types of

Third, in using a tort-based approach, potential victims face additional hurdles, such as choice-of-law analysis and varying time restraints pursuant to the statute of limitations.<sup>316</sup> It is unclear what law would apply to such tort claims under a choice of law analysis. If the claim was that the parent acted negligently in creating the subsidiary, there is theoretically no reason that the tort law of the U.S. state where such decisions were made should apply; if the claim concerned appropriate supervision and due diligence, it is likely that the law of the country where the subsidiary is located would apply.<sup>317</sup> It is often difficult to determine the law of the foreign jurisdiction, and the local law may limit or not even recognize such novel claims, the elements for its torts may be more difficult to prove, or may provide for immunity that might not apply under the forum state's common law.<sup>318</sup> For example, a court in the Netherlands recently ruled that under Nigerian law, a parent company has no obligation to prevent its subsidiary from harming third parties.<sup>319</sup> There is also the likelihood that the claim would be dismissed on forum non conveniens grounds.<sup>320</sup> Moreover, the few negligence-based claims

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conduct for which core corporations are liable abroad, including the "risks for driving, of medical care, of handling weapons, of manufacturing goods").

316. See Skinner, *supra* note 18, at 201, 226–27 (noting that each state has its own choice-of-law analysis that it performs before applying substantive law).

317. See *id.* (explaining that frequently, the court will apply the substantive law of the state in which the injury occurred, which presumably involved a location of operation for the subsidiary).

318. See *id.* at 227 ("Choice of law analysis may therefore create unforeseen barriers to recovery, especially if foreign law is chosen as the substantive law.").

319. See Geert van Calster, *No Big Surprises in Dutch Shell Nigeria/Royal Dutch Shell Ruling*, GAVC LAW (Jan. 31, 2013, 8:25 AM), <http://gavclaw.com/2013/01/31/no-big-surprises-in-dutch-shell-nigeria-royal-dutch-shell-ruling/> (last visited Nov. 12, 2015) (reporting on the Dutch court ruling that Nigerian law applied in the suit brought by a Dutch environment NGO against Shell corporation and other similar holding companies for environmental damages sustained in Nigeria) (on file with the Washington and Lee Law Review); see also Press Release, de Rechtspraak (Netherlands Judiciary), Dutch Judgments on Liability Shell (Jan. 30, 2013), [https://www.rechtspraak.nl/Organisatie/Rechtbanken/DenHaag/Nieuws/Documents/Persbericht\\_Shell\\_UK.pdf](https://www.rechtspraak.nl/Organisatie/Rechtbanken/DenHaag/Nieuws/Documents/Persbericht_Shell_UK.pdf) (stating that the district court dismissed all claims against the core companies and ruled under Nigerian law a parent company is not responsible for preventing its subsidiaries from perpetrating harms against third parties abroad).

320. See Skinner, *supra* note 18, at 207 (discussing at length cases where state courts have routinely dismissed tort actions under forum non conveniens where the harm occurred abroad); see also Hoffman & Stevens, *supra* note 18, at

against parent companies for actions of subsidiaries abroad have thus far been dismissed because courts have demurred in taking jurisdiction over claims based on foreign tort law due to the complex and novel tort claims associated with such actions.<sup>321</sup>

Fourth, both accessing and proving the facts necessary to establish a duty of care or a breach may be very difficult, especially given that the corporation will have control over the information. The factual pattern required to establish both a duty and breach will be unique and thus limited. Only in those unique situations where plaintiffs can establish a duty of care or breach will there be recovery. The theory does not provide for those many other situations where the parent enjoys the immense financial benefits at the expense of the local population.

Even though legal duties of parent corporations might not naturally arise in tort under most states' laws in the United States, the reasons behind the tort-based parental duty-of-care approach supports enactment of statutory duties and liability in certain situations to ensure that victims of business' human-rights violations are not left remediless.

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17–20 (“These state-to-state differences may lead plaintiffs to an analysis of the most favorable procedural forum for a human rights case. Because defendants will engage in the same analysis, personal jurisdiction and forum non conveniens motions will likely be the initial battleground in state court human rights cases.”).

321. See *Romero v. Drummond Co.*, 552 F.3d 1303, 1318 (11th Cir. 2008) (affirming dismissal of the plaintiffs' claims for intentional torts and negligence because “Alabama law does not apply to injuries that occurred outside the state”); *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1355–56 (S.D. Fl. 2011) (dismissing negligence claims the plaintiffs brought under various U.S. state law due to the extraterritorial nature of the conduct at issue); *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007) (dismissing state law claims because “[p]laintiffs have not yet articulated a viable basis for applying California law or Indiana law to the management of a Plantation in Liberia”).



*VII. Recommended Approach to Overcoming Limited Liability of  
Parent Corporations for Foreign Subsidiaries' Human  
Rights Violations*

*A. Statutory Enactment Providing for Corporate Parental  
Liability for Foreign Subsidiaries' Violations of Human Rights  
Norms in "At-Risk" Countries Where Victims Cannot Otherwise  
Obtain a Remedy*

In situations where parent corporations enjoy numerous benefits such as shareholder payouts and tax benefits from their subsidiaries' activities, while at the same time externalizing environmental and human rights costs, a strong ethical argument can be made that parent corporations should ensure that victims harmed by their subsidiaries' violations of human rights norms and serious environmental damage are provided a remedy. Where an adequate remedy cannot be obtained in the host country or against the subsidiary, the parent should not be able to raise the shield of limited liability, especially when it knew the subsidiary was operating in a high-risk country where a remedy for such serious harms would be difficult or impossible to obtain.<sup>322</sup>

Moreover, as already discussed, for current customary international law claims brought under the ATS, the presumption against extraterritoriality set forth in *Kiobel* needs to be overcome, even where victims could otherwise bring claims or seek remedies from parent corporations for extraterritorial harm, such as through veil-piercing.<sup>323</sup> A statutory enactment of the type advocated here would avoid the *Kiobel* problem. Enacting a statute allowing victims of serious extraterritorial torts to disregard limited liability and reach parent corporations is essentially a cause of action applying to extraterritorial conduct. Thus, no presumption would be created in the first place. There is precedent for this—as there are numerous

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322. See *infra* note 325 and accompanying text (defining a "high risk" country).

323. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) ("[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."); *Morrison v. Nat'l Austrl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (articulating the presumption against extraterritorial application of the Alien Tort Statute).

examples of Congress clarifying that certain statutes should apply extraterritorially in certain situations, and Congress could do the same for serious violations of human rights law.<sup>324</sup>

Given the limitations of the enterprise liability, due diligence, and duty-of-care approaches described above, this Article takes the position that limited liability of parent corporations for claims of customary international human rights violations (such as those brought under the ATS) and serious environmental torts should be disregarded where a parent corporation takes a majority interest or creates a subsidiary as part of unified economic enterprise<sup>325</sup> that operates in a “high-risk host country,” *and* (a) victims cannot obtain an adequate judicial remedy for such harms in the country due to such corruption, lack of a cause of action, or other judicial or law-related reasons;<sup>326</sup> (b) victims cannot determine what entity is responsible and thus what entity to hold accountable, given the enterprises’ complex corporate structure; or (c) a subsidiary is underfunded and thus cannot pay any damages resulting from the violations. A “high-risk host country” is a country that has a weak, ineffective, or corrupt judicial system.<sup>327</sup>

Ideally, this change should be done through a statutory enactment noting that parent corporations would be liable in the

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324. See Skinner, *supra* note 18, at 255–56 (suggesting a variety of potential legislative options in order to gain jurisdiction over businesses for human rights claims); see also Paul Barker, *Universal Civil Jurisdiction and the Extraterritorial Reach of the Alien Tort Statute*, 20 U. MIAMI INT’L & COMP. L. REV. 1, 39–40 (2012) (noting that Congress has the ability to specify in legislation whether it should apply extraterritorially); *infra* Part VII.C (discussing extraterritorial enforcement actions against foreign subsidiaries of U.S. corporations).

325. By this, I mean the business of the subsidiary that the parent purchases or creates is done to further the business of the parent as part of an integrated business enterprise, rather than simply a purchase of stock as part of an investment portfolio where the subsidiary’s business is unrelated to the parent’s business.

326. This portion of the test has much in common with how one defeats a defendant’s motion to dismiss based on forum non conveniens, as well as exhaustion of remedies in the host country. The similarities are not intentional but reflect similar notions of fairness when considering whether victims should be able to seek a remedy in a court outside of the host country, such as the country where the harm occurred.

327. Whether or not a country is a “high risk” country would be a question of fact.

above situations. The underlying claims would continue to be claims for violations of customary international law under the ATS, state torts whose facts rise to the level of violations of customary international law, or serious environmental torts.<sup>328</sup>

As mentioned above, a statutory enactment would overcome the barrier created by *Kiobel*, given that through such legislation, Congress or a state legislature would be providing that the cause of action would apply where the action took place abroad, and thus, there would be no presumption against extraterritoriality.

In the alternative, courts could incorporate this approach in “piercing the corporate veil” analyses and when considering enterprise liability and the tort-based parental duty of care. For public policy reasons, the Article takes this approach only with regard to corporate shareholders and not individual shareholders.

This approach has much in common with the financial, control-based enterprise liability approach, but it is more limited in its scope and targets the specific problem presented: the lack of remedy on the part of victims due to ineffectual legal systems. It also shares a philosophy with the modern duty-of-care approach but suggests, primarily, a statutory approach to the problem. It approaches the issue of a parent’s responsibility for a subsidiary’s actions much the way that the duty-of-care approach does: the parent should be responsible when it purchases or creates a subsidiary to operate in a country where it knows or suspects victims will be unable to seek a remedy for any harm from the subsidiary, especially where the subsidiary is going to be working in high-risk industries, such as the extraction or garment industry.<sup>329</sup>

I suggest this particular approach for several reasons. First, it is broader than the current “piercing the corporate veil” analysis, the control-based enterprise liability approach, and the due diligence approach in that the victims do not need to establish either control or lack of due diligence on the part of the

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328. See David D. Christensen, Note, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain*, 62 WASH. & LEE L. REV. 1219, 1224–27 (2005) (describing the various interpretations of which causes of action a plaintiff can bring under the ATS).

329. See Dearborn, *supra* note 2, at 197 (noting that almost all states have adopted some form of a law that “allows plaintiffs access to the assets of a shareholder . . . to satisfy the debts of a corporation”).

parent. Rather, this solution provides a remedy for those victims in situations where parent corporations enjoy benefits of a subsidiary's economic activity at the expense of non-consenting victims, regardless of their actions. In addition, by not requiring parental control, the approach does not provide a "disincentive" for the parent corporation to review the activities of the subsidiary and engage in due diligence. The approach incentivizes parent corporations to ensure subsidiaries are complying with human rights norms and obligations.

Second, the statutory approach avoids many of the previously discussed barriers that victims would face in attempting to establish parental duty of care and breach through traditional, tort-based theories. In addition, the statutory approach also addresses the barrier for extraterritorial violations erected by *Kiobel* because a statute would signal the legislative body's intent that liability exists for extraterritorial conduct.<sup>330</sup>

Third, this approach is narrower than many of the other approaches because parental liability would apply only to violations of international human rights norms and serious environmental torts. Allowing parent corporations to be liable for general torts would be more difficult to get policymakers and courts to adopt.<sup>331</sup> In addition, allowing suits for general torts could create undue hardship and financial repercussions for parent corporations that are not outweighed by the benefits of providing a remedy. Moreover, such cases also could inadvertently limit the direct investment that many of these countries need to overcome poverty.<sup>332</sup>

The test also requires that plaintiffs establish that the country is "high-risk," and that the victims cannot otherwise obtain a remedy due to legal or judicial reasons because they cannot determine which entity to sue or because the subsidiary is underfunded.<sup>333</sup> In this way, the solution targets specific,

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330. See *supra* notes 14–18 and accompanying text (discussing *Kiobel* and its ramifications for this Article's approach).

331. See *supra* note 122 and accompanying text (noting the entrenched status of limited liability in the law, which explains courts' and policymakers' reluctance to abandon it for general torts).

332. See *supra* note 294 and accompanying text (pointing to business investment as one of the purposes of limited liability).

333. See *supra* notes 326 and accompanying text (defining a "high risk

problematic circumstances. By being narrower and available only in situations that are arguably more inequitable, the approach is more likely to be considered by policymakers and courts.

One might question why it is not sufficient for there to be underfunding or inability to ascertain the entity for there to be parental liability without the need to also establish that the host government has a weak or ineffective judicial system. This is because, in theory, a country with a functional and effective judicial system should, and likely will, already provide for solutions to these problems. Such parental liability for subsidiaries actions in countries with effective judicial systems will also likely pose more complex foreign policy and comity concerns, as discussed in more detail below.<sup>334</sup>

Finally, I only advocate for such liability for parent corporations, not individual investors. An argument could be made that all investors, individual or otherwise, of a foreign corporation, should be liable for acts of the foreign corporation where the corporation, and thus shareholders, benefit at the expense of non-consenting individuals who have no remedy available to them. However, the initial policy reasons behind limited liability—to protect individual shareholders' assets—do not apply equally to corporations. In this way, no individual assets are at risk. In addition, corporations do not act with moralistic reasons, whereby individuals have the capacity to do so.<sup>335</sup> Others have articulated reasons why such liability should not extend to individual investors as it might to corporate shareholders.<sup>336</sup> Professor Strasser, in particular, has stated the reasons eloquently. He states:

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country” for purposes of this Article).

334. See *infra* Part VII.D (describing how foreign policy and comity concerns related to this Article's approach can be overcome).

335. See Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 4 (2012) (describing the lack of corporate virtue despite a plethora of corporate regulations).

336. See Berle, *supra* note 186, at 347 (discussing “the argument that it would be inequitable to impose individual liability on associates where they did not intend to create it and the outsider did not seek to have it”); Dearborn, *supra* note 2, at 29, 199, 211, 249, 257 (“[T]he corporation's personhood is largely unproblematic when its shareholders are individual investors or corporations holding minor amounts of stock.”) (internal citations omitted); Strasser, *supra* note 99, at 638 (explaining that a parent company as a shareholder plays a different role than an individual investor shareholder plays).

While traditional corporate law has not articulated different rules for a parent company in its role as a shareholder than for individual investor shareholders, parent companies in fact present different policy issues and their limited liability should be determined by a different analysis. The core idea is that a parent company as a shareholder in its subsidiary companies is in quite a different economic role and performs quite a different management function than individual investor shareholders . . . . A parent company creates, operates and dissolves subsidiaries primarily as part of a business strategy in pursuit of the business goals of the larger enterprise, which the parent and all the subsidiaries are pursuing together. The parent is not an independent investor.<sup>337</sup>

Moreover, getting a statutory enactment or having a court find for such liability against individuals would likely be more difficult to achieve.<sup>338</sup>

### *B. Assigning Liability Without Fault Is Not New*

Assigning liability without requiring fault is not new to our legal system.<sup>339</sup> Our legal system has apportioned liability in several tort situations regardless of culpability because it recognizes that in certain situations, individuals and communities should not have to bear the risk of certain activities from which corporations benefit.<sup>340</sup> This is seen in doctrines of product liability—where a business is strictly liable for defective products, regardless of culpability;<sup>341</sup> where a business is liable

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337. Strasser, *supra* note 99, at 638.

338. See *supra* note 331 and accompanying text (highlighting another example of courts' and policymakers' reluctance to desert limited liability's core purposes).

339. See James Stevens Rogers, *Indeterminacy and the Law of Restitution*, 68 WASH. & LEE L. REV. 1377, 1389 (2011) (noting the prevalence of liability without fault in the twentieth century).

340. See Abraham, *supra* note 105, at 195–96 (suggesting that the entity that stands to benefit from the activity in question should also be the one to absorb the economic downsides).

341. See *id.* at 195 (“There is no need for the plaintiff to show that the manufacturer used inadequate materials, failed to conduct a proper inspection, or otherwise took a risk whose potential costs were greater than its potential benefits.”).

for engaging in particularly abnormally dangerous activities;<sup>342</sup> and where a business is strictly liable for acts of its employees acting within the scope of employment, alternatively referred to as vicarious liability and *respondeat superior*.<sup>343</sup> With regard to the latter, state courts have notoriously used an extremely broad definition of “scope of employment,” specifically so that harmed individuals are more likely to obtain a remedy.<sup>344</sup> In these situations, courts and policymakers have found it fitting to hold businesses strictly liable simply as a matter of choice as to who should bear the costs of business activity. Because businesses enjoy a profit from this activity, they should be the ones absorbing the costs, regardless of culpability on the businesses’ part. In this way, our judicial system has chosen to ensure that costs of doing business are not borne by the public at large. We can, and should, do the same in situations where parent corporations derive benefit from acts of subsidiaries acting abroad in order to ensure that harmed individuals can obtain a remedy for harm they suffer. Just as within the situations described above, where the harmed individuals stand to gain some indirect benefit from the economic activity causing the harm, this should be the case even where communities might obtain some benefit from the actions of the subsidiary, such as jobs, economic enhancement, or products.

*C. Examples of Where Congress Has Overcome Limited Liability  
by Statute*

If Congress or state legislatures are persuaded by the normative arguments regarding parental corporate liability in

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342. See *id.* (discussing the meaning of “abnormally dangerous” in the context of product liability).

343. See *id.* at 182–84 (explaining the elements of *respondeat superior* and the scope of its application).

344. See Elizabeth Wilson, *Is Torture All in a Day’s Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL’Y 175, 212 (2008) (“Use of state respondeat superior law when the United States is being sued, instead of the individual official, makes some sense, because the aim of respondeat superior is to offer a deeper pocket to victims injured by employees.”).

the situations for which this Article advocates, they could enact legislation providing for parent corporation liability. There is precedent for such legislation, at least at the federal level, especially in the areas of public utilities, financial sectors, employer-sponsored pension plans, taxes, securities, export controls, and foreign trade.<sup>345</sup> Such legislation, mostly regulatory in nature, explicitly overcomes the limited liability of parent corporations in certain situations; albeit, in nearly all instances, the statute requires a finding that the parent “controls” the subsidiary rather than the simple fact that the parent owns the subsidiary and financially benefits from it.<sup>346</sup> However, the definition of control varies and does not always track the factors outlined in various states’ corporate veil piercing doctrines.<sup>347</sup>

In at least one instance, “control” can be presumed simply from a controlling ownership interest in stock.<sup>348</sup> The Employee Retirement Income Security Act (ERISA)<sup>349</sup> notes that when a company that is part of a multi-employer sponsored retirement income plan terminates its plan, thus leaving the possibility of unfunded benefits owed to employees of that single employer, all businesses that are under “common control” are liable for the benefits, plus interests, to all the participants in the terminated plan, regardless of whether any or all related businesses have

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345. See, e.g., Blumberg, *Increasing Recognition*, *supra* note 26, at 303 (mentioning that enterprise principles now govern a wide array of industries); Dearborn, *supra* note 2, at 240–45 (identifying ERISA, labor law, and bank holding companies as subject to “explicit statutory enterprise liability”).

346. For a detailed catalogue of legislation and regulations where Congress has statutorily determined when a parent corporation can be liable for obligations of subsidiaries, or enterprises liable for actions of its various businesses, see Blumberg, *Increasing Recognition*, *supra* note 26, at 303–321. As he notes, however, nearly every one requires that the parent control the subsidiary. *Id.* at 304. Dearborn also discusses various instances, including what she terms the explicit statutory adoption of enterprise law with regard to employee pension law, labor laws, and financial institutions. Dearborn, *supra* note 2, at 240–44. This section of the Article relies on both Dearborn’s and Blumberg’s work.

347. See Blumberg, *MULTINATIONAL CHALLENGE*, *supra* note 71, at 33–36 (distinguishing between the different definitions of “control” in the context of the decision-making process of a corporation).

348. See I.R.C. § 1563 (2012) (defining the term “controlled group of corporations” to mean the group possessing a certain controlling stock ownership).

349. 29 U.S.C. §§ 1101–1461 (2012).



corporate form.<sup>350</sup> Importantly, the regulations define “common control” as businesses connected through ownership of a controlling interest with a common parent organization; and a controlling interest is presumed at 80% ownership.<sup>351</sup> In enacting this section of the statute, Congress essentially “pierced the corporate veil” for parent corporations owning at least 80% of the subsidiary, as one court noted.<sup>352</sup>

The First Circuit, in reviewing this statute and regulation, noted that, although state law typically controls when limited liability can be pierced, state law on piercing does “not constrict a federal statute regulating interstate commerce for purposes of effectuating certain social policies.”<sup>353</sup> Thus, Congress can dictate by statute when parental liability should exist when a subsidiary has obligations to others, as long as there is a connection to interstate commerce.<sup>354</sup>

Additionally, in the context of financial institution regulations, for over fifty years the Bank Holding Company Act<sup>355</sup>—which protects creditors and places restrictions on

350. See *id.* § 1301(b)(1) (“[A]ll employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer.”).

351. I.R.C. § 1563 (2012); Treas. Reg. § 1.414(c)-2(b)(2)(i)(A) (2012). The 80% rule is taken from the Internal Revenue Code and Treasury Regulations, as ERISA incorporates both. 29 U.S.C. §§ 1301(b)(1), 1302(b)(3) (2012). See also Blumberg, *Increasing Recognition*, *supra* note 26, at 313 (noting that the term “under common control” refers to “ownership of stock possessing at least 80 percent of the combined voting power of all classes of stock . . . or at least 80 percent of the total value of shares of all classes of stock.”).

352. This was also noted by the First Circuit in *Pension Benefit Guar. Corp. v. O’uimet Corp.*, 711 F.2d 1085, 1093 (1st Cir. 1983). Blumberg, *Increasing Recognition*, *supra* note 26, at 313 (“The regulations utilize the concept of the ‘controlled group of corporations’ as the determining standard for businesses ‘under common control’ and define the term by reference to one of the 80 percent stock ownership standards of the Internal Revenue Code.”). The same is not true of single-employer plans; in those instances, courts have found corporate parents are not liable for subsidiaries’ pension-related liabilities, although, as Professor Phillip Blumberg has noted, in those situations a few courts have opined that piercing standards should be relaxed to further the statutory goals of the statute and plan. *Id.*

353. *Ouimet Corp.*, 711 F.2d at 1093.

354. See *id.* (noting that the congressionally enacted ERISA statute trumped state law concerns about corporate separateness).

355. The Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841–1852 (2012).

mergers and acquisitions—applies to any parent or holding company that controls another covered corporation.<sup>356</sup> There is a presumption of control where the parent or holding company holds 25% of the voting shares of the other corporation and controls the election of the majority of directors or trustees, or the company directly or indirectly exercises a controlling influence over the management or policies of the bank or company.<sup>357</sup>

Perhaps even more significantly, in the context of extraterritorial acts of subsidiaries, Congress has enacted statutes that create liability on the part of the parent regardless of limited liability.<sup>358</sup> For purposes of this Article, the most applicable is the Foreign Corrupt Practices Act,<sup>359</sup> which criminalizes the paying of bribes to foreign officials for business purposes and has accounting and record requirements to prevent the hiding of bribery payments.<sup>360</sup> The Act applies to all U.S. “issuers” of securities and “domestic concerns.”<sup>361</sup> An “issuer” is defined as any company that has securities registered in the United States or is otherwise required to file periodic reports with the SEC.<sup>362</sup> “Domestic concerns” is broader, and encompasses any individual who is a citizen, national, or resident of the United States.<sup>363</sup> This also includes any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship with its principal place of business in the United States or organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States.<sup>364</sup>

Although the anti-bribery provisions of the FCPA do not explicitly make a parent corporation liable for violations

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356. *Id.* § 1841(a)(2).

357. *Id.*

358. *See, e.g.*, 15 U.S.C. § 78dd (2012) (specifying which transactions on foreign securities exchanges are unlawful).

359. *Id.*

360. *See id.* §§ 78dd-1, 78dd-2 (prohibiting foreign trade practices by issuers and domestic concerns).

361. *See id.* § 78dd-1(a) (defining issuers); § 78dd-2(a) (defining domestic concerns).

362. *Id.* § 78dd-1(a).

363. *Id.* § 78dd-2(h)(1).

364. *Id.*

committed by a foreign subsidiary, the books-and-records provisions of the FCPA impose an obligation on corporate parents who are “issuers” to ensure their majority-owned foreign subsidiaries comply with recordkeeping and internal controls.<sup>365</sup> Several enforcement actions have occurred against U.S. corporations under these accounting provisions as applied to their foreign subsidiaries, including requiring the parent to pay fines and disgorge profits attributable to the foreign subsidiaries.<sup>366</sup>

Finally, there is also precedent with regard to Congress providing for extraterritorial jurisdiction.<sup>367</sup> For example, the Foreign Corrupt Practices Act also applies extraterritorially,<sup>368</sup> as does the Civil Rights Act,<sup>369</sup> the Age Discrimination in

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365. See *id.* § 78m(b)(2) (specifying that corporate parents have a duty to diligently oversee the conduct of their foreign subsidiaries).

366. The most recent case involved the SEC charging Goodyear Tire & Rubber Company with FCPA violations when its subsidiaries paid bribes to land tire sales in Kenya and Angola. See Press Release, Secs. Exch. Comm’n, SEC Charges Goodyear with FCPA Violations (Feb. 4, 2015), <http://www.sec.gov/news/pressrelease/2015-38.html#.VQrP6WR4qY0> (last visited Nov. 28, 2015) (describing the settlement between Goodyear and the SEC for Goodyear’s violations of the FCPA) (on file with the Washington and Lee Law Review); see also Press Release, U.S. Dep’t of Justice, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (June 29, 2007), [http://www.justice.gov/archive/opa/pr/2007/June/07\\_crm\\_474.html](http://www.justice.gov/archive/opa/pr/2007/June/07_crm_474.html) (last visited Nov. 28, 2015) (detailing a conspiracy to commit FCPA violations) (on file with the Washington and Lee Law Review); Press Release, Secs. and Exch. Comm’n, SEC Settles Charges Against Former Portland Steel Executive for Anti-Bribery Statute Violations (June 29, 2007), <http://www.sec.gov/litigation/litreleases/2007/lr20174.htm> (last visited Nov. 28, 2015) (noting, inter alia, plea agreements for violations of accounting provisions, as well as other theories holding the foreign subsidiary liable for bribery payments) (on file with the Washington and Lee Law review). For a helpful discussion of such cases, see *The Legal Obligation to Maintain Accurate Books and Records in U.S. and Non-U.S. Operations*, JONES DAY (Mar. 2006), <http://www.jonesday.com/the-legal-obligation-to-maintain-accurate-books-and-records-in-us-and-non-us-operations-03-14-2006/> (last visited Nov. 12, 2015) (on file with Washington and Lee Law Review).

367. See *supra* Part VII.C (discussing specific examples of the extraterritorial application of U.S. law).

368. See 15 U.S.C. § 78dd-1(a) (2012) (applying to any issuer who, for example, acts corruptly in furtherance of promise to bribe a foreign official).

369. See 42 U.S.C. § 2000e(f) (2012) (applying to employment in a foreign country).

Employment Act,<sup>370</sup> and the Americans with Disabilities Act,<sup>371</sup> in certain situations. In addition, several criminal statutes apply to conduct abroad.<sup>372</sup> Moreover, the United States has federal criminal statutes in the area of human rights that apply extraterritorially and that can already be invoked against businesses, namely those regarding genocide,<sup>373</sup> war crimes,<sup>374</sup> torture,<sup>375</sup> and forced recruitment of child soldiers.<sup>376</sup>

Corporations themselves cannot be expected to adopt these principles voluntarily; in fact, doing so might breach their fiduciary obligation to maximize profit.<sup>377</sup> Thus, any such requirements should be imposed on them by policymakers. The best way to incorporate this approach is through statutory changes. This could occur in a variety of ways. First, Congress

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370. See 29 U.S.C. § 623(h) (2012) (applying to practices of foreign corporations controlled by an American employer).

371. See 42 U.S.C. § 12111(4) (2012) (defining employee for the purposes of employment in a foreign country to include an individual who is a citizen of the United States).

372. See 18 U.S.C. § 2423 (2012) (applying to U.S. citizens or permanent residents who engage in illicit sex with minors in foreign countries); *id.* § 2251(c) (applying to any person who engages in producing child pornography outside of the United States for eventual consumption in the United States); *see also, e.g.*, Maritime Controlled Substances Act, Pub. L. No. 96-350, 94 Stat. 1159(a)–(h) (1980) (specifying that the Maritime Controlled Substances Act applies to “acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States”); 18 U.S.C. § 175(a) (2012) (providing for “extraterritorial Federal jurisdiction over an offense under” the Biological Weapons Anti-Terrorism Act “committed by or against a national of the United States”); 18 U.S.C. § 3261 (2012) (mandating that members of the military to who engage in conduct abroad that would be illegal under U.S. law are held accountable).

373. 18 U.S.C. § 1091 (2012).

374. *Id.* § 2441.

375. *Id.* § 2340A.

376. *Id.* § 2442. In addition, a pending Senate Bill, the Civilian Extraterritorial Jurisdiction Act of 2014, expands federal criminal jurisdiction over federal contractors and employees who commit certain criminal offenses abroad including sexual assault and torture. This would end criminal impunity for federal contractors not employed by the Department of Defense and hold public employees to the same standard of law as all Americans. S. 2598, 113th Cong. (2013–2014) (as referred to the Senate Committee on the Judiciary, July 14, 2014).

377. See *supra* note 67 and accompanying text (discussing the potential conflict that corporations may face in maximizing profits at the expense of others).

could enact statutes that create liability on the part of parent corporations, limited liability notwithstanding. A federal statute could be enacted under the power of the Commerce Clause that preempts state limited liability incorporation statutes to ensure liability of U.S. parent corporations in such circumstances. Second, Congress could amend various statutes, such as the ATS and the variety of environmental statutes, to clarify that parent corporations can be liable for the extraterritorial harms of their subsidiaries.

Similarly, individual U.S. states could amend their corporate statutes to allow for liability of parent corporations in such circumstances.<sup>378</sup> In this regard, it is important to recall that corporations are, after all, creatures of the individual state and exist with the permission of each state under which they are incorporated.<sup>379</sup>

#### *D. Foreign Policy and Comity Concerns Can Be Overcome*

As mentioned in the introduction to this Article, some might raise foreign policy concerns with this approach, given that any lawsuit against a corporate parent in the United States would focus on actions taken by a foreign subsidiary in a foreign country.<sup>380</sup> For example, the Supreme Court expressed concerns about whether U.S. courts can adjudicate cases involving extraterritorial acts of businesses consistent with notions of comity in *Kiobel*.<sup>381</sup> Such concerns arguably led

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378. It is important to note, however, that if states did so, there could be arguments of federal preemption if such statutes affect foreign affairs. See Skinner, *supra* note 18, at 202 (“Defendants in such claims may argue federal preemption or argue that the foreign affairs doctrine dictates that federal law regarding such claims should displace state law.”). However, such claims should not pose much of a barrier. *Id.*

379. See *supra* notes 54–55 and accompanying text (discussing the state as the source of a corporation’s existence).

380. See *supra* Part I (highlighting the foreign policy concerns associated with allowing foreign victims to hold foreign subsidiaries and their corporate parents liable).

381. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (Breyer, J., concurring) (noting possible serious foreign policy consequences); *id.* at 1671 (stating that adjudicating a claim must be consistent with those “notions of comity that lead each nation to respect the sovereign rights of other

the Court to apply the presumption against extraterritoriality.<sup>382</sup>

However, these concerns can, and should, be overcome. First, as described above, there are several examples of U.S. laws that apply extraterritorially, including several that address issues involving human rights and corruption.<sup>383</sup> Not only did Congress enact these laws notwithstanding any foreign policy or comity concerns, it does not appear that any of these laws have led to serious foreign policy implications.<sup>384</sup> Second, the ATS has been found to apply extraterritorially for decades without significant foreign policy consequences.<sup>385</sup> Third, such concerns are difficult to justify, especially with regard to U.S. businesses and corporations, given that the U.N. Guiding Principles provide that nations should ensure their businesses are respecting human rights abroad and provide remedies for human rights violations.<sup>386</sup>

Finally, there appears to be few serious comity or foreign policy implications where a parent corporation is simply providing a remedy to victims in the host country.<sup>387</sup> Even if there were some slight concerns, such concerns should not displace the great inequality between parent corporations that benefit from

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nations by limiting the reach of its own laws and their enforcement”).

382. See *id.* at 1669 (“Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it . . . . The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.”).

383. See *supra* notes 367–376 and accompanying text (discussing specific examples where Congress specified that the statute at issue should be applied extraterritorially).

384. See Skinner, *supra* note 18, at 251 (noting the lack of foreign policy consequences in the aftermath of extraterritorial application of the ATS over time).

385. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (describing the modern line of Alien Tort Statute cases).

386. See Skinner, *supra* note 18, at 164 (“Although other possible remedies exist, such as internal company grievance mechanisms, international commitments set forth in documents such as United Nations Guiding Principles on Business and Human Rights . . . specifically note the importance of victims’ access to effective judicial remedies.”).

387. See *id.* at 167 (arguing that negative foreign policy consequences did not result when the United States has historically provided a judicial remedy for extraterritorial harm).

subsidiaries' economic activities abroad and the harm caused to victims. Moreover, although the claim might focus on the acts of the subsidiary, the claim would be against a U.S. corporation over whom the court has clear jurisdiction, as opposed to a claim over a foreign corporation. How a domestic country governs its own corporations should be a matter for that country; thus, how the United States treats its own parent corporations should be a matter for the United States, and the United States alone.

### *IX. Conclusion*

Some might argue that none of this is necessary; that there are enough incentives for businesses to engage with stakeholders; that for corporations to be sustainable, they must respect the human rights of the community; that the long-term sustainability of a corporation depends on strong local economies where the business is located and value exists for all stakeholders, and thus, trust with employees, community members, and other stakeholders is crucial; and that long-term success means respecting human rights.<sup>388</sup>

There is undoubtedly truth in these ideas, and they do provide an incentive for transnational businesses that have long-term growth and value in mind, especially for businesses that engage directly with local communities, where those communities know the corporation involved, and the corporation has its reputation at stake. It is less true for transnational businesses that have short-term profit in mind, and even less true for subsidiaries whose reputation is not linked to the parent, or where the subsidiaries are part of a complex business structure making it nearly impossible to determine who owns the subsidiary. In fact, there are instances where it is nearly impossible to determine who the parent is of a subsidiary causing

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388. See Bob Collymore, CEO Safaricom & Paul Buckle, CEO Nestle, Comments at the Third Annual United Nations Forum on Business and Human Rights, in Geneva (Dec. 2, 2014) [hereinafter U.N. Forum Comments] (notes on file with the author) (analyzing current incentives for corporations to respect human rights).

the damage or engaging in the problematic behavior, often due to a complex business structure.<sup>389</sup>

Whatever the approach, having a clear description of where and under what circumstances a corporate parent would be liable for acts of a foreign subsidiary might be a more welcome approach than one might imagine, given the emerging and recent UK and Canadian cases for direct liability on the part of the parent for breach of a duty of care. In fact, a law partner with a French law firm made comments that some corporations might welcome a clear approach because such could provide clear direction as to what is required of them with regard to subsidiaries.<sup>390</sup> Although there may be a perception that the suggested statutory approach taken in this Article may not find many legs in Congress, compelling arguments for such legislative changes do exist. In addition, given what Congress has already done with regard to Dodd-Frank and the pending federal legislation regarding supply chains, getting legislation enacted at the federal level may not be as difficult as some might suggest. For example, even those lawmakers who are sympathetic to corporate interests also want to portray themselves as pro-human rights.<sup>391</sup> Thus, proposed legislation that is characterized as pro-human rights may stand a better chance of succeeding than expected. In addition, some states may be more willing than Congress to introduce such legislation in an attempt to hold their corporations responsible, and there are already examples of this,

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389. See Phillip I. Blumberg, *Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297, 300, 303 (2001) (noting that "multi-tiered multinational corporate group[s] function with a parent corporation, sub-holding companies, and scores or hundreds of subsidiary corporations organized under the laws of countries around the globe"); see also UN Forum Comments, *supra* note 388 (illustrating the complexity of major corporate structures that span various countries and are composed of multiple subsidiaries, giving the example of British Petroleum which has sub-holding companies and over 1,200 subsidiaries).

390. See Stephane Brabant, Partner, Herbert Smith Freehills LLP, Comments at the Third Annual United Nations Forum on Business and Human Rights (Dec. 2, 2014) (noting that corporations value regulatory clarity in order for them to understand the contours of what is permissible).

391. See Skinner, *supra* note 18, at 250 ("For example, according to some consultees, even those lawmakers who are sympathetic to corporate interests also want to portray themselves as pro-human rights.").



such as with the supply-chain transparency act in California.<sup>392</sup> One might also find more sympathetic state policymakers in some states than in Congress.

Thus far, policymakers have focused on actions of contractors and suppliers and are now requiring transparency and reporting in contracting and supply chains.<sup>393</sup> It is unclear why there has not been the same sort of focus on these corporations' subsidiaries' activities—entities over which they likely can exercise more control. At a minimum, the same sort of transparency and reporting should apply to subsidiaries. But Congress should require even more of parent corporations with regard to their subsidiaries' actions, given that the parent corporations arguably benefit more from their subsidiaries' economic activity than they do those non-related entities that are part of their supply chain.

Adopting the approach outlined in this Article is a way forward to ensure that parent corporations that benefit at the expense of those harmed by their subsidiaries operating abroad fairly address such harms. This is especially important for victims in host countries who cannot otherwise obtain a remedy. They should be provided a remedy by the entity that can best, and normatively should, remedy their harm—the parent corporation.

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392. CAL. CIV. CODE § 1714.43 (West 2012).

393. See *supra* notes 153–154 and accompanying text (giving examples of recent legislative enactments focusing attention on company supply chains).