

# PARENT COMPANY ACCOUNTABILITY

**Ensuring Justice for Human Rights Violations**



**Professor Gwynne Skinner**



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**The International Corporate Accountability Roundtable (ICAR)** is a coalition of human rights, environmental, labor, and development organizations that creates, promotes, and defends legal frameworks to ensure corporations respect human rights in their global operations.

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# EXECUTIVE SUMMARY

## Background

The United Nations Guiding Principles on Business and Human Rights rest on three pillars: the State duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy to those whose rights have been violated.<sup>1</sup>

The State duty to protect human rights entails ensuring the adequacy of remedial avenues, and addressing and eliminating potential barriers to justice. As Guiding Principle 26 recognizes:

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>2</sup>

As mapped out in the 2013 “Third Pillar” Report, which canvassed the most significant legal and practical barriers inhibiting justice, the limitation of liability on the part of the parent company over which the home State has personal jurisdiction in relation to its subsidiary’s actions has resulted in significant obstacles to redress.<sup>3</sup>

While these obstacles persist, there has been an increase in the growth of transnational business, including the number of parent corporations and subsidiaries, over the last forty years as developing countries have campaigned to attract transnational business, resulting in reduced regulations.<sup>4</sup> In 1970, there were approximately 7,000 transnational corporations in the world; that number grew to 30,000 by 1990, 63,000 by 2000, and to 82,000 by 2009.<sup>5</sup> Today, there are more than 100,000 multinational corporations with over 900,000 foreign affiliates.<sup>6</sup> As this trend continues, more victims of human rights violations will be left without a remedy until the barrier created by the doctrine of limited liability of parent corporations is addressed.

## The Project

The “Parent Company Accountability” Project (PCAP) was launched by the International Corporate Accountability Roundtable (ICAR) in 2014 with Professor Gwynne Skinner to explore opportunities in U.S. law for holding parent corporations liable for actions of their subsidiaries and/or business partners. Through research and discussions, the PCAP has developed this Report to describe how the doctrine of limited liability of shareholders benefits parent corporations even as it bars access to remedies for victims of serious human rights abuses.

The Report traces the historical development of corporations and the limited liability of shareholders in the United States, and describes how the doctrine has resulted in a lack of remedy for human rights victims of transnational business. The Report then lays out arguments for why a change to the doctrine is necessary; discusses the developments in France and Switzerland to

address the issue; and surveys human rights litigators' current approaches to holding parent corporations accountable. Finally, the Report recommends the following legislative measure to overcome the limitations of these approaches:

Enact legislation to disregard 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 a 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 can establish that:

1. they 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;
2. they cannot determine what entity is responsible, and thus what entity to hold accountable, given the enterprises' complex corporate structure; or
3. a subsidiary is underfunded and thus cannot pay any damages resulting from the violation.

## I. INTRODUCTION

Around the world, victims of transnational businesses' violations of international human rights norms are often left without a remedy. This is especially true for victims in countries that want to attract transnational business but lack the legal and judicial systems necessary to appropriately regulate businesses' activities and provide remedies to those harmed. Often businesses act through subsidiaries<sup>7</sup> incorporated in a high-risk host country where victims cannot obtain a remedy against the subsidiary in the host country<sup>8</sup> for a variety of reasons: they may not be able to identify the subsidiary to sue; the subsidiary may be underfunded; there may not be a cause of action available under the host country's law; or there may be corruption and ineffective judicial systems that make bringing a suit virtually impossible.

Sometimes the business is the subsidiary of a transnational corporation (parent corporation) or part of a complex corporate enterprise that financially benefits from the subsidiary's business operations. Yet, even where that is the case, victims face challenges in accessing an effective remedy against the parent corporation because of a deeply ingrained legal doctrine – the doctrine of limited liability of shareholders<sup>9</sup> – that also applies to corporate shareholders.<sup>10</sup> Unless the parent corporation is directly involved in the violation or victims can convince a court to “pierce the corporate veil” because the subsidiary was acting as the parent's alter ego,<sup>11</sup> the parent corporation cannot be held liable or be required to provide a remedy to victims of the subsidiary's action.

Given the plethora of benefits parent corporations receive through their subsidiaries' operation in the form of dividends, tax benefits, and preferential tax treatment, there is increasing recognition that victims should be able to obtain a remedy against the parent corporation for violations of international human rights norms and serious environmental torts – especially where they cannot obtain such a remedy against the subsidiary in the subsidiary's home country.

The United Nations Guiding Principles on Business and Human Rights (UNGPs)<sup>12</sup> provide guidance, founded on international law and legal instruments, for the respective duties of the State and responsibilities of companies, including with respect to remedy.

Generally, the UNGPs apply “to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”<sup>13</sup> Guiding Principle 22 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>14</sup> Similarly, Guiding Principle 26 urges countries to 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 a remedy.<sup>15</sup> The Commentary to Guiding Principle 26 specifically notes that “legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise by, inter alia, 1) 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 [country] and cannot access home [country] courts regardless of the merits of the claim.”<sup>16</sup>

Read in their totality, the UNGPs provide that countries where parents of business enterprises are located must ensure that victims receive a remedy for harm caused by any subsidiary of the business enterprise when those victims cannot otherwise obtain a remedy in their own country. The UNGPs are also clear that victims must have ultimate resort to a judicial remedy.<sup>17</sup>

As evidence of commitment to this duty to protect human rights, some countries, notably France and Switzerland, have introduced legislation to provide for parental liability in certain situations.<sup>18</sup> Statutes providing for parental liability (statutorily “piercing the corporate veil”) already exist under U.S. law in certain situations as discussed in Part VI, and there are increasing legislative responses to ensuring transnational businesses are responsible for human rights in their supply chains and with subcontractors.

In light of this evolution of normative standards about transnational corporate responsibility, the time is ripe for re-exploring parent corporate liability for a subsidiary’s violations of international human rights norms and serious environmental torts.

In **Part II**, the Report briefly traces the historical development of corporations and limited liability of shareholders in the United States, including for torts. It also describes how the doctrine has resulted in lack of remedy for victims of human rights abuses at the hands of transnational business.

In **Part III**, the Report sets forth why a change – ideally legislative – to the limited liability doctrine is necessary. The Report identifies the current financial benefits parent corporations receive through their foreign subsidiaries’ operations; describes the inadequacy of relying on host countries in providing an adequate remedy; and sets forth ethical arguments for holding parent corporations liable for subsidiaries’ actions in certain situations.

In **Part IV**, the Report discusses recent legislative achievements as well as judicial setbacks to holding parent companies accountable. This Part considers developments in France and Switzerland regarding parent corporations’ limited liability, and describes evolving attitudes toward business and human rights. It also highlights the challenge of “subject matter jurisdiction” in holding a parent corporation liable in the United States for extraterritorial acts of its subsidiaries, set forth in the 2013 case of *Kiobel v. Dutch Royal Shell*.<sup>19</sup>

In **Part V**, the Report explores approaches to holding corporations liable. This Part first explores the traditional veil-piercing and agency theory approaches and discusses their limited use. Second, it reviews three additional approaches for overcoming limited liability of parent corporations that various advocates and scholars have more recently taken: enterprise liability, the due diligence approach, and the tort-based parental duty of care approach. It describes the circumstances on which these approaches are focused and when they might be successful. This Part also discusses the gaps and limitations of each of these approaches.

In **Part VI**, the Report recommends a legislative measure to overcome the limitations of the approaches outlined in Part V:

Enact legislation to disregard 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 a 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 can establish that:

1. they 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;
2. they cannot determine what entity is responsible, and thus what entity to hold accountable, given the enterprises’ complex corporate structure; or
3. a subsidiary is underfunded and thus cannot pay any damages resulting from the violation.

## II. THE HISTORY OF THE CORPORATION AND UNDERSTANDING LIMITED LIABILITY

In the United States, corporate entities exist with the permission of the individual U.S. state in which they are incorporated;<sup>20</sup> they do not exist as a matter of right.<sup>21</sup> Early in U.S. history, 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>22</sup> Most were public corporations, which were expected to achieve some sort of public purpose or to promote the public good.<sup>23</sup> In the mid-1800s, as more businesses wanted to incorporate, states began to enact statutes that allowed businesses to form corporations without requiring individualized approval, as long as they filed their articles of incorporation with the state.<sup>24</sup> Public corporations – those for which shares are generally available to the public<sup>25</sup> – were still required to have a public purpose.<sup>26</sup> Private corporations – those for which shares are owned privately<sup>27</sup> – were (and continue to be) expected to refrain from actions against the public interest and were expected to comply with all laws.<sup>28</sup> Although the number of corporations, both public and private, has grown exponentially since then,<sup>29</sup> this is still mostly the case today.<sup>30</sup>

Along with the incorporation statutes came the doctrine of shareholder limited liability – the notion that shareholders are only liable for the amount of money invested; the rest of their assets are protected from creditors.<sup>31</sup> In the early to mid-1800s, states began enacting limited liability statutes along with incorporation statutes to encourage investment in corporations, and thus business and economic activity.<sup>32</sup>

Corporations, however, were originally not allowed to own shares in other corporations.<sup>33</sup> It was not until 1888 when New Jersey began allowing corporations to be shareholders of other corporations did corporate ownership of stock begin.<sup>34</sup> Due to this change, the late 1800s and early 1900s saw an increase in the use of the parent-subsidiary structure.<sup>35</sup> Businesses began utilizing subsidiaries during this time for a variety of reasons, including 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 the desire for limited liability.<sup>36</sup>

The original conceptions of limited liability were for contract claims only and not for tort actions.<sup>37</sup> In fact, many scholars claim that limited liability was never meant to apply to tort claims.<sup>38</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 due to the fact that contracts are consensual.<sup>39</sup> Only 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 which 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>40</sup> Thus, these scholars

argue, limited liability could not have been intended to limit liability for torts. But limited liability for corporate torts did develop fairly early in the country's history,<sup>41</sup> apparently under the assumption that as with contracts, limited liability for torts was necessary for economic investment and activity.<sup>42</sup>

These criticisms regarding limited liability for tortious actions continue to ring true today, especially with regard to U.S. foreign subsidiaries' actions in vulnerable communities. Non-consenting communities and individuals are harmed when foreign subsidiaries of U.S. corporations engage in tortious behavior, all the while benefitting the entire business enterprise. In those situations where these non-consenting victims cannot obtain a remedy from the subsidiaries in their own countries, they are left without any remedy due to limited liability of the parent corporate shareholders – the same parent corporations that inure great economic and tax benefits from the subsidiaries' activity.

### III. THE NEED TO RESPOND: THERE SHOULD BE PARENT CORPORATE LIABILITY FOR ACTS OF SUBSIDIARIES IN CERTAIN SITUATIONS

#### 3.1. Financial Benefits of Subsidiaries

When contemplating whether there should be corporate parent liability for tortious acts of their foreign subsidiaries, it is important to recognize that corporate parents enjoy significant financial advantages through the use of subsidiaries. These include lower labor, manufacturing and regulatory costs, income in the form of dividends, and tax benefits.

Many transnational businesses set up or purchase a foreign subsidiary in order to manufacture goods in host countries where labor, manufacturing, and regulatory costs may be lower.<sup>43</sup> As one scholar has noted, “Using sophisticated corporate structures often involving a parent holding corporation and various overseas manufacturing subsidiaries, [multinational corporations] have been able to set up transnational production chains that can bypass or evade national laws on labor and the environment.”<sup>44</sup> Such countries may legitimately need investment, but often lack the legal, regulatory, and judicial systems necessary to ensure adequate protections of human rights, including labor rights, and environmental protections.<sup>45</sup>

Parent corporations also benefit from the foreign subsidiaries’ income in the form of shareholder dividends, just as any shareholder can receive such dividends or payouts.<sup>46</sup> Further, despite generating vast sums of revenue<sup>47</sup> compared to individual wage earners, taxes paid<sup>48</sup> by corporations<sup>49</sup> in the United States constituted only 11.5 percent of total revenue collected by the IRS for the 2014 tax year.<sup>50</sup> U.S. corporations implement the tax preferences available to them through the tax code to reduce the amount of taxes they pay each year. One notable tax reduction available to U.S. corporations involves the establishment and operation of foreign subsidiaries. Two of the biggest tax benefits for U.S. parent corporations operating subsidiaries abroad are deferral of income of the subsidiaries and transfer pricing manipulation.

The current U.S. international tax system consists of a tax on U.S. source income<sup>51</sup> and worldwide taxation on the income of U.S. nationals,<sup>52</sup> coupled with incentives to defer income and keep income abroad rather than repatriate the income to the United States, often through the use of foreign subsidiaries. This shifts profits and economic activity to low tax jurisdictions.<sup>53</sup> A U.S. parent corporation can establish and operate a subsidiary in a foreign country<sup>54</sup> and shift the profits of the foreign subsidiary outside of immediate U.S. taxation until the income is returned to the United States, or repatriated, subject to certain exceptions.<sup>55</sup> By implementing allowable accounting methods, the U.S. parent does not have to include the income of the subsidiary for tax purposes, unless an anti-deferral regime applies.<sup>56</sup> Moreover, financial accounting rules allow corporations to treat the temporary tax deferral as though it is permanent. Specifically, the Accounting Principles Board (APB) 23 provision<sup>57</sup> permits U.S. parent corporations to disregard the taxes they have deferred through

their foreign subsidiaries, 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. This assertion allows the U.S. parent to issue its earnings report without having to account for the repatriation tax, excluding this otherwise requisite cost from its earnings record.<sup>58</sup>

Transfer pricing is currently one of the most high profile areas in international tax, both within and outside of the United States. Transfer pricing principles can be used to shift income from high tax to low tax jurisdictions through the use of a subsidiary. Manipulation of transfer pricing occurs when related entities sell or transfer goods or services among each other.<sup>59</sup> For example, if the subsidiary is located in a low-tax jurisdiction, corporations might seek to concentrate higher profits for goods sold there, as then the taxes on profits will be lower than if those profits were realized in a high tax jurisdiction.<sup>60</sup> Similarly, related entities can shift costs to high-tax countries as the costs deducted by the parent will be higher.<sup>61</sup>

Given the nexus parent companies have with subsidiaries for purposes of tax and other financial benefits, as detailed above, it should be evident and expected that parents cannot be separated from such subsidiaries when victims seek a remedy for the subsidiaries' violations of international human rights and serious environmental harms.

### **3.2. Inadequacy of Relying on Host Countries to Provide A Remedy**

Victims must be able to recover against a parent company in its home country when remedies are unavailable against the subsidiary in the country where the harm occurred. Ideally, all countries would have regulatory and judicial systems sufficient to both prevent large-scale harm to individuals and communities and to provide for a remedy in the event that the subsidiary engages in tortious actions, and subsidiaries would have funds (or negligent tort insurance) sufficient to pay any award, but this is not always the case.

In fact, this is rarely the case in countries where many subsidiaries engaging in risky industries operate, typically developing countries.<sup>62</sup> Globalization has also resulted in many host countries loosening or doing away with regulations in order to attract transnational business.<sup>63</sup> As one author has noted, transnational corporations that have subsidiaries in developing countries can often hold more wealth, and therefore bargaining power, than host countries.<sup>64</sup> In particular, many countries that host subsidiaries engaged in the extractive or other industries with a high potential for human rights abuses may have ineffectual and corrupt judicial systems or no mechanism for victims harmed by businesses' actions to seek or obtain redress.<sup>65</sup>

In addition, sometimes there is simply no statutory or common law basis to bring a claim.<sup>66</sup> Moreover, victims may be unable to identify which subsidiary is operating in their area and thus which entity to bring a claim against.<sup>67</sup> Victims may also have legitimate fears of retaliation by the business or the members of the community if they bring a claim for which the government cannot protect them.<sup>68</sup> Furthermore, victims may not have the ability to get the evidence they need to bring a lawsuit; they may not have sufficient funds necessary to bring a lawsuit; or victims simply may be

unable to find a lawyer in that country willing to bring a suit in the host country's court.<sup>69</sup> All of these factors converge to create a situation where victims are likely to have little recourse in their own countries and no path to potential remedy but that of bringing suit against the parent corporation in its home jurisdiction.<sup>70</sup>

### **3.3. Ethical Arguments for Parent Liability**

Based on the above, there is a strong ethical argument against limited liability where a parent corporation creates or purchases a subsidiary and knows, or should know, that the subsidiary will operate in a country where non-consenting victims of possible harm have no ability to obtain a remedy. This is especially true in instances of serious harm.

The benefits parent corporations receive for actions of subsidiaries are immense, as the previous section has illuminated. Yet, 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 have no access to remedy from the host country, they are left without the ability to seek accountability or compensation for their harm. They alone absorb the cost of the harm, all while the host country and the parent corporation benefit from the harmful activity.

Allowing individuals to seek a remedy from parent corporations for minor harms might be too onerous for corporations such 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.<sup>71</sup> The greater the harm to individuals or communities in host countries where access to remedy is nonexistent, the stronger the ethical argument for ensuring victims are not denied access to remedy from the parent corporation on account of limited liability. Determining where to draw the line between minor harms and those warranting removing limited liability is not an easy task, but policymakers and the judiciary can and do make these choices. One line for determining when parent corporations can be held liable for acts of subsidiaries that might serve well is torts that violate international human rights law and serious environmental law (many of which arguably violate international human rights law). Indeed, the UNGPs, in counseling toward parental liability, restrict such liability to torts that violate international human rights norms.<sup>72</sup>

## IV. LEGISLATIVE ACHIEVEMENTS AND JUDICIAL LIMITATIONS

Today, there is no question that the limitation on liability of shareholders extends to the subsidiary's actions whether its liabilities lie in contract or in tort.<sup>73</sup> Moreover, there are many cases of courts rejecting claims of international human rights violations and serious environmental torts based on limited liability.<sup>74</sup>

This decrease in remedial opportunities has met with an increase in the growth of transnational business, including the number of parent corporations and subsidiaries, over the last forty years as developing countries have campaigned to attract transnational business, resulting in reduced regulations.<sup>75</sup> In 1970, there were approximately 7,000 transnational corporations in the world; that number grew to 30,000 by 1990, 63,000 by 2000, and to 82,000 by 2009.<sup>76</sup> Today, there are more than 100,000 multinational corporations with over 900,000 foreign affiliates.<sup>77</sup> As this trend continues, more victims of human rights violations will be left without a remedy unless the barrier created by the doctrine of limited liability of parental corporations is addressed.

At least two countries are moving forward in creating liability on the part of the parent company or entire corporate enterprise in certain situations.

In France, a bill was introduced that would have created a presumption of liability on the part of parent corporations for their subsidiaries' torts abroad unless the parents engage in human rights "due diligence" regarding acts of those subsidiaries.<sup>78</sup> If they did engage in such due diligence, then they could overcome the presumption of liability.<sup>79</sup> On March 31, 2015, the French National Assembly endorsed an amended version of the bill; it will go to the French Senate in late 2015.<sup>80</sup>

There has also been activity in Switzerland. On September 1, 2014, the Foreign Affairs Committee of Switzerland's Lower Chamber passed a motion calling for Swiss companies operating abroad to require human rights and environmental due diligence.<sup>81</sup> In March 2015, the Committee's motion was narrowly defeated in the Lower Chamber.<sup>82</sup> However, a coalition in Switzerland is gathering signatures for a referendum to be submitted which, similar to the French bill, would require larger companies to engage in due diligence, risk assessment, the development of measures to prevent possible human rights violations and environmental damages, and comprehensive reporting on such policies and actions.<sup>83</sup>

In the United States, Congress has shown historically that in certain situations, it will legislate on the issue of human rights due to ethical concerns, regardless of what might be best for business. For example, the Leahy Amendment prohibits the sales of arms to countries that engage in human rights violations.<sup>84</sup> Moreover, 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>85</sup>



Second, with regard to business and human rights in particular, there have been several recent legislative enactments to ensure that companies perform due diligence with regard to their supply chain. This includes Section 1502 of the Dodd-Frank Act, requiring companies to report to the SEC their efforts regarding due diligence of their supply chain and custody regarding conflict minerals;<sup>86</sup> a regulation that provides that those companies who do business in Burma file reports with the U.S. Department of State regarding human rights;<sup>87</sup> and California's enactment of the Transparency and Supplies Chains Act, under which certain companies must disclose efforts to ensure the elimination of human trafficking and slavery in their supply chain.<sup>88</sup> There are also various pieces of pending legislation, including the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015, a federal bill similar to California's law.<sup>89</sup>

Interestingly, policymakers have focused on actions of contractors and suppliers and are now requiring transparency and reporting in contracting and supply chains. It is unclear why there has not been the same sort of focus on these corporations' subsidiaries' activities – entities over which they likely can, and should - exercise more control.

While there has been some traction to increase parent company accountability on the legislative side, challenges imposed by the judiciary have prevailed. Any approach to overcoming limited liability must also address the challenge of a court asserting subject matter jurisdiction for a subsidiary's actions in the host country, which became more difficult in 2013 with the U.S. Supreme Court's decision in *Kiobel v. Dutch Royal Shell*.<sup>90</sup> In *Kiobel*, the U.S. Supreme Court erected a new barrier in human rights litigation by finding that where Congress does not otherwise note that a claim applies to extraterritorial conduct, the presumption against extraterritoriality<sup>91</sup> applies, and that this presumption applies to claims of customary international law violations brought under the Alien Tort Statute (ATS).<sup>92</sup> The Court held that plaintiffs can overcome the presumption by showing that a claim "touch[es] and concern[s]" the territory of the United States with sufficient force; however, a business's presence in the United States is not alone sufficient to overcome the presumption.<sup>93</sup> A subsidiary's extraterritorial violations would be unlikely to overcome the presumption of extraterritoriality imposed by *Kiobel*, unless, possibly, where the victims could establish decisions made in the United States that led to the harm.<sup>94</sup>

State courts hearing transitory tort claims because of *Kiobel*'s limitation of ATS litigation in federal courts might be influenced by *Kiobel* and adopt a similar approach or may dismiss the claims under *forum non conveniens* grounds,<sup>95</sup> as often occurs in such cases.<sup>96</sup> Thus, even if the problem of limited liability is addressed through, for example, piercing of the corporate veil, victims of extraterritorial violations of customary international law may still be unable to access the courts to bring a claim to hold a parent corporation accountable for lack of subject matter jurisdiction. Therefore, any approach must overcome this barrier as well. The approach set forth in this Report overcomes this barrier. By enacting a statute allowing victims to sue parents directly for customary international law, state tort law that rises to the level of a customary international law claim, or environment harms, Congress or a Legislature is expressly allowing a claim for extraterritorial conduct, and thus no presumption against extraterritoriality is created.

## V. APPROACHES TO OVERCOMING PARENT CORPORATION LIMITED LIABILITY

There are a myriad of approaches to overcoming parent company limited liability, including “piercing the corporate veil,” agency theory, enterprise liability, the due diligence approach and the parental duty of care. The following chart outlines each of these approaches, which will be explored further below.

	DESCRIPTIONS	LIMITATIONS
PIERCING THE CORPORATE VEIL	<p>The veil can be pierced where the parent misuses the separate corporate form and in actuality controls the subsidiary to the extent that the subsidiary is a mere instrument of the parent. Factors that allows for a veil-piercing include:</p> <ul style="list-style-type: none"> <li>- fraudulent or wrongful conduct</li> <li>- intermingling of funds</li> <li>- failure to follow corporate formalities</li> <li>- undercapitalization of the subsidiary</li> <li>- independence of subsidiary’s board</li> <li>- common decision-making and policies</li> <li>- shared directors and officers</li> </ul>	<ul style="list-style-type: none"> <li>- The test is vague and inconsistently applied by courts</li> <li>- The test requires showing that the parent controlled the subsidiary, which is often very difficult</li> <li>- The test does not take into account that a parent corporation benefits greatly through the use of its subsidiary at the expense of the communities where the subsidiary operates</li> </ul>
AGENCY THEORY	<p>A principal is liable for the acts of its agent acting within the scope of authority.</p>	<ul style="list-style-type: none"> <li>- Plaintiffs need to show the subsidiary acted upon direction of the parent, acted within its actual or apparent authority, or where the parent gave the subsidiary directions to carry out a policy of the parent company</li> </ul>
ENTERPRISE LIABILITY	<p>Under the traditional theory, the parent is liable when it has functional or behavioral control over the subsidiary. Such control is lower than the amount of control required to pierce the corporate veil.</p>	<ul style="list-style-type: none"> <li>- Does not take into account situations where the parent may not be in functional control, but still financially benefits from the subsidiary</li> <li>- Requiring control can be a disincentive for parents to maintain due diligence over the subsidiary</li> <li>- It is burdensome for most victims to determine and establish control</li> <li>- No consistent definition for requisite control</li> <li>- Does not address the barriers erected by <i>Kiobel</i></li> </ul>
DUE DILIGENCE	<p>The due diligence approach imposes on a parent company a duty to monitor the activities of the subsidiary to ensure that human rights are complied with within its sphere of influence.</p>	<ul style="list-style-type: none"> <li>- Standards for “due diligence” are unclear</li> <li>- Corporations might simply “go through the motions” and “check the boxes,” resulting in unwarranted and unfair limits to remedies</li> <li>- By focusing only on due diligence, the theory does not fully address why the parent should not be liable for a subsidiary’s actions in situations where the parent benefits, but the victims cannot obtain a remedy</li> <li>- Does not address the barriers erected by <i>Kiobel</i></li> </ul>
PARENTAL DUTY OF CARE	<p>The theory provides that a parent corporation is liable for its own breach of duties owed to third parties. Such legal duty might be created where a parent owns, creates, or allows a subsidiary to operate in a fashion that creates foreseeable harm to non-consenting third parties.</p>	<ul style="list-style-type: none"> <li>- Does not fully address situations where the parent creates/purchases a subsidiary in a high-risk environment, gains benefits, and transfers the risk to the community</li> <li>- The traditional theory requires a fair amount of knowledge or involvement on the part of the parent, and thus does not address situations where the parent has a more separate relationship from the subsidiary but still greatly financially benefits from its subsidiary operating in a high-risk environment</li> </ul>

## 5.1. Piercing the Corporate Veil

Courts have found that the limitation on liability can be removed – an act referred to as “piercing the corporate veil” – in limited situations where a parent is shown to control the subsidiary to the extent that the subsidiary is an alter ego of the parent and uses the separate corporate form for some wrongful purpose.<sup>97</sup> The tests vary from state to state, but generally the veil can be pierced where the parent misuses the separate corporate form for wrongful purposes but in actuality controls the subsidiary to the extent that the subsidiary is a mere instrument of the parent.<sup>98</sup> Courts look to a variety of factors, such as whether there was misrepresentation or fraudulent or wrongful conduct of some sort; 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; whether there was common decision-making between the parent and subsidiary, common policies, and common policy-makers; and whether the parent and subsidiary share directors and officers.<sup>99</sup>

While the current doctrine of “piercing the corporate veil” remains an option to hold parent corporations liable for subsidiaries’ actions, veil-piercing is insufficient for three main reasons. First, many have documented that the test is vague and inconsistently applied by courts.<sup>100</sup> Second, the test requires showing that the parent controlled the subsidiary, typically very difficult to satisfy.<sup>101</sup> In fact, victims of subsidiaries’ violations of international human rights violations and serious environmental harm have typically not been able to pierce the corporate veil.<sup>102</sup> Finally, the piercing test through its factors, does not take into account the fact that a parent corporation benefits greatly through the use of its subsidiary at the expense of the communities where the subsidiary operates.

## 5.2. Agency Theory

Parent corporations can also be liable under an agency theory of liability. Under agency theory, a principal is liable for the acts of its agent acting within the scope of authority.<sup>103</sup>

There have been some court successes in human rights litigation using agency theory, in particular against *Exxon*,<sup>104</sup> and *Chevron*,<sup>105</sup> and *In re South African Apartheid Litig.*<sup>106</sup> Claims based on agency theory may prevail, but only where it can be shown that the subsidiary acted upon direction of the parent, acted within its actual or apparent authority, or where the parent gave the subsidiary directions to carry out a policy of the parent company.

### Case Study: Sinaltrainal v. Coca Cola

In *Sinaltrainal*, the district court in Florida found that the U.S. based Coca-Cola was not liable for the murder of a bottling plant employee at a Coca-Cola USA bottling facility, Bebidas, run by a subsidiary because the plaintiffs failed to produce sufficient evidence to show that

the bottling facility was acting as an agent of Coca-Cola USA. The plaintiffs argued that the U.S. company controlled all aspects of Bebidas's operations through a Bottler's Agreement, which granted Coca-Cola the right to "supervise and control the quality, distribution, and marketing of its products, including the right to terminate or suspend a bottler's operations for noncompliance with its terms and conditions." However, the court held that the Agreement merely established standards that are necessary to protect Coke's product in the marketplace, such as the use of trademark, packaging, and quality control, and did not give Coca-Cola USA a "duty" to control the labor policies or ensure employees' security at the bottling facility. Without having "total control" over the day-to-day activities at Bebidas, the court concluded that Coca-Cola could not be held liable for the actions of Bebidas under agency theory.

*Sinaltrainal v. Coca Cola*, 256 F.Supp.2d 1345 (S.D. Fl., 2003).

### 5.3. Enterprise Liability

Some advocates and scholars have advocated, quite persuasively, for an "enterprise theory" of liability where the parent should be liable when it functionally controls a subsidiary,<sup>107</sup> or, more recently, based solely on economic control where a subsidiary benefits the parent company as part of a unified economic scheme or business.<sup>108</sup> Enterprise liability is a concept that the UNGPs appear to endorse.<sup>109</sup>

Enterprise liability has historically required 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>110</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>111</sup> and it is the type nearly all scholars who have discussed enterprise liability advocate.<sup>112</sup> Some statutes and various court cases have seemingly relied on this type of enterprise liability.<sup>113</sup> However, because 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 is in fact implementing enterprise liability.<sup>114</sup>

A more recent argument for enterprise liability does not require functional control of the subsidiary but advocates for enterprise liability where there is an economically integrated enterprise and where there is a mass tort, a human rights violation, or environmental harm.<sup>115</sup>

Enterprise liability is a viable approach and should be considered in appropriate situations. However, it has its limitations. First, enterprise liability as typically discussed and applied requires a showing of functional or behavioral control over the subsidiary. In this way, it is not all that different from piercing the corporate veil. This type of enterprise liability does not take into account those situations where the parent is not in functional control of the subsidiary, but still financially benefits

from the subsidiary's actions at the expense of non-consenting victims. Second, requiring control can actually serve as a disincentive for parents to maintain due diligence over the subsidiary's actions – they will want to distance themselves as much as possible to avoid liability rather than assess risks and do all in their power to prevent abuses. Third, given that corporate entities are complex and that the enterprise maintains control over documents, being able to determine, let alone establish control is too burdensome for most victims. Fourth, there is no consistent definition of how much control a parent would need to assert over the subsidiary.

Enterprise liability based simply on financial control of subsidiaries or related companies with no limitations whatsoever – 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. This approach would hold parent corporations liable for acts of subsidiaries regardless of the situation or location of the subsidiary. 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 in unanticipated economic and financial repercussions. It is simply too broad, and as such, would not likely gain any traction with legislators.

General enterprise liability where the subsidiary is part of an integrated business enterprise (*i.e.*, exists or was created to further the business goals of the parent and its business is related to the business of the enterprise), and where the subsidiary is involved in a mass tort or human rights violation as suggested by one scholar<sup>116</sup> is an even better solution for the reasons discussed above. However, this approach may also be seen as too broad. Similar to the general financial control-based enterprise liability, it is not limited to situations where the victims cannot otherwise obtain a remedy from the subsidiary either due to underfunding or due to an ineffectual judiciary of the host country. Moreover, although unrelated to the issue of limited liability itself, this approach does not address the subject matter limitation imposed by the Supreme Court in *Kiobel*.<sup>117</sup>

#### **5.4. The Due Diligence Approach**

The due diligence approach would impose on a parent company a duty to monitor the activities of the subsidiary, 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>118</sup> Some scholars and advocates are beginning to argue for this approach<sup>119</sup> and the OECD Guidelines on Multinational Enterprises also advocates for this theory.<sup>120</sup> The UNGPs also devote substantial space to companies' due diligence obligations of their subsidiaries and related companies.<sup>121</sup> The original legislation of both France and Switzerland, discussed earlier, also employed due diligence.

This approach is appealing because it offers something similar to the status quo of limited liability, but incentivizes parent corporations to closely monitor and work with subsidiaries to prevent their engaging in, or aiding and abetting, violations of human rights norms, rather than keeping their

distance lest an argument can be made for piercing the corporate veil or for control-based enterprise. The attractiveness of the due diligence approach also lies in the fact that as a society, we like to attribute harm only where we feel a person – or entity – is responsible in a direct way; and when a person or entity does what is required of them, we feel they should be absolved of liability.<sup>122</sup> For all the same reasons this approach is appealing, adopting it would be a step in the right direction.

This approach, however, has its gaps and limitations. First, it is unclear what the standards for “due diligence” would be. For example, France’s proposed legislation would have held legal persons, including 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>123</sup> The legislation did not discuss what actions were sufficient.

Second, there is a risk that if enacted, corporations will simply “go through the motions” and “check the boxes” much like they do now with regard to certain of the procurement and supply chain regulations,<sup>124</sup> perhaps resulting in unwarranted and unfair limits to remedies. Providing for parent liability in other situations, such as the solution recommended in this Report, would have a similar effect – parents would similarly be incentivized to closely examine a subsidiary’s actions and reduce risks. 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 suffer the bad publicity that goes along with that.

Third, this approach does not fully address the ethical arguments outlined above as to why parent corporations should be liable for a subsidiary’s actions in other situations, such as where the judiciary is corrupt or non-functioning or where the victims cannot obtain a remedy. For example, even where the parent engages in due diligence – whatever that might end up being – a subsidiary might still engage or be involved in human rights violations and cause harm. 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.

Finally, like with enterprise liability, this approach does not address the barrier erected by *Kiobel*.

#### **5.4. Direct Parental Duty of Care**

Some have taken the traditional idea of a parent corporation being held liable for *its own* breach of duties owed to third parties<sup>125</sup> and have argued that such a legal duty is created where a parent owns, creates, or allows a subsidiary to operate in a fashion that creates foreseeable harm to non-consenting third parties.<sup>126</sup>

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: a 2012 U.K. case, *Chandler v. Cape PLC*,<sup>127</sup> and the 2013 Canadian case, *Choc v. Hudbay Minerals*.<sup>128</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 theory, parent corporations could be directly liable for their subsidiary's actions based on the parent owing its own "duty of care" to third parties.<sup>129</sup> In *Chandler*, the U.K. 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>130</sup>

### Case Study: Chandler v. Cape plc

In *Chandler*, an employee of a former subsidiary of the U.K. company Cape plc brought suit against the parent company in the United Kingdom for harm resulting from exposure to asbestos. The U.K. 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 its third parties (in that case, of its employees), and that such circumstances exist when (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. In *Chandler*, the lower court had found that the defendant employed both a scientific and a medical officer who together were responsible for health and safety issues relating to all the employees within the group of companies of which the defendant was the parent; the parent defendant dictated policy in relation to health and safety issues insofar as the defendant's core business impacted upon health and safety; and the defendant retained overall responsibility for ensuring that its own employees and those of its subsidiaries were not exposed to the risk of harm through exposure to asbestos. Cape also had "superior knowledge about the nature and management of asbestos risks," and "Cape could, and 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." Thus, the Court of Appeal ruled that imposing a duty of care on Cape in relation to the health and safety of its third parties was appropriate.

*Chandler v. Cape plc*, No. [2012] EWCA Civ 525, England and Wales App.

Prior to *Chandler*, several other U.K. plaintiff cases relied on the same theory of duty of care, although *Chandler* was the first case to accept the theory in the English Court of Appeal.<sup>131</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>132</sup> Broadly

speaking, the theory is that when a parent company is *directly involved in its subsidiary's operations or exercises de facto control*, it owes a duty of care to anyone affected by the subsidiary's operations.<sup>133</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>134</sup> The significance of the case 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. In this way, it was a groundbreaking decision that indicated it is possible for a parent company to have a duty of care depending on the particular facts. But it is limited, all the same.

Similarly, in *Hudbay*, the plaintiff's theory of direct liability required a showing of foreseeability and proximity, which rested on very specific allegations about the level of knowledge that the parent corporation and its executives had regarding the subsidiary's actions, on facts allegedly establishing a relationship between the parent and the community affected, and that the parent had assumed control over security personnel.

### Case Study: Choc v. Hudbay Minerals

In *Choc, et al v. Hudbay Minerals, Inc.*, a Canadian Court found that a Canadian parent may owe a direct duty of care to a Guatemalan indigenous community whose rights were violated when a subsidiary of the Canadian parent company Hudbay Minerals hired security forces to forcibly evict Mayan community members. The plaintiffs in the case allege that the security personnel at Hudbay's former mining project in Guatemala engaged in numerous abuses. The court rejected Hudbay Minerals' argument that the case against it should be dismissed because of its limited liability regarding its Guatemala subsidiary's action. The court first found that the plaintiffs properly alleged that the subsidiary was acting as an authorized agent of Hudbay Minerals, and thus if plaintiffs can establish this at trial, it could pierce the corporate veil. The court also found that the plaintiffs had properly alleged parent Hudbay Mineral's direct involvement in some of the wrongful conduct, and thus, it could be liable for its own actions. Specifically, the court found that the plaintiffs could proceed with their case because they adequately pled a "novel" duty of care – the harm complained of was a reasonably foreseeable consequence of the alleged breach; there was sufficient proximity between the parties such that it would not be unjust or unfair to impose a duty of care of the defendant; and there was no policy reason to negate or restrict the duty. The plaintiffs had alleged the following: that Hudbay's executives knew or should have known that security forces frequently used violence to evict members of the specific community; that violence had been used in previous evictions they had requested; that there was a higher risk of extreme violence against this community; that the security personnel to be used were inadequately trained and possessed illegal firearms; that rape against women in Guatemala occurred at a high rate; and that Guatemala's justice system had serious problems and that the vast majority of violence goes unpunished. The plaintiffs also pled that the parent



corporation had paid specific attention to the problems of the land conflict between its subsidiary and the Mayan village; the CEO had acknowledged responsibility by saying that the parent had done everything in its power to ensure the evictions were carried out in accordance with human rights; the parent had made public statements regarding its relationship with the Mayan villages; the parent was directly in charge of the operations; and it had assumed direct control over the security personnel. Based on all of this, the court found that the allegations sufficiently alleged foreseeability and proximity. The court also found there was no obvious policy reason to restrict the duty.

Choc v. Hudbay Minerals, Inc., 2013 ONSC 1414 (Can. Ont.) (July 2013).

Thus, although these cases are important models to consider when evaluating how and when a parent should be held liable for acts of its subsidiaries,<sup>135</sup> the decisions do not suggest a duty occurs simply because a parent creates or purchases a subsidiary and knows it will engage in operations that might pose a risk to third parties. Something more is therefore required.

One scholar 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>136</sup> He argues that the vulnerability of rights holders in less developed countries justifies a responsibility to act where effective remedies are not available, highlighting subsidiaries in the extraction industries.<sup>137</sup> He relies on classic tort theory to justify this approach,<sup>138</sup> noting that the law on torts should evolve, create an obligation of due diligence and duty of care on the part of the parent when creating the subsidiary in certain situations, and provide tort liability when the parent fails to exercise due diligence and duty of care.<sup>139</sup>

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 actions of the parent rather than actions of the subsidiary, it might be able to overcome any barrier created by *Kiobel*. But it, too, has its limitations.

Neither the traditional duty of care approach nor the approach based on the Canadian and U.K. cases adequately addresses the situation where the parent creates or purchases a subsidiary in a high-risk environment, gains benefits from that act, and transfers the risk to the community. Moreover, under the duty of care approach as currently formulated in Canada and the United Kingdom, 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. 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 financially benefits from the fact that it created a subsidiary in a high-risk environment.

The more modern tort-based duty of care creating liability based on a subsidiary's operations in a "high risk" country is an important element of the statutory approach discussed in Part VI, but also has its limitations. The difficulty of establishing a duty of care for third party actions under traditional tort law given the traditionally narrow exceptions that typically apply for non-liability of a third party's 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>140</sup> – are significant.

First, acknowledging such duty without establishing requisite knowledge and control will face an "uneasy co-existence"<sup>141</sup> with the separation of entities principle, given how entrenched notions of limited liability are. 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>142</sup> In determining such public policy, the purpose of limited liability will likely be taken into account. In fact, such notions exist 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, at least in part, to limit liability for economic activity. In recent cases in other contexts, the courts have found that under the "third party" theory, an action for breach of a duty of care by a subsidiary 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 for the safety of others.<sup>143</sup>

Second, although it is possible under tort theory to establish a breach on the part of the parent for its own actions (or inactions), it is no easy task. Courts have historically held a breach of duty cannot be found when the defendant has adhered to normal business practices,<sup>144</sup> and this might be difficult to overcome where the corporation is simply engaging in the type of activity that other corporations engage in when creating subsidiaries to engage in economic activity abroad.

There are additional challenges to a tort-based, duty of care approach. For example it is unclear what law would apply to such tort claims under a choice of law analysis.<sup>145</sup> 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 certain decisions about the subsidiary were made should apply. However, if the claim concerned appropriate supervision and lack of due diligence, it is likely that the law of the country where the subsidiary is located would apply.<sup>146</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 any possible tort action may be more difficult to prove; or the foreign law may provide for immunity that might not apply under the home (forum) state's common law.<sup>147</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>148</sup> There is also the likelihood that the claim would be dismissed on *forum non conveniens* grounds.<sup>149</sup> The few negligence-based claims 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>150</sup>

Moreover, the factual pattern required to establish both a duty of care and breach will be unique. 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. Under the duty of care approach, only in those particular situations where plaintiffs can establish a duty of care or breach will there be recovery. Thus, the theory does not provide for those many other situations where the plaintiffs cannot establish duty and care, but where the parent enjoys immense financial benefits at the expense of the local population. However, as discussed in the next section, 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.

## VI. OVERCOMING THE CHALLENGE OF PARENT COMPANY LIMITED LIABILITY

Given the gaps with and limitations of the various approaches to overcome limited liability above, and the jurisdictional challenge created by *Kiobel*, this Report suggests lawmakers take legislative action to statutorily cure the barrier to remedy presented by the limited liability doctrine. Specifically, the recommendation is as follows:

Enact legislation to disregard 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 a 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 can establish that:

1. they 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;
2. they cannot determine what entity is responsible, and thus what entity to hold accountable, given the enterprises’ complex corporate structure; or
3. a subsidiary is underfunded and thus cannot pay any damages resulting from the violation.

This change in limited liability could be done through enactment of a federal statute imposing parental corporate liability in such situations,<sup>151</sup> or through state legislation enacting changes to state incorporation statutes.<sup>152</sup> With regard to state legislation, 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.

The underlying claims would continue to be claims for violation 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 that the cause of action would apply where the action took place abroad, and thus there would be no presumption against extraterritoriality.

The Report also offers the above approach as an additional equitable doctrine for practitioners to consider when civilly prosecuting extraterritorial human rights violations, where the court otherwise has asserted subject matter jurisdiction under *Kiobel*. This doctrine could also be incorporated, where appropriate, into the current equitable approaches discussed above. Piercing the corporate veil is primarily an equitable doctrine, and practitioners could consider the approach outlined in this Report when arguing the factors the courts should take into considering, or when arguing for enterprise liability or parental duty of care as a separate equitable doctrine.

## 6.1. Why This Specific Approach

### How This Approach Overcomes Limitations from Other Theories

The approach advocated in this Report has much in common with the financial control-based enterprise liability approach but 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 more modern parental duty of care modern approach, but suggests primarily a statutory approach to the problem.

The Report offers its particular approach for several reasons. First, it is broader than piercing the corporate veil, agency, the control-based enterprise liability approach, and the due diligence approaches in that the victims do not need to establish either control or lack of due diligence on the part of the parent. Rather, this solution provides a remedy for those victims in situations where parents are enjoying benefits of a subsidiary's economic activity at the expense of non-consenting victims, regardless of their actions. In addition, similar to the approaches that do not require a showing of control, the approach incentivizes parent corporations to ensure subsidiaries are complying with human rights norms and obligations.

Second, it is narrower than the pure economic-based enterprise liability approach and some aspects of the due diligence approach in that it requires a showing that the country be high-risk, and that the victims cannot otherwise obtain a remedy. Whether a country would be "high risk" would be a question of fact. By being narrower and available in situations that are arguably more inequitable, the approach is more likely to be considered by policymakers.

Third, in applying only to violations of international human rights norms and serious environmental torts, the proposal is more limited than the due diligence approach and the parental duty of care approach. Allowing parent corporations to be liable for general torts would be more difficult to get policymakers to adopt. Policymakers might be concerned that allowing suits for general torts could create undue hardship and financial repercussions for parent corporations, and could also inadvertently limit direct investment that many of these countries need to overcome poverty.

Fourth, because the approach is statutory, it avoids many of the barriers victims would face in attempting to establish parental duty of care and breach through traditional tort-based theories. Finally, the approach addresses the limitation erected by *Kiobel* because by enacting such a statute that allows a claim to be brought directly against a parent in the United States in these unique situations, Congress or a legislature would be acknowledging an intent that such a claim would apply to extraterritorial conduct. Thus, this recommendation strikes an important balance.

### Congressional Precedent

If Congress or state legislatures are persuaded by the ethical and normative arguments regarding parental corporate liability in the situation described above, they could enact legislation, thus

overcoming limited liability. There is precedent for such legislation, especially in the areas of public utilities, the financial sectors, employer-sponsored pension plans, taxes, securities, export controls, and foreign trade.<sup>153</sup> Such legislation, although mostly regulatory in nature, explicitly overrules limited liability of parent corporations in certain situations.<sup>154</sup> In at least one instance, “control” can be presumed simply from a controlling ownership interest in stock. For example, the Employee Retirement Income Security Act (ERISA)<sup>155</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 separate corporate forms.<sup>156</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 percent ownership.<sup>157</sup> In enacting this section of the statute, Congress essentially “pierced the corporate veil” for parent corporations owning at least 80 percent of the subsidiary.<sup>158</sup>

Additionally, in the context of financial institution regulations, for over fifty years the Bank Holding Company Act<sup>159</sup> – which protects creditors and place restrictions on mergers and acquisitions – has applied to any parent or holding company that controls another covered corporation, and there is a presumption of control where the parent or holding company holds 25 percent 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>160</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 aspects of limited liability. For purposes of this Report, the most applicable is the Foreign Corrupt Practices Act, 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>161</sup> The Act applies to all U.S. “issuers” of securities and “domestic concerns,”<sup>162</sup> both of which apply to U.S. corporations.<sup>163</sup>

Although the anti-bribery provisions of the FCPA do not explicitly make a parent corporation liable for violations committed by a foreign subsidiary, the books-and-records provisions of the FCPA impose an obligation on corporate parents that are “issuers” to ensure their majority-owned foreign subsidiaries comply with recordkeeping and internal controls.<sup>164</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>165</sup>

Finally, there is also precedent with regard to Congress providing for extraterritorial jurisdiction.<sup>166</sup> For example, the Foreign Corrupt Practices Act applies extraterritorially,<sup>167</sup> as does the Civil Rights Act,<sup>168</sup> the Age Discrimination in Employment Act,<sup>169</sup> and the Americans with Disabilities Act<sup>170</sup> in certain situations. In addition, several criminal statutes apply to conduct abroad.<sup>171</sup> Moreover, the

United States has federal criminal statutes in the area of human rights that apply extraterritorially and which can already be invoked against businesses, namely those regarding genocide,<sup>172</sup> war crimes,<sup>173</sup> torture,<sup>174</sup> and forced recruitment of child soldiers.<sup>175</sup> In addition, a pending Senate Bill, the Civilian Extraterritorial Jurisdiction Act of 2014 would expand federal criminal jurisdiction over federal contractors and employees who commit certain criminal offenses abroad, including sexual assault and torture.<sup>176</sup>

### **Assigning Liability Without Fault is Not New**

Assigning liability without requiring fault is not new to our legal system. Our legal system has apportioned liability in several tort situations regardless of culpability because we recognize that in certain situations, individuals and communities should not have to bear the risk of certain activities from which corporations benefit.<sup>177</sup> This is seen in doctrines of product liability – where a business is strictly liable for defective products, regardless of culpability;<sup>178</sup> where a business is liable for engaging in particularly abnormally dangerous activities;<sup>179</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>180</sup> With regard to the latter, state courts use very broad definitions of “scope of employment” specifically so that individuals harmed are more likely to obtain a remedy.<sup>181</sup> In these situations, courts and policymakers have found it fit to hold businesses strictly liable simply as a matter of choice as to who should bear the costs of business activity. This Report recommends similar types of apportionment, although primarily through a statutory enactment.

## VII. CONCLUSION

In situations where parent corporations enjoy numerous benefits, such as lower labor, manufacturing and regulatory costs, 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 victims harmed by their subsidiaries' actions 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 where it knew or should have known that the subsidiary was operating in a high-risk country where a remedy would be difficult or impossible to obtain.

Although there may be a perception that the suggested statutory approach taken in this Report may not progress in Congress, compelling arguments for such legislative changes exist. In addition, given what Congress has already done with regard to Dodd-Frank and the pending federal legislation regarding supply chains, enacting legislation at the federal level may not be as difficult as some might suggest. In addition, some states may be more willing to introduce such legislation in an attempt to hold their corporations responsible. It is important to remember that corporate entities exist with the permission of the individual U.S. state in which they are incorporated;<sup>182</sup> they do not exist as a matter of right.<sup>183</sup>

Whatever the approach, having a clear description of where and under what circumstances a corporate parent would not be able to invoke limited liability might be a more welcome approach than one might imagine, given the emerging recent U.K. and Canadian cases for direct liability on the part of the parent for breach of a duty of care.<sup>184</sup> Adopting the approach outlined in this Report 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.<sup>185</sup>



## ENDNOTES

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<sup>1</sup> Special Representative on Business and Human Rights, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, adopted by the Human Rights Council, 17th Sess., Mar. 21, 2011, U.N. Doc. A/HRC/17/L.17/31 (June 16, 2011) [hereinafter “Guiding Principles”].

<sup>2</sup> *Id.* at princ. 26.

<sup>3</sup> GWYNNE SKINNER ET AL., *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* 67 (2013), available at <http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar.pdf>.

<sup>4</sup> 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 VIRTUAL INSTITUTE NETWORK* 101, 105 (2010) (citing Rhys Jenkins, *Corporate Codes of Conduct. Self-Regulation in a Global Economy*, 2 *TECHNOLOGY, BUSINESS, AND SOCIETY* 1, 1 (2001)).

<sup>5</sup> United Nations Conference on Trade and Development, *World Investment Report: Transnational Corporations, Agricultural Development and Production*, xxi, U.N. Doc. UNCTAD/WIR/2009 (July 2009), [http://unctad.org/en/Docs/wir2009\\_en.pdf](http://unctad.org/en/Docs/wir2009_en.pdf).

<sup>6</sup> Damiano de Felice, *Challenges and Opportunities in the Production of Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect*, 37 *HUM. RTS. Q.* 511 (May 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2423305](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423305).

<sup>7</sup> A subsidiary is a corporation that is owned or controlled by a parent company through the ownership of shares. MICHAEL DIAMOND, *CORPORATIONS* 905 (Carolina Academic Press, 3rd ed. 2012).

<sup>8</sup> Victims cannot typically sue a foreign subsidiary in the parent’s country, such as the United States, because of lack of personal jurisdiction over the foreign subsidiary. A court must have personal jurisdiction over the defendant to hear the case. *Burnham v. Superior Ct.*, 495 U.S. 604, 628 (1990); *Kulko v. Superior Ct.*, 436 U.S. 84, 101 (1978) (both noting that a court must have personal jurisdiction over the defendant to hear the case). *See also* *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). 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. *Id.* at 761-62. The Court also 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. *Id.* 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 its entirety, looking both nationwide and worldwide, and noting that a corporation cannot be at home in several locations. *Id.* at 762 n.20. The Court 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. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011). Thus, *Bauman* greatly limits the ability of victims of human rights abuses abroad to bring cases against businesses that although 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.

<sup>9</sup> BLACK’S LAW DICTIONARY 1054 (10th ed. 2014); *see also* 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.”); *see also* William Douglas & Carol Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 *YALE L.J.* 193, 193-94 (Dec. 1929) (“Limited liability is now accepted in theory and in practice.

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It is ingrained in our economic and legal system. The social and economic order is arranged accordingly. Our philosophy accepts it.”).

<sup>10</sup> See *United States v. Bestfoods*, 524 U.S. 51, 61-64 (1998) (acknowledging that shareholder protection applies to parents of subsidiaries); see also Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 604 (1986) (“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.”).

<sup>11</sup> *Bestfoods*, 524 U.S. at 62 (“But there is an equally fundamental principal of corporate law, applicable to the parent-subsidary 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.”). Alter ego liability exists when a parent or owner uses the corporate form “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.” *Gartner v. Snyder*, 607 F.2d 582, 586 (2d Cir. 1979) (interpreting New York state law). Evidence of such a relationship often includes similar boards of directors, common policy makers, common policies, and common decision-making between the parent and subsidiary. *Bridgestone/Firestone Inc. v. Recovery Credit Services Inc.*, 98 F.3d 13, 18 (2d Cir. 1996) (“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.”).

<sup>12</sup> Guiding Principles, *supra* note 1.

<sup>13</sup> *Id.* at General Principles.

<sup>14</sup> *Id.* at princ. 22.

<sup>15</sup> *Id.* at princ. 26.

<sup>16</sup> *Id.* at princ. 26, cmt.

<sup>17</sup> *Id.* at princ. 29, cmt.

<sup>18</sup> See, e.g., 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/pion1519.asp>. On March 31, 2015, the French National Assembly endorsed an amended version of the bill; it will go to the French Senate in late 2015. See *Mandatory Human Rights Due Diligence: Developments in Europe*, CORE, <http://corporate-responsibility.org/mandatory-human-rights-due-diligence-developments-in-europe/> (last visited May 27, 2015). See Foreign Affairs Committee, Motion 14.367, *Mise en oeuvre du rapport de droit comparé du Conseil fédéral sur la responsabilité des entreprises en matière de droits humains et d’environnement*, [http://www.parlament.ch/e/suche/Pages/geschaeft.aspx?gesch\\_id=20143671](http://www.parlament.ch/e/suche/Pages/geschaeft.aspx?gesch_id=20143671) (last visited June 5, 2014) (regarding Switzerland); see PUBLIC EYE ET AL., *BUSINESS AND HUMAN RIGHTS DEVELOPMENTS* (2015), available at [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) (last visited Aug. 24, 2015); see further discussion *infra* at Part IV.

<sup>19</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>20</sup> Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CAL. L. REV. 195, 203 (2009); see also Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 981 (1970).

<sup>21</sup> Hamilton, *supra* note 20, at 981.

<sup>22</sup> Blumberg, *supra* note 10, at 587; see also E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886-1936*, 50 HARV. L. REV. 27, 28 (1936).

<sup>23</sup> Blumberg, *supra* note 10, at 587. Examples of early American corporations with a public purpose include bridges, canals, turnpikes, and financial institutions such as banks and insurance companies.

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<sup>24</sup> *Id.* at 591, 593; Merrick Dodd, *supra* note 22, at 28.

<sup>25</sup> BLACK'S LAW DICTIONARY 418 (9th ed. 2009).

<sup>26</sup> Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 46-48 (2002); Thomas P. Byrne, *False Profits: Reviving the Corporation's Public Purpose*, 57 UCLA L. REV. DISCOURSE 25, 31 (2010); Katherine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 313-14 (2011); 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).

<sup>27</sup> Arner, *supra* note 26, at 47.

<sup>28</sup> *Id.* at 48; *see also* In re Walt Disney Co. Derivative Litigation, 906 A.2d 27, 67 (Del. 2006) (holding that there is a failure of the duty of good faith where a corporate fiduciary acts contrary to positive law).

<sup>29</sup> *See generally*, Jackson, *supra* note 26, at 313-328.

<sup>30</sup> *See* Arner, *supra* note 26; *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.").

<sup>31</sup> STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 79 (Oxford Univ. Press, 2008).

<sup>32</sup> *Anderson v. Abbott*, 321 U.S. 349, 362 (1944); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 95-97 (1985) (describing the purpose and advantages of limited liability); *see also* Blumberg, *supra* note 10, 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."); *see also* Phillip I. Blumberg, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY*, 56-59 (Oxford University Press, 1993) (providing background on the emergence of corporate groups and limited liability). *See generally*, Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW U. L. REV. 148 (1992); Stephen B. Presser, § 1:12: *Democracy: A Historical and Analytical of the Piercing Doctrine*, in *PIERCING THE CORPORATE VEIL* (2014). 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. *Id.*

<sup>33</sup> Blumberg, *supra* note 10, at 604; Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C. L. REV. 687, 698 (1998).

<sup>34</sup> Blumberg, *supra* note 10, at 605, 607; Dearborn, *supra* note 20, at 203; 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, 263 (2012); Philip Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493 (2002).

<sup>35</sup> Douglas & Shanks, *supra* note 9, at 193.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; Blumberg, *supra* note 10, at 600; David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1566-67 (1991).

<sup>38</sup> Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 4, 29-39 (1994); Leebron, *supra* note 37, at 1567.

<sup>39</sup> Thompson, *supra* note 38, 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

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(2013) (reasoning 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).

<sup>40</sup> Daniel R. Kahan, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1090 (2009).

<sup>41</sup> *Id.* at 1098-1101.

<sup>42</sup> Dearborn, *supra* note 20, at 202-03.

<sup>43</sup> 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).

<sup>44</sup> *Id.* at 817, citing DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 772-80 (2d ed. 2010).

<sup>45</sup> “Unfortunately, since many developing or newly liberalized nations are susceptible to legal instability, the preferred approach of developed nations is to provide economic protection through political risk insurance.” George T. Ellinidis, *Foreign Direct Investment in Developing and Newly Liberalized Nations*, 4 J. INT'L L. & PRAC. 299, 313 (1995).

<sup>46</sup> See, e.g., Julie Roin, *The Grand Illusion: A Neutral System for the Taxation of International Transactions*, 78 VA. L. REV. 919, 938 (1989).

<sup>47</sup> U.S. corporate tax revenue has steadily declined over the last 50 years, in large part due to U.S. multinationals shifting trillions of dollars in corporate earnings to low tax foreign jurisdictions. William M. Vandenberg et al., *Shifting Corporate Income Overseas Tax Avoidance or Evasion?*, 17 BUSINESS ENTITIES 24 (2015). The third quarter earnings report for U.S. corporations increased to \$1.873 trillion of after tax earnings. Jeffrey Sparshott & Eric Morath, *U.S. Corporate Profits Up Year-Over-Year for 12th Straight Quarter*, WALL ST. J. (Nov. 25, 2014), <http://blogs.wsj.com/economics/2014/11/25/u-s-corporate-profits-up-for-12th-straight-quarter/>; see also Eric Morath, *Amid Global Slowdown, U.S. Growth Keeps Looking Better*, WALL ST. J. (Nov. 25, 2014), <http://www.wsj.com/articles/u-s-third-quarter-gdp-revised-up-to-3-9-advance-1416922352>.

<sup>48</sup> Corporate income taxed at the corporate, or entity, level requires corporations to make estimated tax payments throughout the year and file Form 1120 with the IRS at the end of the year. INTERNAL REVENUE SERVICE, 2014 INSTRUCTIONS FOR FORM 1120 U.S. CORPORATION INCOME TAX RETURN 3, available at <http://www.irs.gov/pub/irs-pdf/i1120.pdf> (last visited July 18, 2015); see also INTERNAL REVENUE SERVICE, PUBLICATION 542, at 5 (2012), available at <http://www.irs.gov/pub/irs-pdf/p542.pdf>.

<sup>49</sup> As discussed in this Report, an important business aspect of the corporate form is the limited liability exposure of shareholders and the centralized management by the Board of Directors or executive staff, with no mandatory shareholder participation in business management. The Ohio Bar publishes a choice of entity comparison chart that includes tax treatment such as income allocation, contributions of property, loss limitations, and transfers of interest. OHIO BAR, BUSINESS ENTITY COMPARISON CHART, available at <https://www.ohio-bar.org/ForLawyers/MemberResources/Documents/Business-Entity-Comparison-Chart.pdf> (last visited Aug. 25, 2015).

<sup>50</sup> This is a stark contrast to the \$1.6 trillion dollars collected through individual and estate and trust taxes, constituting 53.6 percent of total taxes collected in TY2014. INTERNAL REVENUE SERVICE DATA BOOK 2014, at 3 (2015), available at <http://www.irs.gov/pub/irs-soi/14databk.pdf>.

<sup>51</sup> “The top U.S. federal corporate income tax rate is 35 percent. This is the highest rate of all OECD countries and far exceeds the 23.5 percent average.” *The U.S. Tax Code: Love It, Leave It or Reform It: Hearing Before the S. Comm. on Finance*, 113<sup>th</sup> Cong. S. HRG. 113-584 (2014) (testimony of Leslie Robinson, Assoc. Professor, Tuck Sch. of Bus., Dartmouth) (hereinafter *The U.S. Tax Code*).

<sup>52</sup> MICHAEL J. GRAETZ, FOUNDATIONS OF INTERNATIONAL INCOME TAX 12-18 (Foundation Press, 2003). “No country, however, employs a pure ‘worldwide system’ or a pure ‘territorial system.’ International tax regimes throughout the world are hybrid or ‘mixed’ systems.” *Id.* at 13.

<sup>53</sup> “Evidence suggests that U.S. firms are adept at indefinite deferral.” *Id.* See generally, *The U.S. Tax Code*, *supra* note 51.

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<sup>54</sup> Professor Avi-Yonah has identified the tax preference granted to U.S. businesses operating abroad, through the deferral of U.S. tax until repatriation, as having great import. He notes that the privilege of deferral is deepened in accordance with the level of tax in the low-tax foreign jurisdiction. *See* REUVEN S. AVI-YONAH, U.S. INTERNATIONAL TAXATION, CASES, AND MATERIALS 192 (2002).

<sup>55</sup> Ireland for many years provided the classic example of the use of subsidiaries to shield taxable income through a vehicle dubbed the “Double Irish.” Bowing to U.S. pressure, the tax avoidance scheme was disallowed beginning January 2015, although Ireland also announced a new “knowledge-based capital” tax break currently under development for implementation in 2016. *See* Jim Puzanghera & Paresh Dave, *Ireland to Close Corporate Tax Loophole Used by Google and Others*, L.A. TIMES, (Oct. 14, 2014), <http://www.latimes.com/business/la-fi-ireland-tax-haven-20141015-story.html>; *see also* Ernst & Young, *Global Tax Alert* (Jan. 15, 2015), <http://www.ey.com/GL/en/Services/Tax/International-Tax/Alert--Irish-Department-of-Finance-launches-Knowledge-Development-Box-consultation> (last visited July 27, 2015).

<sup>56</sup> Puzanghera & Dave, *supra* note 55; *see also* Ernst & Young, *supra* note 55.

<sup>57</sup> The APB 23 provision was instituted in 1972, by the Accounting Principles Board (the predecessor to the Financial Accounting Standards Board) in Opinion 23. Christopher H. Hanna, *The Real Value of Tax Deferral*, 61 FLA. L. REV. 203, 231-33 (2009).

<sup>58</sup> *Id.* at 235.

<sup>59</sup> Cym H. Lowell, *Significance of Transfer Pricing for Multinational Enterprises*, in U.S. INTERNATIONAL TAX: AGREEMENTS, CHECKLISTS AND COMMENTARY (Thomson Reuters, 2015).

<sup>60</sup> Professor Graetz offers the following example: If Company A, a U.S. contact lens manufacturer, has a wholly owned subsidiary in a low-tax jurisdiction—Company B—U.S. company A can sell lenses to foreign Company B at an artificially low price (\$5.25 per lens despite the manufacturing cost to A of \$5 per lens). Company B then sells the lenses in their low-tax jurisdiction at \$9 each, realizing a profit of \$3.75 per lens. Under this arrangement, only .25 cents per lens is realized as a profit in the U.S., but \$3.75 per lens is realized in the low-tax jurisdiction where Company B is located. GRAETZ, *supra* note 52, at 400.

<sup>61</sup> MARKUS HENN, FRIEDRICH EBERT STIFTUNG, TAX HAVENS AND THE TAXATION OF TRANSNATIONAL CORPORATIONS 1, 6 (2013), available at <http://library.fes.de/pdf-files/iez/global/10082.pdf>.

<sup>62</sup> Dearborn, *supra* note 20, at 206; *see* Christen Broecker, “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 multiple reasons why a State would be unable to enforce standardized business conduct that addresses human rights abuses. Specifically, the plight of impoverished States whose great need for investment will allow for a corporation to affect those States’ policies and willingness to address human rights abuses. Moreover, the host country is most often only able to exercise jurisdiction over a subsidiary that functions on minimal assets and that has policies dictated by a parent corporation in the home State); *see also* Brittany T. Cragg, *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) (indicating a number of reasons why host States may be unable or unwilling to hold transnational corporations accountable for human rights violations); *see also* 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).

<sup>63</sup> *See* Gwynne 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. L. REV. 158, 169-73 (Fall 2014).

<sup>64</sup> *See* Cragg, *supra* note 62, at 751-55.

<sup>65</sup> *See* Catherine Boggs, *Project Management: A Smorgasbord of International Operating Risks*, 4 ROCKY Mtn. L. INST. PAPER NO. 13 (2008). The fact that many host countries involved in the extraction industry have corrupt or ineffective judicial

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systems, and that human rights are often violated with impunity in such countries, is also confirmed by the Bureau of Democracy, Human Rights, and Labor at the U.S. Department of State. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, *Country Reports on Human Rights Practices for 2013*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper> (last visited Aug. 26, 2015). For example, the U.S. Department of State's 2013 Country 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. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, *Democratic Republic of the Congo 2013 Human Rights Report*, <http://www.state.gov/documents/organization/220312.pdf> (last visited Aug. 26, 2015). The report for Nigeria notes that "[i]mpunity remained widespread at all levels of government," and notes that political leaders influence the judiciary, particularly at the state and local levels; that understaffing, underfunding, inefficiency, and corruption continued to prevent the judiciary 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 judges were easily bribed and litigants could not rely on the courts to render impartial judgments. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, *Nigeria 2013 Human Rights Report*, <http://www.state.gov/documents/organization/220358.pdf> (last visited Aug. 26, 2015). 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." BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, *Guatemala 2013 Human Rights Report*, <http://www.state.gov/documents/organization/220657.pdf> (last visited Aug. 26, 2015). 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. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, *Indonesia 2013 Human Rights Report*, <http://www.state.gov/j/drl/rls/hrrpt/2013/eap/220196.htm> (last visited Aug. 26, 2015).

<sup>66</sup> Skinner, *supra* note 63, at 227.

<sup>67</sup> *Id.*; see also Tara Van Ho, Aarhus Univ., Comments at the United Nations Third Annual Forum on Business and Human Rights (Dec. 5, 2015) (notes on file with author).

<sup>68</sup> See Skinner, *supra* note 63, at 172, 231-34. Indeed, a classic obstacle involving litigation against transnational businesses is 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. *Id.* at 215.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*; see also Cragg, *supra* note 62, at 754-55.

<sup>71</sup> To be sure, great economic benefit inures to host countries through the economic activity of subsidiaries created or purchased by U.S. companies. Such investment often results in increased wages, import of technology, developments and investment in infrastructure, and even a decrease in poverty within the category of investment referred to as foreign direct investment. See e.g., INVESTOPEDIA, FOREIGN DIRECT INVESTMENT, <http://www.investopedia.com/terms/f/fdi.asp> (last visited Feb. 5, 2015); 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 socio-economic benefits of foreign direct investment (FDI) include inflow of technology and capital equipment, improvements in infrastructure and market access for local firms, and improvement in the technical training of local labor; environmental benefits of FDI include installation of more efficient and greener technologies in countries that would otherwise have only less efficient, environmentally harmful technologies; human rights benefits include the potential for a higher standard of living in the region and for improvements in civil and political rights); see also Guillermo Emiliano Del Toro, *Foreign Direct Investment in Mexico and the 1994 Crisis: A Legal Perspective*, 20 HOUS. J.

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INT'L L. 1, 86-87 (1997) (stating that 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 the development and transferring of technology and know-how, as well as the promotion of a more efficient share of risk than other means of attracting capital; (3) it creates jobs; (4) it creates welfare; (5) it substitutes for financial aid, loans, and portfolio investments as a means of attracting capital; and (6) it creates growth); Akinori Tomohara & Sadayuki Takii, *Does Globalization Benefit Developing Countries? Effects of FDI on Local Wages*, 33 J. POL'Y MODEL'G 511 (2011) (finding that FDI 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 (1) the injection of capital; (2) the introduction, transfer, or "spillover" of technology; (3) the introduction of advanced management skills; (4) increased host country employment; (5) increased competition in the host country market; and (6) increased foreign exchange earnings).

<sup>72</sup> Guiding Principles, *supra* note 1, at princ. 2.A.12.

<sup>73</sup> Dearborn, *supra* note 20, at 202.

<sup>74</sup> 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 change of prevailing. *See* Skinner, *supra* note 63, at 165, 212-17 (noting summary of consultations, Washington, D.C., June 24, 2013, with numerous U.S. practitioners (notes on file with author)); SKINNER ET AL., *supra* note 3, at 29, 67-68 nn. 483-84, 79-80. Some case examples include: *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 170-71 (2d Cir. 2012), *cert. den.*, 133 S. Ct. 952 (2013) (dismissing claims against Coca-Cola U.S.A. for a subsidiary's role in Egypt's illegal expropriation of land of a Jewish citizen for Coca-Cola's bottling plant use. The case was dismissed for, *inter alia*, failing to allege allegations to pierce to corporate veil); *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 196 (2d Cir. 2010) (J. Leval concur.), *aff'd* 133 S. Ct. 1659 (2013) (noting claims should be dismissed against Shell for, *inter alia*, acts of its subsidiary since plaintiffs could not pierce the corporate veil in a case involving numerous human rights allegations for oil exploration and production in Nigeria); *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001), *aff'd* *Doe v. Unocal Corp.*, 27 F.Supp.2d 1174 (C.D. Cal. 1998) (holding that a parent oil corporation was not liable since it was not an alter ego of its subsidiary for purposes of jurisdiction in a class action suit brought by Burmese citizens. The parent company was not held liable because (1) there was not such unity of interest between the corporate personalities of the parent and subsidiary that the two did not function as separate personalities, and (2) there was no failure to disregard the separate nature of the corporate entities that would result in fraud or injustice), *aff'g* *Doe v. Unocal Corp.*, 27 F.Supp.2d 1174 (C.D. Cal. 1998); *William v. AES Corporation*, 28 F.Supp.3d 553, 561-63 (E.D. Va. 2014) (holding that in a case against a U.S. electricity corporation and a subsidiary in Cameroon for serious problems with the provisions of electricity, including power outages, short circuits, and voltage fluctuations, some of which led to fires which destroyed property and caused deaths and cruel and inhuman degrading treatment, the plaintiffs did not make sufficient allegations to pierce the corporate veil and hold AES liable. The case against the subsidiary was dismissed for a lack of personal jurisdiction); *In re Apartheid Litigation*, 617 F. Supp. 2d 228, 270, 274-75 (S.D.N.Y. 2009) (rejecting theories to pierce the corporate veil (alter ego theory), but allowing the theory of agency to proceed against some defendants based on the factual allegations). On July 27, 2015, the Second Circuit dismissed the remaining defendants, Ford and IBM, for failure to overcome the presumption of extraterritoriality set forth in *Kiobel*. *Balintulo, et al. v. Ford, IBM*, Nos. 14-4104, *et al.*, (2<sup>nd</sup> Cir., July 27, 2015), *aff'g* *In re South African Apartheid Litig.*, 56 F. Supp. 3d 331, 338 (S.D.N.Y. 2014)); *Presbyterian Church of Sudan v. Talisman*, 453 F.Supp.2d 633, 681-86 (S.D. N.Y. 2006), *aff'd*, 582 F.3d 244 (2<sup>nd</sup> Cir. 2009), *cert. denied*, 562 U.S. 946 (2010) (holding that in case alleging genocide, crimes against humanity, and war crimes involving the forced removal of villagers to protect oil fields, after dismissing the case based on aiding and abetting, plaintiffs' motion to amend their complaint to allege alter ego and agency theories was denied, because they did not proffer enough evidence for piercing the corporate veil against Talisman, a Canadian corporation, and certain of

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its subsidiaries); *Bowoto v. Chevron Texaco Corp.*, 312 F.Supp.2d 1229 (N.D. Cal. 2004) (holding that the parent oil corporation could not be liable for alleged human rights abuses in Nigeria based on the theory that the oil corporation and its subsidiary were alter egos. The court allowed the case to proceed on agency theory, but after the case went to trial, the jury ultimately rejected all claims, finding for the company. The Ninth Circuit affirmed the trial court's decisions on a variety of matters. 621 F.3d 1116, 1122 (9<sup>th</sup> Cir. 2010), *cert. denied*, 132 S.Ct. 1968 (2012)); *Sinaltrainal v. Coca Cola* (Sinaltrainal I), 256 F.Supp.2d 1345, 1354-55 (S.D. Fl., 2003) (U.S. based Coca Cola not liable for murder of bottling plant employee by paramilitary group for his efforts to unionize the Coca-Cola USA bottling plant run by a subsidiary because the plaintiff failed to make sufficient allegations to pierce the corporate veil (alter ego) or proceed on agency theory). *See also* *Sinaltrainal v. Coca-Cola* (Sinaltrainal II), 578 F.3d 1252, 1259 (11<sup>th</sup> Cir. 2009) (noting that in Sinaltrainal I, the district court dismissed the case against Coca Cola USA due to plaintiff's failure to sufficiently allege facts to pierce the corporate veil (alter ego)).

<sup>75</sup> 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 VIRTUAL INSTITUTE NETWORK 101, 105 (2010) (citing Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy*, 2 TECH., BUS., & SOC. 1, 1 (2001)).

<sup>76</sup> United Nations Conference on Trade and Development, *World Investment Report: Transnational Corporations, Agricultural Development, and Production*, xxi, U.N. Doc. UNCTAD/WIR/2009 (July 2009), available at [http://unctad.org/en/Docs/wir2009\\_en.pdf](http://unctad.org/en/Docs/wir2009_en.pdf).

<sup>77</sup> de Felice, *supra* note 6.

<sup>78</sup> 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], Nov. 6, 2013. On March 31, 2015, a version of the bill was approved. A provision in the original bill that would have required the company concerned to prove that it was not in control of the activities of its subsidiaries and subcontractors was removed from the final text, and the law will now apply only to companies employing more than 5000 people in France or 10000 globally. CORE, *supra* note 18.

<sup>79</sup> CORE, *supra* note 18.

<sup>80</sup> *See supra* note 78. (noting that a provision in the original bill—which would have required the company concerned to prove that it was not in control of the activities of its subsidiaries and subcontractors—was removed from the final text, and the law will now apply only to companies employing more than 5000 people in France or 10000 globally).

<sup>81</sup> PUBLIC EYE ET AL., *supra* note 18.

<sup>82</sup> *See* Press Release, *Swiss Parliament Motion for Mandatory Human Rights Due Diligence Narrowly Turned Down*, March 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).

<sup>83</sup> *See* Swiss Coalition of Corporate Justice, *Global Business? Global Responsibility* (Apr. 20, 2015), <http://www.corporatejustice.ch/en/media/> (last visited May 27, 2015); *see also* Swiss Coalition of Corporate Justice, *Popular Initiative for Responsible Business*, <http://www.corporatejustice.ch/en/> (last visited Feb. 5, 2015) (noting 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),” which would cover all Swiss companies, and that the text of the initiative is currently under review at the Federal Chancellery).

<sup>84</sup> Foreign Assistance Act of 1961, Pub. L. 87-195, 75 Stat. 424 (codified at 22 U.S.C. 2378d); Nina Serafino, CONG. RESEARCH SERV., 7-5700 (“LEAHY LAW”), *Human Rights Provisions and Security Assistance: Issue Overview* (2014).

<sup>85</sup> Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et. seq. (1977).

<sup>86</sup> *See* 17 C.F.R. § 240.13p-1 (indicating the specific requirements for reporting); 17 C.F.R. §§ 240, 249b (the codified Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act).

<sup>87</sup> 31 C.F.R. § 537.



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<sup>88</sup> Cal. Civ. Code § 1714.43.

<sup>89</sup> H.R. 3226, 114th Cong. (2015). The bill was introduced and moved to the House Committee on Financial Services in July of 2015. The bill requires companies with over \$100 million in global gross receipts to publicly disclose any measures to prevent human trafficking, slavery, and child labor in their supply chains as part of their annual reports to the Securities and Exchange Commission (SEC). *See* <https://www.congress.gov/bill/114th-congress/house-bill/3226/text> (last visited Aug. 24, 2015).

<sup>90</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>91</sup> 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 American 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.* at 248.

<sup>92</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). The Alien Tort Statute is the primarily federal statutory vehicle under which victims seek a remedy for violations of customary international law in federal court. 28 U.S.C. § 1350 (2012) (stating that federal district courts have jurisdiction over tort claims brought by aliens for violations of the law of nations). The ATS was enacted as part of First Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, §9, 1 Stat. 77 (1789).

<sup>93</sup> *Kiobel*, 133 S. Ct. at 1669.

<sup>94</sup> 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* Order, *Doe I v. Exxon Mobil Corp.*, No. 01-cv-1357 (D.D.C. July 6, 2015), ECF No. 512.

<sup>95</sup> This doctrine 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. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

<sup>96</sup> 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* Skinner, *supra* note 63, at 203-213; *see also* Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 STAN. J. COMPLEX LITIG. 1, 34-35 (2014); *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). 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* Annotation, *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* Annotation, *Forum Non Conveniens Doctrines—Alternative Forum Unavailable—Jurisdiction Denied* 57 A.L.R. 4th 973 §12[b].

<sup>97</sup> *United States v. Bestfoods*, 524 U.S. 51, 62 (1998) (“But there is an equally fundamental principal 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.”). Alter ego liability exists when a parent or owner uses the corporate form “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.” *Id.*; *Gartner v. Snyder*, 607 F.2d 582, 586 (2d Cir. 1979) (interpreting New York law). Evidence of such a relationship often includes similar boards of directors, common policy makers, common policies, and common decision-making between the parent and subsidiary. *Bridgestone/Firestone Inc. v. Recovery Credit Services Inc.*, 98 F.3d 13, 18 (2d Cir. 1996) (“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.”).

<sup>98</sup> *Id.*; *see also* BAINBRIDGE, *supra* note 31, at 79.

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<sup>99</sup> See *Bridgestone/Firestone*, 98 F.3d at 18 (“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.”); see also Thompson, *supra* note 9, at 1064. In his empirical study, Thompson notes that the lack of misrepresentation was the factor most cited by courts when refusing to pierce the veil and that “the group of factors most associated with successful piercing included several of the traditional 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.*

<sup>100</sup> Dearborn, *supra* note 20, 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 32, at 110-11; BAINBRIDGE, *supra* note 31, at 77. For a detailed empirical review of the inconsistencies of the piercing test, see generally Thompson, *supra* note 9.

<sup>101</sup> Dearborn, *supra* note 20, at 208.

<sup>102</sup> See *supra* note 74.

<sup>103</sup> “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) (also noting that the agency relationship differs from state to state).

<sup>104</sup> *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). The case is still being litigated. *Doe v. Exxon Mobil Corp.*, 69 F.Supp.3d 75 (D.C. Cir. 2014). Recently, the judge allowed claims 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 Order, *Doe I v. Exxon Mobil Corp.*, No. 01-cv-1357 (D.D.C. July 6, 2015), ECF No. 512.

<sup>105</sup> *Bowoto*, 312 F. Supp. 2d at 1246-47 (refusing to pierce the veil, but holding that the case could proceed under agency law). The case went to trial, and the jury ultimately rejected all claims, finding for the company, and the Ninth Circuit affirmed the trial court’s decisions on a variety of matters. *Bowoto v. Chevron Texaco Co.*, 621 F.3d 1116, 1122 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 1968 (2012).

<sup>106</sup> *In re South African Apartheid Litig.*, 617 F.Supp.2d 228. However, agency claims were dismissed against Defendant Daimler for insufficient pleadings based on agency. *In re South African Apartheid Litig.*, 633 F.Supp.2d 117 (S.D.N.Y. 2009). On July 27, 2015, the Second Circuit dismissed the remaining defendants, Ford and IBM, for failure to overcome the presumption of extraterritoriality set forth in *Kiobel*. *Balintulo, et al. v. Ford, IBM, Nos. 14-4104, et al.*, (2d Cir., July 27, 2015), *aff’g* *In re South African Apartheid Litig.*, 56 F. Supp. 3d 331, 338 (S.D.N.Y. 2014).

<sup>107</sup> See, e.g., Thompson, *supra* note 38, at 12-17 (discussing the theory of enterprise liability and some justifications for its use); see also Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1916-19 (discussing enterprise liability theory in light of arguments on whether limited liability or unlimited liability is the best liability regime for corporations); see also Phillip I. Blumberg, *The Corporate Entity In An Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 298 (1990) (noting enterprise theory is emerging in areas of law dealing with corporate governance); see generally Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 1 (1980) (discussing enterprise liability theory and noting in some cases the theory is the best option while in

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others the theory would need to be reinforced by other techniques); *see also* Howard Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (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*. For a more complete discussion of the enterprise law, especially in comparison to entity law, *see* Phillip Blumberg, *The Increasing Recognition of Enterprise Liability Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295 (1996).

<sup>108</sup> Dearborn, *supra* note 20, at 196, 252 (discussing enterprise liability theory, noting that it 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; there is a unified economic purpose to the enterprise, and only for mass environmental and human rights abuses).

<sup>109</sup> Guiding Principles, *supra* note 1, at princ. 14 (stating that the 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>110</sup> Dearborn, *supra* note 20, at 245-46.

<sup>111</sup> *Id.* at 246-47; Blumberg, *supra* note 107, at 287 n. 6 (stating that control underlies much of statutory enterprise law).

<sup>112</sup> Dearborn, *supra* note 20, at 247 (noting that “there is much agreement among commentators that a ‘control’ approach is the preferred form of liability”); *id.* at 247 n. 320 (identifying those commentators, including Professor Blumberg, who advocates control as a factor in enterprise liability) (internal citations omitted).

<sup>113</sup> *See* Dearborn, *supra* note 20, at 231-240; Blumberg, *supra* note 107, at 321-35.

<sup>114</sup> *See* Dearborn, *supra* note 20, at 239; Blumberg, *supra* note 107, at 329-30 (“In a few instances, enterprise principles have been recognized and applied as such. In most decisions, however, the attribution to a parent corporation 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.”)

<sup>115</sup> *See* Dearborn, *supra* note 20, at 251-52.

<sup>116</sup> *Id.*

<sup>117</sup> *Kiobel* is a barrier to victims who seek to obtain a remedy from a corporate parent for extraterritorial violations by a foreign subsidiary corporation with a separate legal personality, given that such violations would be unlikely to overcome the presumption of extraterritoriality imposed by *Kiobel*. *See* discussion, *supra*, in Part IV.

<sup>118</sup> *See* OLIVIER DE SCHUTTER ET AL., HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES (2012), available at <http://accountabilityroundtable.org/about/publications>; *see also* Guiding Principles, *supra* note 1, at princs. 17-21.

<sup>119</sup> In this regard, *see* Lucien J. Dhooge, *Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute*, 22 EMORY INT’L L. REV. 455 (2008) (discussing transnational businesses’ duty to engage in human rights under Special Representative of the United Nations’ Secretary-General John Ruggie on the issue of human rights and transnational corporations, 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).

<sup>120</sup> OECD, OECD GUIDELINES ON MULTINATIONAL ENTERPRISES (as revised on May 25, 2011), II. General Policies, Commentaries, para. 9, <http://mneguidelines.oecd.org/text/> (stating that the Guidelines “extend to enterprise groups . . . Compliance and control systems should extend where possible to these subsidiaries.”).

<sup>121</sup> *See* Guiding Principles, *supra* note 1, at princs. 17-22.

<sup>122</sup> *See* Dan B. Dobbs, THE LAW OF TORTS § 199, §§ 1, 2-3, 9,16 (2001) (describing tort liability as predominantly fault-based); *see generally* John C.P. Goldberg, *Inexcusable Wrongs*, 103 CAL. L. REV. 467 (2015); *see generally*, Alina Golanski, *Paradigm Shifts in Products Liability and Negligence*, 71 U. PITT. L. REV. 673 (2010). Of course, there is no complete agreement on this, and more recent tort law has recognized apportionment of liability not based on fault, but based on

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social costs and who can bear the financial burden of remedy. *See also* Kenneth S. Abraham, THE FORMS AND FUNCTIONS OF TORT LAW 195-196, 214, 217, 228 (Foundation Press, 4th ed. 2012) (noting developments in tort law apportioning costs based on who can best bear the costs).

<sup>123</sup> The original bill read in relevant part:

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. *Id.* at Title IVB, art. 1386–19.

The provision requiring that the corporation have the burden to demonstrate it took all measures in his or her power was removed in the final bill that is pending. *See supra* note 18.

<sup>124</sup> Comments by panelists from the Third UN Forum on Business and Human Rights, *Principles in Practice—Recent Developments in Law and Legal Practice in the Field of Business and Human Rights*, Geneva, Dec. 1, 2014 (notes on file with author).

<sup>125</sup> As early as 1929, Professors Douglas and Shanks noted that there were situations where, even though subsidiaries maintained their separateness from parent corporations, the latter were seemingly found liable in tort for acts of their subsidiaries. Douglas & Shanks, *supra* note 9, at 205-10. However, they closely reviewed the cases and noted that the liability was either due to the parent’s direct role in the tort or where the subsidiary was acting specifically as an agent for the parent in carrying out a decision of the parent. *Id.* 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 Laboratories, Inc.*, 424 F.3d 35, 37 (1st Cir. 2005) (noting that under the “third party” theory, an action for breach of a 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 others harmed by the subsidiary’s actions) (internal citations omitted).

<sup>126</sup> *See Radu Mares, Responsibility to Respect: Why the Core Company Should Act When Affiliates Infringe Rights*, in Radu Mares (ed.), THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS – FOUNDATIONS AND IMPLEMENTATION, (Martinus Nijhoff Publishers, Leiden, Boston 2012) (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 (2015), available at <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 when these parents act negligently—failing to meet this duty of care or exercise due diligence—in controlling the actions of their subsidiaries, they should be held directly liable); *see also* 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, acts or omissions of the parent company are considered to be in violation of 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 also* Kirshner, *supra* note 34, 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* Comments, Third Annual Forum on Business and Human Rights, *supra* note 123.

<sup>127</sup> *Chandler v. Cape PLC*, No. [2012] EWCA Civ 525, England and Wales App.

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- <sup>128</sup> *Choc v. Hudbay Minerals, Inc.*, 2013 ONSC 1414 (Can. Ont.) (July 2013).
- <sup>129</sup> *Id.*; see also Michael Goldhaber, 3 UC IRVINE L. REV. 127, 132 (2013) (noting that a parent may owe a direct duty of care to a Guatemalan indigenous community whose rights were violated when a subsidiary of the Canadian parent company hired security forces to forcibly evict Mayan community members).
- <sup>130</sup> *Chandler*, No. [2012] EWCA Civ 525 at para. 62-78.
- <sup>131</sup> Goldhaber, *supra* note 128, at 131-33. Goldhaber gives a good summary of UK cases relying on this theory. *Id.* at 130-33.
- <sup>132</sup> *Id.* at 132.
- <sup>133</sup> *Id.* (emphasis added).
- <sup>134</sup> Richard Meeran, *Litigation of Multinational Corporations: A Critical Stage in the UK*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 261 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2001).
- <sup>135</sup> These cases were discussed at great length at the United Nations Third Annual Forum for Business and Human Rights in December 2015 as offering a way forward to hold parent corporations liable. Numerous participants in forums at the Third Annual Forum discussed these cases and the potential new “duty of care approach.” See Comments, Third Annual Forum on Business and Human Rights, *supra* note 123.
- <sup>136</sup> Specifically, Professor Radu Mares of the Netherlands has argued that, where a core company sets up a separate entity with the purpose of making a profit, the core company should be held responsible for the subsidiary’s torts under notions of due diligence. Professor Mares also argues that doing so without due diligence creates an unreasonable risk, which should be considered an affirmative wrong under the law. His theory would require core companies to retain some responsibility to initial structuring and ongoing oversight. Mares, *supra* note 125, 9-11.
- <sup>137</sup> *Id.* at 11-12.
- <sup>138</sup> *Id.* at 13 (citing Section 302, Restatement (Second) of Torts (1965)).
- <sup>139</sup> *Id.* at 14-15.
- <sup>140</sup> Restatement (Second) of Torts § 283 (“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.”).
- <sup>141</sup> Mares, *supra* note 125, at 24.
- <sup>142</sup> 65 C.J.S. § 32.
- <sup>143</sup> *Mendez-Laboy v. Abbott Laboratories, Inc.*, 424 F.3d 35, 37 (1st Cir. 2005) (noting that under the “third party” theory, an action for breach of a 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) (internal citations omitted).
- <sup>144</sup> See *Texas & Pacific Railway Co. v. Behymer*, 189 U.S. 468 (1903); see also *Shandrew v. Chicago St. P., M. & O. Ry. Co.*, 142 F. 320, 325-26 (8th Cir. 1905).
- <sup>145</sup> *Skinner*, *supra* note 63, at 201, 226-27.
- <sup>146</sup> *Id.*
- <sup>147</sup> *Id.* at 226-27.
- <sup>148</sup> Press Release, Rechtbank Den Haag (Court of The Hague), Decision in *Akpan v. Royal Dutch Shell PLC*, Case No. C/09/337050/HA ZA09-1580 (Jan. 30, 2013), <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:BY9854>; see also *Dutch Judgments on Liability Shell*, DE RECHTSPRAAK (Jan. 30, 2013), [http://www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Documents/Persbericht\\_Shell\\_UK.pdf](http://www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Documents/Persbericht_Shell_UK.pdf).
- <sup>149</sup> *Skinner*, *supra* note 63, 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 & Stephens*, *supra* note 96, at 17-20.
- <sup>150</sup> See *In re Chiquita Brands International, Inc., Alien Tort Statute & Shareholder Derivative Litigation*, 792 F.Supp.2d 1301, 1355 (S.D. Fl. 2011) (dismissing negligence claims brought under various U.S. state laws due to the extraterritorial nature of the conduct at issue), see also *Roe I v. Bridgestone Corp.*, 492 F.Supp.2d 988, 1024 (S.D. Ind.2007) (dismissing state

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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.”); *see also* *Romero v. Drummond Co.*, No. 03-0575, DE 329, Slip Op. at 2 (N.D. Ala. Mar. 5, 2007) (“[I]n view of Alabama’s traditional refusal to apply its common law to torts where the injury occurred outside of the state, [the Court will] not apply Alabama common law to the tort claims alleged here, which occurred extraterritorially in Colombia.”).

<sup>151</sup> The First Circuit 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.” *Pension Ben. Guar. Corp. v. Ouimet Corp.*, 711 F.2d 1085, 1093 (1st Cir. 1983). 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>152</sup> It is important to note, however, that if states did so, there could be arguments of federal pre-emption if such statutes affect foreign affairs. *See* *Skinner*, *supra* note 63, at 202. However, such claims should not pose much of a barrier. *Id.*

<sup>153</sup> *See, e.g.*, *Blumberg*, *supra* note 107, at 303; *see also* *Dearborn*, *supra* note 20, at 240-245.

<sup>154</sup> 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*, *supra* note 107, at 303-21. 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 20, at 240-44. This section of the Report relies greatly on both *Dearborn*’s and *Blumberg*’s work.

<sup>155</sup> 29 U.S.C. §§ 1101-1461 (2000).

<sup>156</sup> 29 U.S.C. § 1301(b)(1). The section reads, “[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.” *Id.*

<sup>157</sup> I.R.C. S 1563 (1995); *Treas. Reg. S 1.414(c)-2(b)(2)(i)(A)* (1994). The 80 percent rule is taken from the Internal Revenue Service statutes, as ERISA incorporates the regulations of the IRS. 29 U.S.C.A. §§ 1301(b)(1), 1302(b)(3) (West 1995). *See also* *Blumberg*, note 107, at 313.

<sup>158</sup> This was also noted by the First Circuit in *Pension Ben. Guar. Corp.*, 711 F.2d at 1093. *Blumberg*, *supra* note 107, at 313. 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.*

<sup>159</sup> The Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-50 (1988).

<sup>160</sup> 12 U.S.C. § 1841 (a)(2).

<sup>161</sup> 15 U.S.C. §§ 78dd-1 and -2 (1988).

<sup>162</sup> 15 U.S.C. §§ 78dd-1(a) (issuers) & 77dd-2 (a) (domestic concerns).

<sup>163</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. 15 U.S.C. § 78dd-1(a). “Domestic concerns” is broader, and encompasses any individual who is a citizen, national, or resident of the United States. 15 U.S.C. § 77dd-2(h)(1). 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. *Id.*

<sup>164</sup> 15 U.S.C. § 78m (b)(2) (2002).

<sup>165</sup> The most recent case involved the Securities and Exchange Commission charging Goodyear Tire & Rubber Company with FCPA violations when its subsidiaries paid bribes to land tire sales in Kenya and Angola. *See* Press Release, U.S. Securities and Exchange Commission, SEC Charges Goodyear with FCPA Violations (Feb. 24, 2015), <http://www.sec.gov/news/pressrelease/2015-38.html#.VQrP6WR4qY0>; *see also* Press Release, U.S. Department of

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Justice, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (June 29, 2007), [http://www.usdoj.gov/opa/pr/2007/June/07\\_crm\\_474.html](http://www.usdoj.gov/opa/pr/2007/June/07_crm_474.html); *see also* Press Release, U.S. Securities and Exchange Commission, 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> (noting, *inter alia*, plea agreements for violations of accounting provisions, as well as other theories holding the foreign subsidiary liable for bribery payments; *see also* JONES DAY, *THE LEGAL OBLIGATION TO MAINTAIN ACCURATE BOOKS AND RECORDS IN U.S. AND NON-U.S. OPERATIONS* (2006), *available at* <http://www.jonesday.com/the-legal-obligation-to-maintain-accurate-books-and-records-in-us-and-non-us-operations-03-14-2006/> (discussing the accounting provisions of the FCPA).

<sup>166</sup> *See* Skinner, *supra* note 63 255-56; *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).

<sup>167</sup> 15 U.S.C. §§ 78dd-1(a) (2012).

<sup>168</sup> 42 U.S.C. § 2000e(f) (2012).

<sup>169</sup> 29 U.S.C. § 623(h) (2012).

<sup>170</sup> 42 U.S.C. § 12111(4) (2012).

<sup>171</sup> 18 U.S.C. § 2423 (2012) (applying to U.S. citizens or permanent residents who engage in illicit sex with minors in foreign countries); 18 U.S.C. § 2251(c) (2012) (applying to any person who engages in producing child pornography outside of the United States for eventual consumption in the United States). Other examples include the Maritime Controlled Substances Act, 94 Stat. 1159(a)-(h) (1980), the Biological Weapons Anti-Terrorism Act, 18 U.S.C. § 175(a) (2012), and 18 USCS § 3261 (2012) (mandating that members of the military to who engage in conduct abroad that would be illegal under U.S. law are held to account).

<sup>172</sup> 18 U.S.C. § 1091 (2012).

<sup>173</sup> 18 U.S.C. § 2441 (2012).

<sup>174</sup> 18 U.S.C. § 2340A (2012).

<sup>175</sup> 18 U.S.C. § 2442 (2012).

<sup>176</sup> S. 2598 (introduced July 14, 2014; has been referred to Senate Committee on the Judiciary).

<sup>177</sup> Kenneth S. Abraham, *THE FORMS AND FUNCTIONS OF TORT LAW* 195-196 (4<sup>th</sup> ed. 2012). The author notes two arguments for strict liability: that those who injure are in the best position to broadly distribute the costs of non-negligently caused accidents; and that those who benefit from engaging in the activity should rightly bear the costs associated with the activity, and thus should pay for any injuries. He also discusses how with vicarious liability, the employer is in a better position to make the activity level and research decisions that can affect accident levels; the fact that employees are more likely to be judgment proof than employers, and that the loss-distribution function of strict liability plays a role in supporting this doctrine as well. *Id.* at 214. Abraham also notes that, with products liability, the strictness of liability amounted to an instrument of regulatory and compensation policy, *id.* at 217, and 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. *Id.* at 228.

<sup>178</sup> *Id.* at 226-232.

<sup>179</sup> *Id.* at 201-203.

<sup>180</sup> *Id.* at 213-215.

<sup>181</sup> 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).

<sup>182</sup> Dearborn, *supra* note 20, at 203; *see also* Hamilton, *supra* note 20, at 981.

<sup>183</sup> Hamilton, *supra* note 20, at 981.

<sup>184</sup> In fact, a law partner with a French law firm made comments that some corporations might welcome a clear direction as to what is required of them with regard to subsidiaries. Stephane Brabant, Herbert Smith Freehills LLP, Comments at the United Nations Third Annual Forum on Business and Human Rights (Dec. 5, 2015) (notes on file with author).

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<sup>185</sup> This Report addresses the issue of remedy for victims, and for purposes of scope, does not explore other possible avenues to hold parent corporations accountable for the acts of their subsidiaries. However, ICAR encourages advocates to also explore changes to the tax regime to hold parent corporations accountable for the acts of their subsidiaries, those same subsidiaries for which the parent corporations are receiving significant tax benefits. The U.S. tax code contains the infrastructure, to make U.S. parent corporations more accountable for the human rights record of their foreign subsidiaries. For example, proponents urging greater corporate accountability for international human rights abuses may find guidance in the tax anti-boycott rules currently in place to monitor corporate participation in prohibited international boycotts. In addition to the Export Administration Bureau's regulations governing violations of anti-boycotting mandates, the U.S. Treasury has implemented express tax provisions to prevent corporations from exercising tax benefits otherwise available to them. Among other things, companies participating in banned international boycotts risk losing foreign tax credits, tax deferral on earnings of foreign subsidiaries, and domestic international sales corporations (DISC), as well as tax exemption of a part of the foreign trade income of a foreign sales corporation. Moreover, Subpart F plays a role because, if a subsidiary is found to participate or cooperate with a boycott, the related portion of the income will be considered Subpart F, or foreign source income, that becomes instantly taxable to the parent without regard to its actual repatriation. *Focus on Tax Laws and the Antiboycott Regulations* in EXECUTIVE LEGAL SUMMARY 216 (2015). The implementation of the anti-boycotting tax rules could inform a similar system implemented to prevent international human rights violations by U.S. corporations operating abroad through subsidiaries. Like with the international boycott rules, these should include prevention of the use of foreign tax credits, tax deferral on earnings of foreign subsidiaries, and domestic international sales corporations (DISC), as well as precluding tax exemption of a part of the foreign trade income of a foreign sales corporation. There is ample precedent for changes to tax procedure and policy, as illustrated through the recent regulations stemming inversions (converting a formerly American-based parent company to a foreign company in a jurisdiction with a lower tax rate) and the long history of piecemeal fixes to the tax code. Ending tax deferral and tax preferences for U.S. corporations connected to international human rights abuses should become a similar priority.



