

## Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations

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### Abstract

*A notable development in recent years has been the ubiquity of the giant multinational corporation and its ability, through legal structures, to insulate itself from liability for the conduct of its foreign subsidiaries. In effect, multinational corporations simultaneously become legally invisible in their home states while potentially present through subsidiaries in innumerable other states.*

*This Article focuses on multinational corporations whose parent companies are at home in a developed country while their subsidiaries operate in states in the developing world, and specifically where the foreign subsidiaries are alleged to have violated norms of universal human rights. It examines current legal theory and offers a comparative perspective on legislative and judicial traditions and innovations in several home states of large multinational parent companies. The Article includes an exposé of relevant aspects of the new Restatement (Fourth) of Foreign Relations Law of the United States, approved by a vote of the American Law Institute as of May 2016. The overall goal of the Article is to explore various legal methods by which parent-subsidiary human rights liability might be harmonized.*

*In the aftermath of the Second World War and its upheavals, the Universal Declaration of Human Rights formed the basis of subsequent international human rights concepts, and may thus serve as a point of departure when considering victim rights. In the current era of transnationalization and deterritorialization, law has produced new challenges to human rights as circumstances have altered and destabilized existing structures. We have seen the ability of large corporations to operate across the globe beyond the reach of states with stricter human rights standards of conduct than often exist in the developing world. This is in part because universal human rights so far have had little success in practice in implementing claims of universality or extraterritorial jurisdiction.*

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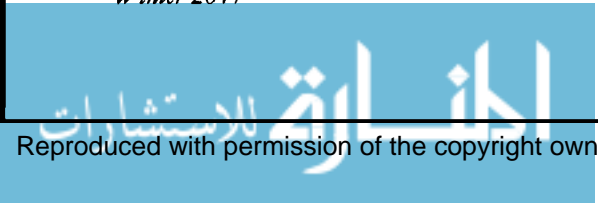
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*In the U.S., jurisdictional standards have tightened since the Supreme Court's Kiobel and Daimler decisions. Both of those decisions undertake to further comity, however, and recent legal developments in several countries, particularly in the area of legislation and court decisions, suggest that legal harmonization might yet eclipse enough of the divide among different nations' legal regimes. Such harmonization could be accomplished by bringing foreign subsidiaries' violations of human rights under extraterritorial jurisdiction, or, alternatively, by reconfiguring legal theory such that extraterritoriality ceases to be an issue. These developments, appropriate to a transnationalizing world and what may evolve in its wake, suggest the potential for increasing international and national laws' respect for human rights issues in a variety of ways that need not be mutually exclusive.*

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## I. INTRODUCTION

### A. General Background

Recent years have raised the issue of what globalization would and should mean for law, and in what ways the facility of encounter that is one of globalization's hallmarks affects law and law's diversity. Transnationalization has enabled both invisibility and ubiquity or, to borrow from the title of a 1929 essay by Valéry, *La conquête de l'ubiquité*,<sup>1</sup> the "conquest of ubiquity." One might describe this conquest of ubiquity for our purposes as the victory of economic or market forces. The ability of transnational corporations to become both legally ubiquitous and yet legally invisible has been bolstered as the world has been de-territorializing and national frontiers have been losing significance on numerous fronts. Paradoxically, human rights which have within them an inherent claim to universality, have not been able to accomplish this feat of the multinational corporation.<sup>2</sup> International human rights have far more remained rooted in national legal systems, incapable of achieving the same efficiency of adaption to transnationalization.<sup>3</sup>

International legal standards since the Universal Declaration of Human Rights have formed the basis of subsequent international human rights law.<sup>4</sup> These standards have not proven easy to enforce legally, but should remain the backdrop for analyzing present and future legal developments. That "legal liability is narrower than moral or ethical responsibility"<sup>5</sup> does not imply that legal theory is independent of either morality or ethics.

In the U.S., the issue of extraterritorial jurisdiction over subsidiaries arose after the Second World War, not only as multinational corporations began to

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<sup>1</sup> Paul Valéry, *La conquête de l'ubiquité*, in II ŒUVRES COMPLETES 1283–87 (1928).

<sup>2</sup> Mireille Delmas-Marty, *Le relatif et l'universel*, in 1 LES FORCES IMAGINANTES DU DROIT 54, 65 (2004).

<sup>3</sup> *Id.*

<sup>4</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). The Universal Declaration, along with the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention against Corruption, are the basis for the U.N.'s Global Compact, guidelines on corporate conduct. See United Nations, UNITED NATIONS GLOBAL COMPACT, *The Ten Principles of the UN Global Compact*, <http://perma.cc/3JYR-PHTN>. The Universal Declaration was drafted in the wake of the horrors of the Second World War. See, for example, Leila Nadya Sadat, *The Nuremberg Trial, Seventy Years Later*, Washington University in St. Louis Legal Studies Research Paper No. 16-06-01. (June 7, 2016), <https://perma.cc/9ABZ-E4MM>. It had roots in the efforts of international legal scholars of the inter-war (post-World War I) years. For a beautiful account of the latter, see generally Nathaniel Berman, "But the Alternative Is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

<sup>5</sup> Olivier Moréteau, *Individual Liability in a Vulnerable Environment: Revisiting the Ethical Foundation of Tort Law*, in ESSAYS IN HONOUR OF JAAP SPIER 242 (Helmut Koziol & Ulrich Magnus eds., 2016).



flourish, but especially as “a flow of common information” began to enable strategic corporate management.<sup>6</sup> Originally, the issue was one of two conflicting state interests and generally concerned an effort to control trade against an enemy or to further another national policy goal that involved restricting the trade of third countries. The issue of individual human rights victims was generally absent.<sup>7</sup>

Today the focus has shifted. Giant multinational corporations operate throughout the world, often with highly complex legal structures. Skinner reports that in 1970, there were approximately 7,000 multinational corporations in the world.<sup>8</sup> By 1990, there were 30,000. By 2000, the number had grown to 63,000; by 2009, to about 82,000.<sup>9</sup> There are more than 100,000 multinationals today and, equally importantly, those multinationals are estimated to have some 900,000 subsidiaries or other affiliated companies.<sup>10</sup> Joseph counts that by 2000, multinational corporations amounted to more than fifty of the world’s biggest economies.<sup>11</sup> Avi-Yonah reports that by 2001, the value of their goods and services, or gross product, was estimated to equal a tenth of the entire world’s gross domestic product,<sup>12</sup> and according to Guillen,<sup>13</sup> the 500 biggest multinationals produce approximately a quarter of the world’s product and half of global trade.<sup>14</sup>

<sup>6</sup> U.S. DEPT. OF COMMERCE, THE MULTINATIONAL CORPORATION: STUDIES IN U.S. FOREIGN INVESTMENT 3 (1972).

<sup>7</sup> For discussion of those statutes, see *infra* Sections II.B.3–4. The exceptions were U.S. policies concerning Uganda and Rhodesia.

<sup>8</sup> Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158, 168 (2014).

<sup>9</sup> *Id.* (citing U.N. Conference on Trade and Development, *World Investment Report 2009: Transnational Corporations, Agricultural Development and Production*, xxi, U.N. DOC. UNCTAD/WIR/2009 (July 2009), <https://perma.cc/ZHM8-5CXT>).

<sup>10</sup> Skinner, *supra* note 8, at 168 (citing 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. (forthcoming May 2015) (manuscript at 8), <https://perma.cc/GGZ5-U8KG>).

<sup>11</sup> SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 1 (2004) (citing Sarah Anderson & John Cavanagh, *Top 200: The Rise of Global Corporate Power*, INSTITUTE FOR POLICY STUDIES (Dec. 4, 2000), <https://perma.cc/BG6C-WXJV>).

<sup>12</sup> Reuven S. Avi-Yonah, *National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality and Harmonization*, 42 COLUM. J. TRANSNAT’L L. 5, 6 (2003) (citing U.N. Conference on Trade and Development, *World Investment Report 2002: Transnational Corporations and Export Competitiveness* 4, U.N. Doc. UNCTAD/WIR/2002 (2002)).

<sup>13</sup> Guillen is the Director of the Wharton School’s Management and International Relations Lauder Institute.

<sup>14</sup> Mauro F. Guillen, *Understanding and Managing the Multinational Firm*, WHARTON, UNIVERSITY OF PENNSYLVANIA 1, <https://perma.cc/E4K2-83FH>.

## B. Corporate Veil Piercing and the Human Rights Dilemma

The autonomy of the corporate personality, the idea that the corporate veil is to be pierced only in the exceptional case of wrongdoing,<sup>15</sup> is a doctrine that has become established throughout the world.<sup>16</sup> This doctrine, which allows parent companies to maintain legal separation between themselves and their subsidiaries, has enabled legal invisibility. At the same time, multinationals have permeated many nations, since a single multinational corporation may have thousands of subsidiaries in hundreds of different countries. Collins has called this “the capital boundary problem,” and he notes that “owners of capital enjoy an unrestricted freedom to determine the shape and size of legal personalities which bear the burden of legal responsibility . . . [and] can exercise their freedom to avoid obligations or restrict another’s rights by adopting patterns of vertical disintegration for productive activities.”<sup>17</sup>

The origins of the structure of legal separation arose in a very different era, however, and for purposes that are increasingly inapposite to the context of huge multinational corporations where subsidiaries may commit international human rights violations abroad. The corporate veil was meant to protect investors in a subsidiary who were all individuals so that those individuals would not be financially responsible for their company’s liabilities above the amount of their investments.<sup>18</sup> Such investor liability would be a disincentive to invest, and consequently detrimental to the economy. Whereas today a common structure is for subsidiaries to be wholly owned by their parent companies, in the U.S., corporate entities were not permitted to own any shares in other corporations before the end of the nineteenth century, 1888 to be exact.<sup>19</sup> Limited liability had begun to take hold in the beginning of that century.<sup>20</sup>

In addition to the astronomical increase in the presence of multinational corporations in many parts of the world, past decades have seen a similarly impressive increase in subsidiaries that are owned entirely by other corporate entities, often their parent companies. Referring to U.S. multinationals in

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<sup>15</sup> See PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 96 (1993).

<sup>16</sup> See Dalia Palombo, *Chandler v. Cape: An Alternative to Piercing the Corporate Veil Beyond Kiobel v. Royal Dutch Shell*, 4 *BRIT. J. AM. LEGAL STUD.* 453, 453 (2015) (“[T]he concept of separate legal personality is established all over the world.”).

<sup>17</sup> Hugh Collins, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*, 53 *MOD. L. REV.* 731, 744 (1990).

<sup>18</sup> See Kurt A. Strasser, *Piercing the Corporate Veil in Corporate Groups*, 37 *CONN. L. REV.* 637, 637 (2005).

<sup>19</sup> Philip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Modern Corporate Groups*, 37 *CONN. L. REV.* 605, 607–08 (2005).

<sup>20</sup> BLUMBERG, *supra* note 15, at 10–14.

particular, Blumberg reports that “most large American corporate groups function through wholly owned subsidiaries.”<sup>21</sup> Yet, according to Blumberg, the transition allowing limited liability to extend from individual shareholders to corporate groups was effected without reflection in the U.S: “[N]o court ever discussed the problem. Limited liability of corporate groups, although one of the most important legal rules of modern economic society, appears to have emerged as a historical accident.”<sup>22</sup>

The need for corporate legal autonomy can be questioned in today’s conditions: namely, where the parent company frequently exercises considerable dominance over the conduct of its subsidiaries, and especially to the extent that the dynamic of interaction between parent company and subsidiary concerns the good of the entire corporate enterprise, and thus is largely unrelated to its structural autonomy. As can be seen throughout this Article, a growing body of literature has been addressing this issue.

Moreover, the plight of the human rights victim, as an illustrative instance of the tort victim more generally, is distinguishable from the contract creditor’s situation, the envisioned target of corporate limited liability. Unlike the tort victim, the contract creditor is, or should be, aware of the corporate structure from the onset of the relevant transaction.<sup>23</sup> By contrast, the tort victim is an involuntary participant in the tort, with no prior opportunity to withdraw from the interaction.<sup>24</sup> This distinction argues in favor of enlarging parent company liability specifically for tort victims.<sup>25</sup>

The reports on corporate veil piercing in tort cases are mixed. On the one hand, Avi-Yonah concludes that courts often do pierce the corporate veil in tort

<sup>21</sup> *Id.* at 141–42.

<sup>22</sup> *Id.* at 59.

<sup>23</sup> This is an oversimplification. There are contract creditors who typically are not part of a bargained-for exchange, such as trade contractors and workers. For this reason, Blumberg would not make a distinction along the lines of the contract as opposed to tort creditor, but of the voluntary creditor, who *bargained* with the defendant, as opposed to the involuntary creditor, who had no opportunity or wish to enter into a transaction with the defendant. BLUMBERG, *supra* note 15, at 136–38.

<sup>24</sup> See Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1920 (1991); David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1601 (1991); Virginia Harper Ho, *Of Enterprise Principles and Corporate Groups: Does Corporate Law Reach Human Rights?*, 52 COLUM. J. TRANSNAT’L L. 113, 136 (2013); Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 390 (1992); Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1204 (2002).

<sup>25</sup> For authors holding this view, see *supra* note 24. *But see* Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89, 105–12 (2013) (finding the tort/contract, involuntary/voluntary classifications largely unhelpful in analyzing veil piercing); Daniel R. Kahan, Note, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1104–07 (2009) (arguing that limited liability for corporate torts is neither historically unjustified nor arbitrary).

cases because of the victim's involuntary harm and inability to avoid risk.<sup>26</sup> On the other hand, Oh cites empirical findings indicating a modern trend of diminished veil piercing in tort cases in the last twenty years.<sup>27</sup> Joseph similarly draws attention to the distinct but germane matter that empirical studies in the U.S., England, and Australia reveal that courts in these countries paradoxically agree to pierce the corporate veil less frequently where the defendant is a corporate holding company than when it is an individual shareholder.<sup>28</sup> This apparent paradox has been explained, however, as being due to the fact that where the defendants are individuals, they often run closely-held family corporations and may not observe legal niceties or rules in running what they perceive to be their family's business, and hence their possession.<sup>29</sup>

In the U.S., piercing the corporate veil generates more litigation than any other corporate law issue.<sup>30</sup> O'Neal and Thompson correlate the frequency of litigation with "the broad equitable terms by which the black letter law of this subject is usually described,"<sup>31</sup> whereas Oh has concluded that the equitable nature of the doctrine is largely overlooked.<sup>32</sup>

Of course, just as individuals may choose not to invest in a company unless they are guaranteed limited liability, so too corporations might be less eager investors in other corporations if potential liability is augmented.<sup>33</sup> These considerations must be weighed in what will often be a comparison of incommensurables, a balance of economic incentives against a dedication to the safeguarding of fundamental human rights as corporate non-state actors assume powers and privileges previously arrogated only to states.<sup>34</sup>

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<sup>26</sup> Avi-Yonah, *supra* note 12, at 15.

<sup>27</sup> Oh, *supra* note 25, at 127.

<sup>28</sup> JOSEPH, *supra* note 11, at 131 (citing Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1038 (1991); C. Mitchell, *Lifting the Corporate Veil in the English Courts: An Empirical Study*, 13 CO. FIN. & INSOLVENCY L. REV. 15, 22 (1999); I. Ramsay & D. Noakes, *Piercing the Corporate Veil in Australia*, 19 CORP. & SEC. L.J. 250, 252 (2001)).

<sup>29</sup> See John S. Delikanakis, lecture for The Rossdale Group, *Veil Piercing/Alter Ego Doctrine: How an Entity's Veil Can Be Pierced & Similar Equitable Remedies Available to Creditors* (June 22, 2016) (author's notes).

<sup>30</sup> O'Neal & Thompson, *Disregarding separate personality of closely held entities, in CLOSE CORPORATIONS AND L.L.C.S: LAW AND PRACTICE* § 1.18 (3d ed. 2015).

<sup>31</sup> *Id.*

<sup>32</sup> Oh, *supra* note 25, at 89.

<sup>33</sup> See BLUMBERG, *supra* note 15, at 125.

<sup>34</sup> See, for example, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461-62 (2001) ("[C]orporations may have as much or more power . . . as governments?").



Structural legal separation among multiple entities of a single corporation has been the vehicle by which multinationals incorporated in industrialized nations, often with exacting human rights norms, benefit from having a presence in the developing world, where increasingly they are being accused of grave human rights violations. As others have noted, such parent companies are also able to reap large economic benefits from their foreign subsidiaries.<sup>35</sup> In 1990, Blumberg was of the view that “[t]he predominance of . . . multinational corporate complexes is creating irresistible pressures for the development of new legal concepts to impose more effective societal controls than those available under traditional entity law reflecting the society of centuries ago.”<sup>36</sup> Host countries, *i.e.*, those states in which the subsidiaries operate and often are incorporated, have welcomed much-needed capital that multinationals have invested in their economies in the past several decades. Some have spoken of a race to the bottom, a competition among numerous host nations to make themselves the most favorable legally and financially to investor companies.<sup>37</sup> Some companies allegedly put pressure on nations to agree to conditions that will allow their subsidiaries the least possible foreseeable liability.<sup>38</sup> The result has been a lessening of corporate regulation in developing nations.<sup>39</sup> Additionally, human rights norms in those countries are often weaker than in corporate home states. Sometimes foreign governments have taken the initiative in committing human rights violations to facilitate drilling or other work with natural resources for multinationals in their countries.<sup>40</sup> According to Monshipouri, Welch, and Kennedy,

The MNCs’ power to control international investment . . . has had enormous bearing on the economies of developing countries. Faced with pressures to attract such investments, governments in the South have had little or no alternative but to be receptive to the terms of the MNCs. The lack of leverage with the MNCs has meant, for example, that minimum wage has been set unrealistically low in developing countries so as to attract foreign

<sup>35</sup> See Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law*, 72 WASH. & LEE L. REV. 1769, 1777 & n. 19, 1779 (2015) (sources cited therein and surrounding text).

<sup>36</sup> Philip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 285 (1990).

<sup>37</sup> See Ratner, *supra* note 34, at 460; Thomas Martial, *L’harmonisation vers le bas de la compétence judiciaire en matière de responsabilité des multinationales: concordance des régimes et garantie d’impunité*, LES BLOGS PÉDAGOGIQUES DE L’UNIVERSITÉ PARIS OUEST (July 3, 2015), <https://perma.cc/AM9F-AN38>.

<sup>38</sup> JOSEPH, *supra* note 11, at 3; Skinner, *supra* note 35, at 1799–800 & n. 108.

<sup>39</sup> Skinner, *supra* note 35, at 1801.

<sup>40</sup> JOSEPH, *supra* note 11, at 3–4; Benjamin Mason Meier, *International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent*, 20 BERKELEY J. INT’L L. 513, 532–33 (2002) (discussing regulatory insufficiency in some African states).

investment. . . . The simultaneous surge in economic growth and inequity has led to serious implications for human rights in the developing world.<sup>41</sup>

One developing country, Colombia,<sup>42</sup> instituted a legal reform in 2008 to strengthen limited liability for closely held corporations and prevent any corporate veil piercing.<sup>43</sup> The law was drafted by Francisco Reyes, the 2015–16 Colombian chairman of the U.N. Commission for International Trade Law (UNCITRAL).<sup>44</sup> He also drafted a proposed Model Act on Simplified Corporations for the Organization of American States (OAS).<sup>45</sup> As this Article was being drafted, Reyes delivered the Tucker Lecture at Louisiana State University Law School, in which he announced that he had not been successful in his attempt at persuading UNCITRAL to adopt his model law, but that after passing a favorable resolution,<sup>46</sup> the OAS General Assembly is set to adopt it imminently.<sup>47</sup>

Reyes describes the Colombian law as ensuring “full-fledged limited liability”<sup>48</sup> for corporations and “disregard of the legal entity theory,”<sup>49</sup> the doctrine which permits courts to consider a parent and its subsidiaries as a single corporate entity for purposes of imposing legal liability on both parent company and subsidiary as a single unit.<sup>50</sup> The “success story” that figures in the title of an article he wrote about the law he drafted for Colombia is a financial success for that nation, with millions more pesos derived in revenue since the law’s entry into force,<sup>51</sup> and so much new employment created through the many new companies incorporated since then that “[s]tatistical analysis suggests . . . the [national]

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<sup>41</sup> Mahmood Monshipouri, Claude E. Welch, Jr., & Evan T. Kennedy, *Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities*, 25 HUM. RTS. Q. 965, 966–67 (2003).

<sup>42</sup> See *Colombia*, THE WORLD BANK, <https://perma.cc/2A2J-XEA2> (characterizing Colombia as a developing country).

<sup>43</sup> L. 1258, décembre 5, 2008, DIARIO OFICIAL [D.O.] (Colom.) [hereinafter Law 1258], <https://perma.cc/ZS77-B7LN>, more fully described in Francisco Reyes, *The Colombian Simplified Corporation: An Empirical Analysis of a Success Story in Corporate Law Reform*, 4 PENN ST. J.L. & INT’L AFF. 392 (2015).

<sup>44</sup> Reyes is Chairman of the U.N. Commission for International Trade Law (UNCITRAL) 2015-2016.

<sup>45</sup> Reyes, *supra* note 43, at 392.

<sup>46</sup> *Id.* at 400; Francisco Reyes, Chairman, UNCITRAL, Tucker Lecture at the Louisiana State University Law School (May 31, 2016) (author’s Tucker Lecture notes on file with author).

<sup>47</sup> Reyes, Lecture, *supra* note 46.

<sup>48</sup> Reyes, *supra* note 43, at 393.

<sup>49</sup> *Id.* at 394.

<sup>50</sup> Reyes uses the term “entity theory,” in contradistinction to Blumberg’s use of “entity law” to denote corporate separability, and “enterprise theory” to indicate that all groups within a corporation form a single enterprise. See BLUMBERG, *supra* note 15, at 89.

<sup>51</sup> Reyes, *supra* note 43, at 394.

unemployment rate may have gone down” in the wake of the new law.<sup>52</sup> Others have noted more generally the strong impact of multinationals on alleviating unemployment and creating wealth in host states, and, according to Monshipouri, Welch, and Kennedy, there is also evidence that in some countries multinationals have helped to increase literacy rates and decrease mortality.<sup>53</sup> For his part, Reyes does not address the issue of involuntary tort law plaintiffs, of otherwise involuntary creditors, or of the effect of strict, full-fledged limited corporate liability law for corporations on the plight of human rights victims.<sup>54</sup>

Contrary to these findings, however, recent evidence suggests that powerful, thriving multinationals may be detrimental to the very national economies which often are believed to profit from corporate success.<sup>55</sup> Bessen has correlated the bargaining power multinationals exercise over both corporate home and host states with the exaction of favorable regulations that boost corporate valuations, and thus appear on the surface to reflect heightened productivity, but that reduce overall economic dynamism through loss of competition and a consequent loss in overall economic productivity.<sup>56</sup>

Moreover, in both the developing and the developed world, multinationals have become ever less subject to the jurisdiction of national courts when accused of violations of fundamental human rights, while human rights themselves have remained fully anchored in national systems.<sup>57</sup> As a result, where alleged victims are unable to seek recourse in their own countries, they often attempt to do so in the country of the multinational’s incorporation. Such suits typically encounter an array of legal obstacles, including rules against extraterritorial jurisdiction, exhaustion of remedies, corporate veil theory, and, in common-law countries, forum non conveniens.<sup>58</sup>

<sup>52</sup> *Id.*; see also *id.* at 403–10 (noting the huge success of the new law in terms of numbers of new corporations in Colombia since its enactment).

<sup>53</sup> Monshipouri, Welch & Kennedy, *supra* note 41, at 972 (citing WILLIAM H. MEYER, HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS: MULTINATIONAL CORPORATIONS, FOREIGN AID, AND REPRESSION 105–107 (1998)).

<sup>54</sup> See Reyes *supra*, note 43.

<sup>55</sup> See James Bessen, *Accounting for Rising Corporate Profits: Intangibles or Regulatory Rents?* (Boston University School of Law, Law and Economics Working Paper No. 16–18, (May 2016)), <https://perma.cc/9HKL-QFV3>.

<sup>56</sup> See *id.*; see also James Bessen, *Lobbyists Are Behind the Rise in Corporate Profits*, HARVARD BUS. REV. (May 26, 2016), <https://perma.cc/7ETB-9T32> (finding that political activity and regulation “account for a surprisingly large share” of the increase in corporate profits and valuations).

<sup>57</sup> See MIREILLE DELMAS-MARTY, GLOBALISATION ECONOMIQUE ET UNIVERSALISME DES DROITS DE L’HOMME 10 (2004).

<sup>58</sup> Perhaps the most famous of the latter cases was *In re Union Carbide Corp. Gas Plant Disaster in Bhopal, India* in Dec., 1984, 809 F.2d 195 (2d Cir. 1987), concerning the disaster in Bhopal, India, which resulted in the deaths of some two thousand people and harm to more than 200,000. The

Like limited liability, these legal obstacles to tort plaintiff recovery originated in the pre-transnationalization era. Consequently, courts strain to apply analytical frameworks ill-adapted to the contemporary mobility and deterritorialization of capital and products. For thirty years, an exception to the clash of antiquated legal structures' woeful failure to deal adequately with the human rights victims of foreign subsidiaries of multinational companies had been the U.S. There, foreign plaintiffs were able to bring such actions, whether against U.S. or foreign defendants, provided the human rights violations were deemed to violate customary international law, or, as the statute put it, the "law of nations," under the Alien Tort Statute (ATS).<sup>59</sup> The ATS grants jurisdiction to federal district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>60</sup> Since *Kiobel*, however, those suits have been curtailed by the Court's holding that the ATS lacks extraterritorial application due to the lack of an express grant thereof in the statutory language, combined with an insufficient nexus between the claims plaintiffs asserted and interests that "touch and concern the United States."<sup>61</sup> After *Kiobel*, the Court in *Daimler* tightened the rules for finding general personal jurisdiction against corporations to where a company was "at home"—namely, where it was incorporated or had its principal place of business, leaving open in a footnote the door to possible exceptions which seem improbable on the basis of the decision itself.<sup>62</sup>

From the perspective of the international situation, how should the dilemma be resolved, especially at a time when the tendency in certain home states in which the parent company is incorporated has been to diminish the extraterritorial jurisdiction of their courts?

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case was transferred to India by a New York federal judge pursuant to the doctrine of *forum non conveniens*.

<sup>59</sup> Alien Tort Statute, 28 U.S.C. § 1350 (2012) [hereinafter "ATS"]. For a thoughtful analysis of how to understand the law of nations from a comparative law perspective, see Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 AM. J. INT'L. L. 475 (2015).

<sup>60</sup> ATS, *supra* note 59.

<sup>61</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). In the language of the Court, the "claims" themselves must "touch and concern the United States with sufficient force" to rebut the presumption against extraterritoriality. *Id.*

<sup>62</sup> See *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 & n. 19 (2014); Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 678 (2015).

## II. HARMONIZATION

### A. Introduction

This Section addresses the sorts of harmonization that may be envisaged to deal with issues of multinational corporate expansion and inadequate victim redress for the consequences of grave human rights violations by foreign subsidiaries. Possibilities include treaties between and among states or action within states by national executives, legislators and/or courts. National steps might be taken in concert with counterparts in other similarly situated states,<sup>63</sup> easing competitive concerns that bold action may hurt any given nation's companies. Alternatively, nations may act alone, either to bring themselves into harmony with legal developments elsewhere or to take the lead in the hope and expectation that others will follow.

Already in 2001, at a time when the ATS was flourishing, Ratner underscored the importance of looking to an international standard that did not depend on any single nation.<sup>64</sup> He argued that international law must provide a uniform, global norm for understanding corporate violation of human rights.<sup>65</sup> His concern that there be a single, predictable law derives from the evolution of corporations into global entities.<sup>66</sup>

International law so far has proven to be an elusive source of protection for human rights where foreign corporate subsidiaries have been accused of grave violations, however. While a single, universal yardstick may not be realistic, or even ultimately desirable,<sup>67</sup> current legal developments in a number of home nations may suggest paths toward reaching standards of corporate human rights obligations that are mutually harmonious and compatible.

### B. Legislation

#### 1. France.

Some countries are exploring legislative avenues of potential civil recovery for human rights victims of foreign corporate subsidiaries in the aftermath of *Kjibel*. France has taken a first step towards a law that would allow the French courts to have jurisdiction for corporate violations of human rights committed by

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<sup>63</sup> For purposes of this Article's scope, principally those of corporate home nations.

<sup>64</sup> Ratner, *supra* note 34, at 475–77.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 461–65.

<sup>67</sup> *See* Ruti Teitel, *Elie Wiesel and the Limits of Witness*, THE TIMES OF ISRAEL (July 11, 2016), <https://perma.cc/97X7-EW56>.

a subsidiary of a French corporation anywhere in the world.<sup>68</sup> It would do this by imputing the conduct of the subsidiary to the parent company.<sup>69</sup> The situations in which this would be permissible would be limited to large corporations whose parent is incorporated in France with a minimum of 5,000 employees, or, if counting both parent and foreign subsidiaries, a minimum of 10,000 employees.<sup>70</sup> The parent company would have a duty of care, but the duty would be something more than the traditional Anglo-Saxon duty of care: the French term used is “*un devoir de vigilance*,” literally a “duty of vigilance.” This duty would extend to taking what the proposed law’s Article 1 describes as “reasonable measures” in order to “prevent the occurrence of risks of violations of human rights and fundamental freedoms, grave bodily or environmental harms or sanitary risks.”<sup>71</sup> This bill is part of a transcontinental dialogue inasmuch as in the *exposé des motifs*, the setting forth of its purposes, explicit reference was made to the ATS.<sup>72</sup>

The French bill was inspired by the devastating collapse of a factory at Rana Plaza in Bangladesh in 2003.<sup>73</sup> Some 4,000 workers were buried under the rubble, with over a thousand people losing their lives. It became widely publicized in France that French clothing brands (along with those of other countries) were being manufactured in the factory.<sup>74</sup> The French companies blamed their suppliers, which were not liable under contemporaneous French law.<sup>75</sup>

After being approved in a vote by the lower house, the French bill went to the Senate, where it was rejected.<sup>76</sup> The Senate debates underscored the potential

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<sup>68</sup> Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [“Law proposal (bill) concerning the duty of vigilance of parent companies and contractors.”]. Assemblée nationale, 14ème législature, no. 2578 (Feb. 11, 2015), <https://perma.cc/5AQU-QV5S>.

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

<sup>70</sup> *Id.* at art. 1(I).

<sup>71</sup> The relevant standards would be those obligations undertaken by the state internationally. See Thierry Vallat, *La proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre en seconde lecture à l'Assemblée nationale*, LE BLOG DE THIERRY VALLAT, AVOCAT AU BARREAU DE PARIS (Mar. 22, 2016), <https://perma.cc/KY3H-GNBT>.

<sup>72</sup> See *Exposé des motifs*, in Proposition de loi, *supra* note 68, at 4. Lisbeth Enneking has credited the ATS with being the impetus behind a “western trend towards . . . foreign direct liability cases.” Lisbeth Enneking, *The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria Case*, 10 UTRECHT L. REV. 44, 44 (2014).

<sup>73</sup> The bill’s *Exposé des motifs*, *supra* note 68 at ¶¶ 3–4, explicitly refers to the incident.

<sup>74</sup> Antoine d’Abbundo, *Itinéraire d’une proposition de loi*, LA CROIX (June 1, 2016), <https://perma.cc/4KZL-DW8A>.

<sup>75</sup> The bill’s *exposé des motifs* also sets forth the lack of liability of the parent companies involved in the Bangladesh disaster. See *supra* note 68, *Exposé des motifs*, ¶ 6.

<sup>76</sup> See Le Sénat n’a pas adopté, en première lecture, la proposition de loi, Sénat, Session ordinaire de 2015–2016, no. 40 (Nov. 18, 2015), <https://perma.cc/P8SH-QEYH>.

danger the law would pose to French corporate profits and, through them, to the national economy.<sup>77</sup> The bill then went back to the National Assembly, where it was once again adopted, now in second reading, on March 23, 2016,<sup>78</sup> after which it was sent back for a second time to the Senate,<sup>79</sup> where it remains as of this writing. It should be noted that in France it is the National Assembly that has the last word, so in principle a second defeat in the Senate would not be fatal to its ultimate passage.<sup>80</sup>

Of note is the resemblance between the French Senate debates and *Kiobel*, where the Court was concerned about all of the world's victims coming to court in the U.S. to seek compensation under the ATS.<sup>81</sup> For their part, some French Senators asked why it is always France, and only France, that must take the humanitarian lead to its own economic detriment, in this case by harming its own multinationals.<sup>82</sup> Just as this was essentially the same attitude of some of the justices in *Kiobel* when they decided to dismiss the plaintiffs' action,<sup>83</sup> in the past, efforts in the U.K. and the E.U. to impose liability on parent companies for their foreign subsidiaries' human rights violations have been stymied by similar concerns.<sup>84</sup>

## 2. A reluctance to act unilaterally: the examples of France and the U.S.

National economic concerns pose powerful challenges, but government leaders may yet be prepared to act in favor of parent company liability for extraterritorial subsidiary conduct where such conduct involves grave violations

<sup>77</sup> See comments of Philippe Dallier and Michel Vaspert, *Séance du 18 novembre 2015 (compte rendu intégral des débats)*, SENAT, <https://perma.cc/UH3C-3ZYX>.

<sup>78</sup> See *Séance du mercredi 23 mars 2016, Assemblée nationale, 14<sup>ème</sup> législature, Session ordinaire de 2015–2016*, <https://perma.cc/2N44-KGBA>.

<sup>79</sup> See Proposition de loi adoptée avec modifications par l'Assemblée nationale en deuxième lecture, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Sénat, Session ordinaire de 2015–2016, no. 496 (Mar. 24, 2016), <https://perma.cc/Q46G-K4BL>.

<sup>80</sup> This presupposes that the President follows the general custom of allowing the National Assembly to be the ultimate decision maker where the two bodies, after two readings, do not come to a common accord on a text. See *Fiche de synthèse n°32: La procédure législative*, ASSEMBLÉE NATIONALE (May 16, 2014), <https://perma.cc/Q6PH-FEED>. Efforts by the French Senate to leave the bill pending until and unless the E.U. adopts a similar policy may stall it, however.

<sup>81</sup> *Kiobel*, *supra* note 61, at 1668 (“[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”).

<sup>82</sup> This is exemplified by the comments of Senator Philippe Dallier, in which the specter of a law that would hurt “our” French and “only . . . our” companies is raised. *Séance du 18 novembre 2015*, <https://perma.cc/XKL9-XYFD>.

<sup>83</sup> *Kiobel*, *supra* note 61, at 1677–78.

<sup>84</sup> See *Kiobel*, *supra* note 61, at 1669; Kiarie Mwaura, *Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil*, 11 J. INT'L. BUS. & L. 85, 107 (2012).

of human rights. What we know is only that we are seeing a reluctance to act *unilaterally*, nationally, at the risk of harming one's own nation economically by benefiting competitor nations whose multinationals would be the third-party beneficiaries of one's regulations, a reluctance seen as executives, legislators and judges engage on a national level in a process of addressing an international, transnational problem caused by globalized commerce. Yet, as we have seen, contrary to commonly held views, Bessen's recent evidence suggests that the powerful multinational in fact may be a drain on national productivity and economic dynamism, not a boon for them.<sup>85</sup>

In 2010, France also enacted a law, known as "*Grenelle II*," that renders parent companies liable for environmental harms committed by their subsidiaries, but only in limited circumstances.<sup>86</sup> Those circumstances require the subsidiary to be in liquidation proceedings and for the parent company to be responsible for the subsidiary's lack of sufficient financing to meet its legal liabilities.<sup>87</sup>

As will be seen in the next Section, comity concerns are another consideration for home countries in relation to host countries.<sup>88</sup> To the extent that acts at issue take place in a foreign state, that nation may object to the home country's exercise of extraterritorial jurisdiction.<sup>89</sup>

### 3. Comity's growing role.

In a perceptive 1987 article analyzing the methodology of extraterritorial application of U.S. law, Brilmayer suggested that comity was a concern of Congress rather than of the judiciary, the courts' primary focus being on furthering U.S. interests.<sup>90</sup> Close to two decades later, however, after years of intense transnationalization, this insight may no longer be valid. Both in his recent book and in a 2015 talk given to France's Supreme Court of Administrative Law, the Conseil d'État, Justice Breyer has signaled the U.S. Supreme Court's appreciation for the importance of comity in its decision-making as one of its most

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<sup>85</sup> Bessen, *supra* note 55.

<sup>86</sup> Loi 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement (1), JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 13, 2010 Article 227-II [hereinafter *Grenelle II*] (amending sections 512-17 of the Environmental Code).

<sup>87</sup> *Id.*

<sup>88</sup> This has been a repeated concern on the part of U.S. Supreme Court justices in recent years. *See, for example*, STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 123 (2015).

<sup>89</sup> Foreign government amicus briefs are mentioned by Justice Breyer as an important consideration militating against extraterritorial jurisdiction. *See id.* at 123, 148.

<sup>90</sup> Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 L. & CONTEMP. PROBS. 11, 20–21 (1987).



significant transitions in the face of globalization.<sup>91</sup> In *The Court and the World*, Justice Breyer traces the evolution of U.S. judicial understandings of comity, and sets forth some of the numerous recent Supreme Court cases that have held it to be an important factor in the Court's decisions.<sup>92</sup> As will be seen in the next Section, past U.S. legislation with extraterritorial effect often did raise comity issues in a time in which the world was less closely linked than today.

#### 4. Past U.S. extraterritorial legislation.

In past legislation, the U.S. enacted numerous statutes that applied to the foreign subsidiaries of U.S. corporations, but, in general, these were in furtherance of war aims, whether "hot" or "cold" in nature.<sup>93</sup> They often provoked hostile responses from U.S. foreign subsidiary host countries, which felt caught in a war they did not care to fight on behalf of the U.S. and where a trade embargo would negatively affect their own economy. With the exceptions of measures aimed against Rhodesia and Uganda,<sup>94</sup> however, the U.S. laws at issue were part of efforts to further its political goals by instituting trade restrictions and were not principally concerned with human rights.

Of particular note to the present context, in the laws that gave the U.S. de facto jurisdiction over foreign subsidiaries were provisions setting a precedent for considering direct liability of the parent company. For example, the Rhodesia regulations were framed so that officers or directors of the U.S. parent company would fall within their purview even if they themselves did not engage in the prohibited trade activity that might benefit the racially discriminatory foreign state, so long as they were found to have "authorize[d] or permit[ted]" their foreign subsidiary to do so.<sup>95</sup> Similarly, pursuant to the trade embargo regulations concerning Cuba before their amendment in 1975, "an American [parent company] . . . actually or *potentially* able to control a foreign firm's trade with Cuba was required to do so."<sup>96</sup>

<sup>91</sup> BREYER, *supra* note 88, at 97; Stephen Breyer talk at the Conseil d'État, Justice of the Supreme Court of the U.S., *L'ordre juridique national en prise avec le droit européen et international: questions de souveraineté?*, talk at the Conseil d'État (April 10, 2015) (notes of author).

<sup>92</sup> See BREYER, *supra* note 88, at 95–133.

<sup>93</sup> For a detailed discussion of these laws, see Robert B. Thompson, *United States Jurisdiction Over Foreign Subsidiaries: Corporate and International Law Aspects*, 15 L. & POL. INT'L BUS. 319 (1983).

<sup>94</sup> Rhodesian Sanctions Regulations, 31 C.F.R. §§ 530.403–10 (1970); laws aiming to deprive Idi Amin's Uganda of U.S. coffee market, 22 U.S.C. § 286e–7 (Supp. V 1981) (amendment to Bretton-Woods).

<sup>95</sup> Rhodesian Sanctions Regulations, *supra* note 93.

<sup>96</sup> Thompson, *supra* note 93, at 331 & n.44 (emphasis added) (citing Letter from Stanley Sommerfield, former Director of Office of Foreign Affairs Control, to Professor Robert Thompson, Associate Professor of Law at Washington University (Mar. 28, 1983)).

The “actual or potential control” standard also had been part of much earlier extraterritorial laws. The 1941 amendments to the Trading with the Enemy Act extended to foreign subsidiaries of U.S. companies,<sup>97</sup> especially in light of the definition given in a Treasury Circular, creating responsibility where parent companies had either actual or potential control.<sup>98</sup> Moreover, some definitions equated ownership with control; in the regulations forbidding trade with China that arose from the Korean War, ownership figured as a sufficient criterion for parent company responsibility.<sup>99</sup> More generally, ownership is interpreted as requiring a majority or more of the shares of a company,<sup>100</sup> and, according to the *Restatement (Third) of Foreign Relations Law*, ownership usually implies control.<sup>101</sup>

### 5. The modern era.

Numerous U.S. statutes specify extraterritorial application, or have been interpreted as doing so.<sup>102</sup> The Foreign Corrupt Practices Act of 1977 (FCPA)<sup>103</sup> is an established U.S. statute with extraterritorial application that has raised concerns similar to those raised with respect to the ATS and the proposed French statute discussed earlier: namely, that the law renders national companies less competitive in a global business environment.<sup>104</sup> The statute imposes penalties, among others, on U.S. multinational companies that bribe foreign officials.<sup>105</sup>

So long as the legislative language is deemed to be express, the Supreme Court has repeatedly stated that, since the modern era of *EEOC v. Aramco*, extraterritorial application is permissible.<sup>106</sup> The modern line of cases establishes a presumption against extraterritoriality. In *Kiobel*, relying on a line of precedents, the Supreme Court stated that “to rebut the presumption, the ATS would need to evince a ‘clear indication of extraterritoriality.’ It does not. To begin, nothing in the text of the statute suggests that Congress intended causes of action recognized

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<sup>97</sup> Trading with the Enemy Act, 12 U.S.C. § 95a (2012), 50 U.S.C. app’x. §§ 1–39 (1976 & Supp. V 1982).

<sup>98</sup> U.S. Treasury Public Circular No. 18 of March 30, 1942, 7 Fed. Reg. 2503 (April 1, 1942).

<sup>99</sup> 31 C.F.R. § 500.329(a) (1982).

<sup>100</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 414, cmt. e at 272 (Am. Law Inst. 1987).

<sup>101</sup> *Id.*

<sup>102</sup> Foremost among them is the Sherman Act, 15 U.S.C. §§ 1–7 (2012), although its interpretation has been subject to changing judicial standards.

<sup>103</sup> Foreign Corrupt Practices Act, 15 U.S.C. § 78dd–1 (2012) [hereinafter FCPA].

<sup>104</sup> See *Avi-Yonah*, *supra* note 12, at 18–19.

<sup>105</sup> See FCPA, *supra* note 103.

<sup>106</sup> *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). For the frequent absence of legislative directive as to extraterritorial applicability of statutes and the judicial presumption that lack of guidance should be equated with lack of extraterritoriality, see *Brilmayer*, *supra* note 90, at 15 & n. 23 and sources cited therein.



under it to have extraterritorial reach.”<sup>107</sup> Thus, unless Congress uses express language permitting extraterritorial jurisdiction, a statute will be deemed to prohibit it.

#### 6. The possibility of custom-made laws.

A headline-maker in the U.S. came from a law Congress passed to facilitate the path for Iranian terrorism victims in executing U.S. court judgments.<sup>108</sup> The law in question referred explicitly to the docket number of the Iranian terrorism case,<sup>109</sup> the case being, it should be noted, actually a consolidation of sixteen cases.<sup>110</sup> The Supreme Court decided a challenge to the constitutionality of the Iran Threat Reduction and Syria Human Rights Act in *Bank Markazi*.<sup>111</sup> It upheld the law, noting that statutes aimed at specific cases are not new, and that they need not for that reason be invalid.<sup>112</sup> A dissenting opinion signed by the unlikely combination of Justices Roberts and Sotomayor disagreed, concluding that the majority was permitting a violation of the separation of powers inasmuch as Congress had interfered with the powers of the judicial branch.<sup>113</sup> By affirming the law’s validity, however, the majority opinion suggests the vast powers of Congress to fashion laws to ensure victim compensation in a highly tailor-made fashion.

#### 7. Switzerland, Canada, and Sweden.

In addition to France and the U.S., several developed countries are also innovating in this area. In Switzerland, a popular initiative proposes a constitutional amendment that, if passed, would impose human rights duties on Swiss corporations as well as their foreign subsidiaries.<sup>114</sup> In Canada, the Foreign Investment Review Act<sup>115</sup> has been applied to deal with multinational corporations

<sup>107</sup> Kiobel, *supra* note 61, at 1665 (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 264 (2010)).

<sup>108</sup> Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772 (2012).

<sup>109</sup> *See id.* at § 8772(b) (referring to “the financial assets that are identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG)”).

<sup>110</sup> *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1319–20 (2016).

<sup>111</sup> *Id.* at 1329.

<sup>112</sup> *Id.* at 1317, 1327 (“Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid.”) (quoting *Plaut v. Spendthrift Farm*, 514 U.S. 211, 239 & n. 9 (1995)).

<sup>113</sup> *Id.* at 1329.

<sup>114</sup> *See Anina Dalbert, Corporate Accountability in Supply Chains of Swiss Multinational Enterprises: An Impossible Case?*, 25–30 (2015) (unpublished M.A. dissertation, The Graduate Institute Geneva, Graduate Institute of International and Development Studies), <https://perma.cc/7F8A-YWNM>.

<sup>115</sup> Foreign Investment Review Act, 1973–74 Can. Stat., c 46, amended by 1976–77 c 52. This statute was the predecessor to the Investment Canada Act, currently in force, R.S.C. 1985 Supp. 1, c 28 (1988).

as if parent and subsidiary were one business enterprise.<sup>116</sup> Sweden also has exercised jurisdiction over foreign subsidiaries through the extraterritorial reach of a statute targeting South Africa and Namibia, but provided that its law would not conflict with those of the subsidiary's home state.<sup>117</sup>

## 8. Criminal Law.

Fourçans has called attention to a trend of incorporating international human rights standards into domestic criminal law.<sup>118</sup> In 2010, as a signatory to the Rome Statute,<sup>119</sup> France incorporated all crimes subject to the International Criminal Court's jurisdiction into its national law.<sup>120</sup> While both common law and civil law legal orders delineate between criminal and civil law, many of the functions of criminal law cases in civilian jurisdictions are filled by tort law in common law systems, a reason to urge universal jurisdiction standards in common law countries for tort cases where the underlying acts are grave violations of human rights.<sup>121</sup> Interestingly, as will be seen in Section D, below, at least in some measure due to the transnationalization of law in a world of enhanced judicial communication,<sup>122</sup> numerous interesting developments have been taking place in recent years in civil law systems in tort recovery that are of consequence to foreign subsidiary human rights violations.

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<sup>116</sup> See Reporters' Note 2 in RESTATEMENT (THIRD), *supra* note 100, at 274–76. Due to U.S. subsidiaries' being within the extraterritorial reach of this statute, the U.S. protested. See *id.*

<sup>117</sup> See *id.* at 276 (citing LAG (1985:98) OM FÖRBUD MOT INVESTERINGAR I SYDAFRIKA [Act (1985:98) banning investments in South Africa] (Svensk författningssamling [SFS] 1985:98) (repealed Dec. 1, 1993) (Swed.), <https://perma.cc/9C8T-N9U4>).

<sup>118</sup> See Claire Fourçans, *Le réinvestissement de l'État dans la répression des crimes internationaux*, in MUTATIONS DE L'ÉTAT ET PROTECTIONS DES DROITS DE L'HOMME 87 (Danièle Lochak ed., 2006).

<sup>119</sup> Rome Statute of the International Criminal Court, opened for signature July 17, 1998, UN Doc A/CONF 183/9 (entered into force July 1, 2002).

<sup>120</sup> Loi 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] (Aug. 10, 2010).

<sup>121</sup> See generally Vivian Grosswald Curran, *Globalization, Legal Transnationalization and Crimes Against Humanity: The Lipietz Case*, 56 AM. J. COMP. L. 363 (2008); Brief of Amici Curiae of Comparative Law Scholars and French Supreme Court Justice in Support of Petitioners on the Issue of Extraterritorial Jurisdiction, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165341.

<sup>122</sup> The enhanced communication affecting civilian legal systems is also that of lawyers who for some time have been urging common-law based arguments in Continental European systems. See Curran, *supra* note 121, at 387, 390–97.

### C. Treaties

Treaties dealing with parent company liability and extraterritorial jurisdiction would allow for a similar response across corporate home states, if not beyond. Indeed, they could allay fears on the part of any single nation about harming its own corporations by reducing competition among treaty signatories to offer friendlier judicial soil to multinationals. Avi-Yonah points to the Organization for Economic Cooperation and Development (OECD) achievement of 1997, in the aftermath of the FCPA, when U.S. multinationals were able to persuade five other states to adopt the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as part of the OECD.<sup>123</sup> Other successful treaties, albeit bilateral rather than multilateral, have been in the area of antitrust between the U.S. and Australia, and the U.S. and Germany.<sup>124</sup>

Treaties concerning corporate responsibility for human rights violations have so far proven elusive. They remain at the soft-law level, with the European Commission declaring that Member States' corporations must start developing standards for the protection of society,<sup>125</sup> and the U.N. developing a Global Compact to invite corporate respect for human rights<sup>126</sup> and Guiding Principles on Business and Human Rights.<sup>127</sup> In 2014, the U.N. Human Rights Council passed a resolution to develop a binding treaty on multinational corporate human rights obligations, a project opposed by both the E.U. and the U.S.<sup>128</sup> In the absence of a treaty, it has been suggested that states engage in notification and consultation where they intend to extend their jurisdiction over a subsidiary

<sup>123</sup> Avi-Yonah, *supra* note 12, at 19 & n. 51 (citing Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1997)).

<sup>124</sup> Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, 34.1 U.S.T. 388 (1982); Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, 27.2 U.S.T.I.A. 1956 (1976).

<sup>125</sup> See Frédérique Berrod & Antoine Ullestad, *Le droit de l'Union européenne et la notion d'entreprise: donner un sens juridique à l'exercice de l'activité économique*, in *RESPONSABILITE SOCIALE DES ENTREPRISES* 135, 146 (Kathia Martin-Chenut & René de Quenaudon eds., 2016).

<sup>126</sup> *The Ten Principles of the UN Global Compact*, UNITED NATIONS GLOBAL, <http://perma.cc/3JYR-PHTN>.

<sup>127</sup> Human Rights Council, Rep. of John Ruggie (Special Representative of the Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (March 21, 2011).

<sup>128</sup> Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014). For an in-depth analysis of the Resolution, see Si Chen, *Towards a Business and Human Rights Treaty* (June 20, 2015) (unpublished M.A. thesis, University of Oslo Faculty of Law), <https://perma.cc/H3BD-V5W3>.

incorporated in the other's territory.<sup>129</sup> In the E.U., directives affecting all Member States may be seen as hybrids between treaties and simple legislation, since they are both international and intra-European. The 1983 Seventh Council Directive requires parent companies to file financial information about their foreign subsidiaries, whether or not those subsidiaries are located within the E.U.<sup>130</sup>

In contrast to some of the soft law developments we have mentioned at the international level, the next section will illustrate that no political or government entity has seen as much activity as the judiciary in adapting the law to the new challenges multinationals pose to fundamental human rights.

## D. Judicial Developments

This Section will explore judicial developments in a number of home state nations. Judicial dialogue is abundant among all of them, and within the E.U.'s Member States all cases are subject to review by the same courts—the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

### 1. Introduction.

#### a) *Situating the U.S.*

Judicial harmonization to address parent company liability for foreign subsidiaries' grave violations of human rights would be a harmonization either in a different direction from the U.S.'s recent re-territorialization of the principle of jurisdiction,<sup>131</sup> or, alternatively, one that did not apply existing standards of extraterritoriality to universal human rights violations. A concurrence in *Kiobel*, for instance, "found the presumption against extraterritorial application to be out of place when it came to the ATS,"<sup>132</sup> whereas the Court's opinion essentially changed the terrain of ATS analysis from one of universal human rights to the extraterritoriality norms of commercial law by aligning the case with others from a commercial context that had nothing to do with issues of universal human rights, as illustrated by its heavy reliance on *Morrison*, a securities regulation case.<sup>133</sup> In

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<sup>129</sup> Note, *Extraterritorial Subsidiary Jurisdiction*, 50 L. & CONTEMP. PROBS. 71, 93 (1987).

<sup>130</sup> Council Directive 83/349, 1983 O.J. (L 193) 1.

<sup>131</sup> Vivian Grosswald Curran, *La jurisprudence récente de la Cour suprême des Etats-Unis en matière d'extraterritorialité et autres questions d'importance internationale*, 43 RECUEIL DALLOZ 2473 (Dec. 11, 2014).

<sup>132</sup> BREYER, *supra* note 88, at 159.

<sup>133</sup> See *Kiobel*, *supra* note 61, at 1664, 1665, 1666. *Kiobel* also cites to *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007), *Kiobel*, 133 S. Ct. at 1666, as well as to other cases unrelated to human rights issues. The antitrust *Empagran* case, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542



2014, it bears noting, the U.S. Supreme Court invoked European law where it denied jurisdiction in *Daimler*, suggesting it was interested in harmonizing U.S. and European law.<sup>134</sup>

Like the U.S. Supreme Court in *Kiobel* and *Daimler*, courts dealing with multinational parent company liability for foreign subsidiaries' human rights violations find that their cases often involve an intersection of laws concerning procedure and jurisdiction, such as extraterritoriality, with commercial and corporation law. As we have seen, international legal doctrines such as comity also figure increasingly in decision making.

#### *b) Corporation law*

##### *(1) Single business enterprise liability*

Within corporation law, the "single business enterprise liability" doctrine has not received much traction in courts to date. This doctrine, however, has historical roots, and might be reinvigorated today, as lawyers in favor of parent company liability might argue it increasingly in transnational cases. Under single business enterprise liability, all entities that share the same commercial objective within a corporation of a complex structure are liable as if they constitute a single corporation.<sup>135</sup> The principle that a parent company and its subsidiaries always have the same goals and interests is already recognized by the Supreme Court in antitrust law:

[T]here can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner.<sup>136</sup>

Under the appellation of the "group of companies" doctrine, the single business enterprise theory has been making headway in international arbitration, and may be particularly apposite to issues of parent company liability for corporations' foreign subsidiaries' human rights violations.<sup>137</sup> As will be seen in

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U.S. 155 (2004), figures in Justices Thomas and Alito's concurring opinion. *Kiobel*, 133 S. Ct. at 1671.

<sup>134</sup> *Daimler*, *supra* note 62, at 763.

<sup>135</sup> John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1099 (2009).

<sup>136</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984). For additional areas of law that adopt similar reasoning, see Strasser, *supra* note 18, at 662, 664.

<sup>137</sup> See GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 101 (2016), citing in particular *Interim Award in ICC Case No. 4131*.

Section E, below, European competition law applies single business enterprise liability.

(2) Agency

In the U.S., agency law, or quasi-agency law, already applies to commercial law as a variant of the doctrine of piercing the corporate veil.<sup>138</sup> In general, it requires the court to find that the parent company controls the subsidiary and that the two are interdependent and integrated.<sup>139</sup> In *Daimler*, the U.S. Supreme Court rejected finding a connection under agency law between the subsidiary incorporated in California and the parent company, Daimler, which was a German corporation.<sup>140</sup> The *Daimler* Court held that the lower court lacked jurisdiction over the parent company.<sup>141</sup> In the U.S., with its common-law methodology, the specifics of each case are highly important, leaving a great deal of discretion to the trial court as finder of fact. This does not facilitate the predictive value of how effective agency or corporate veil piercing theories may be for a given case, but it does leave the door open to creative and evolving solutions on a case-by-case basis.

Normally, veil piercing in the U.S. requires the court to find misconduct, often of a fraudulent nature.<sup>142</sup> In the situation we are discussing, in which a foreign subsidiary violates fundamental human rights, one can invoke parent company manipulation, not in the traditional sense of showing that the parent company stripped a subsidiary of funds, but, if the case's facts support the argument, by claiming that the parent company placed the subsidiary in a location where the latter would not have to face liability for gross human rights abuses. Case law in any event tends to allow veil piercing only for the specific purposes having to do with the subject matter of the lawsuit at hand.<sup>143</sup> Thus, a doctrine relating to the grave human rights violations of foreign subsidiaries may be quite limited in subject matter, relieving courts of needing to do anything more than delineate exceptions.

As the next Section illustrates, we are seeing such a limited exception being carved out in the area of foreign sovereign immunity for expropriations made by

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<sup>138</sup> See PHILIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW § 6.06.2, at 128 (1987) ("The term 'agent' or 'agency' are most frequently being employed by the courts loosely as one of the numerous conclusory metaphors to 'pierce the corporate veil jurisprudence.'")

<sup>139</sup> See PHILIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURE §§ 1.02.2, 4.02, 4.04.1 (1983); PHILIP I. BLUMBERG, SUBSTANTIVE COMMON LAW §§ 6.06, 14.03.3 (1987).

<sup>140</sup> 134 S. Ct. 758–60.

<sup>141</sup> *Id.*

<sup>142</sup> BLUMBERG, *supra* note 15, at 96.

<sup>143</sup> *Id.*





foreign sovereign states in the context of genocide, and perhaps other grave violations of human rights.

## 2. The new Restatement (Fourth) of United States Foreign Relations.

In May 2016, the American Law Institute membership voted to approve parts of the new *Restatement (Fourth) of the United States Principles of Foreign Relations* with respect to the immunity of foreign states from jurisdiction.<sup>144</sup> The new text reflects recent evolutions in court decisions that have widened exceptions to foreign state immunity where expropriations by foreign countries have been made as part of genocide.<sup>145</sup> This development reflects an introduction into case law, now reflected in the new *Restatement*, of a new jurisdictional category for human rights violations.

The overall purpose of the Foreign Sovereign Immunities Act (FSIA)<sup>146</sup> is to set forth the situations in which the U.S. immunizes foreign states from being sued in its courts, but the statute contains an exception for cases “in which property taken in violation of international law are in issue.”<sup>147</sup> This jurisdictional opening does not apply, however, where a state has committed the alleged expropriation against its own nationals, a rule known as the “domestic takings exception.”<sup>148</sup> Interestingly, in recent cases in which a new human rights category for genocide was created, the courts might have reached the same ultimate decision to allow the suits to proceed under pre-existing case law by holding that the plaintiffs had not been deemed citizens or full-fledged citizens by their own governments at the time of the wrongful taking and that, therefore, the domestic takings exception was inapplicable.<sup>149</sup>

<sup>144</sup> See RESTATEMENT (FOURTH) OF THE UNITED STATES PRINCIPLES OF FOREIGN RELATIONS (AM. L. INST. Tentative Draft No. 2., 2016). As of the writing of this Article, the text voted by the ALI membership in May, 2016 theoretically is subject to some possible continued editorial change by the Reporters, but the author has been told by one of its drafters that no further changes will be made (email exchange between author and Reporter Prof. David Stewart, August 22, 2016), nor did comments at the May 2016 ALI meeting suggest membership criticism of it. (Author’s notes).

<sup>145</sup> *Id.*

<sup>146</sup> 28 U.S.C. §§ 1602, *et seq.*

<sup>147</sup> 28 U.S.C. § 1605(a)(3).

<sup>148</sup> *United States v. Belmont*, 301 U.S. 324 (1937).

<sup>149</sup> See, for example, *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 130 (D.D.C., 2011), *aff’d in part, rev’d in part on other grounds*, 714 F.3d 591 (D.C. Cir. 2013); *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *aff’d in part, rev’d in part on other grounds*, 580 F.3d 1048 (9th Cir. 2009), *reh. en banc*, 616 F.3d 1019 (9th Cir. 2010), *cert. denied sub nom.*, *Kingdom of Spain v. Estate of Cassirer*, 564 U.S. 1037 (2011).

a) *Pre-existing domestic takings case law.*

In *de Csepel v. Republic of Hungary*, for instance, the U.S. Supreme Court had rejected defendant Hungary's argument that expropriations of Jewish property in the 1940s constituted a domestic taking and therefore did not rise to FSIA Section 1605(a)(3)'s international law violation requirement.<sup>150</sup> The court had reasoned that, since the Hungarian government no longer treated Jews as citizens at the time of the expropriation, the taking could not be deemed "domestic" in nature.<sup>151</sup> Therefore, the domestic takings exception was inapplicable.<sup>152</sup> Similarly, in *Cassirer v. Kingdom v. Spain*,<sup>153</sup> the U.S. District Court for the Central District of California had reasoned that a German-Jewish victim's heir could sue under the Section 1605(a)(3) of the FSIA over a valuable painting that had been extorted from his grandmother as the price of her exit visa from Nazi Germany. It held that the suit did not come within the domestic takings exception because the Nazi government had not considered Jews to be citizens of Germany when the painting was extorted.<sup>154</sup> In a 1951 case cited by later FSIA domestic taking courts, *Nagano v. McGrath*, the Seventh Circuit had defined citizenship as follows: "[O]ur concept of a citizen is one who has the right to exercise all the political and civil privileges extended by his government."<sup>155</sup>

In more recent cases, however, instead of applying the domestic takings rule in the manner of established case law, courts have created a novel exception to the FSIA, nowhere to be found in the statute's language, that is based on the context of genocide and perhaps other grave violations of human rights.<sup>156</sup> According to the new *Restatement*,

[b]y eliminating the "domestic takings" rule and permitting claims to go forward on the basis of allegations that the takings occurred in the context of egregious violations of international law, this line of decisions appears to expand the scope of § 1605(a)(3) significantly, potentially opening courts in the U.S. to a wide range of property-related claims arising out of foreign internal (as well as international) conflicts characterized by widespread human rights violations.<sup>157</sup>

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<sup>150</sup> 808 F. Supp. 2d 113.

<sup>151</sup> *Id.* at 130.

<sup>152</sup> *Id.*

<sup>153</sup> 461 F. Supp. 2d 1157.

<sup>154</sup> *Id.* at 1165–66.

<sup>155</sup> 187 F.2d 759, 768 (7th Cir. 1951).

<sup>156</sup> *Simon et al. v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), *aff'd*, *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 858 (7th Cir. 2015) (same case essentially reheard by Seventh Circuit).

<sup>157</sup> RESTATEMENT (FOURTH), *supra* note 144, at § 455, Reporters' Note 4.

b) *The new FSIA cases that created the human rights exception.*

Like *de Csepel*, discussed above, *Abelesz v. Magyar Nemzeti Bank*<sup>158</sup> was a FSIA case concerning property takings by Hungarian national banks and the national railway from members of Hungary's Jewish population during the 1940s. The defendants raised the domestic takings rule in a motion to dismiss.<sup>159</sup> Here, however, the Seventh Circuit did not reason that the domestic takings exception was inapplicable due to the state's not regarding the victims as full-fledged Hungarian citizens at the time of the taking; rather, the *Abelesz* court found that "the relationship between genocide and expropriation in the Hungarian Holocaust takes these cases outside the domestic takings rule and its foundations."<sup>160</sup> It explained the underpinning of its conclusion as follows:

Expropriating property from the targets of genocide has the ghoulishly efficient result of both paying for the costs associated with a systematic attempt to murder an entire people and leaving destitute any who manage to survive. The expropriations alleged by plaintiffs in these cases—the freezing of bank accounts, the straw-man control of corporations, the looting of safe deposit boxes and suitcases brought by Jews to the train stations, and even charging third-class train fares to victims being sent to death camps—should be viewed, at least on the pleadings, as an integral part of the genocidal plan to depopulate Hungary of its Jews. The expropriations thus effectuated genocide in two ways. They funded the transport and murder of Hungarian Jews, and they impoverished those who survived, depriving them of the financial means to reconstitute their lives and former communities. All U.S. courts to consider the issue recognize genocide as a violation of customary international law.<sup>161</sup>

The following year, a California district court went a step further by ruling that FSIA jurisdiction was proper even though, after examining the laws of citizenship in the Ottoman Empire at the time of the Armenian genocide, it determined that, unlike the situation of Jews in Nazi Germany, Armenians *had* been considered full-fledged citizens by their government.<sup>162</sup> Nevertheless, it held that the FSIA did not protect the Republic of Turkey from suits in the U.S. under both the reasoning of *Abelesz*, noted above,<sup>163</sup> and the ATS standards the U.S.

<sup>158</sup> 692 F.3d 661 (7th Cir. 2012) *aff'd*, *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 858 (7th Cir. 2015) (same case essentially reheard by Seventh Circuit).

<sup>159</sup> *Id.*

<sup>160</sup> 692 F.3d at 675.

<sup>161</sup> *Id.* (emphasis added); *aff'd*, *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 858 (7th Cir. 2015) (same case essentially reheard by Seventh Circuit).

<sup>162</sup> *Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084, 1101–1102 (C.D. Cal. 2013).

<sup>163</sup> *Id.*

Supreme Court had set forth in *Sosa*,<sup>164</sup> namely, that customary international laws must be “specific, universal, and obligatory.”<sup>165</sup>

Finally, in *Simon v. Republic of Hungary*,<sup>166</sup> a case also involving war-time expropriations of Hungary’s Jewish population, the D.C. Circuit seemed to take yet an additional step beyond both *Abelesz* and *Davoyan*, by equating Hungary’s expropriation of its Jewish population with genocide: “In our view, the alleged takings did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations as themselves genocide. It follows necessarily that the takings were ‘in violation of international law.’”<sup>167</sup>

Thus, the FSIA expropriations exception for takings in violation of international law has become a form of universal jurisdiction for the gravest human rights violations under the FSIA. Such judicial extensions of jurisdiction in civil suits can be a model and compelling argument for the significance of fundamental human rights violations as grounds for jurisdiction in future cases over parent companies in both property and torts cases. In the words of the *Restatement (Fourth)*, this new case law may open “courts in the U.S. to a wide range of property-related claims arising out of foreign internal conflicts characterized by human rights violations.”<sup>168</sup> Where they do so for property-related claims outside of the FSIA, they should do so *a fortiori* for tort claims, whose links to customary international law violations are closer than in expropriation cases.

As the next section discusses, the new *Restatement* also addresses the exhaustion of local remedies. Where it previously was silent, and some courts misconstrued international law norms, the new *Restatement* clarifies the issue of exhausting local remedies.

*c) Under international law, the exhaustion of local remedies arises in cases under the jurisdiction of international tribunals, not of national courts.*

The issue of exhausting local remedies arises frequently in cases involving parent companies and their subsidiaries from different states, since, for reasons discussed earlier, the victim frequently is not suing in the state in which the alleged human rights violations took place, but rather the state in which the parent company is at home. The exhaustion of local remedies requirement originated in the system of diplomatic protection, and was based on the idea that when an

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<sup>164</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>165</sup> *Davoyan*, 116 F. Supp. 3d, at 1102.

<sup>166</sup> 812 F.3d 127 (D.C. Cir. 2016).

<sup>167</sup> *Id.* at 142–143 (emphasis in original; citations omitted).

<sup>168</sup> RESTATEMENT (FOURTH), *supra* note 144.

individual was harmed, his or her state was offended and would take protective legal action.<sup>169</sup>

International law has an exhaustion requirement only with respect to cases before an international tribunal. This requirement exists so that the tribunal does not appear to be usurping the role of national courts: “A claim will not be admissible *on an international plane* unless the individual alien or corporation concerned has exhausted the legal remedies available to him in the state which is alleged to be the author of injury.”<sup>170</sup> Although the *Restatement (Third)* did not explicitly limit the exhaustion requirement to cases before international tribunals, its commentary indicated that this was the nature of exhaustion. It characterized the rule as “generally [having] been observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law;” and that exhaustion is required in such situations “[b]efore resort may be had *to an international court*.”<sup>171</sup>

The exhaustion requirement also serves the important additional goal of securing the adherence of Member States to the international court system by ensuring the ongoing subsidiarity of the international court to the national courts.<sup>172</sup> There has been a divergence of interpretations of this international law requirement among courts in the U. S. which interpreted the FSIA. The new *Restatement* takes a clearer stand than the last one concerning the exhaustion rule: “[T]he rule . . . applies by its terms to “international,” not domestic, proceedings. Accordingly, the interpretation of the statute that does not require exhaustion appears to be the proper one.”<sup>173</sup>

The *Restatement’s* language refers to the interpretation of the FSIA, a specific statute, and would not restrict a domestic law that Congress had enacted from requiring the exhaustion of local remedies. On the other hand, the utility of exhaustion requirements where international human rights violations are alleged is being increasingly called into question, especially since such cases may involve plaintiffs who are victimized in their home states. As Judge Trindade has put it, the rule of exhausting local remedies

<sup>169</sup> See EMMERICH DE Vattel, *LE DROIT DES GENS* ¶ 71 (1758).

<sup>170</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (7th ed., 2008).

<sup>171</sup> RESTATEMENT (THIRD), *supra* note 100, at § 713, Reporters’ Note 5 (quoting *Interhandel* (Switzerland v. United States of America), I.C.J. Rep. [1959] ICJ 6, 26–27 (emphasis added)).

<sup>172</sup> See A.A. CANÇADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW: ITS RATIONALE IN THE INTERNATIONAL PROTECTION OF INDIVIDUAL RIGHTS* 9–10 (1983); Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 COLUM. HUM. RTS. L. REV. 223, 227, 235 (1987).

<sup>173</sup> RESTATEMENT (THIRD), *supra* note 100, at § 455, Reporters’ Note 9.

enjoyed, in classical diplomatic protection and State responsibility for injuries to aliens, a “negative” or preventive character, with emphasis on the character of exhaustion prior to international interposition on a discretionary State-to-State basis. This approach to the rule is hardly adequate for human rights protection . . . [i]n a system of protection fundamentally . . . concerned with the rights of individual human beings rather than of States.<sup>174</sup>

According to D’Ascoli and Scherr, “in order to be properly understood, the rule of exhaustion of local remedies should be regarded differently in the two diverse contexts of diplomatic and human rights protection. It is not convincing to apply the classic rule in its original form and meaning to the field of human rights.”<sup>175</sup> While the applicability of exhaustion requirements to human rights cases is an evolving issue, it is well established and uncontroversial that the exhaustion of local remedies will not be required if it has been determined that they are unavailable, fruitless, or meaningless.<sup>176</sup>

### 3. A last word about the judiciary and the U.S. presumption against extraterritoriality.

The extraterritorial reach of U.S. law, although always controversial in terms of comity concerns, as recently expressed by Supreme Court justices,<sup>177</sup> is not inherently problematic. As we have seen, numerous U.S. statutes over time have specified an extraterritorial application, and, so long as the legislative language is express, the Supreme Court has repeatedly stated that extraterritorial application is permissible.<sup>178</sup> The modern line of cases establishes a presumption against extraterritoriality which, as applied in *Kiobel*, reversed a thirty-year tradition of

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<sup>174</sup> AUGUSTO CANÇADO TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE* 99 (2011).

<sup>175</sup> Silvia D’Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and Its Application in the Specific Context of Human Rights Protection*, EUI Working Papers, Law 2007/02, <https://perma.cc/FT7P-RWU2>.

<sup>176</sup> *See International Law Commission: Draft Articles Adopted in 2006*, in BROWNIE, *supra* note 170, at 501; Application No. 299/57, Greece v. United Kingdom (Second Cyprus Case), [1958-1959] Y.B. Eur. Conv. On Human Rights 186, 192-94 (Eur. Comm’n on H.R.) (1957) (“[I]n accordance with the generally recognised principles of international law, the exhaustion of a domestic remedy is nevertheless not required if the applicant party can prove that in the particular circumstances such remedy will probably prove ineffectual or inadequate.”).

<sup>177</sup> *See supra* Section II, B.2. The initial reference to comity stems from *Hilton v. Guyot*, 159 U.S. 113 (1895). In the recent cases of *Kiobel* and *Daimler*, we see the concerns of several justices to restrain U.S. court decision-making so as to respect other countries’ laws and sovereignty. *See also* *The Charming Betsy Canon*, derived from *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), setting forth the principle that U.S. statutes should be interpreted whenever possible to comport with international law.

<sup>178</sup> *EEOC v. Arabian Am. Oil Co*, 499 U.S. 244 (1991); *Morrison v. Nat’l Australian Bank, Ltd.*, 561 U.S. 247 (2010); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2013); *Kiobel*, *supra* note 61, at 1659.

allowing extraterritorial jurisdiction under the ATS.<sup>179</sup> The Supreme Court stated in that case that its hands were tied because the legislature had not expressly conferred extraterritorial jurisdiction on the statute: “nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach.”<sup>180</sup> On the other hand, to the extent that universal human rights are accorded a status of universality, to recognize, vindicate, and enforce such rights arguably lies outside of the realm of extraterritoriality.<sup>181</sup>

Ratner correctly points out a general reluctance on the part of states to base jurisdiction on universal jurisdiction, however.<sup>182</sup> In my view, the *Kiobel* decision, although reasoned on the terrain of statutory interpretation, is interpretable as an instantiation of this reluctance. Moreover, as Brilmayer noted,

When a [U.S.] court decides whether a statute should apply to a situation which the statute does not address, it inescapably relies upon its own normative views. If one result seems more desirable than another, and the legislature has not expressed a preference, then it seems only reasonable to interpret the statute in accordance with the court’s own view of what is desirable and just. After all, it is sensible to think that the legislature would have wanted this “better” result. The result is a peculiar combination of normative reasoning and deference to Congress, a normative view which is attributed to Congress even though it does not really express an actual congressional choice. This process is clearly at work in the extraterritorial application of American law. Typically, a statute is silent as to its international scope. It seems sensible to interpret the statute in line with the court’s own view of how far statutes ought to reach. . . . The court decides according to its own ideas of justice, usually shaped by principles and traditions of international law, but it need not assume explicit responsibility for having done so. The result is then couched in the language of deference to Congress.<sup>183</sup>

What about the distinction between physical persons and corporations, the issue originally brought to the Supreme Court in *Kiobel* in terms of capacity for liability under the ATS, but never addressed? It has been suggested that, as corporate rights have been constitutionalized,<sup>184</sup> so too should unitary corporate responsibilities, including those of parent companies and subsidiaries in protecting human rights, or at the least by means of legislative action. As Mwaura has pointed out, “[w]hilst states that have reformed their constitutions in order to extend human rights norms to corporations are to be commended for taking this

<sup>179</sup> The first case was *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>180</sup> 133 S. Ct. at 1665.

<sup>181</sup> Ratner, *supra* note 34, at 535–36.

<sup>182</sup> *Id.*

<sup>183</sup> Brilmayer, *supra* note 90, at 17.

<sup>184</sup> In the U.S., see *Citizens United v. FEC*, 558 U.S. 310 (2010).

approach, they need to go a step further by utilizing enterprise principles to extend tortious and human rights liability to the entire network of corporate groups, which were not the intended beneficiaries of the privileges of limited liability when they were first devised.”<sup>185</sup> Ratner, for his part, takes pains to emphasize the differences between corporations and individuals “in terms of their access to resources, their ability to harm human dignity, and ability to avoid the control of the state.”<sup>186</sup> For this reason, he believes that “the primary [international] rules binding on individuals are so narrow as to make transferring them to corporations *insufficient*.”<sup>187</sup>

While the U.S. has tended in recent years to utilize a single lens of extraterritoriality that has its roots in antitrust and commercial law, other countries have been developing extraterritorial civil liability that ultimately may influence the U.S. Supreme Court when it considers comity and pursues its goal of harmonizing law.

#### 4. Home country case law developments outside of the U.S.

##### a) France

France’s foray into expanded extraterritorial jurisdiction has not just been by means of the legislative proposal discussed earlier. One commentator has referred to “normative shifts” (“*mutations normatives*”) that include court decisions occurring in French society with respect to rendering parent companies liable for subsidiary breaches of fundamental rights.<sup>188</sup>

In 2011, France created a section of the Paris criminal court to specialize in handling crimes against humanity.<sup>189</sup> In 2009, a French court exercised extraterritorial jurisdiction where the Palestine Liberation Organization and France-Palestine Solidarité sued two French companies for building a light railway

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<sup>185</sup> Mwaura, *supra* note 84, at 109. Mwaura notes that a number of African nations, including Kenya, Malawi, Gambia, Ghana and South Africa in fact have imposed human rights norms on companies. *Id.* at 85. For a more general theoretical framework for the constitutionalization of human rights vis-à-vis multinational corporations, see Angelo Golio, Jr. *Enforcing Human Rights Through Constitutional Law in Investor-State Arbitration: Pacific Rim v El Salvador* (unpublished manuscript) (on file with author).

<sup>186</sup> Ratner, *supra* note 34, at 494.

<sup>187</sup> *Id.* (emphasis added).

<sup>188</sup> Yann Queinnec, *Émergence du devoir de vigilance raisonnable ou l’impératif de cohérence des dispositifs de gouvernance ESG*, 20 REVUE INT. DE LA COMPLIANCE ET DE L’ETHIQUE DES AFFAIRES 4, 4 (2016).

<sup>189</sup> *Pôle judiciaire spécialisé compétent pour les crimes contre l’humanité*, Art. 22, loi no. 2011-1862 du 13 déc. 2011 relative à la répartition du contentieux et à l’allègement de certaines procédures juridictionnelles. J.O. Sénat du 14/02/2013, p. 468.



system in Israel that travelled through East Jerusalem.<sup>190</sup> Interestingly, the French appellate court dismissed the crimes against humanity claims against the French companies based on the *Kiobel* Second Circuit appellate court holding that corporations cannot be liable for customary international law violations,<sup>191</sup> a holding that may have been invalidated by the Supreme Court's decision in *Citizens United* to the extent one can apply the Supreme Court holding beyond the First Amendment,<sup>192</sup> and that the Supreme Court chose not to affirm in its *Kiobel* review.<sup>193</sup>

In 2012, France's Supreme Court for private and criminal law (*Cour de cassation*) held a multinational company whose parent, Total SA, was incorporated in France, liable civilly (as well as criminally) for devastating environmental damage to the coast of Brittany due to oil spills caused by a Maltese tanker outside French waters.<sup>194</sup> The case involved the liability, among many others, of Total International Ltd., the ship's charterer, which was a Panamanian subsidiary of Total SA.<sup>195</sup> The French court determined that it had jurisdiction in part because of the grave harm to the environment that had resulted from the accident.<sup>196</sup> As far as the civil claims went, the French Supreme Court characterized the torts as "*fautes de témérité*," or torts of "recklessness."<sup>197</sup>

In 2015, the Paris Court of Appeals created legal history in France when it awarded relief to 857 Congolese plaintiffs against the Gabon mining company COMILOG (Mining Company of the Ogooué) for wrongful discharge of workers and failure to pay pensions in Gabon when the basis for the French court's jurisdiction over the defendant was the French nationality of COMILOG's parent group, ERAMET.<sup>198</sup> The case had originated when a train transporting

<sup>190</sup> No. 11/05331, OLP c/ Société Alstom et Veolia, CA Versailles, 3<sup>e</sup> Ch. 22 mars 2013. For a more extensive report on extraterritorial jurisdiction in France, see Hervé Ascensio, *Étude: l'extraterritorialité comme instrument*, <https://perma.cc/7435-7NH8>.

<sup>191</sup> *Id.*

<sup>192</sup> *Citizens United*, *supra* note 184 (holding that for purposes of first amendment speech rights, there is no distinction between an individual and a corporation). In *Kiobel* itself, the Supreme Court declined to reach the issue of whether corporations can be liable for customary international law violations, although it originally had granted certiorari to do so. *See* 133 S. Ct., at 1663.

<sup>193</sup> It should also be noted that in France and other civil legal systems, where a judge is deemed to have made a mistake in legal reasoning, it need not be followed in subsequent cases, as there is no doctrine of *stare decisis*.

<sup>194</sup> *See* Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] crim., Sept. 25, 2012, No. 10–82.938 (known in France as *l'affaire Erika*).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] soc., Sept. 25, 2012, No. 10–82.938.

COMILOG's manganese had collided with a passenger train, causing the death of more than a hundred people. After this incident, COMILOG stopped shipping raw materials by train, and subsequently laid off close to a thousand workers without paying promised severance pay or pensions. The French Supreme Court reversed lower court denials of jurisdiction on the reasoning that the plaintiffs had been denied justice in their home country.<sup>199</sup> In French legal theory, such a conclusion can be based on either: (1) forum necessitatis, pursuant to which the lack of any alternative jurisdiction open to foreign victims for harm that befell them abroad suffices to give them access to French courts; or (2) the universal jurisdiction that is accorded grave violations of human rights.<sup>200</sup>

There also have been some important judicial developments in several other countries over the last few years towards civil responsibility of parent companies for foreign subsidiary human rights violations.

b) *The U.K.*

In 2012, in *Chandler v. Cape plc*,<sup>201</sup> the English Court of Appeal held a parent company directly liable to an employee of its subsidiary where the employee appeared to have been in contact solely with the subsidiary. This case did not involve a foreign subsidiary, however, as both were U.K. companies. In *Chandler*, the plaintiff was able to recover from his employer's holding company for suffering the consequences of asbestosis where the court found that the parent company had had superior knowledge of the health risks and the ability to foresee that the subsidiary would rely on the parent company in avoiding those risks. The *Chandler* court also found that the subsidiary was controlled by its parent company. As Palombo suggests, by creating direct liability from parent company to victim, *Chandler* offers a potential alternative to piercing the corporate veil or to suing under customary international law standards.<sup>202</sup>

Although *Chandler* did not involve a multinational corporation, the U.K.'s High Court of Justice recognized its applicability to the transnational context in

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<sup>199</sup> *Id.*; Queinnec, *supra* note 188, at 5.

<sup>200</sup> Étienne Pataut, *Déni de justice et compétence internationale dans les litiges internationaux du travail*, 2016 DALLOZ 1175 (2016). French legal opinions have less extensive legal reasoning than U.S. counterparts and it is largely left to legal scholars to supply, modify or suggest legal theory to support case solutions, both retroactively and prospectively. On forum necessitatis, see *infra*, note 229 and surrounding text. For more commentary on the issue of French jurisdiction over parent companies for the acts of foreign subsidiaries occurring abroad, see Olivera Boskovic, *Brèves remarques sur le devoir de vigilance et le droit international privé*, 2016 DALLOZ 385 (2016).

<sup>201</sup> *Chandler v Cape plc* [2012] EWCA (Civ.) 525.

<sup>202</sup> Dalia Palombo, *Chandler v. Cape: An Alternative to Piercing the Corporate Veil Beyond Kiobel v. Royal Dutch Shell*, 4 BRIT. J. AM. LEGAL STUD. 453 (2015).

*Lungowe v. Vedanta* in 2016, four years after *Chandler* was decided.<sup>203</sup> In *Vedanta*, the court held that it had jurisdiction over a parent company whose foreign subsidiary was accused of grave environmental harm in a mass tort that had been committed in Zambia against roughly 2,000 Zambian claimants, most of whom were subsistence farmers.<sup>204</sup> Like *Chandler*, *Vedanta* was a case of direct parent liability. Notably, in *Vedanta*, the parent company defendant was not the sole owner of the subsidiary.<sup>205</sup> The *Vedanta* court went further than the Court of Appeal in *Chandler*, not just in extending liability to the parents of foreign subsidiaries, but also in terms of its reasoning. The court's analysis meshed with several of the theoretical frameworks that have been advanced in recent years in favor of holding parent companies liable for foreign subsidiary human rights violations. The court emphasized that the parent company had superior assets in contrast to its subsidiary's precarious financial situation, such that the subsidiary might well be unable to satisfy a verdict if the mass tort action proved successful, and that the parent company had greatly profited from its subsidiary's activities: "Vedanta might [even] put KCM [(its subsidiary)] into liquidation in order to avoid paying out to the claimants"<sup>206</sup> were the suit to be brought in Zambia, where the harm occurred, and "since it is Vedanta who are making millions of pounds out of the mine, it is Vedanta who should be called to account."<sup>207</sup>

This harkens to Skinner's proposal that parent company liability be tied to the profits that a parent gains from its (potentially underfinanced) foreign subsidiary,<sup>208</sup> as well as to Oh's proposal that common law states should apply the doctrine of the constructive trust to impose liability on a parent company for its subsidiary's conduct, where omitting to do so would entail unjust enrichment of the parent company.<sup>209</sup> The *Vedanta* court also analyzed the liability of the formally separate entities as a single business enterprise, reminiscent of Blumberg's theory for an expanded piercing of the corporate veil,<sup>210</sup> and noted in the case at issue the problem that generally pervades foreign subsidiary human rights situations:

<sup>203</sup> *Lungowe v. Vedanta Resources Plc* [2016] EWHC (TCC) 975.

<sup>204</sup> The number of claimants was under review at the time of the judgment, allowing for the possibility of another thousand to be added. *See id.* at ¶ 9.

<sup>205</sup> *See id.* at ¶ 13.

<sup>206</sup> *Id.* at ¶ 79.

<sup>207</sup> *Id.* at ¶ 78.

<sup>208</sup> *See Skinner, supra* note 35, at 1780.

<sup>209</sup> *See Oh, supra* note 27, at 94 (arguing and then developing the idea that "the constructive trust can be applied to a triad of classic veil-piercing scenarios in a more principled manner and with more effective outcomes than the current approach").

<sup>210</sup> *Vedanta, supra* note 203, at ¶ 78 (describing the claim as based in part on the parent's being "the real architects of the environmental pollution").

namely, the impossibility of plaintiffs' obtaining adequate judicial remedies in the host country.

Among the arguments the court rejected was the defendant's claim that the plaintiff had sued the parent company only to be able to sue the subsidiary, the true target of the litigation, in the U.K.<sup>211</sup> On the one hand, the court held that practical motives, such as the deeper pockets of the parent company, were justifiable considerations for suing the parent for the acts of the subsidiary. On the other hand, and relatedly, it held that suing the parent company was not a fraud or even a mere device for haling the subsidiary company into a British court, to the extent it was not the sole motive for suing.<sup>212</sup>

*Vedanta* was decided less than a month before the U.K.'s June 23, 2016 vote to leave the E.U. The *Vedanta* court's rejection of the defendant's argument for *forum non conveniens* was based on the European Court of Justice's (CJEU) decision in *Owusu v. Jackson*, which had held the doctrine of *forum non conveniens* incompatible with the Brussels Convention.<sup>213</sup> The CJEU also held that an English court which had jurisdiction over a defendant domiciled in England could not refuse jurisdiction on the basis that the court of a non-E.U. Member State was a more suitable forum.<sup>214</sup> While *forum non conveniens* may well return to British judicial reasoning in the future, the *Vedanta* decision also relied on the other avenues of analysis noted above, and should remain an important source of legal analysis for parent company liability in foreign subsidiary human rights violations cases.

c) *The Netherlands.*

Already in 2013, several years before *Vedanta* was decided, *Akpan v. Shell*,<sup>215</sup> a landmark Dutch case, had relied on both *Chandler* and *Caparo v. Dickman*, a British precedent on which the *Chandler* court had relied.<sup>216</sup> In *Akpan*, the Dutch court held it had jurisdiction for acts that had occurred in Nigeria and harm that occurred in Nigeria, by a foreign subsidiary of Shell. Shell is a Dutch corporation.<sup>217</sup> The case marks the first finding of liability by the judiciary of a

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<sup>211</sup> *Id.* at ¶¶ 75, 77, 78.

<sup>212</sup> *Id.* at ¶¶ 76–78.

<sup>213</sup> Case C-281/02, *Owusu v. Jackson and Others* E.C.R. 2005 I-01383.

<sup>214</sup> *Id.*

<sup>215</sup> District Court The Hague, 30 Jan. 2013, ECLI: NL: RBSGR: 2013: BY9854 (*Akpan/Shell*); *aff'd on jurisdictional issues; rev'd on document disclosure issue*, Court of Appeal The Hague, 17 December 2015, ECL-NL: GHDHA: 2015:3586 (*Dooh/Shell*). All quotes from *Dooh/Shell* are from the English translation of the case by Cees van Dam.

<sup>216</sup> *Caparo Industries plc v. Dickman*, [1990] UKHL 2.

<sup>217</sup> *Akpan*, *supra* note 215.

developed country in the west for a multinational's injury to the environment in a developing country.<sup>218</sup>

In 2015, the Court of Appeals found that the lower District Court had jurisdiction over both the Dutch parent and its foreign subsidiary under the Dutch Code of Civil Procedure, which allows for a joinder of parties where the claims are sufficiently related.<sup>219</sup> This rule is in keeping with Brussels I, Art. 6 (1).<sup>220</sup>

Most notably, the Court of Appeals stated the following:

Considering the foreseeable serious consequences of oil spillages, inter alia for the environment around the potential leakage, it cannot be excluded beforehand that in such a case the parent company may have to assume liability to prevent spillages (in other words, that a duty exists according to the requirements in the decision *Caparo v. Dickman* [1990] UKHL 2, [1990] 1 All ER 56), the more so if the parent company has made a focal point of preventing environmental damage by activities of its subsidiaries and is to a certain extent actively involved in directing their operational management. This does not mean that without this attention and involvement a duty of care would not be conceivable and that a blameworthy negation of these interests could never lead to liability.<sup>221</sup>

Thus, the Court of Appeals both stopped short of declaring, yet suggested the possibility of, a direct duty by the parent company when the violation is sufficiently serious. It also characterized *Chandler* as being non-exhaustive in its own analysis, and standing for the proposition that "it was not excluded that also other circumstances than the ones at stake in that case could lead to a duty of care of the parent company."<sup>222</sup>

In another blow to the parent company, the Dutch Court of Appeals reversed the District Court's refusal to order document disclosure by Shell to the plaintiffs, who were unable without company records to establish poor company maintenance of pipelines. In civil law countries, discovery requests generally must be made to a judge with a specificity unknown in U.S. common law discovery.<sup>223</sup>

<sup>218</sup> Cees van Dam, Preliminary judgments Dutch Court of Appeal in the Shell Nigeria case, <https://perma.cc/7X2G-9ASM>.

<sup>219</sup> *See id.* at 3.

<sup>220</sup> *See, for example*, Case C-98/06, *Freeport v. Arnoldsson* 2007 E.C.R. I-08319.

<sup>221</sup> *Dooh/Shell, in van Dam, supra* note 215, at 4.

<sup>222</sup> *Id.*

<sup>223</sup> *See, for example*, Vivian Grosswald Curran, *United States Discovery and Foreign Blocking Statutes*, 76 LA. L. REV. 1141, 1143 (2016).

Moreover, Article 7 of Rome II<sup>224</sup> could indicate that Dutch law should apply,<sup>225</sup> with the potential liability of the parent company. Article 7 applies to non-contractual duties deriving from environmental harm and allows the plaintiff to opt to sue “under the law of the country in which the event giving rise to the damage occurred.”<sup>226</sup>

In addition to Rome II, Brussels I Recast<sup>227</sup> has the theoretical tools to harmonize E.U. states inasmuch as it requires judges in Member States to take all relevant circumstances into account when deciding jurisdictional issues.<sup>228</sup> Moreover, Brussels I Recast, although it does not have a provision expressly adopting it, does not exclude the principle of *forum necessitatis*, according to which there must be some forum made available to the victim, and, if no forum is available, then normal jurisdictional rules generally can be suspended in order to create one.<sup>229</sup> Numerous individual E.U. Member States, as well as Switzerland and Canada, do recognize the doctrine. This principle touches what is virtually always a core problem of these extraterritorial jurisdiction cases, because alleged victims of human rights abuses at the hands of foreign subsidiaries of large multinationals are only very rarely able to have a realistic forum in the state in which the violation occurred.<sup>230</sup>

d) *Canada.*

(1) *HudBay.*

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<sup>224</sup> Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations. 2007 O.J. (L199) 40–49 [hereinafter Rome II].

<sup>225</sup> The District Court had applied Nigerian law to the case, as the damage had occurred in Nigeria. District Court The Hague, 30 Jan. 2013, ECLI: NL: RBSGR: 2013: BY9854 (Akpan/Shell).

<sup>226</sup> Rome II, *supra* note 224, Art. 7. In addition, with respect to environmental torts, Rome II requires heightened preventative measures: “Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.” *Id.* at ¶ 25.

<sup>227</sup> Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L351) 1–32 [hereinafter Brussels I Recast].

<sup>228</sup> *Id.* at Preamble ¶ 24.

<sup>229</sup> On *forum necessitatis* in the E.U. and Canada, see Lucas Roorda & Cedric Ryngaert, *Business and Human Rights Litigation in Europe: The Promises Held by Forum of Necessity-based Jurisdiction*, <https://perma.cc/6S96-GMTQ>.

<sup>230</sup> See Skinner, *supra* note 8, at 169–73; JOSEPH, *supra* note 11 at 5.

Canadian law has had an innovative decision in the context of a number of cases filed against HudBay, an enormous Canadian multinational corporation.<sup>231</sup> The defendants were mining corporations operating in Guatemala whose parent company, HudBay, is Canadian.<sup>232</sup> The defendants are two out of a thousand subsidiaries that the parent company has in one hundred different countries.<sup>233</sup> The case's underlying complaint arose out of several land evictions of the native population in Guatemala. Evictions were effected by national police in order to facilitate the work of the subsidiaries. Security employees of the subsidiaries assisted the police, and some allegedly committed violent acts, including gang rape and murder.<sup>234</sup> Some of the alleged rapes were linked to miscarriages in women who were pregnant before they were raped.<sup>235</sup>

The Ontario Superior Court decided first, unsurprisingly, that the corporate veil separating subsidiaries from their parent company could be pierced if the plaintiffs are able to prove at trial that the subsidiaries had been operating as the parent company's agents, agency constituting a traditional exception to the doctrine of the corporate veil.<sup>236</sup> More noteworthy, however, was the court's decision to deny dismissal for the charge of *direct negligence* against the Canadian parent company for the acts of its subsidiaries in Guatemala, which the court described as a "novel duty of care"<sup>237</sup> resting on a tripartite test of (1) foreseeability of the harm; (2) "sufficient proximity" between defendant and plaintiffs such as to fairly impose a direct duty of care on the defendant; and (3) no countervailing policy sufficient to negate the imposition of such direct a duty of care on the defendants.<sup>238</sup>

HudBay marks the first time that a Canadian court in a human rights case has accepted the possibility of civil liability for human rights violations of a parent company for the acts of its subsidiaries in a foreign country.<sup>239</sup> It has also been

<sup>231</sup> *Choc v. HudBay Minerals, Inc.*, 2013 ONSC 1414 (2013) (HudBay). HudBay did not appeal the decision to deny its motion to dismiss. See Alexandra Posadzki, *HudBay Won't Appeal Ruling Bringing Guatemala Case to Canada*, THE GLOBE AND MAIL (Aug. 30, 2013) <http://www.theglobeandmail.com/news/national/hudbay-wont-appeal-ruling-bringing-guatemala-case-to-canada/article14060058/>.

<sup>232</sup> HudBay, *supra* note 231, at ¶ 4.

<sup>233</sup> Susana C. Mijares Peña, *Human Rights Violations by Canadian Companies Abroad: Choc v HudBay Minerals Inc.*, 5 WESTERN J. LEG. STUDIES 1 (2014), <https://perma.cc/7E5G-A62V>.

<sup>234</sup> HudBay, *supra* note 231, at ¶¶ 4–7.

<sup>235</sup> These last allegations do not appear in the court's account of the facts, but were made in plaintiff statements. See Peña, *supra* note 233, at 10.

<sup>236</sup> *Choc v. HudBay Minerals, Inc.*, *supra* note 231, at ¶ 49.

<sup>237</sup> *Id.* at ¶ 56.

<sup>238</sup> *Id.* at ¶ 57.

<sup>239</sup> See Peña, *supra* note 233, at 1.

pointed out that in both this case and *Chandler*, the courts emphasized the specific factual circumstances. This would suggest that the parent companies have assumed a duty for the subsidiaries' conduct, either through their control of the subsidiaries, or through their superior knowledge of the matters relevant to the legal issues and that, consequently, neither case stands for the proposition that a parent company has a general duty of care towards victims of its foreign subsidiaries.<sup>240</sup>

It may, however, be that these cases do represent a significant first step towards the development of such a duty of care for parent companies because of the mechanisms by which common law legal orders undergo evolution. This is addressed in the following Section.

(2) *Common law methodology and an expanded duty of care.*

The common law historically has progressed by small first steps that do not appear to change the established, general principle. Rather, the first step is to create a small exception to the general rule, the second to enlarge and define the exception, and the third to have the exception become the new general rule, such that the original exception swallows and displaces the original rule.<sup>241</sup> This is effected by the common law method of reasoning by analogy from the case at bar to precedents, which, as Levi explains, "operate[s] to change the idea after it has been adopted,"<sup>242</sup> in a variety of ways. For one, where significant numbers of the population experience a pressing need for a new legal principle to take hold, lawyers will argue repeatedly for its application in specific cases, just as they do for the application of the view of a dissenting justice that lost in a past case, until finally, what starts either as a limited exception or, in the event of a dissenter's opinion, as the losing side, may become articulated as a winning legal principle in a future case, later to become established as a respected rule.<sup>243</sup> We already are witnessing such a common-law-like evolution as European Member State courts interpret codes and statutes in consultation with, and by analogy to, each other's decisions.<sup>244</sup>

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<sup>240</sup> See Skinner, *supra* note 35, at 1832–38.

<sup>241</sup> Roscoe Pound, *Introduction to Legal Reasoning*, By Edward H. Levi, 60 YALE L. J. 193, 200 (1951) (delineating and illustrating a tripartite, cyclical pattern to common-law reasoning).

<sup>242</sup> EDWARD H. LEVI, *INTRODUCTION TO LEGAL REASONING* 6 (1949).

<sup>243</sup> See *id.*

<sup>244</sup> This is not to suggest that the methodology within decisions has become common-law in civilian courts. For more on the intricacies of each method of judicial reasoning, see Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: The Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63 (2001). A *jus commune* of the future would not need to envisage an erasure of those differences.



In his book that underscores the importance of considering foreign law, Justice Breyer “predict[s] . . . that as economic globalization marches on, . . . we must remember that legal certainty is particularly important to commercial actors. So is uniformity of result across borders.”<sup>245</sup> When they consider arguments rebutting the presumption against extraterritoriality, in expanding agency theory with respect to foreign subsidiaries, and in creating a direct duty of care theory, U.S. judges may also be more likely to take greater note of Canadian decisions such as *HudBay* and *Vedanta* than of Continental European cases that may be more difficult for them to access.<sup>246</sup> But as the various courts of home states continue to increase mutual contacts and knowledge of each other’s decisions, two developments are predictable: mutual influence will be ensured in Continental European legal systems because of the entrenched role comparative law already enjoys there; and common law systems will inch towards adopting exceptions that eventually swallow their previous rules, as they have been doing for centuries.

e) *The E.U.*

We saw earlier that U.S. law has long been of the view in antitrust cases that a parent and its subsidiaries have the same interests and aims.<sup>247</sup> In E.U. competition law, parent companies are presumed liable for the conduct of their wholly-, and almost wholly-, owned subsidiaries.<sup>248</sup> This presumption of parent company liability has become extremely difficult for a parent company to rebut: in a June 16, 2016 decision, the CJEU held that even where a parent company had ordered its subsidiary not to enter into an anti-competitive agreement, the parent company was liable for its subsidiary’s disobedience on the reasoning that the order was “not sufficient to establish the *absence* of actual influence” by the parent.<sup>249</sup>

<sup>245</sup> BREYER, *supra* note 88, at 195.

<sup>246</sup> But it should be remembered that Canadian law, like most civilian law, incorporates the principle of *forum necessitatis*, while U.S. law at the present time does not. See *supra* note 229 and accompanying text. That too may change. Respondents had pleaded “a doctrine of jurisdiction by necessity” in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and the Supreme Court declined to adopt it under the facts of the case, although suggesting openness to it in principle: “It is not clear from the record, for example, whether suit could have been brought against all three defendants in either Colombia or Peru. We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record.” *Id.* at 419 & n. 13.

<sup>247</sup> See *supra* note 25.

<sup>248</sup> Case C-155/14P- *Evonik Degussa GmbH, AlzChem AG v. Comm’n*, 16 June 2016, ¶ 29 (*AlzChem*), <https://perma.cc/C49D-8R8T>. *Akzo Nobel NV v. Comm’n*, 2009 E.C.R. I-8237, at ¶ 15 (*Akzo Nobel*), <https://perma.cc/4J6Z-246W>.

<sup>249</sup> *AlzChem*, *supra* note 248, at ¶ 36 (emphasis added).

Similarly, where in a related case the parent company had argued that it was no more than an outside financial investor and that a third party had exercised decisive influence on the subsidiary's acts, the CJEU held that the parent company had not rebutted the presumption of its own liability for its subsidiary's illegal conduct, as it had not established that it had failed to exercise decisive influence over the subsidiary's actions.<sup>250</sup> More specifically, the Court held that establishing the decisive influence of any third party over the subsidiary was irrelevant to the parent company's own liability.<sup>251</sup>

The CJEU has emphasized that European competition law analysis is premised on the theory that parent and subsidiary form a single economic unit, and on that basis are jointly and severally liable for each other's misconduct: "[T]he concept of an undertaking . . . must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal."<sup>252</sup>

## E. Executive Action

In the few years since the U.S. Supreme Court decided *Kiobel*, and shifted the terrain of reasoning about the ATS from an international human rights context to an extraterritorial jurisdictional context in a line of commercial law precedents,<sup>253</sup> the federal appellate and district courts have struggled to give meaning to the term the Supreme Court used in *Kiobel* to designate how the presumption against extraterritoriality might be rebutted. More specifically, the courts have struggled with what is meant by the requirement that tortious harms "touch and concern the United States with sufficient force."<sup>254</sup> There are inter-circuit conflicts already,<sup>255</sup> such that sooner or later the Supreme Court will have to accept another ATS case so that it can help to give concrete guidance as to the meaning of the term.

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<sup>250</sup> Case C-154/14P – SKW Stahl-Metallurgie GmbH Holding AG v. Commission, June 16, 2016, at ¶ 72, <https://perma.cc/K6AN-C6MS>.

<sup>251</sup> *Id.*

<sup>252</sup> *Akzo Nobel*, *supra* note 248, at ¶ 55.

<sup>253</sup> *See Curran*, *supra* note 131.

<sup>254</sup> Finding that the claims do "touch and concern with sufficient force": *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 526 (4th Cir. 2014); finding they did not: *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 45 (2d Cir. 2014), *cert. denied sub nom. Khan v. Chowdhury*, 135 S. Ct. 401 (2014); *Balintulo v. Daimler AG*, 727 F.3d 174, 179 (2d Cir. 2013); *Kaplan v. Cent. Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185, 188 (D.D.C. 2013). For a more extensive summary of post-*Kiobel* case law, see Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from Kiobel's Touch and Concern Test*, 66 HASTINGS L.J. 443, 455 & n. 67 (2015).

<sup>255</sup> *See Doyle*, *supra* note 254, at 456.

As the ATS diminishes in importance for foreign plaintiffs seeking compensation for human rights damages, and is likely to remain of marginal utility at least for some time to come,<sup>256</sup> there may be other ways of approaching the issue under U.S. law. In the past, Congress enabled the president to extend extraterritorial jurisdiction within the ambit of particular national emergencies, as is constitutionally required.<sup>257</sup> In recent years, we have seen an unprecedented expansion of unilateral executive power in the U.S.<sup>258</sup> This may pose a risk to the future of the political system,<sup>259</sup> but the fact remains that the president's power has greatly expanded.

Recently, for instance, Treasury Department regulations addressed a specific merger planned by Pfizer and Allergan.<sup>260</sup> Allergan is an Irish corporation, and the merger would have permitted Pfizer to gain Irish nationality for purposes of avoiding U.S. corporate tax rates.<sup>261</sup> New regulations, adopted on the eve of the projected merger, abruptly ended the deal.<sup>262</sup> Thus, finely-tuned executive actions might address civil liability of parent companies for breaches of fundamental human rights by foreign subsidiaries in limited circumstances. The problem with such after-the-fact executive actions, and especially with targeting particular companies, may be the risk of diminishing public confidence in government, which is a serious consideration.<sup>263</sup> No such extreme particularity would be called for in the context of foreign subsidiary universal human rights violations, however.

<sup>256</sup> *But see* BREYER, *supra* note 88, at 163 (“[T]he ATS, at least as interpreted in *Filartiga* and the *Marcos* litigation, is here to stay.”).

<sup>257</sup> That was the case with the statutes discussed, *supra* in Section II.B.4.

<sup>258</sup> *See* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 87–118 (2010).

<sup>259</sup> *See id.*

<sup>260</sup> Caroline Humer & Ransdell Pierson, *Obama's inversion curbs kill Pfizer's \$160 billion Allergan deal*, REUTERS, April 6, 2016, <https://perma.cc/T5AV-3QLD>; Michael J. de la Merced & Leslie Picker, *Pfizer and Allergan Are Said to Abandon Merger As Tax Rules Tighten*, N.Y. TIMES (April 5, 2016), [http://www.nytimes.com/2016/04/06/business/dealbook/tax-inversion-obama-treasury.html?\\_r=0](http://www.nytimes.com/2016/04/06/business/dealbook/tax-inversion-obama-treasury.html?_r=0) (“The proposed regulations, announced on Monday by the Treasury Department, appeared specifically to target Pfizer and Allergan”).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Moreover, on August 4, 2016, as this Article was being drafted, representatives of Pfizer and Allergan brought suit against the Treasury Department and the IRS, on the grounds that the new regulations were “tailored to destroy” their merger, and that the executive branch departments had “gerrymander[ed] a regulation to support rejection of the Pfizer inversion.” Jen Wieczner, *Big Business Groups Just Sued the Government for Blocking the Pfizer-Allergan Merger*, FORTUNE (August 4, 2016), <http://perma.cc/F97R-TRFY>.

## F. International Criminal Liability

International criminal liability for the worst human rights abuses by multinational corporations should perhaps also be evoked. Corporations have a long history of being analyzed in terms of their constitutional rights, and in the U.S. their equivalence to natural persons has grown.<sup>264</sup> In France, the corporation is also treated as a person, and this is a common, although not unanimous, trend among western developed states.<sup>265</sup> As nations analogize the corporation ever more to a natural person, it may also be appropriate, as Justice Binnie of the Canadian Supreme Court has suggested, to consider extending the International Criminal Court's jurisdiction to include corporations.<sup>266</sup>

## III. CONCLUSION

In conclusion, if we look at the phenomenon of transnationalization through the lens of the multinational corporation and of universal human rights, we should be reflecting on how best to address the future. Concerted or harmonious efforts across nations have much to be recommended where the problems are those defined by the end of national borders. Can some sort of new *jus commune* be fashioned with the common law, centuries after national codifications put an end to the last one? Could it coexist with a flourishing of national laws and sovereignties in their national legal cultures?

Our world has become one of encounter, but encounter and presence do not imply mutual understanding. Problems internationalize with mobility and contact. The challenge remains to puzzle out the riddles of the various, diverse jurisdictions. In this way, those searching to harmonize results may better interpret, better communicate and better solve together, so that multinational corporations assume their role as good citizens in all of their component parts, and wherever they may be.

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<sup>264</sup> See *Citizens United*, *supra* note 184, at 310.

<sup>265</sup> Germany continues to immunize corporations from criminal law. See Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 *YALE L. J.* 126, 128 (2008).

<sup>266</sup> Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report*, 38 *BRIEF* 44, 51 (2009).