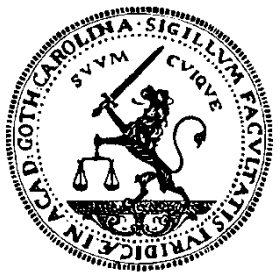

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Outsourcing responsibility

The developments of the doctrine of limited liability concerning multinational corporations and human rights violations

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Summary

Victims of human rights abuses linked to activities of multinational corporations face huge legal gaps and challenges when trying to access compensation for harm. Corporate law covering these scenarios have not yet adapted to the changes of a globalized world and the complex structures of today's multinational corporations (MNCs).

The principle of separate legal entities is one such obstacle keeping victims from seeking remedies when harm is caused by an MNCs' subsidiary. The doctrine protects the parent corporation from any financial or legal obligations arising from the acts of a subsidiary, unless the wrongful act can be directly linked to the faulty behaviour of the parent corporation. However, the parent corporation is in many cases the only viable option for victims to obtain any compensation. Trying to overcome limited liability has been proven difficult due to unpredictability in the courts and due to a heavy burden of proof resting on the plaintiffs.
Academics and legislators are attempting to find ways around limited liability in order to respect human rights, while at the same time not overthrowing core principles within corporate law.
This paper looks at the legal developments of overcoming limited liability regarding human rights violations linked to corporate operations, showing that what has been done so far is not sufficient from a human rights perspective. The core principle that a parent corporation should not be held liable for actions of their subsidiary is hard to break through, but looking at the gross human right violations occurring through MNCs there is a need to reform this doctrine.

Sammanfattning

Offer för brott mot mänskliga rättigheter orsakade av multinationella företags aktiviteter möter stora rättsliga luckor och hinder när de försöker utkräva kompensation för skador. Bolagsrätten som täcker dessa situationer har inte ännu anpassats till förändringarna som den globaliserade världen inneburit, och de komplexa strukturerna som multinationella företag består av idag.

Principen som innebär att varje bolag, även inom en koncern, är en separat juridisk enhet är ett sådant hinder som gör det svårt för offer att kräva ersättning när de lidit skada orsakad av ett multinationellt företags dotterbolag eller leverantör. Doktrinen skyddar moderbolaget från alla

ekonomiska och juridiska skyldigheter som uppkommer utifrån dotterbolagets handlingar, om inte den otillåtna gärningen kan direkt kopplas till moderbolagets eget felaktiga beteende. Att söka ersättning från moderbolaget är dock ofta det enda realistiska alternativet om de skadelidande ska kunna få ut något skadestånd. Att försöka bryta igenom ansvarsfriheten som moderbolaget åtnjuter har visat sig vara svårt på grund av oförutsebar tillämpning i domstolar och på grund av en tung bevisbörda för målsäganden.

Akademiker och lagstiftare försöker hitta rättsliga vägar runt ansvarsfriheten så att mänskliga rättigheter ska respekteras, samtidigt som det är viktigt att inte bortse från fundamentala principer inom bolagsrätten.

Denna uppsats analyserar den rättsliga utveckling som sker kring ansvarsfrihet i förhållande till brott mot mänskliga rättigheter som är kopplade till multinationella företags verksamheter, och visar att det som skett hittills inte är tillräckligt för att mänskliga rättigheter ska anses respekteras. Grundprincipen att moderbolag inte ska hållas ansvariga för dotterbolags handlingar är svår att inskränka, men i proportion med de grova brott mot mänskliga rättigheter som sker genom multinationella företags verksamheter idag så är det uppenbart att reform inom detta området behövs.

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1 Introduction

1.1 Corporate limited liability hindering victims of human rights abuse to obtain compensation

Over the last few decades multinational corporations (MNCs) have expanded globally at a rapid pace and have established subsidiaries and contracts with suppliers all over the world. With this expansion both their financial power as well as their political power have grown. The revenue of these corporations are in some cases larger than the entire BNP of some of the nations in which they have their subsidiaries.[1] Complicated power balances between states and MNCs have emerged in these circumstances.

Knowingly or unknowingly MNCs are through the operations of their subsidiaries overseas directly or indirectly causing human rights abuses. When harm is caused due to the actions or negligence of a corporation it is extremely difficult for the victims to obtain any sort of remedy. This is partly due to political and social issues in the host state (the state where the subsidiary is located) but also due to legal gaps. Unfortunately, legal structures that are holding MNCs accountable for human rights abuses have not developed fast enough to keep up with the rapid growth and expansion of MNCs worldwide.[2] One such major legal obstacle is the principle of separate entities and the limited liability which it provides for corporate shareholders. This principle prevents victims from claiming responsibility from a parent corporation whose subsidiary has violated human rights, as the doctrine of limited liability creates a legal wall between the parent and its subsidiaries. Without the possibility to obtain damages from the parent corporation victims are often left without any remedies at all since the subsidiaries themselves do not have the financial means to provide compensation as the revenue usually flows straight through the subsidiary to the parent corporation.

The challenge lies in finding ways to modernise how MNCs are held liable for human rights abuses, while taking the interests of shareholders and workers into account, respecting core principles in corporate law and avoiding causing a major crisis on the global market.[3]

[1] Moberg 1998, p. 15
[2] Muchlinski 2007, p. 3
[3] McBride 2011, p.12-14

1.2 Purpose and research question

The purpose of this paper is to explain why limited liability creates such a major obstacle for victims of human right abuses caused by corporations' activities, how courts have reasoned regarding these situations and what legislative measures are being taken in order to create clarity in the field and access to justice for victims. An analysis of court cases and legislative efforts will provide insights into what has been effective in overcoming limited liability and if new approaches will solve the issues victims have when trying to receive remedies.

The paper aims to answer the following question:

- Will the current developments of the doctrine of limited liability increase the access to compensation for victims of corporate human rights abuses?

1.3 Methodology and Material

To answer the research question a traditional legal method will be used in combination with a comparative method. To get a comprehensive understanding of how the doctrine of limited liability has developed relevant core principles in corporate law, a body of court cases and legislative measures will be analysed and compared. Firstly, and overview and history of the principle of separate entities will be given. Secondly, different approaches to limited liability developed in common law courts will be presented and thirdly, legislative measures in France and Switzerland will be reviewed. The court cases have been chosen based on their importance for case law development and on what approach the plaintiffs have used when trying to overcome limited liability. The legislative measures in France and Switzerland have been selected because these two countries have recently taken significant steps towards holding MNCs responsible for human rights violations overseas and clarifying under which circumstances parent corporations should be held liable for actions of subsidiaries.

The materials used are court files, legislation and legal doctrine.

1.4 Delimitations

This paper is limited to analysing the role that the principle of separate entities has in the context of MNCs, human rights and remedies for victims. Other aspects hindering victims to seek and obtain compensation such as challenges of establishing jurisdiction, enforcement, corruption and

access to a fair trial in the host state will not be covered in this analysis. The paper is also limited to covering civil torts liability, and will therefore not cover the dimension of criminal liability, which in some cases concerning MNCs and human rights also can be relevant.

1.5 Previous Research

Several academics, human rights organizations and large international organizations have researched the topic of parent corporate responsibility when human rights violations occur in connection with operations in high risk areas. Reports and recommendations have been written on how to create legislation, international and domestic, in order to uphold human rights and different approaches towards limited liability. However, the legal area is still largely undeveloped in the sense that most of the work is still theoretical or consists of non-binding guidelines which means that there is not much being practiced.

1.6 Analytical framework

Whilst recognizing that the issue of human rights abuses linked to corporate activity is not only the fault of the corporation itself but that frail host states failing to enforce human rights also bear responsibility, this paper focuses on the extent to which corporations should be held liable. This paper takes a human rights based approach to MNCs' operations in high risk areas, while at the same time considering the practical legal framework that is needed in order for businesses to function.

1.7 Definitions

High risk area

The UN Global Compact's Guidance on responsible Business in Conflict-affected and High-Risk Areas[4] define a high risk area as places that are currently experiencing violent conflict, areas that are transitioning from violent conflict with the risk of falling back into violence, areas where there is political and social instability which make a future outbreak of violence likely, areas

[4] The UN Global Compact's Guidance on responsible Business in Conflict-affected and High-Risk Areas: A Resource for Companies and Investors

where there are serious concerns about abuses of human rights and political and civil liberties, but where violent conflict is not currently happening.[5]

2 The principle of separate entities and limited liability

2.1 The history and scope of limited liability and separate entities

The principle of separate entities has its foundation in the creation of a fictional legal person whom has its own legal capacity. A legal person can have its own rights and obligations, debts and claims.[6] This means that shareholders and a corporation are legally separated and are not responsible for each other's actions or omissions. This is true even in the cases where a parent corporation has full ownership of a subsidiary.

The principle of separate entities is a core principle in corporate law[7], internationally accepted and originally created to protect investors from debt in the corporation in which they are shareholders.[8] However, historically shareholders have not always been without responsibility but were previously fully liable for the debts of the corporation. The evolution of corporate liability has since moved more and more towards limiting the liability for the owners and today the general rule is that owners stand completely without personal responsibility.[9] These attempts to limit liability in business transactions and thereby encouraging financial investments have made path to tremendous economic growth worldwide.[10]

Originally limited liability was only available to individual investors since companies where not allowed to be shareholders in other companies. However, as the principle of separate entities became increasingly established its application extended to encompass parent corporations and their fully owned subsidiaries.[11] Although similar concepts had been used previously in Europe,

[5] The UN Global Compact's Guidance on responsible Business in Conflict-affected and High-Risk Areas: A Resource for Companies and Investors p. 7
[6] Moberg 1998, p. 26-27
[7] LawTeacher, The Separate Entity Principle, https://www.lawteacher.net/free-law-essays/company-law/the-separate-entity-principle.php?vref=1
[8] Mares (in Deva & Bilchitz) 2017, p. 269
[9] Moberg 1998, p. 18
[10] Boyle 2016, p. 299; Hillman 1997, p. 615; Skinner 2015, p. 1790
[11] Skinner 2015, p. 1791

legislation permitting general limited liability and separation of legal entities began in the 19th century in the United States and inspired similar regulations in the United Kingdom, Germany, France and later the rest of the developed world. One reason for this new type of corporate structure with separation of management and ownership was the large-scale investments needed in the United States to expand the railway and telegraph networks. The operations were so extensive that investments from a multitude of people were needed and investing was considered too risky without some type of protection, but were at the same time necessary in order for the development of infrastructure and the national economy in general.[12]

A landmark case establishing the principle of separate entities was the *Salomon v. Salomon & Co Ltd case*[13] in the United Kingdom from 1897 where the House of Lords for the first time applied the principle to a one-man company (only one single shareholder), radicalising the separation of company and shareholder by extending its reach beyond joint stock companies with several shareholders.[14]

The concept of limited liability has had many advantages. Since the risks for investors are limited to the amount invested, the incentives for investments increase and by that the economy can grow as corporations receive funds. This has in turn made large scale operations possible since these enterprises usually come with a need for large monetary investments coupled with considerable risks.[15]

2.2 Critique of the principle of separate entities and limited liability

Despite its foundational role in corporate law, the principle of separate entities has not been without critique. In the early stages of the emergence of the doctrine worries concerning the separation of managers and owners of a corporation was raised. The fear was that corporations would end up being owned by shareholders whom did not care nor were involved in the way the business was ran, and vice versa, that the managers of the business would become negligent and wasteful as it would not be their own money at stake but rather some unknown shareholders'.[16]

[12] Boyle 2016, p. 282-285; Ireland 2010, p. 846-848; McBride 2011, p. 3; Muchlinski 2010, p. 916
[13] Salomon v. Salomon & Co Ltd
[14] Ireland 2010, p. 847-848
[15] Moberg 1998, p. 32-33
[16] Ireland 2010, p. 840; Moberg 1998, p. 18-19

Experiments examining the difference between limited and unlimited corporations (corporations where the owners are fully liable) in regards to how profit is valued compared to work for the general benefit of society show that executives of limited corporations value profit over the general benefit of society at much higher rates than executives of unlimited corporations do.[17]

It is also argued that the reach of limited liability has gone too far by now protecting not only individual shareholders, but also corporate shareholders which was not the case when the principle first came into play. The fact that it now also covers tort claims is by some seen as unreasonable as in the beginning it was only meant for contract claims.[18] Contract creditors are able to evaluate the risks and benefits before going into business with a corporation while involuntary creditors (third-parties) are forced to bear costs of failed business ventures without having made a choice to take that risk, and without the possibility of gaining profit if the business succeeds. Therefore, it seems unreasonable that parent corporations making huge profits from risk filled operations do not also have to share the burden of paying the costs when harm occurs to involuntary creditors.[19]

Because the principle of separate entities protects parent corporations both from contract and tort claims it gives incentives to carry out very risky operations, creating an extremely favourable climate for shareholders as the parent does not absorb these costs, allowing them to pursue profit in irresponsible ways letting third parties pay for the damages.[20] This means that the cost of efficiency that limited liability provides is unfortunately externalized on society as a whole and especially on vulnerable populations when corporations have activities in high-risk areas. It is an unfair trade when the costs of risk-filled profiteering are put on third parties instead of its profiteers.[21]

Modern critique points to the vast corporate webs that now span globally with complex corporate structures, saying that the old concept of limited liability and the ways of overcoming it simply

[17] Boyle 2016, p. 280
[18] Skinner 2015, p. 1792
[19] Dearborn 2009, p. 205-206
[20] Boyle 2016, p. 278-280; Ireland 2010, p. 838-848; Moberg 1998, p. 35
[21] Mares 2017, Brief 2; Moberg 1998, p. 34; Skinner 2015, p. 1778-1780

do not match todays' reality. Legal structures holding corporations accountable focus too much on formalities which in today's corporate world is a meaningless way of evaluating how a corporation is structured, and therefore who bears responsibility. A much deeper analysis is needed in order to conclude how businesses are intertwined.[22]

2.3 Limited liability, globalisation and human rights

MNCs moving production and other parts of their enterprise overseas create benefits both for the firm and the host state. For corporations, such benefits include low labour costs, lower taxes on exports and imports and other tax benefits, regulatory costs kept low and opportunity to reach a broader market base.[23] For host states, integration on the global market, job creation, access to modern technology and thereby development of the nation are positive aspects of a MNC establishing in the country.

Many of these host states are considered to be so called high risk areas and limited liability for corporations having subsidiaries overseas becomes a huge issue when the costs of human rights violations harm already vulnerable communities or people. The possibilities for these groups to seek compensation in the host state and with the subsidiary is usually very limited due to a number of issues such as corruption, flawed judicial systems and a lack of resources in the subsidiary.[24] The only viable option in order to obtain remedies is to move up the ladder and try to claim compensation from the parent corporation. This is where the principle of separate entities and limited liability creates a nearly unbreakable wall for victims seeking damages for human rights violations as the parent is a separate legal unit from the subsidiary, leaving vulnerable populations to pay the costs for irresponsible business operations, while the parent is still able to reap the profits from the venture.

[22] Dearborn 2009, p. 208
[23] Skinner 2015, p. 1807
[24] Skinner 2015, p. 1800-1804

3 Overcoming limited liability

3.1 Piercing the corporate veil

Piercing the veil became an accepted legal term in the 1920s in the US[25] and is today an established doctrine within corporate law and has the same general prerequisites worldwide. It allows for holding a parent corporation responsible for the actions of a subsidiary without the actions having to be directly traced to the parent corporation. Piercing the veil is possible in situations when it can be proven that the parent corporation controls the subsidiary in such a way that the subsidiary must be considered an agent of the parent and that the parent has misused the corporate form for improper behaviour.[26] Circumstances which determine if the corporate structure has been misused can be misrepresentation or wrongful conduct, intermingling of funds, undercapitalization of the subsidiary, common decision making between the entities, independence of the board of directors, and whether the parent and subsidiary share managers and other personnel.[27]

Theoretically piercing the veil is an option for victims of corporate human rights abuse but it is very hard to achieve. Applying the doctrine in courts have been done inconsistently and rarely, and the premises for the test is vague.[28] One scholar even compared piercing the veil with lightning bolts due to how rare it is, also saying it seems to happen freakishly.[29] The amount of evidence needed in order to show that a parent controlled a subsidiary in such a way needed to pierce the corporate veil is very difficult to produce for plaintiffs in these types of cases.[30] Most plaintiffs trying to pierce the corporate veil in cases concerning human rights violations have not been successful and have been left without remedy.

[25] Tweedale & Flynn 2007, p. 270-271
[26] Moberg 1998, p. 147-148; Skinner 2015, p. 1772-1773
[27] Skinner (ICAR) 2015, p. 15
[28] Dearborn 2009, p. 204; Skinner (ICAR) 2015, p. 15
[29] Easterbrook & Fischel 1985, p. 89
[30] Dearborn 2009, p. 208; Skinner (ICAR) 2015, p. 15

In *Bigio v Coca Cola Co*[31], a case concerning illegal expropriation of land for a bottling plant, the court dismissed the case since the plaintiff was not able to show sufficient grounds for piercing the veil. Also in *Kiobel v Royal Dutch Petrolium*[32], concerning several human right violations for oil exploration and production in Nigeria, the case was dismissed due to failure of piercing the corporate veil and the victims were left without any compensation. In *Sinaltrainal v Coca Cola*[33] the court found that Coca-Cola USA was not liable for the murder of an employee at the plan run by a subsidiary. The plaintiffs were not able to show sufficient amounts of parental control over the subsidiary and therefore an agency relationship could not be confirmed. The court held that control over day-to-day operations at the subsidiary was necessary in order for the subsidiary to be considered an agent, which the plaintiffs were not able to show in this case.[34]

3.2 Parental Duty of Care

The duty of care approach was developed in common law systems and is well established especially in England and Canada. It attributes direct liability to the parent company through proving that the parent had a so called duty of care towards the harmed party which will then be grounds for liability. In order to establish duty of care it must be shown that there was sufficient proximity between the parent and the subsidiary, that the harm was foreseeable, and that it is reasonable and just to impose a duty of care in this specific instance. These general criteria were laid down in the *Chandler v Cape* case[35], which was the first case in England where a plaintiff successfully established duty of care for a parent corporation, however attempts by others had been done previously. The case concerned an employee whom had contracted asbestos due to a short period of employment at the subsidiary. At the time of the law suit the subsidiary did no longer exist and therefore the plaintiff turned to the parent corporation, Cape.[36] The plaintiff was able to show duty of care based on the fact that the parent had a medical officer who was responsible for safety for employees within the group of companies, that the parent had superior

[31] Bigio v Coca-Cola Co., 675 F.3d 163, (2d Cir. 2012)
[32] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659
[33] Sinaltrainal v Coca Cola, 256 F.Supp.2d 1345 (S.D. Fl., 2003)
[34] Skinner (ICAR) 2015, p. 15-16
[35] Chandler v Cape Plc (2012) para 2
[36] Chandler v Cape Plc (2012) para 1

knowledge about managing asbestos and gave instructions to the subsidiary on how to operate.[37] Through this verdict it became possible to hold a parent corporation liable despite the fact that the circumstances did not meet up to the standards of piercing the veil.[38] It must however be pointed out that both the plaintiff and the subsidiary in this case were located in the same country as the parent which possibly made it easier to show proximity. Looking at cases with foreign subsidiaries and plaintiffs show that the requirements for connecting the parent to the harm are difficult to meet.

One example is the *Okpabi v Royal Dutch Shell* which took place five years after *Chandler v Cape*. Victims of human rights abuses[39] and environmental damages in Nigeria sued Royal Dutch Shell and attempted to establish liability based on parental duty of care[40]. The same three step test (foreseeability, proximity and reasonableness) used in *Chandler v Cape* was used in this case in order to evaluate duty of care obligations.[41] Even though the court established that the risk of harm was foreseeable, Shell was not found liable since it did not exercise a sufficient degree of control or proximity over the subsidiary needed to amount to a duty of care.[42] The court explained the differences between cases where a parent has had control over the material operations of the subsidiary and where the parent only issued policies and standards to be applied within the corporate structure. In this case the parent was deemed not to have operational control which is needed for duty of care obligations.[43]
The decision has been criticized for backtracking from prior court decisions on parent corporate liability and for denying the plaintiffs an opportunity for remedies in a case where there was no chance of doing so in the host state.[44]

Another example is the *Longowe v Vedanta* case which is an ongoing case concerning loss of income and personal injury due to water pollution from a copper mine in Zambia, where the

[37] Chandler v Cape Plc (2012) para 61, 62, 72-75 & 79
[38] Skinner & McCorquodale & De Schutter 2013, p. 83-84; Skinner (ICAR) 2015, p. 19-20
[39] Okpabi v Shell (2017) para 9
[40] Okpabi v Shell (2017) para 14
[41] Okpabi v Shell (2017) para 23
[42] Okpabi v Shell (2017) para 126-127
[43] Okpabi v Shell (2017) para 128
[44] Business & Human Rights Resource Centre *Quarterly Bulletin Issue 28, September 2018; Quijano G: Okpabi v Royal Dutch Shell: An opportunity to honor international standards or another instance of corporate impunity?*

plaintiffs also are trying to establish liability through duty of care.[45] The Court of Appeal has just established jurisdiction allowing the case to be tried in the UK and in January 2019 the Supreme Court will hear the case.[46] The basis of the claim for duty of care rests on the facts that the parent corporation provided safety and environmental training to its affiliates and financially supported and exercised control over its subsidiaries. Since this was only a jurisdictional hearing the court did not give a final verdict in regards to the parent's duty of care. However, the court did establish that duty of care can be extended to cover third-parties affected by subsidiaries' operations, not only employees.[47]

The acceptance of claims from third parties claiming duty of care has occurred before, however none has yet been successful[48], and that the court explicitly confirmed that third-party claims are legitimate is new. It demonstrates the way that corporate liability concerning human rights violations is developing and how it might have implications for future third-party plaintiffs.[49]

Courts establishing liability based on duty of care has paved way for victims whom were not able to pierce the corporate veil. The approach is however limited since the liability is still derived from the direct actions of the parent and can not be based merely on the actions of the subsidiary. The approach can therefore not address situations where a close relationship between the parent and the subsidiary can not be proven, which is a big obstacle for victims to overcome.[50]

3.3 Due diligence

The due diligence approach requires the parent corporation to monitor the activities of the subsidiary to ensure that human rights are respected and upheld. The due diligence approach usually requires corporations to identify and assess risks in their operations and supply chains, make a plan and allocate resources in order to prevent risks from materializing and to be transparent concerning how they go about their due diligence.[51] The approach is widely

[45] Longowe v Vedanta (2017) para 20-21 & 79
[46] Business & Human Rights Resource Centre *Quarterly Bulletin, Issue 28, September 2018*
[47] Longowe v Vedanta (2017) para 83(6)
[48] Longowe v Vedanta (2017) para 88
[49] Holly 2017
[50] Chandler v Cape Plc (2012) para 61 & 62; Hannigan 2006, p. 70; Skinner 2015 (ICAR), p. 14; Zerk 2013, p. 44
[51] European Coalition for Corporate Justice, information video: *Putting Human Rights Due Diligence into Law*

recommended in the discussions concerning legislation for liability for corporations, both the OECD Guidelines on Multinational Enterprises[52] and the United Nations Guiding Principles on Business and Human Rights (UNGPs)[53] advocates for due diligence obligations for corporations.

A benefit of this approach is that it incentivises parent corporations to monitor subsidiaries. But it can also cause them to merely go through the motions in order to clear themselves of guilt. It is also unclear how much due diligence is sufficient for a parent corporation to have fulfilled its duties. This causes issues when a subsidiary still causes harm but because of due diligence measures the parent is not held liable and the victims stand without compensation.[54]

Even though this approach is required according to the UNGPs very few corporations practice due diligence since it is not a binding rule, merely a recommendation. However, this approach has inspired domestic legislation efforts which might clarify the specifics of what is required from a corporation. These laws which will be reviewed more in detail further on in the paper.

3.4 Liability without culpability is not new

A large barrier for victims seeking remedies from MNCs, as seen in the presented court cases, is the difficulties in linking the harm to the faulty actions of the parent. It is therefore interesting to look at strict liability which is a doctrine within tort law where a party can be considered responsible for damages without the other party having to prove culpability. Strict liability is a way to discourage irresponsible behaviour of a corporation and protect potential victims. Examples of areas where strict liability is placed on a corporation is liability for defect products, responsibility when engaging in abnormally dangerous activities and liability for the acts of its employees when acting within the scope of the employment.

For this paper, it is interesting to look closer at strict liability for abnormally dangerous activities. Typically, an activity is considered abnormally dangerous if it involves a substantial risk of

[52] OECD Guidelines available at: http://www.oecd.org/daf/inv/mne/48004323.pdf
[53] UNGPs available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[54] Skinner (ICAR) 2015, p. 17-18

harming an individual or property or if it could not be performed without risk of causing serious harm regardless of precautions.[55]

When looking at the extent of the harm caused due to MNCs' operations, in developing nations in particular, it does not seem unreasonable that these activities should be considered abnormally dangerous activities. The activities are not always dangerous in themselves, but the circumstances in which they are performed makes them extremely risk filled. Strict liability is also being used in situations when it is difficult to attribute fault within large corporate structures. This is also a common barrier in the area of MNCs and human rights violations which could be an argument for imposing stricter rules of liability for these types of situations. When looking at MNCs overseas from this perspective strict liability does not seem too unreasonable.

4 Regulatory efforts on limited liability

4.1 International instruments

The two main international instruments covering the topic of corporations and human rights are the UNGPs[56] and the OECD Guidelines for Multinational Enterprises[57]. Both these are soft law initiatives without binding legal obligations but are important since they have set standards for business behaviour worldwide and have been foundational for domestic binding legislation in Europe concerning corporations and human rights.

Both instruments support a human rights due diligence approach where corporations' responsibility to respect human rights requires them to identify, prevent, mitigate and account for how they address actual and potential harmful impacts.[58] The human rights covered in these guidelines are the internationally recognized human rights such as the International Bill of Rights and the fundamental rights in the International Labour Organization's Declaration on

[55] Skinner (ICAR) 2015, p. 27
[56] UNGPs available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[57] OECD Guidelines available at: http://www.oecd.org/daf/inv/mne/48004323.pdf
[58] UNGP principles 13, 15-21; OECD Guidelines ch IV para 1-6, commentary para 15

Fundamental Principles and Rights at Work.[59] If the parent corporation is directly involved either by causing or contributing to serious human rights harm they have an obligation to cease or prevent the impact and in addition use its leverage over the subsidiary or supplier to mitigate impacts. If harm is linked to business operations of a subsidiary or supplier, but not directly linked to the parent corporation, the action plan is more complicated and is based on the leverage which the parent has over the subsidiary or supplier.[60]

The UNGPs do not recommend specific domestic legislation in order to hold corporations liable in regards to human rights although they do recommend that laws with that purpose are created and implemented.[61] Concerning remedies, businesses are responsible for cooperating in making it possible for victims to receive compensation, weather the compensation comes directly from the parent corporation or from someone else considered liable.[62]
Neither the UNGPs nor the OECD Guidelines specify when a parent corporation should pay compensation for harm caused through its subsidiaries or supplies overseas.

4.2 Domestic legislation

Since the UNGPs were adopted by the Human Rights Council in 2011 several states have begun to develop National Actions Plans addressing corporation's human rights responsibilities and some states have gone even further and passed legislation inspired by the UNGPs.[63] Two states, France and Switzerland, have created legislation covering all types of business operations and sectors. Other states whom have created similar legislation regulating corporate liability and human rights abuses, do not cover all types of business operations and do not directly deal with the issue of overcoming limited liability, despite imposing due diligence. Examples of that is the United States which has passed Section 307 of the Tariff Act 1930 which prohibits companies

[59] UNGP principle 12; OECD Guidelines ch IV commentary para 39
[60] UNGP principle 19 commentary; OECD Guidelines ch II para A12, 14 & 22
[61] UNGP principles 3a & 3b
[62] UNGP principle 22
[63] Skinner & McCorquodale & De Schutter 2013, p. 31

from importing products produced by forced labour, and Section 1502 of the Dodd-Frank Act which requires reporting on due diligence measures in regards to conflict minerals.[64]

4.2.1 France

In March 2017 France passed new legislation called the Corporate Duty of Vigilance Law under which large companies are required to create a so called vigilance plan. The plan should identify and rank risks, include procedures to assess subsidiaries, subcontractors and suppliers and establish proper actions to prevent risks. It must also include an alert mechanism and a monitoring scheme in order to evaluate efficiency of the implemented actions. This plan must be published each fiscal year in the company's annual report and companies are required to fully comply by the law by 2019.[65]

The vigilance plan must cover gross violations of human rights, infringements of fundamental freedoms, serious bodily injury, health risks, and environmental damages resulting directly or indirectly from the parent's activities and those of its business relations. The term business relations refers to a very broad scope, covering the whole supply chain including both direct and indirect subsidiaries as well as subcontractors and suppliers with which the parent corporation have established commercial relationships with. The definition of an established commercial relationship is taken from French law and means a stable, regular commercial relationship, taking place with or without a contract under a reasonable expectation that the relationship will last.[66]

If harm occurs the parent corporation will be held liable if the harm can be linked to their failure to comply with their vigilance duties under the new law, and will be required to compensate for any harm that an adequate vigilance plan would have avoided.
This means that victims can seek remedies based on the parent corporation's negligence and does not have as heavy of a burden of proof as previously. However, the burden of proof still lies with

[64] Skinner (ICAR) 2015, p.12; Business & Human Rights Resource Centre, Key Developments, http://www.bhrinlaw.org/key-developments/70-united-states)
[65] French Duty of Vigilance Law, art. L. 225-102-4; Business & Human Rights Resource Centre, Key Developments, http://www.bhrinlaw.org/key-developments/69-france#Devoir%20de%20vigilance
[66] French Duty of Vigilance Law, art. L. 225-102-4; Cossart; 2017, p. 320-321; Business & Human Rights Resource Centre, Key Developments, http://www.bhrinlaw.org/key-developments/69-france#Devoir%20de%20vigilance

the injured who will need to show that the corporation's failure to create a sufficient vigilance plan or failure to follow that plan is what led to the harm.[67] In an earlier draft of the law a reversed burden of proof was included with a presumption of the parent corporation's responsibility, but that part of the legislation did not make it through the French Parliament.[68]

Positive aspects in the law is that it covers a broad scope of human rights violations and will hopefully create incentives for corporations to prevent these from occurring. It will also empower affected individuals and communities to hold corporations accountable by making it easier for them to link the harm to the parent corporation due to a faulty vigilance plan.[69]

During debates before the law was passed, opponents argued that the law is too vague and that the proposed liability regime violates the requirement of personal liability and the prohibition of third-party standing. Since a parent corporation can be held liable for an act of a separate entity they argued that the law would create vicarious liability. The Constitutional Council met these arguments by saying that the basis for civil liability, torts and negligence in themselves are very broad and unspecific, and pointed to the importance of applying general civil liability principles without being hindered by the corporate veil.[70]

4.2.2 Switzerland

Although still under debate, it seems like Switzerland is about to approve new legislation through the so called Responsible Business Initiative (RBI). The proposed law is a popular initiative launched by the Swiss Coalition for Corporate Justice, a coalition of 85 civil society organisations, and is based on the UNGPs.[71]

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[67] Cossart, 2017, p. 321.
[68] Business & Human Rights Resource Centre, Key Developments, http://www.bhrinlaw.org/key-developments/69-france#Devoir%20de%20vigilance
[69] Cossart, 2017, p. 320; European Coalition for Corporate Justice 2017, *The French Duty of Vigilance Law - Frequently Asked Questions*; The French Duty of Vigilance Law LAW n° 2017-399 of March 27th, 2017 (English Translation) available at: http://www.bhrinlaw.org/law-duty-of-vigilance-2-versions-en-october-2018.pdf; Mares (in Deva & Bilchitz) 2017, p. 280; Business & Human Rights Resource Centre, Key Developments, http://www.bhrinlaw.org/key-developments/69-france#fr
[70] Cossart 2017, p. 322
[71] Swiss Coalition for Corporate Justice. Details about the initiative, https://corporatejustice.ch/about-the-initiative/

In Switzerland citizens are able to request amendments to the Federal Constitution and in order to submit a proposal to the Federal Council the initiative needs to collect 100 000 signatures (from people with voting rights) in 18 months. If the initiative passes through the Federal Council and the Parliament it will be put to a popular vote.[72] The RBI collected 120 000 signatures within 12 months and has now lead to a binding referendum. The proposal has made it through several governmental committees and a concrete legal proposal, which is a compromise between the initiators, Parliament and economists, has been presented by the Legal Affairs Committee. This proposal was approved in June 2018 by the National Council (one of the chambers in Parliament) and is about to be voted on in the Second Chamber of Parliament. If approved it will add an article on "Responsibility of Business" to the Swiss Constitution.[73]

With inspiration from the UNGPs the legislation imposes mandatory human rights due diligence in order to regulate corporate liability. The due diligence obligation will have three key requirements: identifying and assessing risks, preventing or ceasing existing violations and account for actions taken.[74] The duties apply to controlled subsidiaries and other business relationships and the scope covers all human rights obligations as defined in the UNGPs, International Bill of Rights and ILOs core Conventions.[75] Whether a subsidiary is controlled by the parent corporation will be determined according to factual circumstances such as legal, economic or through the exercise of power in the business relationship.

The unique part about the Swiss initiative is that it establishes specifics for when parent corporations can be held liable for harm *caused by others*, meaning that the harm does not have to be directly linked to the fault of the parent corporation.[76] The article establishing this (article 101a(2)(c)) covers subsidiaries and suppliers which the parent corporation exclusively control, but not all businesses to which the parent owes due diligence towards. To hold a parent liable for

[72] Swiss Coalition for Corporate Justice. Details about the initiative, https://corporatejustice.ch/about-the-initiative/
[73] Business & Human Rights in Law. *Key Developments in Switzerland*, http://www.bhrinlaw.org/key-developments/64-switzerland#RBI
[74] Article 101a(2)(b) in the initiative text, https://corporatejustice.ch/wp-content/uploads//2018/06/KVI_Factsheet_5_E.pdf
[75] Article 101a(2)(c) in the initiative text, https://corporatejustice.ch/wp-content/uploads//2018/06/KVI_Factsheet_5_E.pdf
[76] Article 101a(2)(c) in the initiative text, https://corporatejustice.ch/wp-content/uploads//2018/06/KVI_Factsheet_5_E.pdf

the actions *of another* the plaintiffs still will have to show damage, its unlawfulness and sufficient causal relationship between the harm and the subsidiary's action or inaction. Once this is proven the burden of proof is reversed on to the parent corporation whom will be held responsible for the violations unless it can prove that it took all due care, meaning that it is not up to the plaintiff to prove negligence.[77]

By most accounts the Swiss proposal is very similar to the French law, but since article 101a(2)(c) explicitly established liability for the *acts of others* and reverses the burden of proof, the Swiss approach creates solutions for the issue of limited liability which goes one step further than the French law.

5 Discussion and analysis

By moving away from piercing the veil as the only option to impose liability on parent corporations and establishing parental duty of care, common law systems have provided victims some relief when trying to seek compensation. The prerequisites needed in order to show close proximity between a subsidiary and a parent and establishing duty of care is still very difficult to overcome. In some cases the circumstances do measure up to the prerequisites in reality but the plaintiffs are not able to prove it in court since the burden of proof is too heavy, especially for communities and people with very limited resources. Other times the facts of the case do not meet the criteria of duty of care or veil piercing but the circumstances of the human rights violations still calls for responsibility to be demanded from the parent corporation.

This shows that the prerequisites and approaches developed in case law allowing plaintiffs to overcome limited liability have not caught up with the reality of how MNCs are structured and operate in high risk areas. Since the burden of proof is high, the application in court is unpredictable, and the prerequisites do not cover the needed range of circumstances the developments in case law have not been sufficient for victims of corporate human rights abuses.

[77] Bueno 2018, p. 13; Article 101a(2)(c) in the initiative text, https://corporatejustice.ch/wp-content/uploads//2018/06/KVI_Factsheet_5_E.pdf

The recent legislation in France and the proposed law in Switzerland will most likely help with the issue of predictability, clarity and burden of proof. By creating due diligence plans, and executing them well, corporations will have better understanding of the risks of their operations, how far their responsibility stretches and be able to act appropriately if harm does occur. It might also provide relief for plaintiffs when trying to prove negligence as they can refer to the due diligence plan.
However, there is always the risk that corporations only go through the motions and create due diligence plans merely to protect themselves from future liability and not to invest in preventing harm. It also seems likely that the main benefit of the laws is that they create incentives to prevent human rights violations rather than dealing with compensation for victims if harm does occur.

Therefore, the most effective tool in overcoming the barriers of limited liability is article 101a(2)(c) in the Swiss proposal. Since it introduces specific liability standards for harm *caused by others* it removes the burden of proof having to link the harm to the actions of the parent itself either through direct liability or through showing that the parent corporation failed to comply with its due diligence towards the subsidiary. This is a huge step and overthrowing the presumption that a parent is not liable, unless very specific circumstances can be proven, questions the whole idea of separate legal entities as an absolute rule in corporate law.

If parent corporations having operations in high risk areas had a presumption of liability for human rights violations the access to compensation for victims would increase since the obstacle of linking the harm to the actions or omissions of parent corporation would not be an issue.
Imposing stricter forms of liability through presumption of parental liability in certain situations is not unreasonable considering there are areas of law which do require responsibility without proving culpability. The circumstances and risks surrounding MNCs' operations in high risk could be comparable to other highly dangerous activities creating grounds for increased responsibility. If doing so there must be clarity on what types of violations the presumption would cover and in what types of circumstances makes an operation high risk.

5.1 Final conclusions

If clarity is brought, both to corporations and to victims, on when parental liability can be imposed much is gained. At the moment overcoming liability is very unpredictable leaving corporations in the dark on what is expected of them and leaving victims without compensation when harm occurs. Developments through case law have not been sufficient in creating pathways for victims to receive remedies even when the circumstances call for it from a human rights perspective. Legislative developments in France and Switzerland will help bring clarity, predictability and hopefully more success for plaintiffs trying to obtain compensation from parent corporations. The fact that the Swiss proposal also explicitly points to when a parent needs to resume liability for the actions of others will increase that possibility even more.

Reversing the burden of proof on to the parent corporation challenges the deeply imbedded presumption in corporate law that parent corporations should not be held responsible for subsidiaries overseas. If this presumption can be broken corporations would invest more into preventing human rights abuses and victims would not be left without compensation.

By limited liability being applied on the scale that it is today problems with accountability, predictability and access to justice has been created. Being considered a separate legal entity from one's subsidiaries is not an absolute right and considering the extent of damages that are caused to vulnerable populations it is time to correct this system where MNCs currently can operate without carrying the costs for human rights violations.

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