HUMAN RIGHTS LITIGATION AGAINST TRANSNATIONAL CORPORATIONS IN THEIR HOME STATES: A PROPOSED REVISION OF THE BUSINESS AND HUMAN RIGHTS TREATY

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ABSTRACT

Where can victims of human rights violations caused by transnational corporations (TNCs) sue the corporations for damages? This Note examines the current options of suing in (1) the host state, where the alleged violations occurred, (2) the home state, where the parent company of the TNC is domiciled, and (3) a third-party state, and argues that suing in the home state is the most viable option in future litigation. To litigate in the home state (a parent company's domicile), plaintiffs need to overcome the barriers posed by the doctrine of separate legal personality of the parent and the subsidiary. This Note examines the four legal theories under which a parent company may be held liable for an overseas subsidiary's wrongful activities.

Recognizing the need to, among other things, provide adequate forums for victims of corporate human rights abuses to seek remedies, the United Nations started the drafting process of a binding treaty aimed to increase access to effective remedies for victims of corporate abuses and ensure accountability for such abuses. This Note explores how the draft treaty, specifically the Third Revised Draft, addresses the question of parent-subsidiary liability. This Note further argues that the relevant provision that addresses transnational corporate liability contains legal uncertainty that may pose immense hardship for victims to obtain remedy and allow disparity in how domestic court systems address the problem of transnational liability. Finally, this Note proposes revisions to the binding treaty in draft to address its shortcomings, clarify the legal theories recognized under the treaty, and incorporate a quasi-strict liability regime.

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I. INTRODUCTION

In the 1950s, Royal Dutch Shell (Shell Parent or Shell), an oil and gas company based in the Netherlands, discovered oil reserves in the Niger Delta in Nigeria.[1] To exploit these resources, Shell established a group of subsidiaries, including Shell Petroleum Development Company of Nigeria (Shell Nigeria).[2] The discovery led to the development of an oil industry that, by 2000, accounted for 40% of Nigeria's GDP.[3] However, due to lax regulation and widespread corruption, pipelines and infrastructure were inadequately maintained.[4] Since the oil discovery, thousands of oil spills have occurred in the Niger Delta region, contaminating farmland and water, and costing many local residents their livelihoods.[5]

The pollution prompted local communities to protest Shell Nigeria's oil extraction activities and the detrimental environmental impact on their lives.[6] With the oil company's encouragement and material support, the Nigeria military conducted a brutal campaign to silence the

1. *See* Jess Craig, *The Village That Stood Up to Big Oil – and Won*, GUARDIAN (June 1, 2022), https://www.theguardian.com/environment/ng-interactive/2022/jun/01/oil-pollution-spill-nigeria-shell-lawsuit. This scenario is based on the alleged human rights violations committed by Royal Dutch Petroleum, presently Shell plc, as part of its oil drilling activities in the Niger Delta region; several cases related to the incidents were filed in the federal courts of United States and was heard and ultimately decided in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

protests and uprisings against oil pollution.[7] To quell unrest and facilitate the company's expansion, the Nigerian government carried out scorched-earth operations on local villages, burning down homes, killing hundreds of villagers, and displacing tens of thousands of people.[8] Concurrently, nine human rights activists were tried and executed for their protests against the oil spills.[9]

Where could the local residents seek appropriate compensation against Shell Nigeria for their harmful activities and involvement in violent suppression? This Note explores the answer to this question from the perspective of the victims harmed by a TNC's activities in a developing country. In Part II, this Note examines the feasibility of the current avenues for victims of human rights violations to bring suit against TNCs to hold them accountable for the harm caused by their business activities. This Note concludes that future litigation will flock to the home-state fora where the TNCs are domiciled. Part III of this Note illustrates the barriers that may bar legitimate claims from the home-state forum and introduces the different liability theories that have been used to overcome the barriers. In Part IV, this Note argues that a multilateral approach is necessary to encourage further development of corporate human rights litigation and avoid a race to the bottom among countries to deregulate their national corporations. In Part V, this Note examines how the issue of TNC liability is addressed in recent drafts of the Business and Human Rights Treaty (named the Legally Binding Instrument to Regulate, in International law, the Activities of Transnational Corporations and Other Business Enterprises), which is under negotiation in a United Nations working group.[10] Part VI

7. *See Investigate Shell for Complicity in Murder, Rape and Torture,* AMNESTY INT'L (Nov. 28, 2017), https://www.amnesty.org/en/latest/press-release/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/.

8. *See generally* Kiobel v. Royal Dutch Petrol. Co., No. 02 Civ. 7618 (KMW) (HBP), 2004 U.S. Dist. LEXIS 28813 (S.D.N.Y. Mar. 11, 2004).

9. *See Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni Nine as Writ Served in Dutch Court*, AMNESTY INT'L (June 29, 2017), https://www.amnesty.org/en/latest/press-release/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court ("Oil giant Shell stands accused of complicity in the unlawful arrest, detention and execution of nine men who were hanged by Nigeria's military government in the 1990s[.]").

10. *Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUM. RTS. COUNCIL, https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc (last visited Aug. 1, 2024); OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP (OEIGWG), UPDATED DRAFT LEGALLY BINDING INSTRUMENT (CLEAN VERSION) TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES art. 8 (July 2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf [hereinafter UPDATED DRAFT]; OEIGWG, LEGALLY BINDING INSTRUMENT TO REGULATE, IN

proposes a revised approach that would provide a more effective mechanism for victims of human rights abuses to establish their claims.

This Note does not comment on the separate topic of substantive human rights doctrine, i.e., what kind of business practices or actions constitute business human rights violations. This Note instead focuses on litigation because it is a key component in the "remedy" aspect of the business and human rights framework. It does not mean to say that litigation should be the primary means of ensuring human rights-conscious business practices.[11] It does not intend to cast a negative light on all overseas corporate investments, implying that TNCs are all potential human rights abusers. Indeed, some companies have voluntarily implemented human rights due diligence policies even absent mandatory regulations (although the overall level of implementation is low).[12] Rather, this Note argues that any foreign investments and transnational business practices should be built on a system that will hold the wrongdoers accountable and entitle victims to remedy.

II. CURRENT VENUES

This Part examines the feasibility of venues for victims to bring suit against TNCs. Victims may choose to pursue legal action in three main types of venues: (1) the host state where the alleged violations occurred, (2) the home state where the parent company of the TNC is domiciled, and (3) a third-party state.[13]

A. *Forum in the Host State*

The first venue that comes to mind is the state where the alleged violations occurred; in the opening scenario, the state would be Nigeria.

INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES: THIRD REVISED DRAFT art. 6 & art. 8 (Aug. 17, 2021), https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf [hereinafter THIRD REVISED DRAFT].

11. For example, many states are onboard to create their own national plans to protect human rights in businesses. *See* Working Group on Business and Human Rights, *National Action Plans on Business and Human Rights*, OFF. OF THE HIGH COMM'R FOR HUM. RTS. (last visited Mar. 14, 2024), https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights.

12. OWAIN JOHNSTONE & OLIVIA HESKETH, POLICY BRIEF: EFFECTIVENESS OF MANDATORY HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE 6 (May 2022), https://modernslaverypec.org/assets/downloads/mHREDD_briefing_FINAL.pdf.

13. Currently no international forum exists to hear complaints of human rights violations committed by corporations. For discussion on the possibility of an international court on business and human rights, see generally Luis Gallegos & Daniel Uribe, *The Next Step against Corporate Impunity: A World Court on Business and Human Rights?*, 57 HARV. INT'L L.J. 7 (2016), https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/Gallegos-Uribe_0615.pdf.

Intuitively, this is the most convenient forum for filing a lawsuit. Investigations can be conducted locally, the suit is adjudicated in a forum familiar to the victims and their counsel, local domestic courts have clear prescriptive and adjudicative jurisdiction over the case, and theoretically, a local proceeding likely puts the most pressure on the local government to take action.

However, this option is often inadequate. In the present scenario, as in many others, the dispute cannot be heard in the state where the violations occurred because the state itself is the direct aggressor.[14] For a state court system to hear a case whose compensation award depends on finding wrongdoing by state-employed security forces, a high degree of judicial independence is required.[15] At the very least, the degree of judicial independence should be such that the government would not automatically be immune from the suit. Such independence is likely lacking in developing countries where similar scenarios would occur.[16] The concern of corruption is also significant when defendants may bribe or coerce an outcome in the state court system.

In the present scenario, it is not hard to see why the government of Nigeria may be unable or unwilling to let the suit proceed in the courts of Nigeria because of the state's complicity in the violations. As the Second Circuit Court of Appeals recognized in *Wiwa v. Royal Dutch Petroleum Company*, victims of human rights abuses most likely cannot sue in the host state where the human rights abuses occurred because the victims may be endangered merely by returning to the host state.[17]

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14. *See, e.g.*, Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88 (2d Cir. 2000). This is one of the cases brought in the U.S. courts for the killings committed by Nigerian forces related to suppression of protests against Niger Delta oil excavation.

15. *See* Christopher A. Whytock, *Foreign State Immunity and The Right to Court Access*, 93 B.U. L. REV. 2033, 2074–78 (2013) (finding that in more than half of cases in which access to U.S. courts is denied to plaintiffs on foreign-sovereign-immunity grounds, courts in foreign jurisdiction either lack judicial independence or are only partly independent, thus denial of U.S. court access is tantamount to denial meaningful court access altogether).

16. *See, e.g.*, Desirée LeClercq, *Nestlé United States, Inc. v. Doe. 141 S. Ct. 1931 (2021)*, 115 AM. J. INT'L L. 694, 694 (2021) (discussing that plaintiffs in *Nestlé* were motivated to file suit in the United States partly because "the Ivory Coast judicial system is notoriously corrupt"). In *Nestlé*, a group of Mali nationals brought a claim in the United States against Nestlé USA for its alleged action of aiding and abetting child slavery in Côte d'Ivoire. *See generally*, Nestlé USA, Inc. v. Doe, 593 U. S. 628 (2021).

17. *See, e.g.*, Wiwa, 226 F.3d at 106. While addressing a *forum non convenience* analysis, the court in *Wiwa* recognizes this rationale forms the basis for the enactment of the Torture Victim Protection Act and presents a strong policy argument for the court's receptivity of the suit. Although the *Wiwa* court discusses difficulties faced by victims of torture, the same difficulties like fear of persecution also confront victims of other types of human rights abuses.

Similarly, in *Cabiri v. Assasie-Gyimah*, the U.S. District Court for the Southern District of New York held that Ghana was an inadequate forum because the Ghanaian plaintiff feared persecution if he were to sue Ghanaian officials for torture in their courts.[18] In another case, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the court emphasized the danger victims confront when they seek redress in the state where the violations occurred.[19] The court stated that, in cases where the government directly participates in the alleged human rights violations, "it would be perverse, to say the least, to require plaintiffs to bring this suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them."[20]

In other circumstances, filing suit where the violations occurred may be difficult simply because the host state does not have a functional or reliable judicial system capable of handling complex and extensive cases, or does not provide sufficient remedies. For example, in the Bhopal disaster of 1984, an Indian subsidiary of the American company Union Carbide leaked more than forty tons of methyl isocyanate gas that spread across the city of Bhopal, killing thousands of residents and exposing over half a million people to the gas.[21] In the aftermath, it was hotly debated whether to bring the case in India or in the United States, with both the Indian government and the Chief Justice of the Supreme Court of India indicating a preference for the case to be tried in the United States.[22]

Later in the United States, a domestic court was asked to rule on a motion to send the case back to India on the basis of *forum non conveniens*.[23] The court was tasked with determining whether the Indian court system was sufficiently equipped to process the complex tort claims involved in the disaster.[24] The plaintiffs' expert witness expressed the

18. Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996).

19. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 336 (S.D.N.Y. 2003).

20. *Id.*

21. *See* Edward Broughton, *The Bhopal Disaster and Its Aftermath: A Review*, 4 ENV'T HEALTH art. 6 (2005).

22. *See In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842, 852 (S. D.N.Y. 1986) [hereinafter *Union Carbide District Case*]; 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, 206 (2014) ("the Chief Justice of the Supreme Court of India indicated that the victims' only chance for a remedy would be an action in the United States, given the serious backlog of cases in India and given that Indian legal commentators simply did not think the Indian courts could handle such a complex case.").

23. *Union Carbide District Case*, *supra* note 22, at 845.

24. *See generally In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F.2d 195, 198–99 (2d Cir. 1987).

view that justice would be denied if the case were transferred to India because the Indian courts lacked the necessary infrastructure, technology, and investigative tools to hear such a massive and complicated case, which would further burden a court already plagued by endemic delays.[25] The expert witness also pointed out that procedural rules in India unfairly disadvantaged plaintiffs in this case: Indian law did not provide for class action suits, had restrictive discovery rules, and allowed defendants to readily employ stalling tactics.[26]

Although Judge John F. Keenan in the Southern District of New York determined that India did provide an adequate platform, he acknowledged the shortcomings of legal actions in India.[27] He found the Indian courts adequate also because India was making an exception to accommodate the Bhopal litigation.[28] Judge Keenan reasoned that although delays are the norm in Indian courts, they would not be the norm in the Bhopal litigation, given that the Indian parliament responded to the disaster by passing the Bhopal Act, ensuring that the courts would resolve related suits "speedily, effectively, equitably and to the best advantage of the claimants."[29] Judge Keenan acknowledged the inadequacy of procedural rules in Indian courts, but he resolved this issue by stipulating that the American Federal Rules of Civil Procedure would be applied in the Indian courts for the ensuing litigation.[30]

The lack of success in cases that were returned to host states based on *forum non conveniens* illustrates the inadequacy of litigation in the host state. Past literature has shown that dismissals on *forum non conveniens* grounds often mark the end of the litigation.[31] The Bhopal Disaster litigation was one of the few exceptions where litigation resumed in the host state forum after being dismissed in a U.S. court and eventually led

25. *See* Jayanth K. Krishnan, *Bhopal in the Federal Courts: How Indian Victims Failed to Get Justice in the United States*, 72 RUTGERS U. L. REV. 705, 715–16 (2020) (quoting the affidavit of Marc S. Galanter in *Union Carbide District Case*, *supra* note 22).

26. *See id.* at 716 (quoting the affidavit of Marc S. Galanter in *Union Carbide District Case*, *supra* note 22).

27. *See Union Carbide District Case*, *supra* note 22, at 848–52.

28. *See id.* at 848.

29. *See id.* at 848.

30. *See id.* at 850.

31. *See* Nicholas A. Fromherz, *A Call for Stricter Appellate Review of Decisions on Forum Non Conveniens*, WASH. U. GLOB. STUD. L. REV. 527, 545 n. 88 (2012), https://openscholarship.wustl.edu/law_globalstudies/vol11/iss3/1 (listing various literature showing that most cases dismissed on forum non conveniens ground were not refiled in foreign courts).

to a monetary award for the victims.[32] This was likely the result of widespread support from lawyers and the Indian government.[33]

In summary, bringing suits in the host state where the alleged harm occurs is usually impractical due to corruption,[34] lack of judicial independence,[35] the risk of further persecution of the victim by the state,[36] and the absence of judicial sophistication necessary to handle a complicated case.[37] Given these hardships, victims have looked beyond the host state to find a forum that would hear their grievances; for some time, that forum was the United States.

B. *Forum in a Third-Party State*

Over the past few decades, the U.S. federal courts have become a popular venue for victims of corporate human rights abuse, thanks to a unique piece of legislation known as the Alien Tort Statute (ATS).[38] Originally included in the Judiciary Act of 1789, the ATS granted federal courts the ability to hear cases in which "an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[39] Initially, the ATS served to solidify national security by establishing a national forum for dispute resolution; not long after its inception, it practically disappeared from litigation and remained dormant for nearly 190 years.[40]

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32. *See* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 98 (2004) (noting that very few cases are litigated after being dismissed in the US on the basis of *forum non conveniens*). Five years after the disaster, Union Carbide Corp agreed to pay $470 million to the Indian government for distribution to claimants under the mediation of the Supreme Court of India as a full settlement. The sum was based on a contested estimate of only 3000 deaths and 102,000 permanent disabilities. Families of the deceased received an average of $2,200. *See* Broughton, *supra* note 21.

33. *See, e.g.*, Tim Covell, *The Bhopal Disaster Litigation: It's Not over Yet*, 16 N.C. J. INT'L L. 279, 281–93 (1991) (describing the government of India's involvement in the litigation); William Claiborne, *American Lawyers Flock to Bhopal—'Get Union Carbide' Is Their Slogan*, WASH. POST (Dec. 12, 1984), https://www.washingtonpost.com/archive/politics/1984/12/12/american-lawyers-flock-to-bhopal/c2f5482f-d81a-4ec6-8fcf-f0a9dd1ad607/.

34. *See* LeClercq, *supra* note 16, at 694.

35. *See* Whytock, *supra* note 15, at 2074–78.

36. Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996).

37. *See* Skinner, *supra* note 22, at 206.

38. *See* An Act to Establish the Judicial Courts United States, 1 Stat. 73, 77 (1789) [hereinafter Judiciary Act]; Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1646–47 (2014).

39. Judiciary Act, *supra* note 38, § 9.

40. *See* Lee, *supra* note 38; Jennifer J. Schaaf, *Semi-Sweet: How a 1789 Statute Protects Domestic "Big Chocolate" Against Corporate Liability in International Human Rights Claims*, 22 WAKE FOREST J. BUS. & INTELL. PROP. L. 100, 101 (2021).

The ATS reemerged as a tool for victims of international human rights violations to seek redress in U.S. courts after the Second Circuit's decision in *Filártiga v. Peña-Irala*.[41] In *Filártiga*, the court held that the ATS provided federal district court jurisdiction to adjudicate a suit brought by a Paraguayan national against a Paraguayan police officer for acts of torture and killings committed in Paraguay.[42] In the 40 years following the *Filártiga* decision, U.S. federal courts have attracted numerous human rights abuse lawsuits under the ATS, including high-profile cases involving TNCs as defendants.[43]

Despite the popularity of ATS litigation among international human rights litigators, the U.S. Supreme Court has maintained an obscure approach toward ATS litigation, never siding with a plaintiff on an ATS claim.[44] The role of the ATS as a conduit for human rights lawsuits against corporate defendants for abusive behaviors worldwide came to a halt after the Supreme Court substantially curtailed its applicability in the past decade.[45]

In *Sosa v. Alvarez-Machain*, the Court limited the types of actions that can be brought under the ATS to only those arising from "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[46] Expanding on this, in *Kiobel v. Royal Dutch Petroleum*, the Court held that there is a presumption against applying U.S. law to conduct in the territory of a foreign sovereign.[47] In the context of ATS claims, the claims must "touch and concern" the U.S. territory "with sufficient force to displace the presumption against extraterritorial application."[48] Moreover, the Court has further ruled in *Jesner v. Arab Bank* that "absent further action from Congress[,] it would be inappropriate for courts to extend ATS liability to foreign

41. *See generally* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

42. *See generally id.*

43. *See, e.g.*, Benjamin Estes, Note, *May the Fourth Be with You: Charting the Future of Corporate Liability Under the Alien Tort Statute After Jesner v. Arab Bank*, 2019 COLUM. BUS. L. REV. 1031, 1040 (2019) (stating that the Filártiga decision led a wave of litigation in which human rights advocates sued multinationals for their alleged abuses in their joint business ventures with host governments).

44. *See* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE (ATS): A PRIMER 22 (2018).

45. *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Kiobel v. Royal Dutch Petrol., 569 U.S. 108 (2013); Jesner v. Arab Bank, 584 U.S. 241 (2018); Nestlé USA v. Doe, 593 U.S. 628 (2021).

46. *See Sosa*, 542 U.S. at 725.

47. *Kiobel*, 569 U.S. at 124–25.

48. *Id.* at 125.

corporations."[49] In *Nestlé USA v. Doe*, the Court determined that a claim arising from child slave labor in Ivory Coast did not sufficiently touch and concern U.S. territory to displace the presumption against extraterritoriality and that a general allegation that the corporation makes "operational decisions" in the United States does not confer jurisdiction in federal courts.[50]

In effect, the U.S. Supreme Court has shut the door to most corporate abuse cases that have been brought under ATS because of the limitations on the cause of action, the touch-and-concern requirement, and the presumption against extraterritoriality.[51] As Professor William Aceves argues, the Supreme Court effectively revised the ATS into the following text:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of [a specific, universal, and obligatory norm of] the law of nations or a treaty of the United States [but only when the tort touches and concerns the United States with sufficient force to overcome the presumption against extraterritoriality] [and not when the violation is committed by a foreign state] [or when the violation is committed by a foreign corporation].[52]

The decline of the ATS in the United States has broader implications beyond the jurisdiction of U.S. federal courts. It highlights the general reluctance of states to hear cases as a third-party state or to accept a third-party state's jurisdiction over disputes arising from activities within their territory or involving their own nationals. Many Western governments, including Germany, the United Kingdom, the Netherlands, Australia, Switzerland, Canada, and the European Commission (on

49. *See Jesner*, 584 U.S. at 265.

50. *See Nestlé USA*, 593 U.S. at 631.

51. *See generally, Sosa*, 542 U.S. at 692–764; *Kiobel*, 569 U.S. at 108–140; *Jesner*, 584 U.S. at 241–324; *Nestlé USA*, 593 U.S. at 628–658.

52. William J. Aceves, *Nestlé & Cargill v. Doe Series: Judicial Activism, Corporate Exceptionalism, and the Puzzlement of Nestlé v. Doe*, JUST SEC. (Dec. 11, 2020), https://www.justsecurity.org/73794/nestle-cargill-v-doe-series-judicial-activism-corporate-exceptionalism-and-the-puzzlement-of-nestle-v-doe/ (brackets in original). *See also* Claire Bergeron et al., *Nestle USA Inc. v. Doe: Supreme Court Clarifies US Corporate Liability for Human Rights Violations Overseas*, JD SUPRA (June 25, 2021), https://www.jdsupra.com/legalnews/nestle-usa-inc-v-doe-supreme-court-7282305/ ("In a series of cases over the past two decades, the Court has gradually narrowed the ATS's scope without closing the door to claims altogether.").

behalf of the EU) have expressed opposition to ATS litigation.[53] Their views are articulated in the amicus briefs submitted in cases such as *Sosa*, *Kiobel*, and the Second Circuit court case *Presbyterian Church of Sudan v. Talisman*.[54]

Their criticisms focus on the extraterritorial application of ATS and the fact that ATS suits allow for universal jurisdiction in civil proceedings.[55] In the *Talisman* case, Canada's letter expressed concerns about the exercise of extraterritorial jurisdiction, stating that such jurisdiction "constitutes an infringement in the conduct of foreign relations by the Government of Canada" and "creates a 'chilling effect' on Canadian firms engaging in Sudan and the ability of the Canadian government to implement its foreign policy initiatives through the granting and denial of trade support services."[56]

The United Kingdom/Netherlands Brief in *Kiobel* argues that it would be inappropriate for the U.S. Supreme Court to create a new rule of corporate liability under so-called customary international law.[57] The brief argues that whether a norm of customary international law exists depends on whether there is a widespread and consistent practice

53. *See Kiobel*, 569 U.S. at 108–40; Brief for the Federal Republic of Germany as Amicus Curiae Supporting Respondents, Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2013) (No 10-1491) [hereinafter German *Kiobel* Brief]; Brief for the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae Supporting Respondents, Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108 (2013) (No 10-1491) [hereinafter UK/Netherlands *Kiobel* Brief]; *Sosa*, 542 U.S. at 692–764; Brief for European Commission as Amicus Curiae Supporting Neither Party, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339) [hereinafter European Commission *Sosa* Brief]; Brief for the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting Petitioner, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339) [hereinafter Australian, Swiss, UK *Sosa* Brief]; Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (dismissing on the ground of failure to establish purposeful complicity of the defendant in the human rights abuses), *cert. denied*, 562 U.S. 946. (2010); Diplomatic Note from the Embassy of Canada to the Department of State (described in Presbyterian Church of Sudan v. Talisman Energy Inc., No. 01 Civ.9882 (DLC), (2005) WL 2082846 (SDNY Aug. 30, 2005)) [hereinafter Canadian Talisman Diplomatic Note].

54. *See Kiobel*, 569 U.S. at 108–40; German *Kiobel* Brief, *supra* note 53; UK/Netherlands *Kiobel* Brief, *supra* note 53; *Sosa*, 542 U.S. at 692–764; European Commission *Sosa* Brief, *supra* note 53; Australian, Swiss, UK *Sosa* Brief, *supra* note 53; *Presbyterian Church of Sudan*, 582 F.3d at 244–68; Canadian Talisman Diplomatic Note, *supra* note 53.

55. *See, e.g.*, UK/Netherlands *Kiobel* Brief, *supra* note 53, at 2, 4; German *Kiobel* Brief, *supra* note 53, at 16; Australian, Swiss, UK *Sosa* Brief, *supra* note 53, at 3–10; European Commission *Sosa* Brief, *supra* note 53, at 12.

56. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ.9882(DLC), 2005 WL 2082846, at *1 (S.D.N.Y. Aug. 30, 2005).

57. Netherlands/UK *Kiobel* Brief, *supra* note 53, at 27.

of states (state practice) and the belief that compliance is obligatory (*opinio juris*).[58] Therefore, a domestic court should not be the one to make a unilateral ruling on how the question of corporate liability is answered by customary international law, especially when the question is subject to ongoing multilateral deliberation, such as within the U.N. Human Rights Council.[59] The German *Kiobel* brief objected to permitting the exercise of jurisdiction for claims without a specific nexus to the United States, claiming it would result in a legal and economic climate that would make it more difficult for corporations to engage in international business.[60]

The governments of Australia, Switzerland, and the United Kingdom filed amicus briefs in the *Sosa* case, expressing concern that U.S. courts essentially assert prescriptive jurisdiction over other countries by imposing their own version of "the law of nations."[61] The brief argues that ATS-created causes of action would fundamentally interfere with other nations' sovereignty, complicate international and local efforts to halt and punish human rights violations, and thereby weaken the "law of nations."[62] Furthermore, it would undermine political efforts to foster the development of the rule of law and good governance.[63]

In summary, regardless of the specific reasoning behind these Western governments' opposition to ATS jurisdiction in these cases, their stance conveys a clear message that they are opposed to having disputes connected to their territories being heard in a third-party state without a clear nexus. In other words, they are against "universal jurisdiction" in similar cases. The *Kiobel* Court duly noted these concerns and significantly limited the applicability of ATS cases.[64] The issue of diplomatic friction has been evident throughout the past decades and is apparent in many ATS decisions, demonstrating that the venue of a third-party state is widely unpopular.

C. *Forum in the Home State of the Parent Company*

Suing a responsible parent corporation in its home state is often the preferred option for victims of human rights abuses, as it offers several

58. *Id.* at 4.
59. *Id.* at 27.
60. German *Kiobel* Brief, *supra* note 53, at 16.
61. Swiss, AU, UK *Sosa* Brief, *supra* note 53, at 27.
62. *Id.*
63. *Id.*
64. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

advantages over pursuing legal action in the host state or a third-party state. For victims of the Niger Delta oil spills, this approach is particularly appealing, as it eliminates the need to risk further persecution by the State of Nigeria. In addition, the Netherlands is likely more willing to and capable of hearing the disputes.[65]

Compared to filing suit in a third-party state without a clear connection to the events in dispute, bringing suit in the home state of the parent company avoids the concerns of jurisdictional overreach and diplomatic friction that contributed to the decline of the ATS as a means for litigating corporate abuses. Even those state governments that have strongly opposed the application of excessive extraterritoriality have shown interest in allowing lawsuits for human rights violations against defendants domiciled within their territories.[66]

Given the practical difficulties of bringing suits in the host state and in a third-party state, suing a corporation in its home country is likely to become the primary option for foreign corporate liability suits going forward.[67] This approach not only ensures a more level playing field for

65. Indeed, the victims of Nigerian oil spills have obtained some remedy from the parent company Shell for their polluting activities. *See Shell to Pay 15 Mln Euros in Settlement over Nigerian Oil Spills*, REUTERS (Dec. 23, 2022), https://www.reuters.com/business/energy/shell-pay-15-mln-euros-settlement-over-nigerian-oil-spills-2022-12-23. *But see* Toby Sterling, *Dutch Court Rejects Suit of Nigerian Widows Against Shell*, REUTERS (Mar. 23, 2022), https://www.reuters.com/business/energy/dutch-court-rejects-suit-nigerian-widows-against-shell-2022-03-23 (holding evidence insufficient to establish that Shell paid witnesses to present false testimony in the trial that led to the men's execution in a suit accusing Shell of participating in the corruption of judicial proceedings that led to the execution of critics of Shell and the government of Nigeria).

66. On the support of the UK Government of these Guidelines, see FOREIGN AFF. COMM., THE FCO'S HUMAN RIGHTS WORK 2010-11, 2010-12, HC 964 ¶ 106 (U.K.) ("In the 2010 *FCO [Foreign and Commonwealth Office] Report*, the department said that it was 'keen' to see the HRC adopt the guidelines, and the Foreign Secretary welcomed the HRC's decision to do so." (internal marks omitted)). Several governmental bodies including France, Germany, and the European Union proposed or passed laws requiring companies to conduct human rights due diligence in their supply chains; the laws do not provide causes of actions for private parties to sue for damages, but it signals a commitment to the issue. *See* Samantha J. Rowe et al., *French Vigilance Law – Latest from the Paris Court*, DEBEVOISE & PLIMPTON (Aug. 10, 2023), https://www.debevoise.com/-/media/files/insights/publications/2023/08/10_french-vigilance-law-latest-from-the-paris.pdf; *The German Supply Chain Act Overview and the Practical Challenges for Companies*, NORTON ROSE FULBRIGHT (Mar. 2024), https://www.nortonrosefulbright.com/en/knowledge/publications/ff7c1d04/the-german-supply-chain-act; *EU Parliament Approves Supply Chain Law*, HUM. RTS. WATCH (April 24, 2024), https://www.hrw.org/news/2024/04/24/eu-parliament-approves-supply-chain-law.

67. *See, e.g.*, Christen L. Broecker, Note, *"Better the Devil You Know": Home State Approaches to Transnational Corporate Accountability*, 41 N.Y.U. J. INT'L L. & POL. 159, 178–87 (2008).

victims but also respects the sovereignty and judicial competence of the countries involved.[68]

III. LIABILITY DOCTRINES FOR THE PARENT COMPANY

While suing a corporation in its home state offers several advantages, it also has its challenges. One of the primary difficulties in holding a TNC accountable in its parent company's home state arises from the complexities of corporate structures. In situations like the Niger Delta case, TNCs often operate overseas through subsidiaries established in the host states and create layers of intermediaries to distance the business operations from both the host state subsidiary and the home state parent company.[69]

A parent company and a subsidiary are conventionally treated as separate legal entities, as per the doctrine of separate legal personality.[70] This means that a parent company is not automatically liable for the wrongdoings of its subsidiary, even if it owns the subsidiary entirely.[71] Parent companies are often insulated from liability for harm caused by subsidiaries and suppliers with the help of the corporate law concepts of corporate personality, limited liability, and the contractual nature of relationships with their suppliers.[72] As is often the case, the home-state parent company may be further distanced legally from the wrongdoings when the alleged violations are directly committed by other parties, be they state or non-state actors.

Currently, there are variations across legal systems in terms of how parent companies are held liable for torts committed by their subsidiaries. Generally, methods for holding parent companies responsible for harm can be divided into four categories: (1) direct liability theory; (2) corporate complicity theory; (3) vicarious liability theory; and (4) piercing the corporate veil theory. This Note will discuss each in turn.

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68. Of course, the Note does not propose that business human rights litigation *should* only be brought in the homes of transnational corporations, which are often industrialized nations. This is only to say that, given the practical reality facing human rights victims, home-state forums are the main battleground for business human rights litigation at present and in the near future.

69. *See* Anil Yilmaz Vastardis & Rachel Chambers, *Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty*? 67 INT'L & COMPAR. L. Q., 389, 389 (2018).

70. *See* JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARD A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES 37 (2014).

71. *See id.*

72. *See* Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. INT'L L.323, 329 (2021).

A. *Direct Liability Theory*

The direct liability theory posits that a parent company is liable for its negligent or wrongful actions that contribute to the harm caused by its subsidiary.[73] Lawsuits under the direct liability theory typically revolve around an alleged breach of the duty of care owed by the parent company to local communities concerning the risks of harm in their business operations.[74] The parent company must have played a direct role in causing the harm, such as by exercising control over the subsidiary's operations or providing negligent oversight.[75]

For instance, victims affected by Shell's Nigerian oil spills sought to hold both Shell Parent[76] and Shell Nigeria accountable for failing to exercise due care during their oil extraction operations in the Niger Delta.[77] Specifically, plaintiffs claimed that given the Shell Parent's knowledge of the risks and consequences of oil spills and its ability to exert influence and control over its subsidiary's local oil extraction operations, the parent company owed a duty of care to the local people.[78] They argued that Shell Parent breached this duty by failing to use its authority over the subsidiary company to prevent oil spills and mitigate the damages.[79]

Under the direct parent company liability theory, the duty of care a parent company owes often depends on its knowledge or constructive knowledge of the risks associated with its subsidiaries' harmful operations, as well as its actual control over those operations.[80] For example, in *Chandler v. Cape plc*, a U.K. appellate court set out the appropriate circumstances that form the basis of the parent's duty of care:

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73. *See* LIESBETH ENNEKING, FOREIGN DIRECT LIABILITY AND BEYOND - EXPLORING THE ROLE OF TORT LAW IN PROMOTING INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY AND ACCOUNTABILITY FOREIGN DIRECT LIABILITY AND BEYOND 172–73 (2012).

74. *See id.*

75. *See id.*

76. In 2022, the corporation moved its headquarters to London and changed its legal name to "Shell PLC." *See* Ron Bousso, *Royal Dutch No More - Shell Officially Changes Name*, REUTERS (Jan. 21, 2022), https://www.reuters.com/world/uk/shell-officially-drops-royal-dutch-name-2022-01-21/.

77. *See* ENNEKING, *supra* note 73, at 172. The Dutch appellate court eventually ordered Shell Nigeria to pay compensation for the oil spills; it further ruled that Dutch Shell has breached its duty of care and has to install a Leak Detection System in the pipelines. *See* Hof Haag 29 januari 2021, NJF 2021, 77 (Oguru/Shell Petrol. N.V.) (Neth.).

78. *See Shell Lawsuit (Re Oil Pollution in Nigeria)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-pollution-in-nigeria/ (last visited Apr. 21, 2024).

79. See Hof Haag 29 januari 2021, 77 (Oguru/Shell Petrol. N.V.) (Neth.).

80. *See* ENNEKING, *supra* note 73, at 172–73; Chandler v. Cape plc [2011] EWCA (Civ) 525 [65, 75] (appeal taken from EWHC (QB)) (U.K.).

> (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[81]

The U.K. Supreme Court has further clarified that a parent company does not automatically owe a duty of care to others for the activities of its subsidiaries.[82] Instead, whether the parent company incurs the duty of care under the direct liability doctrine "depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise, or advise the management of the relevant operations . . . of the subsidiary."[83]

In Canada, the Ontario Superior Court of Justice considered a similar direct liability claim based on the parent corporation's duty of care in *Choc v. Hudbay Minerals*.[84] The plaintiffs in *Choc*, Indigenous people in Guatemala, alleged that the security personnel working for Hudbay's local subsidiaries committed human rights abuses.[85] The plaintiffs brought the action against Hudbay, the Canadian parent company, for its negligence in failing to prevent the abuses connected to its subsidiaries, who were allegedly under the control and supervision of Hudbay.[86]

Ruling on an appeal of a motion to dismiss raised by the corporate defendants, the Ontario Superior Court allowed the direct negligence action against Hudbay to proceed.[87] The court ruled that the plaintiffs had sufficiently pleaded both the foreseeability and proximity necessary to establish the prima facie case of a novel duty of care claim like this.[88] The foreseeability test is met when "the harm complained of was the reasonably foreseeable consequence of the defendant's conduct."[89]

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81. Chandler v. Cape plc [2011] EWHC 951 (QB) at para. 80.

82. *See* Vedanta Resources PLC v. Lungowe [2019] UKSC 20 [49] (appeal taken from EWCA (Civ)).

83. *Id.*

84. *See* Choc v. Hudbay Mins. Inc. (2013), 116 O.R. 3d 674 (Ont. Can.).

85. *Id.* ¶ 4.

86. *Id.*

87. *See id.* ¶ 54, 75.

88. *See id.* ¶ 57, 65, 70.

89. *See id.* ¶ 65, 57.

The court ruled that the test was met because the alleged human rights abuses were reasonably foreseeable consequences of Hudbay's alleged authorization of its security personnel's use of force in response to peaceful opposition from the local community.[90]

The proximity test is met when "the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs."[91] The factors considered in the test of proximity include the "expectations, representations, reliance, and the property or other interests involved."[92] The court ruled that the test of proximity was met because, *inter alia*, the defendants made public representation about their relationship with the local community and its commitment to respecting human rights, and the defendants' mining projects clearly affected the plaintiffs' interest when the defendants' requested the forcible eviction of the plaintiffs.[93]

In essence, a parent company is considered to have breached its duty of care when (1) it incurs a duty of care toward the third parties because of its knowledge of the subsidiary's potentially harmful operations and its actual involvement in or control over those harmful operations;[94] and (2) it fails to exercise due care to prevent harm to third parties that it could have reasonably foreseen might arise as a result of those operations.[95]

This theory of parent company liability focuses on the parent's control over its subsidiary's harmful activities, rather than the parent company's control over the subsidiary itself. It is true that when a parent has actual control over its subsidiaries, it also has the ability to assert control over the activities of its subsidiaries. But, merely having the ability to assert control does not equate to actually exercising that ability, nor does it impose a duty on the parent to do so.[96] Nonetheless, the parent company's control over the subsidiary itself may give rise to liability under the vicarious/indirect liability theory, which is discussed in Section III.C.

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90. *See id.* ¶ 61.

91. *Id.* ¶ 66.

92. *Id.* ¶ 69.

93. *See id.*

94. ENNEKING, *supra* note 73, at 176.

95. *See id.*

96. *See* Vedanta Resources PLC v. Lungowe [2019] UKSC 20 [49] (appeal taken from EWCA (Civ)) (U.K.).

B. *Corporate Complicity Theory*

A related theory is the corporate complicity theory. Under this theory, a parent company can be held liable if it knowingly encouraged or facilitated the commission of harmful acts by its subsidiary.[97] The parent company's liability is based on its complicity in the actions of its subsidiary.[98]

Unlike the direct liability theory, corporate complicity liability does not require a showing that the parent corporation owes a duty of care to the plaintiffs.[99] Instead, corporate complicity liability is applied when the parent company is found to have intentionally or knowingly made a material contribution to the human rights violations committed by a local third party, often a state actor.[100] This theory is based on the well-established idea in criminal law that one is liable for "aiding and abetting," "engaging in a conspiracy," or "being an accessory" to a criminal activity.[101]

The application of this theory is most abundant in ATS cases. In *Talisman*, Talisman Energy, a Canadian oil company, was accused of aiding and abetting the government of Sudan in its genocide campaign to expand its oil drilling operations.[102] The *Talisman* court adopted a test for "attaching aiding and abetting" liability based on international criminal law, under which the plaintiffs must show that the company provided "substantial assistance" to the government of Sudan "with the purpose of facilitating the human rights abuses" to attach civil liability against Talisman Energy.[103]

Like the direct liability theory, the corporate complicity liability theory holds a parent company accountable for its own actions or omissions. The other two types of liability introduced below differ, as they impute liability to the parent company without fault on the part of the parent company, making them forms of strict liability.

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97. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258 (2d Cir. 2009).

98. *See* Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* 169 (Corp. Soc. Resp. Initiative Working Paper No. 59, 2010) [hereinafter Extraterritorial Jurisdiction Working Paper].

99. *Id.*

100. See *id.*

101. *Id.*; *see generally* Oona A. Hathaway et al., *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593 (2020).

102. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir 2009).

103. *See id.* at 248–49.

C. *Vicarious Liability*

Another type of parent company liability is vicarious liability. This theory holds that a parent company can be held liable for the wrongful acts of its subsidiary if it can be established that the parent company exercised significant control or supervision over the subsidiary, and the subsidiary acted as an agent of the parent company.[104] This theory posits that, just like a company may be held liable for what an employee does in the scope of the employment (as an agent of the company), a parent company should be held liable for what its subsidiary does on its behalf.[105]

An illustrative example of this theory can be found in another ATS case, *Bowoto v. ChevronTexaco Corp.*[106] Here, the plaintiffs were Nigerian citizens who had survived human rights violations perpetrated by the Nigerian military, which were supported by a Chevron subsidiary in Nigeria.[107] The court held that the U.S.-based parent companies, ChevronTexaco and Chevron Overseas Petroleum, Inc., could be held liable for the involvement in human rights abuses of their local subsidiary if the subsidiary's activities in dispute were commissioned as an agent of the parent company within the scope of that relationship.[108]

The *Bowoto* court paid particular attention to the parents' control over the local subsidiary when determining whether an agency relationship existed.[109] The court considered factors such as the degree and content of communications between the subsidiary and the parents.[110] In particular, it weighed the communications during the incidents at issue, the extent to which the parents set or participated in setting policy for the subsidiary, and the number of officers and directors shared between the subsidiary and the parents.[111]

D. *Veil-Piercing Theory*

Another type of parent liability is based on the doctrine of piercing the corporate veil, an exception to the principle of separate legal personality, the notion that a parent company and a subsidiary are

104. *See* Extraterritorial Jurisdiction Working Paper, *supra* note 98, at 170; ENNEKING, *supra* note 73, at 181.

105. *See* Extraterritorial Jurisdiction Working Paper, *supra* note 98, at 170.

106. Bowoto v. ChevronTexaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

107. *See Bowoto*, 312 F. Supp. 2d at 1233–34.

108. *See id.* at 1241–46.

109. *See id.*

110. *See id.*

111. *See id.* at 1243.

different legal entities.[112] This corporate doctrine allows the court to disregard the corporate personality and impute the subsidiary's liability to the parent when the parent company exercises a high degree of domination over the subsidiary, to the extent that the two cannot be distinguished from one another.[113]

One veil-piercing doctrine that has arisen in the foreign liability context is the "alter ego" doctrine. Under this doctrine, the parent company may be held liable for the actions of its subsidiary when (1) the unity of ownership and interest renders one the alter ego or a mere instrumentality of the other, and (2) recognizing the two as separate entities would lead to an inequitable result.[114] This theory has been asserted in parent corporation liability cases, but with limited success.[115]

IV. The Business and Human Rights Treaty

Although the current international legal landscape does provide some recourse for plaintiffs to sue corporations in their home states, countries may be reluctant to expand the doctrine of liability and scope of regulation because they worry that the burden on corporations puts their own corporations at a competitive disadvantage compared with corporations in other countries. While state governments have an interest in regulating human rights abuses to which their own corporations contribute, they are also concerned with their own economic interests. Proceedings against major corporations domiciled in their territory can be economically damaging—investors, customers, and employees may suffer—and states rightfully worry that their progressing commitment to corporate accountability will harm them economically.[116]

When relevant legal standards vary so widely across jurisdictions, the lack of a level playing field creates a real apprehension among lawmakers. For example, a French bill was introduced to allow French Courts to have jurisdiction over human rights abuses committed by a subsidiary of a French corporation overseas.[117] When the bill was

112. Enneking, *supra* note 73, at 181.

113. *See id.*

114. *See id.*

115. *See id.* at 183–84.

116. *See* Uta Kohl, *Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute*, 63 Int'l & Compar. L. Q. 665, 685 (2014).

117. *See* Vivian G. Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17 Chi. J. Int'l L. 403, 417 (2016); Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering

debated in the French Senate, some Senators raised the point that the law could pose a danger to French corporate profits and the national economy.[118] Some Senators were specifically concerned about the lack of a level playing field across the globe, asking why it is France, and only France, that must take the lead to provide a humanitarian solution to corporate human rights abuse to its own economic detriment.[119]

When companies domiciled in some jurisdictions face greater risks of being subject to civil suit than others, companies that feel commercially disadvantaged in this way may be encouraged to move their assets and domicile.[120] In turn, domestic lawmakers may be pressured to toughen the judicial hurdles for plaintiffs to bring their own companies to court, encouraging a race to the bottom for countries to change their laws and obtain advantages for companies domiciled in their territories.[121]

It was against this backdrop that the U.N. Human Rights Council adopted the *Guiding Principles on Business and Human Rights*, which established a framework for addressing human rights abuses in TNC business activities based on three pillars: protect, respect, and remedy.[122] Under the third pillar, the *Guiding Principles* ask states to provide access to remedy.[123] States are asked to remove legal barriers that may "prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy."[124] Such legal barriers exist "[w]here claimants face a denial of

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Companies] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 [hereinafter French Vigilance Law].

118. *See* Curran, *supra* note 117, at 417.

119. *See id.*

120. *See* JENNIFER A. ZERK, MULTINATIONAL AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 154 (2006) ("The apparent ease with which multinationals are able to relocate operations, coupled with the dependency of towns and regions on these companies for jobs and economic prosperity, can place home states in a poor bargaining position."). After its subsidiaries were ordered by the Hague Court of Appeal to pay damages for Niger Delta oil spills, Formerly Royal Dutch Shell PLC, now known as "Shell PLC," decided to move the company's headquarters to London from the Netherlands. This move came after its relations with the Government of Netherlands have become increasingly strained due to environmental concerns regarding the company's operations. *See* Laura Hurst, *Shell Investors Back Headquarters Move to U.K.*, BLOOMBERG (Dec. 10, 2021).

121. *See* ZERK, *supra* note 70, at 102.

122. John Ruggie (Special Representative of the Secretary-General on Business and Human Rights), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter Guiding Principles]; *see* Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011).

123. *See* Guiding Principles, *supra* note 122, ¶ 25.

124. *See id.* ¶ 26.

justice in a host State and cannot access home State courts regardless of the merits of the claim."[125] This commentary recognizes that when the host state outright denies justice for victims, as is often the case where the government of the host state is the aggressor, it is imperative for home states to provide a forum.

The *Guiding Principles* further recognizes that legal barriers barring legitimate business arise where "[t]he way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability."[126] The *Guiding Principles* acknowledge that the separate personalities of entities in a corporate group present difficulties to effective judicial remedies. The momentum gained by endorsing the *Guiding Principles* kick-started the process of negotiating a treaty on business and human rights.[127] On June 26, 2014, the U.N. Human Rights Council established an open-ended intergovernmental working group (the OEIGWG) with a mandate to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises[.]"[128] In 2018, the OEIGWG published the first official draft (Zero Draft) of the legally binding instrument.[129] It was named the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (the BHR Treaty).[130] A year later, in 2019, the OEIGWG published the revised draft (First Revised Draft),[131] and in 2021, the OEIGWG published the Third Revised Draft.[132] In July 2023, the OEIGWG published an updated draft.[133]

The BHR Treaty seeks to address the issue presented by attributing liability to corporate groups with separate legal identities for their

125. *See id.*

126. *See id.*

127. *See* Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L & COMPAR. L. Q., 789, 797 (2020).

128. *See* Human Rights Council Res., U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

129. OEIGWG, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Zero Draft* (July 16, 2018), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

130. *See id.*

131. OEIGWG, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Revised Draft* (July 16, 2019) [hereinafter *First Revised Draft*].

132. THIRD REVISED DRAFT, *supra* note 10.

133. UPDATED DRAFT, *supra* note 10.

parent-subsidiary relationships by incorporating certain provisions.[134] The provision most relevant to this Note's discussion is Article 8.6 of the Third Revised Draft of the BHR Treaty, which extends legal liability to corporations for human rights abuses committed by entities with whom they have business relationships.[135] The most recent updated draft published in July 2023 has significantly curtailed Article 8.6, leaving it without the legal standards necessary to create consistent law and outcomes across fora.[136] The language in the Third Revised Draft provides states with clearer guidance on the applicable legal standards for the question of parent-subsidiary liability in transnational litigation.[137] The provision in the Third Revised Draft reads:

> States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses, when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to take adequate measures to prevent the abuse.[138]

For purpose of illustration, this provision can be reworked into the following form:

> States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities (including those of transnational character) for their *failure to prevent* another legal or natural person with

134. *See* THIRD REVISED DRAFT, *supra* note 10, art. 8.

135. *Id.* art. 8.6.

136. Article 8.6 of the Updated Draft only states that "[e]ach State Party shall ensure that legal and natural persons held liable in accordance with this Article shall be subject to effective, proportionate, and dissuasive penalties or other sanctions." UPDATED DRAFT, *supra* note 10, art. 8.6. It is unclear why the Third Revised Draft's provision containing the relevant legal standards was omitted.

137. *See id.*

138. THIRD REVISED DRAFT, *supra* note 10, art. 8.6.

whom they have had a business relationship from *causing or contributing* to human rights abuses,
(A) when:
(1) the former *controls, manages or supervises*
(a) such *person* OR
(b) the relevant *activity* that *caused or contributed* to the human rights abuse,
OR
(2) should have *foreseen risks of human rights abuses*
(a) in the conduct of their business activities (including those of transnational character), OR
(b) in their business relationships,
(B) BUT failed to take adequate measures to prevent the abuse.[139]

The rewording does not revise the substance of the provision, but only reorganizes its phrases and clauses and labels them as elements for purpose of illustration. The next Part will examine, interpret, and critique the provision.

V. The Current Provision and Its Shortcomings

Unlike the *Guiding Principles*, which is intended as a soft law document without legally binding power,[140] the BHR Treaty, proposed as a "legally binding instrument," shall set out clear mandates for countries to extend liability to corporations.[141] In other words, it must have teeth. Because of the variations of legal systems, resources, and broader social circumstances across countries, the BHR Treaty would not create a one-size-fits-all tool and would conceivably be implemented differently in each country. Nonetheless, it should ensure that the provision is written

139. *See id.*

140. Guiding Principles, *supra* note 122, at 1, annex ("Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.").

141. Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument, A/HRC/31/50 ¶ 83 (Feb. 5, 2016), https://documents.un.org/doc/undoc/gen/g16/018/22/pdf/g1601822.pdf?token=xythHKOpn0WCIILUFa&fe=true ("Most delegations [to the working group] underlined that a future instrument should clearly set out the direct obligations of corporations to respect human rights.") [hereinafter First Session Report].

with the consummate level of legal certainty in order to fulfill its role of providing adequate access to remedy.[142] It should strive to create a level playing field for individual plaintiffs and corporate defendants to litigate their claims.[143] It should also create a level playing field among countries and corporations so that corporations may not evade liability by simply moving to a different domicile.[144]

As it stands in the Third Revised Draft, the liability provision, Article 8.6, falls short of its intended purpose. It lacks clarity on how the provision should be applied, fails to delineate the different types of imputed/parent liability actions that its member states could create, and fails to reflect the unique difficulties that arise in transnational litigation against a large corporation.

A. *Analysis of the Provision in the Third Revised Draft*

The test of legal liability contains two elements, (A) and (B). Element (A) provides the situations in which the parent company would incur a duty to be held accountable for its subsidiaries' human rights abuses.[145] Element (B) requires that liability is incurred when the parent company "failed to take adequate measures to prevent the abuse."[146]

Element (A) contains two prongs, (A)(1) ("the former controls, manages, or supervises . . .") and (A)(2) ("should have foreseen risks of human rights abuses").[147] The provision connected the two prongs with the disjunctive connective "or," meaning that the duty would be

142. *See id.* ¶¶ 98–105 (discussing the need for greater access to effective remedy).

143. *See* Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/34/47 ¶ 7 (Jan. 4, 2017) (clarifying that the objective of the drafting process is not to undermine host States or the business sector, but to level the playing field with regard to respect for human rights).

144. *See id.*; First Session Report, *supra* note 141, ¶ 46 ("Some panelists noted that an international binding instrument would benefit businesses as it would provide a set of minimum international standards for all transnational corporations, levelling the international playing field of their operations"); ZERK, *supra* note 120, at 154.

145. The original provision uses the broad, inclusive language "legal and/or natural persons" to refer to the business entity that the provision seeks to hold liable, and it refers to the business entity that is more directly involved in the human rights abuse as "another legal or natural person with whom they have had a business relationship[.]" *See* THIRD REVISED DRAFT, *supra* note 10. For the purpose of concision and illustration, "parent company" and "subsidiary" may be used to refer to the relevant entities because the paper is specifically concerned with a parent/subsidiary situation.

146. *Id.*

147. *Id.*

incurred if either prong is satisfied.[148] Prong (A)(1) further provides two ways to satisfy the prerequisites for liability.[149] One is when the parent company controls, manages, or supervises another legal or natural *person* that caused or contributed to the harmful activities under (A)(1)(a).[150] The other is when the parent controls, manages, or supervises the *relevant activity* that caused or contributed to the harmful activities under (A)(1)(b).[151]

Similarly, prong (A)(2) provides two more ways to satisfy the requisites.[152] One is when the parent company should have foreseen risks of human rights abuses in the conduct of its *business activities* under (A)(2)(a).[153] The other is when the parent company should have foreseen risks of human rights abuses in its business relationships with its subsidiaries and other parties under (A)(2)(b).[154]

B. *Lack of Clarity and Blurring of Liability Doctrines*

The language of prong (A)(1) presents the first instance of the provision's lack of clarity. The prong provides that the parent company incurs duty when it *controls, manages or supervises* another legal or natural person or the relevant activity, but it fails to define what constitutes "control," "manage," or "supervise" under the provision. Leaving these three terms undefined creates legal uncertainties in the implementation of the provision.[155]

The deficiency of prong (A)(1) is even more pronounced because its lack of clarity creates confusion by blurring the demarcation between direct liability and indirect vicarious liability. prong (A)(1) provides liability when:

> (1) the [parent company] controls, manages, or supervises
> (a) such person OR
> (b) the relevant activity
> that caused or contributed to the human rights abuse.

148. *Id.*
149. *See id.*
150. *Id.*
151. *See id.*
152. *See id.*
153. *Id.*
154. *See id.*
155. *See* Bueno & Bright, *supra* note 127, at 798–99 ("The criteria that should be used to establish this control or supervision are not further established, which is also a source of legal uncertainty.").

Although the section presents (A)(1)(a) and (A)(1)(b) as closely related parallels, they may represent two distinct theories of parent liability. As illustrated in Part III, liability based on the control of another *person* comes from an indirect vicarious liability theory; it is a form of strict liability claim that rests on the idea that when a parent corporation is in substantial control of its business affiliate, the business affiliate carries out its activities on behalf of and for the benefit of the parent as an agent. Therefore, when the agent's actions incur liability, such liability could rightly be imputed to the principal. It is a strict liability rule because a showing of fault on the part of the principal, the parent company, is not required.

Vicarious liability is different from liability based on the control, supervision, and management of the relevant *activity*. Liability based on the control of a *business activity* rests on the idea that when a parent corporation is substantially involved in the harmful activities of its subsidiary, it could have intervened at any point in the duration of the activities to prevent or reduce any damage to other parties. The degree to which the parent company takes over, intervenes in, controls, supervises, or advises the management of the relevant activities of the subsidiary creates a duty of care on the parent toward others who may be affected by the subsidiaries' activities.[156] The parent breaches its duty of care when it fails to intervene to prevent harm; it is directly at fault for the harm caused by the activity in which it takes a direct part.[157]

The reason for the confusion probably lies in the drafter's effort to expand the liability for parent companies. Article 6.6 in the First Revised Draft is an equivalent provision to Article 8.6 in the Third Revised Draft.[158] Article 6.6 of the First Revised Draft provides that the parent company may incur liability when it "sufficiently controls or supervises the relevant activity that caused the harm, or should have foreseen risks of human rights violations or abuses in the conduct of business activities[.]"[159] The First Revised Draft does not include liability based on the control of the *person* as provided by (A)(1)(b), and, thus, only provides actions based on direct liability.[160]

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156. *See* Chandler v. Cape plc [2011] EWCA (Civ) 525 [63] (appeal taken from EWHC (QB)) (U.K.); Vedanta Resources PLC v. Lungowe [2019] UKSC 20 [49] (appeal taken from EWCA (Civ)) (U.K.).

157. ENNEKING, *supra* note 73, at 237 (explaining that parent companies may incur direct liability for conduct of their subsidiaries toward third parties if the parent "fail to exercise sufficient care toward the interests of those third parties" or fail to "intervene on their behalf in the subsidiary's activities").

158. *See First Revised Draft*, *supra* note 131, art. 6.6; THIRD REVISED DRAFT, *supra* note 10, art. 8.6.

159. *See First Revised Draft*, *supra* note 131, art. 6.6.

160. *See id.*; ENNEKING, *supra* note 73, at 172–73.

Although Article 8.6 of the Third Revised Draft intends to expand the type of action allowed by attaching liability based on the control of *persons*, it may fail to serve its intended purpose because of the lack of clarity. Consider the scenario of the Nigerian oil spills. Because the terms "control," "manage," and "supervise" are undefined and the legal basis of the action is unclear, the plaintiffs are given no guidance on what they must show to raise a claim. Is it relevant to show that the local subsidiary was financially controlled by Shell Parent and that Shell Parent is dependent on the local subsidiary's profits? Is it relevant to show that Shell Parent and Shell Nigeria share half of their board members, and Shell Parent keeps close management of Shell Nigeria's personnel decisions? Under a vicarious liability theory, these questions are answered in the affirmative.

However, under a direct liability theory, a mere showing of the closeness of the relationship between the parent and the subsidiary would not be enough. Given how the provision is written, a domestic court may (reasonably) determine that "control," "manage," and "supervise" have the same meaning when applied to "person" and "activity."[161] Under this interpretation, in the Nigerian oil spills case, a court may require a showing that Shell Parent actually *exercises* its control over Shell Nigeria (subsidiary) *in* its harmful act of obtaining the Nigerian Military as security personnel, thereby directly engaging in the subsidiary's business activity.[162]

Given the distinct foundations of the two theories of liability, the language of the provision should reflect the distinction. When applied to a legal or natural *person*, the meaning of control should emphasize the extent to which the person under control, while causing or contributing to human rights abuses, acted as an *agent* for the controlling entity.[163] In this context, the focus is on the relationship between the controlling person and the controlled person. The language shall also reflect the strict liability nature of the action and may indicate that a showing of the parent's involvement in the specific harmful activity is relevant but not required.[164]

On the other hand, when control is applied to the *activity*, the interpretation should assess the extent to which the controlling person was involved in the operational aspects of the activities to such an extent

161. *See* THIRD REVISED DRAFT, *supra* note 10, art. 8.6.

162. *See* ENNEKING, *supra* note 73, at 171–72; Chandler v. Cape plc [2011] EWCA (Civ) 525 [71] (appeal taken from EWHC (QB)) (U.K.).

163. *See* ENNEKING, *supra* note 73, at 181.

164. *See id.*

that they could have readily prevented or mitigated the human rights abuses. Here, the emphasis lies on the controlling person's direct involvement in the activities that led to the human rights abuses and their potential influence in altering the course of those activities—or, in other words, their role in allowing the harmful activities to happen.[165] Instead of presenting "such person" and "the relevant activity" as a closely related pair, they should be listed separately, acknowledging their distinct theoretical foundations.

Another instance of lack of clarity rests in Element (B) of the provision, which states that there should be liability when the parent company "failed to take *adequate* measures to prevent the abuse."[166] However, the provision falls short of defining the word "adequate," creating legal uncertainty. Innovative plaintiff-side lawyers may conceivably argue that the fact that the human rights abuse occurred is sufficient to show that the measures taken were not "adequate." It is worth noting that Element (B) is also not included in the First Revised Draft,[167] so the addition of the Element is meant to create an additional pathway to meet the test of liability. However, without a clear definition of the word, any improbable interpretation may be fair game. Domestic courts may also determine whether the measures taken by the defendant corporations were "adequate" on a case-by-case basis, considering the specific factual circumstances of the human rights abuse and other relevant factors.

A reasonable interpretation may be that "adequate" measures have been taken when the parent company complied with the applicable human rights due diligence standards, which were required in Article 6.[168] This interpretation is consistent with the fact that the immediately following provision, Article 8.7, explains the relationship between human rights due diligence and liability for damages.[169] Article 8.7

165. *See id.* at 237–38.

166. THIRD REVISED DRAFT, *supra* note 10, art. 8.6.

167. *See First Revised Draft*, *supra* note 131, art. 6.6.

168. Article 6 of the Third Revised Draft (titled "Prevention") sets out the due diligence requirements. Article 6.3 states that business enterprises shall be required to "undertake human rights due diligence, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships[.]" *See* THIRD REVISED DRAFT, *supra* note 10, art. 6.3. Article 6.4 further states that the human rights measures taken shall include undertaking and publishing of impact assessments, integration of a gender perspective, consultations with relevant stakeholders whose human rights may be affected, consultation with indigenous peoples, reporting on non-financial matters, integration of human rights due diligence requirement in contracts, and due diligence measures in occupied or conflict-affected areas. *See id.* art. 6.4.

169. *See id.* art. 8.7.

provides that human rights due diligence "shall not automatically absolve" a business entity's liability for "causing or contributing to human rights abuses or failing to prevent such abuses[.]"[170] It further states that liability shall be determined "after an examination of compliance with applicable human rights due diligence standards."[171] Article 8.7, therefore, requires that a company may not escape liability under Article 8.6 by simply showing that it has a due diligence process in place and ensures that the human rights due diligence requirements in Article 6 are not merely a box-ticking exercise.[172]

Applying this interpretation, Element (B), by virtue of being an element of the test of liability, also serves as a mechanism to enforce the human rights due diligence standards required in Article 6.[173] Given this advantage, this is the definition of "adequate" that should be applied, and the language of the provision should clearly reflect this definition.

C. *Need for a Quasi-Strict Liability Regime*

The provision should also articulate a quasi-strict liability regime for corporate wrongdoings even when the parent company is not directly involved. Although this point has been mentioned above in section V.B, it deserves another section to address the necessity of a quasi-strict liability doctrine in the BHR Treaty by looking at the provision as a whole.

Article 8.6 of the Third Revised Draft is unclear on whether the parent company may be burdened with strict liability upon showing that its subsidiaries, under the parent's control, committed human rights abuse.[174] It is possible that a domestic court system could adopt a version that only provides direct liability actions, similar to traditional negligence liability. To illustrate, consider the textual language of the current version of Article 8.6: it provides that parent companies are liable for "their *failure to prevent* another legal or natural person with whom they have had a business relationship," and that liability is incurred when they fail to take "adequate measures to prevent the abuse."[175] Applying this textual language, the plaintiffs may be required to show that the parent (1) had the duty and opportunity to take

170. *Id.*
171. *Id.*
172. *See id.*; *see* Bueno & Bright, *supra* note 127, at 798.
173. *See* THIRD REVISED DRAFT, *supra* note 10, art. 6.
174. *Id.* art. 8.6.
175. *Id.*

measures to intervene in the subsidiaries' activities but (2) failed to do so, and (3) the failure caused the abuse.

The provision should incorporate a quasi-strict liability or vicarious liability action for three reasons. First, even though many human rights abuse cases may find a cause of action in tort law, a negligence-based standard does not reflect the qualitative difference between the commission of human rights abuses and the commission of negligent torts. Unlike negligent torts, violations of human rights are not just wrongs committed against individual victims, but also wrongs committed against the social order.[176] Unlike a breach of ordinary care standards in a conventional tort claim, a breach of human rights standards carries a much higher symbolic and social significance to the victims and society.[177]

Second, a fault-based regime puts plaintiffs at an unfair disadvantage given the practical difficulties of litigating against a transnational corporation.[178] Even if they are not litigating their claims in the host state, they have to investigate and collect evidence in the host state, where they are often faced with the danger of persecution and other hostile situations.[179] They may face barriers obtaining visas to allow victims and witnesses to travel to home states to testify.[180] Also, they would litigate their claim in an unfamiliar forum, as opposed to their opposing parties, who would defend themselves in their home forum. Even under a strict or vicarious liability regime, as illustrated above, plaintiffs have to carry the evidentiary burden of proving the role of the subsidiary in causing human rights abuses and the relationship of control between the parent and the subsidiary.

For example, in the Nigerian oil spills scenario, the plaintiffs must show that Shell Nigeria's engagement with military forces caused the ensuing human rights abuses,[181] and that Shell Nigeria was sufficiently controlled by its parent, Shell Parent, for the fault to be imputed to its parent. Because of the inherent hardships for plaintiffs to bring claims against parent companies and the heavy evidentiary burden plaintiffs

176. Rachel Chambers & Gerlinde Berger-Walliser, *The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison*, 58 AM. BUS. L.J. 579, 594 (2021).

177. *See id.*

178. *See* Skinner, *supra* note 22, at 163.

179. *See* Skinner, *supra* note 22, at 172.

180. *See* Skinner, *supra* note 22, at 163.

181. In a suit accusing Shell of participating in the corruption of judicial proceedings that led to the execution of critics of Shell and the government of Nigeria), court says that evidence was insufficient to establish the role Shell plays in the trial that led to the critics' execution. *See generally* Sterling, *supra* note 65.

carry, adopting a quasi-strict liability regime only serves to level the playing field among the parties and remove legal barriers to legitimate claims.[182]

Third, as illustrated by the discussion on Element (B) of the rewritten Article 8.6, the provision may recognize the defense for liability when the parent company has taken adequate measures consummate with the applicable due diligence standard. Incorporating a quasi-strict liability regime would not over-expand the provision in a way that unfairly holds parent companies liable for damages they could not have avoided. Instead, it merely reverses the burden of proof, asking the defendant TNC to show that the parent company has taken adequate measures required by the applicable standard rather than requiring the plaintiff to show that it has failed to do so.

One model of a quasi-strict liability regime for parent companies that provides an affirmative defense of due diligence is the Swiss Responsible Business Initiative.[183] The Initiative was drafted as a constitutional amendment to the Swiss Constitution.[184] The text of the proposed Article 101a of the Swiss Constitution requires companies to carry out appropriate due diligence pursuant to the U.N. *Guiding Principles*, and the proposed 101a(2)(b) provision defines the specific conduct required under the due diligence scheme.[185] The proposed Article 101a(2)(c) provides that "[c]ompanies are . . . liable for damage caused by companies under their control" where they committed human rights violations or environmental violations in the course of carrying out businesses.[186] Article 101a(2)(c) imposes strict liability on controlling companies for the violations committed by controlled companies.[187] The strict liability provision is followed by a due diligence

182. *See* Julianne Hughes-Jennett, *Strict Liability and Human Rights Due Diligence – Too Little Too Early?*, LEXICOLOGY (Oct. 19, 2017), https://www.lexology.com/library/detail.aspx?g=cf9e7105-f04c-4e07-8133-666eba040ce9 ("Justification for imposing strict liability . . . include the difficulty of attributing 'fault' in large corporate structures, deterring risk-taking and, as a matter of fairness and policy, that the cost associated with the risks deriving from a company's activities should be borne by the company, even if the company did nothing wrong").

183. Initiative populaire fédérale 'Entreprises responsables – pour protéger l'e^tre humain et l'environnement' [Federal People's Initiative "Responsible businesses – to protect people and the environment"], CHANCELLERIE FÉDÉRALE, www.bk.admin.ch/ch/f/pore/vi/vis462t.html (last visited Mar. 14, 2024); *see The Initiative Text with Explanations* (2016), SWISS COAL. FOR CORP. JUST., https://corporatejusticecoalition.org/wp-content/uploads/2019/10/KVI_Factsheet_5_E.pdf [hereinafter *Swiss Initiative*].

184. *Swiss Initiative*, *supra* note 183.

185. *See id.* art. 101a(2).

186. *See id.* art. 101a(2)(c).

187. *See id.*

defense for the controlling company.[188] The proposed Article 101a(2)(c) states that the controlling companies are not liable "if they can prove that they took all due care . . . to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken."[189]

Following the model of the Swiss Business Responsibility Initiative, the BHR Treaty provision should reword Element (B) and present it as providing an affirmative defense to liability when the defendant corporation sufficiently shows that it has taken adequate measures consummate with the applicable due diligence standard.[190] Instead of requiring the plaintiffs to bear the burden of proving that the defendant *did not* take adequate measures or that the measures taken were *not adequate*, a more effective provision should reverse the burden of proving due diligence to the defendant corporation. As long as the plaintiffs have made the showing that satisfies the requirements of Element (A), the burden shifts to the defendant to show that they have instituted sufficient preventive measures to meet the applicable due diligence standard.[191] The reversal of burden alleviates the practical difficulties that plaintiffs face in accessing relevant information in order to prove that the defendant was negligent or lax in regulating its subsidiary's conduct.

VI. Revision of Article 8.6

Recognizing these deficiencies in the provision in the Third Revised Draft, I propose revising the provision as follows:

> States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities *(including those of a transnational character)*
>
> (A) when:
>
> (1) another legal and/or natural person that caused or contributed to human rights abuses
>
> (a) was *under the control* of the former legal and/or natural person,
>
> (b) at the time of the relevant activity.
>
> OR

188. *See id.*

189. *Id.*

190. *See* Third Revised Draft, *supra* note 10, art. 8.6.

191. *See id.*

(2) the former person
  (a) *controls, manages, or supervises* the relevant activities that caused or contributed to human rights abuses, AND
  (b) should have *foreseen* the *risks of human rights abuses*
    (i) in the conduct of their business activities (including those of transnational character), OR
    (ii) in their business relationships,

BUT failed to prevent the harm of human rights abuses caused or contributed to by the legal and/or natural person with whom it has a business relationship.

(B) It may be a defense from liability for damage or loss for the natural or legal person to prove that they have taken adequate measures pursuant to the requirements of Article 6 to prevent human rights abuse.

In this revised version of the provision, there are still two main elements, (A) and (B) in the test of liability. Under the proposed new Element (A), like the current version in the Third Revised Draft, there are still two prongs. Unlike the current version, the proposed prong (A) (1) deals with a vicarious liability claim that holds a parent company liable as long as the business entity that caused the human rights abuse was (a) *under the control* of the parent company (b) *at the time* of the harmful activity. This prong creates a quasi-strict liability regime for parent companies when it is shown that one of its affiliated business entities or persons caused or contributed to human rights abuses, and the affiliated business entity or person has such a relationship with the parent company that it is under the parent's control.

In the Nigeria oils spills scenario, the plaintiffs would meet their burden of proof when they make a sufficient showing that (1) the local subsidiary, Shell Nigeria, was involved in the military personnel's violent actions and can be said to have caused or contributed to the ensuing human rights abuses, and that (2) Shell Nigeria was under Shell Parent's control at the time of the violent actions.

To establish that Shell Nigeria was under Shell Parent's control, the plaintiffs may show that: Shell Parent owns a substantial amount of or a majority of the shares and voting rights in Shell Nigeria; Shell Parent has the ability to appoint or remove a majority of Shell Nigeria's management board; Shell Nigeria and Shell Parent have a number of officers and directors in common; Shell Nigeria and Shell Parent rely on each other for their overall success; Shell Parent has exclusive control

that enables it to have decision-making power over Shell Nigeria, in particular over its financial and operational policy.[192]

Conversely, the proposed prong (A)(2) deals specifically with a traditional negligence direct liability claim. Applying this prong, a parent company is liable for its subsidiary's human rights violations when it (a) *controls, manages, or supervises* the potentially harmful activities of the subsidiary and (b) *should have foreseen* the risks of human rights abuses in the business activities or its business relationships but failed to prevent the abuse.

For victims in the Nigeria oil spills case, various factors may be raised to show that Shell Parent controls, manages, or supervises the potentially harmful activities of Shell Nigeria's business activities. The plaintiffs may show Shell Parent's acts or plans to set the policy with its local Nigerian subsidiaries regarding the relevant activities and active steps it took to implement the policy.[193] They may show any assumption of responsibility by Shell Parent regarding the protection of human rights of the local community. The plaintiffs may also show the degree of their reliance upon Shell Parent's Dutch's promise to make an effort to protect human rights.[194]

In order to show that the risks of human rights abuses were foreseeable to Shell Parent, the parent company, the plaintiffs may show that Shell Parent knew or should have known that its oil excavation activities would negatively affect the interests of the local communities and prompt opposition; they may show that violence is frequently used by military personnel when faced with opposition; they may also show that the management of Shell Parent was advised of the rising tensions among the local communities, the parent, and the military personnel because of the social unrests.[195]

Once the plaintiffs fulfill the requirements under Element (A) through either the strict liability prong or the direct liability prong, the burden shifts to the defendant corporation to show that it has taken sufficient measures commensurate with the level of due diligence required under the BHR Treaty. Shell Parent may have an affirmative defense once it carries the burden of showing that the human rights abuse

192. *See generally* Yilmaz Vastardis & Chambers, *supra* note 69; Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1233-34 (N.D. Cal. 2004); French Vigilance Law, *supra* note 117.

193. *See* Vedanta Resources PLC v. Lungowe [2019] UKSC 20 [51–53] (appeal taken from EWCA (Civ)) (U.K.).

194. *See Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 258, ¶ 103 (Austl.).

195. *Id.*; *see* Choc v. Hudbay Mins. Inc. (2013), 116 O.R. 3d 674 (Ont. Can.).

occurred even though it has taken adequate measures consummate with the applicable due diligence standard to prevent human rights abuses.

VII. CONCLUSION

In conclusion, the complexities surrounding the issue of parent company liability for human rights abuses committed by subsidiaries highlight the importance of developing an effective and coherent international legal framework. This Note has critically examined the venue options for bringing suits against corporations for human rights abuses and analyzed various theories of parent company liability.

The U.N. *Guiding Principles on Business and Human Rights* have laid the groundwork for addressing the issue of parent company liability through the BHR Treaty. However, as discussed in this Note, the proposed provisions in the BHR Treaty have certain shortcomings that need to be addressed in order to create a more robust and effective framework. The revised provision suggested in this Note aims to provide clearer guidance on the attribution of liability, particularly in the context of parent-subsidiary relationships. The revision proposal focuses on the unique legal issue of transnational liability posed by parent-subsidiary relationships in transnational business human rights litigation and how the BHR Treaty can effectively address it.