RESPONSIBILITY OF MULTINATIONAL CORPORATIONS IN MUNICIPAL JURISDICTIONS

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BY

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LIST OF ABBREVIATION

AC – Appellate Cases

CA – Court of Appeal

CC – Civil Case

Co. - Company

KLR – Kenya Law Reports

ALL ELR – All England Law Reports

HL – House of Lords

Supra - above

Ibid – only cited in the previous page

s (...) - section

URL – Uniform Resource Locator

KB – Kings Bench

QB – Queen's Bench

LR – Law Report

EU – European Union

GDP – Gross Domestic Production

v – versus

CSR – Corporate Social Responsibility

FLO - Fair-trade Labelling Organization

ATCA – Alien Tort Claims Act

FNC – Forum Non Conveniens

ATS – Alien Tort Statute

ABSTRACT

A multinational corporation is defined as a range of commercial corporate entities existing in more than one country with different legal jurisdictions. Usually there is the parent company, referring to the main control unit of the company; the subsidiary company, typically an extension of the parent in a different country. Just like any other entity, it has its fair share of pros and cons. Aside from the provision of more job opportunities and the role it plays in the advancement of technology; it also has a position in the enhancement of the world's gross product as well as the industrial output. Displacement of people from their homes, environmental harm like pollution and forced labour are some of the key cons arising from multinational corporations especially to their host country causing many to form complaints against them. However, the implementations of corporate sues are rather difficult with the law being in favour of them. This law, arising from Salomon's strict principle of separate personality states that corporate entities exist separately from each other and not necessarily as a group. With this been said, it is then understood that a claimant wishing to sue a parent company based on harm done by a subsidiary company in a different country will have to come up with solid proof showing an agency relationship between the subsidiary company to the parent one. This paper seeks to address three issues specifically: whether the principle of corporate separateness applies to multinational corporations and to what extent, whether a parent company can be held liable for the acts of its foreign subsidiaries, and finally whether courts should rely on the doctrine of forum non conveniens when dealing with cases brought against multinational corporations for wrongs committed by their foreign subsidiaries.

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CHAPTER ONE:

INTRODUCTION AND OVERVIEW

1. BACKGROUND INFORMATION

Major developments with regard to companies have occurred in recent years, due to the growth of Multinational Corporations. They play an important role in international relations and globalization. *Mederd Gabel* and *Henry Bruner* say in this respect:

'*From a mere three thousand in 1990 the number of multinationals has grown to over 63,000 today. Along with their 821,000 subsidiaries spread all over the world, these multinational corporations employ 90 million people (of whom some 20 Million in the developing countries) and produce some 25 percent of the worlds gross product .The top 1,000 account for 80% of the world's industrial output…the Multinationals have had some beneficial effects, even if they are the "unintentional by*-products of multi-*national corporations' profit maximizing activities."They have paid increasing tax revenues to the government of countries they operate in, provided employment opportunities, offered goods and services that were previously unavailable ,and above all, brought in capital, technology and management techniques. But the list of the negative impacts of their operations is also long."*[1]

There is a shift in the corporate structure from being confined to the level of subsidiaries operating within the state of incorporation of the parent company to the recognition of subsidiaries operating within the jurisdiction of foreign states. Corporate entities with commercial operations in more than one country have been variously named '*multinationals*', '*transnational corporations', 'multinational corporations,'* and *'multinational enterprises'*.

There are arguable differences in the meanings of each of these terms. For example, *'multinational'* could be taken to refer to corporations owned by nationals of more

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[1] Gabel,M and H.Bruner, 'Globalinc-An Atlas of the Multinational Corporation'(2003) <http://www.globalenvision.org>

than one country[2]. '*Multinationals*' could be distinguished from '*transnational corporations*' that are incorporated in one country but operate across national borders in other countries. For the purpose of this paper, the terms '*multinational corporation*' and '*Multinational Enterprise*' will be used interchangeably to refer to the range of commercial corporate entities which operate in more than one country.

Generally speaking, multinationals comprise a group of separate but related corporate entities based in different countries with different legal jurisdictions. Each entity in the group can be related in different ways: one entity (the 'parent') might own the shares or assets of another entity (the 'subsidiary'); two entities might own or operate equal parts of a third entity (a 'joint venture'); or one entity might enter into contract with another entity for the supply of services. Each of these corporate relationships can combine to create one corporate 'family tree', which makes up the 'multinational enterprise'.

The impetus for shifting to multinational enterprises is the stiff competition in the market place forcing firms to seek new opportunities in other parts of the world. Multinationals operate on a large scale in markets throughout the world, fostering economic growth and in some circumstances improving people's lives. Economic power sets multinationals apart from other types of businesses. Multinationals represent a source of foreign direct investment, technology and export income that generates jobs, economic activity and development.

Under national laws, multinationals are 'legal persons', with equivalent legal status to domestic corporations and people (or 'natural persons'). Multinationals are nevertheless able to use their mobility to escape reach of national jurisdictions, which are generally confined to national borders-legally and practically. They can move their operations, products, services and finances within and beyond the legal structures that regulate their activities in the national, regional and international realms. The result is that multinational enterprises can exploit jurisdictional gaps and escape effective regulation especially in relation to tax regimes.

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[2] See in *International Labor Organization*, ILO Tripartite Declaration of concerning Multinational Enterprises and Social Policy' (1977) 17 ILM 422 (1978 ILO Declaration)

However in the course of their operations within the jurisdiction of foreign states, the multinational corporations have had a negative impact on the residents in their host countries. The subsidiary companies incur liabilities, which could either be criminal or tortuous. Whether mining for gold, producing hazardous chemicals, manipulating the genetic structure of plants, or engaging in a variety of other commercial ventures, multinational enterprises can also harm people. Victims seeking to hold multinationals to account for the harm they cause invariably find that the formidable economic leverage of these corporate giants, combined with legal and financial obstacles, works to deny them redress.

For instance in the case of *Doe vs. Unocal Corporation*[3], an action was brought in America against the Total S.A., a French multinational parent, among some American parent corporations, for alleged exploitation of forced labour in the construction of an oil pipeline in Burma. The action was dismissed both in the lower court and the Court of Appeal for the Ninth Circuit. The Court of Appeal relied on the general rule that a subsidiary and the parent corporation are separate entities, and that jurisdiction is not established merely because a relationship exists between the parent and the subsidiary.

In some instances most subsidiary companies are usually not worth suing as the subsidiaries are not financially capable or stable to compensate the victims of their wrongs. Some are insolvent and/or uninsured by the time they are being sued.
However by their nature, multinationals organize and structure themselves in a manner which will ensure that the parent company is protected from financial liability. *Richard Meeran* says:

> *"Using Complex and confusing structures, MNC'S (Multinational Companies) have been able to distance and separate the parent, headquarters, company from the local operating subsidiaries, thereby protecting the MNC from legal liability…As far as overseas operations are concerned, this corporate structure and relationship has a dual purpose. First it enables the control of*

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[3] 248 F. 3d 915 (9th Circ.) 2001

the business from the centre to be ensured secondly it protects MNC the group as a whole since legal obstacles and difficulties in obtaining justice in local courts against local subsidiaries(which are often insolvent and uninsured),means that MNC escapes responsibility altogether and victims go without redress.'[4]

Claimants going after the Multinationals must first contend with the strict interpretation of the principle of separate personality which is a universally acceptable as fundamental by the commercial world. This concept ensures that a corporation is a legal entity distinct and separate from its members. This doctrine was propounded in *Salomon's* case and has up till now been accepted as law. In the same way a corporation is separate and distinct from its shareholders so is the subsidiary company which though in one sense the creature of their parent companies, are treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities. The subsidiary companies own its property and the parent company has no claim. This legal loophole has seen the Multinationals absolve themselves of liability of their subsidiary companies.

Victims of multinationals and especially the subsidiary companies can only convince the court that the parent company is liable if they can prove that the subsidiary company is the agent of the parent company or that the company is mere façade concealing the true facts. With regards to proof of an agency relationship, practice has shown that a parent company is more likely to reject the existence of an agency relationship to ensure that it absconds liability. This is where difficulty arises because as Atkinsons J in *Smith,Stone and Knight Limited* stated, the existence of an agency relationship is a question of fact in each case. Proof of an agency relationship then becomes another task altogether.

Another way of going round the separate entity principle is by piercing the corporate veil where a corporation is a mere facade. However the courts will only pierce the veil in this situation where it is satisfied that the defendant has used the corporate structure

[4] Richard Meeran, 'Liability of Multinational Corporations: A Critical Stage'Autumn 1999 <http://www.labournet.net>

to evade limitations imposed on its conduct by law or rights and reliefs which third parties already posses. However the courts will not pierce the corporate veil where the company has structured itself to evade such rights or reliefs as third parties may in the future acquire as was stated in *Adams plc.*

Even with those exceptions to the rule of separate entities, claimants will still have a daunting task in going after the company where the group of companies is located in different jurisdictions as the claims over the parent companies will most often than not be contested on grounds of *forum non conviniens.*

The courts in UK have not been hesitant in holding that the law recognizes the concept of separate entities in group enterprises. This was particularly enunciated in *Adams v Cape Industries plc* where the court accepted the notion that a company can organize itself with a view to minimizing its liabilities and these will not be considered as a mere façade concealing the true facts. This would be the position if Kenya were to follow in this direction.

Hannigan suggests that the law should be developed so that obligations and responsibilities would attach to the group and not to individual companies a position which found favour with Lord Denning in *DHN Food Distributors case.* However the single unit approach was rejected in *Woolfson* and *Re P[olly Peck International plc (No.3).*Those that rejected the argument put forth by *Hannigan* and his proponents did so allegedly in keeping with the *Salomon* principle. They argued that doing so would be performing a legislative function. The law therefore as currently developed is that a person claiming against a group of companies must identify the precise subsidiary with which they are dealing and which is responsible as the principle in *Salomon's* case will operate so as to prevent a claim against elsewhere in the group. However, in most cases, the subsidiaries are uninsured or by the stage of proceedings often insolvent, no longer operative, or has been sold on to other parties.

Plaintiffs will also have to contend with the doctrine of *forum non conviniens* (forum) in their quest for compensation from Multinationals. This conclusion is purely discretionary on the part of the court. This discretionary power especially in the UK has served as the biggest obstacle for overseas claimants to hold UK based multinational companies legally accountable in the UK courts for the abuses of their overseas subsidiaries. This is with exception to EU states by virtue of *Article 2 of the European-wide Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters of 1968* which prevents the English Courts from applying *forum* where the appropriate forum is another EU state (*the Gisondi claim*)

The parent companies have been quick in finding opportunities to apply for stay of proceedings by placing their reliance on *forum* especially in the context of personal injury cases with regards to non-EU states. The exercise of this discretionary powers and especially the use of this discretion to dismiss cases have left victims at a great disadvantage.

The test applied by the courts in applying *forum* is two-stage; i) whether the case is instituted in a place where there is the "most real and substantial connection" or ii) where "justice" is more likely to be served. With regard to the first stage, the nature of personal injury cases i.e. the injuries, victims and witnesses occurred or are located overseas. Therefore the foreign jurisdiction (where subsidiary is located) becomes the forum where the case has the "most real and substantial connection" (*Connelly and Cape plc*)

In the second stage, though most likely to tip off the scale in favour of the victims can prove hard to demonstrate. So that it is not enough that the Plaintiff shows that they will enjoy procedural advantages by suing in that country or that there is no legal aid in the more appropriate foreign forum but that substantial justice will not be done in the more appropriate foreign forum(*Cape plc*). That proves to be another task altogether.

To try to counter the rigidity of the doctrine of separate entity in personal injury cases, claimants have sought redress in UK courts on the argument that a UK company owes the foreign workers a duty of care and can be held directly responsible for injuries suffered by workers in the overseas subsidiaries rather than challenging the principle of corporate seperateness. The duty of care as the basis for the argument is founded on the reasoning that control by the parent company establishes a duty of care and direct negligence independent of its shareholding. This argument has found acceptance in

Thor Chemical Holdings case except that this case is somewhat unique in the light of the fact that it occurred against an exceptional background. Therefore cannot be regarded as authority in that respect. However the issue still remains unresolved in the UK but largely untested in other jurisdictions. In the US the courts adopted this line of reasoning in *Amoco Cadiz* case.

Another legal obstacle in bringing claims against multinationals and especially in the UK, is with regard to establishing jurisdiction and this is especially so in tort cases. According to Order 11 of the Rules of the Supreme Court Jurisdiction of multinational is established by residence. A corporation is regarded as resident in the UK if it's incorporated and formed under the law of the UK, has its registered office or official address in the UK, or its central management and control exercised in UK. Therefore anyone wishing to claim against a multinational must prove to the courts that it has jurisdiction to hear that claim by demonstrating residence.

The claimants will also find another challenging problem in imposing criminal liability of corporations as this involves attributing the blameworthy state of mind to the corporation. Attributing the culpable state of mind to a non-human entity is theoretically difficulty. The courts in exploring the possibility of using universal jurisdiction to impose criminal liability have applied the principle of vicarious liability which holds a master responsible for the acts of its servants. This has been applied in corporations and subsidiaries in Kenya and has been used in the US as well. The Identification theory has also been used to hold that the acts and state of mind of directing minds of the corporation as minds of the corporation.

In Kenya to attribute criminal liability to a corporation two problems arise:

i. A corporation having no social duties in general is unable to form a criminal state of mind; and
ii. Means by which to establish the "mind" of the corporation.

Related to those legal obstacles are the problems of government's lack of resources, government favouring economic interests over people and communities and lack of access to means of redress.

There is therefore need for regulation of Multinational Corporations, both nationally and internationally. Nationally and in the Kenyan context, there is need by the government to provide means of redress for those adversely affected or likely to be adversely affected by acts of the Multinational Corporations. There is also need for development and enforcement of law already in place as well as technical and financial assistance from other host states who have tried seeking legal redress against these foreign companies.

Internationally, there is need for an international approach to redressing multinational wrongs aimed at facilitating national reforms and providing international means of redress.

This paper has mostly been informed by the position of the courts in the UK and America in dealing with claims against multinationals. The Kenyan position on the subject is yet to gain ground. However it is expected that in the future there might be developments in terms of case law on the subject. This study is therefore important in this respect.

Therefore, the legal challenges facing victims who seek redress against multinational corporations include:

i. Establishing and maintaining jurisdiction or the right to have their cases tried within the jurisdiction of the parent company;
ii. *Forum non conveniens* doctrine which gives the courts discretion to conclude that a particular court is not the appropriate forum for the case to be heard;
iii. The obstacle of corporate separateness as propounded in the celebrated case of *Salomon vs. Salomon*[5].
iv. In some instances especially with regard to developing countries there may be weak and/or corrupt legal systems, or otherwise anarchy on the state bordering on no government, thereby making it difficult for the victims to enforce their rights.

[5] (1897) AC 22

Various legal systems have responded differently to this situation, with courts in some being sympathetic with the victims, while others lean towards protecting the business of the enterprise.

This paper shall seek to examine the extent to which the courts can hold the multinationals liable for the acts of their foreign subsidiaries in two major areas; in Tort and in Criminal law.

2. STATEMENT OF THE PROBLEM

This study is aimed at establishing whether the principle of corporate separateness applies to multinational corporations and if so, the extent to which a parent company can be held liable for the acts of its foreign subsidiaries. This study will also look at whether courts should rely on the doctrine of forum non conveniens when dealing with cases brought against multinational corporations for wrongs committed by their foreign subsidiaries.

3. RESEARCH HYPOTHESES

This thesis proceeds on the premise of a number of hypotheses as set out below:-

i) There is need for the development of a legal framework for corporate accountability for multinational corporations.

ii) Whether the principle of separate personality as propounded in *Salomon v. Salomon* is outdated and should not apply to multinational corporations

iii) Whether there is need for Courts to hold parent corporations liable for acts of their subsidiaries by piercing the parent's corporate veil or assigning tort liability directly to the parent company.

4. RESEARCH OBJECTIVES

The purpose of the proposed research is to determine the extent to which courts in Kenya and other jurisdictions are willing to hold parent companies liable for acts of their foreign subsidiaries by piercing the parent's corporate veil or assigning tort liability directly to the parent company.

The specific objectives of the study are:

i. Critically examine the applicability of the principle of separate personality established in *Salomon vs Salomon* on multinational corporations and their foreign subsidiaries;
ii. Asses the adequacy or otherwise of both the municipal and international laws in regulating the conduct of multinational corporations;
iii. Examine the Kenyan situation on liability of Multinational Corporations

5. JUSTIFICATION FOR THE STUDY

The recognition by courts of separate personality of each constituent company in a group and the reliance by the same on the doctrine of forum non conveniens are some of the legal challenges faced by claimants who attempt to file action against a parent corporation on the basis of conduct or liabilities of its subsidiaries.

This author tries to address the issues identified in this paper by comparing them to already existing texts with a view to providing new knowledge in terms of addressing the issues, especially in the Kenyan context. This, however, is not to say that the author disregards the existing literature.

The position taken by courts in America and the United Kingdom when dealing with claims against parent corporations is not similar with what we have in Kenya. There is a likelihood of such cases being filed in our courts in the near future hence the need for this study.

This study is intended to provoke consideration for solutions to the legal barriers faced by the victims of tortuous acts of multinational corporations; with suggested proposals to this end.

The study shall also analyze the problem of attributing criminal liability to collective entities such as multinational corporations.

6. SCOPE AND LIMITATION

This study is intended to determine the extent to which the principle of separate personality is applicable to present day multinational corporations and the extent to which courts in various jurisdictions are willing to hold parent corporations liable for tortuous and criminal acts of their foreign subsidiaries. This study will do a comparative study of how tortuous and criminal liability is attributed in various situations in other countries and in Kenya

For purposes of this study, we will review the position taken by courts in America and the United Kingdom when dealing with such claims against parent corporations. In Kenya, such cases are not prevalent and the case law may therefore be limited.

The author chose America because firstly, it is the only nation that has statutorily authorized an alien to bring a civil action against another alien for a violation of international law. This is known as the Alien Tort Claims Act. There are also other alternatives though, such as public international law, converting human rights violation to torts, the parties’ civil system of France as well as civil suits within the United Kingdom, which is why the author also preferred the United Kingdom.

7. RESEARCH METHODOLOGY

Given the nature of the subject under inquiry, the study will primarily require library research. Text books and articles will be important especially in tracing the evolution of the company as a legal entity, the emergence of multinational corporations and the problems of the multinational corporations, the concern of this thesis. The textbooks and other published materials will be obtained from the University of Nairobi’s Parklands Library and Jomo Kenyatta Memorial Library. Others will include the British Council Library.

Articles by authoritative writers both published and unpublished will be sourced. Additionally we shall rely on articles posted on the internet.

There will also be reliance on case law and review of past judicial decisions on matters related to the liability imposed upon multinational corporations both nationally and internationally.

Treaties, conventions and protocols on the regulation of multinational corporations at the international level will also be examined.

8. THEORETICAL FRAMEWORK

The proposed study in a chapter by chapter breakdown will be ordered as follows:

Chapter One: Introduction and Overview

In this chapter considerations are made out for the problem's background, issues to be investigated, the hypothesis, methods of research and objectives together with the justification, scope and limits, sample literature review, methodology and theoretical framework.

Chapter Two: Literature Review

Chapter Three: Historical Conception of a Company as a Person

Brief Synopsis of the Evolution of the Separate Entity Character of a Corporation as crystallized in *Solomons v Solomons & Co.* and as obtains now; and as concerns the populace on the cold separateness of corporations, resulting in the bargain between the populace and the corporation for the social responsibility.

In this Chapter we shall consider the relevance to of the famous case of *Salomon vs. Salomon* and its relevance in the age of multinational corporations, the consequences that arise from accepting the legal position established in the case. This study shall also look at the limitations to the separate character of the multinational corporations.

Chapter Four: Emergence of Multinational Corporations

In this Chapter we shall consider the historical aspect of Multinational Corporation, the various types that have emerged. We shall also look at the principles of company law and the laws that are still applicable as far as multinational corporations are concerned.

Chapter Five: Tortuous Aspects With Regard To Multinationals

This Chapter covers the avenues by which multinationals can be held liable in Tort and the various Torts that have arisen. It shall include a comparative study of the legal situation in various countries, the challenges that have been faced as well as Kenya. It shall include an in-depth study of the international legislation on tortuous claims, such as in the International Labour Organization and other International bodies.

Chapter Six: Criminal Liability on Multinational

The study shall cover the origin of attributing criminal acts to corporations, the principles that the courts have relied in finding parent corporations liable for the acts of their subsidiaries in foreign countries. The study shall also cover the challenges of attributing criminal intent to the actions of the multinational and the offences that have been commonly charged such as bribery and money laundering.

Chapter Seven: Summary, Conclusions and Recommendations on Kenya's Situation

This author in this Chapter shall make various recommendations for reform in Kenyan Legislation in the areas of Tort and Corporate Criminal Liability.

CHAPTER TWO

2.0 LITERATURE REVIEW

There are a number of articles and case law on the liability of multinational corporations for acts committed by their foreign subsidiaries. Much has been done by way of comparative analysis to show how different jurisdictions handle such matters.

a) **Whether the principle of corporate separateness applies to multinational corporations and to what extent.**

In the article *'Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that comforts with Due Process,'* by Jennifer A. Schwartz[6], the author explains that with the expansion of international commerce and the proliferation of multinational corporations, corporate structures that involve an alien (non U.S.) parents and U.S. subsidiaries have become increasingly common since multinational corporations often establish subsidiaries and other affiliated corporate structures to benefit from tax, accounting, legal, political, and administrative advantages benefits of having such an arrangement. Multinational corporations establish subsidiary corporations in other countries so that they can reap the gains from expanding abroad while limiting its exposure to legal and economic risk. They limit their risk by establishing entities that function independently in other countries while remaining part of an integrated conglomerate group. Yet as corporate structures become increasingly fragmented and complex, ascertaining the allocation of responsibility, authority, and control among affiliated corporations becomes challenging. Courts are asked to make that difficult determination anytime a member of a conglomerate group is named as a defendant in a legal dispute. In attempting to do so, courts are forced to work within the limitations of jurisdictional rules that are inadequately tailored to address modem corporate structures.

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[6] J.D. expected, School of Law, University of California, Berkeley (Boalt Hall), 2008; Fulbright Fellow, Japan, 2004-05; B.A., University of California, Los Angeles, 2004.

Questions arise with regard to when should the alien corporate affiliate of a U.S entity is subject to the jurisdiction of a U.S court. Plaintiffs frequently bring lawsuits involving multinational corporations in the U.S. because of the advantages U.S. forum offers. These advantages include a plaintiff-friendly jury system, choice of law rules available in the fifty state jurisdictions, the availability of standards of liability and damage theories, and generous damage awards. Personal jurisdiction over alien corporations in general and alien parent corporations in particular is an important and controversial area that lies at the intersection of civil procedure and corporate law. Personal jurisdiction, the power of a court to hear a dispute and render a valid judgment that will be recognized by other courts is a crucial procedural determination made by the judge at the outset of litigation. The outcomes of defendants' initial challenges to jurisdiction often have more significant implications for cross-border litigation than for domestic litigation. Defendants fear U.S. courts for the same reasons that plaintiffs seek them out. In particular, U.S. courts have uniquely broad discovery obligations and plaintiff-friendly rules of decision, often making the defendant's exposure much higher in an American court than it would be at home. Further, jurisdictional outcomes in cross-border cases may have broad implications for foreign affairs, diplomatic relations, and international trade.

In cross-border cases involving affiliated corporate defendants, the most controversial and intensely-litigated issue can be whether the conduct or presence of a domestic corporation will subject its alien affiliate to jurisdiction in a U.S. court in cross-border cases involving affiliated corporate defendants, is the most controversial and intensely-litigated issue thereby exposing the alien corporation to liability for actions of its affiliate. The issue of piercing the corporate veil for jurisdictional purposes often arises in product liability actions brought against alien parent corporations that operate U.S. subsidiaries. A plaintiff’s ability to assert jurisdiction against a parent corporation is especially critical when the assets of a subsidiary are insufficient for the plaintiff to obtain complete recovery of a judgment. The standard employed by U.S. courts to assess personal jurisdiction has significant implications for business incentives and strategies as alien multinational corporations engage in strategic jurisdictional planning.

Generally, analyzing the constitutionality of asserting jurisdiction over foreign defendants requires an examination of two distinct requirements namely:

a) The purposeful availment requirement restricting the assertion of personal jurisdiction to circumstances in which a foreign defendant has fair warning that it may be subject to suit in a particular forum, and

b) Jurisdiction over foreign defendants must be reasonable; it must not offend "traditional notions of fair play and substantial justice."

I am of the opinion that due process concerns over the reasonableness of asserting jurisdiction have particular resonance when applied to defendants from foreign countries, as the Supreme Court articulated in *Asahi Metal Industry Co. v. Superior Court.*[7] Although some scholars argue that aliens cannot claim due process protection, many U.S. courts afford aliens that protection. This Comment presumes that aliens are guaranteed due process protection under the U.S. Constitution. This Comment examines the divergent approaches to jurisdictional veil piercing taken by courts and proposes a new jurisdictional veil-piercing standard.

The proposed jurisdictional veil-piercing standard seeks to align a court's inquiry with due process requirements, while also reducing the inconsistency and uncertainty of current approaches. One of the fundamental goals of any jurisdictional test is to provide a framework that will yield predictable and consistent results. Although both the jurisdictional veil-piercing and reasonableness inquiries are heavily fact-dependent, it is not impossible for courts to adopt a cohesive standard and build sufficiently clear and detailed precedents that will achieve predictable, fair outcomes. The proposed jurisdictional veil-piercing standard gives courts flexibility and discretion to assess the realities of affiliate corporate arrangements on a case-by-case basis. Furthermore, a clearer standard will promote judicial efficiency in deciding jurisdictional questions.

[7] 480 U.S. 102, 114-15 (1987).

In another article on the *Violation of Human Rights by Transnational Corporations*, Barrister Hassan Faruk[8] argues that many multinational corporations often wield significant power and affect numerous human beings both directly and indirectly in various sectors of public and private life. In his opinion, Multinational Corporations use their economic power to gain most favorable conditions for their activities. If for instance a state introduces environmental laws, Multinational Corporations have the capacity to seek new sites for production where regulation is not as strong.

The author further discuses the ways in which multinational corporations have abused human rights by violating the human right to life, including the right to enjoy life, freedom from forced or slave labour, freedom from deprivation of or injury to health, enjoyment of a clean and healthy environment, air pollution, water pollution, environmental dumping among others.

However, the author observes that there is no international backstop to hold companies accountable when national regulatory systems are insufficient. He further concludes that the UN norms on the Responsibilities of Transnational Corporations recently adopted are not binding and do not provide for legal consequences in the event of non compliance by a multinational corporation.

b) **Whether a parent company can be held liable for the acts of its foreign subsidiaries**.

In the introduction to his article, '*Liability of Parent Corporation for the obligations of an insolvent subsidiary under America case law and Argentine Law*'[9], Hector Miguens challenges the acceptability of the concept of entity law with respect to many aspects of the legal relationships of parent and subsidiary corporations. He further notes the unwillingness of the on the parts of the courts and legislatures to

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[8] Faruk, H., 'Violation of Human rights by Transnational Corporations; Is there any effective enforcement mechanism?'

[9] Supra note no. 3

continue accepting the traditional view of corporate law when it no longer corresponds to the reality of the modern business enterprise in a complex industrialized society.

In his article, he reviews various cases in which the American courts imposed liability on a parent company for the obligations of an insolvent subsidiary. He proceeds to compare the American position with that of the insolvency law in Argentina. The American case law reveals the reliance of the American courts in some cases on the 'piercing the corporate veil' jurisprudence in imposing liability upon the parent company for the obligations of its insolvent subsidiary. Instances when the American Courts agree to lift the veil and when not are neither consistent nor predictable nor determinable. The ultimate decision on whether or not to impose liability on a parent company where the veil was lifted reflects consideration of numerous factors, including such matters as adequacy of capitalization, compliance with customary corporate formalities; including separate bank accounts, separate books and records and separate meetings of directors and shareholders; the intrusive participation by the parent in the managerial decision-making of the subsidiary; presentation of the subsidiary to the public as an independent business or as integral part of the group; and whether the subsidiary and the parent are engaged in the collective conduct of a single integrated economic enterprise.

With regard to this position, I propose as a better solution, an alternative liability system of the director of the group, derived from his control or his unified economic policy. An essential condition for such liability is that the debts of the bankrupt company have been incurred as a result of his control. On the other hand, to facilitate the procedural requirements, the author proposes to invert the burden of proof to the opposite side; to the holding or dominant company.

I am to the view that Hector Miguen's study is limited to the liabilities arising out of an insolvent subsidiary and compares the position in two jurisdictions only viz America and Argentina.

With regard to multinationals complying with national or international rights, authors have approached it differently. For instance, Alice Palmer[10] looks at the failure by multinationals to comply with national or international rights and ways in which affected communities can seek redress in either the host or the home country. She observes that[11] in many cases of multinational wrongs, a developing country with a large workforce and rich in natural resources hosts the multinational's foreign direct investment, while the multinational's home is a developed country that houses and benefits from the lion's share of the multinational's financial assets. In her opinion, claims for redress brought by people and communities adversely affected by multinational activities and products might be based on the national laws and procedures of the home or the host country, including laws that implement international obligations. The nature of national laws and regulations giving rise to a claim for redress will vary from country to country, and may impose conflicting obligations or extend conflicting rights. They might include statutory requirements, civil or criminal codes, contracts or long-standing legal principles established by the courts.

The author proceeds to determine those who can bring claims against multinational corporations or what is otherwise known as the *locus standi*. Only those people directly affected or harmed by the activities or products of the multinational corporation may be able to bring claims. In her opinion, people who might suffer harm in the future but are unable to demonstrate present harm, or those acting in public interest may be denied access by the courts.

I don't hold the same view since the author considers the barriers that may hinder people and communities from seeking redress against multinational corporations in the host countries. The first barrier is their governments' lack of resources. Barriers to redress arise when governments are unable to establish an effective and comprehensive system of corporate regulation setting out corporate duties, and individual and community rights. Countries may also have a lack of financial or human resources which may prevent them from implementing and enforcing the

[10] Palmer, A, 'Community redress and multinational enterprises' , FIELD November 2003

[11] At page 7

relevant laws through systems of redress. The second barrier is that of governments favoring economic interests especially when the government in question owns part of the business venture. Where a multinational's operations are in the host government's economic interest, it might be considered counterproductive for the government to facilitate redress for the multinational's wrongs through the national legal framework.

The third barrier set out by the author is the lack of access by the communities to the means of redress due to the relevant rules of standing which might exclude complaints where the harm is only general and not specific to an individual-such as some forms of environmental harm. The last barrier is that of multinational structures and jurisdictional limits.

In my view, the author should have addressed the issue of how people and communities may seek redress against multinationals in the future. I propose that emphasis should be laid on strengthening national means of redress in the host country, strengthening national means of redress in the home country and developing international means of redress.

The article is relevant to this study as it sets the basis upon which victims can seek redress against multinational corporations either in the host or home countries.

In an Article *Parent Corporation Liability for Foreign Subsidiaries* by Waldemar Braul and Paul Wilson, the author explains that Environmental liability is increasingly an international concern. He says that it is especially evident in judicial decisions holding parent corporations liable for environmental damages caused by their foreign subsidiaries. This article discusses several precedent-setting cases in Canada, the United States and Europe. These cases show that Courts will hold parent corporations liable for the environmental sins of their subsidiaries by piercing the parent's corporate veil or assigning tort liability directly to the parent company.

The *Amoco Cadiz* Decision

In 1978, the Amoco Cadiz tanker grounded on the coast of France and spilled its cargo of crude oil, damaging the marine environment. The French government, French individuals, businesses and associations sued the owner of the Amoco Cadiz, Amoco Transport Company ("Amoco Transport"), and its American parent Standard Oil Company ('Standard Oil') in the Northern District Court of Illinois (the jurisdiction of Standard Oil).[12]

The Court found that Amoco Transport, a Liberian corporation, was merely a nominal owner of the Amoco Cadiz and that Standard Oil controlled the design, construction, operation and management of the tanker and treated it as if it belonged to Standard Oil. The Court found Standard Oil liable in tort for its negligent supervision of its subsidiaries. Additionally, the Court saw little rationale for treating Standard Oil differently from its subsidiaries, which were treated as mere 'instrumentalities'. The negligence of the subsidiaries was therefore assigned directly to the parent

The Canadian Beazer Decision

A noteworthy Canadian parent-subsidiary environmental case is *Beazer and Atlantic V. Environmental Appeal Board*[13], decided by the British Columbia environmental Supreme Court in late 2000. The litigation concerned a 1997 order by the British Columbia environmental regulator. The order directed a Pittsburgh company to remediate a contaminated site formerly owned by its subsidiary. Te subsidiary no longer existed at the time of the order; it was amalgamated after the contaminating activities took place. The regulator therefore issued the order jointly against the successor company and the parent company, expressly stating that the parent corporation was a past operator of the site. The Waste Management Act[14] states that an operator means a person who is or was in control of or responsible for any location located a t a contaminated site.

The Canadian United Canadian Malt Decision

Also in 2000, the Ontario Superior Court of Justice, in *United Canadian Malt Ltd. v. Outboard Marine Corp. of Canada*[15], allowed a tort claim to proceed against an American parent corporation. The plaintiff claimed that its property had been

[12] Re Oil Spill By The Amoco Cadiz Off The Coast of France On March 16, 1978, MDL Docket No. 376 ND Ill. 1984, American Maritime Cases, 2123-2199.

[13] (2000), Vancouver Registry Doc L001638 (BCSC)

[14] RSBC 1996, c. 482 as amended

[15] (2000), 34 C.E.L.R. (N.S.) 116

contaminated by leachate originating from property formerly owned by a (still-operating) Canadian subsidiary of an American corporation. The plaintiff claimed damages against the Canadian subsidiary, its individual directors and officers and the American parent corporation. The individual directors and officers and the American parent corporation brought a motion to strike out the statement of claim as disclosing no reasonable cause of action against them. The Court acknowledged that the claim against the American parent corporation was in essence "an attempt by the plaintiff to 'pierce the corporate veil' and thereby fasten liability on the parent corporation for the actions of its subsidiary." The legislation in Ontario does not provide a British Columbia-type definition of 'operator', but this did not prevent the Court from concluding that a parent corporation can be held liable for the subsidiary on the basis of the control it exercises. In particular the Court noted that the plaintiff had an arguable case that the parent "controlled" the subsidiary by the following activities: · the American parent "managed, directed and controlled" the closure and clean-up of the property; · the American parent, in other contexts, had represented that it was responsible for the environmental problem, that the Canadian subsidiary had no authority to deal with the problem and, that any and all decisions regarding the problem would be made by the American parent alone; and · the American parent, subsequent to the discovery of the contamination problem, stripped all of the assets out of the Canadian subsidiary.

As a result, the plaintiff's case was allowed to proceed to trial (which has not yet been held).

The US Bestfoods Decision

Under the United States' Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[16] any person owning or operating a facility at the time a hazardous substance is released to the environment in an unsanctioned manner is strictly liable for the removal and remediation costs associated with the resulting clean-up. The statute and its legislative history offer little guidance on who is considered an "operator", and the Courts have reached mixed conclusions about when parents become liable as "operators". The US Supreme Court's 1998 decision in

[16] 94 Stat. 2767, as amended, 42 U.S.C. 9601 et seq

United States v. Bestfoods[17], while not involving a foreign subsidiary, is an instructive source of guidance for anticipating parent-subsidiary liability. The Court held, as a basic principle, that a parent corporation cannot be found liable under CERCLA for a subsidiary's environmental practices merely on account of its active involvement in the subsidiary's general affairs. This principle has two exceptions, the Court noted. One exception arises where a corporate parent is derivatively liable. That is, the corporate veil between the parent and subsidiary may be pierced where the corporate form would otherwise be misused to accomplish wrongful purposes (e.g., fraud). The Court found no wrongful purpose in this case. The second exception arises where the parent corporation is directly liable as an "operator" based on the parent's relationship to the facility (not merely based on the parent's financial or legal relationship to the subsidiary). The test for direct liability of a corporate parent is "whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility." The Court gave several examples to contrast "accepted norms" with "eccentric" acts. The Best foods decision, however, will likely not be the final judicial word on parent liability. The following questions remain unanswered.

The company for ensuring the observance of proper standards of health and safety by its overseas House of Lords unanimously decided that all the claimants could sue the parent company in subsidiaries. The Court noted that the trial would require particular attention to the parent's role in the operations of the subsidiaries, whether directors and employees of the parent had knowledge, what actions were taken or not taken by the parent and whether the defendant owed a duty of care to the employees of the subsidiary companies. The evidence, the Court concluded, was documentary in nature and would most likely be found in the offices of the parent corporation. In addition, the Court found it significant that the parent company and its subsidiaries and assets are no longer present or available to be sued in South Africa.

With regard to this, I conclude that as international trade becomes even more pervasive, corporations need to pay particular attention to the growing case law on the governance of parent and subsidiary corporations. The Courts have demonstrated

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[17] 118 S. Ct. 1876 (1998)

a willingness to apply corporate and tort law principles in sometimes flexible ways to give remedies to foreign victims of environmental damage. The Courts, for example, are willing to pierce the corporate veil in environmental matters where the parent corporation has exerted too much control over the subsidiary, the facility or even just the site that caused the damage. The Cambior and Cape Asbestos illustrate that the Courts may also hold a parent liable under negligence where the parent knew or ought to have known that the activities of the subsidiaries would cause damage.

In an article *'A Comparative Study of the Tea Sector in Kenya: A Case Study of Large Scale Tea Estates',* by Kenya Human Rights Commission (KHRC), it provides that the workers, both permanent and casual, are entitled to a number of benefits that are provided for by the company. The benefits include free health care provision, housing, water, schools for their children and a few workers are allocated small portions of the land where they can grow food crops for their daily sustenance. The company also provides for clinics and dispensaries in the tea estates. This privilege as noted above is extended to both permanent and casual workers, however it discriminates the dependants of casual workers who are charged a fee for use of the benefit. However, the workers complain of working in indignity and of sexual harassment as well.

In my opinion, corporations should be responsible for its workers well-being. Of notable concern was the issue of sexual harassment. From the analysis presented in this research report sexual harassment is prevalent in the large scale tea estates. Due to the nature of this crime, women victims suffer in silence due to the enormous costs associated with seeking redress and the stigma associated with 'coming out' and reporting this crime. Sexual harassment causes incalculable economic, psychological and physical harm to its victims and it serves to entrench patriarchal systems that inhibit the empowerment of women. It should be noted that the formal mechanisms to report cases of sexual harassment are either absent or under utilised in the case of Unilever. They recommended to the management of the company to take the issue of sexual harassment seriously and develop suitable and impartial avenues in which such cases can be reported and seriously acted upon by the management. In addition, the article provides that casualization of labou*r* is a serious issue that the government needs to address. It has an impact on job security and thus impedes the realization of

the right to work. It is understandable for the management of the company to use this root as an avenue to decrease their labour costs. However the mandate to realize the right to work and ensure that casual labourers are guaranteed on job security lies with the government.
From our observations the housing conditions of the workers especially the pluckers is deplorable. IAs noted above the laws in Kenya do not explicitly state what 'adequate shelter' is however it is our recommendation that the Medical officer in Kericho should take a more active role in inspecting the housing conditions for low cadre employees in the tea estates. The management should also immediately increase the housing quarters of the workers or make alternative arrangements for their housing, this would include provision of housing allowance which is commensurate to the average and adequate house rent payable in Kericho.

The Ninth Parliament passed five new labour laws in 2007, the Employment Act, 2007, the Occupational Safety and Health Act, 2007, the Work Injury Benefits Act, 2007, the Labour Relations Act, 2007 and the Labour Institutions Act, 2007 repealed the previous archaic laws. These laws can be said to be progressive in that they create new provisions in the labour statutes that did not exist. The new provisions include clauses on sexual harassment and incorporate a better understanding of casualization of labour by stipulating that persons employed longer than three months should have written contracts. It is our recommendation that these laws should be fully and impartially enforced to ensure the demise of casualization of labour and sexual harassment in the workplace.

CSR initiatives such as FLO and Rainforest Alliance are new efforts in the tea sector which mandate the companies to take responsibility for their actions and decisions. These initiatives as noted have only recently commenced and it would be premature to suggest that they have had any impact. Therefore, to an extent this article provides that national laws should govern multinational corporations.

In the article *'The Accountability of Multinationals for Human Rights Violations In European Law'* By Olivier De Schutter, the author states that Multinational corporations domiciled in the Member States of the European Union may generally be said to benefit from a complete impunity when they commit human rights violations abroad. This is especially true in the typical situation in which they invest in developing countries, either by extending their activities in those countries or by the creation of subsidiaries having a distinct legal personality, because of the lack of interest local governments may have in the protection of human rights or, more often, because of their inability to ensure that protection effectively. The impunity of these corporations is a reality, whether these enterprises are directly responsible for human rights violations or whether their responsibility is more indirect, for instance because their presence in certain jurisdictions facilitates or encourages human rights abuses by governments. The main issue the author addressed was the liability of multinationals and explains that violations by Multinational corporations remain unpunished because the liability of corporations mostly depends on the procedures set up by the States.

The author differs with the position of others by stating that Multinational corporations are under a duty to respect the basic rights and freedoms of all whom are affected by their activities and whenever their objective to make profit appears to conflict with the full preservation of the rights of others (employees, families of employees, neighboring communities), the conditions under which States may restrict certain non-absolute rights or freedoms for public interest reasons should apply, *mutatis mutandis*, to the restrictions imposed by corporate actors to the rights and freedoms of those with whom they interact: these restrictions should be necessary for the fulfillment of the legitimate aims of the corporation, and they should remain within the limits required by the principle of proportionality.

c) Whether courts should rely on the doctrine of forum non conveniens when dealing with cases brought against multinational corporations for wrongs committed by their foreign subsidiaries.

Forum non conveniens permits a trial court to dismiss a case where an alternative forum is available in another country and is substantially more convenient for the parties, the witnesses, or the court.

In the Article *'National Interests, Foreign Injuries, and Federal Forum Non Conveniens',* Elizabeth T. Lear[18] challenges the doctrine of forum non conveniens stating that it weakens national interests in international tort cases and that foreign injuries caused by multinational corporations who tap the American market implicate significant national interests in compensation and/or deterrence. The author refers to the case of *Gulf Oil Corp .v. Gilbert*[19] which is a classic case of domestic forum shopping adopted by most states, provides that a district court first determines whether an alternative forum is available[20] but also cautioned the district court judges that 'unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should be rarely disturbed.' This endows criteria for choice whereby there are atleast two opportunities in which the defendant is amenable to process. If a court determines that an adequate alternative forum is available, the court must then balance a variety of private and public interests associated with the litigation. As identified in *Gilbert*, the factors pertaining to the private interests of the litigants include "the relative ease of access to proof," "availability of compulsory process" for attendance of witnesses, the possibility of view of premises when appropriate to the action, "and all other practical problems that make a trial of a case easy, expeditious, and inexpensive." Questions as to the enforceability of any judgment rendered by the foreign tribunal also may be a relevant consideration. The public interest factors identified in *Gilbert* include the administrative difficulties for courts "when litigation is piled up in congested centers instead of being handled at its origin," the local interest in having localized controversies decided at home, the interest in having the trial in a forum that is at home with the law that must govern the action, the burden of jury duty imposed upon the citizens of a community that has no relation to the litigation, and the avoidance of unnecessary problems in conflicts of law or in the application of unfamiliar foreign law.

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[18] Professor of Law, University of Florida Fredric G. Levin College of Law. I am grateful to William Page, John Lopatka, Alyson Flournoy, and Lyrissa Lidsky for comments on earlier versions of this Article. A special thanks goes to my outstanding research assistants, J. Cole Oliver, Garland Reid, Simon Rodell, and William Snyder.

[19] 330 U.S 501 (1947)

[20] In assessing whether a forum non conveniens dismissal is appropriate.

In my view, federal forum non conveniens dismissals subvert American interests in a majority of cases. No case brought by an American resident plaintiff should be subject to forum non conveniens dismissal regardless of the facts of the case or the litigation difficulties. Nor should cases brought by foreign plaintiffs involving global goods be routinely dismissed; the failure of the federal courts to adjudicate such claims undermines critical national interests in safety. She proposes that the best that can be said of the doctrine is that, in a handful of foreign plaintiff cases involving non-global goods, we can feel confident that dismissal does no harm to our national interests. Forum non conveniens litigation is time consuming and expensive, provoking factual hearings, appeals, and mandamus actions. It occurs in every foreign injury case. Federal forum non conveniens decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard. Circuit splits running the gamut from the petty to the fundamental infect the federal system. Some scholars have raised serious questions about the constitutionality of the entire federal regime. It is time to give up the experiment. Simply put, the federal judiciary has not demonstrated any competence in weighing the national compensation, deterrence, and hypothetical protectionist interests inherent in forum non conveniens decisions. If the courts have serious concerns about the fairness of international litigation, they should look to the Due Process Clause of the United States Constitution for guidance.

In an article by the *International Peace Academy*[21] the project participants found that the problem of jurisdiction remains a barrier to international prosecution. While business entities have been found to commit violations, no international forum has the power to prosecute a legal person for the international crimes in question. All business entities are legal persons. The jurisdiction of international courts or tribunals does not yet extend to legal persons (individuals).

The article sets out the obstacles to tort litigation in establishing domestic liability. The participants noted that not all jurisdictions have strong traditions of tort litigation. Civil law jurisdictions, such as France and Norway, do not have as robust a system of

[21] 'Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law', A joint project of the International Peace Academy and FAFO AIS, Executive Summary December 1, 2004

Tort litigation when compared to some common law jurisdictions. Further, establishing jurisdiction is a prerequisite for assessing the liability of corporate entities for actions committed abroad. Also, the doctrine of *forum non conveniens* allows for a lawsuit to be dismissed if the court deems that a foreign jurisdiction is the more appropriate forum for its resolution, even if all the other elements of jurisdiction and venue are satisfied in the court in question.

The article discusses international crimes in detail setting out which international crimes can be considered torts and prosecuted in domestic courts. The article does not provide solutions to the obstacles of establishing jurisdiction and the doctrine of *forum non conveniens.*

In his survey on the access to courts for corporate accountability, *Richard Meeran*[22] observes that Multinational Corporations invariably organize themselves to protect the financial position of the parent company; local subsidiaries are insolvent or at least not worth suing and/or uninsured; the claimants have no means of obtaining practical access to justice in their home courts; workmen's compensation schemes in place at home often preclude claims against an 'employer'.

In his study, the author relies on a series of three English cases which have developed English law with respect to access to justice for overseas victims of multinational corporations and Multinational Corporation.

On the *forum non conviniens* principal, the author indicates that it has been developed by the courts of England to halt a claim brought (properly) within their jurisdiction, on the grounds that there is a 'more appropriate' forum elsewhere. The rationale is that the principle should ensure that a case is tried in the jurisdiction with which it has the closest connection, or rather that courts should avoid infringing the sovereignty of other states by exceeding their jurisdiction.

We should proceed to deal with the issue of 'forum shopping' as applied to foreign claimants attempting to sue in a particular country. Multinational Corporations have

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[22] Meeran, R., Access to courts for corporate accountability: recent developments

been known to exercise what is known as 'reverse forum shopping' whereby the Multinational Corporations seek to displace a claim from a place where it is natural to sue-the Multinational's domicile- to a venue where the Multinational Corporation knows the claimants will probably be denied access to justice altogether. The author further notes the efforts towards a global convention on jurisdiction vide the '*Hague Conference on Private International Law*'. Despite such efforts, the concept of *forum non conveniens* has effectively been allowed back in, largely on the insistence of the US government.

In conclusion, I am of the opinion that legislation to remove the corporate veil barrier, increase damages awards in developing countries, and allocate funding to enable cases to be fought in developing countries, would enhance the deterrent objective of legal action and would also encourage more uniform application of standards of health and safety and environmental protection across the globe.

In an article titled *'Dismissing ATCA claims by invoking the doctrine of Forum Non Conveniens: a comparison of defensive tactics and a practical assessment'* by Aaron L. Levenstadt, he initially comments on the history of the Forum Non Conveniens Doctrine referring to the discretion of a court to refuse to hear a case if the forum is inappropriate or inconvenient for the defendant or the jurisdiction. The Forum Non Conveniens doctrine has determined the practical outcome of some prominent international cases, including personal injury cases of global significance. The doctrine originated as an equitable remedy in the common law of Scotland. It then migrated to England and onwards to the American states. Admiralty courts were the first to use the Form Non Conveniens, as it helped organize cases regarding international maritime commerce. American admiralty magistrates recognized that although they had jurisdiction over cases involving aliens, they reserved the right to dismiss these cases if a more convenient and judicious forum presented itself.

The Supreme Court's decision in *Gulf Oil v. Gilbert* (1947)[23] extended the doctrine of Forum Non Conveniens beyond its maritime roots. The Court held that federal courts

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[23] 330 U.S. 501; 67 S. Ct. 839; 91 L. Ed. 1055; 1947 U.S. LEXIS 2551

should use the doctrine to dismiss an action if inconvenience to the parties, witnesses or local courts would render an alternative forum more appropriate.[i] Under the doctrine of forum non conveniens, a court may dismiss an action when there is an alternative forum in which the defendant is amenable process and where the most convenient legal arena fashions itself. The debate in common law countries, such as the United States, has been about what constitutes inconvenience in international cases.

Despite the Supreme Court's instructions, lower District Courts could not develop reliable standards to balance the conflicting Gilbert factors. In *Piper Aircraft Co. v. Reyno* (1981) the Court diminished the disparity by proposing the comprehensive two-stage "Reyno test": First, an adequate alternative forum must be identified and if an acceptable forum exists, then the dismissal decision should be based on a careful weighing of the Gilbert factors.

The author continues that this balancing task requires prudence because of the Supreme Court's decision in *Koster v. Lumbermens* (1947), which shifted the preliminary advantage to the plaintiffs. The majority opinion in *Koster decided "When the plaintiff has chosen the home forum, it is reasonable to assume that the choice is convenient; but when the plaintiff or real parties in interest are foreign, this assumption is much less reasonable and the plaintiff's choice deserves less deference."* This comment has been interpreted to mean that from the onset of the motion, defendants face the arduous task of showing that public and private interest factors tilt strongly in favor of dismissal.

In conclusion, the author proposed that a spectrum of public and private interests exists in the psyche of the American judiciary. On one end rests class 'A' interests- U.S. public interests that have evolved through acts of Congress to oppose dismissal. On the opposing end lie class 'B' interests- Private factors that have resisted evolution and continue to advocate for dismissal on Forum Non Conveniens grounds.

Through an analysis of four ATCA cases the author states that he hypothesized that judges deposited each Gilbert factor on one side of this spectrum. Interests that favor dismissal, which tend to be public, are gathered and scored. In a similar fashion, interests that oppose dismissal, which tend to be private, are also marked and weighed. This FNC balancing act is equitable for the most part, unless the plaintiffs are non-American. In these cases, defendants easily obtain their motions to dismiss, while only carrying a minimal burden. The historic and precedential weight associated with having an American citizen on the docket trumps many relevant sides 'A' factors.

In my opinion, foreign citizenship alone does not warrant imposing a higher burden on a plaintiff or lessening the normally heavy burden to be borne by the defendant. It must be remembered that the ultimate purpose of the FNC is to find the forum that best serves the ends of justice. Under the patronage of the ATCA, U.S. courts' concern with providing procedural safeguards to American plaintiffs should extend equally to foreign plaintiffs who have chosen to assume the burden of litigating in the United States. Foreign plaintiffs, like their American counterparts, may encounter substantial procedural obstacles if forced to litigate in a foreign forum.

Sarjbit Nahal elaborates on the problems faced by victims seeking redress against Multinational Corporations in the English Courts. Her study considers personal injury cases brought to English cases by overseas victims and the legal challenges faced by the victims. The victims have to establish and maintain jurisdiction. If jurisdiction can be established and maintained, the second obstacle which will be encountered is the strongly entrenched principle in UK company law by which a UK based parent company has a totally separate legal identity and legal liability from its overseas subsidiaries and vice versa.

In relation to corporate criminal liability, *Gerry Ferguson*[24] clearly states the problem; 'in attaching criminal liability to a corporation, the central issue is attributing a

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[24] Gerry Ferguson, *Corruption and Corporate Criminal Liability',* paper prepared for the seminar on 'New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions,' February 4-5, Vancouver, British Columbia. Also presented at the 'International Colloquium of Criminal responsibility of Collective Legal Entities,' Berlin, Germany, May 1998

culpable mental state (or *mens rea)* –a required element of most criminal offences –to non-human, artificial entities.'[25] The author proceeds to enunciate on the traditional devices used to hold corporations criminally liable, such as vicarious liability, the identification theory and locating fault in a Multinationals organizational structure, policies and ethos. The identification test is, in essence, tests done to determine the directing brains behind the corporation, be it a subsidiary in a foreign country.[26]

[25] Gerry Ferguson, *Ibid note 13.*.

[26] Review of the US, Doe-vs-Unocal Corporation. Last UK case, capture by Richard Meeran, that have developed English Law, on access to justice for overseas victims.

CHAPTER THREE

3.0 HISTORICAL CONCEPTION OF A COMPANY AS A PERSON

3.1 THE SEPARATE ENTITY: *Salomon Principle*

The fundamental attribute of corporate personality is the source of all other attributes of the modern day company. In essence it provides that the corporation is a legal entity, distinct from its shareholders, even if it is a one-man company with one shareholder controlling all the activities. It is thus capable of enjoying rights and being subject to duties that which are not the same as those enjoyed or borne by its members. It is a legal personality is tied up with the established doctrine of separate personality as propounded in the case of *Salomon vs. Salomon & Co.*[27] This fundamental attribute of corporate personality provides that the corporation is a legal entity distinct from its members. The corporation therefore enjoys rights and is capable of enjoys rights and is subject to duties which are not the same as those enjoyed or borne by the individual members. As Lord Macnaghten stated:

> *"The company is at law a different person altogether from the subscribers…and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not is law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable in any shape or form, except to the extent and in the manner provided in the Act*."[28]

Since the *Salomon case*, the complete separation of the company and its members has never been doubted. Lord MacNaughten further clarified that 'once the Memorandum is duly signed and registered, even if there are only seven shares taken, the subscribers are a body corporate capable fore with of exercising all the functions of an incorporated company. The company attains maturity at its birth, there is no period of minority and no interval of incapacity. A body corporate thus made capable by

[27] [1897] AC 22

[28] *ibid*, at 51

statute cannot lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not.'

3.2 CONSEQUENCES OF THE SEPARATE PERSONALITY

3.2.1 Limited Liability

The incorporated company has a number of advantages. It follows that a corporation being a separate personality, the members are not as such liable for its debts. Davies adds that the rule of non-liability also applies in principle to obligations other than debts: the company is liable and not the members.[29] In the absence of any provision to the contrary, the members are completely free from any personal liability. Under section 4 of the Company Act, a company is limited by shares, members liability is limited to the amount of unpaid on the share whereas in a company limited guarantee, the members agree to guarantee to pay in the event of any liability arising.

There are however cases where the court will determine liability of the shareholders where there is evidence of a principal –agent relationship between the shareholder or director and the company. The case of *Gramophone & Typewriter Co. Ltd v Stanley*[30] where Buckley LJ stated that it was well established that holding of all the shares does not establish a relationship of principal and agent between the shareholder and the company. There are however, instances when the courts have allowed the veil of incorporation to be lifted, but in general it is opaque and impassable.[31]

3.2.2 Property

Incorporation enables the property of the association to be more clearly distinguished from that of its members. In an incorporated company, the property of the associates is the joint property of all the members although their rights therein may differ from their rights to separate property because of the right to joint property must be dealth with according to the rules of the society and no individual member can claim any

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[29] Paul Davies, *Gower and Davies' Principles of Modern Company Law,* 7th Edition, London: Sweet & Maxwell 2003 24.

[30] [1908] 2 KB 89; Also *Tunstall v Steigman* [1962] 2 QB 593*; Ebbw Vale UDC v South Wales Traffic Area Licensing Authority* [1951] 2 KB 366

[31] Paul Davies, supra footnote 29

particular asset to the property. The members have claim merely to their 'shares' in the undertaking.

3.2.3 Suing and Being Sued

As a legal person a company can take action in its own name to enforce the legal right. Conversely, it may be sued for breach of its legal duty.

3.2.4 Perpetual Succession

As an artificial person the company has neither body, mind and soul. It has been said that a company is 'invisible, immortal and thus exists only in the consideration of the law.' It can only cease to exist by the same process of the law otherwise it is not subject to the death of natural body. The company continues to exist even while the owners come and go.

3.2.5 Transferability of Shares

Section 75 of the Company Act states that 'the shares and other interests of any member of a company shall be moveable property transferable in the manner provided by the articles of the company.' In a company, shares are freely transferable where upon transfer; the assignee becomes a full member with full rights.

3.2.6 Borrowing

The incorporated company is able to raise capital much more easily than a sole trader or a partnership. This is through the use of a facility called a float charge, which charge that 'floats' over all the assets of the company and from time to time attaches to certain assets without preventing the company from disposing of its assets in the normal course of business.

3.2.7 Vicarious Liability

As discussed earlier, the liability of the company may also depend on the principal of vicarious liability. The principal of vicarious liability on the other hand, provides that the employer will be liable in tort for acts of his employees or agents for actions, which, though not authorized, are within the scope of their employment. The principal, however will not, in general be liable for the criminal acts of the employees, unless he has initiated, or participated in, the crime.

Applying these principles is more complicated when the principal is a corporate body, which cannot confer authority on agents and employees except through the actions of natural persons.[32]

3.3 THE *ULTRA VIRES* RULE

It is a Latin phrase that means 'beyond the powers'. Is has been used to describe actions taken that are beyond the legal powers of those who have purported to undertake them. In the case of a company, the question of whether the company has the capacity to act would be addressed by whether it is incorporated or not. A company that is incorporated has a personality distinct from its members and hence has the power to act in its own right. The purpose of the doctrine is to protect investors, who thereby know objects in which the money is to be applied and creditors by ensuring that the company assets to which the creditors by ensuring the company assets to which the creditors look for repayment of their debts isn't wasted in authorized activities.

The doctrine of *ultra vires* has often been used in reference to acts committed by the company's organs or agents. Another instance is where the company has undertaken an action, which is unlawful.[33]

This doctrine became accepted as being applicable to companies in the latter part of the nineteenth century. In the landmark decision of *Ashbury Railway Carriage and Iron Co. Ltd v Riche*[34] where the court stated that where a company was incorporated under statute, and acted beyond the scope of objects expressly provided in the statute or its Memorandum of Association, such acts were void as beyond the company's capacity even if ratified by all its members. Later on, the courts sought to narrow the scope of the resulting *vires* by distinguishing between 'objects' and 'powers'. They applied the *ejusdem generis* rule, so that powers could only be used in relation to

[32] Gower and Davies, *Principles of Modern Company Law,* 7th Edition, London: Sweet &Maxwell, 2003 130.

[33] Gower and Davies (footnote 4 above) 131, refers to the case of *Ashbury Railway Carriage,* Lord Cairns L.C clarified, though that "The question was not as to the legality of the contract; the question is to the competency and power of the company to make the contract."

[34] (1875) L.R. 7 H.L 653

objects.[35] Companies then circumvented this clause by stating that each 'objects' clause was to be treated as independent and in no way ancillary to each other, and further by inserting the power to 'carry on any other trade or business whatsoever which can, in the opinion of the Board of Directors, be advantageously carried on by the company in connection with or ancillary to any of the above business or the general business of the company.[36]

A company registered under the Company's Act cannot effectively do anything beyond powers expressly or impliedly conferred upon it by in its memorandum of association. Any purported activity in excess of these provisions will be ineffective even of agreed to by all the members unanimously.

3.4 LIFTING THE CORPORATE VEIL

Any modern consideration of lifting the corporate veil must almost certainly begin with the decision of the Court of Appeal in *Adams v Cape Industries*.[37]The case saw the most detailed judicial review of this aspect of company law ever undertaken in the UK. Justice Scott, and then the Court of Appeal, refused to allow the veil to be lifted on an English parent company whose American subsidiary had been successfully sued by American litigants but which had insufficient assets to satisfy judgement.

Lord Justice Slade said: "Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities". The law will not permit the lifting of the corporate veil just because the interests of justice would be better served by doing so.

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[35] Gower and Davies (footnote 4 above) 132, cited the case of *Cotman v. Brougham* [1918] A.C 514, where the court held that it was *intra vires* for a rubber company underwrite an issue of shares of an oil company by virtue of its 'independent' power to underwrite shares.

[36] Gower and Davies (footnote 4 above) 133. The provision was upheld in *Bell Houses Ltd v City Wall Properties Ltd* [1980]

[37] [1991] 1 All ER 929.

This means that sometimes a director can take advantage of the corporate veil to relieve himself of a liability that he would otherwise fall under. This article will look at three recent cases where the corporate veil has been considered.

3.4.1 Personal responsibility

The case of *Williams v Natural Life Health Foods*[38] concerned a small limited liability company running a health food shop in Salisbury. The managing director, who was also the major shareholder, advertised for potential franchisees to run their own health food outlets. His company, the franchisor, would offer advice and assistance to the franchisee and would be paid fees for this.

Two people who decided to take advantage of this business opportunity opened a shop in Rugby. They were sent detailed financial projections for the proposed business. The managing director of the franchisor had played a prominent part in producing these projections. However, the projections proved to be negligent and over-optimistic – the Rugby shop operated at a loss for eighteen months and then ceased to trade completely.

The owners of the Rugby shop began proceedings against the franchisor but soon after proceedings had begun the Salisbury business went into liquidation. For this reason the plaintiff franchisees joined the franchisor's former managing director in the proceedings as a second co-defendant.

The House of Lords said that a director of a limited company was only personally liable for loss suffered as a result of negligent advice given by him on behalf of the company if he had assumed personal responsibility for that advice. Such an assumption of responsibility had to be determined objectively. The absence of personal dealings points strongly against an assumption of responsibility.

Therefore it is abundantly clear that a director can avoid the risk of personal liability by trading through a limited company so long as he does nothing to show that he is accepting any personal liability for what he does. As Lord Steyn said: "In the present case there were no personal dealings between [the managing director] and the

[38] [1998] 2 All ER 577.

plaintiffs. There were no exchanges or conduct crossing the line which could have conveyed to the plaintiffs that [he] was willing to assume personal responsibility to them."

3.4.2Fraud

However, a director cannot hide behind the vicarious liability of his company where he is fraudulent. In *Standard Chartered Bank v Pakistan National Shipping Corporation*[39] a director knowingly and deliberately made a false statement in order to obtain payment on a letter of credit.

The House of Lords held that a director cannot escape personal liability for deceit on the grounds that he acted as he did on behalf of and for the benefit of his company. Although an agent might assume responsibility on behalf of another person without incurring personal liability in respect of a negligent misrepresentation (as had been the case in Williams), the same reasoning could not be applied where there has been fraud.

As Lord Hoffmann put it: "No one can escape liability for his fraud by saying 'I wish to make it clear that I am committing this fraud on behalf of someone else and am not to be personally liable'". The director in this case was being sued for his own tort rather than for his company's tort. In other words, he was not being found liable because he was a director; his liability arose because he personally had committed a fraud.

3.4.3 When may the veil be lifted?

The veil of incorporation has been considered in *Trustor AB v Smallbone*[40] The significance in this case lies in the way counsel for the claimant invited the Court of Appeal to lay down rules as to when the veil of incorporation may be lifted.

Smallbone was a director of Trustor AB, a Swedish registered company. Without the consent of the other directors, he transferred large amounts of corporate funds into a company controlled by him, Introcrom Ltd. He then removed some of these funds

[39] (No 2) [2002] UKHL 173 [2003] 1 All ER 173

[40] [2001] 3 All ER 987.

from Introcrom Ltd's bank account into his own name. Being aware of all the circumstances, Smallbone was found to be jointly and severally liable with Introcrom Ltd for those sums received by him from its bank account. The court then had to consider whether Smallbone was liable for sums paid from that account to other persons.

Trustor AB, the claimant company, sought to obtain the lifting of the veil of incorporation of Introcrom Ltd under three headings:

- the company was a sham with no unconnected third party involved
- the company was involved in the impropriety
- it was necessary that the veil should be lifted in the interests of justice.

The Court of Appeal was content to lift the corporate veil on the first two grounds but not the third. It was stated that there was no general power to lift the corporate veil simply because it was necessary in the interests of justice.

Again the case of Adams v Cape Industries plc was cited with approval. The veil should not be lifted merely because legal technicalities resulted in injustice.

3.5 SUMMARY

The separate entity principle propounded in Salomon's case provides certain advantages to an incorporated company including limitation of liability, right to own property, right to sue and be sued, perpetuity, and transferability of shares, right to borrow and the principle of vicarious liability which attaches.

However there are circumstances when the corporate veil may be lifted to attach personal responsibility, in cases of fraud by directing minds, where the company is a sham with no unconnected party involved or where the company was involved in impropriety.

The veil will not be lifted simply because it was necessary for the interests of justice.

CHAPTER FOUR

4.0 EMERGENCE OF MULTINATIONAL CORPORATIONS

4.1 HISTORICAL SURVEY

Multinational companies have been generally defined as a group of separate but corporate entities. They are often very large and have their offices, factories and branch plants in various countries all coordinated from a centralized office.[41]Multinationals have become a vehicle of the globalization process. Economic globalization, the linked process of trade and liberalization, privatization and deregulation, has resulted in huge increase in the movements of capital, goods and services following the stiff competition in the market place. [42] This has resulted in large amounts of foreign investment being directed towards developing countries where the raw materials, labor, production costs are much cheaper.[43]

There is also the new generation of companies carrying our business in developing countries having sought concessions from the Governments so as to carryout large scale agricultural and mining activities. With the growth of companies, there has been shift in corporate structure from being confined to the parent companies, operating within the state of incorporation to the recognition of subsidiaries operating in the jurisdiction of foreign states.

The first multinational, appearing in 1602, was the Dutch East India Company[44] which was granted permission to carry our trade in the Far East. Since then the concept of the multinational corporations has developed greatly to the mammoth

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[41] Definition from wikipedia.com

[42] Halina Ward, *Governing Multinationals: The role of Foreign Direct Liability*, Briefing Paper of the Royal Institute of International Affairs, No. 18 of February 2001.<……………> (accessed on September, 2005) page 1

[43] According to the 1999, UNCTAD's World Investment Report *Foreign Direct Investment and the Challenge of Development,* New York and Geneva, there are an estimated total number of 60,000 parent companies world wide with over half a million foreign affiliates

[44] From the website :< http://www.globalpolicy.org/intljustice/atca/2001/05crplblty.htm> (accessed on September 28, 2005)

companies that exist to day wielding more power and possessing more wealth than many nation-states.[45]

In the course of carrying out their operations in the foreign states, subsidiary companies incur liabilities, which could either be contractual, tortuous or even of a criminal nature or even environmental degradation. Kenya, being a developing country has its share of multinational companies that have established subsidiaries. [46] The victims that wish to take action in court to recover their claims have experienced difficulty in finding the proper forum in which to do so. Alex Magaisa contends that Corporate Groups are formed in order to reduce exposure to liability generally and to avoid tort liability particularly where firms are engaged in hazardous and highly risky activities.[47] He quotes from Baughen:

> '*The relocation of hazardous activities to the developing countries by multinational companies in the developed world has become a well-established feature of the global economy'*[48]

Alex Magaisa argues that large global firms attempt to reduce exposure to liability in tort arising in one of the many jurisdictions where they operate through subsidiaries or members of the Group. There are tragic examples that demonstrate the problems associated with multinational business forms that have taken place in recent years. These are examples that illustrate the concern that has arisen about the activities of these multinational companies.

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[45] Hassan, Faruk Al Imran, Barrister, '*Violation of Human Rights by Transnational Corporations: Is There Any Effective Enforcement Mechanism?'* **********In 1992, General Motors world wide sales ($132.4 Billion) exceeded the GDP of Indonesia ($126.4 Billion), Norway ($115.7 Billion), Poland ($ 83.8) and Malaysia ($57.8 Billion).

[46] Find examples *******

[47] Magaisa A, *'Corporate Groups and Victims of Corporate Torts – Towards a New Architecture of Corporate Law in a Dynamic Marketplace*', *Law, Social Justice & Global Development Journal (LGD)* 2002 (1) <http://elj.warwick.ac.uk/global/02-1/magaisa.html>

[48] Baughen S (1995),'Multinationals and the Export of Hazard', (58) MLR 54.

The Bhopal Tragedy:

The case concerned the Union Carbide (India), a subsidiary of Union Carbide International, USA. Where in 1984, a deadly gas Methyl IsoCyanate (MIC) escaped into the atmosphere causing a highly toxic cloud which killed 2100 people and injured at least 200000 others. The repercussions of this disaster continue to haunt the area and its inhabitants to this day. The parent company was blamed for failing to ensure that proper standards were followed at the subsidiary's plant and the group was considered to have acted negligently. After protracted litigation and haggling in and out of courts the Parent Company made an out of court settlement and paid up to $470 million in compensation to the victims.

Other cases

There are other examples which include the activities of Shell Corporation in Nigeria's oil fields. In Latin America, the Caribbean, Cote D'lvoire and the Phillipines thousands of banana plantation workers were affected and rendered sterile by the use of pesticides manufactured by the US-based Dow Chemicals[ii]. Other cases are the case of Thor Chemicals Holdings Ltd., a British-based multinational which was importing toxic waste from the United States and other countries which declined to process the materials because they are too harmful. It contained high levels of mercury at the Cato Ridge plant in South Africa that killed two of the original claimants and left one permanently disabled. Many workers have since sued the UK-Parent Company for injuries caused by exposure to mercury. It causes poor concentration, bleeding gums, memory loss, sexual dysfunction and irritability. When highly contaminated workers reacted, the company simply shifted them and rested them elsewhere, and opened the gates to take in a new group of fresh, job-hungry men ready to do work. They wanted work, which they got, but they also got mercury contamination and all its effects. Within a few months it would be their turn to be laid off, and yet another group would come…and so it went on…[iii]. The mercury recycling plant was eventually forced to shut down and a commission of inquiry was instituted in 1996 by the then President of South Africa, Nelson Mandela. The results show that Thor Chemicals imported harmful waste that has affected not just the workers but the soil and the local environment in South Africa[iv]. In 1997 Thor Chemicals settled out of court with some of the claimants after the House of Lords had rejected its defence to have the action stayed in England. An out of court settlement has also meant that there is no legal precedent on the responsibility of parent companies for the wrongs of subsidiaries.

These are some examples of the problems that have arisen in the conduct of multinational business by large firms. The risky businesses appear to have exposed victims in many jurisdictions where the firms operate or sell their products. Yet the difficulties of holding the firms responsible for their activities are as complicated and phenomenal as the structures that build the firms themselves. Having thus set the scene of the problems, it is now intended to analyze how the identified fundamental tenets of corporate law are used to achieve the desired ends and consequently to demonstrate the need for changes in the approach of and to company law as we understand it today.

4.2 TYPES OF MULTINATIONAL CORPORATIONS

According to an article by the International Association for Social Science Information Service and Technology (IASSIST)[49] there are three types of multinational companies; International government organizations, international business and international philanthropic and other non-governmental organizations.

The international governmental organizations are multinational control structures. These include the World Bank, the International Monetary Fund and the European Union among others. They consist of a permanent corps of civil servants, unaccountable to any single state, who create records on the most important worldwide issues of the day.

The second type is the major philanthropic and other non-governmental international organizations. These organizations ranging from Greenpeace to the Rockefeller and Ford Foundations, Transparency International are accountable to members or to boards of directors or, even, to the heirs of the original donor. The records of the activity may be centralized or dispersed among national chapters; the sources of

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[49] Article on *Preservation Access and the Multinational* by the <www.iassistdata.org> (accessed on September 20, 2005)

capita; or the number of members, may be publicized or a closely held secret; the actions of boards, may be publicly reported or may be absolutely secret.

The third and most important type for purposes of this study is the international business and commercial establishments. It has been said that these have functioned internationally for centuries (think of the Chinese and Phoenician Traders who would trade throughout the known world). The late twentieth century has changed the concept remarkably. The difference mainly is in the assembly of goods through multiple nations producing components; in the move from international goods or financial markets into international service providers; and from the speed with which information and currency flows. This borderless market, however still relies on corporate headquarters somewhere in the globe. The headquarters are normally the traditional homes of the company, where the corporate officers have their offices, or it could be a single officer in a location that gives the most advantageous tax position for the company.

These type of companies set their work practises and employment standards without much accountability to anyone, other than to the owners. Setting up a policing, enforcing liability, setting up mechanism to procure transparency and accountability, including access to records is a Sisyphean task.

4.3 SETTLED PRINCIPLES TO MULTINATIONAL CORPORATIONS

4.3.1 Limited Liability

As a separate legal entity, separate and distinct from its shareholders, the company must be treated like any other independent persons with rights and liabilities appropriate to itself.[50] The decision in *Salomon's* legitimised the concept of separate personality; this concept has been applied to equally legitimise the group concept where a company is not owned by individuals but other companies. The same principle applies as the group as well as the one-man company still conducts business, enters into contracts, and incurs debts. Each individual incorporated company owns property and only the company can insure that property and not the principal

[50] Hannigan, Brenda *Company Law* (2003) Lexis Nexis, Butterworths; United Kingdom 66.

shareholder.[51] In case of subsidiary companies, the property is owned by the incorporated subsidiary and the parent company has no claim.

This principle persists as long as members as only members and the business is a going concern. Members who become involved in the management of the company's business, for example as Directors, will find that a separate legal personality does not necessarily protect them from personal liability to third parties. Therefore parent companies will be liable for the acts of their subsidiaries especially where it is proved that the parent companies are directly involved in the management of the subsidiary companies. The most obvious is that of torts committed in the course of directorial duties.

The extent to which those acting or running subsidiaries depends on the operation of the doctrines of agency and rules such as assumption of responsibility in tort law and identification in criminal law.

In a group, each incorporated subsidiary company is a being separate and distinct, and not the agent of the controlling shareholder, its parent company.[52] In Kenya, the definition of a holding Company is set out in s. 154 (4) of the Companies Act, Cap 486, Laws of Kenya thus:

> *"(4) For the purposes of this Act, a company shall be deemed to be another's holding company if, but only if, that other is its subsidiary."*

According to s. 154 (1) and (3) a subsidiary is described viz:

"For the purposes of this Act, a company shall, subject to the provisions of subsection (3), be deemed to be a subsidiary of another if, but only if –

- *a) that other either-*
- *i) is a member of it and controls the composition of its board of directors; or*
- *ii) holds more than half in nominal value of its equity share capital; or*

[51] *Macaura v Northern Assurance Co* [1925] AC 619, HL.

[52] *Salomon v Salomon & Co Ltd* [1897] AC 22; *The Albarezo* [1977] AC 774 at 807, HL, per Roskill LJ; *Bank of Tokyo Ltd v Karoon* [1987] AC 45 at 64, CA; *Adams v Cape Industries plc* [1990] BCLC 479 at 519 to 520.

b) the first-mentioned company is a subsidiary of any company which is that other's subsidiary."

c) That the directorship is held by that other company itself or by a subsidiary of it.

and;

3) In determining whether one company is a subsidiary of another-

a) any shares held or power exercisable by that other in a fiduciary capacity shall be treated as not held or exercisable by it;

b) subject to paragraphs (c) and (d), any shares held or power exercisable-

i) by any person as a nominee for that other (except where that other is concerned only in a fiduciary capacity); or

ii) by, or by a nominee for, a subsidiary of that other, not being a subsidiary which is concerned only in a fiduciary capacity, shall be treated as held or exercisable by that other;

C) Any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded;

d) *Any shares held or power exercisable by, or by a nominee for, that other or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business."*

The relationship between the subsidiary and the holding company is the same as between the Mr. Salomon and his company. The parent company and the subsidiaries are separate legal entities and each company is entitled to expect that the court will apply the principles of *Salomon v Salomon & Co Ltd*[53] in the ordinary way and respect the separate identity of each company in the group.[54] This is so even if the

[53] [1897] AC 22.

[54] *Adam v Cape Industries plc* [1990] BCLC 479 at 520, CA; *Ord v Belhaven Pubs Ltd* [1998] 2 BCLC 447 at 458, CA.

subsidiary company has a small paid up capital and a board of directors all or most of who are also directors or executives of the parent company.

Multinationals have created a new twist to the concept of suing and being sued. Claimants have the problem in going after the parent company where there is a group of companies, located in a different jurisdiction. In such a case, the claims will more often that not be contested on the grounds of *forum non-conveniens* i.e which country's court would most convincingly handle the dispute. This has been dealt with differently in various legal systems. Some courts are inclined towards protecting creditor's interests, while others towards protecting the business of the enterprise, and even others have been influenced by patriotic and/or political considerations.

The Debate on Limited Liability

As a separate legal entity, separate and distinct from its shareholders, the company must be treated like any other independent persons with rights and liabilities appropriate to itself.[55] The company is the one that conducts business, enters into contracts, and incurs debts. The company owns property and only the company can insure that property and not the principal shareholder.[56] In case of subsidiary companies, the property is owned by the incorporated subsidiary and the parent company has no claim.

Limitations to Limited Liability

The consequences of the separate personality of the company are that inevitably, the decision-making has to rest with a natural person who is the Manager or the Director. In other words decision-making is done by primary organs (such as the Board of Directors) or officers. This raises the issue of whether the decisions taken can be attributed to the company, and there are therefore exceptions to the principle in *Salomon's* case. Hannigan provides the exceptions as:[57]

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[55] Hannigan, Brenda *Company Law* (2003) Lexis Nexis, Butterworths; United Kingdom 66.

[56] *Macaura v Northern Assurance Co* [1925] AC 619, HL.

[57] Hannigan, Brenda (footnote 5 above) 66.

(i) Where on the facts an agency relationship does exist between the company and its shareholders; and

(ii) Where the corporate structure is a mere façade, concealing the true facts. In this case, the court will disregard the separate legal entity and go through the company to reach the shareholders and/or its Directors /Managers behind the issue in the matter, a process described as piercing the corporate veil.

There may also be statutory provisions, where for reasons of taxation of financial transparency, the separate legal entity may be disregarded. For example provisions require parent companies to prepare consolidated group accounts showing the affairs of the parent and subsidiary undertaking.

4.3.2 The Agency Relationship

Salomon established that the company is not per se the agent of its shareholders. However, on particular facts an agency relationship may be established between a company and its shareholders.[58] This has commonly arisen where in a group context, where it is advantageous for a parent company to plead that a subsidiary company is a mere agent of the parent. Of course, as a general rule, a parent company is more likely to reject the existence of the agency relationship to ensure that not liability is attached to it for the subsidiary's debts.

An example is the case of *Smith, Stone & Knight Ltd v Birmingham Corpn.*[59] The case was whether the compensation of the for compulsory purchase payable by a local authority when the property of a subsidiary company was acquired. To maximize the compensation payable, the parent company on this occasion argued that there existed an agency relationship.

Atkinson J stated that the existence of an agency relationship is a question of fact in each case. In which even the issue to be determined is whether the subsidiary is

[58] *Gramophone & Typewriter Co. Ltd v Stanley* [1908] 2 KB 89 at 96, 100.

[59] [1939] 4 All ER 116.

carrying on the business as the parent company's business or on its own.[60] Atkinson went to identify a number of factors which were relevant, in his opinion to the determination of the issue, namely who was carrying on the business, who received the profits, who was actually conducting the business, who appointed those persons, who was the head and brains of the venture and who was in effective and constant control of the business. The court determined that on the facts[61], the arrangement between the parent company and the subsidiary was such that the business and profits belonged as a matter of law to the parent company. Atkinson J's opinion was that the subsidiary was a legal entity and nothing more, as the control of the parent company was quite comprehensive. The subsidiary was not operating on its own behalf, but on behalf of the parent company – the parent company was hence the party entitled to the compensation.

Other case law that further illustrates the point is *Re FG (Films) Ltd*[62] where the court held that the film did not qualify as a British film as the company acted at all times as the agent of the and nominee of the American parent company. The existence of the English company was purely 'colorable'.[63]

In the case of *Adams v Cape Industries plc*[64] the court was to enforce judgment on an English company only if it had presence in America. The court was then to determine whether certain American companies were subsidiaries of the English company. It was necessary for the court to look into the detail of the relationship between the English parent company and American subsidiaries to see whether the subsidiaries were carrying on their own business or that of the English parent company.

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[60] [1939] 4 All ER 116 at 121

[61] Hannigan (footnote 5 above) summarised the facts as: The parent company had all the shares except five in the subsidiary company and the profits of the parent company. The parent company appointed the persons who conducted the business and it was in constant and effective control of the business.

[62] [1953] 1 All ER 615. Hannigan also cites *Firestone Tyre &Rubber Co Ltd v Lewellin* [1957] 1 All ER 561 where the court held that there existed an agency relationship between the parent company and the subsidiary for assessment of tax purposes.

[63] Hannigan, Brenda, (footnote 5 above) 68.

[64] [1990] BCLC 479.

The Court of Appeal, in considering one of the subsidiaries found that it was indisputable that at the very least a substantial part of the business carried on by the subsidiary at all material times, was its own business. Despite the closeness with the English parent company, whose products its marketed, it had no power to bind the parent company to any contractual obligation and never effected a transaction in such a manner that the parent company became subject to any contractual obligations to any person. The court held that the business carried on, was carried on by the subsidiary on its own account.[65] While the English company had provided funding for it, it carried on business on its own account and not as an agent of the English Company.

An incorporated company will limit the authority of an agent by the inclusion of a provision in the Memorandum or articles of association. This would even limit the agent's ostensible authority as well. Where a third party was transacting with the company….In the 19th century, the courts developed a qualification to the rule that actual or constructive notice of the constitution might prevent reliance on the doctrine of ostensible authority. In the case of *Royal British Bank v Torquand*[66]the court established the rule that those dealing with a company, even though they had actual or constructive notice of the contents of its memorandum and articles, were not normally required to satisfy themselves that internal procedures referred to in the articles had been complied with.

4.3.3 The *Ultra Vires* Doctrine

The doctrine of *ultra vires* has often been used in reference to acts committed by the company's organs or agents. Another instance is where the company has undertaken an action, which is unlawful.[67] This doctrine became accepted as being applicable to companies in the latter part of the nineteenth century. In the landmark decision of *Ashbury Railway Carriage and Iron Co. Ltd v Riche*[68] where the court stated that

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[65] Hannigan, Brenda, (footnote 5 above) 68.

[66] (1856) 6 E. & B. 327

[67] Gower and Davies (footnote 4 above) 131, refers to the case of *Ashbury Railway Carriage,* Lord Cairns L.C clarified, though that "The question was not as to the legality of the contract ; the question is to the competency and power of the company to make the contract."

[68] (1875) L.R. 7 H.L 653

where a company was incorporated under statute, and acted beyond the scope of objects expressly provided in the statute or its Memorandum of Association, such acts were void as beyond the company's capacity even if ratified by all its members. In relation to multinational corporations, activities that the incorporated company undertook which were not included in their memorandum of association are null and void.

The question of whether a third party was affected by the void-ness, where a transaction is found to be *ultra vires* transactions may depend on the state of the third party's knowledge. A third party cannot be expected to check whether a particular action of the company is ultra vires the objects of the company. In common law, the third party's knowledge that the Directors are exercising their power for a purpose beyond their authority prevents the third party from enforcing the contract against the company. However where the third party had no knowledge and the same could not be obtained by reasonable attempts to find out such information, such as a multinational corporation that has the memorandum of association situated in another country; such a company cannot use the doctrine of ultra vires as a defense to absolve them of liability. Where the multinational corporation argues that the agent or the Director acted beyond their powers therefore the company is not liable for their actions, the courts should note the fact that with the group of companies spread out in a number of countries, it would be difficult to ascertain the exact objects that are *intra vires.*

4.4 LIMITATIONS TO ITS SEPARATE CHARACTER

4.4.1 Piercing the Corporate Veil

Where the Company Structure is a Mere Façade concealing the True Facts

There are special circumstances that may justify piercing the veil. The court will pierce the corporate veil where special circumstances exist indicating that it is a mere façade, aimed at concealing the real facts, in other words where it is in the interests of justice to do so. This was stated by the Lord of Lords in the case of *Woolfson v Strathclyde Regional Council.*[69] The case involved the amount of compensation

[69] (1978) 38 P & CR 521, HL.

payable on the compulsory acquisition of land by the local authority. The House of Lords on appeal stated that it was appropriate to pierce the corporate veil only where special circumstances existed indicating that the company was a mere façade concealing the true facts. In that particular case the court felt that piercing the corporate veil to discover the true owner of the company for purposes of compensation was not an acceptable position. Therefore there were no grounds for dealing with the corporate veil as a mere façade.

The mere façade test was endorsed in numerous English cases subsequently, including the case of *Adams v Cape Industries plc*[70]and by Sir Andrew Morritt V-C in *Trustor AB v Smallbone*[71] The court held that the defendant, a Director had misapplied the funds and used the new company as a mere façade and ordered the piercing of the corporate veil which then rendered the defendant, defenseless.

The Court of Appeal in *Adams v Cape Industries plc* engaged in a lengthy review on what constituted identifying a mere façade, and when it was appropriate to pierce the veil. The court started with *Salomon's case:* that all companies are separate legal entities from their shareholders. There are however, two ways round the principle; the agency arguments as has been discussed before or the where the court concludes that the company structure is a mere façade concealing the true facts as stated in *Woolfson v Strathclyde Regional Council.*

The Court of Appeal laid down the cases where piercing does occur as situations where the corporate structure has been used by the defendant to evade; Limitations imposed on his conduct by law and such rights of relief of third parties already possessed against him.[72]

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[70] [1990] BCLC 479 at 515

[71] [2001] 2 BCLC 436 at 444 -445. This may be applied in Kenya as persuasive case law. The facts of this case were that some £20m had gone missing in company and had ended up in company I Ltd. The claimant company sought to pierce the corporate veil, so as to establish that receipt of that money was indeed by S and was essentially a front.

[72] [1990] BCLC 479 at 520.

Slade LJ further clarified that the court would not accept the position that the veil would be pierced where the corporate structure was used to evade such rights of relief as third parties may in the future acquire. He stated that:[73]

> *"…We do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this way is inherent inn our corporate law."*

The counsel for the plaintiff had argued that the purpose for which the company had been formed was so that the English company could trade in the US through the subsidiaries without running the risk of tortuous liability with respect to its asbestos trade and therefore warranted the piercing of the corporate veil. Slade LJ, acknowledging that this might be the case, stated further that:[74]

> *"...in our judgment, Cape was in law entitled to organize the group's affairs in that manner and ...to expect that the court would apply the principle in Salomon v Salomon & Co Ltd[75] in the ordinary way."*

The court is justified in piercing the corporate veil where the corporate structure has been used by the defendant to evade:

(i) Limitations imposed on his conduct by law;

(ii) Rights and reliefs which third parties already possess;

[73] [1990] BCLC 479 at 520

[74] [1990] BCLC 479 at 520

[75] [1897] AC 22.

Limitations Imposed On His Conduct By Law:

This was enunciated in the case of *Jones v Lipman*[76]and in *Gilford Motor Co Ltd v Horne*[77]. In the case of *Jones v Lipman* the defendant in an attempt by the defendant to evade an order for specific performance, transferred a property to a company set up solely for this purpose. He and a clerk for his solicitors were the only shareholders and directors. The court held that the company was a mask, created merely to evade obligations and ordered specific performance against the company.

In the other case of *Gilford Motor Co Ltd*, the director of the company was subject to a restraint of trade provision. He sought to breach this contract by forming a company that would carry out competing business. The company was formed with his wife and employees as directors and shareholders. The court held that the company was formed as a device to mask the carrying on of business by the defendant in breach of a pre-existing legal obligation and granted an injunction as against the company and the defendant.

In the case of *Re Bugle Press Ltd*[78] where a company was formed solely to facilitate the expropriation of minority shareholders in another company by the majority using the English Company Act which allowed for 90% of the shareholders to compulsorily acquire the remaining 10% of the shares in certain circumstances. The court held that the incorporation was an abuse of the statutory provisions.

A further illustration is the case of *Re H*[79]where the Court of Appeal held that where the defendant uses the corporate structure as a device or façade to conceal his criminal activities, the court could lift the corporate veil and treat the assets of the company as the realizable property of the defendants. The court considers the motive of the defendant as a significant in determining whether to pierce the corporate veil. The conduct has to be that that is manifestly unjust.

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[76] [1962]1 All ER 442.

[77] [1933] Ch 935, CA

[78] [1961] Ch 270.

[79] [1996] 2 BCLC 333, CA.

4.4.2 Rights and Reliefs Which Third Parties Already Possess

This is normally where the corporate structure is simply interposed belatedly as an attempt by the defendant to evade rights of relief which third parties already possess as against him. An illustration is provided in the case of *Re a Company*[80]where a chain of companies was used by the defendant to put assets out of the reach of the plaintiffs after proceedings against the defendant had been commenced. It was held that the pierce to enable the plaintiffs to pursue the assets.[81] The court also pierced the corporate veil in the case of *Trustor AB v Smallbone*[82] where the company was used by the director to conceal his receipt of money extracted improperly from the claimant company by him.

The court may also decline to lift the corporate veil in certain circumstances. In the case of *Ord v Belhaven Pubs Ltd*[83] the plaintiff had sought leave of the court to substitute the original defendant company with the holding company or another wholly owned subsidiary in the group, following that as a result of restructuring of the group assets six years previously, the defendant company no longer had substantial assets. The Court of Appeal held that while the court had jurisdiction to pierce the corporate veil where the company is a mere façade concealing the true facts, there had to be evidence of such a façade. There was no impropriety alleged in the group restructuring, no transfer away of assets of defendant company at an undervalue, and no improper motive. The court was of the opinion that the restructuring was as attempt to rationalize the groups activities, in light of the prevailing market circumstances (namely the recession of the property markets in the early 1990s). Thus, in the absence of any impropriety sham or concealment in the restructuring of the group, it would be wrong to lift the corporate veil in order to make the shareholders of the defendant company liable instead of the company itself.

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[80] [1985] BCLC 333, CA.

[81] Hannigan (see footnote 5) cites the case of *BCCI SA v BRS Kumar Bros Ltd* [1994] 1 BCLC 211where a company shifted assets to another company to avoid the reach of charges granted to creditors of the first company. The court held that a receiver would be appointed over the assets of the second company which was arguably nothing more than the first company in anew guise.

[82] [2001] 2 BCLC 436.

[83] [1998] 2 BCLC 447, CA.

4.5 CONSIDERING THE CORPPORATE GROUP–SEPARATE ENTITIES OR A SINGLE UNIT?

The modern business world has evolved greatly from the time of *Salomon v Salomon & Co Ltd* and his one man company, to the contemporary phenomenon of the corporate group with subsidiary companies being owned by corporate shareholders.

As discussed under agency, shareholding alone does not make the entity the agent of the shareholder, whether that shareholder be an individual or another company. The Court of Appeal in *Adams v Cape Industries plc*[84]clarified that:

> *"…save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v Salomon & Co Ltd merely because it considers that justice so requires. Our law… recognizes the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities…"*

Thus, if Kenya was to follow the English position then the courts in Kenya would consider all the companies in a group of companies as separate legal entities and not ads the agents of the controlling shareholder.

There are then the exceptions to the general rule that have been stated, namely agency and piercing of the corporate veil. It is possible that there is an agency relationship between a subsidiary and a parent company such that the subsidiary is acting as an agent for the parent company, as noted previously in *Smith, Stone & Knight Ltd v Birmingham Corpn.*[85] We also established that the court may pierce the corporate veil where the subsidiary is a mere façade concealing the true facts.[86] We also determined

[84] [1990] BCLC 479 at 513

[85] [1939] 4 All ER 116

[86] *Woolfson v Strathclyde Regional Council* (1978) 38 P & CR 521 , HL.

that the fact that the shares are wholly within the control of one shareholder does not make the company a façade, nor is the group structure a façade where it is set up with a view of minimizing liabilities which might arise in the future. The Court of Appeal elucidated the point:[87]

> *"…we do not accept as a matter of law that the court is entitled to lift the corporate veil a against the defendant company which is a member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability in respect of particular future activities of the group will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this way is inherent in our corporate law."*

There are arguments that in light of the circumstances of the modern day business world, the courts should relax their strict interpretation of the principle in *Salomon's case* and allow the veil to be lifted in the group context. Hannigan proposes that the law should be developed so that obligations and responsibilities would be attached to the group and not to individual companies. The law would thus reflect the economic reality which is that companies that trade as a group, raise capital as a group are the considered by those dealing with them to be a group and hence should be treated by the courts as a group.[88]

This approach has met mixed reactions in the English courts. Lord Denning supported the development of group enterprise law in the case of *DHN Food Distributors Ltd v Tower Hamlets LBC*[89], the position was rejected by the House of Lords in *Woolfson v Strathclyde Regional Council*[90]. The dilemma was stated by Slade LJ:[91]

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[87] [1990] BCLC 479 at 520.

[88] Hannigan, Brenda (footnote 5 above) 75.

[89] [1976] 3 All ER 462 at 467, CA (dissenting opinion)

[90] (1978) 38 P & CR 521, HL.

[91] [1990] BCLC 479 at 508.

"There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies is a separate legal entity possessed of separate legal rights and liabilities."[92]

Slade further commented that;

"We agree…that the observations of Robert Goff LJ in the case of Bank of Tokyo Ltd v Karoon[93] are the opposite:

"Counsel suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically…they were one. But we are concerned not with economics but with the law. The distinction between the two is, in law fundamental and cannot be bridged."

Robert Walker J, in the case of *Re Polly Peck International plc (No 3)[94]*, concluded that he could not regard a group of companies as a separate economic unit, as such a submission would create a new exception to the rule in *Salomon's case* that was not recognized by the court in *Adams v Cape Industries plc[95]* and therefore was not open to the court. The court further rebutted the idea that a group of companies might be regarded as a single unit in the case of *Ord v Belhaven Pubs Ltd[96]*. Hobhouse emphatically rejected this opinion stating that:[97]

"The approach of the judge in the present case was simply to look at the economic unit, to disregard the distinction between

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[92] Slade LJ referred to the case of *The Albarezo* [1975] 3 All ER 21 at 28, or [1977] AC 774 at 807 per Roskill LJ.

[93] [1986] 3 All ER 468 at 485, (1985) AC 45 at 64.

[94] [1996] 1 BCLC 428.

[95] [1990] BCLC 479 at 513

[96] [1998] 2 BCLC 447, CA.

[97] [1998] 2 BCLC 447, CA at 457

the legal entities which were involved and to say: since the company cannot pay, the shareholders who are the people financially interested should be made to pay instead. That of course, is radically at odds with the whole concept of corporate personality and limited liability and the decision of the House of Lords in Salomon v Salomon & Co Ltd."

One can therefore say that in taking this position, the courts would be performing a legislative function that is reserved for parliament. Hobhouse LJ opined that the true position was that the companies are entitled to organize their affairs in group structures and to expect the courts to apply the principles of *Salomon v Salomon & Co Ltd* in the ordinary way.[98]

The primary reason for the use of a group structure by multinationals is to further limit liabilities. Templeman J stated in *Re Southard Ltd*[99]that:

"A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholder of the parent company. If one of the subsidiary companies …turns out to be a runt in the litter and declines into insolvency to the dismay of the creditors, the parent company and other subsidiary companies may prosper at the joy of the shareholders without any liability for the debts of the insolvent subsidiary."[100]

It is unlikely that the parent company will accept the liabilities if a subsidiary where it will endanger its shareholders and creditors. Therefore a person claiming against a group of companies must identify the precise subsidiary with which they are dealing and which is responsible as the principle in *Salomon's case* will operate so as to prevent their having a claim against assets elsewhere in the group. This is especially

[98] [1998] 2 BCLC 447, CA at 458.

[99] [1979] 3 All ER 556.

[100] [1979] 3 All ER 556 at 565.

true for multinational corporations where the plaintiff wishes to add the parent company as a party to a suit as against a subsidiary.

A particular feature of group companies is cross-guarantees. These are contractual devices made between the parent company and its subsidiaries so as to ignore the separate legal entities and to be able to lend to the group and to recover from the group. Creditors that are unable to secure cross-guarantees (lack of bargaining power) are to be satisfied with what is known as a letter of comfort from the parent company. In the case of *Sticznia Gdanska v Latvian Shipping Co*[101]which involved the repudiatory breach of a subsidiary of shipping contracts which it had entered into with the claimant Polish Shipyard for six vessels. The subsidiary was incorporated in Liberia while the parent company was owned by the state of Latvia, who controlled most of the country's shipping fleet. The parent company had given no guarantee for the subsidiaries liabilities. It however entered into a contract with the company that provided the directors of the subsidiary company, that the subsidiary *'…will be kept in sufficient funds …to honour its liabilities as and when they fall due.'* Since the claimant was not a party to this contractual undertaking, it could not sue the parent company directly on it.

The Court of Appeal held that the parent company used the withdrawal of financial support as the means to bring about the destruction of the contracts. This it did by unlawfully breaching its obligations to fund the subsidiary. The parent company was liable, thus in tort for the indirect inducement by unlawful means of the subsidiary's breach of its contracts.

Hannigan also points out that, on insolvency, a liquidator might be able to establish that the parent company has exercised control over the subsidiary as to constitute itself a shadow director of the subsidiary. This would open up the possibility of potential civil liability by the parent company as a shadow director for matters such as wrongful trading by the subsidiary. A shadow director is an individual who is influential in the running of the company without taking a position on the board.[102]

[101] [2002] 2 Lloyd's Rep 436, CA.

[102] Hannigan Brenda (see footnote 5) 141.

In the case of tort creditors of subsidiary companies, it has been argued that the application of the *Salomon* principle is unfair as they are involuntary creditors. The court established in *Adams v Cape Industries plc*[103] where the claimants were tort creditors having sued the company for compensation for illness suffered as a result of exposure to asbestos. The court strongly affirmed the principle in *Salomon's case,* and emphasized that the use of the group structure in this way to insulate the rest of the group from future liabilities of a particular subsidiary was inherent in English company law.

4.6 THE LEGAL OBSTACLE OF ESTABLISHING AND MAINTAINING JURISDICTION

4.6.1 Jurisdiction

Jurisdiction is a major issue with multinational corporations where there are companies spread out through out the globe. Where one determines to institute a case in a country, one must ensure that they are able to establish jurisdiction. In tort cases, a plaintiff (i.e. the victim making a claim) must be able to establish jurisdiction "as of right, meaning that they can legally call upon the jurisdiction of the local courts over a defendant who is resident in that country (i.e. the company must be based in that country or headquartered there). In the United Kingdom, jurisdiction can be invoked over non-residents, but only in limited circumstances".[104] A corporation will be regarded as 'resident' in the UK if it's incorporated and formed under the law of the UK, has its registered office or official address in the UK, or its central management and control is exercised in the UK.[105]

4.6.2 Forum Non Conveniens

The other problem that exists in instituting a claim against multinationals is that of *forum non conveniens*. This is the discretion of the court to conclude that that country is not the appropriate forum for the case to be heard, to refuse to hear the case where

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[103] [1990] BCLC 479 at 513

[104] Under Order 11 of the *Rules of the Supreme Court,* a defendant can be served outside England where they are domiciled in England, if the claim involves real property located in England, a contract made in England, or the tort is committed in or causing damage in England. The court also maintains a further discretion in such cases.

[105] See further J.J. Fawcett, "Jurisdiction and Subsidiaries" *Journal of Business Law,* 1985, p. 16.

it feels that there is some other available legal forum 'in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.'[106]

Forum is a doctrine that developed through a series of commercial cases and its rationales lie in this area. Amongst a few of the arguments which have been raised in and out of the courts in favour of *forum* are: "anti-chauvinism" or "comity", and the desire not to act in a way derogatory to foreign courts; the desire to control "forum shopping", whereby a plaintiff attempts to bring their claim in a forum which would give them higher compensation; and "public interest" concerns such as the expense of litigation and possible congestion in the English courts.[107]

This discretionary power is known as the *forum non conveniens doctrine* (forum) and in the United Kingdom has served as one of the biggest obstacles for overseas workers attempting to hold UK-based multinational companies legally accountable in the UK courts for abuses that have occurred in the operations of their overseas subsidiaries. Under English law, the test will not be met where 'substantial justice will not be done in the alternative forum',[108] a determination that may be sensitive touching on foreign policy.

In the context of the personal injury cases such as the *Cape Plc* case, the defendant parent company will rely on *forum* by applying to 'stay' the proceedings, namely, to have the case heard in the foreign jurisdiction (where the injuries occurred) rather than in the UK. In exercising this discretion, the courts must be satisfied that the other forum is "the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice".[109]

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106 *Spiliada Maritime Corp.* v. *Cansulex Ltd* [1987] A.C. 460.

107 See A.G. Slater, "*Forum Non Conveniens: A View from the Shop Floor*" 104 the Law Quarterly Review, 1998, p. 555; and J.J. Fawcett "*Trial in England or Abroad: The Underlying Policy Considerations*" 9 Oxford Journal of Legal Studies, 1989, p. 205.

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109 *Spiliada Maritime Corp.* v. *Cansulex Ltd* [1987] A.C. 460 at p. 476.

The decision of the court in ***Adams v Cape Industries plc***[110] on *forum* was the first favourable decision with regard to a group action against an UK multinational. As a result, South African asbestos victims, and potentially a plethora of other victims of the operations of UK multinationals abroad, are able to have their claims tried on their merits in the UK.

Arguments for and against forum

As explained in the previous page, "anti-chauvinism" or "comity" have been raised in and out of the courts in favour of *forum*.

Forum non Conveniens being a discretionary power, "judges with discretion to dismiss cases will be quite inclined to exercise it… [and] the situation of the victims themselves is in continual danger of being forgotten".[111] The realities of the victims' lives and the actual merits of their allegations do not play the primary role in *forum*. Yet many victims are likely to be in an "all or nothing situation". In many cases, the overseas subsidiary of the multinational, is uninsured or by the stage of proceedings often insolvent, no longer operative, or has been sold on to other parties.

Two Stage Spiliada Test

The application of *forum* is governed by a two-stage test laid down by the House of Lords (the *Spiliada* test):

Stage 1: The Most Real and Substantial Connection

At this stage, the burden is on the defendant (parent company) to show that the country where the case is instituted is "not the natural or appropriate forum for the trial" and that "there is another available forum which is clearly or distinctly more appropriate than that forum". (I.e. the "natural forum" or the jurisdiction with which the claim has its "most real and substantial connection".)[112] The court the considers all of the factors that point in the direction of another forum, such as: the residence of the

[110] [1990] BCLC 479.

[111] Peter Prince, "Bhopal, Bougainville and OK Tedi: Why Australia's *Forum Non Conveniens* Approach is Better" 47 *International and Comparative Law Quarterly* 573, p. 583.

[112] *Spiliada Maritime Corp.* v. *Cansulex Ltd* [1987] A.C. 460 at p. 476 at 477.

parties[113], the factual connections between the dispute and the courts (such as the place the events occurred and the residence of the witnesses), and issues of convenience and expense.[114]

In personal injury cases, however, the nature of the actions and the fact that the injuries, victims, and witnesses all occurred or are located overseas, will usually mean that the foreign jurisdiction is the one with which the case will have its most real and substantial connection.[115] The claimants have not argued against this finding.

In the case of ***Connelly* v. *RTZ Corporation***, the trial judge found that Namibia was *prima facie* the jurisdiction with which the case has its most real and substantial connection. This finding was based on the facts that: the injury was sustained in Namibia, the principal witnesses of fact lived in Namibia or South Africa, some of the expert witnesses would be Namibian, a site inspection of the mine in Namibia would be necessary, and that the Namibian courts had the expertise and effectiveness to conduct a fair trial.[116]

In the *Cape Plc* case, the nature of the personal injury claims and the finding that each of the 3,000 South African plaintiffs individual diagnosis, prognosis, causation and damage would have involved evidence and medical examination of each plaintiff and an enquiry into the conditions in which each plaintiff worked or lived and for the period for which they did so, all "tipped the balance very clearly in favour of South Africa at the first stage of the *Spiliada* exercise".[117]

Stage 2: Substantial Justice

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[113] *Ibid* at 478, 481-2.

[114] *Ibid* at 478.

[115] It was only in the *Thor* case that the court ruled in favour of the UK. But this case can be seen as something of an exception due to its unique fact situation where an alleged unsafe system of work in the UK was exported to the foreign jurisdiction. See *Sithole and Others* v. *Thor Chemical Holdings Ltd and another* TLR 15 February 1999, p. 111.

[116] *Connelly v RTZ* [1996] 2 WLR 251, p. 254.

[117] Sarbjit Nahal (see footnote 66). Nahal refers to the case of *Lubbe and others* v. *Cape plc and other appeals* [2000] All ER (D) 1024.

Where the court concludes that some other forum is more appropriate for the trial of the action, it will grant the defendant a stay unless the plaintiff can show that there are circumstances by reason of which "justice" requires that the case should be heard in the country where the case is instituted. At this second stage, the court will concentrate on whether "the plaintiff will obtain justice in the foreign jurisdiction".[118] The plaintiff will not prove this by showing that they will enjoy procedural advantages such as higher damages by suing in that country. The plaintiff must take the foreign forum as they find it, even if it is in some respects less advantageous than the previous country.[119] It is not even enough to show that legal aid is available in the country of institution but not in the more appropriate foreign forum.[120] It is only if the plaintiff can establish that "substantial justice" will not be done abroad that a stay will be refused.[121]

For the personal injury victims, their ability to overcome *forum* and to have their cases heard in the country of incorporation of the parent company, often rests at this second stage and in the difficult task of showing that they will not obtain justice in the foreign jurisdiction. It is in this regard that the *Cape Plc* case is seen as a breakthrough.

Thus far, the leading favourable decision has been in the *Connelly* v. *RTZ*[122] case, where the court found that the victim's inability, in practice, to have their case tried in Namibia meant that the case should be heard in the country of incorporation, namely the UK. The court found that the victim could not fight a case without professional legal assistance and expert scientific witnesses, both of which necessitated financial assistance[123] in the form of legal aid or a conditional fee arrangement, neither of

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[118] *Spiliada Maritime Corp.* v. *Cansulex Ltd* [1987] A.C. 460 at 478; *Connelly v RTZ* [1996] 3 WLR 373, 384.

[119] *Spiliada Maritime Corp.* v. *Cansulex Ltd* [1987] A.C. 460 at 482, Connelly *supra* note 104 at 384.

[120] *Lubbe, supra* note 21.

[121] *Spiliada Maritime Corp.* v. *Cansulex Ltd* [1987] A.C. 460 at 482; *Connelly, supra* note 104 at 385.

[122] [1996] 2 WLR 251, p. 254.

[123] *Connelly, supra* note 22 at 386.

which was available in Namibia but was available in the UK.[124] In these circumstances, which have been regarded by the Lords as "exceptional"[125], the court was satisfied that the case was one where "substantial justice cannot be done on the appropriate forum [Namibia], but can be done in the jurisdiction where the resources are available".[126]

The success in *Connelly* has been reinforced and strengthened by the House of Lords' recent favourable decision in the *Cape Plc* case, where the court was also strongly influenced by the difficult realities facing the claimants, and in particular, that:[127]

i) there was no convincing evidence to suggest that legal aid might be made available in South Africa to fund the potentially long and expensive case and no hint that public funds might, exceptionally be made available to fund it;

ii) The South African Contingency Fees Act did not apply to the fees of expert witnesses, and the personal injury issues involved called for high quality expert advice and evidence, on medical, industrial and other issues;

iii) No firm of South African lawyers with expertise in this field had the means or would undertake the risk of conducting the case on a contingency fee basis; and

iv) The absence of developed procedures for handling such group actions in South Africa.

The House of Lords held that staying the case in favour of the more appropriate forum (South Africa) would result in the probability that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if their claims were to be justly decided, with Lord Bingham, commenting that:

> *"This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means, in*

[124] *Ibid*. at 385.

[125] *Lubbe, supra* note 21.

[126] *Connelly, supra* note 22 at 386.

[127] Sarbjit Nahal (see footnote 66) 10.

South Africa, to prosecute these claims to a conclusion provides a compelling ground, at the second stage of the Spiliada test, for refusing to stay the proceedings here."

The decision in the case in *Adams v Cape Industries plc* means that complaints will, at the very least, now have the opportunity to be heard in the UK courts on their facts.

CHAPTER FIVE

5.0 TORTUOUS ASPECTS WITH REGARD TO MULTINATIONALS

5.1 PRINCIPLES OF TORT LAW

Originally in action in tort was commenced by royal writ, issued from the Chancery, the writs remedied the injuries that in modern terms are called 'torts.'

Tortuous liability arises from a breach of a duty primarily fixed by law. This duty is towards persons generally and its breach is redressible by an action for unliquidated damages.[128] Liability in tort law is imposed:-

(i) As a legal consequence of a person's act or omission, if he is under a legal duty to act; or as the legal consequence of a person's act or omission of another person with whom he stands in some special relationship such as that of master and servant. This is known as vicarious liability.

(ii) Where liability is based on fault, or where an intention to injure is recognised but more often, negligence is sufficient. Other cases, such as strict liability, liability is in varying degrees independent of fault.

(iii) Whereas most torts require damage resulting to the plaintiff which is not too remote a consequence of the defendant's conduct. However torts such as trespass and libel do not require actual proof of actual damage.

The Tort of Negligence

The basis for the tort of negligence is that of corrective justice, namely that one who wrongfully causes another harm should correct the injustice by payment of compensation which will put them in a position equivalent to the one they enjoyed before the harm (as far as money can do this). To prove that a defendant is negligent, a claimant must establish certain essential elements of liability:

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[128] Rogers, W. V. H., *Winfield and Jolowicz on Tort* (London: Sweet and Maxwell, 2006)

i) The claimant must establish that the defendant owed them a duty of care, or a standard of care that would be expected of a reasonable person (or company) in the circumstances.
ii) If a duty is shown to exist, the claimant must show that the defendant breached the duty, or failed to comply with the standard of care required in the circumstances to protect others from the unreasonable risk of harm;
iii) The defendant's negligence must cause the plaintiff loss;
iv) The loss must not be too remote (i.e. must be foreseeable); and
v) The defendant must not be able to raise any defence to the plaintiff's claim.

Vicarious Liability

Vicarious liability is a legal doctrine that assigns liability for an injury to a person who did not cause the injury but who has a particular legal relationship to the person who did act negligently. For vicarious liability to arise, there must be an existence of the employer/employee relationship and the employer must have worked within the scope of employment. The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed.

The liability of corporations

Corporate liability determines the extent to which a corporation as a legal person can be liable for the acts and omissions of the natural persons it employs. It is sometimes regarded as an aspect of criminal vicarious liability, as distinct from the situation in which the wording of a statutory offence specifically attaches liability to the corporation as the principal or joint principal with a human agent.

Evidently, a corporation can only act through its employees and agents so it is necessary to decide in which circumstances the law of agency or vicarious liability will apply to hold the corporation liable in tort for the frauds of its directors or senior officers.

Where liability for the particular tort requires a state of mind, then to be liable, the director or senior officer must have that state of mind and it must be attributed to the company. In *Meridian Global Funds Management Asia Limited v. Securities Commission*[129], two employees of the company, acting within the scope of their authority but unknown to the directors, used company funds to acquire some shares. The question was whether the company knew, or ought to have known that it had acquired those shares.

The Privy Council held that it did. Whether by virtue of their actual or ostensible authority as agents acting within their authority (see or as employees acting in the course of their employment their acts and omissions and their knowledge could be attributed to the company.

Therefore, if a director or officer is expressly authorised to make representations of a particular class on behalf of the company, and fraudulently makes a representation of that class to a Third Party causing loss, the company will be liable even though the particular representation was an improper way of doing what he was authorised to do. The extent of authority is a question of fact and is significantly more than the fact of an employment which gave the employee the opportunity to carry out the fraud.

In *Lloyd v Grace, Smith & Co.*[130], the principle which the House of Lords held to be applicable was stated by Lord Loreburn to be:- "*If the agent commits the fraud purporting to act in the course of business such as he was authorised, or held out as authorised, to transact on account of his principal, then the latter may be held liable for it*".

In *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited* [1971] 2 QB 711, a company secretary fraudulently hired cars for his own use without the knowledge of the managing director. A company secretary routinely enters into contracts in the company's name and has administrative responsibilities that would give apparent authority to hire cars. Hence, the company was liable.

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[129] [1995] 2 AC 500

[130] [1912] AC 716

The Duty of Care

Tort liability is based on the establishment of a duty of care. The courts have applied various principles in determining a duty of care. The first principle is the 'neighbour principle'. This was pioneered by Brett MR in *Heaven v Pender* (1883), but the most important formulation of a general principle is that of Lord Atkin in *Donoghue v Stevenson* who stated that:

> "*You must take reasonable care to avoid acts or omissions which you can reasonably foresee are likely to injure your neighbour. Who, then in law, is my neighbour? The answer seems to be – person's who are so closely and directly affected by my act that I ought to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question*."

The 'neighbour' principle, based on reasonable foresight, and was found to be too wide. In *Ann v Merton LBC* (1977) 2 All ER 118, Lord Wilberforce introduced the two-stage test;

> "*First, one has to ask whether…there is sufficient relationship of proximity…in which case a prima facie duty arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any policy considerations which ought to be negative, or to reduce or limit the scope of the duty*."

In most cases it is a question of fact, whether the defendant owes the Plaintiff a duty of care on the particular facts of the case. This is referred to as the 'duty in fact.' The existence of that particular duty is not in issue, what is in issue is whether a duty is owed in that particular case.

This case (Ann v. Merton LBC) was however overruled by the decision in *Murphy v. Brentwood District Council* [1991] 1 AC 398. Here, the House of Lords overruled its earlier decision in *Anns v Merton London Borough Council* (1978) on the law governing the liability of local authorities for the inspection of building foundations. In the earlier decision, the House of Lords held that a local authority was under a legal duty to take reasonable care to ensure that the foundations of a building complied with building regulations. This created a very wide and extensive duty of care for local authorities which was out of kilter with the development of this area of law (negligence) in relation to other property like goods. There was considerable academic and judicial resistance to the decision in *Anns case*. In overruling it, the House of Lords in Murphy cited the reluctance of English law to provide a remedy for pure economic loss, that is, loss which is not consequential upon bodily injury or physical damage. However, the Murphy approach has not been followed elsewhere in the common law world, with the consequence that the impact of Murphy restricting liability for negligently caused economic loss has been considerably less in those jurisdictions where liability stems from the precedent of *Anns v Merton London Borough Council.*

Caparo Industries plc v Dickman [1990] 1 All ER 568 has effectively redefined the 'neighbourhood principle' as enunciated by Lord Atkin in the case of *Donoghue v Stevenson [1932]* AC 562. The House of Lords, following the Court of Appeal, set out a "three-fold test". In order for a duty of care to arise in negligence:-

- harm must be reasonably foreseeable as a result of the defendant's conduct
- the parties must be in a relationship of proximity
- it must be fair, just and reasonable to impose liability

5.2 RECENT HISTORY OF TORT CLAIMS

In recent times, there has been a wave of legal actions in the United, Kingdom, Canada and Australia with the aim to hold parent companies accountable legally for the negative environmental, health and safety, labour and human rights. These causes are tortuous. The cases have commonly been brought by foreign workers or residents of communities harmed by mining, oil or gas extraction or chemicals manufacture.

It is established law that corporations are liable in tort law to the same extent as a natural person. The legal consequences of the actions and the mental states of the corporation's agents and employees are imputed to the corporation. It has been stated that 'Corporations can commit almost any kind of tort that individuals can commit , and are liable for the acts of their agents and servants in the same degree as natural persons are liable for the actions of their servants and agents.'[131]

There have been a few cases that are initiated by host country governments on behalf of their injured citizens however the majority have been initiated by private citizens. All of the claims have been brought in common law jurisdictions.[132]These suits call on parent companies of multinational corporations to ensure that their behaviour as direct investors in other countries matches the standards of care that would be expected at home. They are essentially claims in tort.

A cause of action against a multinational corporation has to be done carefully and properly. The case has to be framed carefully. The risks of liability are likely to increase the closer a parent company gets to the day-to-day control of associated companies or subsidiaries.[133] The problem as discussed at length in Chapter Three is the legal principle that different companies in the same multinational group must be treated as separate entities. The parent company will use the defence that it cannot be held liable for the acts of the subsidiary. It is for the court to determine the extent of influence that the parent company has over the subsidiary. More often than not the parent company does in fact, exercise complete control over the subsidiary.[134]

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[131] Menno T. Kamminga, Saman Zia-Zarifi, '*Liability of Multinational Corporations under International Law'*, Kluwer Law International: Hague, London, Boston. Referring to W. M. Fletcher, et al., *Fletcher Cyclopaedia of the Law of Private Corporations,* Vol. 10, rev. ed. (1993) section 4877, pp. 337-338.

[132] Halina Ward, *Governing Multinationals: The Role of Foreign Direct Liability* Briefing Paper, New Series No. 18 Feb 2001, the Royal Institute of International Affairs 1.

[133] *Ibid* at page 2

[134] *Briggs v James Hardie & Co Pry Ltd* (1989) 16 NSWLR 549, at page 577.

The Personal Injury Cases

The cases have not sought to directly challenge the principle of corporate separateness, but rather, to take advantage of the argument that a UK parent company itself owes the foreign workers a duty of care and can be held directly responsible for the injuries suffered by workers in their overseas subsidiaries. Traditionally, a parent company cannot be held liable for the conduct of other companies within a corporate group because of the principle of corporate separateness. But these cases seek to establish that the factual links of ownership and control by the parent over the foreign subsidiary mean that they can and should be held liable.

Control by the parent company is alleged to establish a direct duty of care and direct negligence independent of its shareholding (although the shareholding is the mechanism by which the parent company exercises control). It is suggested that provided there is sufficient involvement in, control over and knowledge of the subsidiary operations by the parent there is no reason why the general principles of negligence should not apply so that in certain circumstances such a duty should exist. In this sense, the argument is analogous to that of "product" liability, except that what is at issue are "processes" rather than products.[135] The corollary of this argument, that a duty should be imposed in respect of overseas operations, would seem to be that:

> "*The nature of the duty is to ensure that those operations do not subject those in close proximity, such as workers, to a significant risk of injury of which the parent company is, or ought to be aware. In other words, compliance with home or international standards is required of a parent company. It would be illogical (and contrary to the fundamental principles of negligence) on the one hand, to decide that the parent owed a duty, but on the other hand, that the scope of this duty varied from place to place and in particular, was less in a developing, than a developed, country. If this analysis is correct, then it reinforces the argument that "double standards", in respect of health and safety, are neither morally nor legally justifiable*."[136]

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[135] Richard Meeran, "When is there a duty of care?: For "*The Times",* (11 January 2000)

[136] *Ibid*. at 11-12.

Thor Chemical Holdings Ltd / Desmond Cowley

These arguments have yet to be definitely tested in the UK courts. The argument was accepted as a valid line of reasoning in *Thor Chemical Holdings*. However, this case is somewhat unique in light of the fact that it "occurred against an exceptional background".[137] The facts of the case were captured by *Richard Meeran* viz:

"During the 1980s, Thor manufactured mercury-based chemicals in Margate, England. Health and safety at the Margate factory came under repeated criticism from the Health and Safety Executive (HSE) due to elevated levels of mercury in the blood and urine of workers. In 1986, the company terminated mercury-based processes in Margate and shifted its Margate operations (including key personnel and plant) to Cato Ridge, Natal, South Africa. At the South African factory, the same deficiencies which had been identified by the HSE were replicated and the operation also relied extensively on casual untrained labour. Workers were said to be "recycled" with workers with high levels of mercury were laid off and replaced by new casual labourers. In February 1992, three workers died and many other were poisoned to varying degrees. An inquiry and criminal prosecution in Pietermaritzburg Magistrate's Court imposed the equivalent of a £3,000 fine on Thor. Shortly thereafter, compensation claims against the parent company and its Chairman, Desmond Cowley, were commenced in the English High Court on behalf of 20 workers.

Thor allegedly shifted an unsafe system of work (including key personnel and plant) to South Africa, despite the fact that it had been repeatedly criticised by the Health and Safety Executive in the UK due to elevated levels of mercury in the blood and urine of workers. These same deficiencies were replicated in the South African operations. The parent company's design, transfer, set-up, operation and supervision and monitoring of an intrinsically hazardous process thus made much stronger the claim that the company had acted negligently (through its acts and omissions) by failing to take steps to protect the South African workers against the foreseeable risk of mercury poisoning".[138] The case was settled in 1997 for £1.3 million but a further

[137] David McIntosh "When is there a duty of care?: Against" *The Times* (11 January 2000)

[138] Richard Meeran, "When is there a duty of care?: For "*The Times",* 11 January 2000.

21 claims are now in progress, and after the company's attempts to stay the action on *forum* grounds were rejected, the case was listed for trial in October 2000.

Cape Plc Case

More important though will be the upcoming trial in the *Cape Plc* case. In this case, the central thrust of the claims which will ultimately have to be decided is not against the defendant as the employer of the claimants, or as the occupier of the factory where they worked, or as the immediate source of the contamination in the area where the plaintiffs lived, but rather against the defendant as a parent company which knowing (so it is said) that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss).

Resolution of this issue will not be easy. Lord Bingham suggested that it will necessarily involve such elements as an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. He added that if a duty were held to exist, "there would be a serious factual issue whether the defendant was in breach of it". Some of the factual issues which the claimants are bound to raise in this regard, include:

i) Laws regulating the use of asbestos existed in the UK from 1931 but the conditions in Cape's South African operations were inexcusable with its own records showing asbestos levels in their Penge factory as being, on average 20 times higher than those permitted in the UK;
ii) Evidence such as that of one witness who found "young children completely included within large shipping bags, trampling down fluffy amosite asbestos…, kept stepping lively by a burly supervisor with a hefty whip…"

iv) Directors were actively involved in undermining the association between asbestos and cancer which was said to threaten "future recruitment of personnel for their mines";

v) Cape referred none of this in evidence to the 1973 UK Parliamentary committee investigating treatment of South African workers by British firms; and

vi) While the fact hundreds of workers at Cape's Barking factory in the UK developed asbestosis led to the closure of this factory in 1968, South African operations continued until the 1980s.[139]

Even in light of such facts, the issue of whether a parent company owes a duty of care in such scenarios not only remains unresolved in the UK, but largely untested in other jurisdictions. The Indian *Mehta* decision following the Bhopal disaster is pertinent to some degree, but at essence, dealt with the Indian Constitution. The only successful analogous case was the US *Amoco Cadiz* case, which was a first instance decision and not tried and tested by the higher level courts.

Amoco Cadiz

In the *Amoco Cadiz* case, the US District Court concluded that not only were the subsidiaries liable for their direct involvement in damage caused by a tanker of the coast of Normandy, but their parent company was also liable because of the close control it exercised over its subsidiaries:

> *43. As an integrated multinational company which is engaged through a system of subsidiaries. Throughout the world, Standard is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities AIOC and Transport."*
>
> *44. Standard exercised such control over its subsidiaries AIOC and Transport, that those entities would be considered to be mere instrumentalities of Standard. Furthermore, Standard itself was initially involved in and*

[139] *Ibid*

controlled the design, operation and management of Amoco Cadiz and treated the vessel as if it were its own.[140] "

The ultimate decision in these cases, and particularly the Cape Plc case could mark a pivotal breakthrough in the attempt to hold UK multinationals accountable with regard to human rights. In the meantime though, the question of parent company liability "remains in suspended animation, to be used against any multinational with English headquarters when allegations can be made to an extent sufficient to convince the court that there is a 'triable issue'…"[141]

The Legal Obstacle of Establishing a Company is Negligent

The ultimate legal basis, on which the personal injury cases rest though, is that of the civil action of the tort of "negligence". Foreign workers seek to establish that UK corporations owe them a "duty of care", that this duty was breached causing them loss, and that the company is negligent and thus liable to pay the workers compensation. The cases do not seek to pierce the corporate veil but rather, to hold the parent company itself responsible to the foreign workers. This argument has not yet been tested in the courts but if it proves to be successful, it will mark a further significant breakthrough in ensuring that UK multinationals are held legally accountable for human rights.

5.3 COMPARATIVE STUDY

THE PRINCIPLE OF CORPORATE SEPARATENESS

BRITAIN

Sarbjit Nahal discussing the position of corporate liability in England with relation to multinationals[142] states that in Britain, the English courts have jurisdiction to deal

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[140] *Amoco Cadiz,* US District Court, Northern District of Illinois, 18 April 1984, 2 *Lloyd's Law Reports* (1984) 338.

[141] *Supra* note 124

[142] *Supra* note 99 above (last accessed on October 6, 2005)

with the case where the defendant is based in England. This is the same throughout the European Union by virtue of Article 2 of the European-wide Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968.

JURISDICTION

The first legal challenge, according to *Nahal*, is that of establishing and maintaining jurisdiction or the power to have the UK courts decides the matter in controversy (rather than in the foreign jurisdiction where the injuries occurred). The courts apply their discretion under the *forum non discretion conviniens* (*forum*) to decide that the jurisdiction where the acts and injuries occurred rather than the UK is the 'appropriate' forum for the case to be heard. The case of *Cape Plc* case was a breakthrough with regard to jurisdiction, with the House of Lords ruling that such cases should be heard in the UK where issues such as cost and lack of legal aid abroad would result in 'substantial injustice' for the overseas victims.

Exercising jurisdiction over a UK multinational

Nahal, explains that for a case to be heard in the UK, a plaintiff, under Order 11 of the Rules of the Supreme Court, must be able to establish jurisdiction "as of right, meaning that they can legally call upon the jurisdiction of the English courts over a defendant who is resident in the UK (i.e. the UK based or headquartered corporation). Jurisdiction can also be invoked over non-residents, but only in limited circumstances".[143] He states that "…a corporation will be regarded as 'resident' in the UK if its incorporated and formed under the law of the UK, has its registered office or official address in the UK, or its central management and control is exercised in the

[143] Under ***Order 11*** of the *Rules of the Supreme Court,* a defendant can be served outside England where they are domiciled in England, if the claim involves real property located in England, a contract made in England, or the tort is committed in or causing damage in England. The court also maintains a further discretion in such cases.

UK."[144]

Corporate Separateness

Where jurisdiction, is established and maintained, the second obstacle which will be encountered is the strongly entrenched principle in UK company law by which a UK based parent company has a totally separate legal identity and legal liability from its overseas subsidiaries, and vice versa. This principle is near untouchable and the courts may only 'pierce the veil' and hold the parent company responsible for the actions of its subsidiary in exceptional circumstances.

The Legal Obstacle of Corporate Separateness in the UK

Another obstacle that will exist in any attempt to hold UK multinationals legally accountable in relation to human rights is the near sacrosanct nature of the structure by which companies are organised. In the UK, multinational companies have tended t o organise along extended lines of closely held parent company--subsidiary company relationships. This structure has been described as a "pyramid", with a UK-based or headquartered parent company at the apex, owning and controlling a network of wholly- or majority-owned subsidiaries. In turn these subsidiaries may themselves be intermediate holding companies for a further sub-group of closely held subsidiaries.[145]

The bedrock of this complicated UK company structure is a concept seen as crucial to commerce known as "corporate separateness" or the "corporate veil", whereby each of the different companies within the corporate group is a separate legal person in its own right, with separate legal rights and liabilities.[146] Thus the parent company of a wholly-owned subsidiary is no more responsible for its subsidiary than would be a member of the public for the negligence of a large public company, in which he or she

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[144] *Supra* note 99, cites J.J. Fawcett, "Jurisdiction and Subsidiaries" *Journal of Business Law,* 1985, p. 16.

[145] Peter Muchlinski, , *Multinational Enterprises and the Law.* Oxford: Blackwell, 1999 at page 65.

[146] See *Saloman* v. *Saloman & Co Ltd* (1897) AC 22.

owns a single share. Save in the case of very narrowly defined exceptions, the parent company is no different than any other shareholder. [147]

As a result, in practice, multinational companies are able to utilize these structures escape liability for the actions of their overseas subsidiaries.

NEGLIGENCE

In the UK, the personal injury cases have not sought to directly challenge the principle of corporate separateness, but rather, to make the untested legal argument that, on the facts, the parent company is directly responsible or negligent for the injuries suffered by workers in their overseas subsidiaries. This entails establishing that a UK parent company has breached the 'duty of care' it owes to workers overseas and is liable to pay compensation to them for their injuries.

The Cape Plc Case[148]

We shall consider the case of *Cape Plc* as an important demonstration of how the obstacles have been dealt with. The case involved personal injury and involved some 3,000 South African asbestos victims who sued the London-based UK multinational Cape Plc. The case shows how violations can be committed by a company in its operations abroad, and in turn, the legal obstacles which currently face overseas victims in their attempts to hold companies legally accountable in the UK for such violations.

The facts as provided by *Nahal* were;

> "*Cape Plc was involved in the mining and milling of blue and brown asbestos in the Northern Cape and Northern Provinces of South Africa from 1890 until 1979."*
>
> *Until 1948 the operations in the North Western Cape were carried out directly by the parent company but for the remainder of the*

[147] Richard Meeran, "When is there a duty of care?: For "*The Times",* 11 January 2000 <…..>.

[148] The information on the case is largely based on Richard Meeran, "When is there a duty of care?: For "*The Times",* 11 January 2000

period, through wholly owned subsidiaries. The profits from South African operations owned by Cape Plc flowed back to the UK."

The Prieska mill (Northern Cape) was situated in the middle of town, close to the school. In and around Prieska, the focus of blue asbestos mining and milling operations, the incidence of asbestos-related disease was very high, with whole families being affected. In 1962, Cape Plc's Chief Medical Officer, based in London, visited South Africa and reported that:

> *"…at Prieska the conditions around and about the mill are not good. The crusher is out of doors – it was obvious that quite a cloud of dust was being produced and blown away by a fairly strong wind towards the town."*

At the Penge mine (Northern Province), conditions were just as bad with Cape Plc's own records showing that asbestos dust levels during the 1970s were 20 times higher than the UK limit during the corresponding period. Laws regulating the use of asbestos existed in the UK from 1931 but the conditions at Cape's operations were inexcusable. Cape Plc also took full advantage of the apartheid regime using young children in its mines and mills. A government health inspector, Dr. Gerritt Schepers observed that:

> *"…exposures were crude and unchecked, I found young children completely included within large shipping bags, trampling down fluffy amosite asbestos, which all day long came cascading down over their heads. They were kept stepping down lively by a burly supervisor with a hefty whip. I believe these children to have had the ultimate of asbestos exposure."*

Hundreds of workers at Cape Plc's Barking UK factory also developed asbestosis. While the prevalence of asbestos-related disease caused the Barking factory to close in 1968, South African operations continued until the 1980s. Cape Plc has also settled thousands of UK-based asbestos claims, paying out some £30 million in compensation by 1996. To date, though, no South African case had been fully heard and no compensation has been paid to the South African victims."

In February 1997, compensation claims were commenced in the English High Court on behalf of three Penge workers who had lived near the mine and were now suffering from asbestosis, and two Prieska residents suffering from mesthelioma, an asbestos-related cancer of the lining of the lung, who had lived in the vicinity of the mine."

The claims were based on the negligent control of the company's worldwide asbestos business from the UK, including the failure to take any, or adequate measures to reduce asbestos exposure to a safe level, or to warn of the dangers of asbestos. In January 1999, further actions comprising some 3,000 claims were commenced in the UK against Cape Plc by South African claimants exposed to asbestos in the same geographical regions of South Africa."

The Cape Plc could then be said to be based on tort because it is clear that a duty of care was owed by the subsidiary company in South Africa to its employees. Noting from Lord Atkin, in *Donoghue v Stevenson*, *'(one) must take reasonable care to avoid acts or omissions which (one) can reasonably foresee are likely to harm your neighbour…*' and Lord Wilberforce, in *Anns v Merton LBC* (1977) who added that *'there must be a sufficient relationship of proximity… (for) a prima facie duty to arise*.' The existence of an employer-employee relationship is clearly a sufficient relationship of proximity. It is established law that the employer has a duty to ensure the working conditions of an employee are safe and not harmful to the health.

THE DOCTRINE OF FORUM NON CONVENIENS

In the UK, where a plaintiff sues a defendant 'as of right' in the UK courts, the courts still have a discretion to conclude that England is not the appropriate forum for the case to be heard. This discretionary power is known as the *forum non conveniens doctrine (forum)* and has served as one of the biggest obstacles for overseas workers attempting to hold UK-based multinational companies legally accountable in the UK courts for abuses that have occurred in the operations of their overseas subsidiaries.

The defendant, under the principle applies to 'stay' the proceedings, namely, to have the case heard in the foreign jurisdiction (where the injuries occurred) rather than in the UK. For the court to exercise this discretion, they must be satisfied that the other forum is "the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice".[149]

For foreign personal injury victims bringing an action in the UK, *Nahal* states:-

> *"…the salient reality is that "judges with discretion to dismiss cases will be quite inclined to exercise it… [And] the situation of the victims themselves is in continual danger of being forgotten".[150] The realities of the victims' lives and the actual merits of their allegations do not play the primary role in forum. Yet many victims are likely to be in an "all or nothing situation". If the case were to be heard in their own jurisdiction, they may face a variety of obstacles to justice, such as fear in local courts of persecution, delay and funding. Equally important, in many cases, the overseas subsidiary of the UK multinational, is uninsured or by the stage of proceedings often insolvent, no longer operative, or has been sold on to other parties. As such, forum, according to Richard Meeran of*

[149] *Spiliada Maritime Corp.* v. *Cansulex Ltd* [1987] A.C. 460 at p. 476.

[150] Peter Prince, "Bhopal, Bougainville and OK Tedi: Why Australia's *Forum Non Conveniens* Approach is Better" 47 *International and Comparative Law Quarterly* 573, p. 583.

> *Leigh Day & Co.*[151]*, solicitors for the Cape Plc claimants, often demonstrate a "total lack of reality" by refusing to look to at the realities and merits of the case.*[152]

As stated above, the most troublesome aspect is the principle of *foreign non conveniens.*

Another problem is that standards in labour, environmental, health and working conditions may not be the same all over the world, and it would be difficult to bring before the court an action against a parent company that is acceptable in the county where the breaches are said to have occurred. This is sadly the situation with many developing countries which are incapable of maintaining the same standards that have been established in the developed countries. Some principles of international law are relatively new concepts such as the precautionary principle in environmental law, and there may be differing views on the extent of they should be applied and whether there are customary international law.

THE EU AND THE BRUSSELS CONVENTION

It is important to note that the English courts may not apply *forum* where the appropriate forum is another EU state. EU states, including the UK, have all contracted to the Brussels Convention[153], Article 2 of which states that *"persons domiciled in a Contracting State, shall, whatever their nationality, be sued in the courts of that State".* Thus, Italian workers employed at Cape Plc's Turin manufacturing subsidiary could not be prevented from making a claim in the UK where the company is domiciled (the *Gisondi* claim), whereas, South African and other non-EU workers have and continue to be subject to *forum*.

The rest of Europe (except for the UK) accepts Article 2 without qualification,

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[151] The Advocate firm that represented the plaintiffs in the *Cape Plc case.*

[152] Interview with Richard Meeran, 18 July 2000. Richard Meeran, "When is there a duty of care?: For "*The Times",* 11 January 2000 <…..>.

[153] *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968* which has been incorporated into English law the *Civil Jurisdiction and Judgments Act 1982*.

meaning that the courts have no discretion to use *forum* where the parent company is domiciled in an EU state, but the alternative forum is a non-EU country. In the UK though, the Court of Appeal has held that the courts do have such a discretion.[154] This finding has been criticised as misunderstanding the Convention and even as "downright wrong".[155] The issue will ultimately have to be decided by the European Court of Justice in what will be an extremely important decision:

> *"The fact that a group action brought in any other EU Country against a company domiciled in that country could not be stayed, whereas the increased number of foreign Claimants encourages the grant of a forum non conveniens stay, serves to highlight the discrepancy between England and the rest of the EU in relation to the application of Article 2. Resolution of this point by the ECJ may well result in the total demise of forum non conveniens in cases involving English-based companies*."[156]

LIABILITY OF THE PARENT COMPANY

Escaping Liability while Maintaining Control

Using these extremely complex corporate structures, parent companies have been able to escape liability for the actions of their local (overseas) operating subsidiaries. Nonetheless, the parent company is still often able to retain control of its subsidiaries through such structures as cross-directorships between the parent and subsidiaries, the formulation of policy, technological control and financial control. With regard to overseas operations, this structure and relationship serves two important purposes: i) it enables the parent company to retain control of the business from the UK; and ii) it protects the multinational group as a whole, since such factors as legal obstacles and difficulties in obtaining access to justice in local courts against local subsidiaries (which are often insolvent and uninsured), means that the multinational groups escapes responsibility altogether and victims go without redress.

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[154] *Re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72.

[155] P.M. North and J.J. Fawcett *Cheshire and North's Private International Law (12th ed.).* London: Butterworths, 1992 at page 334.

[156] *Supra* note 3 at APGE 12.

Piercing the corporate veil

Despite the near sacrosanct nature of this structure and relationship, it is possible in certain narrowly defined circumstances to "*crack... open the corporate shell*"[157] or "pierce the corporate veil" by either going behind the corporate personality to its members or directors, or of ignoring the separate personality and liability of each company in favour of the corporate group as a whole.[158] If one could successfully pierce the veil of the multinational company in human rights-type cases, a UK parent company could be held legally accountable for the actions of its overseas subsidiaries.

The courts will lift the veil, but they will only do so because of special, exceptional, narrowly defined circumstances. In this vein, they have made it quite clear that they will not "lift the veil merely because it considers that justice so requires".[159] Under various UK statutes, the veil can be lifted in certain specific situations, but these are unlikely to arise in the context of multinationals and human rights.[160] Case law has also established that it is possible to pierce the veil, albeit in the three very narrowly defined circumstances or exceptions outlined and reiterated in the case of *Adams v. Cape Industries plc* (where it should be added the veil was not pierced):[161]

i) Firstly, the courts will pierce the veil and regard all the companies in a corporate group as a "single economic unit" in interpretation cases, such as where it is construing a statute, contract or other document and it is needed to effect its underlying purpose or meaning.

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[157] Per Devlin J. in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford* [1953] 1 Q.B. 248 at 278.

[158] Paul L. Davies, *Gower's Principles of Modern Company Law (6th Ed.).* London: Sweet & Maxwell, 1997, p.148.

[159] *Adams & Others* v. *Cape Industries plc* [1990] Ch. 433, p. 537.

[160] A number of such instances arise under the *Insolvency Act 1986 and Companies Act 1985*, such as where there is a reduction of the number of members of the company, fraudulent or wrongful trading, abuse of company names, employment of disqualified directors, misdescription of the company, and premature trading.

[161] *Adams, supra* note 47.

ii) Secondly, the courts will pierce the veil when the corporate group structure is a "mere façade concealing the true facts" (i.e. a "sham"). The motives behind the corporate group structure will be quite important in this regard.

iii) Finally, the courts will pierce the veil where there is express agreement between the parent and subsidiary that one is acting as the agent of the other (i.e. exercising control and authority over them).

In practice, these exceptions are so narrow that they will make it extremely difficult to pierce the veil. The courts have made it quite clear that they are not entitled to lift or pierce the veil against a company that is a member of a corporate group merely because the corporate structure has been used so as to ensure that legal liability falls on another company in the group. The very structure of UK company law thus allows UK based companies to escape liability for the potential actions, omissions, injuries, deaths, and human rights abuses caused by its subsidiaries overseas. According to the English courts, "Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our company law".[162] But for those trying to hold UK multinationals accountable for human rights, the "effect of the corporate veil makes it practically difficult for claimants injured by multinationals to get justice anywhere" – they "fall through the net completely".[163]

UNITED STATES OF AMERICA

In 1789, the US Congress adopted the Alien Tort Claims Act as part of the Judiciary Act. This Act granted the district courts extra-territorial jurisdiction over specified claims, particularly concerning human rights violation no matter where the violation occurred, even if in another country. This legislation has been used in increasing frequency to hold multinationals accountable. This has been followed by increased lobbying by environmental and human rights groups in international law for liability to be created for violations committed by multinational corporations or their executive

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[162] *Adams*, *supra* note 47 at 544D, E.

[163] Interview with Richard Meeran, "When is there a duty of care?: For "*The Times",* 11 January 2000.

officers. The rediscovery and application of this statute from 1980 has generated much case law especially in establishing torture as an international tort.

People and communities claiming to have been harmed by the foreign operations of US-based multinational corporations have relied on the Alien Tort Claims Act, and have developed innovative and largely untested arguments in an effort to obtain justice in the US.[164]

Multinational enterprises in the mining and oil industries have been the prominent target of claims by foreign citizens in human rights and environmental abuse cases by foreign subsidiaries and joint venture operations.

Examples of these claims include the actions brought against Unocal or its operations in Burma[165], Texaco (now Chevron Texaco) for its operations in Ecuador and Peru,[166] Freeport-McMoRan for its joint venture operations in the former Irian Jaya,[167] Chevron and Shell for their respective subsidiary oil operations in Nigeria,[168] and Union carbide for the gas-plant disaster in Bhopal, India.[169] These cases have been hampered at each stage by adversarial procedural findings against the plaintiffs.

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[164] Alice Palmer, "Community *Redress and Multinational Enterprises"* Foundation for International Environment Law and Development, November 2003. <http://www.businesss-human-rights.org> (accessed on September 7, 2005) 10.

[165] *National Coalition Government of the Union of Burma at al v Unocal, Inc et al* 176 F.R.D 329 (C.D. Cal. 1997) ('*NCGUB v Unocal '); Doe v Unocal,* 963 F. Supp. 880 (C.D. Cal. 1997) ; 67 F. Supp. 2d 1140 (1999).

[166] *Aguinada v Texaco, Inc.,* 945 F. Supp. 625 (S.D.N.Y 1996); *Jota v Texaco, Inc.* 157 F. 3d 153 (2d. Cir. 1998) (cases merged).

[167] *Beanal v Freeport-MacMoRan, Inc., and Freeport-MacMoRan Copper and Gold Inc.,* 969 F. Supp. 362 (E.D La. 1997)

[168] *Bowoto et. al. v Chevron Corporation et. al.* , Slip op. No C 99 2506 (N.D. Cal. 2000) ('*Bowoto v Chevron').*

[169] *Bano v Union Carbide,* 273 F.3d 120 (2d Cir. 2001); 2003 U.S Dist. LEXIS 4097 (S.D.N.Y 18 March 2003)

Understandably, the Alien Tort Claim Act is unpopular with most businesses who are now lobbying for it to be curtailed.[170]

Further more, in 1992 the US congress enacted a new statute containing a modified version of the ATCA, the Torture Victim Protection Act (ATVPA) to expressly protect US citizens as well as aliens, but which is limited to only two specific international law violations: torture and summary execution.[171] The important of the TVPA lies both in its expansion of the civil remedy to US citizens and ringing endorsement of the 1980 line of cases on torture. However, apart from limiting the Act's application only to the two above mentioned human rights abuses, and requiring that the underlying be committed 'under actual or apparent authority, or color of law, of any foreign nation' [172], the TVPA also limits its reach to an 'individual' as a defendant.[173] One court has held that the word 'individual' excludes corporate defendants.[174]

The language of the ATCA directs US district courts to assert jurisdiction over torts in violation of 'the law of nations', which the US courts have defined for the purpose of the statute as including international law norms that are universal, obligatory and definable.[175] Thus, there must be a general international acceptance of the prohibition, and it must be both binding without exception and subject to a clear definition. Since international law evolves over time, the courts look to modern views of the content of the same outlined in treaties, conventions, declarations, resolutions and judicial decisions, as well as the opinions of international scholars.[176] In response to this, the 'universal, obligatory and definable' standard has been applied to

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[170] '*In Defence of the Alien Tort Claim Act'* 10 January 2003 http://www.earthrights.org/news/atca.shtml

[171] Kamminga Menno T. and Zia-Zarifi ed, '*Liability of Multinational Corporations under International Law'* Kluwer Law International 2000<http://kamminga-Corporate obligations-under-Intl-Law doc>

[172] Torture Victim Protection Act, section 2 (a)[American Law)

[173] Torture Victim Protection Act, section 2 (a)[American Law]s

[174] *Beanal Vs. Freeport-McMoran, Inc*., 969 F. Supp. 362 at 381-382 (E.D. La. 1997)

[175] The Standard was first articulated in *Forti Vs. Suarez Mason*, 672 F. Supp. 1531 at 1540 (N.D. Cal. 1987 [hereafter, Forti I]

[176] *Supra* note 158.

incorporate a rang of international human rights violations into the ATCA jurisprudence namely ‘disappearance’[177], genocide and war crimes and crimes against humanity, slavery[178] and certain acts of cruel, inhuman or degrading treatment[179] and gender violence such as rape.[180] Currently pending cases ask courts to find (in our case regarding liability of multinational corporation) egregious violations of environmental standards.[181]

Cases over the last twenty years have also gradually expanded the range of defendants who can be held accountable under the ATCA. While the original ATCA lawsuit involved the actual torturer, late suits expanded the notion of accountability to reach those in a position of command responsibility, in other words, those who planned, ordered or directed human rights abuses, or who know or should have known about the abuses and failed to prevent their occurrence or punish those responsible.

Private Complicity in State Action

In the case of *Kadric v Karadzic*[182], the court recognized that state action requirement may extend accountability to otherwise private actors who act in complicity with public-where the public actors, for examples instigates, consents, or acquiesces in the violation. As stated in *Eastman Kodak v Kavlin,* [183] ‘*It would be a strange tort system*

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177 *Forti Vs. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal 1988) (non reconsideration)(disappearance); Forti I, Ioc. Cit. n. 14, at 1541-1542 (summary execution, prolonged arbitrary detention)

178 *Kadic Vs. Karadzic*, 70 F.3d 232 (2d Cir. 1995)

179 *Xuncaz Vs. Gramajo*, 886 F. Supp. 162 at 185-189 (D. Mass. 1995)

180 *Doe Vs. Unocal Corp*., 963 F. Supp. 880 at 891-892 (C.D. Cal. 1997)

181 *Jota Vs. Texaco, Inc*., 157 F. rd 153 (2d Cir. 1998); *Beanal Vs. Feeport-McMahon, Inc*., loc. cit. n. 13. In a lower court ruling in the Jota case, *Aguinda Vs. Texaco*, 1994 WL 142006 (S.N.D.Y.), at *6*7, a district court judge indicated support for the argument that certain egregious environmental harms violate international law; the appellate court reversed on other grounds and declined to address this question, 157 F. 3d at 159, n. 6. In Beanal, the district court held that corporate actions that harm the environment did not violate established norms of international law, Beanal, loc. cit. n. 13, at 382-384; the issue is currently on appeals.

182 Loc, cit. n. 16, at p.245.

183 978 F.Suspp. 1078 (S.D. Fla. 1997) at 1091.

that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state powers.'

This was emphasized in *Doe I. v Unocal*[184] where the court noted that a private party's actions will be considered state action with the state or its agents; enters into an agreement with a government actor; 'engages in a conspiracy' or 'acts in concert' with a government actor; 'engages in conspiracy' or 'acts in concert' with state agents; or aides and abates state agents.[185]As the courts summarized, '[*W]here there is "a substantial degree of co-operative action" between the State and private actors in effecting the deprivation of rights, State action is present*'.[186]

Government immunities strictly limit ATCA litigation. In a major setback, the US Supreme Court held in 1989 that foreign States are immune from suit for gross human rights abuses under the ATCA, unless those cases fall under the standard statutory exceptions to sovereign immunity.[187]Sovereign immunity in the United States is governed by the **Foreign Sovereign Immunities Act** ('FSIA'),[188]which permits suits against foreign sovereigns only in a narrow range of cases.[189] In *Amerada Hess*, the Supreme Court refused to create an additional exception for gross human rights abuses; as a result, the court held that the Argentine government could not be sued for in US courts for an attack on a civilian ship, despite the allegation of a clear violation of international law. A lower appellate court later applied this rule to bar a lawsuit against the German government for Nazi-era human rights abuses.[190]

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[184] Loc. Cit. n. 17, at 890.

[185] *Doe v. Unocal*, loc. Cit. n. 17, at 890-891.

[186] Ibid. (citation omitted). In a related case against Unocal , the same judge found the allegations of state action to be sufficient where 'defendants' challenged actions are inextricably intertwined with those of the [Burmese military] government. National Coalition of Government of the Union of Burma v. Unocal, Inc., loc. cit. 36, at 349.

[187] *Amerada Hess Shipping Corp. v. Argentine Republic*, 488 U.S. 428 (1989).

[188] 28 United States Code $$1330, 1602-1611.

[189] The exceptions are set forth in 28 United States Code 4 1605: the most common exceptions apply to torts committed within the United States and to commercial matters.

[190] *Prinz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C.Cir 1994). But see dissenting opinion of Wald, J., 26 F. 3d, at 1176-1184.

The FSIA however did allow\a human rights lawsuit to proceed against Argentina where the claims fell within the statutory exceptions.[191]Foreign states have also been sued successfully when responsible for the assassination of political opponents who had sought sanctuary in the United States.[192] A highly politicized 1996 amendment to the FSIA permits suit by US citizens against foreign sovereigns for torture and extrajudicial killing, but only when the defendant government is on the US government's list of foreign States designated as 'countries supporting international terrorism'.[193]

Litigation against the US government is regulated by the restrictive **Federal Tort Claims Act**, which permits such claims for many torts committed within the United States, but prohibits claims arising out of abuses in foreign countries as well as most of those committed as most of those committed as intentional acts or in the implementation of discretionary policy decisions.[194] It is possible, however, to sue US government officials for abuses committed outside the scope of their authority – that is, if the US government does not assume legal responsibility for an official's actions or if those actions or if those acts constitute violations of the Constitution or specific statutory protection, governmental immunities will not shield the individual.

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[191] *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699 (9th Cir. 1992). In Siderman, the appellate court found that the confiscation of plaintiffs' property fell within the commercial activity exception of the FSIA, as well as an exception for the expropriation of property in violation of international law: the court also held that Argentina had used the US courts in its attempt to persecute Siderman, triggering an additional FSIA exception .

[192] See, *Domingo v. Republic of Philippines*, Civ. No. 82-1055(W.D.Wash. July 17 , 1984) (unpublished opinion); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C.1980).

[193] This FSIA exception is codified at 28 United States Code 4 1605(a)(7). As of April 1999, the State Department had designated seven countries as 'countries supporting international terrorism' and therefore subject to suit under this exception: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. 15 Code of Federal Regulations, part 772. Pursuant to the statute, judgements have been issued against both Cuba and Iran. *Cicippio v. Islamic Republic of Iran*, 18 F Supp.2d 62 (D.D.C. 1998*); Flattow v. Islamic Republic of Iran*, 999 F.Supp. 1 (D.D.C. 1998); *Alejandre v. Cuba*, 996 F.Supp. 1239 (S.D. Fla. 1997).

[194] The Foreign Tort Claims Act and the exceptions to US government liability are codified at 28 United States Code 44 1346, 2 680.

Suing Corporations in the United States

The Alien Tort Claims Act incorporates principles that permit both criminal claims against corporate defendants for a wide range of wrongs and civil procedure rules that allow suits in the United States for wrongs committed in the United States.

Jurisdiction over Extra-territorial Torts

For a case to be decided in the United States, the courts must have jurisdiction over the subject matter of a dispute and personal jurisdiction over the defendant.

Subject Matter Jurisdiction

A State court in the United States will have jurisdiction over subject matter over virtually any claim brought against a defendant over whom the court has personal jurisdiction. The federal system is however more restrictive, however this arises from the constitutional provisions relating to division of powers between the federal government and the State courts. However for most suits that concern international law or suits between a citizen and a foreign state and a US citizen-the federal courts have the authority over State courts. The federal subject matter requirements will then usually have already been satisfied.

The Alien Tort Claims Act grants federal jurisdiction over torts in violation of the law of nations therefore affording federal courts subject matter jurisdiction over all claims falling within the reach of the statute even where they have no connection to the US.

Personal Jurisdiction

US courts recognize two central categories of personal jurisdictions over both individuals and corporations: specific jurisdiction and general jurisdiction. Our interest is however in general jurisdiction as it affords the court authority to resolve any and all claims against a defendant, no matter where the underlying events took place. Conflict of laws principles may point the court to apply the law of another foreign state, or the court may choose as a matter of discretion to disincline to hear the case.

A parallel notion of 'physical presence' applicable to corporations relies on the concept that a corporation that is 'doing business' in a state is thereby 'present' in that state. As a result most of the states permit the assertion of general jurisdiction over corporations 'doing businesses in the state. The relevant 'business' must entail some kind of continuous or systematic involvement with the state, rather than isolated contracts, but the exact standard varies among the 50 states. The presence of an agent or an office may be sufficient to trigger general jurisdiction over all claims asserted against the corporation. Under this principle, many multinational corporations are subject to suit in the United States for conduct occurring in other countries. The threshold requirement is that they meet the 'doing business' standard in the State in which the lawsuit is filed.

In *Wiwa v. Royal Dutch Shell*,[195] the plaintiffs sued corporations involved in oil extraction in Nigeria, alleging complicity in human rights abuses that included the summary execution of Ken Saro- Wiwa, as well as torture and other violations. They asserted jurisdiction in the United States on several theories, including nationwide contacts; attribution of the activities of various subsidiaries to the parent companies; and, on the basis of the actions of defendants' agent in the state of New York. A federal magistrate recommended against a finding of jurisdiction on all these theories. The district court judge disagreed, however, relying in particular on the presence of the agent, an individual paid by the defendants to maintain an office and represent the defendants in the New York. On June 8, 2009,on the eve of trial, the parties agreed to a settlement.[196]

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[195] *Wiwa v. Royal Dutch Petroleum Co. and Shell Transport and Trading C*o., Civ. No. 96-8386 (Order granting Motion to Dismiss, 25 Sept. 1998) (unpublished opinion).

[196] As discussed in the following section, however the case was dismissed on the basis of forum non conveniens. An appeal is currently pending.

In *Doe v. Unocal*, however, a co-defendant, the French oil company 'Total' won its motion to dismiss the claim for lack of jurisdiction.[197] The court refused to consider nationwide contacts to hold Total responsible for the actions its multiple California subsidiaries. In addition, the court found that Total's direct contacts with Unocal in California were insufficient to support specific jurisdiction over Total. In March 2005, Unocal agreed to compensate the Plaintiffs in a historic settlement that ended the dispute.[198]

US corporations abroad may be subject to claims arising under domestic US law. A lawsuit on behalf of Palestinians killed after exposure to tear gas, for example, charged that the tear gas manufacturer had violated US tort standards in its manufacture and sale of the deadly product.[199]Several claims in California rely on a strict state law that prohibits unfair business practices, including misrepresenting the conditions under which their products are manufactured.[200] A lawsuit filed on behalf of workers in a US protectorate, the Pacific island of Saipan, relies on several applicable US federal labour statutes.[201] Again, these cases are possible because of the combination of corporate tort principles and US jurisdiction rules. Nevertheless, the cases do face significant hurdles: courts may choose to apply the law of the place where the abuses took place, rather than US law, or may dismiss the case in favour of litigation in another forum.[202] If the plaintiffs can show that the significant tortuous acts took place within the United States - decisions about labour practices, for example, or the manufacture of a product exported for use abroad – the courts are less likely to grant a discretionary dismissal, and more likely to apply US law to the claim.

Forum non conveniens

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[197] *Doe v. Unocal Corp.*, 27 F.Supp.2d 1174 (C.D. Cal. 1998) (Order granting Total's Motion to Dismiss).

[198] The dismissal of Total is currently pending on appeal.*(check)

[199] The plaintiffs in *Gurah v. Federal Laboratories*, Civ. No. 2958 (Common Pleas, Philadelphia, PA), recently settled their claim with the manufacturer.

[200] *Kasky v. Nike*, Civ. No. 99446 (San Francisco Superior Court, filed 20 April 1998). The case was dismissed without a written opinion on 8 Feb. 1999, and is currently on appeal.

[201] See *Doe v. Gap*, Civ. No. 99-329 (C.D. Cal., filed January 13, 1999), and related state complaints.

[202] See discussion of forum non conveniens in the following section.

The *forum non conveniens* doctrine grants a judge the discretion to dismiss a case if an adequate alternative forum exists, and if, after considering a list of public and private interests, it appears that trial in another country would be more appropriate. The factors include the relationship of the litigation to the particular US state in which it is filed, as well as the location of the witnesses and other evidence. Most human rights cases will survive a *forum non conveniens* challenge because the courts of the place of the abuse are not open to the plaintiffs, often because bringing such a lawsuit would endanger the plaintiffs' lives or because the judicial system simply will not rule on such issues.[203] Trial courts, however, have dismissed two cases on the basis of *forum non conveniens;* one of the two has been reversed and remanded to the trial court for reconsideration, while the other is currently under appeal.

In the *Wiwa* case against Royal Dutch Petroleum arising out of the actions in Nigeria,[204] all parties recognized that the courts of Nigeria did not represent a viable alternative, but the trial court found that the case be tried instead in England as opposed to the U.S where the Plaintiffs had brought the action as one of the co-defendants is incorporated and therefore the Defendant's motion to dismiss should be granted for *forum non conviniens*; On appeal to the US Court of Appeals for the Second Circuit, Plaintiffs argued that a *forum non conviniens* dismissal would vitiate Congressional intent to allow plaintiff's claims to be heard in U.S. Defendants cross-appealed the ruling on personal jurisdiction. In a huge victory for the plaintiffs, the Court of Appeals on September 15, 2000 reversed the district court's *forum non conveniens* dismissal, concluding that the United States is a proper forum. The Court also upheld the district court's ruling that jurisdiction over the defendants was proper

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[203] In the absence of a military oppressive regime, US courts are often unwilling to find the courts of a foreign nation to be inadequate. However, even if a country's judicial system is functioning and available to resolve more typical litigation, those courts may be unable to objectively resolve a human rights claim or a claim of a particular human rights plaintiff. In *Eastman Kodak v. Kavlin,* loc. Cit. n. 31, at 1082-1087, the court found that the defendants had failed to meet their burden of showing that Bolivia constituted an adequate alternative forum, in light of extensive evidence of corruption in the Bolivian legal system, coupled with the claim that the Bolivian courts had already been used to violate the plaintiff's rights.

[204] *Wiwa v. Royal Dutch Shell,* loc. cit. n. 57. On June 8, 2009,on the eve of trial, the parties agreed to a settlement.[204]

and remanded the case back to the district court to rule on defendants' other objections to the suit.

Royal Dutch/Shell petitioned the United States Supreme Court to review the Second Circuit's decision, but on March 26, 2001, the Court declined to do so, and let the Second Circuit's decision stand. Royal Dutch/Shell had argued to the Supreme Court not only that the Second Circuit erred in finding that a New York court has jurisdiction over it and that the case is properly heard here rather than in England, but also that the Supreme Court should overturn the Second Circuit's landmark 1980 holding in *Filartiga v. Pena-Irala* that the Alien Tort Claims Act allows suits by aliens for violations of customary international law. The Supreme Court's order did not address the merits of these arguments. Nonetheless, it was an important victory for the plaintiffs, because it rebuffed Royal Dutch/Shell's effort to end the litigation without a court ever hearing evidence of Shell's involvement in the egregious abuses at issue.

A series of claims against Texaco for egregious environmental harm were dismissed by the trial court in favour of suit in Ecuador, despite the Ecuadorian government's argument that the plaintiffs would have a better opportunity to obtain redress in the courts of United States.[205] The *Jota* appellate court, however, ordered the trial court to reconsider its *forum non conveniens* dismissal, taking into account plaintiffs' allegations that most of the key decisions were made in New York. The appellate court also ordered the trial court to consider the plaintiffs' argument that the application of *forum non conveniens* is inappropriate where the Congress has indicated intent to permit human rights litigations to proceed in the United States, an argument made by the plaintiffs in *Wiwa* as well.[206] The *Jota* court instructed the lower court to consider the plaintiffs' claim 'that to dismiss the present case would frustrate Congress's intent to provide a federal forum for aliens suing domestic entities for violation of the law of nations.'[207].

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[205] *Jota v. Texaco,* loc. Cit. n. 21. The case has been complicated by several shifts in the position of the government of Ecuador.

[206] See K.L. Boyd, 'The Inconvenience of Victims; Abolishing Forum Non Conviniens in the U.S. Human Rights Litigation', 39 *Va. Int'l L.* (1998) at pp. 41-87.

[207] *Jota v. Texaco,* loc. Cit. n. 21.

A decision, issued on August 16, 2002, the U.S. Court of Appeals for the Second Circuit affirmed the lower court's decision to dismiss the case. The Court of Appeals, however, did not adopt the district court's finding that plaintiffs would be unlikely to state a claim for a violation of international law. Rather, the Court held that it was unnecessary to consider that issue, because other public and private interest factors would require dismissal even if the ATCA expresses a strong U.S. policy interest in hearing this case. Given the Court of Appeals' conclusion, the district court's finding that massive environmental damage of the kind alleged is unlikely to be actionable under the ATCA was dicta.

Studies of *forum non conveniens* dismissals have shown that the cases are rarely, if ever, litigated in the home country after a dismissal in the United States.[208] At this point, the US courts offer an opportunity to remedy international human rights violations that simply is not available in other nations. Until such time as other states, or the international community as a whole, offer victims of human rights violations meaningful options to obtain redress, dismissals on the basis of *forum non conveniens* deprive such plaintiffs of their only chance at a remedy.

Doe v. Unocal[209]

These cases have been in an intensive discovery phase, including numerous depositions in the United States and Asia. For months the parties and the court struggled over the terms of a Protective Order that govern the defendants' use of plaintiff identifying information in their investigation because of the security risks to the plaintiffs. These issues and the issues regarding the scope of privileges in discovery have taken a prominent role in the litigation of the case. The District Judge has dismissed the giant French oil company Total from the *Doe v. Unocal* case for lack of personal jurisdiction and this decision has been appealed.

The Court had stated that it wants most of the discovery completed by September 1999 and for a hearing on expected summary judgement motions to be set in December 1999. The trial was scheduled to start in the late spring of 2000.

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[208] See J. Duval-Major, 'One Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff', 77 *Cornell L.* Rev. (1992) p. 650.

[209] 963 F. Supp. 880 (C.D. Cal. 1997)

Wiwa v. Royal Dutch Petroleum (Southern District of New York)
This case charges Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell) with complicity in the November 10, 1995 hanging of Ken Saro-Wiwa, John Kpuinen, two of nine leaders MOSOP (Movement for the Survival of the Ogoni People), the torture and detention of Owens Wiwa, and the wounding of a woman who was peacefully protesting the bulldozing of her crops in preparation for a Shell pipeline, who was shot by Nigerian troops called in by Shell. The case was brought under Alien Tort Claim Act and alleges violations of the Racketeer Influenced and Corrupt Organizations Act (RICO).

Defendants moved to dismiss both the initial and the amended complaints on the grounds of lack of personal jurisdiction over Royal Dutch/Shell, *forum non conveniens* (the defendants argued that the case should be heard in the Netherlands or England), and lack of subject matter jurisdiction (defendants argued, inter alia, that ATCA did not apply to a corporation and that the claim was precluded by the political question and act of state doctrines, as well as Nigeria law on corporate liability). The court then ordered preliminary discovery on the question of personal jurisdiction over the corporation.

Final briefing on the motion was argued December 5, 1997. On March 31, 1998, Magistrate Judge Henry Pitman recommended that the Court grant defendants' motion to dismiss (1) for lack of personal jurisdiction and (2) pursuant to the doctrine of *forum non conveniens*. Both parties filed timely objections to those portions of the Magistrate Judge's Recommendations and Report with which they disagreed. On September 25, 1998, Judge Kimba wood concluded that personal jurisdiction was appropriate in New York, but adopted and accepted the Report in concluding that the defendant's motion to dismiss should be granted for *forum non conveniens* and that England was a more convenient forum.

Plaintiffs filed a Motion for Recommendation of the dismissal for *forum non conveniens*, arguing that the Court failed to impose the conditions necessary to ensure

that an adequate forum against all defendants was available and that *forum non conveniens* dismissal of their claims brought under the Alien Tort Claims Act was inappropriate.
Plaintiffs' Motion for Reconsideration was granted in part but denied in part. The Court granted plaintiffs' motion solely to the extent that it imposed the following conditions on its dismissal for *forum non conveniens*: that defendants consent to service of process, comply with all applicable discovery rules, consent to pay any judgement rendered, waive any security bond that might be required and waive any statute of limitations defence if the action is committed within one year of the final disposition of this matter. The Court denied plaintiffs' motion to condition dismissal on defendants' waiver of procedural doctrines that plaintiffs argued could preclude plaintiffs from any remedy before English courts.

The Court further denied plaintiffs' motion for reconsideration made in light of a Second Circuit October 5, 1998 decision. In *Jota v. Texaco*, Inc., 157 F. 3d 153 (2d Cir. 1998). Plaintiffs argued that the District Court should determine that a *forum non conveniens* dismissal is inappropriate in this action brought under the **Alien** Tort Claims Act, and a dismissal in this case would vitiate Congressional intent. Plaintiffs have appealed the ruling; defendants have cross-appealed the ruling on personal jurisdiction. The briefing was to be completed by June 1999.

Doe v. Gap[210]
This involved a class action lawsuit challenges garment production system on US soil based upon peonage and involuntary servitude, and violations of the rights of women, under which tens of thousands of foreign guest workers work for unfair wages in unlawful sweatshop conditions in the Commonwealth of the Northern Marian Islands. The complaint alleges violations of the Alien Tort Claims Act, the Racketeer Influenced and Corrupt Organizations Act ('RICO') and torts actionable under the federal indentured servitude and anti-peonage statutes and state common international law.

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[210] Civ. 99-329 (filed C.D. Cal. January 13, 1999)

Two related cases were filed in 1999, one under the Fair Labor Standards Act in federal court and another in state court by Global Exchange, Sweatshop Watch and UNITE charging unfair business practices under California Business and Professions Codes. (Union of Needletrades Industrial and Textile Employees v. The Gap, 300474, plaintiffs alleged clothing retailers including The Gap Inc., Tommy Hilifiger and J, Crew deceived the public about labour abuses at their Saipan factories and that the manufacturers' clothes are mislabelled.

Eastman Kodak v. Kavlin[211]

Eastman Kodak employee Juan Jose Carballo brought suit against Kodak subsidiary Casa Kavlin and one of its officers, Susana Kavlin. Carballo claimed that false criminal charges were brought against him and that he was maltreated and arbitrarily detained for eight to ten days in Bolivia. The defendant filed a motion to dismiss the complaint on the grounds:

a) Lack of personal jurisdiction.
b) *Forum non conveniens*.
c) Failure to state a claim under Bolivian law and;
d) The Alien Claim Act.

The district court rejected this motion. The court's opinion contained a detailed analysis of arbitrary arrest and detention and held that those who conspire with state actors are liable. An evidentiary hearing on personal jurisdiction was held and the corporate defendant was dismissed. The case against Susana Kavlin proceeded. On February 12, 1998, a Bolivian court entered a final judgement against Eastman Kodak and awarded damages to the plaintiff Casa Kavlin , S.A., the former defendant in the U.S. action. In March 1998, defendants moved for leave to amend their answer and affirmative defences, adding the affirmative defence of collateral estoppel. The court rejected this motion because of 'the current state of the judicial system and Defendant's alleged influence over litigation in Bolivia'. The case recently reached a successful settlement for plaintiffs; the terms of the settlement are undisclosed.

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211 978 F. Supp. 1078 (S.D. Fla. 1997)

Beanal v. Freeport-McMoran[212]

Plaintiff Tom Beanal, Indonesian citizen and member of Amungme tribe, filed class action against Freeport McMoran for cultural genocide, human rights violations and environmental torts for open pit copper, gold, and silver mine at the Grasberg Mine in Indonesia. On April 10, 1997, the court ruled that the plaintiff had standing to allege cultural genocide of the Amungme tribe, certain human rights violations and environmental torts, but stated that plaintiff should amend the complaint. Defendants' motion to strike the second amended complaint was granted on August 7, 1997 for failure to state a claim. On March 3, 1998, the court granted defendant's motion to strike the third amended complaint and dismissed with prejudice plaintiff's claims. Plaintiffs appealed to the Fifth Circuit. Briefing was completed in January 1999.

Alomang v. Freeport-McMoran[213]

Yosofa Alomang brought a class action in state court of Louisiana charging state torts related to cultural genocide and environmental violations. In March 1998 appellate ruling reversed the lower court dismissal, rejecting defendants' arguments that there were no state law violations alleged, that the defendant was a separate legal entity from the corporation in Indonesia, that the Act of State doctrine preclude the claims and that the Indonesian government was an indispensable party. The case was remanded for further proceedings consistent with the opinion. Rehearing was granted April 15, 1998. Another motion to dismiss was denied on February 25, 1999.

Kasky v. Nike, San Francisco Superior Court

This suit charges Nike Inc. with violating California Business and Professions Code 17200. The suit alleges that workers who make Nike products in China, Indonesia and Vietnam are not paid living wages and must work long hours in dangerous working

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[212]969 F. Supp. 362 (E.D. La. 1997) note: On November 29, 1999, the Fifth Circuit Court of Appeals upheld the dismissal of the case on the grounds that plaintiff had failed to provide adequate factual underpinning for his claims.

[213] 97-1349; 718 So. 2d. 971 (La. App. 4 Cir, 1998)

conditions for little pay, the company violated 17200 because Nike mislead the public about the working conditions of labourers, claiming that its contracts with suppliers forbid slave labour, corporal punishment and other abusive practices.

Defences counsel moved to dismiss the case based on a First Amendment defence, saying that Nike can't be sued for speech made in 'self-defence' after its labour practices were subject to public criticism. On February 8, 1999, Judge David Garcia dismissed the case without written opinion. Plaintiffs' counsel Allan Caplan of Bushnell, Caplan and Feilding announced that plaintiffs would appeal. Plaintiffs are also represented by Milberg, Weiss, Bershad, Hynes & Lerach.

Gurab v. Federal Laboratories, Inc. & Trans Technology Corp.

In 1992, a claim in Pennsylvania state court on behalf of two of the plaintiffs in a related case in the Western District of Pennsylvania *Abuzeinah et al. v. Federal Laboratories Inc. and Trans Technology Corp*. (W.D. Pa.)

The suit was brought by families of Palestinians who were killed by exposure to CS gas; a lethal 'riot control' weapon manufactured and distributed by Federal Laboratories, Inc. and Trans Technology Corp. It alleged that the company sold CS gas to the Israeli armed forces despite their knowledge that Israel's use of CS gas had resulted in many civilian deaths.

The plaintiffs asserted that even though this gas was designed to be sprayed outdoors, Israel fired it directly at people or in enclosed or confined residential spaces without giving any warning or allowing people any means of escape, thereby exposing peaceful civilians, not involved in 'rioting' or other unlawful activity, to the gas. International human rights groups, including the UN Relief and Works Agency and Amnesty International, reported that at least 80 Palestinians have died since December 1987 as a result of exposure to CS gas. The case has yet to be determined.

THE KENYAN POSITION

Kenya as a nation is part of the victims of the side effects of Multinational Corporation. It is crucial to note that the world today is a period of continuing globalization. It therefore follows that the global corporal rule is now facilitated by international law treaties and a network of super national organizations (IMF, WORLD BANK WTO, GATT) that have created the legal economic and political framework for this rule[214].

It is clear that Kenya being a developing state and a colony of the British it's a fact that a lot of legislation that are used to date were absorbed from the colonization[215] period and sadly even after the colonize change theirs to stand the test of time Kenya still maintain the old fashion in some area. It's therefore crucial that the stand taken by such states such as UK represent a fair take of Kenya since they have some laws in common.

Prof Makau Mutua[216] highlights the emergence of the shortcomings of corporate rule. He argued that the regime of international law is illegitimate. Its predatory system that legitimizes reproduces and sustains the plunder and subordination of the third world war by the west. Neither universality nor its promises of global order and stability make international law a just equitable and legitimate code of global governance for the third world.

It's imperative to note that several violations of human rights of workers has been undergoing in multinational corporation based in Kenya but due to the complexity of their nature of accountability several cases go unnoticed. The report highlights realized cases of corporate power misuse in a Kenyan multinational corporation known as Del Monte[217]

Mr. Mutiso case was a striking evidence of a multinational corporation violation of right of workers. He died of severe malaria due to the corporation negligence. The late

[214] "Exposing the soft belly of the multinational beast" KHCR Report 2002

[215] i.e the company law act cap 486 was borrowed from the English Companies.

[216] Makau Mutua "what is TWAL" proceedings of the 9th annual meeting of the American society of international law April 5th -8th 2000.

[217] Multinational based in Thika-Kenya

Peter Mutiso Komolo was treated with painkiller on an ailment that requires intravenous quinine a maximum of six doses at interval of eight hours. [218]

Under the report is another surviving victim of the multinational misuse of power *Mr. Kinuthia* is a disabled man thanks to the extensive burns from concentrated sulphuric acid. He is described by one Doctor M.A. Hag as a physical and mentally crippled with multinational only awarded him 360,000, funds that almost ended in medication a shamefully way that a corporate employee could end up in.

The case of ***Rogers Muema Nzioka v Tiomin Company Limited*** is a case law in Kenya jurisdiction that tries to show the puzzle of liability of International Corporation. It led to and still causes a controversy as the Kenya's government is caught between pleasing the company and remaining accountable to its citizens. The standoff also pits the government and Tiomin Kenya Limited, the Kenyan subsidiary of the Canadian firm, against local and international environmental groups.

The facts of the case were that Tiomin Kenya Ltd the Defendant was a locally incorporated subsidiary of Tiomin resource inc. of Canada. Tiomin Kenya obtained a licence to prospect for titanium in Kwale District. The Plaintiffs were the local inhabitants of the prospective mining area and brought the suit on their behalf and on the behalf of other inhabitants.

The plaintiff brought an injunction to restrain the carrying out of the mining activities and for a declaratory order that any mining carried there will be illegal. They also prayed for general damages. The plaintiffs were concerned that not only that Tiomin Kenya was not offering them adequate compensation but also that mining activities would result in numerous environmental and health problems which could not be adequately compensated in damages. They argue that Tiomin Kenya had not submitted an environmental impact assessment plan and that it had not been licensed under section 58 of the Environmental Management and Coordination Act no 8 of 1999 (EMCA)

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[218] Dr. S.K. Muli of Mituki consultants in the Matuu nursing home after conducting the post morterm (2001) no. 97

Tiomin relied on the licence granted under the Mining Act Cap 306 and stated that it was merely prospecting and not mining titanium. They further declared themselves as agents or nominees for Tiomin resource Inc of Canada. The court granted the sort injunction declaring that on a balance of probability the applicants had made a cse for an injunction.

In the last controversy[219] *Haran Ndubi, executive director of Kituo cha Sheria* emphasizes the fact that the acts of eth multinational corporation are anting. He says that the local legal organization, the firm has disregarded Kenya's Land Laws, especially the stipulation that nay lease ought to reach the local land control board six months prior to signing. "When I sought evidence that the company had adhered to this piece of legislation" he explained, "its president Jean Potvin failed to produce consent documents, saying only that the company had deposited them with the Kenya Government". Oddly, the company claims it didn't retain copies of the documents.

Given the soaring corruption cases in Kenya revolving around limited liability companies, it is the public's expctatiuon that the Kenyan cpurts would rise to the occasion by "lifting the corporate veil" to expose the real fraudsters. It would make a lot of social and economic sense if a company is barred from being the later ego if the principal corporate.[220].

Solid Hold Ltd vs Trans National Bank Ltd & Another [2005] D. Musinga Judge stated that "if the applicant had any valid grounds for objecting to the sales of its property, it should have filed the application before the public auction was held. Considering its conduct before and after the auction, I find that the applicant had no valid grounds upon which it could challenge the sale of its property. The applicant admitted having borrowed money from the first respondent which it had not repaid in

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[219] Where at least a quarter of the half million people who live in Kenya's Kwale district, near the Indian Ocean Coast, venetually may be evicted to make way for a controversaial mining project by the Canadaian firm Tiomin Resources Inc. The rest, and others living along the coast, could facee significant health risk due to the toxic emissions associated with titanium mining.

[220] Tome Francis "Judiciary must" lift the corporate veil" to recover stolen public funds and property " 13th February 2011

full as at the time when the suit property was sold. It had been served with an appropriate statutory notice and the property was lawfully sold to the second respondent through a public auction. Thereafter the applicant vacated part of the premises that it was occupying and advised its tenant who occupied the other part of the second respondent was the new owner of the same. The second respondent then began extensive refurbishment of the suit premises. It is trite law that a mortgagor's right of redemption is extinguished as soon as a mortgage sells the mortgaged property by public auction as was held by the Court of Appeal in ***Mbuthia vs Jimba Credit Finance Corporation & another*** **Civil Appeal No 111 of 1986**". All this clearly shows that the applicant had no prima facie case with a likelihood of success….. The applicant's claim must therefore fail in its entirety and I hereby dismiss the same with costs to the Respondents"

He further reinforced his decision with the following remarks. That if the plaintiff truly knew that the charge document had been prepared by an unqualified person and wanted to advance that argument to hold on to the property, why did it wait to file the suit and the application after a period of more that three months from the date when the property was sold? I would have been more sympathetic to the applicant had it raised the above argument immediately after it was served with the statutory notice of sale of property but coming so late in the day, I say that delay defeats equity.

Ismael Omabti Ochieng & 9 others v Kenya Tea Development Authority [2006]

10 December 2001, the new company known as the Kenya Tea Development Agency Ltd (a new body created from an "authority to a limited liability company [Kenya Tea Development Authority] wrote a letter to the plaintiff Ismael Ombati, purporting to terminate his service. This letter was reference "Early retirements from the agency." The Employment Services (management) stated that it would award the 1st plaintiff a three month pay in lieu of notice, a golden hand shake of Kshs 150,000.00 and pay of two months salary for every month basic salary, was to be paid. The 1st plaintiff filed suit almost a year later challenging the dismissal stating that it was unlawful and in breach of the Constitution of Kenya.

It was held inter alia that the powers to declare the staff no longer public offices to private company laid elsewhere. There was therefore nothing to show that the

Minister was given powers delegated by the law or Public Service Commission to deal with staff. Reference were made to the fact that the Minister by including Section 8 in the LN44/99 of transferring the staff from the authority that he revoked to a propose limited liability company was actually creating a situation found in the Employment law of UK known as the TRANSFER OF UNDERTAKINGS (Protection of employment) Reg. 1981.

This law "creates a situation where it is as if the original contract of employment was agreed with by the new employer. Thus an employees" period of service will transfer to the new employer. When the trade business or undertaking is transferred to a new employer their continuity is also prescribed by Section 218 (2) ERA 1966 and the employees length of service moves to the new employers although as pointed in NOKES v Doncaster Collieries (194) AC 1014 HZ this is likely to require the knowledge or consent of the employee" (Employment Law, Malcom Sergeant, Peason Education Ltd 2001)

Caneland Ltd vs Dolphin Holdings Ltd and Another (1999) I EA, 29 Mbaluto J stated that "AS shown above, the courts have refused to permit the logic of the principle laid down in Solomon's case to apply 'where it is too flagrantly opposed to justice, convenience or interests of the Revenue (Gower-Ed at 112) and will disregard the fundamental principle of corporate personality if justice warrants it. Equity will not permit a statute or indeed law to be a cloak fro fraud. In my Judgement this is one of those cases where the corporate veil ought to be lifted because given the special circumstances of this case; it would be tantamount to allowing a debtor to hide behind the cloak of corporate identity to avoid meeting its legal obligations…"

Mradula Suresh Kantaria v Suresh Nanalal Kantaria [2007]

The facts to the decree holder(s) (wife) is executing a decree against the Judgement-this case is that the debtor (husband) after divorce. The attachment is against goods alleged to belong to a limited liability company owned by the father (with 55% share) and their son (with 45% share). The Managing Director of the company whose alleged goods are attached by the mother is the absolute shareholder of the company that owns the 45% share of the company in which he is the Managing Director. The further revelation from the material before the court is that it is the Judgement – Debtor (father) who effectively runs Jaribu Credit Traders Limited despite the fact that the Managing Director is the son. This is confirmed by the evidence on record that all payment cheques shown in this matter are undeniably signed by Judgment-debtor. Indeed there was no attempt to prove that the son-Managing Director of Jaribu credit Traders Limited has nay control of the day to day running of the company. This could be done by showing for example, that the Managing Director signs documents and cheques of the company.

D.A. Onyanja held that the application must fail since there is not enough evidence to come to the conclusion on the balance of probability that the goods attached belonged to the objector company and in the alternative, that even if the goods attached belonged to the objector, they so belonged because the Judgement debtor deliberately purchased them in the name of the corporate entity whose corporate personality he little respected but which he used selectively to avoid meeting his legal obligations. The court indeed finds no reason to respect or honour a legal personality, which the Judgement debtor himself honoured more in breach than otherwise.

Authorities relied were that such as in the case of ***Corporate Insurance Co. Ltd vs Savemax Insurance Brokers (2002)*** were Ringera J. Stated that "*And it is a well known principle of company law that the veil of incorporation may be lifted where it is show n that the company was incorporated with or was carrying on business as no more than a cloack, mask or sham, a devise or stratagem for enabling the directors to hide themselves from the eye of equity. That may well be so if on the evidence it is clear that the Directors have dealt with the assets and resources of the company as their personal bounty for use for their own purposes. Such facts my well be disclosed in the examination of the Directors or in affidavits filed…on principle I see no reason why the veil cannot be lifted at the execution stage…*"

In regards to Legislation to be applied to such corporate tortuous acts same shall be far determined by the field the act falls in the Laws of Kenya. For instance in the Nzioka case the laws relevant were EMCA s 2,3 (1), 2,3,4…….Civil Procedure Rules Cap 21 (sub legislation) order XXXIX rules 1 and 2, Land Control Act Cap 302, Mining Act Cap 306 and Limitation of Actions Act Cap 22.

For tort law the Civil Procedure Code and Rules must come in. So is the Constitution, The Interpretation and general provisions Act Cap 2[221] and other general statutes. The *Civil Procedure Code*[222] for instance tries to facilitate the responsibly of International Corporation among others entities through Order 28 which provides that Commissions issued by foreign courts for the examination of persons in Kenya shall be executed and returned in such manner as may be from time to time authorised by the High Court.

Section 3.1 clarifies the same in the following wording. That in the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

*The Companies Act Cap 486 (*in business related ventures*)* also acts as a guiding rules for eligibility of the corporate and so is its subsidiary legislation The companies (High Court) to name a few. So is the supreme law of the land the Constitution of Kenya under the chapter on protection of fundamental rights and freedoms of the individual realises the need to guard citizen against detrimental acts such as those cause by multinational corporation.

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[221] Part VI- General provisions regarding legal proceedings and penalties.

[222] Cap 21 Laws of Kenya

CHAPTER SIX

6.0 CRIMINAL LIABILITY ON MULTINATIONAL

6.1 CORPORATE CRIMINAL LIABILITY

If a corporation is to be criminally liable, it is clear that the crime must not be a personal aberration of an employee acting on his own; the criminal activity must in some sense, reflect corporate policy so that it is fair to say that the activity was the activity of the corporation. There must be…kinship of the act to the powers of the officials, who commit it.[223]

The courts have begun to explore the possibility of using universal jurisdiction to impose liability through the domestic courts on multinational corporations that participate in crimes. This involves permitting litigants to trace liability for acts committed by subsidiaries to the parent company. This is on the basis that the parent company benefited from the acts of the subsidiary and that consequently it should be held liable for the harm that has been committed by the subsidiary company in the host state.

The central issue has been that of attaching criminal liability to a corporation. Criminal liability has traditionally only been attributed to persons because a crime consist of the fundamental elements of a culpable mental state (*mens rea)* and the action that is unlawful (*actus reus).* Attributing the culpable mental state, to non-human artificial entities is a theoretical difficulty. The *mens rea* offences are usually subjective, requiring that one knowingly (or ‘willfully blind’), recklessly or intentionally commits an unlawful action.[224]

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[223] Simmonet, J in State v. Christy Pontiac – GMC, Inc. 354 N.W 2d 17 (1984)

[224] Gerry Ferguson, *Corruption and Corporate Criminal Liability’,* paper prepared for the seminar on ‘New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions,’ February 4-5, Vancouver, British Columbia Page 2, From the Website<http://www.labournet.net> (accessed on September 20, 2005).

The question then arises, can a corporation –an artificial entity-be held liable for *mens rea* offences committed by its employees. As established in Chapter Two, a corporation is a separate legal entity, having its own legal identity-separate from the shareholders, directors and officers.

There have been various theories for treating corporations as responsible actors deserving of penal sanctions for criminal actions.[225] *P. Fauconnet* argues his theory based on the companies distinct legal personality.[226]*P.A French*, on the other hand argues legal personality alone is inadequate and articulates a theory of a corporation as a moral and intentional actor[227]; and *Fisse* and *Wells* argue that its unnecessary to frame corporate responsibility in terms of moral notions that apply to humans, that a corporation can and often does exceed the sum of its individual parts and that a corporation's true responsibility can be located in its organizational structure, policy, procedure and culture.[228]

George ochich[229] states in his article that approaches to corporate criminal responsibility and liability need to strike a delicate balance between justice and the social utility of the product. Imposition of criminal liability upon corporations must be alive to the broader social purposes of criminal punishment and the effectiveness of the punishments administered. Convicting companies for whatever offences, while considering the general good of society that may result out of it, must not fly in the face of logic. There is no doubt that corporate criminal liability serves some social utility. First, companies are averse to the idea of being convicted and often fight hard to avoid or resist convictions lest the criminal process exposes them to adverse publicity which may threaten the otherwise fair reputation that the company may have tried to build in the minds of the public. Thus, it promotes obedience to law. Second,

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225 Gerry Ferguson, Ibid .

226 P. Fauconnet, *La responsibilité: étude de sociologie* (Paris: Libraire Felix Alcan, 1920) as described by J.A Quiad, *The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis* (1998) 43, McGill L.J 67.

227 P.A French, '*Collective and Corporate Responsibility* (New York: Columbia Univ. Press, 1984) as discussed in Quiad, Note 12.

228 B. Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions'* (1983), 56 S. calif. L. Rev. 1141; C. Wells, '*Corporations*

229 Supra

to the extent to which it may publicly expose a company's criminal activities through the criminal process, corporate criminal responsibility enables the public to know the company for what it truly is. The public may then deal with the company from an informed position.

The trends in criminal liability of corporations exemplify a predominantly utilitarian outlook in criminal law. They are not quite based on the theory of justice but largely upon the need for deterrence. They are scarcely concerned with justice to the victims of corporate offences or other parties who may get affected by the punishments slapped upon the company. In many instances when a fine is slapped upon a company, the expectation is that the pain of paying the fine may cause the company to pull up its corporate socks.

While it is acceptable that a company can commit virtually any crime, it does not always makes sense to prosecute or convict a company. Prudently, criminal responsibility should be human, because in the last resort only human beings can be punished and even punishment that is apparently slapped upon a company ultimately inflicts suffering upon the individuals associated with the company, albeit indirectly. No justice is really served by purporting that responsibility for a crime may fall upon the person known as the company. The company itself is a legal figment whose physical embodiment is only a piece of paper – in the case of a registered company, the certificate of incorporation or the memorandum of association. It has no feelings and it can hardly be said to have been convicted or acquitted or punished 'justly' or 'unjustly'.

Sometimes, placing criminal responsibility upon the company rather than an individual within the company may fall for the unscrupulous designs of criminal individuals within the company. Upon the knowledge that companies may be criminally liable on their own account, ill-bent individuals may disguise their criminal activities under the veil of the company and use the company as a shield. An individual may commit an offence under the cloak of a company so that the company is convicted as the individual escapes liability. Such conviction will shift the criminal liability (e.g. fine), or part of it, that would otherwise fall upon the individual so that it falls upon the company or its shareholders. Although where there is clear evidence that a company director intends to enter a plea of guilty in order to shift criminal responsibility from the individual offender to the company, the courts may come to the aid of minority shareholders and grant them an injunction to forbid the plea (Glanville Williams gives an example of a case where the High Court in England accepted to grant such an injunction on behalf of some minority shareholders: G Williams, *op. cit.*, p 976 at n. 3.) That unnecessarily burdens the shareholders with the further responsibility of having to initiate the court action.

The main offences or crimes that have commonly been charged against multinational corporations are bribery, fraud and municipal corruption. Other offences are the laundering of proceeds obtained from such bribery and the possession of property derived from either offence.

Criminal law can be used to hold directors of corporations liable in the foreign courts for acts or injuries causing death in the host state of the subsidiary. Thus the newly coined phrase 'corporate killing'

6.2 THE HISTORICAL ASPECT

For a long time the common law of England did not permit a corporation to be convicted of a crime.[230] The exception however was based on the doctrine of vicarious liability. Vicarious liability was assumed to be confined to those offences that did not require mens rea. Under this, the master is liable for the conduct of his servant in the course of the servant's employment. This was mainly in the area of tort law in the seventeenth century in order to provide compensation to third parties who were injured by a master's servant while the servant was carrying on the master's business. The justification for the doctrine is that since the master acquired the benefits of the servants work, he should carry the burdens. There was also the other fact that the master usually was more economically capable to foot the bill.

Ferguson notes that while the common law recognized the appropriateness of vicarious liability for tort compensation, it rejected vicarious liability for crimes since crimes required *mens rea* or personal fault as one of the main elements of a crime.[231]

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[230] Gerry Ferguson, supra footnote 1, 2

[231] *R v Higgins* (1730) 92 E.R 518.

The court established that the master-servant relationship was not a sufficient basis for imputing personal fault to the master. *Ferguson* then provides the three common law crimes that were recognized by the courts; public nuisance, criminal libel and contempt of court[232]- where the courts did not require *mens rea*. *Mens rea* was also not required for a number of regulatory offences created by statute which the courts held to be absolute liability offences. In these four categories of offences, where no *mens rea* was required, the court applied vicarious liability, allowing the master to be convicted for the offences committed by the servant. The master could thus be either an individual person or a corporation. Therefore, apart from the four vicarious liability exceptions, corporations were immune from liability under criminal law.

In *R v ICR Haulage Co Ltd*[233], a limited company was convicted of a common law conspiracy to defraud. On appeal it was contended that a company could not be guilty of an offence involving as an essential ingredient mens rea in the restricted sense of a dishonest or criminal mind. It was held that a limited company can as a general rule be indicted for its criminal acts which from the very necessity of the case must be performed by human agency and which in given circumstances become the acts of the company, and that for this purpose there was no distinction between an intention or other function of the mind and any other form of activity.

In *Re Supply of Ready Mixed Concrete (No 2)*[234], it was stated that an employee who acts for the company within the scope of his employment, even if against the express instructions of his employer, may well bind the company as he is the company for the purpose of the transaction in question. The same view was expressed by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

Both cases show that a company may be liable to third parties or be guilty of the commission of an offence even though the relevant employee was acting dishonestly

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[232] *R v Great North of England Ry. Co.* (1846) 115 E.R 1264 and *R. v Stephens* (1866) L.R 1 Q.B 702 (public nuisance); *R v Holbrook* (1878) 4 Q.B.D 42 (criminal libel) ; and *R v Evening Standard Co Ltd* [1954] 1 Q.B 578 (contempt)

[233] [1944] 1 KB 551

[234] [1995] 1 AC 456

and/or in breach of his contract of service or even against the interests of the company. In that case, the House of Lords accepted that the management had gone to considerable lengths to ensure compliance with their instructions, but once a transaction had been entered into by an employee who had the power to deliver on behalf of the company, such considerations went merely to the issue of mitigation. While the Privy Council recognized in *Meridian Global Funds Management* that it is a matter of interpretation as to whether a particular statute seeks to 'fashion a special rule of attribution for the particular substantive rule,' both the Privy Council and the House of Lords were quite prepared to adopt this notion of 'merger' of minds in the case of restrictive trade practices law and securities regulation, given the discerned public policy in avoiding a result which might defeat the purpose of the legislature.

The acts or omissions of a company or other formal body that are punishable in criminal courts; such acts or omissions are usually for the benefit of the organization at the behest of an individual or group of individuals at management level within the organization. It was held in *HL Bolton (Engineering) Co. Ltd v TJ Graham & Sons Ltd*[235] that 'The state of mind of these people is the state of mind of the company and is treated by the law as such'. These acts or omissions may be to the detriment of other employees, customers, consumers, or the public at large.

Early in the twentieth century, courts began to reconsider the question of imputing criminal liability to corporations. The courts sought to dismantle criminal immunity from criminal law. Court held that the use of such words as 'everyone' by criminal statutes could include corporations,[236] and hence, Ferguson corporations could be punished by common law fines for offences where the only penalty specified for such offences in the *Code* was imprisonment.[237] The courts also specified procedural rules for how a corporation could be summoned and appear for trial. These procedural and evidentiary rules were later codified. Courts also rejected the argument that corporations can not be held criminally responsible for offences committed by their officers where the offence committed was *ultra vires* i.e. beyond the scope of the

[235] [1957] 1 QB 159

[236] *Union Colliery Co. v The Queen* (1900) 31 S.C.R 81.

[237] Gerry Ferguson, supra footnote 1, 5. *R v Great West laundry Co.* (1900) 3 C.C.C 514 (Man. Q.B)

officer's employment, unless those employees were expressly ordered to commit the act in question.

The most challenging problem of imposing criminal liability on corporations is the difficulty of attributing the blameworthy state of mind, i.e. *mens rea*, to a creation of the law, an abstract, non-human entity, that is the corporation. The issue was tackled head-on in the 1915 case decided by the House of Lords; *Lennard's carrying Cross Co Ltd v Asiatic Petroleum Co*[238]. There he invented a theory of primary corporate liability for offences requiring fault which has become known as the "identification" theory or the "alter ego" theory of responsibility. The case, as described by Ferguson[239] concerned the civil liability of a corporation for damages under a statute which afforded the corporation a defense if proved that the damage occurred without its fault. Question was whether the fault of a director, who was actively involved in the operation of the company, could be attributed to the corporation. Viscount Haldane held that it was, and laid down the general principle of the directing mind, in attributing fault to a corporation. He stated:

> *"[A] corporation is an abstraction. It has no mind of its own more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation…For if Mr. Lennard was the directing mind, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself.*"[240]

The first indication that corporate liability might move beyond the confines of strict liability or nuisance came in *Mousell v. London and North Western Railway*[241] where the company was held vicariously liable for an offence which

[238] [1915] A.C 705.

[239] Gerry Ferguson, supra footnote 1, 5.

[240]1915] A.C 705 at 713 (H.L).

[241] [1917] 2 K.B 588.

required mens rea , the act of its manger giving false account with intent to avoid payment of tolls. Lord Atkin made reference to the mens rea point as follows: *…While prima facie a principal is not to be made to be criminally liable for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if in fact the act is done by his servants…* By the mid 1940's the view that that a corporation could be held liable for criminal offences was taking shape. Noting such change, Stable J in *R. v. ICR Haulage* noted *"… this is a branch of the law to which the attitude of the courts has in the passage of time undergone a process of development…"*

6.3 WHETHER A CORPORATION CAN BE CRIMINALLY LIABLE FOR ITS ACTS

There are three devises that have been used to hold corporations criminally liable for true crimes and regulatory offences. The first, as we have seen is vicarious liability and the second is what has come to be called the 'identification theory'. The third, is locating fault in the corporation's organizational structure, policies, culture and ethos which permitted or encouraged the commission of the crime. The third device has however not been widely accepted and has not been tested in Kenya.[242]

Parent Company Liability for acts of its Subsidiary

As noted previously, the principle of vicarious liability holds that the master is liable for the acts of the servant, done in the course of the master's business without proof if any personal fault on the part of the master. This applies to corporations and subsidiaries that are incorporated in Kenya. It is not applied widely, as establishing vicarious liability does not require proof of personal fault on the part of the master.

The Concept of Corporate Separateness

The second device, the identification theory provides that the acts and state of mind of certain senior officers in a corporation-the directing minds of the corporation- are

[242] Gerry Ferguson, supra footnote 1, 6.

deemed to be the acts and state of mind of the corporation. The directing minds are identified as the corporation itself. The corporation is considered to be directly liable, rather than vicariously liable. The identification theory differs from the principle of vicarious liability, as it holds corporations liable only for the fault of senior corporate employees or officers, who are the directing minds, rather than for the fault of all the employees as the case in vicarious liability. The identification theory is used to attribute *mens rea* to the corporation itself, whereas in the case of vicarious liability, no distinct or separate 'corporate' *mens rea* by those who control or run the corporation is required.

Mens rea offences require that a subjective state of mind such as intention, knowledge or willful recklessness. Other crimes are those requiring an objective state of mind such as criminal negligence.[243] In the Canadian case of *Canadian Dredge & Dock Co. Ltd v The Queen*[244] the court stated that: 'the corporate veil now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of the natural person.'[245]

Ferguson explains that the identification theory was created as a pragmatic median rule between the extremes of total vicarious liability for all criminal acts and no corporate liability unless the board of directors had expressly authorized the acts. The identification in finding a middle ground, states that the actions and mental state of the corporation will be found in the actions and state of mind of employees or officers of the corporation who may be considered the directing mind and will of the corporation in a given sphere of the corporation's activities. The crucial question is the determining who is the directing minds and will of the corporation.

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[243] Gerry Ferguson, supra footnote 1, 7.

[244] (1985) 19 C.C.C. (3d) 1 (S.C.C) 22;

[245] *Canadian Dredge & Co*, note 16, at 22.

Attributing *actus reus* to a company was clearly shown in the Canadian case of *Canadian Dredge & Dock Co. Ltd v The Queen*[246] where the certain corporations and the senior officers of such corporations, were convicted of the *mens rea* offence of conspiracy to defraud. The officers had participated in 'bid rigging' for dredging contracts for the government. As a result of the accused's collusion, the government paid more for the dredging than it ought to have paid. The collusion, or bid rigging was done by the persons in charge of making bids for each corporation. These persons were senior officers, the vice-presidents and general managers. Thus, both the *actus reus* and the *mens rea* of the offence was committed by the directing minds of the corporation. The Supreme Court stated:[247]

> "*It [the identification theory] produces the element of mens rea in the corporate entity, otherwise absent from the legal entity not present in the natural person, the directing mind….This establishes the 'identity' between the directing mind and the corporation which results in the corporation being found guilty for the act of the natural person [who is directing the mind]" emphasis Ferguson's.*[248]

In the context of corporate liability, the directing mind need not physically commit the offence as long as the corporation's directing mind is a party to the offence. The Canadian case of *Canadian Dredge & Dock Co. Ltd* erred in this regard is stating that the 'actor-employee who physically committed the offence must be the directing mind'[249] Ferguson clarifies by stating that 'The directing mind must commit the *actus reus* with the appropriate *mens rea*, but he or she need not be the person who physically commits it.[250]

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[246] (1985) 19 C.C.C. (3d) 1 (S.C.C) 22;

[247]*Canadian Dredge & Dock Co. Ltd,* note 18 at 15.

[248] Gerry Ferguson, supra note 1, 7 footnote 29.

[249] *Canadian Dredge & Dock Co. Ltd,* note 18 at 15.

[250] Gerry Ferguson, supra footnote 1, 8.

6.4 COMPARATIVE STUDY

UNITED STATES OF AMERICA

In the United States, corporate criminal liability has been applied through the use of vicarious liability doctrine. Especially for federal offences, which are largely but not exclusively regulatory offences.[251] In relation to the respondeat superior doctrine and the premises of corporate liability today, respondeat superior doctrine is derived from agency principles of tort law. It is the common law rule in the federal courts and in most state courts today. Although in the American legal system, the business enterprise, most often a corporation, is theoretically a distinct legal entity, its behaviour must obviously consist the behaviour of individuals within the enterprise. Thus the criminal liability of the enterprise is compared to a form of accomplice liability. One ought to prove the specific 'intent' for a corporation as for an individual defendant in order to apply the doctrine; because the intent of the offending agent is imputed directly to the corporation though it is not necessary to prove that a specific person acted illegally, only that some agent of the corporation committed the crime.

It is also necessary that the prosecution show that the illegal act was committed 'within the agent's scope of employment.' Courts generally find conduct to fall within the scope of employment even if it was specifically forbidden by a superior and occurred despite the good faith efforts on the part of the corporation to prevent the crime. Another factor to be considered is whether the agent committed the crime with the intent to 'benefit' the corporation. This intent should be present. The corporation may be held criminally liable even if it received no actual benefit from the offense, although the existence or absence of benefit is relevant as evidence of intent to benefit. Thus, under the current doctrine, it is not necessary that the

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[251] *United States v Basic Construction Co.* 711 F. 2d 570 at 573 (4th Cir. C.A 1983) where the court stated: '[A] corporation may be held criminally responsible for antitrust violations committed by its employees if it were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if…such acts were against corporate policy or express instructions.'

employee be primarily concerned with benefitting the corporation, because courts recognize that many employees act primarily for their own personal gain.

In the *Supreme Court of Minnesota in State v. Christy Pontiac – GMC, Inc.*[252] explained these three points thus; '*[W]e believe, first of all, the jury should be told that it must be satisfied beyond a reasonable doubt that the acts of the individual agent constitute the acts of the corporation. Secondly, as to the kind of proof required, we hold that a corporation may be guilty of a specific intent crime committed by its agent if: (1) the agent was acting within the course and scope of his or her employment, having the authority to act for corporation with respect to the particular corporate business which was conducted criminally; (2) the agent was acting, at least in part, in furtherance of the corporation's business interests; and (3) the criminal acts were authorized, tolerated, or ratified by corporate management......'*

The court further stated that the legislature had not expressly excluded corporations from criminal liability and therefore intent of the corporation is to be considered as persons within the meaning of the code. The court summed it thus;

> *"... [N]or are we troubled by any anthropomorphic implications in assigning specific intent to a corporation for theft of forgery. There was a time when the law, in its logic declared that a legal fiction could not be a person for purposes of criminal liability, at least with respect to offenses requiring specific intent. Most courts today recognize that corporations may be guilty of specific intent crimes…Particularly apt candidates for corporate criminality are types of crime, like theft by swindle and forgery , which often occur in a business setting… If a corporation is to be criminally liable, it is clear that the crime must not be a personal aberration of an employee acting on his own; the criminal activity must in some sense, reflect corporate policy so that it is fair to say that the activity was the activity of the corporation. There must be…kinship of the act to the powers of the officials who commit it…"*

[252] Supra note 218.

Under the prevailing legal rule in the American federal court and in most states, corporations can be held criminally responsible for any act committed by an employee as long as that act is committed within the scope of employment and with some intent to benefit the employer. In the federal system, this rule derives from the common law as there is no generally applicable criminal statute embodying this standard. Unlike other criminal laws, which are embodied in statutes approved by Congress, Corporate Criminal Liability has not been approved by Congress, but instead created by courts through common law.

KENYA

It has been said that criminal law as it touches corporations has not appreciated developments in the modern world.[253] The law as applicable in Kenya was mainly derived from English law and the position in England, for many years, was that corporations lay outside of criminal law. "*It had no soul to damn and no body to kick*"[254]

As can be seen in Kenyan legislation, a person has been defined to include company also. The Interpretations and General Provisions Act[255] at section 3 defines a person to include *"a company or association or body of persons, corporate or unincorporated."* This applies to all statutes.

In the case of *Richard Nduati Kariuki vs Leonard Nduati Kariuki & anor* Nairobi Misc. Civil App No. 7 of 2006 (unreported) Court stated that *"constitutional thinking is premised on the state conferred power to the neglect of private power but the law appreciate the fact that even private individuals and corporate bodies enjoy right and/or have propensity to violate rights."*

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[253] Richard Kariuki, '*Corporate Frauds'*, Thesis Paper, Faculty of Law, Nairobi. 14

[254] Lord Thurlough, quoted in Leigh, *Criminal Liability of Corporations in English Law'* Weidenfed and Nicolson Publishers, 1969, 4.

[255] Cap 2 of the Laws of Kenya

An example is with regard to the Kenyan banking industry, whereby the anti-corruption agency was called in to investigate circumstances under which the Central Bank advanced over Sh8.3 billion to five banks under liquidation. The CBK was accused of acting in disregard of the law pertaining to securities and guarantors. According to the report, the collapsed Exchange Bank received the lion's share of the advances amounting to Sh4.5 billion. Others were Trade Bank (Sh2.4 billion), Post Bank Credit Ltd (Sh1.3 billion), Euro Bank (Sh1 billion) and Continental Bank of Kenya Ltd (Sh43 million). Although the money was expected to be recovered from the deposit protection fund, the questions that arise is whether the parent bank can be held liable for the acts of a subsidiary bank in Kenya.

With respect to Euro Bank, a small but ambitious Nairobi bank, was liquidated after admitting being insolvent. The management of the bank was detained by the police for questioning.

Kenya's Anti-Corruption Police Unit investigated Euro Bank's collapse, with an aim to find out the whereabouts of billions of shillings of savers' money, including a large proportion of public funds. The biggest casualty is the National Hospital Insurance Fund, which lost 479m shillings in the collapse, and which has now lost 1.2bn in Kenyan banks since the 1980s. Since there is no legal framework that could have enabled the government to pursue the parent holding company for the act of Euro-bank of Kenya, the question that arise is whether Kenya is ready enact legislation to deal with acts being perpetrated by multinational corporations.[256]

In the matter of Mrs Amina Haji Bankruptcy Cause No. 58 of 2004 *"a corporation is not, like a partnership or a family, a mere collection or aggregation of individuals. In the eyes of the law it is a person distinct from its members or shareholders, a metaphysical entity or a fiction of law, with legal but not physical existence."*

It is as Lord Selborne said *"a mere abstraction of law"* and Lord Macnaghten observed *"at law a different person altogether from the subscribers to the memorandum of association"*. The principle of the independent existence of a

[256] News from Africa <www.newsfromafrica.org>

company was explained and emphasized by the House of Lords in the case of Salmon vs Salmon & Co. Ltd [1987] A.C.22,51.

In regards to legislation there are general laws like the Constitution of Kenya that gives a general outline of the laws that are applicable to several matters this included. Section 3 of the Constitution which provides as follows: *This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".*

The "***State Corporation Act Cap 446*** of the Laws of Kenya hereinafter referred to as "the Act" was enacted in 1986 and revised in 1987.

It is common ground, that at that time ADC, which was a state corporation, had majority shares in KSC. This meant that KSC was a subsidiary of ADC by virtue of the fact ADC held more than 50% of the nominal value of its equity share capital, and the obvious interpretation would be that being a subsidiary of a state corporation, KSC was governed by the Act, and it therefore fell within the full ambit of the Act, for it is clearly stipulated that a "state corporation" under section 2 (c) of the Act includes "a subsidiary of a state corporation."

It is common ground that ADC was established as a body corporate and it would be required "to comply with such general or special directions as the Minister may from time to time issue in the performance of its functions" (section 3 of the ADC Act). In my opinion, that requirement is couched in mandatory terms, and having found that KSC was a subsidiary of ADC, therefore fell within the mandate of the Minister, and that it was required to comply with his special and general directives.

The Companies Act does not require a private company to submit its audited accounts to Parliament. Indeed, it is only a company which is classified as a state corporation which is also required to submit its quarterly reports and annual budgets and also appear before the Public Investments Committee, to explain maters pertaining to its affairs. Something that would not be required of a firm which was not a state corporation. I find that KSC therefore acknowledged that theirs was a state corporation, and without creating a farce, acted in compliance with the particular statutory requirements as is required of all state corporations. It can therefore only be concluded that by its conduct in word and deed, it acknowledged that it was a state corporation, a fact whish is supported by Government Of Kenya's action in appointing the Chairman of KSC over the years, as well as other members of its board by virtue of the provisions of section 6 of the Act, which provides for the composition and appointment of boards of state corporations. It is also clear from the pleadings herein that he held his term at the Government Of Kenya's pleasure. He was also required to obtain authority to travel out of the country.

Of interest is the fact that members acknowledged at several board meetings that it was necessary to seek Government Of Kenya's authority before the floatation of the shares and the privatization, especially because they acknowledged that KSC was considered to be strategic, and it was clear form the exhibits on record that it had not been listed amongst those which Government Of Kenya's intended to privatize."

A counsel in the case of ***Manager, Nanak crankshaft Ltd vs Republic*** **[**2008**]** Eklr relied on the holdings of a judge in the case of ***Stephen Obiro v. R***. [1962] E.A. 61 Farrell, J noted that "Even if some means can be found of bringing an unincorporated body before the Court, a further difficulty arises in deciding how it is to plead to the charge. In the instant case, a person named in the charge as the chairman of the union appeared and pleaded on behalf of the union. There is nothing in the record to show that the learned resident magistrate made any inquiry to ascertain whether he was in fact authorized by the union to plead on its behalf, and in any case there is no provision in law enabling a representative to appear and plead on behalf of an unincorporated body. Under Section 207 of the Criminal Procedure code Cap 75 it is the accused person who must plead to the charge, and even an advocate is not ordinarily permitted to plead on his behalf: ***R v Hussein Mohamed Moti*** (1953), 20 EACA 161. The same difficulty was considered in relation to the taking of plea from a corporate body in ***M.S.Sondhi Ltd vs R.*** (1950) 17 EACA 143, where after referring to the provisions of s. 96 of the Criminal Procedure Code the Judgement proceeded.

There would appear to be provision in the Criminal Procedure Code governing the reception of a plea from a company in a criminal proceeding and in its absence Mr. Kelly suggest that a Court should follow the provisions of S. 33 of the U.K Criminal Justice Act, 1925. We agree with Mr. Kelly to this extent that where a company is charged before any Court with a criminal offence the Court should satisfy itself before taking any plea from any person that he is a representative of the company for the purpose of answering the charge.

Statutes such as the ***Penal Code Cap 63*** and ***Criminal Procedure Codes Cap 75*** also acts as guiding principles to this effect. ***Companies Act Cap 486*** gives a guideline on the place of subsidiary companies in holding companies. One of the most important limitations imposed by the Companies Act on the recognition of the separate personality of each individual company is in connection with associated companies within the same group enterprise. In practice it is common for a company to create an organization of inter-related companies each of which is theoretically separate entity but in reality part of one concern represented by the group as a whole. Such is particularly the case when company is parent or holding company and the rest are its subsidiaries.

*Under **section 154** of the Companies Act Cap 486* a company is deemed to be a subsidiary of another if but only if:-

a) That other company either
    i) Is a member of it and controls the composition of its board of director or
    ii) Holds more than half in nominal value of its equity share capital or
b) The first mentioned company is a subsidiary of any company which is that other's subsidiary.

Under section 150 (1) where at the end of the financial year a company has subsidiaries, the accounts dealing with the profit in general meeting when the company's own balance sheet and profit and loss account are also laid. This means that group accounts must be laid before the general meeting.

The group accounts should consist of a consolidated balance sheet for the company and subsidiary and also a consolidated profit and loss account dealing with the profit and loss account of a company.

Section 151 (2)-it may be observed that the treatment of these accounts in a consolidated from qualify an old rule that each company constitutes a separate legal entity i.e. the veil of incorporation will be lifted so that they will not be regarded as separate legal entity. The statute here recognizes enterprise entity rather than corporate entity i.e. the veil of incorporation will be filed so that they will not be regarded as separate legal entities but will be treated as a group.

In 1701, Lord Holt C.J was of the view that a corporation is not indictable but the particular members are. [257] The argument was that since the company did not have the actual existence, it could not be guilty of a crime because it could not have a guilty will. Quoting from *Richard Kariuki*;

> *"…Furthermore even of the legal fiction, which gives to a corporation an imaginary will. Activities that could be ascribed to the fiction created must be such as connected with the purposes for which the company was created to accomplish. A corporation could not therefore commit a crime because any crime would necessarily be ultra vires the corporation. Moreover a corporation is devoid not only of mind but also of body and therefore incapable of receiving the usual punishment. What? Must they hang the common seal? Asked an advocate in 1682 in the case of R v City of London…"*[258]

However with the proliferation of companies, it has been felt that there is need to bring corporations within the jurisdiction of criminal law. As stated by *Turner*:

> "*...Under the commercial developments which the last few generations have witnessed, corporations have become so numerous that there would have been grave public danger in continuing to permit them to enjoy the old immunity..*."

[257] Clark, Robert C. *Corporate Law* (Little, Brown 1986)

[258] *Supra* footnote 244, [1682] 8 St. Tr. 1039 at 1138.

The first time corporations were brought within the jurisdiction of the criminal law; there was a failure to satisfy absolute statutory duties. Courts were not concerned with the problem of imputing *mens rea* to a company. In Kenya, a company would thus be prosecuted for failing to uphold a statutory duty as imposed by the **Companies Act**, or those offences provided for under the Kenya Revenue Authority, or against Customs and Excise.

Where one seeks to impute criminal liability to a corporation in Kenya, two problems arise; First, a corporation, having no social duties is generally unable to form that state of mind, which is required for the *mens rea* of the crime. The only crimes that it could then be suitably convicted of are strict liability crimes as is the case. The second problem is the means by which the 'mind' of the corporation can be established.

There are certain English cases that equivocally determined these points. In ***DPP v Kent Sussex Contractors.***[259] Lord Caldecote stated that:

> *"…The real point which we have to decide……is…..whether a company is capable of an act or will or a state of mind, so as to be able to form an intention to deceive or to have knowledge of the truth or falsity of a statement ….although the directors or general managers of a company are its agents, they are something more. A company is incapable of acting or speaking or even of thinking except in so far as its officers have acted, spoken or thought …the officers are the company for this purpose…"*

The other problem of corporate intention, on the other hand, was found by treating the *mens rea* of certain employees of the company as the *mens rea* of the company itself. However, it was not the *mens rea* of every employee that was deemed to be that of the company. The courts apply a fiction, to convert the acts and thoughts of a human being and not those of the company and thus thereby attributing personality to it. This is what has earlier been mentioned as the identification principle.

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[259] [1944] 1 KB 810.

In the leading case of ***Tesco Supermarkets Ltd v Nattrass***[260] Lord Viscount Dilhorne stated that the employee:

> *"…would have to be someone who is in actual control of the company or a part of them. He has to be a person who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders."*

Lord Denning also clarified in the case of ***H.L. Bolton (Engineering Co) Ltd v TJ Graham and Sons*** which was approved by the House of Lords , and stated that *'…Some of the people…are directors and managers who represent the directing mind and will of the company and control what is does. The state of mind of these managers is the state of mind of the company and it is treated by the law as such…*'

This formula does not include all the managers since not all such managers shall represent the directing mind and will of the corporation. This wide and flexible test was soon replaced by the *controlling officer test.* It is a question of law whether a person is to be regarded as having acted as the company's directing mind or merely as the company's servant or agent.

6.5 SUMMARY

Both Kenya criminal law and English criminal law has developed the fiction of corporate personality. The corporation can therefore act, only through individual persons. The company can thus be criminally liable where there is an individual who has committed the actual criminal conduct required for the offence , and with the appropriate culpable frame of mind and who is sufficiently important in the corporate structure for his acts to be identified with the company itself.

The other problem that arises when there is a crime is what the most suitable sanction is. Once a corporation is set up legally as a corporation, it follows that certain defined

[260] [1972] AC 153.

duties are imposed on some of its personnel and rights accrue to certain people within the new body. Corporate actors are ubiquitous and extremely powerful elements in our social life yet the criminal law has not been properly adapted to handle this development. In Kenya where a company is found liable of criminal acts, the owners simply wind up the company and form another. The punishment that can usually be imposed on corporations in Kenya, will consist of corporate fines and enforced adverse publicity as a sanction.

It is thus of the essence to conclude that even though corporate criminal liability does exist as an applicable concept in Kenyan law, the same has yet to fully develop in light of the traditional criminal law offences as envisaged within the provisions of the Penal Code and the Criminal Procedure Code, which Acts are overriding over the Criminal Process in Kenya. Therefore, the recognition, application and development of Corporate Criminal Liability in Kenya will to a large extent depend on the willingness and effort of the judicial system in Kenya.

CHAPTER SEVEN

7.0 SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

7.1 SUMMARY

TORTIOUS RESPONSIBILITY

a) Doctrine of Forum Non Conveniens

As earlier discussed, Aaron L. Levenstadt in his Article provides mechanisms which can be employed so as to address the issue of tortuous responsibility. He speaks in context of the United States that the ultimate purpose of the FNC is to find the medium that best serves the ends of justice, and that the United States courts should implement procedural safeguards to American Plaintiffs which should also similarly extend to foreign Plaintiffs who are litigating in the U.S. This is to try and curb the difficulties the foreign Plaintiffs would encounter when litigating in the United States.

This should be incorporated in all if not most jurisdictions, and as result, it will go a long way in addressing the violations that are caused by the multinational corporations especially in foreign countries.

In some situations, people or communities may not have access to the courts or administrative tribunals so as to make their complaints. People might, for example, be ineligible to bring a case under the relevant rules of standing, where they are ruled to have no *locus standi*. Laws governing who has standing vary around the world, although they often allow only those people directly affected to bring complaints. Applied strictly, standing rules can exclude complaints where the harm is only general – such as some forms of environmental harm – and not specific to an individual. In some countries, people might be barred from bringing legal proceedings where legal action has already been initiated in another country.

Those eligible to bring complaints may also lack the financial or legal resources necessary to realise their claims. Multinational enterprises generally have significant financial and legal resources to defend claims against them – often unlike the people and communities seeking redress. In those circumstances, claimants rely on pro bono legal services that may not always be available.

Access to compensation schemes established by governments or agreed by multinationals might also be hampered by eligibility criteria that serve to deny compensation to some affected people or communities. In the *Cape* case, for example, a lack of access to legal services and compensation in South Africa led to the proceedings being pursued in the United Kingdom. International laws addressing the same, as well as implementing procedural safeguards to foreign Plaintiffs should be incorporated.

Furthermore Multinationals sometimes organise their company structure and financial assets to make it difficult for people and communities to bring and enforce claims against them. They might ensure that the entity operating in the host state has only limited financial assets to compensate or remediate harm.

For example, in the *Thor* litigation, the UK court found that Thor probably restructured itself to isolate its financial assets from the corporate entity in the multinational group which had been the subject of claims by workers in South Africa suffering from mercury poisoning. Moreover, host-state courts will not necessarily have jurisdiction over a foreign entity. In such cases, it might be impossible for people and communities to bring a claim against the home-state entity in the host state. Even if a court finds a foreign entity to be within its jurisdiction, multinationals can rely on the corporate veil to protect their foreign cash-rich entities from the liabilities of the host-state entity. If people and communities overcome these hurdles, they might still be unable to enforce a judgment against a foreign entity. They might have to take the host-state judgment to the home state courts to enforce it against the home-state entity. However, a home-state court will not necessarily recognise the host-state judgment as being legally enforceable. As mentioned above, States courts should implement procedural safeguards to Plaintiffs in a bid to minimize/eradicate this problem.

b) Liability of parent company for the acts of its subsidiary

According to Stephanie Ratté in her Article, the failures of the ATS shed light on not only the lack of corporate environmental regulation in an international context, but also the various forces that make enforcement of international environmental responsibility particularly challenging, hence making it difficult for most jurisdiction to even access law so as to sue international parent companies. It should be noted that factors such as the power of large MNCs, the economic motivations of less developed nations, and the uncertainty of environmental rights in the international legal system all contribute to this difficulty. A people's ability to bring claims for redress depends on the existence of underlying rights and duties. It is the violation or breach of these rights and duties that is the basis of claims for redress. Barriers to redress arise when governments are unable to establish an effective and comprehensive system of corporate regulation setting out corporate duties, and individual and community rights. Some countries have rafts of laws governing the environmental and social performance of corporations, including multinationals operating within their borders.'

In Kenya, no laws have yet been passed to deal specifically with the regulation of multinational corporations. This is despite the fact that numerous multinational corporations have established multinationals in the company and more are anticipated. This is due to the fact that Kenyan laws on labour and environmental management are not stringent enough (although improving with the inception of NEMA) and this kind of situation attracts foreign direct investment.

Also, a lack of human or financial resources might prevent some countries, especially Kenya from implementing, enforcing or reinforcing these laws through systems of redress. The expenses are even higher where a case may need to be instituted as against the parent company in a foreign state. The legal fees in such as case may sky-rocket.

There are however, more aspects that create problems for international environmental regulatory systems. International law should be focused more on private individuals rather than nations. Stephanie Ratté later recommends that the limited success of plaintiffs indicates that the ATS cannot be relied upon as the one mechanism for seeking compensatory and punitive damages from US corporations that allegedly cause harm in other nations with or without color of law. Framing of environmental claims as human rights claims might be more efficient. It is mandatory that we recognize the importance on environmental security, otherwise, the problem will remain the same.

She concludes that the ATS alone cannot constitute a global solution for enforcing corporate environmental responsibility. Multiple mechanisms working in conjunction with each other is in her opinion the best way to a solution. This includes legal solutions among others. Parent corporation may not be in direct control of the events that lead to massive harm, but they are in a better position to prevent these catastrophes before they occur through modes such as protections, oversight and allocation of capital resources.

c) **Whether the principle of corporate separateness applies to multinational corporations, and to what extent.**

As we know, one of the critical features of corporate law is the principle of entity, or limited liability, which insulates a corporation's owners from the debts of the corporation beyond the amount of their investment. Piercing the corporate veil is the only exception to this principle. A direct cause of action should be provided to tort creditors. A system of joint and several liability between the parent corporation and the creditors of a subsidiary would most directly cause the parent corporation to take affirmative steps to prevent harm.[261] It is problematic to allow parent corporations to escape liability for the torts of their subsidiaries.

CRIMINAL RESPONSIBILITY

A subsidiary corporation is considered a separate entity hence this makes it difficult for victims to sue the parent corporation. The solution to this is piercing the corporate veil in such a circumstance. Another avenue arises in the instance where the parent company has a subsidiary or employee that acts as its agent. Therefore, if the agent is

[261] Meredith Dearborn, 'Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups' 2009

in the court's jurisdiction, the court may assert personal jurisdiction over the parent corporation.[262]

Emphasis should also be brought to the fundamental and human rights enshrined in the Constitution as means of protecting the citizens. This is a way ensuring responsibility as well.

In the case of *Opiyo & 25 others vs Attorney General & another*,[263] it seeks to show a medium in which employers can rely on when in the instance they are victims of the negative consequences of corporations. First of all, as a matter of law and proper judicial practice, a court of law must satisfy itself of its jurisdiction. In this instance, Parliament had passed a law imposing a tax on loans enjoyed by employees such that as much as the rate of interest would be based on the market lending rate, it would hike up to 22% from 15%. Eventually, the employees went on strike. This was after the Banks-Shop Stewards Committee had earlier issued the Minister of Finance with a strike notice but the same was ignored. The Bank Association meanwhile issued notices that failure of the employees to call off the strike and resume work, they would be dismissed. They were all dismissed but a notice to reapply for their jobs was issued and they reapplied, only that not all were accepted. Out of the 12,000, 11,400 were re-employed, leaving out 600 employees. The ex-employees brought this cause to court. The court stated that *'there is no doubt that apart from the shopstewards the process of absorbing staff on re-application was discriminatory for the simple reason that all the bankers who went on strike were in the same boat and guilty of the same misconduct other than the shopstewards ofcourse.'* This was what was held by the Industrial Court. In short, this creates an emphasis on the importance of non-discriminatory laws in protecting employees of these national as well as international corporations. The case *Kenya Airways Ltd vs Kenya Airline Pilots Association*[264] was referred to.

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[262] Yasmine Gado, *'Principles and Mechanisms to Hold Business Accountable for Hum an Rights Abuses',* 2009

[263] Civil suit no. 1971 of 2001 (OS)

[264] Miscellaneous Application No. 254 of 2001

The High Court further provided that the enjoyment of the fundamental rights and freedoms enshrined in the Constitution can only be limited by the Constitution. Any other law which tries to curtail, limit or inhibit the enjoyment of such rights and freedoms would be inconsistent with the Constitution, particularly section 3.

The same was seen in the case of *Mecol Ltd vs the Attorney General & 7 others*[265] . the applicants were the employers of the 3rd to the 7th respondents. The services of the respondents were terminated on 31st May 1999, and they were asked to go on their leave immediately so that it runs concurrently with the one month termination notice. The trade union (2nd respondent) filed a report with the Ministry of Labour that there exists a dispute between itself and the applicant. The Ministry accepted the report and conducted an investigation but the recommendations were not liked therefore the matter was referred to the industrial court. The industrial court failed to give a fair hearing. The High court concluded that it was wrong for the industrial court to not afford the respondents a fair hearing. The court therefore entitled the applicant to a declaration that the industrial court of Kenya, award, in cause no. 84 of 2004 is null and void.

Emphasis, however, was on the supremacy of the Constitution. Section 3 was quoted, that 'This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.'

The Constitution should mandatorily be upheld because it is the supreme law of the land, and in addition because it protects the fundamental and human rights of its citizens, which is of paramount importance.

In *Peter Ng'ang'a Muiruri vs Credit Bank Ltd & 2 Others*[266], the learned Judge stated that *'...the guard of the guards is the Constitution and the law'*. A functional and purposive interpretation is to be given to constitutional provisions which protect human rights.

[265] Misc Civil Application no. 1784 of 2004

[266] Civil Appeal 203 of 2006

7.2 CONCLUSION

It can be deduced that the problems concerned with multinational corporations are far from over. Multinationals create problems such as environmental hazards especially in a foreign country, and when called out to rectify, they claim that they are bankrupt, or that they have already paid out their shareholders hence are in no position to remedy the problems they have caused.

With regard to the principle of corporate separateness, I conclude that in cross-border cases involving affiliated corporate defendants, the most contentious and intensely-litigated issue can be whether a domestic corporation will subject its alien associate to jurisdiction in courts in cross-border cases involving affiliated corporate defendants.

The projected jurisdictional veil-piercing standard seeks to align a court's inquiry with due process requirements, while also reducing the inconsistency and uncertainty of current approaches. Of importance is to provide a framework that will yield predictable and consistent results. Although both the jurisdictional veil-piercing and reasonableness inquiries are heavily fact-dependent, it is not impossible for courts to adopt a cohesive standard and build sufficiently clear and detailed precedents that will achieve predictable, fair outcomes.

Furthermore, there is also no international backstop to hold companies accountable when national regulatory systems are insufficient. The UN norms on the Responsibilities of Transnational Corporations recently adopted are not binding and do not provide for legal consequences in the event of non compliance by a multinational corporation.

In response to whether a parent company can be held liable for the acts of its foreign subsidiaries, I conclude that corporations need to pay particular attention to the growing case law on the governance of parent and subsidiary corporations. The Courts have demonstrated a willingness to apply corporate and tort law principles in sometimes flexible ways to give remedies to foreign victims of environmental damage. The Courts, for example, are willing to pierce the corporate veil in environmental matters where the parent corporation has exerted too much control over the subsidiary, the facility or even just the site that caused the damage.

The ultimate purpose of Forum Non Conveniens is to provide the most suitable forum for the ends of justice to be met. Procedural safeguards with regards to plaintiffs should extend to foreign plaintiffs also, so as to minimize substantial procedural obstacles that may be encountered. In addition, legislation to remove the corporate veil barrier, increase damages awards in developing countries, and allocate funding to enable cases to be fought in developing countries, would definitely improve the deterrent objective of legal action and would also encourage more uniform application of standards of health and safety and environmental protection across the globe.

7.3 RECOMMENDATIONS

Multinational enterprises can be regulated both under international and national legal frameworks. For instance, non-discriminating laws should be put in place. Companies entering a foreign country worry most about discrimination-both explicit and implicit discrimination. In place, legislative measures should be taken to implement laws that can eradicate this. Such non-discrimination provisions will provide much of the security that investors need without compromising the ability of democratic governments to conduct their business.

The other problem lies where host countries, such as Kenya do not have a system that is necessarily available or capable of holding multinationals to account for their wrongs, while in applying international law, the problem is it only regulates relations between states. Kenya should embark on efforts to:

1. Strengthening national means of redress in Kenya.
2. Strengthening national means of redress, providing avenues by which citizens can seek redress even in other countries.
3. Participating in the development of international means of redress.

Options for improving means of redress in Kenya

As stated, strengthening the ability of Kenyan authorities to provide the means of redress to those adversely affected by multinational corporations' wrongs would be the best starting point for making multinational enterprises accountable for their activities.

Secondly, the development and enforcement of laws in the place in which the multinational corporation wrongs occur gives effect to the right of national governments and local communities to control the activities in their territory. This enables national laws and legal infrastructure to address local priorities and interests.

Thirdly, technical and financial assistance from other states enables host countries to build the necessary legal and administrative infrastructure to provide means of redress. The technical aid should be sought from countries that have already instituted cases against foreign companies such as Nigeria, South Africa and Burma. Liberal rules governing standing to bring cases would be an important element in the design or amendment of national frameworks for redress. Any assistance would need to give people the necessary tools, such as legal aid, to access means of redress.

Technical and financial assistance to support these projects should ideally come from:

a) The Kenya government
b) Aid programmes offered by other national governments
c) The private, academic or non-profit sectors free of charge or for reduced fees.

People and communities affected by multinational activities still face the hurdles presented by: The corporate veil separating entities in the corporate group, the flight of assets to foreign jurisdictions and the governments reluctant to compromise investment revenues by requiring compliance with environmental and social standards.

Redress in International Law

It is true that corporations interfere with the enjoyment of a broad range of human rights though international law has failed both to articulate the human rights obligations of corporations and to provide mechanisms for regulating corporate conduct in the field of human rights. Individuals have rights under international human rights law and obligations under international criminal law.

The barriers to redress for multinational wrongs at the national level cannot be dealt with by individual governments acting alone. The international community must work together to develop an international approach to give people adversely affected by multinational corporation activities the means of redress.

An international approach to providing means of redress for multinational corporation's wrongs, as stated by *Alice Palmer*[267] could serve two functions:

a) Facilitate national means of redress
b) Create international means of redress where national systems fail.

International law facilitating national means of redress

An international approach to redress would facilitate the systematic reforms necessary at national level – in both the host and home countries. Consistent with the idea that international law governs only state-to-state relations, this first function would bind only governments, requiring states to put international laws into effect by providing means of redress within their national frameworks.

The first step in developing an international approach to the development of national means of redress requires that governments work together to identify those means of redress that already exist at the national level, and the gaps or failures in their implementation. After that the governments agree on the principal mechanisms for redress, borrowing from existing instruments such as the Aarhus Convention.

[267] Alice Palmer, supra footnote 256, 14.

These principal elements would then be used by the international community as a basis for an international agreement on national means of redress for multinational wrongs. International agreement requiring governments to develop national means of redress would need to set out the types of national procedures and institutional frameworks necessary to provide redress within the national system. Elements of an international agreement on national means of redress for home and host countries would include the:

a) Eligibility or ‘standing’ of people and communities to bring claims against multinational enterprises
b) Provision of financial and legal resources to realise those claims
c) Timing and manner of hearings and decisions after complaints are made
d) Availability of appropriate remedies to Multinational Corporation wrongs
e) Enforcement of foreign judgements.

Alice suggests that such an international agreement would also need to include providing national governments with the financial and technical assistance required to implement means of redress.[268]

[268] Ibid, 15.

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11. GLOSSARY OF TECHNICAL TERMS

Forum non conveniens: In civil procedure, the doctrine that an inappropriate forum- even though competent under the law- may be divested of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should instituted in another forum in which the action might originally have been brought.

Parent Corporation: A corporation that owns more than 50 percent of the voting shares of, or has an otherwise controlling interest in, another corporation (called a subsidiary corporation). Also termed parent company.

Subsidiary Corporation: A corporation in which a parent corporation has a controlling share.

Tort: A civil wrong for which a remedy may be obtained, usually in the form of damages; a breach of a duty imposed by law.

Corporate Criminal Liability: Holding Corporate personalities liable for criminal acts.

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[i] Id.

[ii] Meeran, R., 'The Battle Against the Big Guy' at <http://www.mg.co.za> archives 19/10/99.

[iii] Eveleth A, 'New Claim Against Chemical Giant Thor', <http://www.sn.apc.org> archives 20/02/98.

[iv] Koch E., *'SA Still Taking Others Waste'* <http://www.mg.co.za> archives 12/07/96.