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# To what Extent should a Parent Company be Held Liable for the Acts of Subsidiary?

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## ABSTRACT

*This paper is written to explain the extent to which the parents company can be held liable. This is done by analysing the extent by the use of Ruggie's Pillars from the UN. The paper uses the pillars under the ambit of the principles of Duty of Care, Accountability and Legal Remedies to understand how the parent companies can be held liable with regard to these principles and how the principles must be used in a broad spectrum to hold parent companies liable as well as how the other pillars could be used in ways to hold parent companies liable as well as protect people from the violation of human rights. Simultaneously, the gaps of law to hold parent companies liable in India are analysed. The outcome of the paper is that there is scope for development and need to hold parent companies liable in India and Internationally.*

## I. INTRODUCTION

Piercing the corporate veil, is the simple understanding of a legal process by which the distinct legal character of a company is disregarded<sup>2</sup>. The concept of piercing the veil is a longstanding debate in the various international fields in regards to legal, humanitarian grounds, environment etc.

In order to understand the concept of corporate veil, the conceptual understanding of separate legal personality must be taken into account. According to sec. 9 of the Companies Act, 2013, once a company has been incorporated, it develops a personality of its own and is distinct to that of the members who constitute the company. The company becomes a body corporate which has the capable personality, of functioning as an incorporated individual. There are several distinct features of an incorporated company, some of them include;-

- **Limited liability** – This means that the liability of members of the company are restricted nominally to what the shares held by the person are.<sup>3</sup> They are not bound to give up anything more than invested.

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<sup>2</sup> Robert B. Thompson, Piercing the Corporate Veil: An Empirical Study, Cornell Law Rev. 1036 (1991)

<sup>3</sup> JH Rayner Ltd. V Deptt. Of Trade and Industry, (1990) 2 AC 418

- **Continuous Succession-** Once incorporated, the company continues to exist even after the death of the members of the company. The company is made up of shares and these shares can be inherited by the shareholder's heirs. The purpose of the same is that the affiliates of the company may change, but the company does not cease to exist and its continuity is not affected.
- **Capacity to sue and be sued-** One of the most distinct traits is that a company can sue or be sued in its own name and not in the name of its members/owners. This means, a company can protect its name by the right to sue and a victim can complain against a company and the company can be sued.

However distinct the personality is, the immunity and benefit of the company is still enjoyed by and carried out for certain individuals. In contrast, with benefit, comes responsibility and hence there are reasons for which the corporate identity can be removed and the individuals can be sued. This is what is called the piercing of the corporate veil. The court can do the same for particular reasons;-

- When the incorporation was merely a reason for a tax benefit
- Where the control of subsidiary is actually with the parent company
- Where the company is a scam in itself
- Where there exists an enemy character
- Any Statutory provision
- Public Interest

### **Importance of study**

The structure of a multinational company is in the form of a parent subsidiary style and this is for various reasons like tax benefits, management ease and regulatory compliance. It has been evident historically that because of doctrines like that of separate legal identity, it allows multinational parent companies to organize themselves in such a way that, although the subsidiary do not respect human rights, the parent company will not be held liable. When this is seen from the perspective of the aggrieved, it promotes the concept of piercing the veil of parent companies but in today's society, there is no hard and fast statute that allows for the parent company to be held liable. International law has become hostile to the idea that a collective company structure provides a veil against accountability.<sup>4</sup>

In order to pierce the corporate veil, the parent company will be held liable for the acts of the

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<sup>4</sup> Metaphor in International Law: Language, Imagination and Normative Inquiry 86 Nordic Journal of International Law 170 (2017)

subsidiary, which is a total disregard to the principle of legal separate entity. The extent to which a court take into consideration a human right violation to pierce the veil is big question, especially when a subsidiary has violated human rights. The way a parent company is held liable will be based on principles like good faith, the duty of care etc. The last decade or so, has seen a gradual rise of the importance of international human rights law and the importance of the same in countries. It has reshaped an individual's role under international law and in spotlight, the way a corporation must operate and treat its employees, customers and stakeholders. It is important to take into consideration these individuals and their rights and the extent to which a parent company can be held liable since this is a gap of research.

## **II. LITERATURE REVIEW**

### **The Circuit Split on Mens Rea for Aiding and Abetting Liability Under the Alien Tort Statute, Boston Law Review.**

This particular journal is situated around the concept of Alien Tort Statute. Under this statute, foreigners or what is sometimes known as aliens are allowed to sue in the US. This journal highlights the history of the statute and how it came into existence, while comparing to present day scenarios. This journal was important as it stood out to be one of the most important legal concepts that need to be implemented in different parts of the world, including India. Through the explanation of the evolution of the statute, it highlighted an important gap that home countries should be allowed to sue defendants that do not originate from the country for the bases of human rights violations and this became an important part of the primary research. The journal explained the concept in a very systematic way which was the highlight of the reading it, however the journal also repeats its self in different ways, which leads to confusion which is a major disadvantage.

### **Case Study of Niger Delta and Shell case by The Bureau of Investigative Journalism.**

This is a case study on the shell environmental damage on the Niger Delta and harm caused to the people who lived around the area. This case study is vital to the research as it proves how parent companies are held liable in International law and reiterates the ideology of accountability of parent companies in this research. The analysis was quick and easy to understand but at the same time, this was a drawback since it wasn't as detailed for the reader.

### **Group Company Liability. Eur Bus Org Law Rev**

In this journal, the main topic was the concept of separate legal identity of a corporation,

however it highlighted an important law of due diligence that became vital to the research. The particular law has drawn attention in the research in the international perspective as well as the need to implement it in the Indian perspective. The journal had written the exact topic in an realistic way, so it is understandable to a reader. However, since the journal did not focus on this, the research in this journal was limited for the scope of the paper. It helped mould the understanding of what is needed to be done in other countries as well as what the next step of research should be.

### **International Journal of Advanced Engineering**

The particular journal highlights The Bhopal Gas Tragedy, and what happens in the case. It highlights the various stages of the case and what has happened internationally. This is vitally important for the research as it highlights one of the most important case studies of the country. It highlighted a gap with regard to the how the law is implemented in the country and how there is a large gap in law.

## **III. RESEARCH QUESTIONS AND OBJECTIVE**

1. To what extent should a parent company be held liable for the acts of subsidiary?

### **Objective**

- The objective is to understand the extent to which a parent company should be held liable with reference to the Ruggie's pillars developed in the UN.
- The objective is to understand the lack of scope in law in India for holding parent companies liable in consonance to precedents.

## **IV. RESEARCH METHODOLOGY**

The research methodology comprised for this paper can be said to be a mix of primary and secondary sources. In order to analyse the question, the research was done in a qualitative and quantitative way. The qualitative research was expressed in the secondary sources and the quantitative data was founded on the bases of primary research. The primary research approach was a questionnaire circulated among law students. The sample size was twenty five people and this can be highlighted to be a disadvantage as the sample size was small and bigger sample, would ideally aid better results. The questions was all multiple choice and was relating directly to an aspect that needed to be answered in the research undertaken. The main purpose of using law students as a sample was researched upon. The survey was then sampled across students on social media through links that lead them to the online form. In consonance, the secondary sources founded was mainly journals published on public domains

like Yale Law Review, Cambridge law Review etc, a number of cases were studied, both internationally as well as in India to get an in depth understanding.

## V. RESEARCH AND ANALYSIS

### A. International Perspective

Traditionally, the states have been considered to have the responsibility to safeguard the human rights of individuals. International law views corporations as possessing certain human rights, but it generally does not recognize corporations as bearers of legal obligations under international law.<sup>5</sup> Modern times have changed this view, Multinational Companies have been the centre of attention. John Ruggie developed three pillars, that have become a part of the United Nations Guiding Principles on Business and Human Rights (UNGP), *the duty to protect, respect and remedy*. The UNGP was created to form a list of obligations for governments and private businesses, as a duty to protect civilisation from human rights abuses and to promise the incapacitated persons an appropriate access for redressal and compensation. The understanding of the three factors developed by Ruggie must be understood;-

- **The duty to protect-** This is pertinent directly to the obligation of the state and its duty to protect the citizens and their human rights against abuses from parties like businesses.
- **The duty to respect -** This is regarding the corporate responsibility and the corporate obligation to respect the human rights of anyone who gets affected by the workings of the business, this includes stakeholders, employees, customers etc.
- **Access to remedy-** This can be said to be the obligation of both the state and a corporate duty to provide a proper redressal mechanism for those been infringed of their human rights.

The two pillars respect and remedy can be directly associated to companies and their obligations. Ruggie has highlighted the need for companies around the globe to respect the human rights and remedy them, if infringed. A revisionist ideology is that businesses have human rights responsibilities, but the conditions under which they can be held responsible and the extent to which they can be held responsible is a point of discussion<sup>6</sup>. In order, to answer this question, the paper highlights three factors that must be taken into consideration;-

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<sup>5</sup> Jordan J. Paust, "Human Rights Responsibilities of Private Corporations", *Vanderbilt Journal of Transnational Law*, vol. 35 (2002)

<sup>6</sup> <https://www.cambridge.org/core/terms>. <https://doi.org/10.1017/bhj.2016.1>

## Legal Remedies

Rooting from the conceptual understanding of separate legal personality, it becomes very difficult for a victim of human right abuse to gain justice against big parent companies, with no grounding in the subsidiary situated country. The legal remedies referred to in this area, is regarded to the concept of extraterritoriality, this is the legislative jurisdiction where a court applies domestic or international law to acts that had taken place beyond the country's jurisdiction.<sup>7</sup>

Human Right Violations have been on the rise in recent years and due to efforts of human rights organizations and the media, the liability of corporates are finally being put forth. However, it is not enough that these corporates are just found liable, there must be forums in which the victims can gain justice. If we compare it to the Ruggie's pillars, it is the duty of the state to protect by implementing rules and regulations and provide a forum for remedy if corporations chose to not follow the same and it is the duty of the corporation to oblige of the same.

A number of nations have introduced systems to help in providing remedies when necessary. In the US, the makers of law have formulated the Alien Tort Claims Act, also known as the Alien Tort Statute, this allows federal district courts jurisdiction over cases filed by non-citizens. This means that, a foreigner can sue a corporation in the US for a violation that the country is in part of in accordance to a treaty or any such form<sup>8</sup>. Up until the year 2018, foreigners could sue entire corporations for violations that caused harm to American citizens. This view was altered in the landmark case, *Jesner v. Arab Bank*<sup>9</sup>, where a Jordanian bank in the US was being sued. It was held that non-American defendants cannot fall under the purview of statute and upheld the case of *Kiobel v. Royal Dutch Petroleum Co I*.<sup>10</sup> The need for the home country to address the violations caused to the citizens is a rising concern and a majority of 70% of the sample size agrees that the home country must have the authority over non home country corporation cases. Another very important statute is the BRIBis, article 4. This is a part of the treaty between specific European countries. This particular article allows for the defendants to bring about jurisdiction in an EU country, when the defendant is a part of an EU nation. In the case of *Lungowe & Ors v Vedanta Resources Plc & Anor*<sup>11</sup>, it was held that the claim for pollution damage in Zambia was held liable for the sake of justice in

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<sup>7</sup> Corporate Social Responsibility, Human rights and Law, Olufemi Amao

<sup>8</sup> Srish Khakurel, The Circuit Split on MensRea for Aiding and Abetting Liability Under the Alien Tort Statute, Boston Law Review, Volume 59, Issue 8 (2018)

<sup>9</sup> *Jesner v Arab Bank, PLC*, No. 16-499,584 U.S

<sup>10</sup> *Kiobel v. Royal Dutch Petroleum Co*, 569 U.S 108

<sup>11</sup> *Lungowe & Ors v Vedanta Resources Plc & Anor* [2016] EWHC 975 (TCC)

the name that the only way to bring about action against the company was through this treaty. The legal remedies discussed above, originates from removing the attributes of a separate legal identity. However, as seen above the extraterritorial remedies have limitation and is very difficult to hold a parent company liable for a claim against the subsidiary. As this would involve, breaking the idea of separate legal identity, courts dislike the option of doing so. This is because, it goes against the basic principle of corporate law and makes an entity one. In consequence, court decisions will always be very case-specific to balance the reasonableness of incorporating a separate entity while clamping down abuses.<sup>12</sup>

### **Accountability**

The concept is the understanding that there is a presumption of responsibility for the actions and decisions of a person or company on its parent or owner. Hence, accountability is said to be a pervasive concept that encompasses various fields in which the responsibility can be held. Accountability can be placed in different aspects like moral, political, administrative, managerial, economic, legal, consequences-related and professional accountability.<sup>13</sup> Now if this is related to the piercing of the corporate veil, lack of accountability can be associated with public interest. This can be further linked to the principle of good faith, the principle suggests that everything is done, should be done in a fair manner<sup>14</sup>. We can impliedly link ethical and moral behaviour of the company to this. In order to pierce the veil, it must be analysed on the basis that of public interest and how the lack of accountability of the parent company in assuring that the subsidiary company is in line with all necessary regulations and obligations to ensure no violation is committed like that of human rights.

The concept can be further analysed by understanding the pillar of respect in comparison to the concept of accountability, as stated before, it is the duty of the corporate to respect, this includes the parent companies. The parent companies need to be made liable for acts of the subsidiary. In a case study analysis of the Oil pollution damage caused by Royal Dutch Shell in the Niger Delta, In the study, it was seen that shell was negligent in cleaning up an oil spill, which affected the health of the people<sup>15</sup>. it can be seen as to how the parent company tried to push the blame on to the local subsidiary. However, they were unsuccessful and the court held Shell equal party to the case as they could be held accountable for human rights

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<sup>12</sup> Karen Vandekerckhove, *Piercing the corporate veil: a transnational approach* (Alphen aan den Rijn: Kluwer, (2007)

<sup>13</sup> Rolf H Weber, *Realizing a New Global Cyberspace Framework* 78, Berlin: Springer, (2015).

<sup>14</sup> Good Faith In International Law, Bonn Research papers on International Law, Paper no.2/2013,(2013)

<sup>15</sup> Analysis: Business hides behind corporate veil on human rights abuse claims — The Bureau of Investigative Journalism, <https://www.thebureauinvestigates.com/opinion/2011-12-09/analysis-business-hides-behind-corporate-veil-on-human-rights-abuse-claims>

violations caused to the people of the Delta. The principle and the duty of companies have been set together even in the UNGP obligations, GP 21 in particular, which states how a company should report human right issues and how its addressed, *“In all instances, communications should: (a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences; (b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved; (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.”*<sup>16</sup>. The obligation further reinstates the importance of respecting and provides for ways in which corporates can direct responsibly if any violation occurs. Accountability is also vital on the basis that, not all subsidiaries are well off to provide adequate compensation to the people who have been prey to human rights violations and the idea of a parent company is what brings the idea of fair justice into picture.

### **Duty of Care**

The principle of duty of care originates from the tortious principle that suggests a legal obligation to have a standard of care towards those in relevance. In this case, the parent company to the subsidiary and its stakeholders.

According to the ways a parent company veil can be pierced is based on the amount of control it has on the subsidiary company. The parent company does not have to show explicit control to prove that they own a duty of care, but rather an understanding or an implicit understanding of something that could happen in the subsidiary is enough to be considered for a duty of care from the parent company.<sup>17</sup> In the landmark case of *Chandler v Cape*<sup>18</sup>, it was further established that the court can hold the parent company liable on the bases of duty of care in appropriate circumstances.<sup>19</sup>

If this is correlated to the relation to Ruggie’s pillars, it can be seen to have a direct relevance to the pillar of respect and protect. The parent companies cannot chose to ignore the basic running of the subsidiary. It is a misunderstood norm that the only duty of the parent company is to overlook the financial aspect of the company and collect the dues from the subsidiary. Not only should the parent’s control over its subsidiary be analysed but that

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<sup>16</sup> The United Nations Human Rights Commission, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide, [www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf).

<sup>17</sup> Crossing the Corporate Veil The Cambridge Law Journal, Vol. 71, No. 3 ( 2012).

<sup>18</sup> *Chandle v Cape*, 2012, EWCA (Civ) 525

<sup>19</sup> Gwanee, Skinner, Parent Company Accountabilty, ICAR Journal

together with notions of proximity, fairness, and reliance<sup>20</sup>. The result of the same, is that the name of the company is not put in jeopardy. Similarly, it is held that, it is the duty of the state to protect and if this principle is looked at in a broad perspective, the state must reinstate the duty in corporations to implement their duty of care towards all stakeholders for example, France, has a statutory duty of vigilance, which requires corporations, which have over five thousand employees to take reasonable care in the identification and prevention of risks to human rights and fundamental freedoms.<sup>21</sup> Only if the state creates stricter rules and obligations, will the corporations feel the need to follow through and build on the same. Through the primary research conducted, more than sixty percent of the sample have agreed to the point that parent companies must have an obligation to the subsidiary and victims of human right abuses. It was also seen that around fifty two percent are of the opinion that the state must enforce stricter rules on corporations to obligate their duty of care towards subsidiaries. Without, casting a legally binding duty of care rule on the parent company for responsibility for infringements by a subsidiary, a victim can still only sue the subsidiary. Hence, this will depend on the way the remedy pillar is implemented by the state and its degree of fair justice.<sup>22</sup>

## **B. Indian Perspective**

From the above discussion, the international perspective of the extent to which a parent company can be held liable and how it is being implemented has been examined. When this is put in a similar view with an Indian lens, it has to be noted that despite India being a part of the United Nations, it is very evident from precedents that the scope of holding a parent company liable is very limited, in fact a human rights violation against even a corporate to be held liable is difficult.

The first distinction that must be is to understand the meaning of a subsidiary under company law in India. According to section 2(87) of the Companies Act, it lays down conditions by which a company can be considered a subsidiary of another company,

- 1) The holding company has authority over who the members of the board of directors are.
- 2) Has more than one half of the total share capital, on its own or with additional subsidiary companies.

It must now be noted, that looking at the ever progressing state of the country, India has a

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<sup>20</sup> Thompson v. The Renwick Group plc [2015] 2 BCC 855

<sup>21</sup> Petrin, M., Choudhury, B. Group Company Liability. *Eur Bus Org Law Rev* **19**, (2018).

<sup>22</sup> Liability of Parent Companies for Human Rights Violations of Subsidiaries, Rolf H. Weber/Rainer Baisch

number of multinational subsidiaries located in the country and each of which satisfy the above criteria. The extent of which the parent company is held liable in the country is very limited. However, this must not be mistaken with the idea that the country is not doing anything to support its treaties held in the United Nations. A number of talks have taken place on the implementation of the UNGP in the country. In the year 2017, NHRC and CII conducted conferences on the development of business and human rights and the implementation of the UNGP.<sup>23</sup> The country also comprises of existing legal tools to be used for the protection of its citizens from corporate harm.

- **National Human Rights Institutions-** after the UN adoption of the Human Rights Declaration, India established these institutions to help protect and provide a forum for aggrieved persons.<sup>24</sup> This entails the idea that even for corporate crimes, these forums act as a valid mechanism in the protection of human rights.
- **Fair Labour Association-** It is a labour association that helps ensure ethical and right practices are assured in business organizations.

As seen above, although mechanisms are set in place, the Companies Act 2013 or any such act does not have any provision to hold a parent company liable. In the famous case of the Bhopal Gas Tragedy, where a deadly gas was let out of a Union Carbide plant in Bhopal<sup>25</sup>. The particular plant was run by a subsidiary of the Union Carbide Corporation that washed their hands away from the tragedy that struck. From the outset and analysing with regards to Ruggie's pillar of respect, it is evident that the neither did the subsidiary nor did the parent company respect the human rights violation caused to the people of Bhopal. As illustrated previously, it is the duty of the parent company to ideally assure that the requirements are met. This is because the amount of power and knowledge the company had over the subsidiary creates legal duty to stakeholders. In this case, as the situation got worse, the victims filed a case in the US under the Alien Tort Statute to pierce the veil and hold the parent company liable. However, they were unsuccessful on the basis of the lack of jurisdiction. In this case it can be seen that the victims of human right violations were left with no remedy from the parent company. If we look at Ruggie's concept and the duty of the state to protect, it is clear that as a there is a lack of protection of human rights and no appropriate forum to hold parent companies liable and pierce the veil on the basis of any concept like public interest or control in the subsidiary. Despite the failure of giving relief,

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<sup>23</sup>Chakraborty, Adrij and Mehra, Anahita United Nations Guiding Principles and the Business and Human Rights in India, Centre for Legal Research and Advocacy ( 2018)

<sup>24</sup> Gagan Deep Daliwal, International Journal of Law, Volume 4, Issue 2

<sup>25</sup> Harmandeep Singh, International Journal of Advanced Engineering, Vol 2, Issue 6 (2016)

no amendment was made or change gathered for the future. To substantiate this analysis, from the primary research it was seen that, 80% of the sample was unaware of any kind of statute that provides for a remedy against a parent company in India and a majority was of the opinion that such laws should be implemented.

Apart from this landmark case, a number of cases in India have highlighted when the veil of the parent company can be pierced. In the case of *Life Insurance Corporation of India v. Escorts Limited and Ors*<sup>26</sup>, it was held that, if a parent company and subsidiary company are linked for the cause of action, then the veil of the parent company can be pierced to hold them liable. However, the mechanism as stated previously has not been mentioned and the extent to which the parent company will be held liable and to what extent of control and this broad scope acts as a hinderance in cases, where human rights are violated and the veil needs to be pierced. Similarly, the courts in India have held that, if a subsidiary has no real independent existence, it can pierce the veil of the parent company, similar to the above, it must be said that the extent to which this can be proved is very limited and not explicitly understood. This is because, if we look at the pillars created by Ruggie, the duty to respect will result in the parent company bringing forth their views and holding control in the subsidiary, but this can be seen an implicit barrier to independence of the subsidiary and against the principle of separate legal entity so it must be understood as to the extent of which this can be held.

## VI. CONCLUSION

To conclude, it can be said that the scope of International law is limited but there are significant efforts being taken by nations to develop strategies and statutes to help protect people from human right violations of corporates. As discussed previously, since there are no decided legal principles to which international law follows to hold a parent company liable. The paper highlights three important concepts,

- **Legal Remedies**- It still lacks a major development to provide remedy for the aggrieved parties of human right abuses. It is very evident, that if such remedies are put in place, it will help in holding the parent companies responsible, especially in cases like the having a remedial forum for parent companies to be sued in the home country of the subsidiary.
- **Accountability**- The need to hold parent companies accountable for the violations of human rights due to the acts of the subsidiaries on the principle of good faith and

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<sup>26</sup> *Life Insurance Corporation of India v. Escorts Limited and Ors*, (1986) 1 SCC 264

reliance. It analysed the need and importance of it internationally like in the UNGP obligations.

- **Duty of Care-** The most important reasoning behind holding a parent company liable is its duty of care towards the stakeholders of the company and the need for a parent company to be responsible for the violations of the subsidiaries.

In consonance, it must be said unlike the rest of the world, India has lack of legal principles and is seen to not be a practical concept to hold a parent company liable for the acts of violation done by the subsidiary company. There is a need to highlight the scope in which present laws are there and extend the purview of the laws. It also must be understood that, there is a propounded understanding, that the country must borrow international concepts, like the Alien Tort Statute of America or the Due Diligence law of France and implement such principles in India. This is because, the legal system is strong and his scope of handling cases outside the jurisdiction, while entailing obligations on multinational companies. This is vital as it will also help in reducing the harm cause to humans and the country as a whole, it will help the future generations strengthen the stand they take against the big corporations.

## **VII. RECOMMENDATIONS**

1. Internationally, more stringent concepts should be implemented by organizations like the UN, which make it mandatory for parent companies to follow and assure the subsidiaries follow the same.
2. In India, laws must be more stringent and based on more international legal principles and applicable to all multinational parent corporations that have subsidiary firms in the country.

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