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HUMAN RIGHTS UNDER THE CORPORATE VEIL
A comparison between national legal systems and the U.N. Guiding Principles

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SUMMARY: 1. The corporate veil issue – 2. The English legal system – 3. The Italian legal system – 4. The U.N. Guiding Principles on Business and Human Rights – 5. Conclusion.

Abstract

Modern global economies are characterised by dramatic and fast-changing challenges, which constantly require adopting new and valuable regulatory solutions. In such a compelling environment, invoking the law could sometimes prove to be insufficient, since suitable remedies may be already therein present in principle, but still not implemented by the necessary enforcement instruments. A clear example of this kind of issue is undoubtedly evident in corporate governance and human rights protection. Business activities are increasingly often conducted through multisided organisational structures that include varying subjects and stretch across national borders: corporate groups, parent-subsidiary relationships, and global value chains. Because of such complex role interactions, business structures that pose a threat to human rights may prove to be a

difficult target for compensation claims, given the difficulty to establish which particular entity is accountable for the lamented damage. Along these issues, the present article will try to answer the following question: how far can corporations escape their liabilities from human rights violations? And in particular: to what extent can they hide behind the “juridical veil” of other legally separated entities within their business ties? In doing so, a comparative approach will be adopted, showing how national fundamental principles may find recognition and harmonisation within the frame of soft law instruments. Thus, in the current global economy, the law in action will be shown as a valid tool in support of the law in books, enhancing some basic principles of the latter and prompting us to consider new vital objectives.

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La moderna economia globale è spesso caratterizzata da scenari di vasta portata ed in rapida evoluzione, che impongono al diritto l’arduo compito di rimanere sempre al passo coi tempi. In un simile contesto, invocare leggi e codici può, talvolta, rivelarsi insufficiente. Difatti, difronte all’insorgere di nuove esigenze, e nell’assenza di una legislazione che intervenga prontamente a disciplinarle, gli opportuni rimedi giuridici potrebbero essere sì teorizzati nel quadro dei principi fondamentali, ma spesso rischierebbero di difettare dei necessari meccanismi attuativi. Un esempio di tale situazione è chiaramente riscontrabile nel settore della gestione di impresa e della tutela dei diritti umani. Le attività economiche sono sempre più frequentemente condotte attraverso i canali di strutture organizzative complesse, che coinvolgono diversi soggetti economici e possono estendersi ben oltre i confini di un singolo stato: gruppi societari, reti di imprese e catene di fornitura. In siffatti intrecci di rapporti commerciali e societari, le esigenze di tutela, che dovessero sorgere relativamente ad una attività di impresa condotta in violazione di diritti umani,

rischierebbero di rimanere vanificate dall'oggettiva difficoltà di individuare il soggetto responsabile per l'illecito. Pertanto, alla luce di tale specifica problematica, nel presente articolo ci si interroga su quali siano, ad oggi, le effettive possibilità per una società di capitali di sottrarsi alle proprie responsabilità inerenti alla tutela dei diritti umani. In particolare, si cercherà comprendere fino a che punto una società possa addurre, quale giustificazione, il fatto di non essere il soggetto direttamente coinvolto nella violazione, ammantandosi dietro il "velo" della personalità giuridica di altri soggetti facenti parte della sua rete di rapporti commerciali. Nel cercare la più idonea risposta giuridica a tali interrogativi, sarà adottato un approccio di tipo comparatistico, evidenziando il ruolo che anche gli strumenti di *soft law* possono avere nell'ambito del riconoscimento e dell'armonizzazione dei principi fondamentali di tutela presenti all'interno degli ordinamenti nazionali. All'esito di tale analisi, si renderà evidente come, talvolta, la cosiddetta *law in action* riesca a svolgere un ruolo determinante nell'adozione di nuove efficaci soluzioni che, pur presenti in nuce anche nella *law in books*, faticano ad affermarsi in quest'ultima.

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1. The corporate veil issue.

Almost all over the world, public opinion expects corporations which harm human rights to compensate for their abuses[1], without circumventions of any kind, either dependant on their structural organisation, or on their geographical location.[2] However, it is undeniable that every legal subject could not be held responsible

[1] John F. Sherman, "Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of its Subsidiaries?" [2018] Business Law International 23, at p. 23
[2] See ibid.

without conditions: such limits are traceable even to the works of the Greek Philosopher Aristotle and generally identifiable with the *"one's psychological and physical"* possibility *"to give an account of one's actions"*.[3] This idea is, actually, inherent in the meaning of the word responsibility itself, that descends from the Latin verb *respondeo* (= *"to answer"*) and whose etymology recalls the idea of being answerable or accountable for something to someone.[4] Therefore, even at the level of a general understanding of the concept, it is logically arguable that corporations could not be held indefinitely responsible, even in the case of human rights violations.

Complicating things is the fact that nowadays, global economy is conducted not only "in the first person", but often through business ties that include varying subjects and stretch across national borders, for instance: corporate groups, parent-subsidiary relationships, and exclusive contracts between retailers and their suppliers.[5] As a consequence, it may happen that corporations attempt to evade their liabilities by interjecting other entities, with separate legal personality, between themselves and those to whom they would otherwise grant protection. A clear example is global value chains, where the law sometimes proved unable to ensure protection to rights claimed against a subject who was too "far" from the plaintiff within the chain. Precisely, in *Das v. George Weston Ltd.*, the sued companies turned out to be unaccountable for the damage suffered by the employees of their suppliers, which were situated in another State.[6]

In response to the described issue above, it could be argued that every company could potentially be held liable for violations

[3] See ibid.
[4] Kenneth Amaeshi et al., "Corporate Social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility? Clarifications, Expectations and Implications" [2008] Journal of Business Ethics 223, at. p. 225
[5] Rolf H. Weber and Rainer Baisch, "Liability of Parent Companies for Human Rights Violations of Subsidiaries" [2016] European Business Law Review 669, at p. 671
[6] *Das v. George Weston Ltd.*, 2017 ONSC 4129, 5 July 2017

performed by other entities in touch with it. This idea would be justified not only by the need for an equitable allocation of responsibility but even by other more tangible and practical necessities. In this sense, it is worth noting that the intervention of other subjects may seriously frustrate legitimate claims, for instance when tort victims are compelled to trigger the responsibility of a parent company after its subsidiary has proven to be insolvent or has already been dissolved.[7] But again, such an extension of liability could not be applied without meeting some legal requirements. In this respect, it is significant that different incorporated businesses, also when acting within tight business relationships, remain distinct subjects, because of their separate legal personalities. Therefore, violations are likely to be attributable to the only subject that actually performed the breach. The only exemption may be comprised of those complex business organisations where more than one entity may find itself in the abovementioned *"psychological and physical"* possibility to give an account of the violation, though indirectly.

Given this background, this article will try to answer the following question: how far can corporations escape their liabilities for human rights violations? And in particular: to what extent can they hide behind the "juridical veil" of other legally separated entities within their business ties? The answer will come from an assessment of those factors that, juridically speaking, may provide ground for an extension of liability among companies: such criteria are generally identified with the concepts of control, ownership, and influence.[8] In particular, this contribution will adopt a comparative approach, analysing the English and the Italian legal systems and, then, comparing the results with the rules contained in the U.N. Guiding Principles.

[7] Christian Witting and James Rankin, "Tortious Liability of Corporate Groups: From Control to Coordination" [2014] Tort Law Review 91 at p. 93
[8] Amaeshi et al. (above n. [4]), at p. 12-19

2. The English legal system.

The issue at stake here is very suitable for debate in the UK, where the existence of a juridical veil, separating corporations from their shareholders, is clearly inferable from one of the cornerstones of English corporate law, which is the doctrine of "entity law". This could be described through the words of Hansmann and Kraakman, who enumerate the fundamental characteristics of incorporated businesses: 1) distinct juridical personality of the company; 2) limited liability of its shareholders; 3) investors ownership in shares; 4) delegation of the managerial functions to a board of directors; 5) shares transferability.[9] The centrality of such a doctrine has always been justified by the fundamental role it has always been playing in the UK mercantile economy, as underscored by Lord Sumption in *Prest v Petrodel Resources Ltd*: *"it is not just legally but economically fundamental, since limited companies have been the principal unit of commercial life for more than a century. Their separate personality and property are the basis on which third parties are entitled to deal with them and commonly do deal with them"*[10].

Thus having set the context, it should be pointed out that separate personality and shareholders' limited liability should not be taken as something that cannot ever be removed or disregarded. In this respect, the expression "piercing the corporate veil" should be taken as a metaphorical depiction of the moment when a judge claims to be empowered to penetrate the "veil" of legal personality that separates a company from its shareholders, identifying the former with the latter and holding them both jointly responsible for

[9] Henry Hansmann and Reinier Kraakman, "The End of History for Corporate Law" [2001] Georgetown Law Journal 439, at p. 439-440
[10] *Prest v Petrodel Resource Ltd* [2013] 2 AC 415, at para 8

the company's behaviours.[11] Therefore, the expression displays an operation that directly challenges the traditional doctrine of "entity law", so undermining one of the cornerstones of English corporate law.[12]

However, it could not be overlooked that the veil-piercing theory, which today is deemed to be the only real exemption to entity law[13], presents several tricky nuances. Actually, it could be conceived as more or less revolutionary, depending on the varying juridical justifications offered for it.[14] This is due to the fact that such an approach stems from a case-law legal basis, while statutory law provides only for exhaustive circumstances in which the activity of a company may be directly attributed to its controllers.[15] Thus, in light of a lack of uniform provisions and even of a general doctrine on the matter[16], it becomes pertinent to give an account of the different juridical arguments that, case by case, have been used to support the idea of piercing the veil. For instance, Farrar presents an account of potential circumstances that could provide ground for the operation in question: agency, fraud, group enterprises, trusts, tort, tax, the companies legislation, other legislation.[17] In fact, in all the aforementioned hypothesis, juridical personality and limited liability could work as an unfair shield, contributing to infringing the interests of creditors, who could legally bring a claim only against the company that formally performed violations and not against the actual controllers hiding behind.[18]

Focusing on all the judgements that have been issued over the past decades, it was firstly seen in *DHN Food Distributors Ltd v*

[11] Alper H. Yazici, "Lifting the Corporate Veil in Group of Companies: Would the Single Economic Unit Doctrine of EU Competition Law Set a Precedent?" [2014] Law & Justice Review 127, at p. 131
[12] See ibid., at p. 144
[13] *Prest v Petrodel Resource Ltd* [2013] 2 AC 415, at para 16
[14] See ibid., at p. 144
[15] Witting and Rankin, (above n. [7]), at p. 93; see also Yazici (above n. [11]), at p. 146
[16] *Prest v Petrodel Resource Ltd* [2013] 2 AC 415, at para 18
[17] John H. Farrar, *Farrar's Company Law* (Butterworths 1998), at p. 69-70
[18] Alan J. Dignam and John P. Lowry, *Company Law* (Oxford University Press, 2016), at p. 49

Tower Hamlets LBC that the principle of piercing the veil was affirmed with regard to corporate groups.[19] Pursuant to this decision, different companies belonging to the same group should be treated as a single economic unit, when, as expressed in the opinion of Lord Denning, the subsidiaries *"are bound hand and foot to the parent company and must do just what the parent company says"*. Therefore, in such cases, the parent company and its subsidiary *"should not be treated separately so as to be defeated on a technical point"* and *"should, for present purposes, be treated as one, and the parent company (…) should be treated as that one"*.[20] In particular, this position was grounded on the idea that different companies could be intimately connected by the same economic interests[21], consequently deserving the same legal treatment on three conditions: control, the identity of economic purposes, and evident need of equitable allocation of rights and responsibilities.[22]

Then, this opinion had to face the *"unyielding rock"*[23] of the traditional entity law doctrine, as it had been historically affirmed in the landmark ruling in *Salomon v A Salomon*: *"A legally incorporated company must be treated like any other independent person with its rights and liabilities (…) whatever may have been the ideas or schemes of those who brought it into existence"*.[24] As a consequence, *DHN Food Distributors Ltd v Tower Hamlets LBC* was followed by many decisions that refuted Lord Denning's opinion, considering it void of real juridical foundations and mostly founded on economic matters.[25] For instance, in the 1978 *Woolfson v Strathclyde Regional* case, the House of Lords set stricter requirements for piercing the

[19] *DHN Food Distributors Ltd v Tower Hamlets* [1976] 1 WLR 852
[20] *DHN Food Distributors Ltd v Tower Hamlets* [1976] 1 WLR 852, at p. 860
[21] "Lifting the Corporate Veil" (Clarkson Wright & Jakes) <https://www.cwj.co.uk/site/businessservices/commerciallitigation/corporate_veil.html> accessed 27 March 2020
[22] David Kershaw, *Company Law in Context: Text and Materials* (Oxford University Press 2012), at p. 64
[23] Aleka Mandaraka-Sheppard, "New Trends in Piercing the Corporate Veil – The Conservative Versus the Liberal Approaches" [2013] LSLC Maritime Business Forum 1, at p. 2
[24] *Salomon v A Salomon and Co Ltd* [1897] AC 22 (HL), at p. 30-31
[25] "Lifting the Corporate Veil", (above n. [21])

corporate veil, which was considered feasible only in the case that the corporate personality had provided a mere façade, hiding the facts and allowing the parent company to avoid liability.[26]

Finally, the question seems to have found an authoritative standstill in the 2013 ruling of the English highest court on the case *Prest v Petrodel Resources Ltd*. On the one hand, Lord Neuberger and Lord Sumption noted that the veil piercing approach had been improperly invoked in most of the previous cases and that there was still significant ambiguity in its foundations.[27] On the other hand, Lord Neuberger recognised that the theory could prove to be a *"potentially valuable judicial tool to undo wrongdoing in some cases, where no other principles is available"*.[28] On these premises, the Court could be awarded the merit of having set aside references to vague and *"protean"* requirements, such *"façade"* or *"sham"*, clarifying what kind of wrongdoing may justify piercing the veil, although as a last resort[29]. In particular, the rationale underpinning the decision is represented by the distinction between two different principles: a) the concealment principle, involving *"the interposition of a company or perhaps several companies so as to conceal the identity of the real actors"*; and b) the evasion principle, concerning when *"there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement"*.[30] Of the two circumstances, only the latter allows the judge to disregard (or "pierce") the corporate veil, while the first one *"is legally banal and does not involve piercing the corporate veil at all"*, since the judge

[26] *Woolfson v. Strathclyde Regional Council* [1978] 2 EGLR 19 (HL)
[27] *Prest v Petrodel Resource Ltd* [2013] 2 AC 415, at para 27 and 79
[28] See ibid., at para 80
[29] See ibid., at para 28
[30] See ibid.

will remain free to identify the real actors behind the veil, not needing to disregard it, but just *"looking behind it"*.[31]

In a nutshell, the Supreme Judges agreed that the foundation of the veil piercing is true and deliberate abuse of corporate legal personality[32]. Specifically, they recognised the possibility to disregard the corporate veil under the following conditions: 1) ownership and control are not sufficient by themselves; 2) the interest of justice cannot be the sole justification for piercing the veil, but the necessity to compensate for wrongdoing is required; 3) the corporation's conduct must include a form of impropriety and not only a breach of contract; 4) such an impropriety must consist of circumventing the liability of a controlling society; 5) a company can start being used as a mere façade, even when it was not incorporated with that purpose.[33]

Nevertheless, the decision in *Prest* did not manage to stay out of criticism. Actually, as inferable from the wording of paragraph 28 of the judgement itself, the principle therein affirmed was very likely to be subject to different interpretations, especially due to the possible overlapping of the two similar concepts of concealment and elusion[34], and this is exactly what successive commentators claimed to have happened[35]. That is why, before reaching some conclusions on how entity law-related issues have been addressed in the UK, it appears crucial to take into account another note-worthy instrument to extend liability over the barriers erected by separate legal identities, by resorting to tortious liability in negligence and, in particular, with emphasis placed on one of its main requirements: the duty of care.[36] Actually, this tort law approach is less likely to be addressed and

[31] See ibid.
[32] See ibid., at para 34
[33] Mandaraka-Sheppard (above n. [23]), at p. 9
[34] *Prest v Petrodel Resource Ltd* [2013] 2 AC 415, at para 28
[35] Augustin R. Spotorno, "Piercing the Corporate Veil in the UK: The Never-Ending Mess" [2018] Business law Review 4, 102-109
[36] Witting and Rankin (above n. [7]), at p. 13

opposed as revolutionary, since it does not directly derogate from separate legal personality and limited liability, but confines itself to hypotizing a sharing of responsibility between two corporations, which continue to be considered as distinct entities.[37]

The leading case under this perspective is considered to be *Chandler v Cape plc*[38], whose factual context is arguably useful to present the reasoning behind this doctrine of the duty of care among different companies. The facts of the case were the following: Mr. Chandler, an employee of Cape Building Products Ltd, contracted asbestosis due to the working conditions at the factory. Given the impossibility of bringing an action against Cape building, that had ceased to exist by the time he discovered the illness, Mr. Chandler resorted to suing Cape plc, the parent company by which the shares of Cape Building were fully controlled. In support of his lawsuit, he claimed the parent company would be responsible, given its potential leverage on the subsidiary's organization of workplace conditions.[39]

In issuing its judgement, the House of Lords found that *"it was "fair, just and reasonable" to impose a duty of care on Cape plc on the basis that the company had assumed a responsibility to Mr Chandler"*.[40] In particular, the arguments offered in support of this decision allow to extract some pillars that the Court considered essential for ascertaining the assumption of responsibility by a corporation for the damages suffered by the employees of another entity. These requirements for such a liability extension were numbered by Arden L.J. as follows: 1) the fact that a parent company and its subsidiary share the same business; 2) the fact that the parent company was or had to be informed about the security conditions in the subsidiary's workplace; 3) the fact that the parent

[37] Yazici (above n. [11]), at p. 153
[38] *Chandler v Cape Plc* [2012] EWCA Civ 525, at para 62
[39] See ibid.
[40] See ibid.

company was or had to be informed about the actual danger embedded in the workplace; 4) the awareness of the parent company that the subsidiary or its employees were expecting its intervention.[41] Finally, under a proof perspective, claiming the assumption of a duty of care by the parent corporation would require the plaintiff to demonstrate not the involvement in the operation of securing the workplace, but only regular interventions in the subsidiary's activities, such as production and funding.[42]

Taking a first conclusion for the UK, it is worth noting how both the veil-piercing and the duty of care approach emphasise the concepts of ownership, and proximity, which, in the piercing approach, should also be accompanied by impropriety and abuse. Although workable, both the remedies present some shortcomings. Concerning veil-piercing, the final requirements for obtaining the sought legal effect seem to remain blurred in the constantly changing orientations of the English courts.[43] While with regard to the approach based on the duty of care, it has been pointed out how the features encountered in *Chandler* are not likely to be found in every case where there is a need to call forth the accountability of other entities behind the formal wrongdoer.[44] Moreover, it should not be overlooked that the cases of veil-piercing have never regarded compensation for human rights breaches. Therefore, the availability of this remedy remains, currently, purely theoretical.

3. The Italian legal system.

Leaving the UK, The Italian system of laws does not expressly provide for discipline on the matter at stake in the present article:

[41] Andrew Sanger, "Crossing the Corporate Veil" [2012] The Cambridge Law Journal 465, at p. 480
[42] See ibid.
[43] "Lifting the Corporate Veil", (above n. [21])
[44] Witting and Rankin (above n. [7]), at p. 17 and Augustin R. Spotorno (above n. [35])

either in specific law provisions or in general principle. However, a very fundamental framework within which to trace our analysis is undoubtedly evident in article 41 of the Italian Constitution, mandating that private economic initiative shall not be conducted in a way that causes damage to human safety, freedom, and dignity.[45] Furthermore, some norms can be spotted that appear of primary importance for our analysis. In particular, article 2359 of the Italian Civil Code that gives juridical value and effect to corporate relations based on control: control intended as, on the one hand, majority shareholdings and, on the other hand, significant influence through shares ownership or contractual bonds.[46] Therefore, starting from these premises, principles could be found embedded in certain pieces of legislation, which could be deemed suitable for providing an extension of tortious liability among separate legal entities.

At arguably the first place on the list is the D.Lgs. 231/2001[47]. This introduced the institution known as *"responsabilità amministrativa delle persone giuridiche"*, whereby responsibility for corporate crimes can be borne not only by the physical person author of the crime but, to some extent, also by the legal entity that benefited from the illegal act.[48] The D.Lgs. 231/2001 has, therefore, the merit of having introduced an exception to the principle *"societas delinquere non potest"*, whereby corporations cannot be charged with crimes.[49]

Conditions for obtaining such an extension of accountability is the coexistence of the following circumstances: the commission of a crime that falls within the exhaustive list provided by article 25 et

[45] Art. 41, Italian Constitution
[46] Art. 2353, Italian Civil Code
[47] D.Lgs. 8 giugno 2001, n. 231, *Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300*
[48] See ibid. and, in particular, art. 5, c. 1, D.Lgs. n. 231/2001
[49] "La responsabilità amministrativa degli enti e il D.Lgs. n. 231/01: la gestione della corporate governance" [2017] Diritto.it <https://www.diritto.it/la-responsabilita-amministrativa-degli-enti-e-il-d-lgs-n-23101-la-gestione-della-corporate-governance/> accessed 27 March 2020

seq.; the fact that the commission was by qualified subjects, having the characteristics numbered under article 5; the presence of interest or a benefit of the legal entity; and, finally, as a negative condition, the failure by the corporation in establishing an organizational model, adequate to prevent the commission of crimes. In particular, article 5 requires that the author is either a company representative, or someone charged with managerial powers, or *de facto* managing and controlling the company, or even someone subject to the directives or supervisory powers of the abovementioned ones. This, in combination with the obligation of the company to provide valid measures to prevent the crimes, sets out a form of corporate responsibility that may be described as failure to supervise (*culpa in vigilando*).[50]

Focusing on the above-described provisions, it could be observed how they may also establish the juridical foundations of corporate responsibility for human rights violations. This is because many of the crimes listed under article 25 et seq. are to protect interests that are clearly relevant in relation to human rights protection. For instance, some crimes therein concern: female genital mutilation[51]; homicide, personal injuries and breach of the norms on safety at work[52]; environmental damages[53]; racism and xenophobia[54]. As a consequence, both scholars and courts hypothesized the admissibility of a civil action in compensation of the damage caused by the crimes, directly towards the accountable company.[55] In fact, pursuant to article 185 of the Italian Criminal Code, every crime generates an

[50] Saverio Capolupo, "Responsabilità Amministrativa da Reato della Società Controllante per gli Illeciti Commessi nell'Interesse del Gruppo" [2018] Fisco, at p. 2
[51] art. 25 *quarter*.1, D.Lgs. n. 231/2001
[52] art. 25 *septies*, D.Lgs. n. 231/2001
[53] art. 25 *undecies*, D.Lgs. n. 231/2001
[54] art. 25 *terdecies*, D.Lgs. n. 231/2001
[55] Francesco V. Rinaldi, "La responsabilità degli enti ex D. Lgs. 231/2001: natura giuridica e ammissibilità di una costituzione di parte civile proposta direttamente nei confronti dell'ente" [2013] Filodiritto <https://www.filodiritto.com/articoli/2013/05/la-responsabilita-degli-enti-ex-d-lgs-2312001-natura-giuridica-e-ammissibilita-di-una-costituzione-di-parte-civile-proposta-direttamente-nei-confronti-dellente> accessed 27 March 2020, at p. 1

obligation on the author to compensate the victims for the detriment they suffered.[56]

Moreover, the discipline set forth in the D.Lgs. 231/2001 could arguably be awarded another merit: to provide a tool for lifting the corporate veil and pave the way for an extension of accountability among a holding company and those under its control. This contention was originally supported by both jurisprudence and scholars. In particular, the early judgements on the application of the 2001 Law justified such an extension on the base of a *"corporate group interest"* in committing a crime.[57] In one case, such interest was deemed existent when the holding corporation does not represent a mere tool to administrate shareholdings, but is actively engaged in the same kind of economic activities carried out by the controlled companies.[58] In another case, the group interest was identified in an even more abstract circumstance, that is to say simply the profit sharing within the group.[59]

Nevertheless, although theoretically promising, the abovementioned contentions seem to disregard some crucial factors. Firstly, the juridical existence of corporate groups, as separate legal entities reflecting one common interest, has always been dismissed in the Italian system of laws.[60] This is on the base of the assumption that the Italian law, namely art. 2359 of the Civil Code, only provide regulation on the effect of control-based relations among separated companies, without any recognition of corporate groups as entities with their own legal personality. Moreover, article 5 of the D.Lgs. 231/2001, states that companies shall be accountable only when a crime is performed by a physical person who, formally or *de facto*, is

[56] Art. 185, Italian Criminal Code
[57] Tribunale Milano, Ord., 20-9-2004, in leggiditalia.it and Tribunale Milano, 14-12-2004, in leggiditalia.it
[58] Tribunale Milano, Ord., 20-9-2004, in leggiditalia.it
[59] Tribunale Milano, 14-12-2004, in leggiditalia.it
[60] See Cass. civ. Sez. lavoro, 9-12-1991, n. 13226, in leggiditalia.it and Cass. civ. Sez. III Sent., 17-7-2007, n. 15879, in leggiditalia.it

managing or controlling the corporation.[61] Then, on this premise, more recent jurisprudence of the Supreme Court affirmed that condition for asking a holding to give account for crimes committed by its controlled company is that the crime is performed not only in the interest and with the benefit of the holding itself, but with direct cooperation of a physical person belonging to its organisation.[62] Therefore the mere and hypothetical existence of a "group interest" would not be sufficient.[63]

That being said, there seemingly remains only one viable way to establish "collective liability". In this sense, as correctly pointed out in recent studies on the subject, the irrelevance of "group interests" does not prevent a company from being punished for a crime committed within the business activity of one of its controlled companies, if, according to the requirements set in article 5, the crime can be ascribed to both corporations.[64] Besides, such potential sharing of liability is arguably everything but rare in parent-subsidiary relations, as for in every circumstance of forms of control based on ownership or influence.[65] Also the drafters of the 2001 Law seem to have been fully aware of this, as inferable from the explanatory memorandum illustrating the meaning of "gestione di fatto" (*de facto* direction): *"persons who exercise a penetrating domain over the entity (this is the case of the non-director partner, but holder of almost all of the shares, who fixes from the outside the guidelines of the company policy and the execution of particular transactions)"*.[66] However this means no responsibility for holding companies outside the deeds of physical people from their organisation and, in

[61] art. 5, c. 1 lett. b., D.Lgs. n. 231/2001
[62] Cass. pen. Sez. V, 18-01-2011, n. 24583, in leggiditalia.it and Cass. pen. Sez. II Sent., 27-09-2016, n. 52316, in leggiditalia.it
[63] Cass. pen. Sez. II Sent., 27-09-2016, n. 52316, at p. 13.3, in leggiditalia.it
[64] Fabrizio D'Arcangelo, "La Responsabilità da Reato nei Gruppi di Società e l'Abuso di Direzione Unitaria della Holding" [2017] Società 1
[65] See ibid., at p. 4
[66] Relazione Ministeriale al D.Lgs. n. 231/2001, at p. 7

particular, no accountability for those corporations that just turn a blind eye to the criminal activities performed by their business partners or controlled entities.

Furthermore, all the reasoning above is further downsized by the orientation of the Italian highest Court (at least so far[67]), whereby the Supreme Judges excluded the hypothesis of a civil claim based on article 25 et seq. of the D.Lgs. 231/2001.[68] The rationale behind this decision refers to the fact that the 2001 Law does not expressly provide for such a lawsuit. According to the Supreme Judges, this lack of mention reveals the intention of the legislator not to grant any civil remedy. In particular, this deduction is derived from the fact that the possibility of bringing a civil claim is mentioned neither in the rule that identifies the subjects of the proceeding, nor in those regulating the different stages of the criminal proceeding, nor, and most of all, in article 54 concerning the preservation order. In fact, while the general discipline on preservation orders refers to the necessity of protecting the sums needed for complying with the civil obligations stemmed from the crime[69], such a necessity is not mentioned under article 54, D.Lgs. 231/2001.[70]

In light of everything stated before, it appears that the combination of article 2359 of the Civil Code and the D.Lgs. 231/2001 may in principle provide juridical foundations for an idea of corporate accountability based on ownership and influence. However, such a possibility is practically dismissed by the absence of any form of presumption of joint liability between a holding and its controlled companies. The present article, then, aims at displaying other useful norms and principles under Italian law. In doing so, it will be keeping aware that such hypotheses remain a very residual way to go beyond

[67] See Corte di Assise di Taranto, Ord. 4-10-2016 and Tribunale di Trani, Ord. 7-5-2019
[68] Cass. Pen., sez. IV, 17-10-2014, n. 3786, in leggiditalia.it
[69] Article 316, Italian Criminal Procedure Code
[70] Cass. Pen., sez. IV, 17-10-2014, n. 3786, in leggiditalia.it

the corporate veil and achieve an extension or responsibility in control-based corporate relations.

Firstly, articles 2497 et seq. of the Civil Code, introduced by the D.Lgs 6/2003[71]. These norms discipline the responsibility of a company that exerts “direction and coordination” over another one, in the case that the latter had suffered prejudice consequently to such guidance activities. According to the abovementioned articles, the shareholders and the creditors of the mistreated company shall be authorised to take legal action against the controlling one directly.[72] In this regard, the notion of “direction and coordination” acquires crucial importance. In particular, as it is both directly stated under article 2497 sexies[73] and clearly inferable from the explicative document attached to the D.Lgs. 6/2003[74], the requirements concerning “direction and coordination” are presumed in the case of corporate control, as referred to in the abovementioned article 2359 of the Civil Code. This means that an actual control-based detrimental interference by the holding company would constitute a case of liability.[75]

Secondly, it could be useful to make a brief exposition of article 2043 of the Civil Code, that governs the most traditional and general form of tort claims in the Italian legal system. The norm mandates that every fact, at fault or negligent, that causes unjust harm, oblige the author to compensate.[76] Building on this basic provision, the Supreme Court of Italy has set the conditions for holding responsible a controlling society due to its interferences in the activities of a controlled company, when such interventions had caused the

[71] D.Lgs. 17 gennaio 2003, n. 6, *Riforma organica della disciplina delle società di capitali e società cooperative, in attuazione della L. 3 ottobre 2001, n. 366*
[72] Article 2497, Italian Civil Code
[73] Article 2497 sexies, Italian Civil Code
[74] Relazione illustrativa del decreto legislativo recante: *"Riforma organica della disciplina delle società di capitali e società cooperative, in attuazione della legge 3 ottobre 2001, n. 366"*
[75] Flavia Betti Tonini, “La Responsabilità degli Enti e i Gruppi di Società. Situazione Italiana e Spunti Comparatistici con Francia e Germania” (PHD thesis, Università degli Studi di Trento year 2012-2013), at p. 23-24
[76] Article 2043, Italian Civil Code

controlled entity to become insolvent.[77] In particular, the Court found that for establishing the responsibility of the controlled company, it would be necessary to ascertain an actual and proactive intervention, such as the activity of providing false information or declarations.[78] Therefore, the involvement of a holding proves again to be relevant to its accountability.

That being said, although having nothing in common with human rights protection, both the abovementioned instruments display some valuable elements for our analysis. Particularly, they show the attempt of both the law and the jurisprudence to make it possible to trigger the tortious liability of a holding, when it gets involved in the business activities of a controlled company, in ways that are detrimental and abusive. Such principle may turn out to be useful when a right for compensation for human rights violations has already been recognised against a controlled society, but this is being insolvent due to the control activities by the holding. For instance, it has already been described how a company may act improperly and, then, try to evade its liabilities by hiding behind other entities, used as a mere façade and sometimes deprived of any creditworthiness.

Therefore, to briefly sum up the Italian situation, it could be observed how, on the one hand, the regulation under the D.Lgs. 231/2001 theoretically provides valid elements to address the question at the base of the present contribution: to that extent that it could be said to establish an extensive form of accountability for failure to prevent detrimental events, thus bringing to an innovative idea of human rights due diligence to be performed by holding companies.[79] However, this path turns up to have been excluded in

[77] Cass. civ. Sez. III, 28-02-2012, n. 3003, in leggiditalia.it
[78] See ibid.
[79] FIDH / HRIC / ECCJ, "Il Decreto Legislativo N. 231/2001: Modello per Una Normativa Europea sulla Human Rights Due Diligence? Documento di Sintesi Informale" [2019] < https://www.fidh.org > accessed 27 March 2020

the interpretation given by the most authoritative jurisprudence. On the other hand, articles 2497 and 2043 of the Civil Code may indirectly provide food for thoughts in terms of responsibility based on ownership and abusive influence, thus echoing the experience seen before in the UK. Nevertheless, none of the aforesaid regulatory instruments have ever been applied for the purpose of addressing violations of human rights.

4. The U.N. Guiding Principles on Business and Human Rights.

Finally, after having assessed the situation in two national legal orders, our comparative analysis will try to benefit also from what happens at an international level. The UN Guiding Principles on Business and Human rights (hereinafter, the "Guiding Principles") were endorsed by the UN Human Rights Council, through Resolution 17/4, issued on 16/06/2011[80]. By this act, the Council recognised that the Guiding Principles would provide a means of implementing the United Nations "Protect, Respect and Remedy Framework", representing a step forward in promoting common standards of sustainability and human rights respect within the current globalised context.[81] In this light, the Guiding Principles have been described as *"a blueprint for the steps that all states and business should take to uphold human rights"*.[82]

The Guiding Principles reflect the need for a global regulatory framework, which is particularly pronounced in the field of global business and global value chains, where the emergence of new kinds of rules is progressively eroding the borders between *"local and*

[80] UN Guiding Principles on Business and Human Rights, at p. v.
[81] UN Resolution 6 June 2011, n. 17/4, at p. 1-2
[82] Zeid Ra'ad Al Hussein, "Ethical Pursuit of Prosperity" (The Law Society Gazette 23 March 2015) <www.lawgazette.co.uk/analysis/comment-and-opinion/ethical-pursuit-ofprosperity/5047796.fullarticle> accessed 27 March 2020

global, law and non-law, public regulation and private ordering, form and substance".[83] They could be defined as a non-binding instrument aiming at establishing a new environment, based on the cornerstones that had been foreseen by the UN Secretary-General's Special Representative for Business and Human Rights John Ruggie: a context where it is possible to meet the social need for having human rights protected and respected, and where remedies are available in cases of infringement.[84] For this purpose, the Principles are structured into three pillars, respectively named: I. the state duty to protect human rights; II. the corporate responsibility to respect human rights; and III. access to remedy.[85]

Furthermore, it is worth noting that one of the rationales behind this set of guidelines consists of the awareness *"that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies"*.[86] This idea appears directly pertinent to the question at the centre of the present article, since, as recently observed by John Ruggie himself, law often fails in regulating the conducts of the modern businesses of our current globalized economies, whose conducts are often performed by distinct legal entities under a common command.[87] In fact, such a regulatory lack in national legal systems has prompted thinking that *"there is no binding authority as of yet requiring parent corporations to remedy the harms caused by their foreign subsidiaries' violations of human rights norms (…), there is persuasive legal authority for requirements in the form of the U.N. Guiding Principles."*.[88]

[83] Grietje Baars et al., "The Role of Law in Global Value Chains: a Research Manifesto" [2016] London Law Review of International Law 1, at p. 5
[84] Weber and Baisch, (above n. [5]), at p. 673
[85] UN Guiding Principles on Business and Human Rights, at p. vi.
[86] UN Resolution 6 June 2011, n. 17/4, at p. 1
[87] John G. Ruggie, "Multinationals as Global Institution: Power, Authority and Relative Autonomy" [2017] Regulation and Governance 1, at p. 13
[88] Gwynne Skinner, "Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law" [2015] Wash. & Lee L. Review 1769, at p. 1815

Nonetheless, the scope of application of the UN Guiding Principles should be underscored. Pursuant to Principle 13, *"The responsibility to respect human rights requires that business enterprises (…) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts"*.[89] As a consequence, it has been observed that, according to the Guiding Principles, corporate accountability extends far beyond the legal personality of a single corporation, but potentially encompasses the conducts of a wide plethora of other actors, that is to say, entities that could be linked to the company through a parent-subsidiary relationship or even solely by contractual agreements.[90] Actually, this is also confirmed by the UN Interpretative Guide to the Corporate Responsibility to Respect Human Rights, which defines business relationships as *"those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services"*.[91]

Consequently, it seems relevant to point out what actions businesses are expected to take according to the Principles. In fact, businesses are supposed to *"avoid"* and *"prevent"* human rights breaches, not only refraining from causing harm directly but also making use of their leverage in their business relationships.[92] This seems to suggest two points. Firstly, that a corporation is expected to actively play a role, not only in avoiding harms, but even preventing them if the company has the leverage to do so.[93] Secondly, the required conduct implies consequences in the case that a company may fail in exercising the leverage that is necessary to prevent

[89] Principle 13of the UN Guiding Principles on Business and Human Rights
[90] Sherman (above n. [1]), at p.25
[91] The Corporate Responsibility to Respect Human Rights, an Interpretive Guide, at p. 5
[92] Principle 13of the UN Guiding Principles on Business and Human Rights
[93] Sherman (above n. [1]), at p.29

human rights breaches within its business relationships. In such cases, as clearly stated in the commentary to Guiding Principle 19, the company is expected to enhance its leverage or to end the relationship at risk.[94]

5. Conclusion.

Taking everything into consideration, an accurate analysis should stick to two main results. On the one hand, a comparative inquiry reveals that different legal systems share similar principles in addressing the question of corporate accountability for other entities' conducts. In particular, it seems that judges could look beyond the corporate veil, wherever a company is involved in some form of abuse, as in the case of the UK doctrine of "*veil-piercing*" and of the D.Lgs. n. 231/2001. Besides, sometimes, also contractual bonds could acquire relevance, as see for the duty of care. On the other hand, it could not be overlooked that all the juridical remedies that have been reviewed have been rarely considered as instruments available in the field of human rights protection. Moreover, it is often seen that those remedies are either based on evanescent requirements, like the "veil-piercing", or seemingly deficient in granting compensation rights, as it has been underscored in relation to the D.Lgs. n. 231/2001.

With that in mind, the results may offer a clearer understanding of those juridical grounds that are already available for establishing a harmonised, broader and more enforceable corporate obligation to conduct "human rights due diligence" over other entities' activities. In addition, the UN Guiding Principles, although not binding, seem to encourage such solutions, prompting the adoption of even lower requirements of accountability. Firstly, they apply to a wider range of

[94] Commentary to Guiding Principle 19

situations, while national laws are often confined to situations where corporations are in shareholding relationships, eventually qualified by remarkable proximity. Secondly, by placing emphasis on the concepts of both actual and potential leverage, they seem to exclude many of the eventual justifications that, in national systems, would discharge businesses from being proactive in preventing harms to human rights.

As a result, it could be argued that soft law is playing a leading role in providing a common frame, where already existing national principles may find application in protecting human rights over the stretched and articulated relations of the modern economy. Besides, it would not be the first time that instruments other than the hard law play such a role. For instance, this has already been evidenced by the Bangladesh Accord: an independent, legally binding agreement between brands and trade unions finalised to build a safe and healthy environment in the global garment industry. In that case, the initiative in establishing norms regarding supply chain liability and chains governance was totally left to private actors, instead of being undertaken by states and other official institutions. On that account, it is once again evident that, in the current global economy, the law in action could prove to be a valid tool in support of the law in the books, enhancing some basic principles of the latter and prompting it to consider new vital objectives.

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