

Enforcing Labor Rights against Multinational Corporate Groups in Europe

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Voluntary corporate codes of conduct for multinational enterprises can have certain quasi-legal effects for national legal systems, but the enforcement of labor standards remains at the national level. Two main obstacles to the enforcement of labor rights against multinationals are limited access to justice in multinationals' home countries and the concept of limited liability. These obstacles are understood differently in common law and civil law jurisdictions and require different approaches to overcome them.

Introduction

BASIC HUMAN AND LABOR RIGHTS HAVE BEEN DISREGARDED FOR as long as human labor has been employed. Notable examples are slave labor by the Nazis during World War II and the exploitation of workers on colonial plantations in the eighteenth century. According to international human rights groups, the exploitation of differences in living standards and employment rights of developing countries has resulted in detrimental conditions for workers, and this in turn has helped fuel a protectionist backlash in some developed countries. (Oxfam 2000).

It is widely recognized that multinational enterprises (MNEs) have become the most important players in the global economy, employing millions of people around the world. MNEs wield enormous power because of their mobility and economic strength; they can demand and secure huge amounts of government assistance to attract or support their presence. Most states seek to gain from their relationships with MNEs, often resulting in a "race to the bottom" in which lower standards in employment and

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environmental protection are seen by MNEs as a competitive advantage.¹ Sophisticated corporate structures and global reach allow MNEs to benefit from an extraordinary lack of accountability to anyone except their shareholders.

This paper specifically addresses law and practice in Europe with a particular distinction drawn between countries with common and civil law traditions and with some comparative remarks about the U.S. system in conclusion. The first section of the paper, International Standards of Corporate Behavior, briefly addresses the rules governing standards of MNE behavior in the field of labor relations, with particular emphasis on codes of conduct, both external and internal. The second section Extraterritorial Jurisdiction and MNEs, focuses on an analysis of the development of legal remedies within national legal systems and the possibilities for holding MNEs directly accountable for labor and human rights violations. The next section addresses the impact of limited liability on MNE litigation. The final section Multinational Enterprise Liability, concludes that to hold MNEs accountable for international torts, the problems of access and limitation of corporate liability must be resolved. Strategies for overcoming these barriers include a more expansive definition of jurisdiction in MNE cases, greater availability of legal aid for MNE victims, and the adoption of an enterprise, rather than entity, approach to liability.

International Standards of Corporate Behavior

Approaches to Corporate Standards Setting. Identifying the best practices for MNEs is a difficult task. There have been many attempts to introduce standards of behavior for MNEs by means of codes of conduct. Various actors—corporations, states, international and regional organizations, NGOs, industry associations,² and other stakeholders³—have adopted such codes.

In investigating the supervision and governance of MNEs, three levels of regulation can be considered: international, national, and regional. Taking into account the transnational nature of MNE activities, the area of MNE regulation, in principle, should coincide with the global market. But such

¹ Concern about the “race to the bottom” was expressed in the Preamble to the Constitution of the International Labour Organization (ILO), which dates back to 1919: “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”

² For example, the chemical industry’s “Responsible Care.” Initiated in Bhopal in response to the 1984 Bhopal disaster, “Responsible care” has evolved as an initiative of the chemical industry worldwide. It commits member companies to continual improvement in aspects of health, safety, and environment and to openness in communicating their activities and achievements.

³ For instance the multistakeholder code of conduct SA 8000, which contains labor standards, verification, and certification program in various sectors worldwide.

international regulation would restrict state sovereignty in the economic sphere by allowing the international system to regulate matters previously regulated exclusively by the state, and most states are reluctant to allow interference in domestic issues.

An alternative to international regulations, often proposed by human rights groups, is to introduce domestic legislation requiring certain codes of conduct of MNEs headquartered in the most economically developed countries, members of the Organization of Economic Cooperation and Development (OECD). However, there are at least two serious disadvantages to this approach. First, it might lead to different legislation in each OECD home country, and thus to varying standards as applied by foreign firms in a given host developing country. Second, there is a danger that multinational firms could easily avoid such domestic legislation by moving their primary legal office offshore. In the absence of binding international standards, the combination of international standards and domestic enforcement will be inevitable in any effective system of legal or quasi-legal regulation. A brief discussion of some of the most notable MNE codes of conduct for MNEs follows.

Corporate Codes of Conduct

Draft UN Code of Conduct on Transnational Corporations. In 1976 the UN began the process of negotiating a “Code of Conduct on Transnational Corporations” (the UN Draft Code). Although this code was never adopted, it contains a number of approaches subsequently appearing in other codes, including a definition of transnational corporations. The UN Draft Code addressed certain MNE activities such as employers’ rights, environmental protection, consumer protection, and issues of ownership and control. Paragraph 14 of the UN Draft Code prohibits discrimination and requires transnational corporations to respect human rights and fundamental freedoms in the countries in which they operate. With respect to employment, training, working conditions, and industrial relations, the UN Draft Code refers to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

ILO Tripartite Declaration on Principles for Multinational Enterprises and Social Policy. The “Tripartite Declaration on Principles for Multinational Enterprises and Social Policy” (the ILO Declaration) was adopted by the ILO in 1977. In the late 1970s there still was a chance that the UN Draft Code of Conduct would be adopted, and the ILO Declaration may well have become the “social chapter” of the UN code. (Tapiola 2001). The adopted ILO Declaration aims to directly regulate labor and social issues of MNEs. It extends the application of the ILO instruments to MNEs, including

the “Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted in 1998.

The ILO Declaration emphasizes the positive contribution that MNEs could provide to economic and social conditions worldwide. The document contains a set of voluntary guidelines on social policy agreed to by the three groups—business, labor, and government. The declaration is meant to apply equally to parents, affiliates and the business partners of MNEs (ILO 2002).

The ILO Declaration requires member countries to treat MNEs in ways “no less favorable than that accorded in like situations to domestic enterprises,” essentially mandating uniform treatment of local and foreign companies. The general policies section outlines a number of vague requirements; for example, “enterprises should take fully into account established general policy objectives of the member countries in which they operate.” The ILO Declaration stresses the primacy of national sovereignty: “All parties concerned by this declaration should respect the sovereign rights of states, obey the national laws and regulations, give due consideration to local practices, and respect relevant international standards.” Also mentioned as binding are the Universal Declaration on Human Rights (and the corresponding international Covenants) and the Constitution of the ILO.”

To promote member state implementation of the ILO Declaration, the ILO initiated a system of periodic surveys on the declaration’s effects. The system is based on the ILO code itself, which in its introduction states “triennial surveys are conducted to monitor the extent of the application of the declaration by governments, employers, workers, and MNEs.”

OECD Guidelines for Multinational Enterprises. In 1976, the OECD, whose members include most of industrially developed nations, adopted guidelines for MNEs (the OECD Guidelines) to promote responsible business conduct consistent with applicable laws (OECD, 1976). The OECD Guidelines attempted to establish the position of the main home countries of multinationals before the then planned UN Code of Conduct (Tapiola 2001). The guidelines are a nonbinding instrument including a declaration recommending that MNEs and member states comply with the guidelines. The OECD established national contact points for handling inquiries and solving problems that arise in connection with the OECD Guidelines. In addition, the Committee on International Investment and Multinational Enterprises (CIME) was established, a body that periodically or at the request of a member country interprets matters related to the guidelines.⁴

⁴ Over thirty cases have been submitted to the CIME, principally involving employment and industrial relations.

The OECD council has the power to adopt decisions on clarifying the guidelines, which are binding on all OECD members. In 2000, the OECD substantially updated its guidelines and adopted a revised set of guidelines and enhanced implementation procedures. The 2000 OECD guidelines cover a range of issues including employment and industrial relations, disclosure of information, science and technology, and environmental protection.

United Nations Global Compact. In 1999, UN Secretary-General Kofi Annan pressed business and society to forge a global compact: an initiative that attracted a good deal of public attention. The global compact encouraged companies to adopt and implement nine core principles promulgated by the UN, principles already accepted by most of the world's nations. The global compact seeks to advance responsible corporate citizenship so that business may help solve many of the challenges associated with globalization. However, the global compact is not a regulatory instrument; it does not measure the conduct of MNEs, but rather it relies on public accountability and the self-interest of companies and civil society to fulfill its goals (UN Global Compact 2000).

Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The UN Sub-Commission on the Promotion and Protection of Human Rights approved one of the most recent standard-setting initiatives for transnational corporations, the "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," in 2003. The norms are mandatory and backed up by mechanisms for implementation and enforcement.

As far as labor rights are concerned, the norms make reference to the above-mentioned ILO Declaration. The norms deal more specifically with the rights of workers, such as the right to equal opportunity and non-discriminatory treatment, prohibition of forced or compulsory labor, protection of children from economic exploitation, and labor's right to a safe and healthy work environment. The norms also call on transnational corporations and businesses to provide remuneration that ensures an adequate standard of living for workers and their families. Finally, the norms require freedom of association and the right to bargain collectively.

The norms are intended to be applied by national courts and tribunals pursuant to national and international law, but they do not address how courts should proceed if there are jurisdictional problems. Thus, the norms do not provide specific cross-border mechanisms for tracing liability back to a parent company, leaving open the question of the appropriate forum in which to hear claims. What makes the norms different from most other

codes of conduct is that they are aimed not only at transnational corporations, but also at “other business enterprises,” including any business entity that has relations with a transnational corporation, if the impact of its activity is not entirely local or if it has committed violations. However, MNEs can in principle be held liable for actions of their business partners only if they are complicit in the wrongdoing, and the norms do not provide a detailed description of how complicity should be understood.

Regional Efforts. Regional organizations have also begun to address issues of corporate social responsibility. In January 1999, the European Parliament passed a resolution calling for a legally binding framework for regulating European transnational corporations operating in developing countries. The resolution asks the European Commission and the European Council to create a legal basis for reaching the extraterritorial activity of European transnational corporations and requests that the European Commission establish an independent monitoring body to promote observance of the proposed European code of conduct, identify best practices, and receive complaints about corporate conduct from interested parties. The resolution makes reference to ILO core labor standards and the above-mentioned ILO Declaration on Multinational Enterprises and Social Policy (European Parliament, 1990).

The resolution also calls on the European Commission to enforce the requirement that all private companies carrying out operations in third countries on behalf of the EU, and financed out of the European Commission’s budget or its funds, act in accordance with the Treaty on European Union in respect of fundamental rights. The resolution provides that in the event of noncompliance, such companies will no longer be entitled to receive EU funding, in particular, assistance with investment in third countries. While it seems that this part of the resolution will be enacted, the European Commission has not yet adopted it.

Another regional organization, the Commonwealth of Independent States,⁵ drafted an “Agreement on the Regulation of Social and Labor Relations in Transnational Corporations,” which was adopted by member states in 1997. This was the first attempt to address corporate social responsibility in the former Soviet countries. The main advantage of this agreement is that it established a system of collective bargaining at a transnational level. However, to date, scant use has been made of this agreement.

⁵ Commonwealth of Independent States is a regional organization that unites most of the former Soviet Republics.

Corporate-Generated Codes of Conduct. Company shareholders, investors, and the public have been increasingly challenging the MNEs in developed countries to account for allegations of human and labor rights violations at offshore operations. In response to this pressure, numerous MNEs have adopted codes of conduct,⁶ regulating their workforce policies and those of their contractors abroad.⁷ The two main objectives of corporate codes of conduct are as follows: to meet social expectations and, in the absence of other enforceable mechanisms, to provide minimum labor standards. Clearly, corporate codes create the image of being “good global citizens,” which obviously is good for business.

Evaluating the Impact of Codes of Conduct. Codes of conduct can play an important role in shaping the system of legal regulation. The main drawback of codes is that the rules governing multinational behavior is normally not legally binding and their application cannot be enforced. If the norms are to be binding, they need to be codified in international agreements and treaties or become obligatory through *opinio juris*, a doctrine requiring states to act in accordance with established custom (Statute of the International Court of Justice).

Codes of conduct reflect national practice, and the requirement that MNEs comply with national laws is laid down in the codes. The obligations codes place on MNEs can only supplement, but never contradict, obligations arising from national laws. Moreover, no exception is made for national regulations violating the fundamental principles of the codes or those of other relevant international instruments (e.g., national regulations that legitimate discrimination against women).

Labor standards are still predominantly national. This is also the case with the labor standards contained in ILO conventions. All international conventions require ratification by national governments and are applied at the national level. The supervisory mechanisms of the ILO focus on member states' compliance with international obligations. This is also the case at the regional level. Even within the framework of the most developed regional organization in the world, the European Union, most European labor law directives need to be implemented into national laws (Blanpain

⁶ The texts of these codes were compiled by the ILO on CD-ROM: Codes of Conduct and Multinational Enterprises, Geneva, 2002.

⁷ For example, Levi Strauss had to sever links with Myanmar and China while introducing new terms of collaboration for business partners that forbid child labor or forced labor and addressing issues of worker health, safety, minimum wages, and maximum hour guidelines. Global sourcing and operating guidelines of Levi Strauss & Co. are available at: <http://www.levistrauss.com/responsibility/conduct/guidelines.htm>

and Colucci 2004). This reflects the fact that states are only empowered to enforce violations in their own territory and consequently have no influence on the decisions made by MNEs, especially when an MNE headquarter is located in another country.

It would not be fair, however, to say that codes of conduct are only cosmetic, or an attempt by multinationals to evade national laws and collective bargaining. Corporate codes of conduct often seem to be the only tool against violations of labor rights by MNE subsidiaries or subcontractors in developing countries in the absence of enforceable international labor standards. Courts may take the codes into consideration when the standards of MNE behavior are in question. Moreover, the codes may have other “quasi-legal” effects. For instance, in the 1979 Batco case, a Dutch court concluded that when the Batco tobacco factory in Amsterdam, which is part of the multinational British American Tobacco Company, publicly declared that it accepted OECD guidelines, it became legally obligated to conform with the guidelines. However, the enforced application of voluntary codes of conduct is not established in national legal systems.

The codes may inspire legislation, incorporating them into legal systems. In addition, they can also be used in interpreting national laws. In the absence of mandatory codes of conduct addressing MNE behavior, and because labor laws are enforced by states, judicial remedies against MNE violations should be considered.

Extraterritorial Jurisdiction and MNEs

Jurisdiction and MNEs. The application of rules of good corporate behavior, including those contained in codes of conduct, implies that there is a suitable and proper court for enforcement. The integrated transnational character of multinational enterprise activities results in a mismatch between the managerial reach of the firm and the jurisdictional reach of the state, which seeks to regulate the MNE. The inadequacy of state regulation may lead to attempts by a state to extend its laws beyond its territorial jurisdiction, or to apply its regulations extraterritorially.

To sue an MNE in a developing host state may present a number of drawbacks, such as, insufficient legal infrastructure, difficult access to justice, and political complications. There are several good reasons for bringing claims against multinationals in home rather than host countries. As a general rule, there are substantive differences in developing versus developed county legal systems, like higher damage awards and the superior enforceability of court decisions in developed countries. Innovative and

flexible strategies by plaintiffs' lawyers in multinationals' home countries enable victims to achieve better results (Ward 2001). In addition, it may be impossible to sue in the host country because the MNE may no longer have a legal or factual presence therein.

Foreign employees or residents of communities harmed by mining, oil or gas extraction, or chemicals manufacturing typically bring actions against MNEs. Courts must determine the most appropriate venue for a suit to be heard: the defendant's domicile, the state where the violation took place, or the state where the violation's consequences are felt. The doctrine of *forum non conveniens* allows common law country courts to refuse to hear a case if another legal forum is available "in which the case may be tried more suitably in the interests of all parties and for the ends of justice" (*Spiliada Maritime Corporation v. Cansulex Ltd* [1986] AC 460).

As a practical matter, there are two major contrasting systems of national jurisdiction: civil law countries that prefer rigid rules of jurisdiction and common law countries that prefer flexible rules of jurisdiction. We shall first consider the English courts' approach to jurisdiction over MNEs.

English Courts. English procedural law is similar to that found in other Anglo-Saxon legal systems. An important aim of English procedural law is to ensure that cases are tried in the country where they can be most cost-effectively heard. According to the *forum non conveniens* principle as developed in *Spiliada Maritime Corporation v. Cansulex Ltd.*, the defendant can prove that there is another and more appropriate forum wherein the case should be heard. In cases involving MNE misconduct abroad, application of this principle usually means that the court will refuse the case because the victims and the subsidiary company are located in another jurisdiction.

However, the court in *Thor Chemicals Holdings Ltd.* took another approach. The *Thor Chemicals* case concerned the impact of the England-based MNE *Thor Chemicals Holdings Ltd* and its South African manufacturing operations. Initially, *Thor* manufactured mercury-based chemicals in Margate, England. After being criticized for unsafe working conditions, *Thor* relocated its manufacturing to South Africa, where it operated as before. *Thor* relied on untrained temporary workers to control against excessive mercury exposure, but in 1992 three workers died and many others were poisoned due to unhealthy working conditions.

The plaintiffs argued in England that the British-based parent company was liable because of the negligent design, transfer, set-up, operation, and monitoring of its industrially hazardous processes. The plaintiffs claimed that the parent company and its chairman were directly responsible for setting up and maintaining factories in South Africa, which they knew or ought to

have known, were unsafe for workers. This claim was based on the fact that the parent company had relocated the reprocessing plant to South Africa and established, as a wholly owned subsidiary, its plant in Natal. Moreover, the chairman of the parent company was employed by the South African subsidiary to design and set up the infrastructure of the new reprocessing plant.

The defendants applied for a stay of the proceedings in favor of litigation in South Africa, but their application was dismissed. Indeed, Thor's former South African workers succeeded in bringing three separate actions against the company, all of which were settled out of court, two in 1997 and the third in 2000.

In another case, RTZ, the House of Lords decided in 1997 that a former worker at the Rossing Uranium Mine in Namibia, a Rio Tinto subsidiary, could sue in England for damages for personal injuries. In 1996, the Court of Appeals, referring to Article 6 of the European Convention on Human Rights, stated that.

... faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment and interests of justice tend to weigh, and weigh strongly in favor of that forum in which the plaintiff could assert his rights.

The House of Lords agreed, finding that in light of the worker's inability to litigate in Namibia, the case should be allowed to proceed in England. In the lead judgment, Lord Goff noted, "the question, however, remains whether the plaintiff can establish that substantial justice be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available." The action later failed because it had been initiated after the period allowed by law had expired.

Another interesting case is *Lubbe v. Cape Plc*. This case concerns the England-based company Cape Plc and 2000 South African victims of asbestosis, who worked under unsafe conditions during South Africa's apartheid years, at Cape's wholly owned South African subsidiaries. Cape's chief medical officer, based in London, visited South Africa and reported that the conditions at the mining facility were dangerous for workers and people living nearby, but management failed to take adequate measures to remedy the problem. In 1997, compensation claims against Cape were brought in the English High Court on behalf of workers and residents afflicted with asbestos-related lung cancer. The issue brought before the English court was whether England was the appropriate forum for hearing the cases. Claimants alleged that Cape, as parent company, owed them a direct duty of care independent of any duty of care owed by its local subsidiary.

The Cape case was heard in England at the request of the government of South Africa. The defendant applied to stay the South African claims on forum grounds. In January 1998, the defendant's application was granted, but on appeal the decision was reversed. The Court of Appeals found the fact that "... the alleged breaches of ... duty of care ... took place in England rather than in South Africa ..." to be determinative.

In addition, the court found that in South Africa, legal aid would not be available to finance such potentially expensive litigation and retaining expert legal counsel willing to take the case on a contingency-fee basis was unlikely. Therefore, the court concluded that a South Africa trial would amount to a "denial of justice," which is still further grounds for refusing to stay the proceedings. The claimants' lack of funding and not South Africa's lack of developed class action procedures was controlling in this case, the court emphasized.

The claimants in Cape also pointed to Article 6 of the European Convention on Human Rights in their opposition to the stay application, observing that the convention identifies access to the court and to a fair trial as "rights." In its consideration of Cape, the House of Lords, applying the Spiliada principles, determined that the international obligations of the UK should be considered in cases where the claimants' (obligatory international) rights might otherwise be denied.

Cape claimants also referred to the 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters. Article 2 of the Brussels Convention provides victims with a right to sue in the English courts simply because of defendant's domicile there. The court found the article applicable in Cape because even though South Africa is not a contracting party to the convention, the UK is a signatory to the document. Although this question was not resolved in the Cape case, the House of Lords acknowledged that the convention could be an alternate basis for bringing the suit in England and noted that the issue required a ruling from the European Court of Justice.

The issue was resolved in *Group Josi Reinsurance Company SA v Universal General Insurance Company*, decided shortly after Cape. The European Court of Justice considered the claim of a Canadian plaintiff suing a Belgian company in the French courts and found that, as a general rule, the state of a claimant's domicile is not relevant for the purposes of applying the rules of jurisdiction laid down by the convention. The rules should be applied in any case where the defendant's domicile lies in a contracting state; thus, the Brussels Convention may apply to a dispute between a defendant domiciled in a contracting state and a claimant domiciled in a nonmember country.

The decision in *Cape* seems likely to encourage other potential claimants and their lawyers to commence proceedings in the English courts against UK-based parent companies. Also, in *Cape*, the House of Lords mentioned that considerations of public interest, such as the need to avoid a flood of foreign claims and interest in having foreign disputes decided where they arise, should not affect a court's decision as to where a case ought to be tried.

Richard Meeran, solicitor for the claimants in *Cape*, argued that general principles of negligence should apply in cases like *Cape* so that in certain circumstances a duty of care is presumed (Meeran 1999). With respect to its employees, Meeran would impose upon employers a duty analogous to that owed by a manufacturer to consumers for its defective products. Indeed, the proximity of an MNE to its employees is closer than that of a manufacturer to consumers of its products. Another approach he offers is to view an MNE as a single entity, i.e., as an enterprise. When injuries result from the negligence of a parent company function, the parent should be liable. Common law tort principles have in fact been employed in cases such as *RTZ* and *Cape*. The concept of corporate limited liability will be dealt with in more detail after analyzing how European continental courts deal with the MNE jurisdiction issue.

Continental European Courts. In civil law countries of continental Europe, courts have rigid rules of jurisdiction. Once the court has ascertained that it can hear a case under applicable rules of international jurisdiction, it lacks the discretion to decline jurisdiction for any reason. The advantage of this system is the high degree of predictability it offers to litigants. Its main disadvantage is that the rules of jurisdiction are abstractly framed to fit the largest number of cases. The courts are not empowered to adapt to the cases before them, though adaptation may be desirable in a great number of cases. The systems based on this tradition have developed a rule of substitution to offset injustices that would result from a negative conflict of jurisdictions.

Another factor affecting litigation against MNEs in civil law systems is that the civil law recognizes additional grounds of jurisdiction, unusual for common law. For example, several countries permit suit against an individual whose property is present on its territory, a rule known dismissively as the "Swedish umbrella rule": Do not leave your umbrella in Sweden, or you may find yourself subject to suit in Swedish courts for any claim whatsoever (Smit 1972). French citizens may bring suit in French courts for any claim, against any defendant. Articles 14 and 15 of the French Civil Code assert French jurisdiction over any suit brought by or against a French national.

However, I know of no successful claims brought against multinationals under the articles.

In many civil law countries, high filing fees must be paid to the court before initiating litigation. It is customary in civil law countries for legal fees to be paid in advance. In addition, in most civil legal systems, civil remedies are purely compensatory. Punitive damages are permitted only in a few jurisdictions outside of the common law system—an aspect of civil law that deters novel legal claims from being brought in civil law countries, particularly when litigated by plaintiffs with scarce resources. For the foregoing reasons, the bulk of litigation against MNEs has taken place in common law countries.

Multinational Enterprise Liability

Limited Liability and MNEs. Today, the principle of separation of legal identity and liability between different companies is accepted universally. The concept of limited liability is based on the assumption that an independent corporation is managed by its own directors and officers. According to the OECD, all major industrial countries recognize the principle of limited liability, which is applied to subsidiary corporations in all these jurisdictions (Hofstetter 1990).

Professor Jonathan Landers has observed that historically limited liability was never really intended to protect a parent corporation from the liability of the subsidiary (Landers 1975). Landers ventured that if limited liability was not yet accepted, a strong argument could be made that it should not be extended to the corporate parent vis-à-vis its subsidiary. He further proposed that an individual company within a corporate group should enjoy limited liability only if it is adequately capitalized and organized and managed to ensure that it individually has a realistic potential for profitability. The subsidiary must not be excessively dependent on the parent and the parent must treat its subsidiary as a separate entity.

The International Court of Justice (ICJ) has also accepted the separate legal entity principle of corporate law. In *Barcelona Traction, Light & Power Company (Belgium v. Spain, 1970)*, the ICJ stated that:

International law has had to recognize the corporate entity as an institution created by states in a domain essentially within their domestic jurisdiction . . . separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are grounded on and determined by a firm distinction between the separate entity of the company and that of the shareholders, each with a distinct set of rights.

According to Professor Phillip Blumberg, who has written extensively on the subject, identical protection has traditionally been accorded to the shareholder who is merely an investor in corporation's business and to the shareholder-parent company in a complex corporate group, which is itself engaged in the conduct of the business of the group. Needless to say, the relationship of these two types of shareholders to the enterprise is quite different (Blumberg 1990). The justification for limited liability is weakened where a parent intervenes in the management of its subsidiary corporations. The absurd result of limited liability doctrine is that the parent company of a wholly owned subsidiary is no more responsible, legally, for the unlawful behavior of the subsidiary than a member of the public who owns a single share. Only in exceptional circumstances is the parent company regarded as a simple shareholder (Meeran 1999).

The development of sophisticated multinational corporate group structure may be a response to various commercial factors. In many cases, a corporation will isolate a particularly risky activity in a selected subsidiary to shield the parent company from tort liability. As Professor Blumberg stated, "in such business planning, traditional entity law is being utilized to attempt to create a safe harbor for corporate groups seeking to externalize the costs of a subsidiary's negligence in conducting highly risky activities" (Blumberg 1987). A corporation will also set up its corporate structure to avoid labor laws. Multinational group enterprises can disregard work safety standards in subsidiaries located in developing countries; in addition, they can pose obstacles to employee representation and information sharing, and weaken collective labor activity.

Limited liability for MNEs gives rise to serious problems when involuntary creditors are created through a company's negligence or violations of work safety standards. Under limited liability, the costs of the corporation's tortious behavior are business costs that are involuntarily imposed on the victims rather than on the company, then spread generally among those benefiting from the behavior, generally shareholders and consumers. This frequently has the inhumane consequence of imposing heavy costs on those least able to bear them.

In response to these problems, Professor Blumberg has suggested applying enterprise theory, rather than commonly accepted entity theory, to corporate liability. According to the fundamental principle of entity law, the parent corporation cannot be made liable for debts or acts of other corporations in the group because they are thought to be distinct legal entities. According to enterprise theory, the affiliated group of companies is considered to be a single economic enterprise and, consequently, the liabilities of subsidiaries can attach to the parent company. MNEs are

not likely to accept enterprise theory since it would increase their exposure to liability and impede the expansion of their international business enterprises.

The Anglo American doctrine of “piercing the corporate veil” offers some justification for group liability, such as, when a subsidiary has insufficient assets to meet the claims against it, and victim compensation is appealing on moral grounds. Cases where this doctrine has surfaced are legally controversial because the entity theory is so well accepted that it is difficult to hold a parent company responsible for acts of commission or omission by subsidiaries (Leebron 1991).

English Courts. Initially, English corporate law imposed unlimited liability upon the owners. However, due mainly to lobbying by rapidly developing English railways in need of heavy capital investments, parliament enacted the Limited Liability Act of 1856 and the Joint Stock Companies Act of 1856, which granted limited liability to registered companies (Blumberg 1987).

England’s most significant limited liability case is *Salomon v. Salomon & Co.*, in which the lower court ruled that the enterprise was a one-man company and therefore a sham. The House of Lords unanimously reversed the decision, indicating that nothing in the statute prohibited Mr. Salomon from incorporating his business and, invoking the limited liability principle, he was not liable. The hegemony of Salomon has remained unchallenged and has meant that even within group structures, separate legal personalities of different companies are recognized (Prentice 1999).

In another case, *Re A Company*, an English court pierced the corporate veil, finding that the shareholders engaged in fraud and controlled a network of foreign companies and trusts used to dispose of assets. In explaining its rationale for piercing the corporate veil in this case, the court indicated “the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficiency of the corporate structure under consideration” (*Re A Company* 1985).

A group of companies engaged in mining operations were involved in another case, *Adams v. Cape Indus*, 1990. The court applied the Salomon principles and refused to embrace the theory that the parent and subsidiary should be regarded as one enterprise because of the integrated nature of the business.

The seminal issue in cases holding parent companies accountable under English law is a finding of a legal duty of care. In *Cape Plc.* the plaintiffs’ argument was that the controlling parent company was directly responsible for injury to the claimants, on the following grounds:

(a) UK board members were in charge of the South African operation and all its aspects; (b) the main board and South African board members were common as to those who exercised ultimate control from the UK; (c) the group accounts were so constructed to give parent company full control of local budgeting in particular as to safety; (d) the parent issued group instructions from head office on health and safety matters; (e) purchase of safety equipment was coordinated and controlled by head office for the group; (f) the UK parent was responsible for a central research unit investigating asbestos risk and its management.

As has been shown, English courts can pierce the corporate veil to achieve justice when there is enough evidence to establish a duty of care and to show that the enterprise constituted a single integrated business.

Continental European Courts. In a number of situations, the courts in continental Europe apply the “economic unit theory” to define the corporate entity. This theory concentrates on economic reality, rather than on legal incorporation, and considers a number of separate corporations a single entity if they are controlled and managed by the same shareholders.

Significant progress in regulating corporate structures has been made in Germany, and in particular in the so-called Konzernrecht (Assmann 1990). Professor Blumberg characterized German law on corporate groups as “the most advanced in the world” (Blumberg 1987). The German Stock Corporations Act is applicable to all subsidiary companies in the form of the German Stock Corporation. The act distinguishes three types of corporate groups, namely, integration concerns, contract concerns, and *de facto* concerns.

Integrated concerns represent a corporate structure where a parent holds between 95 and 100 percent of a subsidiary and the companies agree to integrate formally. Subsidiary directors are bound to follow directions from the parent notwithstanding any detrimental effects on the subsidiary. The subsidiary has joint and several co-liability of the parent company for all existing and future creditor claims against the subsidiary.

A contractual group under German law is formed through a control agreement, which gives a parent the right to use broad directing powers vis-à-vis its subsidiary. A parent’s broad authority under a control agreement is balanced by its obligation to compensate the subsidiary for all deficits incurred during the contract period. Subsidiaries can compensate creditors through bankruptcy law, if necessary.

In *de facto* concerns, the parent interferes with the subsidiary’s business through uniform control (by means of stock ownership). In theory, a broad and systematic involvement by the parent in the subsidiary’s affairs is

prohibited. However, these provisions of de facto concerns may appear, they remain a dead letter because of the difficulties in proving such control and due to high enforcement risks and costs (Dorresteijn 1995).

The German Stock Corporation Act does not cover subsidiaries in the form of partnerships or close corporations and there is no other codified act relating to corporate groups consisting of GmbHs (limited liability companies). Therefore, German courts stepped in. The Bundesgerichtshof held in *Autokran* that a controlling enterprise was liable to the dominated companies' lessor for lease amounts payable. The plaintiff leased cranes to seven GmbHs that neglected to make lease payments. The plaintiff recovered the balance owed from the defendant company that controlled the delinquent GmbHs. The court established a qualified de facto relationship between the controlling company and the GmbHs because the controlling defendant had entered into a contract with each GmbHs under which it received the right to all profits. In return, the controlling defendant company was obliged to assume all debts of the GmbHs, including wages owed. The court applied the statutory provisions pertaining to a contractual group (contractual Konzern) by analogy and held the controlling company liable for the obligations of the controlled GmbHs.

In another case, *Tiefbau*, the Bundesgerichtshof held a bank, one of several owners of a GmbH, liable to the liquidator of a GmbH because the bank controlled all the financial affairs of the GmbH. The court applied the German Stock Corporation Act by analogy and held that the bank was liable for losses incurred by the subsidiary GmbH.

In *TBB*, a creditor sued the parent company for the amount it was owed by the subsidiary. The court stated that the dominating company would be liable if control over the GmbH was abusive. The court noted "the dominating company of a GmbH is liable if it exercises management in a way without regard to the interest of the dependent companies and without compensation of their inflictions."

In French labor law, the theory of an economic and social unit was developed shortly after World War II and has become a well-established concept. This enterprise concept allows employees of groups of companies to establish representative bodies common to all companies of the "economic and social unit" by a single enterprise committee, a trade union delegation or common staff delegates (Rodière 1990). However, the economic and social unit in French law has no other personality than that of each of its members.

French labor law attaches parent liability whenever the parent is involved in the relationship between a subsidiary and its employees. For instance, when a parent has directly addressed subsidiary employees by giving them

work instructions, it automatically assumes joint and several liabilities to the subsidiary's employees (Teyssie 1992). But, the simplified parent liability standard in French labor law appears to be used only for small and typically weak creditors like employees. Employees bear the brunt of limited liability and tend to be under-compensated for bearing it. Despite its limited reach, this regime is criticized because it does not give the parent company the opportunity to prove that it did not have a damaging influence on the subsidiary (Williamson 1984).

Conclusion: Enforcing Labor Rights Against MNEs

As this paper has shown, a vast disparity exists between labor and capital in the global marketplace, such that irresponsible MNEs may not be held responsible for damages that may befall their workers abroad. Because international law, including ILO instruments, is currently based on treaties and customary law it, will take a long time before MNE misconduct can be effectively addressed on an international level. Voluntary codes of corporate conduct have become the most visible tool in filling this gap.

Voluntary codes of conduct for MNEs are "soft law," in that the courts cannot enforce them. Both hard and soft laws reflect dominant moral and practical concepts, nationally and internationally. Codes of conduct and the other initiatives discussed represent progress in employment relations and in defining and enforcing good corporate behavior for MNEs. Codes can have quasi-legal effects on national legal systems, but one should not overestimate their impact. Enforcement of labor standards ultimately lies with national governments and courts that decide cases primarily on the basis of domestic law. A more effective system would include a combination of international standards and domestic enforcement in multinationals' home countries.

If domestic enforcement is to be effective, two problems that arise in MNE liability for human and labor rights violations must be resolved, namely, barriers to court access in MNE home countries, and the limited liability concept. These obstacles allow MNE parent corporations to hide behind the corporate veil separating them from their overseas subsidiaries and to escape liability by "forum shopping" for a jurisdiction in which its defense is likely to prevail.

There is a vast difference in jurisdictional approaches taken by common law and civil law courts. The principle of *forum non conveniens* is applied by the courts of England as a mechanism for refusing jurisdiction in cases like those against MNEs. However, there have been a number of English cases

where courts have extended jurisdiction to include worker safety in foreign subsidiaries. In civil law countries, rigid rules on jurisdiction create barriers to access the courts for victims of MNE torts abroad. Innovative claims are much more likely to be brought in common law jurisdictions where attorneys' fees are paid by the losing party. The availability of legal aid and contingency-fee arrangements in England was a key consideration for claimants in cases like Cape. In both legal systems, applying the rules of the Brussels Convention, which allows plaintiffs to sue in the European Union based on the defendant's domicile, is a promising approach.

Another important obstacle to holding MNEs accountable is corporate limited liability. As shown, English courts will pierce the corporate veil to achieve justice and/or the parent company failed to meet accepted standards of care.

German courts have applied an enterprise concept, investigating the close *de facto* relationship between companies. Corporate liability is established if the evidence shows a sufficient level of economic integration between parent and subsidiary. This approach would allow for creation of a separate set of laws on liability for corporate groups, and for MNEs in particular. Civil law countries could apply the economic unit concept in determining whether a parent company can in principle be held responsible for the human and labor rights violations of its subsidiaries.

A few comparative comments regarding the United States legal system are in order. The legal systems of the United States and England are similar since both countries' legal traditions are rooted in common law. Nevertheless, there are critical differences between the two, the most important of which is the United States' Alien Tort Claims Act (ATCA): a law providing plaintiffs with lawful grounds to sue multinationals for violating their human and, particularly, their labor rights. Based on ATCA, scores of American multinationals like Unocal have been sued in the United States⁸ for alleged commission of human rights violations by their foreign subsidiaries.

The *Doe v. UNOCAL* case confirms that multinationals can be held liable in the United States if they provided practical assistance to a foreign state knowing that said assistance would likely support the commission of human rights violations. Although this case was eventually settled in 2004, earlier decisions advanced possibilities for holding multinationals liable for human and labor rights violations committed abroad. In the light of the Unocal litigation, there are some signs that labor rights can be enforced against multinationals in the United States courts, provided that the

⁸ In *Doe v. Unocal*, Myanmar nationals sued the American oil company of Unocal for gross human rights violations including forced labor.

company in question is directly implicated in the alleged violation of fundamental human rights. While [t]he ATCA serves to differentiate the United States from Europe; it is important to recall that victims of European multinationals can make use of other remedies to enforce their rights such as the Brussels Convention.

Another workable approach taken in both the United States and Europe are public campaigns against multinationals for alleged violations of human and labor rights at their overseas subsidiaries. Public condemnation of workers' rights abuses can and have forced large multinationals such as Nike to their working conditions at their foreign subsidiaries (Segal 1998). Campaign groups are also active elsewhere around the globe applying public pressure on multinationals to improve their human rights practices in developing countries.⁹

The problems of enforceability of labor and human rights in European countries, under either the civil or common law tradition vis-à-vis the United States are essentially the same, as are the proposed solutions despite their different legal systems. In looking to the future, the legal solutions for multinational human rights violations continue to evolve in both common law and civil law jurisdictions. The real challenge will lie in persuading MNE home countries to recognize domestic MNE liability for human and labor rights violations abroad.

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⁹ For the list of campaign groups around the world see Corporate Watch listing at <http://www.corporatewatch.org/?lid=62>

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