**International Commission of Jurists**

**Proposals for Elements of a legally binding instrument on Transnational Corporations and other Business Enterprises**

**ADVANCE UNEDITED DOCUMENT- PART V**

**4.1 Transnational corporations and legal liability: parent company liability, supply chain and corporate complicity**

Establishing legal liability of the business enterprise is a first step, but it is always not enough to tackle obstacles to effective remedy and accountability, given the complex way in which businesses organize and operate across-frontiers and the frequent involvement of a plurality of actors in the commission of human rights abuse. Because of the prevalence of the doctrine of “separate legal personality” and the frequent fact that parent and subsidiary (or supplier) are located in different jurisdictions and subject to different legal regimes, domestic legal accountability and remedies are many times unable to deliver satisfactory results for victims of abuse committed by subsidiaries and suppliers. Situations whereby one business enterprise participates in the commission of a human rights abuse by another business enterprise, by facilitating, aiding or abetting, or enabling the commission of the abuse, must be covered in the treaty if it is to be an effective framework for accountability and remedies.

There are various degrees and intensity in the relationship between the enterprises involved. For instance, one enterprise may be the wholly-owned or partially-owned subsidiary of another enterprise, or it may have a controlling or dominant position in relation to the other or others. There may be cases in which one enterprise is linked to another only on the basis of a commercial contract as supplier or contractor or sub-contractor, without having a controlling or dominant position in their mutual relations. In all these cases it is always possible that one may contribute to the abuse committed by another enterprise.

The relationship pertaining to parent-subsidiary companies is a particular source of concern. The parent company and its subsidiaries are separate legal entities. There is a “corporate veil” that separates one legal entity from the other even if both have a common owner or shareholders or have a single operational policy in many areas. What is commonly known as a “transnational enterprise,” is in fact a conglomerate of enterprises which have separate legal personality, operating in practice as a single economic unit. The existence of this “corporate veil” has been seen over the years as an impediment to allocate responsibilities to the parent and subsidiaries respectively and as an obstacle for the victims of abuse to obtain remedies vis-à-vis the parent company, which many times contributed to the commission of the abuse.

There are also legal and jurisprudential developments that support the need to recognize the group of legally separate companies that operate as an economic unity as a single enterprise capable of bearing legal responsibility on its own right. The Court of Justice of the European Union in application of EU Directives on competition law, consolidated accounting and taxes disregarded the legal formalism of the separate legal entities doctrine and considered the economic reality of groups of enterprises that are legally separate from each other but in practice act as economic unities under a controlling or dominant enterprise.[[1]](#footnote-1) The Directive on Competition law uses the word “undertaking” which the Court interpreted as comprising also the group of enterprises that have a common controlling or dominant parent. The Court has also developed a rebuttable presumption in cases of anti-competitive conduct whereby the parent and the subsidiary would form a single undertaking if the parent holds all or most of the assets of the subsidiary.[[2]](#footnote-2)

Similar developments may be observed in the United States, but also limited to certain areas, notably competition law, tax law, bankruptcy, regulation of public utilities and securities and investments. In addition, United States practice is worth to note in the areas of environmental torts and labour law. For instance, in *re Oil Spill by Amoco Cadiz off Coast of France* a Federal court in Illinois,[[3]](#footnote-3) in addition to holding Standard oil directly liable for the spill, found Standard liable as part of the integrated enterprise.[[4]](#footnote-4) But in *United States v. Bestfoods*, the Supreme Court found that statutory provisions did not displace or alter common law standards of limited liability or separate personhood, although parent companies could be held directly liable for hazardous spills from a subsidiary’s facility if the parent was involved with the operations related to the pollution.[[5]](#footnote-5) The United States National Labor Relations Board (NRLB) has developed its own unique standard reflecting enterprise principles, called the “integrated enterprise,” for the purposes of the National Labor Relations Act (NRLA),[[6]](#footnote-6) and the Supreme Court affirmed the concept of “integrated enterprise” in some of its jurisprudence.[[7]](#footnote-7) Under the Employees Retirement Income Security Act (ERISA) all businesses “which are *under common control* shall be treated ... as a single employer.”[[8]](#footnote-8)

The English law of civil remedies has evolved to permit the attribution of responsibility to the parent company where the parent was involved in the operations that caused the damage, among other factors, by its subsidiary abroad. However, courts in the Netherlands seem to have cast doubt on whether the parent would have a duty of care in relation to the communities living near the operations of their foreign subsidiary.[[9]](#footnote-9) Further evolution of English common law may bring about sufficient clarity in this field, but the prospective treaty could also make a contribution in laying global rules to guide national action on this issue that is seen as one of the most acute.

It does seem fair and consonant with the need to enhance the protection of human rights in the global economy to contemplate a system of enhanced responsibilities, including legal, for the parent or controlling companies of large multinationals. At present, transnational corporations obtain a substantive part of their benefits from their foreign operations or investments while assuming very limited local costs (taxes, legal and regulatory liabilities, etc). The global expansion of economic operations has brought together investors, businesses, consumers, workers and local communities in an ever closer network that allows the creation of wealth in a global scale. Yet that interconnection does not find expression at the level of legal responsibilities of parent and controlling companies.

It is in this context that several actors have made proposals to create legal duties for parent companies to enhance their responsibility in the global economy. The ICJ believes those and other similar proposals should be seriously considered by the OEWG.[[10]](#footnote-10)

Some of the proposals the ICJ has made in this paper might play a role in clarifying the extent of responsibility for parent companies. For instance, a general legal responsibility to respect human rights and to carry out human rights due diligence in the corporation’s global operations encourages more involvement of the parent in the operations of the subsidiary, and could serve as proof of such involvement in the concrete operation that caused harm.[[11]](#footnote-11) In any event, delineating in the prospective treaty more detailed and tailored rules can only add more certainty and enhance the protection of rights.

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| The OEIWG should consider the following as elements of the prospective treaty to clarify the legal responsibility of the parent company:  States should adopt measures to make possible the civil liability of business enterprises based in their jurisdiction for their contribution to human rights harm caused by business corporations under its ownership or control. To that end:   * incorporate in their statutes relating to civil proceedings a rebuttable presumption of control by the parent company of the subsidiary’s operation that caused harm. This presumption would operate in situations where the parent exercises general control in the sense of tax, accounting or competition law (control of majority of shares or voting rights, right to appoint the majority of managers, or the power to exercise dominant influence). * Incorporate in their laws an obligation for business enterprises under their jurisdiction to conduct human rights due diligence that covers at least the operations of business enterprises domiciled in other countries and that are under their ownership or control.   States should adopt measures to ensure that their national legislation on corporate criminal liability contemplates liability for accessory responsibility, including various forms of participation in the crime committed by another agent, including “complicity”. The corporate liability for complicity should not be made contingent to the existence of the equivalent substantive criminal law in the country where the principal perpetrator committed the crime. |

1. C.170/83 Hydroterme Gerätebau GmbH v Compact del Dott. Ing Mario Andreoli & C. Sas, CJEC 1984 §11; C-41/90 Klaus Höfner and Fritz Elser v Macrotorn GmbH, CJEC 1991, §21 [↑](#footnote-ref-1)
2. Case 6-72, Europemballage Corporation and Continental Can Company Inc. v Commission of the EC, CJEC, 1973 [↑](#footnote-ref-2)
3. The Court had to assess liability where a supertanker crashed and spilled over 200,000 tons of crude oil into the seas off Brittany. The ship was owned and operated by subsidiaries of the Amoco International Oil Company, which was a wholly owned subsidiary of Standard Oil Company of Indiana. In re Oil Spill by Amoco Cadiz off Coast of France on Mar. 16, 1978, No. MDL 376, 1984 A.M.C. 2123 (N.D. Ill. Apr. 18, 1984). [↑](#footnote-ref-3)
4. *Id.* at 2194 “As an integrated multinational corporation which is engaged through a system of subsidiaries in the exploration, production, refining, transportation and sale of petroleum products throughout the world, Standard is responsible for the tortious acts of its wholly owned subsidiaries and instrumentalities.” [↑](#footnote-ref-4)
5. See United States v. Bestfoods, 524 U.S. 51, 70 (1998) [↑](#footnote-ref-5)
6. Blumberg, Op citnote , at 307 [↑](#footnote-ref-6)
7. Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255 (1965) [↑](#footnote-ref-7)
8. So long as a company owns 80 percent of the voting shares of a subsidiary, then those companies are part of a “controlled group of corporations.” 29 U.S.C. §§ 1001-1461, § 1301(b)(1). As noted in *Connors v. Hi-Heat Coal Co., Inc.*, each “business that is a member of a controlled group is . . . jointly and severally liable for the withdrawal of any other member of the group.” *Connors v. Hi-Heat Coal Co.*, 772 F. Supp. 1, 5 (D.D.C. 1991) Thus, a parent is obligated to pay the withdrawal liability incurred by subsidiaries within its controlled group. *See also, e.g.,* *McDougall v. Quickie Transp. Co.*, 6 F. App'x 456, 458 (7th Cir. 2001); *Pension Ben. Guar. Corp. v. E. Dayton Tool & Die Co.*, 14 F.3d 1122, 1127 (6th Cir. 1994); *Cent. States, Se. & Sw. Areas Pension Fund v. Koder*, 969 F.2d 451, 452 (7th Cir. 1992) [↑](#footnote-ref-8)
9. *Chandler v Cape plc*, England and Wales Court of Appeal (Civil Division) 25 April 2012, case number [2012] EWCA Civ 525, paras. 69-80. Available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html> (accessed 28 March 2014). [↑](#footnote-ref-9)
10. Amnesty International, among others, has suggested placing parent companies “under an express duty of care towards individuals and communities whose human rights may be or are affected by their global operations, including the activities of their subsidiaries”. In serious cases, it is further proposed, the parent company should be presumed to be legally responsible, subject to rebuttal. Amnesty International, Injustice Incorporated, 2014 p. 201-205. The general recognition of a clear duty of care of the parent company in relation to these subjects will eliminate existing uncertainty, and facilitate proceedings against the parent company. See an analysis of the difficulties in this area in Needs and Options Report, p. 14. At the level of the EU, the project Human Rights in Business has made several recommendations concerning this same issue that may usefully be considered at the international level. See: [www.humanrightsinbusiness.eu](http://www.humanrightsinbusiness.eu). Another possibility, suggested by Queniec and Bourdon is to consider the parent company fully and automatically responsible for the negative impacts caused by their owned or controlled subsidiary and that such presumption may be rebuttable by the company showing that they could not reasonably have had knowledge of the events in question. [↑](#footnote-ref-10)
11. Corporate Complicity & Legal Accountability, Report of the ICJ Panel of Legal Experts, 3 vols, Geneva, 2008, vol. 3, p. 28 and ff [↑](#footnote-ref-11)