Human rights violations framed as transnational tort claims against parent companies: an evaluation of case law, global trends, and implications for corporate groups

Big Ten and Friends Workshop: this is an almost complete first draft – I look forward to your comments on how to take this paper forward

Introduction

A number of jurisdictions have developed a body of jurisprudence, which, to varying degrees, allows their courts to accept jurisdiction over claims where extraterritorial human rights violations are framed as tort law suits and brought against a parent company in its home jurisdiction. Recent examples of these suits include *Lungowe v. Vedanta Resources Plc.*[1] and *Araya v. Nevsun Resources Ltd.*,[2] currently pending decisions from the respective Supreme Courts of the United Kingdom and Canada, and *Acuña-Atalaya v. Newmont Mining Corp.*,[3] currently before the Delaware courts. Through analysis of individual cases and global trends, this paper provides an evaluation of the significance of this legal development for parent companies. It asks what risk of liability they face, and what they should do to respond to the risk and ensure that they adhere to human rights standards.

The development of this body of jurisprudence dates back to the 1980s when one of the original transnational tort claims was brought in the United States courts following the catastrophic chemical leak at Bhopal in India.[4] How did the litigation seek to attribute liability for this unprecedented industrial disaster? The American parent company, Union Carbide, was alleged to be liable in tort on the grounds that it designed, built and operated the pesticides plant operated by its Indian subsidiary in Bhopal, from which the chemicals leaked, killing and injuring thousands of people. The U.S. courts' dismissal of the case on grounds that India was the appropriate forum for the litigation, and the subsequent low value settlement of all proceedings against

[1] *Lungowe and Others v. (1) Vedanta Resources Plc. and (2) Konkola Copper Mines Plc.* [2016] EWHC 975 (TCC); [2017] EWCA Civ 1528.
[2] ***Araya v. Nevsun Resources Ltd*** **[2017] BCCA 401.**
[3] *Acuña-Atalaya et al v. Newmont Mining Corporation et al*, case number 1:17-cv-01315, Delaware District Court.
[4] *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India* 634 F. Supp. 842 (S.D.N.Y. 1986) *aff'd,* 809 F2d 195 (2nd Cir 1987), *cert. denied,* 484 US 871 (1987).

the corporate group by the Government of India, highlighted how difficult it is for victims in transnational tort cases to get access to remedy. The gravity of the injustice for the victims of Bhopal fomented the emerging international movement that demanded corporate accountability for extraterritorial harms.[5]

In the years that followed the Bhopal litigation, a number of tort claims were brought before the U.S. courts against U.S. parent corporations in respect of the overseas operations of their subsidiaries.[6] These claims were filed in state courts, or in the federal district courts.[7] Cases were also initiated against corporate defendants in Canada,[8] Australia[9] and England.[10] A significant issue for the plaintiffs across jurisdictions is how to attribute liability to the parent company, when the proximate cause of the harm is the operations of a subsidiary company. One method of doing this is to pierce the corporate veil and make the parent company liable in respect of the negligence of its subsidiary. Another method, and the focus of this paper, is to make the parent company liable in respect of its own primary breach of duty. By targeting the parent company, plaintiffs have avoided seeking to pierce the corporate veil. Tests vary for veil piercing but in most jurisdictions this power is reserved for exceptional cases only.[11]

Attributing liability to the parent company allows plaintiffs to bring within the frame of judicial consideration the acts of supervision, management and control which may have been instrumental in the harm they have suffered ostensibly at the hands of the subsidiary. On a more practical note, plaintiffs can sue the parent company in its home state, the domicile of the company providing the required connection to the

[5] Amnesty International, 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy' (2014).
[6] See, for instance, *Aguinda v. Texaco* 142 F. Supp. 2d 534 (S.D.N.Y. 2001); *Flores v. SPCC*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002) and *Bowoto v. Chevron Texaco Co.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004).
[7] Filing in federal district courts is under the diversity jurisdiction set out in Art. III of the U.S. Constitution.
[8] *Recherches Internationales du Québec v. Cambior Inc* [1998] QJ No 2554.
[9] *Dagi v. Broken Hill Proprietary Co Props* (No 2) (1995) 1 VR 428.
[10] *Connelly v. RTZ Corporation* [1998] AC 854, *Sithole and Others v. Thor Chemicals Holdings Ltd and Another* TLR 15 February 1999 and *Lubbe and Others v. Cape Plc* [2000] 1 WLR 1545.
[11] For instance, the veil will only be pierced where there has been fraud or where the level of control by the parent company is so extreme as to render the corporation an alter ego or a sham: Anil Yilmaz-Vastardis and Rachel Chambers, 'Overcoming the corporate veil challenge to access to remedy in cases of corporate human rights abuses: Could international investment law inspire the Proposed Business and Human Rights Treaty?' (2018) 67 ICLQ 389, 394.

jurisdiction to enable the home state courts to hear the claim. The necessity for plaintiffs to have to access remedy in the courts of the home state of the parent company as a result of the widely accepted 'governance gap' is well covered in the literature.[12] To summarise, in many instances this is the only option for them when host state remedies are absent or ineffective due to corruption, weakness or absence of rule of law, lack of state financial resources to enforce local laws, hold timely trials etc. It also avoids plaintiffs having to seek compensation from a local subsidiary, which may be impecunious or defunct.

There has been acceleration in the number of transnational tort claims against corporate defendants in recent years. This trend is taking place in tandem with the adoption and uptake of the current international policy consensus in this area – the UN Guiding Principles on Business and Human Rights (UNGPs). Although these tort claims do not typically invoke human rights standards as a benchmark for alleged wrongdoing, they offer a possible avenue for private parties to bring suit against transnational corporations in domestic courts based on conduct which is alleged to violate international human rights standards. They do this by providing a cause of action for the harming of private interests that correspond with interests denominated as human rights under international law. The architect of the UNGPs, John Ruggie, explicitly recognized the role of tort law in providing access to remedy to victims of human rights abuse at the hands of corporations.[13]

The growing body of transnational tort jurisprudence is the subject of scholarship, addressing pertinent questions such whether there is overlap between negligence laws and the concept of the corporate responsibility to respect from the UNGPs;[14] the impact of the UNGPs on this tort litigation;[15] and the relationship between these tort

[12] See, for instance, Penelope Simons and Audrey Macklin, 'The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage' (Routledge 2014).
[13] John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts', A/HRC/4/035, 9 February 2007.
[14] Radu Mares, 'A Gap in the Corporate Responsibility to Respect Human Rights' (2011) 36 Monash University Law Rev. 33. The corporate responsibility to respect is discussed below, in the section on the international policy position.
[15] Astrid Sanders, 'The Impact of the "Ruggie Framework" and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation' in Jena Martin and Karen Bravo (eds.), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press 2015) 288–315; Carola Glinski, 'The Ruggie

cases and state obligations to redress corporate-related human rights violations.[16] There is also scholarship more broadly plotting the trend,[17] and encouraging states to reduce barriers to such litigation being heard in their jurisdiction.[18] The new perspective offered by this paper is, through analysis of individual cases and global trends, an evaluation of the significance of this legal development for parent companies. What lessons can be drawn for corporate actors about their liability risk? How should corporate actors respond to this trend, in particular with respect to their policies and management of their subsidiaries? How does it interact with their corporate responsibility to respect human rights?

The case law analysis begins with consideration of cases brought in the jurisdiction of England and Wales.[19] This is the primary venue for transnational tort litigation outside the United States.[20] As will be discussed below, there is a growing body of jurisprudence on the direct liability in negligence of parent companies there. There follows discussion of the liability risk the English case law presents for parent companies, and the practices that they should therefore adopt to respond to the risk, in particular as regards group-wide policies on human rights. The analysis then moves to cases brought in other jurisdictions, including the Netherlands, Germany, Canada, and the U.S. The cases are grouped according to certain trends. For instance, while tort litigation in common law jurisdictions predominates in this field, there is emerging case law from civil law jurisdictions. An example is *Akpan v. Shell*, from the

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Framework, Business Human Rights Self-Regulation and Tort Law: Increasing Standards through Mutual Impact and Learning' (2017) 35(1) Nordic Journal on Human Rights 15 and Gabrielle Holly, 'Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: *Kamasaee v Commonwealth*' (2018) 19(1) Melbourne Journal of International Law 52.

[16] Daniel Augenstein, 'Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy' (2018) 18(3) Human Rights Law Review 593.

[17] Michael Goldhaber, 'Corporate Human Rights Litigation in Non-US Courts: A Comparative Scorecard," (2013) 3 UC Urvine Law Review 135. Paul Hoffman and Beth Stephens, 'Human Rights Litigation in State Courts and Under State Law' UC Irvine Law Review (2013) 3(1) 9.

[18] Jodie Kirshner, 'Why is the US Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute' (2012) 30 Berkeley J Int'l L 259 and Cees van Dam and Filip Gregor, 'Corporate Responsibility to Respect Human rights Vis-à-vis Legal Duty of Care' in Juan José Álvarez Rubio and Katerina Yiannibas, *Human Rights in Business* (Routledge 2017) 119.

[19] The United Kingdom is divided into separate legal jurisdictions. For the purposes of this paper, only the civil jurisdiction of England and Wales will be considered and references to England and the English courts shall be deemed to include Wales.

[20] Goldhaber (n 17) and Sanders (n 15) 290. See, generally on the advantages of bringing legal proceedings in the English courts, Trevor Hartley, *International Commercial Litigation: Text Cases and Materials on Private International Law* (CUP 2009) 310.

Netherlands, one of the only transnational tort claims in this field that been tried with success for the claimant (albeit against the foreign incorporated subsidiary, not the parent company). As will be seen, the applicable law for the underlying tort analysis in *Akpan* was Nigerian law (which looks to English law precedent) – a situation that is distinctive of several non common-law cases.[21] The trend of Canadian courts hearing tort cases against mining companies is discussed, as is the renewed interest among the U.S. academy in state common law tort claims as a vehicle for this litigation, in the period since the U.S. Supreme Court severely circumscribed the use of the Alien Tort Statute. The last section draws together learning for corporations from the survey of litigation.

Before examining the cases, the paper will set out the international policy position as it pertains to corporations and human rights. This gives background and context the question of how companies should respond to the transnational tort litigation risk.

The international policy position

In his role as Special Representative of the Secretary General to the United Nations on the issue of human rights and transnational corporations and other business enterprises, the UN Human Rights Council tasked Harvard professor John Ruggie with identifying and clarifying standards of corporate responsibility and accountability with regard to human rights. The mandate lasted from 2005 to 2011, culminating in the adoption by the Human Rights Council of the UN Guiding Principles on Business and Human Rights, which implemented the 'Protect, Respect, Remedy' framework Ruggie had produced three years earlier.[22]

The 'Protect, Respect, Remedy' framework and the UNGPs rest on three 'pillars': the 'state duty to protect' against human rights abuses by corporate actors, the 'corporate responsibility to respect' human rights, and the necessity to provide for effective

[21] Another example is *Jabir v. KiK Textilien* [Dortmund, Germany], discussed below.
[22] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31, Annex. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5.

'access to remedy' for victims. The focus here is on the second pillar.[23] This pillar clarifies that the standard of responsibility for business with regard to human rights is to respect these rights,[24] and the corresponding Guiding Principles (Principles 11 – 24) elaborate on the steps that companies must take to 'know and show'[25] that they do so. The UNGPs identify a hierarchy of different of impacts if a business enterprise 'causes', 'contributes' or is 'directly linked' to adverse human rights impacts, and also clarifies that business enterprises have a responsibility to 'remediate' the impacts it causes or to which it contributes. Key aspects of 'knowing and showing' are adopting a human rights policy, reporting on human rights impacts, and undertaking human right due diligence. The latter process entails identifying whether a business has caused or contributed to adverse human rights impacts, integrating and acting upon the findings, tracking responses, and if an adverse impact has occurred, co-operating with remediation.[26] This should occur 'as early as possible in the development of a new activity or relationship'[27] so that adverse effects can be prevented or mitigated. It is not limited to single legal entity that is the parent company, but rather applies to the whole corporate group.

In accordance with the terms of the mandate, the UNGPs do not aspire to create binding international law or obligations on companies.[28] Rather, in Ruggie's words,

> their normative contribution lies … in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[29]

The corporate responsibility to respect is therefore said to reflect societal expectations of corporate behaviour, also known as the company's 'social license to operate'. It has

[23] The role of tort law in providing access to remedy in accordance with the third pillar is the subject of academic work, see above (n 15).
[24] The wording is that 'businesses should avoid adverse human rights impacts' (UNGP 11). This contrasts with the language of an earlier attempt to create internationally agreed standards for corporations on human rights – the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights – 'TNCs and OBEs have the obligation to promote, secure the fulfillment of, ensure respect of and protect human rights' (para. 1).
[25] Protect, Respect and Remedy' (n 22) para. 26.
[26] UNGP 22.
[27] ibid.
[28] John Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights Foundations and Implementation* (Brill 2012) 51.
[29] Report of the SRSG (n 22) para. 14.

been argued that this soft responsibility could develop into a hard obligation through, for instance, the use of the due diligence expectation in tort litigation as evidence of conduct that adheres to the relevant the standard of care. A corollary of this is the argument that conducting due diligence reduces the company's exposure to legal liability. This is articulated in the UNGPs:

> Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse'.[30]

The issue companies raise in light of the trend discussed in this paper of an increasing number of tort claims against them is that believe that they are being penalized for 'showing' their group-wide policies on human rights, in that their policies and reports are being used as evidence of a level of involvement with their subsidiaries that supports a direct negligence claim against the parent. This possible dilemma will be discussed below, following discussion of the English case law.

The case law: England and Wales

Background to the tort claims

Since the late 1990s, a number of transnational tort cases have been brought in the High Court of England and Wales. The majority have been argued as negligence claims. They seek to impose direct liability for actions or omissions by the parent company in respect of harm committed abroad. For instance, in *Connelly v. RTZ Corporation Plc.*[31] a worker suffering from laryngeal cancer who had been employed at RTZ's uranium mine in Namibia brought a claim for compensation. He alleged that the England-based RTZ parent company took key strategic technical and policy decisions relating to the mine. In particular, he alleged that RTZ had devised the mine's policy on health, safety and the environment and /or had advised the mine as to the contents of the policy. Thus the foundation of the plaintiff's claim was that the parent company had breached its duty of care to him with the result that he had suffered harm.

[30] UNGPs (n 22) commentary to Guiding Principle 17.
[31] *Connelly v. RTZ Corporation plc. and Another* (1999) CLC 533.

Until the case of *Chandler v. Cape Plc.*[32] there had been no judicial determination of a case alleging direct liability of the parent company: the closest the courts had come is a decision in response to a strike out application in the case of *Ngcobo v. Thor Chemicals Holdings Ltd*.[33] In this matter the cause of action was negligence and the claim was against the UK-headquartered parent company of a South African manufacturer of mercury-based chemicals. Liability was asserted on the basis of negligent design, transfer, set-up, operation, supervision and monitoring of the intrinsically hazardous processes at the South African plant. The strike out application was unsuccessful. The Judge accepted that the plaintiffs 'went well beyond establishing a clear evidential basis' for liability against the parent company. The basis for the argument of a duty of care was also accepted in *Connelly*, mentioned above. The court in *Connelly* observed that, although the claimant's arguments were unusual, if they were supported by facts they would likely give rise to a duty of care.[34]

The case of *Chandler* was an important legal development, albeit in a domestic case concerning events at a factory in the U.K. which produced asbestos. The plaintiff worked at the factory during the late 1950s and early 1960s loading bricks. He later contracted asbestosis as a result of inhaling dust in this workplace. His employer was Cape Products, a subsidiary of the defendant Cape Plc. Cape Products had gone out of business some years prior to the case being filed. The plaintiff brought proceedings against the parent company arguing that it had assumed responsibility for Cape Products' employees and was therefore liable for Cape Products' admitted negligence, despite the separate legal identity of Cape Plc. and Cape Products. The judge at first instance approached the question of whether Cape Plc. owed the plaintiff a duty of care using the three-stage test established in *Caparo Industries v. Dickman*.[35] The three stages are (1) that the harm incurred is reasonably foreseeable; (2) that there is a relationship of 'proximity' or 'neighbourhood' between the party owing the duty and the party to whom it is owed, and (3) that the court is satisfied that, given the particular circumstances, it is fair, just and reasonable to impose a duty.[36] The judge did not dwell long on the first and third stages of the test, both of which the plaintiff met, but focused on the narrow issue of proximity which forms the second stage of the

[32] *Chandler v. Cape Plc.* [2012] EWCA Civ 525.
[33] January 1996, per Maurice Kay J, unreported.
[34] *Connelly* (n 31) 533. See also *Lubbe* (n X).
[35] [1992] 2 AC 605. This is the leading English case for determining new tortious duties of care.
[36] ibid, 618.

test, and in particular on whether Cape Plc. controlled or took overall responsibility for Cape Products' measures to protect its employees against harm from asbestos exposure.[37] He was satisfied that there was such proximity as to found the duty of care.

The first instance decision was upheld on appeal. Giving the leading judgment in the Court of Appeal, Arden LJ set out the principles that apply in such cases:

> In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[38]

She was prepared to find that Cape Plc. had assumed responsibility towards the Cape Products' employee in circumstances where Cape Plc. had installed its asbestos production business at the Cape Products' site and maintained a certain level of control over the business, through involvement in and influence over its subsidiary's operations. This control was illustrated by Cape Plc. issuing instructions about company products; the requirement placed on Cape Products that it seek parent company approval before incurring capital expenditures; Cape Plc's centralized product development process; and its common company policies.[39]

A judgment in a subsequent case heard by the Court of Appeal, *Thompson v Renwick Group*,[40] confirmed that a plaintiff would have had to show that the parent company

[37] [2011] EWHC 951, para. 73.
[38] *Chandler* (n. 32) para. 80.
[39] Martin Petrin, 'Assumption of Responsibility in Corporate Groups: *Chandler v Cape Plc.*' (2013) 76 Modern Law Review 610, 612.
[40] *Thompson v. Renwick Group* [2014] EWCA Civ 635.

was better placed, through superior knowledge or expertise, to protect its subsidiary's employees against the risk of injury.[41] In contrast, merely holding shares in the subsidiary did not satisfy the test. In *Thompson* the plaintiff also suffered from asbestosis as a result of exposure to asbestos during the course of employment. He brought proceedings against his employer's parent company. The judge did not find that the parent company had assumed a duty of care to its subsidiary's employee because the parent company had no special knowledge of the risks associated with asbestos. This decision illustrates that to meet the four principles from *Chandler* entails a careful examination of the relationship between parent company and subsidiary or associate company.

The current wave of litigation

There has been a steadily growing trickle of tort cases against transnational corporations in the English courts, boosted by *Chandler* and also by legal developments at the European level. In 2005, a decision of the European Court of Justice clarified that national courts of the European Union did not have the power to dismiss cases brought against EU-domiciled defendants on the grounds that a court of a non-EU-Member State would be a more appropriate forum for the trial of the action.[42] Following this judgment, a handful of transnational tort cases were brought in which, without being able to avail themselves of the defence of *forum non conveniens*, corporate defendants did not challenge jurisdiction of the English courts.[43] Then came a shift in tactics. Corporate defendants began to challenge jurisdiction by arguing that the plaintiffs in these cases did not have an arguable case against the domestically domiciled corporate defendant (usually the parent company). The test for jurisdiction was premised on there being 'a real issue to be tried between the [plaintiff] and the domestic defendant'.[44] A 'real issue to be tried' equates to an arguable case. The arguable case is of direct negligence against the domestic defendants, also known as the 'anchor defendant' because this defendant anchors the claim in the jurisdiction. A trilogy of cases currently before the courts of England and Wales illustrate the

[41] ibid.
[42] *Owusu v. Jackson* [2005] 2 WLR 942.
[43] *Guerrero v. Monterrico* [2009] EWHC 2475; *Bodo Community v. Royal Dutch Shell Plc.* [2014] EWHC 958 (TCC); *Kesabo and Others v. (1) African Barrick Gold Plc. (2) North Mara Gold Mine Ltd.* [2013] EWHC 3198 (QB).
[44] Civil Procedure Rules (the rules of civil procedure used by the Court of Appeal, High Court of Justice and County Courts in civil cases in England and Wales) r. 6B 3.1(3).

different approaches the courts have taken when they identify features relevant to deciding whether a parent company owes a duty of care, and thus whether there is a 'real issue to tried'.[45]

Lungowe v. Vedanta

This case concerns the impact of pollution from a copper mine in Zambia that is operated by Konkola Copper Mines Plc. (KCM), the Zambian subsidiary of Vedanta Resources Plc. The plaintiffs, 1,826 Zambian citizens, allege that they have suffered personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land arising out of the operation of the mine. They make a direct claim of negligence against Vedanta, alleging that it breached the duty of care it owed them to ensure that KCM's mining operations did not cause harm to the environment or local communities. They also claim against KCM, using the causes of action of negligence, nuisance, trespass, and liability under the Zambian statutes.

Both Vedanta and KCM challenged jurisdiction by arguing that the claim against the parent company was a 'device' or 'illegitimate hook' to enable them to bring proceedings in the English court. They asserted that the case is really against the foreign company, KCM and that Zambia, where KCM is registered, is the correct place for the case to be heard. The legal test for a joinder of defendants such as this to be held to be a 'device' is a strict one – that the claim was brought with the 'sole object' of ousting the jurisdiction of another court or that the basis of the joinder was fraudulent. The preliminary hearing took place in the Technology and Construction Court (TCC) (a specialist division of the English High Court). The presiding judge, Coulson J., concluded that this test was not met. He found that the plaintiffs had presented a 'thoughtful, and detailed attempt' to establish Vedanta's (direct) liability.[46]

To establish Vedanta's direct liability, the plaintiffs had to demonstrate that they had an arguable case that Vedanta owed a duty of care to affected local communities in the area of the mine, and that they breached this duty through their actions and/or

[45] *Lungowe* (n 1); *His Royal Highness Emere Godwin Bebe Okpabi and Others v. (1) Royal Dutch Shell Plc. and (2) Shell Petroleum Development Company of Nigeria* [2017] EWHC 89 (TCC); [2018] EWCA Civ 191 and *AAA and Others v. (1) Unilever Plc. and (2) Unilever Tea Kenya Ltd.* [2017] EWHC 371 (QB); [2018] EWCA Civ 1532.
[46] *Lungowe* [2016] (n 1) para. 121(c).

omissions. Such a duty of care has only been established once at trial, in *Chandler*. As discussed above, this was a domestic case and the plaintiff was a former employee of Cape Plc.'s subsidiary. The plaintiffs sought to extend the *Chandler* duty of care to their international claim, and towards themselves as members of the people living in the vicinity of the subsidiary company's operations. Since the arguments about jurisdiction were made at a preliminary hearing, the plaintiffs only needed to show that there was an arguable case that the parent company had a duty of care to them. Their difficulty was in finding evidence to demonstrate an arguable case, at this preliminary stage prior to discovery in the litigation had taken place, meaning that they were reliant on documents available in the public domain, and the witness testimony of a whistle-blower.

The judge's conclusion that the plaintiffs made a thoughtful, and detailed attempt to establish Vedanta's direct liability was premised on four pieces of evidence, which pointed towards there being sufficient proximity between the parent company and the plaintiffs to found a duty of care.[47] The first was Vedanta's sustainability report.[48] The court held:

> This document stresses that the oversight of all Vedanta's subsidiaries rests with the Board of Vedanta itself. The report also expressly refers to problems with discharges into water. That section of the report makes an express reference to the particular problem at the mine in Zambia, and states that 'we have a governance framework to ensure that surface and ground water do not get contaminated by our operations.'[49]

The other three pieces of evidence were the management agreement between Vedanta and KCM, which states that a number of services including project development and management, are provided by Vedanta; a decision of an Irish court which considered the important role of the parent company's employees in the Vedanta corporate group; and the witness statement of a former KCM employee (and whistle-blower) which provided direct evidence of Vedanta's control over KCM.

The company appealed. The Court of Appeal unanimously upheld the first instance decision. Simon LJ, giving the lead judgment, noted that the circumstances giving rise to the duty of care may be present where the parent company '(a) has taken direct

[47] As noted above, 'proximity' is one of the tests from *Caparo* for determining new tortious duties of care.
[48] *Lungowe* [2016] (n 1) para. 119.
[49] ibid.

responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim; or (b) controls the operations which give rise to the claim.'[50] The evidence that the parent had invested heavily in the subsidiary (arguably beyond a conventional parent-subsidiary relationship) and that it had direct and substantial oversight of the subsidiary's operations in question in the litigation was sufficient to demonstrate an arguable case based on control against the parent company. As one commentator correctly identifies:

> [T]he Court of Appeal was persuaded by the evidence on Vedanta's direct training, administrative, financial, strategic and environmental support in the implementation of KCM's mining infrastructure and by statements regarding the commitment to address environmental problems resulting from KCM's operations.[51]

Vedanta appealed this decision and the U.K. Supreme Court heard the appeal in January 2019. A decision is expected imminently, and is eagerly anticipated. As the first of the trilogy of cases to be heard on appeal, the Supreme Court decision is expected to clarify the features relevant to deciding whether a parent company owes a duty of care, a point on which the three Court of Appeal judgments are not always clear.

Okpabi v. Shell

These are parallel claims brought on behalf of the inhabitants of two communities: the Ogale Community and the Bille Kingdom in Ogoniland, Nigeria, which consists of around 40,000 people. Over several years there have been repeated oil spills from Shell's pipelines in Ogoniland, many of which have not been cleaned up. The plaintiffs seek compensation through their suit for 'damages arising as a result of serious and ongoing pollution and environmental damage caused by oil spills emanating from the defendants' oil pipelines and associated infrastructure'.[52] The losses suffered include damage to land, and injury to livelihood and health. The case against the U.K.-registered Royal Dutch Shell Plc. (RDS) is based on the common law of negligence and asserts that RDS breached its duty of care to ensure that its subsidiary Shell Petroleum Development Company of Nigeria's operations in the Niger Delta did not cause harm

[50] ibid, para. 83.
[51] Ekaterina Aristova 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction' (2018) 14(2) Utrecht Law Review 6, 13.
[52] Okpabi [2017] (n 45) para. 13, citing the Particulars of Claim.

to the environment and their communities.[53] Negligent management is alleged both in relation to maintenance of the pipeline and facilities to acceptable standards, and to taking effective measures to protect them from interference by third parties, in the form of unlawful siphoning off of oil, which has also involved damage to the pipeline and other facilities, and consequent spillage of oil. Shell challenged the jurisdiction of the English courts to hear the case, and the matter came for a preliminary hearing before the TCC. The judge presiding, Fraser J., ruled that the case could not proceed. As with *Lungowe*, the plaintiffs needed an arguable case against the U.K.-registered parent company, in order to be able to bring proceedings against it and its subsidiary the Shell Petroleum Development Company of Nigeria (SPDC) in the English courts. This is because RDS is the so-called 'anchor defendant' (the defendant in the jurisdiction).

The decision that there was not an arguable case was premised on the fact that RDS has distanced itself from the operational side of oil production. In particular, it has done this through a restructure in 2005, which made RDS 'the ultimate holding company of the Shell group of companies'.[54] It has no employees and its role is (a) holding shares in its subsidiaries and investments; (b) setting the overall strategy and business principles for the Shell Group of companies; (c) reporting on the consolidated performance of the Shell Group of companies, making appropriate disclosures to the markets, and maintaining relationships with investors and (d) holding responsibility for approval of changes to the capital and corporate structure of the Shell Group of companies. In view of this limited role, the judge accepted the company's argument that RDS is not operating the same business as SPDC (one of the tests from *Chandler*).[55] He also accepted that RDS did not have more specialist knowledge compared to SPDC and that there was no evidence that SPDC relied on RDS for its superior knowledge. 'SPDC is a wholly autonomous subsidiary with considerable income and sizeable assets of its own.'[56] The judge found that 'RDS simply has no experience whatsoever of oil operations in Nigeria, which is an extraordinarily difficult place to carry on such activities.'[57]

[53] ibid. There are related claims made against the subsidiary, Shell Petroleum Development Company of Nigeria.
[54] ibid, para. 83.
[55] ibid, para. 116.
[56] ibid.
[57] ibid, para 117.

The plaintiffs appealed. In a split decision, the Court of Appeal upheld the first instance judgment that the plaintiffs had not established an arguable case that RDS had a duty of care to the Nigerian communities affected by the pipeline. Giving the lead judgment, Simon LJ made a distinction between a parent company that controls material operations of its subsidiaries, and a parent company that issues mandatory policies and standards for application throughout the corporate group, in order to ensure conformity with particular standards.[58] Even though there was a centralized system of mandatory design and engineering in place across Shell subsidiaries, this did not support a finding that RDS exercised control over SPDC's operations, a necessary first step to support a duty of care.[59] '[T]he concern was to ensure that there were proper controls and not to exercise control.'[60] Sir Geoffrey Vos, concurring with Simon LJ, emphasised that the parent company was just a minority shareholder, that 'the corporate structure itself tends to militate against the requisite proximity' needed for a duty of care to arise,[61] and concluded that the evidence fell short of Shell 'assuming responsibility for, or controlling the day-to-day operations of SPDC.'[62]

The dissenting judgment of Sales LJ provides a contrasting viewpoint. The judge held that the plaintiffs had shown at the preliminary stage that they had a good arguable case that RDS owed them a duty of care at the times material to the case.[63] He found evidence to support an arguable case that RDS had assumed control or shared control over the pipeline through organization of Shell's global affairs which included centralized control over operations in Nigeria; the powers of the RDS Executive Committee to control the subsidiary's operations and RDS's public statements on the protection of the environment and health. He concurred with the other judges that 'simply setting global standards (even those which purport to be mandatory) to guide the conduct of operating subsidiaries would not be sufficient to lead to the imposition of a duty of care on RDS.'[64]

[58] Okpabi [2018] para. 89.
[59] ibid, paras. 118-129.
[60] ibid, para. 125.
[61] ibid, para. 205.
[62] ibid.
[63] ibid, para. 134.
[64] ibid.

But he attached greater importance to the global standards than his colleagues on the bench:

> [The global standards] are significant in the context of the [plaintiffs'] case overall. This is because the existence of such standards was capable of providing a mechanism for the projection of real practical executive control by RDS's CEO and ExCo [Executive Committee] over the affairs of SPDC, if they wished to.[65]

In reaching his conclusion in favour of the plaintiffs, Sales LJ relied upon Shell's sustainability report which showed oil spills in the Niger Delta were the group's worst reported spills and he took into account the fact that part of the remuneration of members of RDS's Executive Committee was linked to their success in controlling environmental damage, thus making them personally interested in ensuring that they could exercise effective control in managing that risk. Using arguments built on Sales LJ's dissent, the plaintiffs have appealed the decision to the Supreme Court.

AAA v. Unilever

The facts of the Unilever case are quite different from those of the other two cases in the trilogy. After the Kenyan presidential election in 2007, there was a wave of violence throughout the country. Riots spread onto a tea plantation owned by one of Unilever's subsidiaries, Unilever Tea Kenya Ltd. (UTKL). The rioters committed a number of atrocities there including rape and murder. The claimants are tea plantation workers who fell victim to these violent acts, and family members of workers who were killed in the violence. They sued Unilever and UTKL in England, where Unilever is registered, alleging that the former, as 'anchor defendant' owed them a duty of care and breached that duty by failing to put in place adequate crisis management policies. On the question whether Unilever owed a duty of care the trial judge in the High Court, Laing J., found that the damage that occurred on the tea plantation was not foreseeable by either Unilever or UTKL.[66] Foreseeability is one element of the test for a duty of care in a novel situation from *Caparo*. Another element, proximity, was found to be present and Unilever's corporate structure was distinguishable from that of Vedanta and Shell.

[65] ibid, para. 161.
[66] Unilever [2017] (n. 45).

The Court of Appeal upheld the first instance decision on foreseeability but overturning the decision on proximity, finding that there was no proximity between the plaintiffs and Unilever. Sales LJ wrote the only judgment for the court. He identified two categories of cases where a parent company would owe a duty of care: (1) where the parent company has in substance taken over the management of the relevant activity; or (2) the parent company has given relevant advice to the subsidiary about how it should manage a particular risk. The latter was potentially applicable. He examined the policies that the company had in place in respect of risk management and found that those provided by the parent company were high-level, generic documents which left the specifics to be established at the local level by the subsidiaries. Riots like those that occurred in 2007 had not happened on the tea plantation before. Unilever did not hold superior knowledge on local political or ethnic matters. For these reasons there was no proximity and the appeal was rejected. The plaintiffs have appealed the decision to the Supreme Court.

Discussion of the trilogy of cases and their implications for parent companies

The English courts are applying a high threshold in holding parent companies to account for actions taken by their subsidiaries overseas: that the parent company controls the operations that give rise to the claim or that the parent company has given relevant advice to the subsidiary about how it should manage the particular risk that materialized. Although the approach taken by the English courts has not been inconsistent, it may give rise to some degree of uncertainty for international companies trying to understand the scope of their accountability for subsidiaries operating abroad. For instance, the focus on whether the parent company actively controlled the subsidiary's day-to-day operations in *Okpabi* (Sir Geoffrey Vos, noted above) does not find support in the other cases, and represents are more rigorous standard than 'control' (*Lungowe*) (also described as 'management' in *Unilever*). The emphasis on the corporate structure militating against the requisite proximity in *Okpabi* (Sir Geoffrey Vos, noted above) sounds, as one commentator put it, like a presumption against liability resulting from the formality of the corporate structure as

it is organized on paper.[67] The same commentator rightly criticizes such a presumption:

> One might further question whether such a presumption detaches the common law from modern corporate realities: complex structures across multiple jurisdictions, often overlaid with business teams and individuals working in various capacities. It is suggested that parent company liability cases should instead turn on the overall reality of a situation, rather than attaching any unwarranted legal presumption.[68]

The trend for these cases is to be won or lost on the evidence – or, critically, the absence of evidence – presented to the court about the interaction between parent and subsidiary. For this reason companies have raised the concern that their human rights policies and reports are being used against them to evidence their involvement in their subsidiaries' operations.[69] In at least one example, a company has gone so far as to use disclaimers in its reports to seek to exclude liability for the report's contents: in *Okpabi* the dissenting judge rejected this as being an effective disclaimer.[70] It is clear from the preceding discussion of the trilogy of cases that more than a centralized policy is required for a duty of care to be arguable, however. Companies that decide to have greater involvement in their subsidiaries' operations for instance to protect and ensure the sourcing of a valuable commodity such as a significant copper mine (*Lungowe*) will have to take substantive steps to make this happen, and it is these steps that potentially expose them to liability risk, not the company's sustainability policy. Corporate lawyers Hogan Lovells correctly identify the interests at stake:

> this line of cases adds to the management's concerns on how to minimize legal risks while maintaining effective control of operations in the different parts of the world … [In recognition of] the need to ensure consistency among the operating entities in the implementation of the parent entity's worldwide policies .. careful planning of the level of involvement of the subsidiaries is required.[71]

What is said in reports to reassure investors and other stakeholders that the centre is maintaining effective control over the component companies within a corporate group

[67] Russell Hopkins, 'Parent Company Liability: Where Are We Headed?' Bright Line Law Bulletin, November 2018.
[68] ibid.
[69] At the World Law Forum Conference on Arbitration of Business and Human Rights Disputes held in London on March 22, 2019, a speaker talked about the quandary faced by companies, saying that it is undeniable that companies that hold themselves to higher human rights standards are at greater risk of claims being brought against them.
[70] *Okpabi* [2018] (n. 45) para. 153 (iii).
[71] Hogan Lovells, 'When is a parent company liable in tort for acts of its subsidiary? *AAA and Others v. Unilever Plc. and Another* [2018] EWCA Civ 1532' (August 2018).

should be a good faith reflection of reality. If the corporation benefits from reassured investors, it must also be prepared to expect complaints and even lawsuits from those affected by its overseas operations that seek to challenge the outcome of activities controlled from the centre on workers and local communities.

Courts examine sustainability / human rights reports when determining if there is an arguable case for a duty of care because this legal question is currently being determined in preliminary hearings prior to discovery taking place. This means that plaintiffs are not in a position to adduce different evidence of the relationship between parent and subsidiary such as internal emails, board meeting notes etc. But the reason why these questions are being determined at a preliminary stage is that corporations have adopted the litigation tactic of challenging jurisdiction. In these circumstances it is arguably disingenuous to complain that sustainability / human rights reports are being used in evidence against them.

As already noted, the fact pattern in *Unilever* is distinct from *Okpabi* and *Lungowe*. The only transnational tort case to proceed to trial in this area, *Kalma v. African Metals Ltd.*,[72] also concerned criminal violence perpetrated by a third party. In this case the legal analysis focused on tort liability for failing to prevent the criminal acts of others, rather than the *Chandler* precedent used in the trilogy of cases.[73] After the substantive trial of the issues, the judge found against the plaintiffs. Although the decision is heavily fact-based, it demonstrates how difficult such cases are to prove (or, from a corporate perspective, how easily they are to successfully defend). The case concerns a project to construct an iron ore mine in Sierra Leone. The company created the infrastructure to mine and transport the iron ore but their work was not without significant local controversy, leading to unrest. The Sierra Leone Police (SLP) reacted with brutality towards the protesters, committing violations such as rape, beatings, and shootings. The 142 plaintiffs in the litigation claim that they are victims of these violations. Their case was put on three primary grounds: vicarious liability, accessory liability, and direct negligence liability. The judge found against the plaintiffs on all

[72] *Kalma v. African Minerals Ltd. and Others* [2018] EWHC 3506.
[73] Tort law on failure to prevent the criminal acts of others was discussed at first instance in *Unilever* but the judge applied Kenyan law, which is different from the equivalent English law (n 45). In contrast, the law of Sierra Leone was the applicable law in *Kalma*, but the parties agreed that that in respect of liability, the law of Sierra Leone could be treated for all practical purposes as being identical to that of England and Wales.

three grounds. In respect of the direct negligence claim against the parent company, the judge did not find that the evidence supported the allegation that the company was involved in the SLP's negligent acts, despite the fact that agents of the company called the SLP when the unrest broke out, and provided material assistance to the SLP in carrying out its violent operations. The general rule that there was no duty of care for the acts of third parties (here the SLP) applied. The judge was not prepared to extend the duty of care to a novel situation such as this. The failure of the plaintiffs to win their case at trial is a stark reminder of the legal challenges faced in transnational tort cases in England, despite this being the primary venue for transnational tort litigation outside the U.S.

Emblematic tort cases drawn from different jurisdictions

This section of the paper does not attempt to provide a comprehensive description of tort cases from different jurisdictions, but instead seeks to identify certain trends in the litigation.

Civil law jurisdiction cases in which English common law is the applicable law

The application of English common law precedent to claims brought in civil law jurisdictions is a distinctive trend among transnational tort cases. For instance, in the Dutch case of *Akpan v. Royal Dutch Shell*,[74] the applicable law was Nigerian law, which draws on English law precedent. The facts in *Akpan* were similar to those in *Okpabi*: the allegations concern oil spills and pollution in the Niger Delta and the defendant corporations are Royal Dutch Shell Plc. (the Anglo-Dutch parent company)[75] and Shell Petroleum and Development Company Ltd. (the Nigerian subsidiary). A major difference is that *Akpan* is not a class action like *Okpabi*, but rather a claim by a single fisherman. The suit alleges that the oil spills he complained of were due to a lack of maintenance of a wellhead and inadequate safety measures to prevent sabotage. At trial the District Court of The Hague, applying Nigerian law and, by extension, English

[74] *Akpan v. Royal Dutch Shell Plc*., Court of Appeal, The Hague, 17 December 2015, ECLI:NL:GHDHA:2015:3587.
[75] Although RDS is registered in the U.K., the Dutch courts can assert jurisdiction over it because the company is actually headquartered in the Netherlands, and such jurisdiction in permissible under arts. 4 and 63(1) of the Brussels I Regulation (recast), Regulation (EU) No 1215/2012 of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

law, had to apply the *Caparo* test and the principles from the case of *Chandler* to the facts at hand. The court decided that RDS was not engaged in the same business as SPDC because it was not engaged in oil production in Nigeria like SPDC. Therefore the parent was not expected to have better knowledge regarding the prevention of risks from harm of oil spills and pollution, meaning that there was no proximity between the parties to found a duty of care. The court also found no reason to depart from the principle in Nigerian (and English) tort law that there is no general duty of care to prevent others from suffering harm as a result of the activities of third parties. It did find against SPDC, however, making this the only transnational tort claim against a TNC to succeed at trial. This case is now the subject of appeals both by the plaintiff and the defendants.

While an English court might not have adopted certain of the reasoning of the Dutch court (for example, the Dutch court's acceptance of the defendants' 'floodgates' argument that liability should be denied because there was an indeterminate number of potential plaintiffs) the Dutch court's restrictive approach to proximity was later mirrored by the English courts in *Okpabi*. *Akpan* is not legal precedent for the English courts, but it is certainly conceivable that the courts in *Okpabi* were aware of the Dutch decision. Another case concerning oil pollution in the Nigeria is currently before the Italian courts. Nigerian law and, by extension, English common law is the applicable law and the plaintiffs allege that the parent company is directly liable in negligence.[76] It remains to be seen if the Italian courts will adopt a similar stance to that of the Dutch and English courts in *Akpan* and *Okpabi*.

Another case in which English common law precedent has been applied in a civil law jurisdiction is *Jabir v. KiK*.[77] A novel feature of this case that differentiates it from the cases discussed so far is that it concerns a first tier supplier, not a subsidiary.[78] When corporations' overseas operations are conducted contractually through suppliers and licensees, it becomes even more difficult to attribute direct liability to the parent

[76] Essex Business and Human Rights Project, 'Legal Opinion on English Common Law Principles on Tort Case: *Ododo Francis Timi v. ENI and Nigerian Agip Oil Company (NAOC)*' (February 7, 2018).
[77] *Jabir v. KiK* (n. 21).
[78] Another such case is *Das v. George Weston Ltd*. 2018 ONCA 1053 – a Canadian case concerning the collapse of the Rana Plaza building in Bangladesh that was dismissed by the courts.

company (known as the lead company).[79] In *Jabir*, the plaintiffs attempt to persuade a German court that the principles from *Chandler* apply when the relationship between the companies is one of contract rather than of equity. The plaintiffs are victims of a fire in a textile factory in Pakistan run by a Pakistani company called Ali Enterprises (AE), and the families of those who died in the fire. KiK is a German low-cost apparel retailer. AE produced almost exclusively to KiK. The allegation in the case is that many of the factory windows were barred, the emergency exits locked, and the building had only one unobstructed exit, impeding the exit of employees who, as a consequence, suffocated or were burned alive inside. The factory had recently been the subject of a health and safety audit by an Italian social auditing firm, acting on behalf of KiK. These safety problems were not identified. The plaintiffs sued the company in Germany for compensation for personal injury and death. Pakistani law, which is the applicable law in the case, is derived from the common law, meaning that English law precedent is used in novel cases.

A brief on the applicable law that was submitted to the German court argues that the case deals with the responsibilities of purchasers of goods from suppliers in situations in which there is not the 'arm's length' relationship characteristic of most such commercial situations.[80] It alleges that KiK was in a position similar to that of the parent, Cape Plc., in *Chandler*. It had made a commitment to the health and safety policy to be followed by AE; it had enough potential influence over the supplier making it able to fully implement its standards had it wished to; it had, via its auditor, specialist knowledge of the criteria for distinguishing adequate from inadequate factory safety provisions which AE did not have; and it was in a line of business that overlapped with that of AE sufficiently to make it fair that its knowledge and experience should be brought to bear on the improvements sought. The joint effect of this superior knowledge of current safety criteria, taken together with its failure to intervene to rectify working conditions, created an environment in which AE relied on KiK's guidance and was encouraged to continue its workplace practices due to the absence of pressure from KiK.

[79] Anil Yilmaz-Vastardis and Sheldon Leader, 'Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains: A Legal Guide' (Legal Guide, Essex Business and Human Rights Project, University of Essex, December 2017) <http://repository.essex.ac.uk/21636/1/Improving-Paths-to-Accountability-for-Human-Rights-Abuses-in-the-Global-Supply-Chains-A-Legal-Guide.pdf .

[80] Essex Business and Human Rights Project, 'A legal opinion in the case of Jabir and others v KiK Textilien' (December 7, 2015).

The case did not reach trial however, meaning that these careful arguments on lead company liability were not ventilated. Having been granted legal aid by the court on the basis of an arguable case, the court later dismissed the case because the statute of limitation had expired. The outcome of the litigation was therefore reached on process rather than substance, a decision which the plaintiffs regret, and that they have appealed.

Canadian cases against mining companies

As the major global center for mining companies, Canada has been a key jurisdiction for bringing claims against parent companies in this sector. *Choc, et al v. HudBay Minerals, Inc.*[81] is one such case. The allegation that lies behind this litigation is that the security personnel at HudBay Minerals' former mining project in Guatemala engaged in numerous human rights abuses, including the killing of an outspoken critic, the shooting of another, and rape of local women. The plaintiffs' main argument alleges HudBay's direct involvement in some of the wrongful conduct by its subsidiary (direct parent company liability). In the alternative, they seek to pierce the corporate veil. The case has survived a preliminary challenge on the basis of *forum non conviens* and a strike out application on the merits of the claim. With regard to the allegation of direct negligence against the parent company, the court ruled there was sufficient evidence to argue proximity between the plaintiffs and defendants based on statements made by Hudbay asserting its direct involvement and its high level of direct operational oversight of the subsidiary.[82] The court granted Amnesty International Canada intervenor status in the litigation.[83] Amnesty International cited the English case law to support its argument that parent company liability is not new to tort law, and that the imposition of a duty of care was therefore foreseeable to the corporate defendants.[84] This argument, and the relevance of the English law precedent, will be considered when this case is heard at trial.

[81] *Choc, et al v. HudBay Minerals, Inc*. 2013 ONSC 1414 (July 22, 2013).

[82] Hudbay, paras. 69 and 70.
[83] ibid, para. 3.
[84] *Choc, et al v. HudBay Minerals, Inc*., Factum of the Intervenor, Amnesty International Canada, para. 25.

In *Araya v Nevsun Resources Ltd.*[85] the plaintiffs, three Eritrean refugees, claim on behalf of themselves and more than 1,000 Eritrean workers, that Nevsun is liable in negligence and for breaches of customary international law including forced labor, torture, slavery, and crimes against humanity. The claims relate to Nevsun's alleged complicity in the use of forced labor at a mine site in Eritrea. The mine is jointly owned by Nevsun (60%) and the Eritrean state (40%). The Eritrean state drafted labor using its National Service Program – a system known to amount to use of forced labor. An attempt by Nevsun to have the claims under customary international law struck out was unsuccessful, the court finding it at least arguable that customary international law forms part of Canada's common law, and rejecting the defendant's defences based on act of state and *forum non coneniens*.[86] This decision was the subject of an appeal to the Supreme Court of Canada which was heard in January 2019. Thus, as with the English jurisdiction, the issues in parent company liability cases are receiving the highest level of judicial attention. As with *Lungowe*, the judgment is eagerly awaited.

The U.S.

The U.S., through the Alien Tort Statute, has been the dominant jurisdiction in the field of transnational human rights litigation for a number of years. After the Supreme Court curtailed the use of the Alien Tort Statute in *Kiobel v. Royal Dutch Shell*,[87] however, there has been renewed interest among the U.S. academy in state common law tort claims as a vehicle for this litigation.[88] In *Kiobel*, the Supreme Court famously held that the principles underlying the presumption against the extraterritorial application of domestic statutes also apply to the ATS. *Jesner v. Arab Bank*[89] further curtailed use of the statute, the Supreme Court ruling that foreign corporations may not be defendants in ATS claims, and leaving open the question whether claims can be brought against U.S. companies.

[*Discussion of Acuña-Atalaya v. Newmont Mining Corp will go here*].

[85] *Araya v. Nevsun Resources Ltd.* [2017] BCCA 401.
[86] ibid, paras. 177-197.
[87] *Kiobel v. Royal Dutch Petroleum Co*, 133 S Ct 1659.
[88] See, for example, the special issue of the UC Irvine Law Review, volume 3, issue 1 (2013) and Roger Alford, 'Human Rights Litigation After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation' 63 (2014) Emory Law Journal 1089.
[89] *Jesner v. Arab Bank*, 584 U.S. __, 24 (2018).

It is noteworthy that the dismissal of the *Kiobel* litigation in the U.S. has prompted the plaintiffs to seek access to remedy in another jurisdiction – the Netherlands. In June 2017 they launched a civil case against RDS making the same allegations as were the subject of the U.S. proceedings, namely that the company was complicit in the 1995 execution of Ogoni activists who contested Shell's operations and the Nigerian Government over the effects of oil pollution. A trial took place on February 12, 2019.

Discussion:

- Global trends: I concur with opinion that 'the overarching pattern appears to be one in which judges are reluctant to extend responsibility to parent corporations. Instead, there is an apparent deference to the general goal of promoting investment abroad, anxiety over imposing burdensome liability on local corporations, and adherence to the view of a TNC as a disaggregated and decentralized entity.'[90] My assessment is that the litigation risk that corporations face is fairly weak.

- Imminent *Lungowe* decision may however represent a slow directional change if the U.K. Supreme Court upholds the direct parent company negligence finding from the Court of Appeal. A significant message and one that, as seen in this paper, will have repercussions beyond the English jurisdiction.

- What should companies do when faced with the litigation risk of transnational tort claims?

- Companies that do less to 'know and show' their human rights impacts, per the UNGPs, are not recognizing the changing policy landscape, the latter expressed in such terminology as 'societal expectations' and 'licence to operate' but potentially having financial and, increasingly, legal consequences.

[90] Andrew Sanger, 'Transnational Corporate Responsibility in Domestic Courts: Still Out of Reach?' (2019) AJIL Unbound 113, 8.

- Financial impact primarily related to brand protection and meeting the expectations of social investors (including those working in mainstream investment with a social portfolio). These are not insignificant considerations for many corporate actors.

- Existing obligations under reporting / non financial disclosure law already require certain companies to report on human rights and environmental due diligence throughout the corporate group.[91]

- The (slow) direction of travel is towards mandatory human rights due diligence obligations for corporations of a certain size. A recent report on access to remedies in the EU recommends that member states adopt human rights due diligence laws like French law.[92] Another recent report says it is 'highly likely' that we will see more due diligence regulation in the near future.[93]

- Thus companies are best prepared to face the litigation risk not by turning away from their subsidiaries, but by setting human rights and environmental standards and using their best efforts to ensure that their subsidiaries adhere to them.

[91] Rachel Chambers and Anil Yilmaz-Vastardis, 'The new EU Rules on Non-financial Reporting: Potential Impacts on Access to Remedy?' (2016) 10 Human Rights and International Legal Discourse – Special Issue, the Corporate Responsibility to Respect Human Rights: the Emerging European Union Regime 26

[92] EU Directorate-General for External Policies, Policy Department Study, 'Access to legal remedies for victims of corporate human rights abuses in third countries', section 6.2.

[93] Global Business Initiative and Clifford Chance LLP, 'Business and Human Rights: Navigating a Changing Legal Landscape' (March 2019) 6.