Developments in the Field

Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability

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I. Introduction

Victims of corporate human rights abuses face serious obstacles to obtaining an effective legal remedy. While host state courts often remain the preferred forum for pursuing legal redress, factors such as lack of due process, political interference, mistrust of the courts or absence of affordable legal assistance mean that a claim in the host state may be unviable. In these instances, claimants must be able to turn to the courts in the home state to secure justice. The barriers to pursuing this type of transnational litigation have been documented extensively.[1]

On 10 April 2019, the United Kingdom (UK) Supreme Court delivered its judgment in *Vedanta Resources PLC v Lungowe*.[2] A few weeks later, on 1 May 2019, a Dutch court issued an important decision in the *Kiobel v Shell* case.[3] The rulings in *Vedanta* and *Shell* are a significant development and may pave the way for a more fundamental breakthrough in terms of access to home state courts. At the same time, however, similar jurisdictional issues remain unresolved in other ongoing claims. In this piece, we analyse the commonalities and wider implications of these two decisions, and draw lessons for domestic regulation as well as for the proposed treaty on business and human rights.

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[1] Daniel Blackburn, 'Removing Barriers to Justice: How a Treaty on Business and Human Rights Could Improve Access to Remedy for Victims' (Amsterdam: SOMO, 2017); Amnesty International et al, 'Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse' (4 September 2017), https://www.business-humanrights.org/sites/default/files/documents/AI_BHRRC_Elaborating_Solutions_Report_Template_1%20Sep%202017.pdf (accessed 28 August 2019).

[2] *Vedanta Resources PLC v Lungowe* [2019] UKSC 20.

[3] *Esther Kiobel v Royal Dutch Shell PLC* [2019] ECLI:NL:RBDHA:2019:4233.

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II. Jurisdiction in Parent Company Accountability Cases

In European private international law, the Brussels I Recast Regulation establishes harmonized rules on jurisdiction for civil liability claims filed against entities domiciled in European Union (EU) member states.[4] Under Article 4 of this Regulation, EU domiciled defendants may be sued in the courts of the country where they are domiciled. In 2005, a European Court of Justice ruling in *Owusu v Jackson* eliminated the possibility for Member State courts to 'decline to exercise the jurisdiction conferred on them by Brussels I Regulation on the basis that another forum would be more appropriate to hear the claim',[5] bringing an end to the *forum non conveniens* doctrine in the EU.

In recent years, civil claims in Europe for corporate human rights abuses in non-EU countries have relied on the Brussels I Regulation. However, the Regulation's scope of application is limited to European defendants. Therefore, residual jurisdiction over non-EU entities, including foreign subsidiaries of European companies, will be determined by domestic private international law rules of the forum.[6] This has enabled the recent re-emergence of jurisdictional challenges based on arguments relating to the appropriateness of an EU forum for hearing cases concerning foreign defendants. Notwithstanding these challenges, the English and the Dutch courts accepted jurisdiction in *Vedanta* and *Shell*, respectively.

A. *Vedanta v Lungowe* in the UK

In August 2015, 1,826 Zambian villagers filed a claim against mining company Vedanta and its Zambian subsidiary, KCM, in the High Court in London. The claimants alleged that as a result of the toxic effluent discharge from the KCM-operated Nchanga Copper Mine, they have suffered loss of income through damage to the land and waterways on which they rely.[7] They further contended that many villagers have suffered personal injuries as a result of having to consume and use polluted water. KCM and Vedanta's applications challenging the jurisdiction of the English courts were dismissed at the first stage and at appeal. The defendants' final appeal to the Supreme Court was dismissed in April 2019. The effect of the judgment is that the claims against both Vedanta and KCM can proceed in England.[8]

As part of the appeal, the Supreme Court considered whether England was the proper place to bring the claim against KCM, given that Vedanta had offered to submit to the Zambian jurisdiction, which would have allowed the whole case to be tried there. Lord Briggs considered that 'Zambia would plainly have been the proper place for this litigation as a whole, provided substantial justice was available to the parties in

[4] Axel Marx et al, *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries* (February 2019), 34, http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf (accessed 28 August 2019).

[5] Ibid.

[6] Ibid.

[7] Leigh Day, 'Supreme Court Rules Zambian Villagers' Case Against Vedanta to be Heard in English Courts' (10 April 2019), https://www.leighday.co.uk/News/2019/April-2019/Supreme-Court-rules-Zambian-villagers-case-against (accessed 28 August 2019).

[8] Ibid.

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Zambia'.[9] He went on to conclude, however, that this would not be the case because (i) the impoverished claimants would be unable to access funding to bring a group claim as they could not obtain legal aid and further conditional free agreements are unlawful, and (ii) Zambia lacks legal teams experienced in handling large and complex litigation, particularly against a well-resourced corporate defendant.[10]

B. *Kiobel v Shell* in the Netherlands[11]

Esther Kiobel and three other women sued oil giant Shell in the Netherlands over what they claim was Shell's involvement in the unlawful arrest, detention and execution of their husbands by the Nigerian military, following a crackdown on Ogoni protests against Shell's pollution of the Niger Delta. Shell argued that the legal requirements to enable the Dutch court to hear the claims against the Nigeria-based subsidiary had not been met, and that there was no basis for a joint handling of the claims because the claims against the European 'anchor defendant' were bound to fail. On 1 May 2019, judges at the District Court of the Hague allowed the case to go forward, rejecting the jurisdictional challenges from Shell.[12]

In the *Shell* ruling, the court accepted that the claims against the Dutch parent company and its Nigerian subsidiary are based on mainly the same facts and legal grounds, and that consequently there is such a connection between the claims against the individual defendants that a joint hearing is justified for reasons of efficiency. This is sufficient reason to assume jurisdiction under Dutch law. The Dutch courts had largely followed the same reasoning when assuming jurisdiction in another case against Shell by Akpan and Milieudefensie a few years earlier.[13]

III. Duty of Care

Gregor has analysed the situation in several European jurisdictions with regard to access to judicial remedies for victims of business-related human rights abuses involving European companies. For the UK, he concludes that:

> tort claims for corporate human rights abuses have been brought as negligence cases against parent companies for harms arising from the activities of their subsidiaries. Litigators have tried to establish that in circumstances where a connection can be made between an alleged harm and the parent company's responsibility for particular functions or deficiencies in functions within the corporate group, the parent company

[9] *Vedanta Resources PLC*, note 2, para 87.

[10] Ibid, paras 89 and 100.

[11] Ms Kiobel's earlier case against Shell, filed in the United States in 2002, came to an end when the US Supreme Court ruled that it did not have jurisdiction to hear it.

[12] Amnesty International, 'Nigeria/Netherlands: Shell Ruling "A Vital Step Towards Justice"' (1 May 2019), https://www.amnesty.org/en/latest/news/2019/05/nigerianetherlandsshell-ruling-a-vital-step-towards-justice/ (accessed 5 September 2019). The judgement is available in English at: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2019:6670.

[13] *Friday Alfred Akpan and Vereniging Milieudefensie v Royal Dutch Shell PLC and another*, District Court of the Hague [2013] ECLI:NL:RBDHA:2013:BY9854; Court of Appeal of the Hague [2015], http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2015:3586 (also in English).

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> may owe a duty of care to those adversely affected. The notion of the parent company's duty of care has gained increasing traction in the UK, not least since the 2012 Court of Appeal ruling in *Chandler v Cape* which held that, under certain circumstances, a parent company could owe a legal duty of care to employees of its subsidiaries.[14]

Under Dutch law, a similar framework applies, wherein a parent company may be liable if it has a degree of knowledge of and control over the activities of its subsidiary that caused the damage. However, in the Shell cases in the Netherlands, the Dutch courts applied Nigerian law, which in turn incorporates the notion of a duty of care in the UK as described above.

In several recent international corporate accountability cases, corporate defendants have adopted a legal strategy of interweaving jurisdictional challenges with arguments that they do not owe a duty of care to claimants harmed by their subsidiaries. They contend that as the UK parent is the 'anchor defendant' linking the case to the jurisdiction, if there is no case against the parent – because it has no duty – then the case against the subsidiary, which is a foreign entity, cannot proceed. Shell has made this argument both in the cases pending in the UK and in the Netherlands. Shell's argument succeeded at the UK's Court of Appeal in *Okpadi v Shell*,[15] but not at the Dutch Court of Appeal in *Akpan, Milieudefensie v Shell.*[16] It is worth noting that duty of care was not an issue in the *Kiobel v Shell* case in the Netherlands, which is a human rights case, rather than a claim for negligence.

A similar argument was made in the *Vedanta* case. In its submission to the Supreme Court, Vedanta's lawyers argued that there was no real triable issue against the company, primarily on the basis that Vedanta did not owe the claimants an arguable duty of care under English law. In his judgment, Lord Briggs summarized the critical question as '… whether Vedanta sufficiently intervened in the management of the Mine owned by its subsidiary KCM to have incurred, itself (rather than by vicarious liability), a common law duty of care to the claimants…' .[17] Vedanta's argument that a parent company could never incur a duty of care in respect of the activities of a subsidiary by simply setting group-wide policies and guidelines, and expecting the subsidiaries' management to comply with them, was rejected by the Court. Instead, the Court identified three routes by which a parent company could potentially incur a duty of care to individuals who are harmed by the operations of its foreign subsidiary by laying down group-wide policies and guidelines: (i) disseminating defective or inadequate group-wide policies and guidelines; (ii) taking active steps to implement group-wide policies; and (iii) by formulating such policies, holding itself out as exercising supervision and control of its subsidiaries, even if it does not in fact do so.[18]

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[14] Filip Gregor et al, 'The EU's Business: Recommended Actions for the EU and its Member States to Ensure Access to Judicial Remedy for Business-Related Human Rights Impacts' (December 2014), https://corporate-responsibility.org/wp-content/uploads/2015/02/eu_business.pdf (accessed 5 September 2019).

[15] [2018] EWCA Civ 191.

[16] The Court of Appeal ordered Shell to disclose the requested documents, as it considered that it could not be ruled out that the parent company could be held liable in view of the relevant case law. The court is yet to deliver its judgement on the merits. *Friday Alfred Akpan*, note 11.

[17] *Vedanta Resources PLC*, note 2, para 44.

[18] Ibid, paras 52–53.

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Applying these criteria, Lord Briggs in *Vedanta* found:

> … the published materials in which Vedanta may fairly be said to have asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine, and not merely to have laid down but also implemented those standards by training, monitoring and enforcement, are sufficient on their own to show that it is well arguable that a sufficient level of intervention by Vedanta in the conduct of operations at the Mine may be demonstrably at trial, after full disclosure of the relevant internal documents of Vedanta and KCM, and of communications passing between them.[19]

IV. Implications of *Vedanta* and *Shell* Decisions

Regarding jurisdiction, the Dutch courts have confirmed that the efficiency of simultaneous litigation against multiple defendants is the primary criterion to establish jurisdiction, hence leaving no place for the application of the *forum non conveniens* doctrine in whatever form. In *Vedanta*, the Supreme Court found that England is the proper place for the claim to be heard. While the *Vedanta* judgment leaves room for the application of the *forum non conveniens* doctrine in future cases, it is notable that the importance of access to justice was a critical consideration in the judgment with respect to the 'proper place' question.

Concerning duty of care, the *Vedanta* judgment is undoubtedly a critical development in holding parent companies to account for their corporate social responsibility-type statements. Some commentators have argued that the findings in *Vedanta* of the significance of corporate policies for parent company duty of care and potential liability may have a 'chilling effect' on companies' willingness to set and implement human rights and environmental policies centrally.[20] The *Vedanta* judgment appears to catch parent companies on the horns of a dilemma. Investors, civil society organizations and, in some cases, regulators expect companies to publish information regarding their management of their subsidiaries. Until now, these statements were not considered in and of themselves as giving rise to a duty of care. In this sense, Lord Briggs' judgment may have profound implications and poses a challenge for multinationals: stop disclosing such information over liability fears, thereby attracting questions from shareholders and other stakeholders, or continue to make such statements in the knowledge that talk is no longer cheap when it comes to the management of human rights and environmental issues in the corporate group?

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[19] Ibid, para 61.

[20] Gabrielle Holly, 'Zambian Farmers can Take Vedanta to Court over Water Pollution. What are the Legal Implications?' (10 April 2019), https://www.business-humanrights.org/en/zambian-farmers-can-take-vedanta-to-court-over-water-pollution-what-are-the-legal-implications (accessed 5 September 2019); Robert McCorquodale, 'Vedanta v. Lungowe Symposium: Duty of Care of Parent Companies' (18 April 2019), http://opiniojuris.org/2019/04/18/symposium-duty-of-care-of-parent-companies/ (accessed 5 September 2019).

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V. Recommendations for Legal Reforms

At the national level, the introduction of legislation establishing the duty of corporations to conduct human rights due diligence in order to prevent and address human rights abuses (including breaches of environmental standards) throughout their business activities and relationships could clarify the scope of parent companies' responsibilities. This would in turn avoid a situation where firms adopt a hands-off approach to managing human rights and environmental issues in the corporate group context.

At European level, a study carried out for the European Parliament's Sub-Committee on Human Rights makes interesting proposals for revising the Brussels I Regulation to include two new provisions to provide greater legal certainty and to ensure that the right to access to justice for non-EU claimants is respected in disputes linked to EU territory. First, the authors of this study recommend 'extending the jurisdiction of the courts of the EU member state where an EU parent company is domiciled to claims over its foreign subsidiary or business partner when the claims are so closely connected that it is expedient to hear and rule on them together'.[21] Second, they suggest that a *forum necessitates* is established, 'on the basis of which EU member states' courts may, on an exceptional basis, hear a case brought before them if the right to a fair trial or the right to access to justice so requires, and the dispute has a sufficient connection with the State of the court seized.'[22]

The judgments in *Vedanta* and *Shell* cases also provide important insights for the proposed treaty on business and human rights that is currently being negotiated in the Human Rights Council by the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.[23] First of all, the proposed treaty has the potential to settle jurisdictional ambiguities once and for all. The Brussels I Regulation, including the proposed new provisions, could serve as a model in this regard. Furthermore, the treaty could create more clarity about the duties parent companies have in relation to their subsidiaries when it comes to preventing and addressing human rights as well as environmental harm across the globe, and thereby create more certainty for both victims and companies.

The revised draft of the proposed treaty was published in July 2019.[24] The treaty's draft article on jurisdiction (Article 7) does seem to mirror the Brussels 1 Regulation, but does not incorporate the additional provisions recommended by the European Parliament's Sub-Committee on Human Rights. This means that when adopted in its current form, defendant parent companies might still dispute jurisdiction in cases where the alleged harm is caused by a subsidiary. This gap could be fixed by introducing a presumption of

[21] Marx et al, note 4, 112.

[22] Ibid.

[23] United Nations Human Rights Council, 'Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights', https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx (accessed 5 September 2019).

[24] United Nations Human Rights Council: Open-Ended Intergovernmental Working Group Chairmanship, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Revised Draft' (16 July 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (accessed 28 August 2019).

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control, or even a statutory duty of care for a parent company regarding its subsidiaries to respect human rights and environmental standards.

The revised draft of the proposed treaty follows a slightly different path: it seeks to establish through domestic regulation a human rights due diligence obligation across and beyond the corporate group (Article 5).[25] In Article 6, it also establishes liability for parent companies when they fail to prevent their subsidiaries from causing harm to third parties, but 'control' or 'foreseeability' are proposed as a condition for such liability, which is in fact a codification of current case law. If the revised draft is adopted unchanged, the question of control will most certainly remain the centre of the litigation between plaintiffs and defendants. Even though a combined reading of Articles 5, 6 and 7 *may* result in parent company liability, these provisions do not establish it unambiguously. To ensure that parent companies can no longer hide behind their corporate structure to evade liability for human rights and environmental harms caused by their subsidiaries, it would be advisable for the negotiators of the treaty to add, at the minimum, a presumption of control of parent companies over their subsidiaries.

VI. Conclusion

Recent decisions by the British and Dutch courts signal promising developments with regard to establishing parent company accountability for human rights harms caused by their subsidiaries, both when it comes to jurisdiction of home state courts and duty of care of the parent company for the subsidiaries' actions or omissions. At the same time, ambiguities between court decisions remain and the risk for a potential boomerang effect with parent companies assuming less responsibility in relation to their subsidiaries is also present.

This demonstrates a need for clarity and harmonization of rules and regulations, both to create legal certainty for all parties as well as secure the progress made on access to home state courts. The proposed treaty on business and human rights holds great potential in this regard. Based on the case-based lessons shared in this piece, the authors advise states to strengthen the provisions on jurisdiction, prevention and legal liability in future drafts in such a way that they improve access to home state courts of parent companies whose subsidiaries cause human rights abuses.

Finally, at the time of writing, the possibility of Britain leaving the EU without a deal raises the very significant issue that the Brussels I Regulation would become irrelevant for British companies and there would be a return to the *forum non conveniens* arguments. If that happens, it would indeed be a significant backward step in corporate accountability.

[25] Space does not allow us to discuss the relationship between human rights due diligence and duty of care, but see Cees van Dam et al, 'Corporate Responsibility to Respect Human Rights vis-à-vis Legal Duty of Care' in Juan José Álvarez Rubio and Katerina Yiannibas (eds), *Human Rights in Business Removal of Barriers to Access to Justice in the European Union* (London: Routledge, 2017), 119, 138.

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