

**THE EXTRATERRITORIAL QUEST FOR JUSTICE: THE CASE
FOR IMPOSING A “DUTY OF CARE” ON PARENT COMPANIES
IN THE ABSENCE OF A BINDING BUSINESS AND HUMAN
RIGHTS TREATY.**

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NDXPRI039**



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Date: 27 January 2023

University of Cape Town

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Word Count: 24 046

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Dedication

To Ken Saro-Wiwa, Fikile Ntshangase, Berta Caseras, Sikhosiphi 'Bazooka' Radebe and the countless others who have who have paid the ultimate price for fighting for a better more accountable world in which corporate impunity is rare and remedies are common.

Acknowledgments

Firstly, a huge thank you to my supervisor, Mikovhe Maphiri for walking this long (and often treacherous) journey with me. But for not giving up on me - even when I had given up on myself. Second, to my parents for their unwavering support through the last few years, who will now be able to read this and finally understand what consumed my life for the past year. This minor dissertation is the product of many cups of coffee, take-aways, long nights and random Wifi-hotspots as I travelled through the rural Eastern Cape for work. It is a product of love and support from a number of people in my life who have carried me through the journey and whose kindness I will never forget. It has been the ultimate lesson in resilience and dedication.

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ABBREVIATIONS:

Anglo: Anglo American South Africa Limited

ATCS: Alien Tort Claims Statute

BHR: Business and Human Rights

BLL: Blood-lead levels

CDC: Centre for Disease Control

CSR: Corporate Social Responsibility

EU: European Union

ESG: Environmental, Social and Governance

ICC: International Chamber of Commerce

ICESCR: International Covenant on Economic, Social and Cultural rights

IGWG: Inter-Governmental Working Group

ILO: International Labour Organisation

KCM: Konkola Copper Mines Plc

MNC: Multi-National Corporations

OECD: Organisation for Economic Cooperation and Development

SA: South Africa

UDHR: Universal Declaration of Human Rights

UK: United Kingdom

UNGPs: United Nations Guiding Principles on Business and Human Rights

UNHRC: United Nations Human Rights Council

US: United States of America

CHAPTER ONE

I BACKGROUND AND CONTEXT

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. There is no single silver bullet solution to the institutional misalignments in the business and human rights domain. Instead, all social actors – States, businesses, and civil society – must learn to do many things differently. But those things must cohere and become cumulative, which makes it critically important to get the foundation right.”¹

In an increasingly globalised world, Multi-National Corporations (MNCs) have become as influential as States.² The extent of this influence has reached into the human rights arena and subsequently reignited conversations about the interface between business and human rights.³ Concerningly, States no longer have a monopoly over human rights violations, nor are they seen to be the primary duty-bearers.⁴ Despite this, there are no effective accountability mechanisms to hold MNCs liable in the international sphere, often leaving victims of human rights violations without recourse or forced to seek justice in other jurisdictions.⁵ Historically, most attempts at holding corporations liable for their complicity in human rights violations have been futile. However, recent developments in the international sphere provide a glimpse of hope that the tide on corporate accountability is changing.⁶ Against the backdrop of the international negotiations for a binding business and human rights treaty, courts have been willing to impose a ‘duty of care’ on parent companies for the acts or omissions carried out by their subsidiaries abroad.⁷

¹ John Ruggie 'Protect, Respect & Remedy: A Framework for Business and Human Rights' (2008) 3 *Innovations: Technology, Governance, Globalization* at 189.

² David Bilchitz 'The necessity for a business and human rights treaty' (2016) 1 *Business and Human Rights Journal* at 205.

³ Florian Wettstein 'CSR and the debate on business and human rights: Bridging the great divide' (2012) 22 *Business Ethics Quarterly* at 739-770.

⁴ Denis Gordon Arnold 'On the division of moral labour for human rights between states and corporations: A reply to Hsieh' (2017) 2 *Business and Human Rights Journal* at 312.

⁵ John Ruggie 'Protect, respect and remedy: A framework for business and human rights' (2008) 3 *Innovations: Technology, Governance, Globalization* at 206.

⁶ Recently, the UK Supreme Court found that a group of Zambian claimants could bring a case before the English Courts for pollution caused to a water source in Zambia in *Vedanta Resources Plc v Lungowe*. This will be discussed at length in chapter 4 of this minor dissertation.

⁷ Richard Meeran 'Multinational Human Rights Litigation in the UK: A Retrospective' (2021) 6 *Business and Human Rights Journal* at 260.

The business and human rights interface of the twenty-first century is shaped by the dominant role that corporations play in our society.⁸ Due to the liberalisation of trade and investment, there are billions of people across the world that depend on corporations for their livelihoods, and this has led to MNCs gaining significant influence.⁹

This influence has been vast enough to shape international legal norms, and has led to many hurdles in getting a binding business and human rights treaty off the ground.¹⁰ The treaty is significant as it marks a departure from traditional international law practices insofar as it allows for holding corporations directly liable under international law.¹¹ Currently, corporations can only be held liable for the infringement of human rights under the domestic law of the States in which they operate.¹² Enforcement then becomes complicated when States are in a weaker position than MNCs or are more concerned with the attraction of foreign investment than the enforcement of human rights.¹³

In 2011, the United Nations Human Rights Committee endorsed the Guiding Principles on business and human rights (UNGPs) often referred to as the “Ruggie Principles”.¹⁴ The UNGPs introduced a three-pillar framework aimed at respecting, protecting and remedying harm.¹⁵ This framework aimed to bridge the ‘governance gap’ between business and human rights. The status of the UNGPs is ‘soft law’ meaning that it merely serves as a guideline, and its mechanisms are voluntary.¹⁶ The problem then lies in needing corporations who carry out human rights abuses to self-regulate. Furthermore, the fact that corporate human rights violations are still widespread suggest that there is a need for States to move beyond voluntary mechanisms for human rights violations. The governance gap in the international legal system has made the implementation of the third pillar of the UNGPs, remedying

⁸ Marcel Kordos & Sergej Vojtovic 'Transnational corporations in the global world economic environment' (2016) 230 *Procedia-Social and Behavioral Sciences* at 153.

⁹ Catherine Coumans 'Minding the “governance gaps”: Re-thinking conceptualizations of host state “weak governance” and re-focussing on home state governance to prevent and remedy harm by multinational mining companies and their subsidiaries' (2019) 6 *The Extractive Industries and Society* at 676.

¹⁰ David Kinley & Junko Tadaki 'From talk to walk: The emergence of human rights responsibilities for corporations at international law' (2003) 44 *Virginia Journal of International Law* at 945.

¹¹ *Ibid.*

¹² The words “corporations” and “companies” will be used interchangeably in this dissertation. A wider discussion on this is provided in Chapter 2.

¹³ Surya Deva 'Human rights violations by multinational corporations and international law: where from here' (2003) 19 *Connecticut Journal of International Law* at 2.

¹⁴ United Nations, 'Guiding Principles on Business and Human Rights' (2011) HR/PUB/11/04.

¹⁵ *Ibid* at page 1. The “respect, protect and remedy” framework as contained in the UNGPs.

¹⁶ Noura Barakat 'The U.N. Guiding Principles: Beyond Soft Law Student Notes' (2015) 12 *Hastings Business Law Journal* at 592.

harm, extremely challenging.¹⁷ Claimants who seek to hold corporations liable are forced to mould their claims within the parameters of the often-inadequate domestic private law system of foreign States which is often a barrier to accessing justice.¹⁸

Historically, prominent cases against MNCs have been litigated as delictual claims which require proving some form of negligence on the part of the MNCs.¹⁹ While some success has been found, this method has been fraught with procedural hurdles. In particular, extra-territoriality has been the biggest barrier for foreign claimants who have attempted to sue the parent companies in their domiciled State. The United States of America (US) infamously shut the door to foreign claimants who attempted to litigate under their civil recovery regime, the Alien Claims Tort Statute.²⁰

In 2014, the United Nations Human Rights Council (UNHRC) convened an inter-governmental working group (IGWG) in order to formulate and prospect an internationally binding human rights instrument that specifically dealt with the regulation of MNCs.²¹ This resolution was tabled by South Africa (SA) and Ecuador and co-sponsored by multiple other countries in the Global South.²² The treaty sharply divided the States of the UNHRC, and it was even opposed by fourteen States including the US and members of the European Union (EU). Instead, a less 'radical' resolution was adopted through the UNHRC which expressed in-principle support for the UNGPs and the development of a national action plan while an assessment of the benefits of a legally binding instrument could be made.²³ As of December 2021, the treaty is in its revised third draft and international negotiations are still ongoing.²⁴ In the interim, there has been a series of 'duty of care' cases which aim to hold parent companies liable for the actions of their subsidiaries.

¹⁷ Liliana Lizarazo-Rodríguez 'The UN 'Guiding principles on business and human rights': Methodological challenges to assessing the third pillar: Access to effective remedy' (2018) 36 *Nordic Journal of Human Rights* at 355.

¹⁸ *Ibid.*

¹⁹ The law of delict is referred to as "tort law" in Anglo-American jurisdictions. For the purposes of this dissertation, the word "delict" will be used. See generally, Rob Midgley & Max Loubser 'The Law of Delict in South Africa' Oxford University Press Southern Africa (2010).

²⁰ Richard Meeran 'Tort litigation against multinational corporations for violation of human rights: An overview of the position outside the United States' (2011) 3 *City University of Hong Kong Law Review* at 2.

²¹ Danwood Mzikenge Chirwa 'The doctrine of state responsibility as a potential means of holding private actors accountable for human rights' (2004) 5 *Melbourne Journal of International Law* at 5.

²² The treaty was co-sponsored by Bolivia, Cuba, and Venezuela. See: Sara McBrearty 'The proposed Business and Human Rights Treaty: Four challenges and an opportunity' (2014) 57 *Harvard International Law Journal* at 11.

²³ Olivier De Schutter 'Towards a new treaty on business and human rights' (2016) 1 *Business and Human Rights Journal* at 41.

²⁴ Riccardo Vecellio Segate 'The first binding treaty on business and human rights: a deconstruction of the EU's negotiating experience along the lines of institutional incoherence and legal theories' (2022) 26 *The International Journal of Human Rights* at 126.

(a) A parent company's 'duty of care' to its subsidiaries

While the definition of a 'duty of care' differs in various jurisdictions, it is viewed as being linked to a corporations already existing 'due diligence' obligations.²⁵ This pre-existing 'due diligence' obligations refers to an objective standard of conduct that corporations are expected to abide by and on which fault may be assessed.²⁶ The UNGPs also provide some clarity on the 'due diligence' obligations of corporations.²⁷ The UNGPs envisages 'due diligence' as a process undertaken by corporations whereby, they ensure both compliance with domestic laws as well as the management of human rights risk with an outlook to mitigating any harm and remedy such harm where it occurs.²⁸ Similarly, Palombo states that:

“A due diligence obligation of a parent company entails a duty of care that such a corporation owes to the victims of human rights abuses. At the same time, a duty of care entails a due diligence obligation of the parent company to oversee the activities conducted by its affiliates.”²⁹

Accordingly, while the concepts of 'due diligence' and a 'duty of care' are distinct, they have been construed as being interlinked as a breach of either responsibility gives rise to liability on the part of a parent company.³⁰

In the recent *Vedanta* judgment,³¹ the United Kingdom Supreme Court (UK Supreme Court) has held that a 'duty of care' is an obligation a parent company owes to its stakeholders.³² The case concerned a delictual claim brought by a group of Zambian claimants against an English parent company and

²⁵ Doug Cassel 'Outlining the case for a common law duty of care of business to exercise human rights due diligence' (2016) 1 *Business and Human Rights Journal* at 179.

²⁶ Jonathan Bonnitcha & Robert McCorquodale 'The concept of 'due diligence' in the UN guiding principles on business and human rights' (2017) 28 *European Journal of International Law* at 902.

²⁷ “Principle 17 adumbrates: In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.” In: Upendra Baxi 'Human rights responsibility of multinational corporations, political ecology of injustice: Learning from Bhopal thirty plus?' (2016) 1 *Business and Human Rights Journal* at 36.

²⁸ Jonathan Bonnitcha & Robert McCorquodale op cit note 26 at 909.

²⁹ Dalia Palombo 'The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals' (2019) 4 *Business and Human Rights Journal* at 270.

³⁰ *Ibid.*

³¹ *Vedanta Resources PLC and Another v Lungowe and Others 2019 (20) (United Kingdom Supreme Court)*. Hereafter, referred to as “*Vedanta*”.

³² *Ibid* at paragraph 49-55.

its Zambian subsidiary for pollution caused to a water source in Zambia.³³ In *Vedanta*, the main question of law before the UK Supreme Court was whether a claim for damages that occurred in Zambia could be brought before the English Court.³⁴ Importantly, while the judgment only deals with the jurisdictional challenge, the court had to consider the merits and in particular whether Vedanta owed a ‘duty of care’ to its Zambian subsidiary.

The UK Supreme Court in *Vedanta* concluded that despite England not being the *forum conveniens*, the Zambian claimants had a right to access substantial justice.³⁵ Beyond this, the judgment has also provided a non-exhaustive list of when a parent company can be seen to owe a ‘duty of care’ to its subsidiaries. The judgment further indicates that parent companies who publicly profess oversight over the human rights, environmental, social, or labour standards of their subsidiaries assume a ‘duty of care’ to those harmed by the subsidiary.³⁶

Similarly, in the recent *Okpabi v Shell* case, the UK Supreme Court held that a group of Nigerian claimants could bring a case against UK-headquartered Royal Dutch Shell for environmental harm caused by oil spill in Nigeria.³⁷ Liability in the *Okpabi* case arose from the extensivity of control that Royal Dutch Shell exercised over its Nigerian subsidiary and its failure to maintain the oil pipeline to prevent environmental harm.³⁸ The judgment largely drew on the UK Supreme Court’s previous findings in *Vedanta*, and emphasised that where a parent company professes control and oversight over its subsidiaries it may be held liable for the acts or omissions of that subsidiary.

Prior to the *Vedanta* and *Okpabi* judgment, the UK Supreme Court held in *Lubbe v Cape plc* that a group of South African claimants who wished to seek damages for asbestos poisoning could sue the UK-domiciled parent company before the English courts.³⁹ While the concept of a ‘duty of care’ is mentioned only four times in the judgment and in relation to the employees of a subsidiary controlled

³³ *Ibid* at paragraph 49-55.

³⁴ *Ibid* at paragraph 4-5.

³⁵ The doctrine of *Forum Conveniens*, or convenient forum, deals with the most appropriate court to hear a case subject to the rules of Private International Law. *Forum non conveniens*, or the inconvenient forum, is often a procedural defence raised by MNCs who do not wish to be sued in their home jurisdiction. For more on *Forum non Conveniens* see: Malcolm J Rogge ‘Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda’ (2001) 36 *Texas International Law Journal* at 299.

³⁶ *Vedanta* supra note 31 at para 53.

³⁷ *Okpabi and others v Royal Dutch Shell Plc and another 2021 (UKSC 2018/0068) (UK Supreme Court)*. Hereafter referred to as *Okpabi*.

³⁸ Eddy Wifa & Titilayo Adebola ‘Triumph for Farmers and Fisherfolks: The Hague Court of Appeal finds Shell Liable for Oil Spills in Nigeria’ available at <https://www.abdn.ac.uk/law/blog/triumph-for-farmers-and-fisherfolks-the-hague-court-of-appeal-finds-shell-liable-for-oil-spills-in-nigeria/>, accessed on 1 February 2021.

³⁹ *Lubbe and Others v Cape Industries plc* 2000 (41) (United Kingdom House of Lords). Hereafter referred to as *Lubbe*.

by a parent company, it did lay the foundation for a wider application of the concept of a parent company's 'duty of care'.

These developments in European courts are particularly significant for various reasons, the first being that a large number of MNCs are headquartered in Europe and operate subsidiaries in the Global South.⁴⁰ This geographical gap often allows them to evade liability through the corporate structure despite having a degree of control over these subsidiaries.⁴¹ Secondly, the opposition to a binding treaty, while not a clean split, has mostly come from countries in the global north.⁴² And thirdly, it appears that after decades of business and human rights litigation, courts are more willing to impose human rights obligations on corporations.

Importantly, these developments have not only been limited to courts in the Global North. In October 2020, an application to certify a class action against Anglo American South Africa Limited ("Anglo") on behalf of a class of residents in the Zambian city of Kabwe was brought in the Johannesburg High Court in South Africa. The class is primarily made up of children and women of child-bearing age and seeks, *inter alia*, damages for the harm suffered by the claimants as a result of lead poisoning from the surrounding environment.⁴³

The claimants allege that during the period in which the Anglo controlled the mine in Kabwe, it was the principal lead and zinc mine in the region and consequently responsible for the corresponding proportion of the lead pollution present in the surrounding environment.⁴⁴ The case hinges on the fact that Anglo is liable due to their role in the management and oversight of the medical and technical safety aspects of the mine's operations.⁴⁵ Additionally, it is alleged that Anglo was aware of large-scale environmental impact of the mine but did not take measures to mitigate the damage nor did they rehabilitate the area and surrounding towns.⁴⁶ If certified, this would be the first case before a South African court on a parent company's 'duty of care' towards its subsidiary.

⁴⁰ See generally: David Bilchitz 'The Moral and Legal Necessity for a Business and Human Rights Treaty' (2020) 20 available at: <http://business-humanrights.org/sites/default/files/documents/>, accessed on 10 February 2021.

⁴¹ Stefan Lo 'Piercing of the corporate veil for evasion of tort obligations' (2017) 46 *Common Law World Review* at 43.

⁴² Brigitte Hamm 'The Struggle for Legitimacy in Business and Human Rights Regulation—a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty' (2022) 23 *Human Rights Review* at 118.

⁴³ *Various Parties on Behalf of Minors v Anglo American South African Limited* 32777/2020. The discussions on the Kabwe case have been drawn from the court pleadings which have been filed at the Johannesburg High Court.

⁴⁴ *Ibid* at paragraph 28 of the founding affidavit.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at paragraph 32-33 of the founding affidavit.

(b) Problem statement

It is accepted that MNCs wield tremendous power, which has significant implications for both domestic and international human rights regimes.⁴⁷ Unlike States, which undertake international legal obligations, MNCs have long argued that human rights norms do not apply to them and that they are simply bound by the domestic law of the country in which they operate.⁴⁸ This line of argument, along with unequal bargaining power imbalances in the international system, has contributed to the failure to get a binding business and human rights treaty off the ground.⁴⁹ This governance gap also poses potential issues for the effectiveness of the human rights and justice system globally. As discussed above, the notion of a parent company's 'duty of care' has started to gain traction in international litigation. This minor dissertation will look at the imposition of a 'duty of care' on parent companies to bridge the governance gap in the global human rights system.

(c) Aim of study

The aim of this study is to contribute to the evolving discussion on business and human rights. Notably, this area of study is broad and encompasses both private and public international law, international criminal law as well as the law of delict as most cases have been litigated through civil claims. This minor dissertation will focus particularly on the imposition of the notion of a parent company's 'duty of care' towards their subsidiaries as it has been litigated in civil claims. In doing so, it will look at the changing understanding of corporations in our society and the need for greater access to justice.

(d) Research question

The question that this dissertation seeks to address is "how can the imposition of a 'duty of care' on a parent company for harms caused by their subsidiaries abroad improve corporate accountability in the absence of a binding business and human rights treaty?"

(e) Research methodology and limitations

⁴⁷ David Bilchitz op cit note 2 at 205.

⁴⁸ Ibid.

⁴⁹ Ibid.

This study will be exclusively conducted via desktop research and by virtue of this will be limited in its findings. This study will include an analysis of the relevant literature on business and human rights as well as the recent developments in litigation specifically drawing on the recent UK Supreme Court cases of *Vedanta v Lungowe* and how this could influence South African courts in deciding the Kabwe class action. It looks at both primary sources such as case law and pleadings as well as secondary sources of law including journal articles, books and websites.

(f) Chapter outlines

Conclusively, this chapter has illustrated the governance gaps in the realm of business and human rights and how this has allowed corporations to evade accountability. Chapter one has provided a high-level overview of the international legal framework for business and human rights as well as an introduction to the *Vedanta v Lungowe* case which will be used as a case study for exploring the concept of a parent company's 'duty of care' towards its subsidiaries. Chapter two will explore the development of the concept of a 'duty of care' by looking at the literature on the changing understanding of the role of corporations in our society, and Chapter three will provide an analysis on how courts have developed the concept of a parent company's 'duty of care'. Chapter four will then include an analysis of the *Vedanta* judgment with a particular focus on what the judgment means for future 'duty of care' claims. Chapter five will then provide a discussion of the Kabwe Class Action case, and how South African courts may be influenced by the UK Supreme Court's finding in *Vedanta*. And finally, chapter six will provide the conclusions and recommendations related to the imposition of a 'duty of care' on parent companies and the future of transnational litigation.

CHAPTER TWO

II LITERATURE REVIEW ON THE PURPOSE OF A CORPORATION

(a) What is the purpose of a corporation?

The ethical and social responsibility of corporations were debated extensively during the Covid-19 pandemic, which raised questions about the roles of pharmaceutical corporations in providing access to life-saving treatments such as vaccinations.⁵⁰ Santoro and Shaklin have argued that the imposition of a moral responsibility onto corporations has now become increasingly accepted.⁵¹ They believe that this stems directly from the notion of a “corporate social contract” which is underpinned by the political social contract.⁵² Santoro and Shaklin explain that this “corporate social contract” relates to the level of trust between society and corporations.⁵³ They further argue that the corporation is an invention of society insofar as it is conferred juristic personhood by society and therefore has a corollary duty to operate for the benefit of that society.⁵⁴

While debates about the roles of corporations have now come to the forefront of the contemporary human rights discourse, its history spans decades and can be traced back as far as 1931 in a series of public exchanges between Adolf Berle and Merrick Dodd.⁵⁵ What is known as the Berle-Dodd debate on the purpose of a corporation began when Berle published his now-famed article in the Harvard Law Review titled “*Corporate Powers as Powers in Trust*”.⁵⁶ In his article, Berle argued that the powers held by directors of a company are held in trust for shareholders as the sole beneficiaries of the company — whose primary purpose is profit-making.⁵⁷ Conversely, Dodd believed that companies should be for the benefit of both their shareholders as well as the society in which they

⁵⁰ Michael Santoro & Robert Shanklin 'Human rights obligations of drug companies' (2020) 19 *Journal of Human Rights* at 562.

⁵¹ *Ibid.*

⁵² For more on the political social contract see: Diana-Abasi Ibanga 'Is there a social contract between the firm and community: Revisiting the philosophy of corporate social responsibility' (2018) 7 *International Journal of Development and Sustainability* at 357.

⁵³ Michael Santoro & Robert Shanklin *op cit* note 50 at 562.

⁵⁴ *Ibid.*

⁵⁵ Adolf Augustus Berle 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* at 1049.

⁵⁶ *Ibid* at 1049.

⁵⁷ *Ibid.* Berle's position later became linked to the concept of “shareholder primacy”. For more on shareholder primacy see: Robert Rhee 'A Legal Theory of Shareholder Primacy' (2017) 102 *Minnesota Law Review* at 1951-2016.

operated.⁵⁸ Dodd's reply, which was penned in "*For Whom are Corporate Managers Trustees?*", observed that the role and view of the corporation was evolving and stated the following:

"If we recognise that the attitude of law and public opinion toward business is changing, we may then properly modify our ideas as to the nature of such a business institution as the corporation and hence as to the considerations which may properly influence the conduct of those who direct its activities."⁵⁹

Interestingly, Dodd advocated for a proactive approach to social corporate accountability insofar as he argued that corporate managers "...who control business today should voluntarily and without waiting for legal compulsion manage it in such a way as to fulfil those responsibilities."⁶⁰ Dodd highlighted that the US Supreme Court's decision in *Munn v Illinois* which held that the state of Illinois was able to place a cap on the price of the storage of grain as this business was "affected with a public interest".⁶¹

Berle, however, differed and stated that the directors of companies only owed duties to their shareholders and any wider consideration that Dodd believed to be evidence of their broader responsibility to society were simply acts that occurred in the course of business activity.⁶² After Dodd questioned the effectiveness of the law which supposedly ensured that directors would act in the best interest of shareholders, the Berle-Dodd debate drew to a close in 1935.⁶³

Surprisingly, almost two decades later in 1942, Berle re-visited his position on the role of corporations in society. Berle conceded that societal changes such as the implementation of a minimum wage, competition laws and other legislation had led to the argument settling "... (at least for the time being)

⁵⁸ Edwin Merrick Dodd 'For Whom Are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* at 1163.

⁵⁹ Ibid. Dodd's position later became known as "managerialism" which stood in contrast to the idea of "shareholder primacy". For a wider discussion on managerialism see: Stephen Bainbridge & Christina Johnson 'Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307 In the Wake of Corporate Reform: One Year in the Life of Sarbanes-Oxley - A Critical Review Symposium Issue' (2004) 299 *Michigan State Law Review* at 300.

⁶⁰ Edwin Merrick Dodd op cit note 58 at 1153.

⁶¹ Ibid at 1149.

⁶² Arguably at the time, Berle's position was influenced by socio-legal developments of the 1920's and in particular the outcome of *Dodge v Ford Motors Company* case in which the Michigan Supreme Court ruled that the purpose of a company is to maximise profits for its shareholders rather than its contributions to society at large. See: Michael Vargas 'Dodge v. Ford Motor Co. at 100: The Enduring Legacy of Corporate Law's Most Controversial Case' (2020) 75 *Business Lawyer* at 300.

⁶³ John Macintosh 'The issues, effects and consequences of the Berle-Dodd debate, 1931-1932' (1999) 24 *Accounting, Organizations and Society* at 146.

squarely in favour of Professor Dodd's contention."⁶⁴ Berle's concession however, was limited to accepting that American society had transformed in such a way that created the corporate system that Dodd had argued for in his 1932 article, and not that he was incorrect at the time of writing.⁶⁵ And while Berle and Dodd diverged on their views regarding the roles of corporations, they were both concerned about unchecked corporate power and in many ways the debate has continued and evolved over time.⁶⁶

The Berle-Dodd debate is widely accepted as the precursor to current debates on Corporate Social Responsibility (CSR) and Business and Human rights (BHR).⁶⁷

(b) Towards the regulation of corporate power

(i) The Nuremburg Tribunal:

Similarly, while business and human rights litigation is gaining traction globally, it has a long and often dark history. The Nuremberg Tribunal (the tribunal), which prosecuted corporations for their involvement in aiding and abetting the Nazi Germany regime, is viewed as a watershed moment in the move towards corporate accountability.⁶⁸ The purpose of the tribunal was to hold military officials and individuals accountable for their role in aiding the Nazi regime, however, the complicity of corporations in propping up the Nazi regime was also acknowledged.⁶⁹ These corporations faced harsh sanctions varying from large fines to the seizure of assets — and in some extreme cases, corporations were even dissolved completely.⁷⁰ The tribunal regenerated a sense of hope in the movement for corporate accountability, but this was unfortunately short-lived as the next few decades were fraught with difficulties in holding corporations liable.⁷¹

⁶⁴ Philip Cochran 'The evolution of corporate social responsibility' (2007) 50 *Business horizons* at 449.

⁶⁵ John Macintosh *op cit* note 63 at 146.

⁶⁶ *Ibid.*

⁶⁷ William Bratton & Michael Wachter 'Adolf Berle, E. Merrick Dodd and the new American corporatism of 1932' in *Edward Elgar Publishing* (2018) at 534.

⁶⁸ Jonathan Kolieb 'Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability under International Law' (2016) 32 *American University International Law Review* at 584.

⁶⁹ Wolfgang Kaleck & Miriam Saage-Maaß 'Corporate accountability for human rights violations amounting to international crimes: the status quo and its challenges' (2010) 8 *Journal of International Criminal Justice* at 702.

⁷⁰ Tyler Giannini & Susan Farbstein 'Corporate Accountability in Conflict Zones: How Kiobel Undermines the Nuremberg Legacy and Modern Human Rights' (2010) 52 *Harvard International Law Journal* at 121.

⁷¹ While most human rights litigation against MNC's now takes place outside of wartime conduct, the Nuremberg Tribunal was an important step in the move towards corporate accountability. See: Anita Ramasastry 'Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labour Cases and Their Impact on the Liability

(ii) The development of voluntary codes and guidelines

Wettstein argues that these questions were related to societal changes such as deregulation and privatisation that became more common in the post-Cold War global economy as well as the emerging power relations in the global political economy.⁷² Consequently, there continued to be many developments in the international sphere towards the regulation of corporations. The governance gap created by the failure of international law to keep pace with globalisation and the evolution of corporate power was becoming more evident.⁷³ Kolieb has argued that the legitimacy of the international legal system now rests on its ability to respond to the expansion of power of MNCs.⁷⁴ By the 1970s the impact of corporations on States and their domestic policies were becoming a prominent topic at the international level.⁷⁵ In response to these developments, the International Chamber of Commerce (ICC) adopted the “Guidelines for International Investment” in 1972.⁷⁶ The ICC Guidelines consisted of a voluntary code aimed at the regulation of corporations operating in developing countries.⁷⁷

Following this, the Centre on Transnational Corporations was established by the UN and was mandated to produce a code of “good governance” that could voluntarily be adopted by transnational corporations.⁷⁸ Despite the “good governance” code being non-binding, it was not well received by certain States.⁷⁹ This subsequently led to a failure in it being adopted and it was eventually abandoned in 1992.⁸⁰ Similarly, the Organisation for Economic Cooperation and development (OECD) and the International Labour Organisation (ILO) eventually adopted corporate codes of conduct — which

of Multinational Corporations Stefan A. Riesenfeld Symposium 2001' (2002) 20 *Berkeley Journal of International Law* at 131.

⁷² Florian Wettstein 'CSR and the debate on business and human rights: Bridging the great divide' (2012) 22 *Business Ethics Quarterly* at 742.

⁷³ Penelope Simons & Audrey Macklin, *The Governance Gap* Extractive industries, human rights, and the home state advantage, New York (2014) at 9.

⁷⁴ Jonathan Kolieb op cit note 68 at 570.

⁷⁵ Despite these developments, some economists like Milton Friedman continued to support Berle's initial position by arguing that “the only responsibility of corporations is to make profits.” See Milton Friedman 'The social responsibility of business is to increase its profits' in *Corporate ethics and Corporate Governance* Springer (2007) at 173.

⁷⁶ Danwood Mzikenge Chirwa 'The long march to binding obligations of transnational corporations in International Human Rights Law' (2006) 22 *South African Journal on Human Rights* at 79.

⁷⁷ The last decade has seen significant attention being given to sustainable investment become a crucial part of a corporation's business strategy. See: Mansi Jain, Gagan Deep Sharma & Mrinalini Srivastava 'Can sustainable investment yield better financial returns: A comparative study of ESG indices and MSCI indices' (2019) 7 *Risks* at 1.

⁷⁸ Danwood Mzikenge Chirwa op cit note 76 at 79.

⁷⁹ Ibid.

⁸⁰ Ibid.

was largely due to the fact that most corporations were only willing to adhere to guidelines and preferred self-regulation.

During this time there was also a rise in the CSR movement which advocated for corporate accountability for human rights abuses.⁸¹ The CSR movement sought “to place certain societal expectations and demands directly on businesses, while encouraging them to integrate such demands and expectations into their normal operational strategies.”⁸² However, the CSR movement faced many challenges as expectations from society differed especially in the context of transnational operations.

The UN Global Compact was another significant milestone in the move towards a framework for corporate accountability. It was proposed by then Secretary General of the UN Kofi Annan at the World Economic Forum in 1999.⁸³ The UN Global Compact “essentially asks companies to contribute to a more sustainable and inclusive global market by embracing, supporting and enacting a set of core values concerning human rights, labour standards, and environmental practices”.⁸⁴ The Global Compact was surprisingly well received by corporations. Chirwa argues that this is largely due to the fact that the Global Compact was voluntary and has weak monitoring mechanisms.⁸⁵ Wettstein argues that the UN Global Compact resulted in human rights becoming relevant to corporations as opposed to just “add-ons” to labour issues, which also furthered the relationship between CSR and human rights generally.⁸⁶

While these developments may seem mostly positive, there is a disjuncture in seeking to apply human rights standards on a voluntary basis through the use of non-binding codes and guidelines. Despite the disjuncture, corporations seem to favour voluntary codes as this allows them to secure their investments; this is best illustrated by US-headquartered corporations accepting the Sullivan

⁸¹ A wider discussion on CSR is provided in paragraph (c) below. There was now a wider acceptance that businesses should not be seen as a separate entity from the society in which they operate and the concept of corporate citizenship which were encouraged companies to make business decisions based on their impact and operations in society. See: Halina Ward 'Securing transnational corporate accountability through national courts: implications and policy options' (2000) 24 *Hastings International & Comparative Law Review* at 452.

⁸² These expectations and demands were voluntary and would have to be adopted by the corporations themselves.

⁸³ Danwood Mzikenge Chirwa op cit note 76 at 89.

⁸⁴ Danwood Mzikenge Chirwa op cit note 76 at 89.

⁸⁵ Ibid at 90.

⁸⁶ Florian Wettstein 'CSR and the debate on business and human rights: Bridging the great divide' (2012) 22 *Business Ethics Quarterly* at 747.

Principles but continuing their operations in Apartheid South Africa during a time of international divestment.⁸⁷

These various codes and compacts discussed above eventually culminated in the UNGPs and the “respect, protect and remedy” framework put forward by John Ruggie which was discussed in Chapter 1.⁸⁸ Notably, the UNGPs marked a significant departure from voluntarism and towards the domain of ‘soft law’.⁸⁹

These developments marked the beginning of the intersection of human rights and CSR where multiple codes were based on an established understanding of human rights rooted in the Universal Declaration of Human Rights (UDHR) and its related instruments.⁹⁰ However, some scholars argue that the inter-relation between the two has always existed. Louis Henkin has argued that a proper interpretation of the UDHR, specifically articles 29 and 30, makes it clear that the language in the declaration intended to include businesses and not limit its application to States.⁹¹ As a result of this, Henkin argued that those who advocate for its applicability to be limited to States are mistaken in their interpretation and understanding of the purpose and plain meaning of the text in the UDHR.⁹²

Importantly, the UNGPs have outlined a normative framework for human rights obligation for corporations to observe throughout their operations. Many mandatory developments such as human

⁸⁷ Notably, some scholars have argued that guidelines such as the Sullivan Principles laid the groundwork for what is now the UNGP. See: Anita Ramasastry 'Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability' (2015) 14 *Journal of Human Rights* at 238.

⁸⁸ This development is one of the clear cases where CSR and BHR have neatly overlapped. Anita Ramasastry highlights that the compact is voluntary in nature and therefore often viewed as an initiative of CSR. She is however critical of the UNGP and argues that while it was an important initiative, it lacks “teeth” as there is no accountability mechanism for corporations who are found to be in violation of the UNGPs. It nevertheless remains a significant development in the history of BHR.

⁸⁹ John Ruggie, Caroline Rees & Rachel Davis 'Making ‘Stakeholder Capitalism’ Work: Contributions from Business & Human Rights' (2020) at 9.

⁹⁰ The preamble reads as follows: “...a common standard of achievement for all peoples and all nations, to the end that every individual and *every* organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

⁹¹ Andrés Felipe López Latorre 'In defence of direct obligations for businesses under international human rights law' (2020) 5 *Business and Human Rights Journal* at 79.

⁹² As discussed in the introductory chapter, only States are subjects of international law. However, some commentators have argued that the wording of the UDHR intends to not limit its application to only States. Henkin has argued that the word “every” contained in the part of the preamble includes and can be extended to corporations. See: Louis Henkin 'The Universal Declaration at 50 and the Challenge of Global Markets Symposium: The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets--Keynote Address' (1999) 25 *Brooklyn Journal of International Law* at 9.

rights due-diligence laws were propelled by the UNGPs.⁹³ Ruggie has argued that this has additionally impacted investments and human rights are now given increased attention in terms of ESG principles.⁹⁴ The UNGPs are however not without criticism. Thabane has argued that the UNGPs fail to articulate the importance of access to domestic remedies.⁹⁵ He argues that instead, there is an unbalanced emphasis on “host state judicial remedies” and “non-judicial mechanisms” which may not be appealing to the victims of corporate human rights violations.⁹⁶ Similarly, Ramasastry agrees that the UNGPs are imperfect, however, she considers that in the absence of a binding treaty, the UNGPs, as imperfect as they are, remain the key framework by which we should assess corporate conduct.⁹⁷ Furthermore, Ramasastry points out that the move towards a binding treaty emphasises that there has been a significant societal shift in our understanding of the roles of corporations.⁹⁸

This significant shift in the understanding of the UNGPs was illustrated in the ground-breaking judgment of *Milieudefensie and others v Royal Dutch Shell*, in which the Hague Court of Appeals ordered Royal Dutch Shell to reduce their global carbon dioxide emissions by 45%.⁹⁹ The judgment is particularly significant as it marks the first instance of an imposition of a ‘carbon cap’ on a private company extending beyond governmental regulations.¹⁰⁰ Additionally, this was the first case to have mentioned the UNGPs as well as the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises in its reasoning for the decision, despite their soft law status.¹⁰¹ In their ruling, the Court assessed Royal Dutch Shell’s “duty of care” to the Dutch claimants under the Dutch law of delict.¹⁰²

(c) From corporate voluntarism to corporate accountability

⁹³ Ruggie, Rees & Davis op cit note 89 at 9.

⁹⁴ John Ruggie & Emily Middleton 'Money, millennials and human rights: sustaining 'sustainable investing'' (2019) 10 *Global policy* 144.

⁹⁵ Tebello Thabane 'Weak extraterritorial remedies: the Achilles heel of Ruggie's' protect, respect and remedy 'framework and guiding principles' (2014) 14 *African Human Rights Law Journal* at 60.

⁹⁶ Ibid.

⁹⁷ Anita Ramasastry op cit note 87 at 244.

⁹⁸ Ibid.

⁹⁹ *Milieudefensie and Others v Royal Dutch Shell Plc* (District Court of The Hague) 2021.

¹⁰⁰ For a more in-depth analysis of recent climate change litigation trends and the Dutch Court of appeal's interpretation of duty of care in the case of *Milieudefensie v Royal Dutch Shell Plc*, see: Otto Spijkers 'Friends of the Earth Netherlands (*Milieudefensie*) v Royal Dutch Shell' (2021) 5 *Chinese Journal of Environmental Law* at 237-256.

¹⁰¹ Ibid.

¹⁰² The judgment is particularly important as it was an instance of a court imposing a standard of care on a private actor outside of imposed governmental regulations. Furthermore, the court drew important links between human rights and climate change and asserted that corporations have a duty to combat climate change through the supply chains.

(i) Corporate Social Responsibility versus Business and Human Rights?

The inter-relation between CSR and BHR has been widely debated.¹⁰³ Some scholars view CSR as laying the foundation for the contemporary BHR debates that are ongoing today, while others view it as a separate debate completely.¹⁰⁴ Amodu states that there is no universally accepted definition of CSR.¹⁰⁵ However, other scholars such as Scherer and Palazzo, have described CSR as an ‘umbrella term’ for various “initiatives and processes, which corporations put in place to make sure it meets social and moral expectations while pursuing its economic interests.”¹⁰⁶

Ramasastri believes that while CSR and current BHR debates are interlinked, they remain distinct concepts.¹⁰⁷ She further argues that this is because CSR emphasises responsible behaviour on the part of corporations, whereas BHR “focuses on a more delineated commitment in the area of human rights” and can partially be viewed as a response to CSR and its perceived failure.¹⁰⁸ This perceived failure is seen to be a product of the emphasis CSR has placed on voluntarism which flows from viewing the role of corporations as social partners.¹⁰⁹ According to Ramasastri, the important distinction between CSR and BHR is that the latter “grows out of a quest for corporate accountability” with the focus shifting away from the image of the corporation to the need for accountability.¹¹⁰ Indeed, this has similarly been argued by other BHR scholars such as McCorquodale and Simons, as well as Deva and Bilchitz.¹¹¹ Wettstein argues that this tension is primarily due to the incongruence between the assumption of voluntary obligations and the “moral nature” of human rights as well as the perceived apolitical nature of the corporation.¹¹²

The late 1970s saw the birth of the business and human rights movement which Ramasastri describes as being “born of negative impacts and a quest to remedy harm already caused rather than an

¹⁰³ Anita Ramasastri op cit note 87 at 244.

¹⁰⁴ Ibid.

¹⁰⁵ Nojeem Amodu 'Business and human rights versus corporate social responsibility: Integration for victim remedies' (2021) 21 *African Human Rights Law Journal* at 853.

¹⁰⁶ Guido Palazzo & Andreas Georg Scherer 'Corporate Social Responsibility, Democracy, and the Politicization of the Corporation' (2008) 33 *The Academy of Management Review* at 10.

¹⁰⁷ Anita Ramasastri op cit note 87 at 237.

¹⁰⁸ Ibid.

¹⁰⁹ Florian Wettstein op cit note 86 at 747.

¹¹⁰ Anita Ramasastri op cit note 87 at 283

¹¹¹ See: Robert McCorquodale & Simons Penelope 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *The Modern Law Review* at 598-625; Surya Deva & David Bilchitz *Building a treaty on business and human rights: context and contours* Cambridge University Press (2017) at 1-27.

¹¹² Florian Wettstein op cit note 86 at 748.

underlying debate over the role of companies alongside states as promoters of positive obligations.”¹¹³ Scholars such as Rasche and Waddock have argued that the intersection between the two fields have become more apparent with the introduction of the UNGP s.¹¹⁴ For example, the concept of ‘due diligence’ which has been included in the UNGP s as it was part of the corporate lexicon.¹¹⁵ However, they note that the concept of ‘due diligence in the UNGP s differs from the common corporate understanding of the process undertaken to manage business risk, while legally it is a standard of conduct to which fault is assessed. Mares, however, has argued that the concept of due diligence fails to ‘capture the idiosyncratic nature of human rights impact’ which she sees as being reduced to an exercise of risk management.¹¹⁶

Ruggie argues that the critical role of stakeholder engagement further separates the concept of human rights due diligence and from the more well-known corporate concept. He further explains:

“Human rights due diligence reflects the general categories of stakeholder – employees, suppliers, customers and communities – that is typically cited in reference to stakeholder capitalism. Yet it avoids the common critique that these categories are too expansive, and the interests of their members too varied, for executives to make sense of in their deliberations. Instead, human rights due diligence places the focus squarely on those people whose basic dignity and equality are at risk of harm from the ways in which business gets done.”¹¹⁷

In summation, the contemporary debates on BHR, there is a consensus that BHR marks a shift away from the recognition of the positive role a corporation may play in a society towards a narrower focus on holding corporations accountable for harm caused.¹¹⁸

Ramasastri puts forward that: “At its core, BHR focuses on victims or impacted communities and articulates their concerns in terms of a broad swathe of treaty-based rights in an effort to provide a clear basis for remedies and justice” as opposed to what she terms as an ‘à la carte’ view of human rights.¹¹⁹ Put simply, the BHR framework that exists is what sets it apart from CSR. Ramasastri

¹¹³ Anita Ramasastri op cit note 87 at 240.

¹¹⁴ Andreas Rasche & Sandra Waddock ‘The UN guiding principles on business and human rights: Implications for corporate social responsibility research’ (2021) *Business and Human Rights Journal* at 6.

¹¹⁵ Andreas Rasche & Sandra Waddock op cit note 114 at 6.

¹¹⁶ Ibid.

¹¹⁷ Ruggie, Rees & Davis op cit note 88 at 9.

¹¹⁸ See generally: David Bilchitz ‘Do corporations have positive fundamental rights obligations?’ (2010) *Theoria: A Journal of Social and Political Theory* at 20.

¹¹⁹ Anita Ramasastri op cit note 87 at 239.

further argues the difference in CSR and BHR means that the fields are diverging and as the BHR movement gains prominence, the idea of “corporate voluntarism” loses appeal to the wider stakeholder community.¹²⁰ Ramasastry however adds that BHR can draw on the lessons of CSR and possibly introduce incentives for corporations to incorporate into their operations.¹²¹ Wettstein takes a more moderate view and believes that both CSR and BHR can learn from each other.¹²² Wettstein believes that there has been a change in CSR in terms of its view of human rights and believes that BHR simply takes this a step forward in attempting to close governance gaps and find judicial remedies for where there is harm. Wettstein further argues that an having an inter-related view of the debate between BHR and CSR “...provides the space for the conceptualisation of positive human rights obligations for corporations.”¹²³

(d) Chapter Conclusion

Conclusively, this chapter has highlighted the evolving nature and understanding of corporations in our society which is seen through the move towards binding standards as opposed to the continuation of voluntary guidelines being imposed. It has outlined the linkages and differences between CSR and the BHR movement as well as what they can learn from one and other. This chapter has explained that in many ways, the UNGPs is a culmination of both the successes and perceived ‘failures’ of the CSR movement and marks the watershed moment in the quest for corporate accountability.

¹²⁰ Notably, history has highlighted corporations prefer ‘self-regulation’ or soft law guidelines as mentioned in Chapter 1. The proposed Business and Human Rights treaty would be a hard law approach to regulating corporate human rights violations.

¹²¹ Anita Ramasastry op cit note 87 at 237.

¹²² Florian Wettstein op cit note 86 at 752.

¹²³ Ibid.

CHAPTER THREE

III LITERATURE REVIEW THE DEVELOPMENT OF LITIGATION AGAINST MULTINATIONAL CORPORATIONS

(a) The development of litigation against MNCs

As discussed in chapter one, the draft business and human rights treaty which is currently being debated at the international level, aims to move away from voluntary guidelines and self-regulation towards binding obligations in an attempt to move towards corporate accountability. The negotiations for a binding treaty began almost a decade ago and have highlighted that a shift this significant is an iterative process. In the absence of a binding treaty, practitioners and activists have had to look for alternative and creative ways in order to litigate business and human rights cases.

This has led to an explosion of civil liability cases against MNCs which have been a direct product of the failure of States to ensure effective domestic remedies coupled with the absence of an internationally binding treaty on corporate accountability. One of the more popular methods has been to litigate against parent companies failing to uphold their 'duty of care' towards their subsidiaries. In these cases, claimants attempt to hold parent companies liable for harm caused by their subsidiaries.¹²⁴ This has resulted in multiple delictual claims being brought by victims of corporate human rights violations brought in the corporate defendant's home State.¹²⁵ And while claims against MNCs often differ in substance, Aristova has argued that clear patterns have emerged from civil litigation against MNCs.¹²⁶ Three main commonalities can be seen: first, the claims are framed through delictual rather than corporate law remedies, such as corporate veil piercing, or even international human rights law.¹²⁷ Secondly, the litigation is initiated by private parties, either an affected community or employees of the subsidiary.¹²⁸ And thirdly, claims are brought before the courts in the parent company's home State, which is usually not where the harm occurred.¹²⁹

¹²⁴ Florian Wettstein op cit note 86 at 752. Notably, the Global North/South Divide is visible in litigation as well. The parent companies are usually headquartered in the Global North with subsidiaries that cause harm in the Global South.

¹²⁵ Ekaterina Aristova 'Tort litigation against transnational corporations in the English courts: The challenge of jurisdiction' (2018) 14 *Utrecht Law Review* at 7.

¹²⁶ Ekaterina Aristova op cit note 125 at 7.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

(i) Litigation in the US under the Alien Tort Claims Statute

In the US, the most widely publicised corporate accountability cases have been litigated under the Alien Tort Claims Statute (ATCS),¹³⁰ which confers jurisdiction on the US federal courts over delictual claims arising from a violation of Customary International Law for a non-US plaintiff.¹³¹ Over the course of the 1990s, the ATCS was used in an attempt to hold US-based corporations liable for human rights violations abroad.¹³² The scope and applicability of the statute was widely debated by lawyers and academics alike, however, the appeal court in *Doe v. Exxon Mobil Corp* held that corporate liability under the ATCS was possible.¹³³

Subsequently, it was under the ATCS that the Khulumani Support Group¹³⁴ brought a series of reparations cases (Khulumani cases) against US businesses who profited off ties with the Apartheid regime.¹³⁵ Initially, the Khulumani cases did not have the support of the SA government, which labelled it as a threat to the project of reconciliation and diplomatic relations with the US.¹³⁶ The SA government went as far as approaching the court a quo to dismiss the case.¹³⁷ The case also faced major opposition by the MNCs as well as the British and US governments who petitioned the Supreme Court to disallow foreigners to file lawsuits based on human rights violations that occurred extraterritorially.¹³⁸ Upon the appeal of the Khulumani case, the SA government revisited their position and stated that the US court was the appropriate forum to resolve the case.¹³⁹ During the span of the litigation, multiple judgments based on the ATCS were handed down, some of which were

¹³⁰ United States Judiciary Act of 1798.

¹³¹ Julian Simcock 'Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission' (2011) 47 *Stanford Journal of International Law* at 239.

¹³² Notably, while contemporary BHR litigation differ in form, they are seen to be a result of the Nuremberg Tribunal which paved the way for the application of liability to corporations who were complicit in human rights violations. See: Margaret Satterthwaite 'Extraordinary Rendition on Disappearances in the War on Terror Symposium: Amnesty International USA - Fulfilling the Legacy: International Justice 60 Years after Nuremberg' (2006) 10 *Gonzaga Journal of International Law* at 80.

¹³³ Adam Pearse 'John Doe VIII v. Exxon Mobil Corporation: The D.C. Circuit Affirms Corporate Liability Under the Alien Tort Statute' (2011) 25 *Tulane Environmental Law Journal* at 232.

¹³⁴ "Khulumani Support Group (Khulumani), a national organization of victims and survivors of gross human rights violations committed during apartheid, 213 with two main aims: firstly, to ensure that victims took part in the TRC and that the Commission functioned in a 'victim-centred' manner; and secondly to contribute to the empowerment of victims" See: Tshepo Madlingozi 'On transitional justice entrepreneurs and the production of victims' (2010) 2 *Journal of Human Rights Practice* at 213.

¹³⁵ *In re South African Apartheid Litigation* 2009 (624 F. Supp. 2d 336) (United States District Court, New York).

¹³⁶ Narnia Bohler-Muller 'Reparations for apartheid-era human rights abuses: the ongoing struggle of Khulumani support group' (2013) 27 *Speculum Juris* at 4.

¹³⁷ *Ibid.*

¹³⁸ Narnia Bohler-Muller op cit note 136 at 14.

¹³⁹ *Ibid.*

detrimental to the Khulumani cases. Particularly, the US Supreme Court decision in *Kiobel v. Royal Dutch Petroleum* held that the Alien Tort Claims Statute has a presumption against extra territoriality.¹⁴⁰ In other words, the US Supreme Court could not impose liability on a US-headquartered corporation for harm that occurred outside of the US.¹⁴¹ The decision in *Kiobel*¹⁴² sealed the fate of the Khulumani case which was eventually thrown out due to the harm having occurred in SA.¹⁴³ Interestingly, in May 2022 a new bill based on the ATCS was introduced in the US Congress which aims to clarify of the applicability of ATCS. Of particular significance, the bill in its current form aims to ensure that harm that occurred outside of the US can be litigated under the ATCS.¹⁴⁴ Similarly to these developments in the US, Europe has seen an increase in the proposal of human rights due diligence laws. Interestingly, this is in contrast to the EU stance that the bloc has adopted against the binding business and human rights treaty at the international level.¹⁴⁵

The early 2000 s saw similar BHR developments in South Africa, when a class action lawsuit was filed on behalf of a group of miners who had contracted silicosis from working in various gold mines located in South Africa.¹⁴⁶ The silicosis cases dragged on for years and parallel proceedings were instituted in the UK, however the UK court eventually ruled that it had no jurisdiction over the

Commented [1]: Take a look at this. I think it's a mistake

¹⁴⁰ *Kiobel v. Royal Dutch Petroleum* 2013 (569 U.S 108) (US Supreme Court).

¹⁴¹ There are significant developments currently occurring in the USA regarding the extraterritorial application of the ATCS which may lead to future claims against US-headquartered MNCs to be litigated in the US.

¹⁴² In March 2022, Esther Kiobel, unfortunately lost her civil case against Shell who she accused of being complicit in the 1995 execution of her husband related to a protest over oil pollution in the Niger Delta. See: Amnesty International 'The Hague: Esther Kiobel vows to continue her campaign for justice' available at <https://www.amnesty.org/en/latest/news/2022/03/the-hague-esther-kiobel-vows-to-continue-her-campaign-for-justice/>, accessed on 29 June 2022.

¹⁴³ Notably, this decision was at odds with the finding in the final Truth and Reconciliation Commission report that emphasised the central role businesses played in sustaining the Apartheid State. See, Truth and Reconciliation Commission of South Africa *Final Report* (1999) available at <https://www.justice.gov.za/trc/report/index.htm>, accessed on 15 August 2022.

¹⁴⁴ Business and Human Rights Resource Centre 'ICAR Statement on the introduction of Alien Tort Statute Clarification Act in the U.S. Senate' available at <https://www.business-humanrights.org/en/latest-news/icar-statement-on-the-introduction-of-alien-tort-statute-clarification-act-atsca-in-the-us-senate/>, accessed on 29 June 2022.

¹⁴⁵ Ibid. "By 2020, there were legislative proposals for versions of human rights due diligence on the table in Germany, the Netherlands, Norway and Switzerland, with active debates underway in countries including Sweden, Finland, Denmark, the UK and, notably, at EU level. However, the question of what accompanying policy measures would be needed to make any new legal requirements as effective as possible was yet to receive the attention it merited."

¹⁴⁶ "Silicosis is an incurable lung disease caused by the inhalation of silica dust. Gold is usually found alongside silica, so goldminers are especially at risk. Silicosis itself is generally not fatal, but contracting the disease significantly increases the risk of tuberculosis (TB), which can be fatal." from: Jason Brickhill 'A river of disease: Silicosis and the future of class actions in South Africa' (2021) 37 *South African Journal on Human Rights* at 32.

matter.¹⁴⁷ The class was eventually certified in South Africa, and an out-of-court settlement was reached in 2013 with a compensation trust being set up for affected miners and their families.¹⁴⁸

(ii) Litigation in the United Kingdom and the development of a parent company's 'duty of care'

More recently, there have been significant developments in parent company liability based on a 'duty of care' before the courts in the UK. This is despite parent company liability being viewed as a controversial concept due to what many call the principle of 'limited liability'. This principle entails that a parent company is viewed as a separate legal entity from its subsidiaries.¹⁴⁹ This structure presents obvious problems when dealing with harm or loss suffered by an individual in the case where a subsidiary is unable to provide compensation.¹⁵⁰ Petrin has further argued that parent company liability cases are often complex as they lie "at the hazy intersection of company law and [the law of delict], where bedrock principles such as limited liability, separate corporate personality, and traditional principles of negligence collide."¹⁵¹ However, Meeran argues that:

"There is no reason in principle why, like any other legal entity or person, a parent company which is responsible for, or in control of, specific functions at overseas subsidiary operations should not be liable for damage arising from those functions or deficiencies in them."¹⁵²

While many recent 'duty of care' cases have been hailed as 'ground-breaking', the concept of a parent company's duty of care is not new and in fact arises out of their common law duties.¹⁵³ Similarly, Cassel argues that "By recognizing this duty of care, courts would not impose on business enterprises

¹⁴⁷ Tebello Thabane op cit 95 at 52.

¹⁴⁸ Jason Brickhill "Historic South African Silicosis Class Action Settlement Approve", (OxHRH Blog, August 2019), <https://ohrh.law.ox.ac.uk/historic-south-african-silicosis-class-action-settlement-approved/> accessed on 28 July 2022.

¹⁴⁹ Mollie Rigby 'Parent Company Liability for Tortious Wrongs: Is Duty of Care a More Effective Mechanism than Corporate Veil Piercing?' (2022) 2 *Leeds Student Law and Criminal Justice Review* at 1.

¹⁵⁰ Ibid.

¹⁵¹ Martin Petrin 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc' (2013) 76 *The Modern Law Review* at 603.

¹⁵² Meeran op cit note 20 at 2. Meeran further states that this is particularly important as the media attention that will naturally follow cases of this nature may also serve as a deterrent to other MNC

¹⁵³ Molly Rigby op cit note 146 at 2. Notably, Rigby argues that these obligations are separate to their obligations that may arise out of company law.

any responsibility not already assigned to them by widely adopted international human rights standards, but would simply incorporate those standards into domestic tort law.”¹⁵⁴

Prior to the recent judgments above, which allowed parent company liability cases to proceed before the UK courts, the 1990 case of *Caparo Industries plc v Dickman* was the leading case on a parent company’s duty of care.¹⁵⁵ The *Caparo* case concerned whether the auditors of the company owed a ‘duty of care’ to both current and prospective investors, in their judgment the House of Lords formulated a three-fold test which is as follows:

- 1) The harm cause must have been reasonably foreseeable
- 2) The proximity between the claimant and defendant must be appropriate
- 3) It must be fair, just and reasonable to impose this duty.¹⁵⁶

While the *Caparo* case itself does not concern the harmful actions of a subsidiary, it has become important in the development of the concept of a ‘duty of care’ in the UK.¹⁵⁷ Many scholars have however argued that *Caparo* has caused significant uncertainty around the imposition of a ‘duty of care’ and the resultant test developed by the court.¹⁵⁸ For example, Palombo argues that the *Caparo* Judgment stated that the existence of a duty of care hinged on a number of factors — which are not generally applicable to all cases dealing with a ‘duty of care’ and which need to be assessed on their own merits.¹⁵⁹ Palombo further argues that this led to the creation of a myth, that in order for there to be a ‘duty of care’, a case should fit within the parameters of already established case law.¹⁶⁰

Post-*Caparo*, there have been four other prominent cases in the UK dealing with jurisdictional issues, namely: *Lubbe v Cape*; *Lungowe v Vedanta*; *Okpabi v Royal Dutch Shell plc*; and *AAA v Unilever plc*.¹⁶¹ The main commonality amongst these cases is that they concern allegations of extraterritorial

¹⁵⁴ Doug Cassel op cit note 25 at 180.

¹⁵⁵ Dalia Palombo 'Okpabi v Shell and Lungowe v Vedanta Dispell Three Myths' available at <https://corporatejusticecoalition.org/news/okpabi-v-shell-and-lungowe-v-vedanta-dispell-three-myths/>, accessed on 26 June 2022.

¹⁵⁶ Ekaterina Aristova op cit note 123 at 7.

¹⁵⁷ Ibid.

¹⁵⁸ John Hartshorne 'Confusion, contradiction and chaos within the House of Lords post Caparo v Dickman' (2008) *Tort Law Review* at 1-15.

¹⁵⁹ Dalia Palombo op cit note 155.

¹⁶⁰ Ibid.

¹⁶¹ Dalia Palombo op cit note 28 at 271. This dissertation will briefly touch on these cases as they are relevant for the development of a ‘duty of care’ in the UK. A further exploration of the judgment in *Vedanta* will be provided in Chapter 4.

harm and a corresponding ‘duty of care’ owed by a MNC for delictual harm suffered.¹⁶² Notably, all of these cases were decided on jurisdictional issues and the UK courts are yet to issue a judgment on the merits of these cases.

In *Cape Plc*, a group of South claimants attempted to sue Cape Plc for exposure to asbestos while in the employ of Cape Plc’s South African subsidiary.¹⁶³ The claimants alleged that Cape Plc had failed to perform their oversight obligations in the operations of their subsidiary and accordingly put in place measures to mitigate exposure to asbestos.¹⁶⁴ Cape Plc raised the *forum non conveniens* defence which seemed to succeed until the case was appealed to the House of Lords.¹⁶⁵ Writing on behalf of the court, Lord Bingham stated:

“...if these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and expert evidence which would be essential if these claims were to be justly decided this would amount to a denial of justice.”¹⁶⁶

The court in *Lubbe* made it clear that while SA may have been the most appropriate forum for the case, the risk of the claimants not having substantial access to justice provided enough reason for the case to be heard before the English Courts. Palombo argues that while the outcome of *Lubbe* was hailed as largely successful, the judgment made it unclear if parent company liability could be imposed in the case where the claimants did not have an employment relationship with the parent company or their subsidiary.¹⁶⁷

Just over a decade since the *Lubbe* ruling, the 2012 case of *Chandler v Cape Plc* became the first instance of a court recognising that a parent company owed a ‘duty of care’ towards their subsidiary.¹⁶⁸ In this case, Mr Chandler was employed by the subsidiary, Cape Plc, between 1959 to 1962.¹⁶⁹ During this period Mr Chandler was exposed to asbestos and was eventually diagnosed

¹⁶² Ibid.

¹⁶³ *Lubbe v. Cape Plc* [2000] I W.L.R. 1545, UK House of Lords.

¹⁶⁴ Ibid.

¹⁶⁵ The House of Lords was the predecessor to what is now the UK Supreme Court.

¹⁶⁶ *Lubbe v Cape Plc* supra note 163.

¹⁶⁷ Dalia Palombo op cit note 155. Palombo further argues that this left third parties, such as communities who may have been victims of environmental harms vulnerable as they did not have a direct connection with the parent companies.

¹⁶⁸ *Chandler v Cape plc* [2012] EWCA Civ 525, UK Court of Appeals.

¹⁶⁹ Ibid at 3111.

with asbestosis almost fifty years later — at which point the subsidiary where Mr Chandler had worked was no longer in existence.¹⁷⁰ The Court in *Chandler v Cape Plc* established a four part test in order to determine whether a parent company would owe a ‘duty of care’:

- “(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.”¹⁷¹

These cases are particularly significant as they emphasise the amenability of the court to view the relationship between the parent and subsidiary in the broader context which disallows them to avoid liability through the corporate structure. It is however notable that the court in *Lubbe* found that there was a duty based on the fact that Cape Plc had assumed responsibility for the operations of their subsidiaries.¹⁷² Rigby highlights that the “assumption of responsibility” which incurs a duty of care requires a special relationship between the defendant and claimant and this is of course not the case with all harms caused by the operations of MNCs as this would exclude community claimants.¹⁷³

As highlighted above, the question of the “proper place” or “convenient forum” has played a central role in parent company liability cases.¹⁷⁴ Palombo argues that there was an assumption that overcoming this jurisdictional burden was almost impossible for claimants and once *forum non conveniens* was raised as a defence, it would almost always be accepted. The court in *Lubbe* made clear that this is not the case, instead claimants need to prove that they have an arguable case against the defendants. This was a prominent feature in both the recent judgments of the UK Supreme Court in *Vedanta* and *Okpabi*.¹⁷⁵

¹⁷⁰ Mollie Rigby op cit note 146 at 3.

¹⁷¹ *Chandler v Cape Plc* supra note 128.

¹⁷² Andrew Sanger ‘Crossing the corporate veil: The duty of care owed by a parent company to the employees of its subsidiary’ (2012) 71 *The Cambridge Law Journal* at 480.

¹⁷³ Mollie Rigby op cit note 146 at 3.

¹⁷⁴ Ekaterina Aristova ‘The Future of Tort Litigation against Transnational Corporations in the English Courts: Is Forum [Non] Conveniens Back?’ (2021) 6 *Business and Human Rights Journal* at 399.

¹⁷⁵ *Ibid* at 408. Notably, the *forum non conveniens* doctrine was limited by the European Union Court of Justice in the case of *Owusu v Jackson* in 2005, meaning that proceedings in the UK could no longer be stayed on this ground. There is much debate about what the UK’s withdrawal from the European Union may mean for the future of delictual

In *Vedanta*, the UK Supreme court allowed a group of Zambian claimants to sue the UK-domiciled parent company (Vedanta Resources Plc) for environmental damage from the Nchanga copper mine which was operated by Vedanta Resources Plc's Zambian subsidiary.¹⁷⁶ The ruling by the UK Supreme Court dealt with whether there was an arguable case related to the imposition of a 'duty of care' on the parent company. It was constrained to a jurisdictional assessment of the matter. The *Vedanta* judgment will be explored in greater detail in the following chapter.

The ruling in *Vedanta* laid the groundwork for the *Okpabi v Shell* judgment, where the UK Supreme Court confirmed the courts previous finding in *Vedanta*. In Particular, that UK courts have jurisdiction over UK-domiciled parent companies for delictual claims arising from extraterritorial harm.¹⁷⁷ Palombo has highlighted that the jurisprudence in these two cases have dispelled three common myths surrounding a parent company's duty of care.¹⁷⁸ The first myth is that English courts would be reluctant to assert jurisdiction over delictual claims where the harm occurred extraterritorially.¹⁷⁹ The second myth was that the parent company owes a 'duty of care' only to their employees but not to other stakeholders.¹⁸⁰ And finally, that there are very limited circumstances in which a 'duty of care' can be proved.¹⁸¹

While creative litigation methods have been able to (momentarily) fill in the governance gaps, the issue of corporate impunity remains. Litigating human rights abuses using private law remedies, such as a delictual claim, has its shortcomings. Often the complexity of the case and procedural barriers faced by claimants often draws out litigation and requires destitute claimants to go up against the unlimited resources of MNC's.¹⁸² The recent rulings in *Vedanta* and *Okpabi* indicates that the UK Supreme court is aware of some of the jurisdictional hurdles that claimants may face in litigating against MNCs and indeed, a significant amount of literature on the issues with business and human

litigation against MNCs and the use of forum non conveniens. See: Lorna Gillies 'Appropriate adjustments post Brexit: residual jurisdiction and forum non conveniens in UK courts' (2020) 2020 *Journal of Business Law* 161-183.

¹⁷⁶ Ekaterina Aristova op cit note 174 at 405.

¹⁷⁷ Ibid at 407.

¹⁷⁸ Dalia Palombo op cit note 155.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Wolfgang Kaleck & Miriam Saage-Maaß op cit note 68 at 702.

rights cases is focused on the fact that access to justice is often a long road for victims of harm.¹⁸³ This is best exemplified in the *Vedanta* case which will be explored in detail in the next chapter.

(b) Chapter conclusion

Conclusively, the literature discussed above explores the incremental way in which the current BHR litigation has developed. Particularly, it has highlighted the need for creative litigation methods to be deployed in the absence of a binding business and human rights treaty. Despite continuous opposition to a binding treaty in the Global North, there continues to be many legislative developments, particularly in European countries. Similarly, the Clarification of the Alien Tort Claims Statute is a milestone development considering that the decision of the Supreme Court in *Kiobel* closed the door to foreign litigation who wished to sue American Corporate defendants in their home state. While these are welcomed developments, the past two decades have surmounted in a body of evidence that voluntary assumptions of responsibility by MNCs for human rights violations is insufficient for the current problems that exist.¹⁸⁴ The problems that persist today reiterate that the UNGPSs are not the solution, but rather the start of addressing the governance gap in the BHR arena.¹⁸⁵ The issue of an adequate remedy is central to addressing the lack of accountability for MNCs. Through the use of delictual remedies *Vedanta* hopes to pave the way to greater accountability by imposing a ‘duty of care’ on parent companies. Subsequently, an exploration of the case will be provided in the next chapter.

¹⁸³ Gwynne Skinner, Robert McCorquodale, Olivier De Schutter & Andie Lambe 'The Third Pillar' (2013) *Access to Judicial Remedies for Human Rights Violations by Transnational Business. Bruselas-Londres: ICAR-CORE-ECCJ* at 16.

¹⁸⁴ For example, the Covid-19 pandemic raised questions about the human rights obligations of pharmaceutical companies and waiving intellectual property rights for life-saving medicines such as vaccines. See: Sharifah Sekalala, Lisa Forman, Timothy Hodgson, Moses Mulumba, Hadijah Namyalo-Ganafa & Benjamin Mason Meier 'Decolonising human rights: how intellectual property laws result in unequal access to the COVID-19 vaccine' (2021) 6 *BMJ Global Health* at 1 -9.

¹⁸⁵ Mihir Kanade 'The United Nations Guiding Principles on Business and Human Rights: presenting the problem as the solution' in *The Earth Charter, Ecological Integrity and Social Movements* Routledge (2014) 79-89.

CHAPTER FOUR

IV *VEDANTA V LUNGOWE*: A CASE STUDY FOR THE IMPOSITION OF A 'DUTY OF CARE' ON A PARENT COMPANY

(a) Background to the case

The *Vedanta* case concerned a delictual claim, brought by British law firm Leigh Day on behalf of a group of Zambian claimants who resided in the Chingola District in the Copperbelt.¹⁸⁶ The claimants alleged that mining activities carried out by Nchanga copper mine, which is said to be the second largest in the world, had polluted a waterway which they relied on for both subsistence farming and personal use.¹⁸⁷ The mine was operated by Zambian-based Konkola Copper Mines Plc (KCM), whose English-domiciled parent company, Vedanta Plc had a majority shareholding while the Zambian government owned the minority stake.¹⁸⁸ Accordingly, both Vedanta and KCM were cited as defendants.¹⁸⁹ Despite KCM not being a wholly-owned subsidiary, Vedanta published materials stating that they were extensively involved in the operations and policies of KCM.¹⁹⁰ The claimants alleged that KCM was aware of the environmental harm that occurred in the course of their operation which led to “personal injury, damage to property, loss of income and loss of amenity and enjoyment of land.”¹⁹¹

The question of law before the UK Supreme Court was whether a claim for damages that occurred in Zambia could be brought before the English Courts.¹⁹² Notably, this was solely a jurisdictional challenge and the Court did not rule on the merits of the claim.¹⁹³ Vedanta and KCM had challenged the jurisdiction of the English Courts to hear the case based on the fact that they believed the claimants

¹⁸⁶ *Vedanta* supra note 31 at para 2. The Zambian Copperbelt is a region straddling the Alastair Fraser 'Introduction: Boom and bust on the Zambian Copperbelt' in *Zambia, Mining, and Neoliberalism Springer* (2010) 1-30. n

¹⁸⁷ *Ibid* at para 2.

¹⁸⁸ Samvel Varvastian & Felicity Kalunga 'Transnational corporate liability for environmental damage and climate change: Reassessing access to justice after *Vedanta v. Lungowe*' (2020) 9 *Transnational Environmental Law* at 326.

¹⁸⁹ Vedanta and KCM were the appellants before the UK Supreme Court.

¹⁹⁰ *Vedanta* supra note 31 at para 2.

¹⁹¹ Daniel Bertram 'Environmental Justice “Light”? Transnational Tort Litigation in the Corporate Anthropocene' (2022) 23 *German law journal* at 744.

¹⁹² *Ibid*.

¹⁹³ Daniel Bertram op cit 191 at 749.

were “forum shopping”¹⁹⁴ by using Vedanta as an anchor defendant.¹⁹⁵ In 2016, the trial court held that the claim could proceed in England, where one of the defendants were domiciled, despite the fact that the alleged delictual harm occurred extra territorially.¹⁹⁶ Vedanta unsuccessfully appealed this judgment to the Court of Appeals prior to it coming before the UK Supreme Court which unanimously dismissed the appeal in a judgment penned by Lord Briggs.¹⁹⁷

(b) The case before the UK Supreme Court

The issues for determination before the UK Supreme Court was the preliminary question of jurisdiction. However, the following questions which were related to the merits of the case had to be explored in determining whether the Court had jurisdiction over the matter:¹⁹⁸

1. Whether there was a legally triable issue against Vedanta as the parent company of KCM;
2. Whether KCM was the proper party to the claim against Vedanta;
3. Whether England was the proper place for the claim to be heard;
4. Whether substantial justice would be assured if the Court declined jurisdiction.

(i) A legally triable issue against Vedanta

In terms of determining whether there was a legally triable issue against Vedanta, the claimants alleged that Vedanta had extensive control over KCM as they were involved in the regulation of their compliance, safety and environmental standards and monitoring.¹⁹⁹ Vedanta, however, alleged that

¹⁹⁴ “Forum Shopping” refers to the practice of litigants choosing to bring claims in a jurisdiction where they believe they will have a more favourable outcome rather than the more convenient forum. See: Friedrich K. Juenger 'Forum Shopping, Domestic and International' (1988) 63 *Tulane Law Review* at 553.

¹⁹⁵ “The rules of civil procedure for England and Wales provide that a claim against an English defendant can “anchor” the case, allowing the courts to exercise jurisdiction over another “necessary or proper party” to the claim.” In: Tara Van Ho 'Vedanta Resources Plc and Another v. Lungowe and Others' (2020) 114 *American Journal of International Law* at 111.

¹⁹⁶ In most cases concerning corporate accountability, the extra-territoriality of the harm has often served as a valid defense for multi-national corporations. This because a major issue in early cases litigated using the Alien Tort Statute in the US which was discussed in Chapter 3.

¹⁹⁷ *Vedanta* supra note 31 at para 102.

¹⁹⁸ Importantly, the UK Supreme Court only pronounced on the jurisdictional issue in this case and did not rule on the merits of the claims put forward by the claimants.

¹⁹⁹ *Vedanta* supra note 31 at para 3.

the claimants were incorrectly pursuing them in order to force KCM to defend themselves before the English Courts, being the *forum non conveniens*.²⁰⁰ The Court however held that Vedanta exercised a “very high level of control and direction” over KCM which supported the claimant’s allegation.²⁰¹

Similarly, the trial court also found that Vedanta’s group-wide policies lead to a triable issue against them as the parent company.²⁰² Therefore, the claimants interest in pursuing Vedanta went further than merely securing the English Court’s jurisdiction over KCM.²⁰³ Lord Briggs held that the claimants did have a bona fide claim against Vedanta who, unlike their Zambian subsidiary, was not of questionable solvency and thus able to possibly settle a judgment debt.²⁰⁴

(ii) Vedanta’s ‘duty of care’

In the Judgment, Lord Briggs found that for the purposes of English common law, whether a parent company owes a “duty of care” to its subsidiary is dependent on the extent to which the parent company “availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary”.²⁰⁵ By virtue of the fact that Vedanta owned KCM, it had substantial control over their operations and therefore could be seen to owe a “duty of care” to its subsidiary.²⁰⁶ Vedanta argued that allowing a claim to be brought against them based on their involvement in, and the implementation of their group-wide policies, would result in the creation of a new category of negligence.²⁰⁷ This assertion was rejected by Lord Briggs who held that this was not a claim that exceeded the bounds of their common law duties. Furthermore, Vedanta’s willingness to intervene in the operations of KCM as well as the extent of the supervision that they provided to the management justified the imposition of a “duty of care”.²⁰⁸ This willingness was further publicly advertised by Vedanta themselves, therefore the claim did not only rest on the fact that they were in de facto control of KCM.²⁰⁹

²⁰⁰ Ibid at para 24 -27.

²⁰¹ Ibid.

²⁰² Ibid at para 24.

²⁰³ Tara Van Ho op cit 195 at 111.

²⁰⁴ *Vedanta* supra note 31 at para 24-27.

²⁰⁵ Ibid at Paragraph 49.

²⁰⁶ Significantly, the claimants provided some evidence that Vedanta, being the larger parent company of KCM, meant that they were of greater solvency and, unlike Zambia, conditional fee agreements were permitted in the UK in order to facilitate access to justice.

²⁰⁷ *Vedanta* supra note 31 at para 49 – 53.

²⁰⁸ Ibid.

²⁰⁹ Ibid at para 53.

While not intended to be exhaustive, Lord Briggs identified three instances in which a “duty of care” can arise.²¹⁰ First, where the guidance or policy from the parent company falls short of legal standards or is defective; secondly, where the parent company goes beyond holding itself out as being in control but has a proactive role in the implementations of the policies; and thirdly, where a parent company publicly proclaims to exercise that degree of supervision and control of its subsidiaries, even if it does not in fact do so”.²¹¹ Importantly, Lord Briggs highlighted that there is nothing novel about parent company liability arising from their ‘duty of care’.²¹² He states in paragraph 54 of the judgment: “...there is nothing special or conclusive about the bare parent/subsidiary relationship, it is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all.”²¹³

(iii) The convenient forum

The appellants argued that the claimants were “abusing EU law” by relying on the Brussels I Recast Regulation (Brussels Regulation). The Brussels Regulation established uniform rules on jurisdiction for civil claims filed against corporations who were domiciled in the member states of the European Union.²¹⁴ Notably, this case was heard prior to Brexit and therefore the Brussels I Recast Regulation was still applicable.²¹⁵ The European Court of Justice brought an end to the defence of *forum non conveniens* in their ruling in the 2005 case of *Owusu v Jackson*.²¹⁶ Subsequently, if a claimant could prove a triable issue against a defendant who is domiciled in the UK, a court is able to exercise jurisdiction over the claim.²¹⁷ Additionally, the court must take into consideration the interests of the parties and access to substantial justice in addition to the burden placed on the parties by having to litigate in any of the potential jurisdictions in which the case can be heard. The risk of having

²¹⁰ Ibid at para 51-55.

²¹¹ In the case of *Chandler v Cape P l c* the court dismissed the arguments on the corporate veil and instead accepted a broad view of the concept of “assumption of responsibility” which opened the door for delictual claims against parent companies who were domiciled in the UK. See: Ahmed Mukarrum 'Private international law and substantive liability issues in tort litigation against multinational companies in the English courts: recent UK Supreme Court decisions and post-Brexit implications' (2022) 18 *Journal of Private International Law* at 62.

²¹² This argument is also shared by Cassel et al and has been discussed in Chapter 3.

²¹³ Ibid at para 54.

²¹⁴ Marilyn Croser, Day Martyn & Mariëtte van Huijstee et al *Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability* (2020) 5 *Business and Human Rights Journal* at 131.

²¹⁵ Ekaterina Aristova op cit note 171 at 399 – 422.

²¹⁶ Surekha Rodrigo 'The Restriction of the Power of the Courts to Stay Proceedings in Favour of More Appropriate International Courts: The Decision in *Owusu v Jackson*' (2012) 2 *Southampton Student Law Review* at 59.

²¹⁷ Elsabe Schoeman 'Litigating about Where to Litigate: *Vedanta Resources Plc v Lungowe* [2019] UKSC 20 Case Note' (2019) 52 *Comparative & International Law Journal of Southern Africa* at 448.

irreconcilable judgments in different forums on the same issue has to be taken into consideration when deciding on the “convenient forum” or “proper place” which refers to the most appropriate forum in which the case may be heard considering the interest of justice.

Under the rules of Private International Law, the principle of *forum conveniens* requires a court to take into account the various “connecting factors” that relate to the matter and the subsequent burden that would be placed on any of the parties by litigating in one jurisdiction over the other.²¹⁸ However, a court may allow a case to proceed even in the event that it finds another forum may be closer connected to the matter if declining jurisdiction would amount to a barrier to accessing justice.²¹⁹

In the Vedanta case, the trial court found that the connecting factors pointed towards Zambia being the proper place for the case against KCM, however, due to the fact that Vedanta was domiciled in the UK and the potential risk of a conflicting judgment, the court concluded that the case against KCM should also proceed in England. Notably, in paragraphs 81- 83 Lord Briggs states that the court *a quo* erred in this finding and that the potential risk of irreconcilable judgements does not “transform the right to sue one defendant in the English Courts to a right to sue all defendants in England.”²²⁰

Notably, the Supreme Court differed with the trial court on whether England was the proper place for the claim to be heard. Furthermore, the trial court looked at Zambian legal principles and found that the Zambian court was likely to interpret principles of negligence in line with the English Common Law.²²¹ The trial court had concluded that because there was a risk that two separate claims could be brought due to the location of the defendants, however they ultimately held that England was the proper place to bring the claim.²²² Lord Briggs disagreed and stated in paragraph 87:

“This case seeks compensation for a large number of extremely poor Zambian residents for negligence or breach of Zambian statutory duty in connection with the escape within Zambia of noxious substances arising in connection with the operation of a Zambian mine. If substantial justice was available to the parties in Zambia as it is in England, it would offend

²¹⁸ Ahmed Mukarrum op cit note 211 at 68.

²¹⁹ Ibid.

²²⁰ Ahmed Mukarrum op cit note 211 at 68.

²²¹ Ibid at Paragraph 56. The Zambian legal system has its roots in English Common Law and customary law. See: William L Church 'The common law and Zambia' (1974) 6 *Zambian Law Journal* at 1.

²²² For general conflict of laws rules, a court would look at connecting factors such as the applicable law; the place of the causation and harm; other factors such as the fact that that many of the claimants do not speak English, would need translation, and would have difficulty traveling from Zambia to England; the location of many witnesses; the need to translate documentary evidence; and that a Zambian judgment is enforceable in English courts.

the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England, if the risk of irreconcilable judgments arose purely from the claimants' choice to proceed against one of the defendants in England rather than, as is available to them, against both of them in Zambia."²²³

Furthermore, Lord Briggs held that the risk of conflicting judgments does not give rise to the right to sue all defendants before the English Courts, instead, equal weight had to be given to the availability of an alternate forum and whether the defendants are willing to submit to their jurisdiction.²²⁴ This was of particular significance as Vedanta was willing to submit to the jurisdiction of the Zambian Courts.

(iv) Access to substantial justice

While the UK Supreme Court found that Zambia was the "proper place" for the claim to proceed, they nevertheless had to conduct a separate inquiry into whether there would be a real risk that substantial justice would not ensue if they declined to exercise jurisdiction over the claim.

"If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice."²²⁵

Lord Briggs emphasised that this finding was not an impugment on the competence and impartiality of the Zambian legal system, but rather based on two important issues that arise if the claim were to proceed in Zambia.²²⁶ The first being that the claimants were from impoverished communities and the possibility of securing legal representation on contingency fee agreements were not permitted.²²⁷ Secondly, there were no Zambian legal teams suitable to take on a matter of this complexity, particularly considering the defendant was a MNC, and that KCM had a history of being an adversarial opponent.²²⁸ Accordingly, Lord Briggs found that there was a risk of denying the claimants access to substantial justice if the claim could not proceed before the English Courts and therefore dismissed the appeal by Vedanta.

²²³ *Vedanta* supra note 31 at para 87.

²²⁴ *Vedanta* supra note 31 at para 81-83.

²²⁵ *Ibid* at para 88.

²²⁶ *Ibid* at para 89.

²²⁷ *Ibid*.

²²⁸ *Ibid*.

(c) Is the *Vedanta* judgment a model for litigating against MNCs?

It is undeniable that the outcome of the *Vedanta* judgment has marked a turning point in human rights litigation against MNCs. However, as highlighted above, the case before the UK Supreme Court was solely a jurisdictional challenge. Bradshaw has argued that jurisdictional challenges are often a tactic of “corporate might” with the intention to draw out the litigation and frustrate the claimants.²²⁹ The UK Supreme court seemed aware of this and included a critique on the way the litigation was conducted from paragraph 7 of the judgment.²³⁰ In early 2021, the case was settled out of court for an undisclosed amount prior to a court ruling on the merits of the case. Nevertheless, the judgment is a massive step towards allowing access to justice for victims of human rights abuses committed by corporate defendants. There is also a suggestion in the judgment that parent companies who publicly profess to oversight over the human rights, environmental, social or labour standards of their subsidiaries assume a ‘duty of care’ to those harmed by the subsidiary. Whether this ‘duty of care’ exists would need to be determined on a case-by-case basis. It would therefore be presumptuous to state that all UK-domiciled parent companies owe a ‘duty of care’ to their foreign subsidiaries. However, the judgment does offer us a recognition that there is a level of legal responsibility that parent companies may owe to their subsidiaries.

Lustig has argued that the main significance of the *Vedanta* judgment is that it “disrupts the boundaries posed by the corporate and the sovereign veils and their function as legal barriers in transnational litigation of this kind.”²³¹ Notably, judgment highlights the fact that large corporations, with complex holding structures are no longer able to enjoy unbridled immunity, especially in the case where that immunity would shift the risk to the victims of their harm.²³² Lustig however, is unsure of whether *Vedanta* serves as a model for when it comes to remedying the costs of trials and access to effective representation.²³³ On one hand, using delictual claims may enable destitute communities to access some form of compensation and bring their case to a forum in which there

²²⁹ Carrie Bradshaw 'Corporate Liability for Toxic Torts Abroad: *Vedanta v Lungowe* in the Supreme Court' (2020) 32 *Journal of Environmental Law* at 139 – 150.

²³⁰ *Vedanta* supra note 31 at para 7-8.

²³¹ Doreen Lustig 'The *Vedanta* challenge to multilateralism: Piercing the boundaries of the global legal order—Afterword to the Foreword by Karen Alter' (2022) *International journal of constitutional law* at 9.

²³² *Ibid.*

²³³ Doreen Lustig op cit note 231 at 9.

may be greater access to justice.²³⁴ However, the Court’s decision is influenced by the fact that they believe that the Zambian legal system and representation in Zambia is unable to provide the claimants with justice.²³⁵

Notably, many of the barriers to accessing justice within Zambia are symptomatic of the historical (and current) colonial relationship which is based on exploitation. For example, documents containing evidence that the British government was aware of the potential environmental harm that emanated from the Nchanga Copper mine but did not act on this in order to preserve their relationship with the Zambian government came to light during the trial.²³⁶

Furthermore, the court established jurisdiction based on the limited capacity of the Zambian claimants to access effective legal representation as well as the technical competences of Zambian legal professionals who may have offered their services.²³⁷

In Paragraph 97 of the Judgment, the Court attempts to deflect any potential criticism that this reasoning is an extension of neo-colonialism, especially given Zambia’s former status as a British Colony.

“I am conscious that some of the foregoing paragraphs could be seen as a criticism of the Zambian legal system. I might even be accused of colonial condescension. But that is not the intention or purpose of this part of the judgment. I am not being asked to review the Zambian legal system. I simply have to reach a conclusion on a specific issue, based on the evidence before me. And it seems to me that, doing my best to assess that evidence, I am bound to conclude ... that the claimants would almost certainly not get access to justice if these claims were pursued in Zambia.”²³⁸

Bradshaw has argued that Lord Briggs pre-empted possible criticisms of “colonial condescension” in his analysis of whether there would be access to justice in Zambia.²³⁹ For this reason, he provided an

²³⁴ Ibid.

²³⁵ *Vedanta* supra note 31 at para 88-89.

²³⁶ Laurèl Jayde 'Poisoned Land: Lungowe v Vedanta' available at <https://theecologist.org/2019/mar/06/poisoned-land-lungowe-vs-vedanta>, accessed on 30 August 2022.

²³⁷ *Vedanta* supra note 31 at para 88-89.

²³⁸ Ibid at para 97.

²³⁹ Carrie Bradshaw op cit note 228 at ...

extensive explanation for the finding that there would not be access to substantial justice in Zambia and stated that it had less to do with the independence of the Zambian Judiciary, and more to do with the risk of corruption seeing as the Zambian government had a stake in the mine.²⁴⁰ Lustig, however, has argued that this decision fails to take into account “the voice, presence and agency” of the litigants who chose to litigate the case in England, and has argued that this taints the judgment in terms of establishing access to justice grounded in an understanding of human rights.²⁴¹

Similarly, while many have hailed the *Vedanta* judgment as opening the door to foreign claimants, it appears that rather than it having been flung open, it has instead been left ajar.²⁴² Lustig has argued that more is needed to ensure substantive access to justice in a post-colonial world, in order to ensure that rights are protected and responsibility is asserted.²⁴³ In the absence of this, Bradshaw argues that it would simply mean that “battlegrounds may simply shift to determining the boundaries of substantial justice.”²⁴⁴ Likewise, Lustig has emphasised that the quest to ensure substantial access to justice in a post-colonial world cannot simply be accessing the doors of the Court. Instead, Lustig argues that there needs to be a profound commitment to correcting the rights violations, representation, and voice of those whom the law prevented from being heard.²⁴⁵

(d) Conclusion

While the case has clarified some aspects of a parent company’s “duty of care” it has left future delictual claims against MNCs to the will of the courts. Claimants then have to hope that there is a holistic view of the nature of the claim and the underlying considerations especially where there are litigants with unequal resources.²⁴⁶ Notwithstanding the criticism of *Vedanta*, it has now developed the jurisprudence on BHR and marks an important turn away from the previous *Kiobel*-era court decisions which have allowed corporations to avoid accountability for human rights violations.

²⁴⁰ Ibid.

²⁴¹ Doreen Lustig op cit note 231 at 43.

²⁴² Carrie Bradshaw op cit note 228 at...

²⁴³ Doreen Lustig op cit note 231 at 43.

²⁴⁴ Carrie Bradshaw op cit 228 at 9.

²⁴⁵ Doreen Lustig op cit note 231 at 43.

²⁴⁶ Ekaterina Aristova op cit 171 at 422.

CHAPTER FIVE

V THE IMPACT OF THE VEDANTA JUDGMENT ON FUTURE DUTY OF CARE CLAIMS ON PARENT COMPANIES

(a) *Vedanta* and the Kabwe class action

The previous chapters have highlighted that the tide on corporate accountability has turned. The UK Supreme Court's decision in *Vedanta* has paved the way for future claims against UK-domiciled parent companies before the English Courts. And whilst the *Vedanta* case was eventually settled out of court, the precedent set by the judgment will likely influence future 'duty of care' cases against parent companies in other jurisdictions.²⁴⁷ One such possible case is the Kabwe class action (Kabwe case) that is currently before the Johannesburg High Court in South Africa.²⁴⁸

Significantly, there are striking similarities between the *Vedanta* and the Kabwe case.²⁴⁹ For one, the claimants in the Kabwe case are members of a community in Zambia who live in the surrounding area of what was once the largest lead mine in the world.²⁵⁰ They seek to bring a civil claim against Anglo American South Africa Limited (Anglo), a subsidiary of Anglo-American Plc, for the harm suffered due to lead poisoning from their surrounding environment. In particular, the class comprises women and children as lead poisoning can lead to severe neurological developmental and fertility issues which makes both women and children particularly vulnerable to the effects of lead poisoning. Additionally, the claimants seek blood lead screening for children and pregnant women who reside in Kabwe as well as rehabilitation of the surrounding environment. It is notable that Anglo has endorsed the UNGPs since its introduction in 2011.

²⁴⁷ It is uncontroversial to state that *Vedanta*, along with the subsequent decision in *Okpabi*, is the leading authority on trans-national litigation claims dealing with parent companies and the harms committed by their subsidiaries.

²⁴⁸ *Kabwe and 12 Others v Anglo American South Africa Limited (2020/32777)*.

²⁴⁹ Notably, class actions are relatively new in South Africa and there is no class action legislation that exists. However, there is jurisprudence from both the Supreme Court of Appeal and the South African Constitutional Court which has laid down a framework for claims of this nature to be heard in South Africa. The particular type of human rights litigation that has been framed as class actions are of interest to the general discussion on BHR, however this falls outside of the scope of this dissertation. For more on class actions in South Africa see: Steven Budlender, Gilbert Marcus & Nico M Ferreira Public interest litigation and social change in South Africa: Strategies, tactics and lessons Atlantic Philanthropies (2014) at 144.

²⁵⁰ Munyaradzi Makoni 'UN concern over health at site of former Zambian lead mine' (2021) 398 *The Lancet* at 478.

(i) The History of mining in Kabwe, Zambia

In order to fully understand the events which gave rise to the Kabwe case, the socio-historical formation of Kabwe needs to be understood. Despite the cessation of lead mining in the area, the Zambian city of Kabwe is still haunted by its mining past. The impact of previous decades of mining operations has resulted in Kabwe being one of the world's most toxic and polluted cities.²⁵¹ In October 2020, an application was brought in the Johannesburg High Court to certify a class action against Anglo on behalf of certain residents in Kabwe.²⁵² The class is primarily made up of children and women of child-bearing age and seeks, *inter alia*, damages for the harm suffered as a result of lead poisoning from the surrounding environment. Kabwe's history is largely intertwined with the mineral revolution of the 1860s where the expansion of mining operations was largely driven by European imperialism.²⁵³ After the discovery of lead and zinc deposits in 1902, Kabwe became one of the continent's largest lead mines and smelting operations.²⁵⁴ Unsurprisingly, the geographical setup of Kabwe closely resembles most mining towns in Africa — that being that the labourers, who were often poor Black people, lived in informal housing structures or *townships* around the mine. These *townships* were mostly located to the west of the mine in the crosswind of the mine dumps and smelter.²⁵⁵

While the harmful effects of lead poisoning are widely acknowledged, the long-term consequences of persistent lead exposure are not fully appreciated.²⁵⁶ Notably, lead does not bio-degrade over time and can remain in the soil for hundreds of years.²⁵⁷ Elevated soil-lead levels pose a serious public health risk, and it is particularly dangerous for young children as it can result in severe

²⁵¹ Rafael Baieta, Martin Mihaljevič, Vojtěch Ettler, Aleš Vaněk, Vít Penížek, Jakub Trubač, Bohdan Kříbek, Josef Ježek, Miroslav Svoboda & Ondra Sracek 'Depicting the historical pollution in a Pb–Zn mining/smelting site in Kabwe (Zambia) using tree rings' (2021) 181 *Journal of African Earth Sciences* at 1.

²⁵² At the time of writing, the case was still at the certification stage.

²⁵³ Tomas Frederiksen *Unearthing Rule-mining, power and the political ecology of extraction in colonial Zambia* The University of Manchester, (2010) 20.

²⁵⁴ Buzandi Mufinda *A history of mining in Broken Hill (Kabwe): 1902-1929* University of the Free State, (2015) at 1.

²⁵⁵ There is academic writing dating back to 1972 describing the undesirable location of these townships and the harmful environmental impacts of the mines. See: A Reilly & C Reilly 'Patterns of lead pollution in the Zambian environment' (1972) 6 *Medical Journal of Zambia* 125 at 126.

²⁵⁶ Michael Shannon 'Severe Lead Poisoning in Pregnancy' (2003) 3 *Ambulatory Pediatrics the official journal of the Ambulatory Pediatric Association* 37 at 38.

²⁵⁷ Bohdan Kříbek, Imasiku Nyamb & Vladimír Majer et al 'Soil contamination near the Kabwe Pb-Zn smelter in Zambia: Environmental impacts and remediation measures proposal' (2019) 197 *Journal of Geochemical Exploration* at 159.

neurodevelopmental issues.²⁵⁸ These effects can be life-long and in severe cases, lead poisoning has been linked to organ failure, brain damage and infertility.²⁵⁹ Lead exposure during childhood can also result in high-risk pregnancies as lead gets stored in the skeleton and can be transferred through the placenta prenatally.²⁶⁰

Concerningly, lead poisoning in Kabwe is seen as a natural consequence of living in the surrounding environment.²⁶¹ This narrative has been used by the Zambian government to avoid addressing the lead pollution crisis and is a part of the reason why no one has been held responsible for this environmental catastrophe.²⁶² A study undertaken by John Yabe et al. found that in random sampling of children in Kabwe, their Blood-Lead Levels (BLL) exceeded the Centre for Disease Control's (CDC) BLL of concern which is 5 micrograms of lead per decilitre of blood (mg/dL).²⁶³ Their study found that the average BLL of children in Kabwe was 65.9 mg/dL. To contextualise this, a BLL of 45 mg/dL would require ongoing chelation therapy.²⁶⁴ Yabe et al's report highlights the fact that even decades after the closure of the mine, there was no difference in the levels of lead poisoning and any attempts to rehabilitate the environment were clearly not effective.²⁶⁵

(ii) The case against Anglo in the Kabwe Class action

The claimants allege that during the period in which Anglo controlled the mine, it was the principal lead and zinc mine in the region and consequently responsible for the corresponding proportion of the lead pollution present in the environment of Kabwe.²⁶⁶ The case hinges on the fact that Anglo is liable due to their extensive involvement in the management and oversight of the technical and safety aspects of the mine's operations.²⁶⁷ Additionally, it is alleged that Anglo was aware of the large-scale

²⁵⁸ Jason Gandhi, Rafael J Hernandez & Andrew Chen et al 'Impaired hypothalamic-pituitary-testicular axis activity, spermatogenesis, and sperm function promote infertility in males with lead poisoning' (2017) 25 *Zygote* 103 at 105.

²⁵⁹ Golden Zyambo, John Yabe & Kaampwe Muzandu et al 'Human Health Risk Assessment from Lead Exposure through Consumption of Raw Cow Milk from Free-Range Cattle Reared in the Vicinity of a Lead-Zinc Mine in Kabwe' (2022) 19 *International journal of environmental research and public health* at 1.

²⁶⁰ Vanda RÍsovÁ 'The pathway of lead through the mother's body to the child' (2019) 12 *Interdisciplinary toxicology* 1 at 2.

²⁶¹ Hillary Waters 'The biopower of ignorance: Individualizing blame for lead poisoning in Kabwe, Zambia' (2019) 2 *Environment and Planning E: Nature and Space* 390 at 396.

²⁶² *Ibid* at 391.

²⁶³ John Yabe, Shouta MM Nakayama & Hokuto Nakata et al 'Current trends of blood lead levels, distribution patterns and exposure variations among household members in Kabwe, Zambia' (2020) 243 *Chemosphere* 1 at 2.

²⁶⁴ *Ibid*.

²⁶⁵ *Ibid*.

²⁶⁶ Founding Affidavit Kabwe Class Action.

²⁶⁷ *Ibid*. Extensive involvement or control was a significant part in Lord Briggs' judgment in finding that *Vedanta* owed the claimants a duty of care.

environmental impact of the mine but did not take measures to mitigate the damage nor did they rehabilitate the area and surrounding towns.²⁶⁸ The claimants submit that this knowledge and their failure to act establishes a “duty of care”.²⁶⁹

Interestingly, the claimants explicitly state that this case fits neatly into the formulation of the “duty of care” as stated in paragraph 55 of *Vedanta*, therefore making the claim actionable.²⁷⁰ This is remarkable, as Anglo, similarly to *Vedanta*, have submitted that there is no “triable issue” in this matter.²⁷¹ Richard Hermer, a barrister who acted for the claimants in *Vedanta*, submitted an expert report for the claimants in the Kabwe case. In the report, Hermer stated that if it were established, on expert evidence, that low levels of lead in the blood stream give rise to a significantly increased risk of developmental and behavioural problems, this would constitute an actionable injury. In other words, Hermer has argued that an actionable injury, such as elevated BLL, would constitute a “triable issue”.

Additionally, claimants allege that Anglo had knowledge of the environmental harm emanating from the operations of the mine.²⁷² This ‘knowledge’ is important for the claimants to establish liability on the part of Anglo. A further similarity is that the corporate structure in *Vedanta*, which operated according to a “group system” with a highly centralised management, mirrors that of the structure of Anglo. Anglo in essence controlled all the operations of the mine in terms of its financing, management and technical and environmental policies. Hermer’s expert affidavit concludes that Anglo owed a duty of care to protect Kabwe residents from the harmful effects of lead pollution, due to its *de facto* oversight and control of the key mine operations, and relevant advice given to the mine, between 1925 and 1974. Anglo however has submitted that the question of their extent of control can only be decided at the trial stage and is not to be currently determined as part of the certification application.²⁷³

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid* at paragraph 30. As discussed previously, while the definition of a ‘duty of care’ differs in various jurisdictions, it is viewed as being linked to a corporation’s already existing ‘due diligence’ obligations. See: Doug Cassel op cit note 25 at 180.

²⁷⁰ One of the main questions before the UK Supreme Court in *Vedanta* was whether there was a “triable issue” against *Vedanta*. Similarly, Anglo has argued that there is no actionable claim against them.

²⁷¹ *Vedanta* supra note 31 at paragraph 17-18.

²⁷² Knowledge of harm would need to be proved by the applicants in order to impose liability on Anglo.

²⁷³ At the time of writing, the case was still in the certification stage. Part of the *Vedanta* judgment addressed the fact that prior to the case reaching the UK Supreme Court, the case dragged on for many years due to a series of ‘mini-trials’ and dispute regarding evidence. Similarly, prior to the certification hearing, the Kabwe class action was subject to various interlocutory applications.

In summation, the claimants allege that under Anglo's control, the mining operations lead to widespread lead poisoning to the local community. Despite knowledge of this, Anglo ignored advice to rehabilitate the environment due to economic considerations. Anglo, however, denies liability and states that Zambia Consolidated Copper Mines (ZCCM) was wholly responsible for the mine after the transfer of ownership in 1974. Additionally, Anglo states that the high levels of lead poisoning in Kabwe is due to the concentration of lead in the surrounding environment rather than through their actions. The claimants, however, allege that despite the official transfer of the mine occurring in 1974, one of Anglo's long-serving advisors, remained on the board of ZCCM until the early 2000s, and therefore allowing Anglo to have knowledge and insight into the operations of the mine. The claimants have subsequently submitted that Anglo was aware of the environmental impact of the mine and its continued harm that post-dated their official ownership. Interestingly, whilst the claimants state that members of the class have BLL that exceed 45ug/dl, at which medical intervention is required, Anglo has submitted medical expert reports that conclude that none of the class members have sustained lead-related harm. The claimants also state that this attitude towards or treatment of patients would not be acceptable in the USA, where Anglo's medical experts are based, or anywhere else in the Global North.²⁷⁴ This disparity was highlighted in the report of the Special Rapporteur on the right to a healthy environment which stated that:

“The disturbing phenomenon of poor and marginalised communities being more heavily affected by pollution is a form of environmental injustice. Environmental injustices related to pollution and the production, export, use and disposal of toxic substances are rooted in racism, discrimination, colonialism, patriarchy, impunity, and political systems that systematically ignore human rights.”²⁷⁵

(b) Suing the wrong defendant in the wrong forum?

²⁷⁴ There is a stark difference in the way in which MNCs act in rehabilitating the environment in the Global South versus the Global North. This is explored in more detail in: Tineke Lambooy, Mary A Varner & Aikaterini Argyrou 'The Corporate Responsibility to Remedy (3rd Pillar Ruggie Framework)-Analysis of the Corporate Responses in Three Major Oil Spill Cases: Shell-Nigeria, BP-US (the Gulf), Chevron-Ecuador' (2011) *University of Oslo Faculty of Law Research Paper* at 7-55.

²⁷⁵ David R. Boyd & Marcos Orellana *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* (2022) available at http://www.srenvironment.org/sites/default/files/Reports/2022/A_HRC_49_53_AdvanceEditedVersion.pdf, accessed on 15 November 2022.

A major theme in all BHR litigation is the significant procedural hurdles that claimants have to overcome in order to have their cases heard.²⁷⁶ In the Kabwe case, Anglo has stated that they are not the correct defendant in the case due to the ownership of the mine being transferred to ZCCM and therefore it is a claim that should be brought before the Zambian Courts. The claimants, however, have accused Anglo of engaging in “jurisdictional gamesmanship”. The claimants submit that Anglo is domiciled in the jurisdiction of the Johannesburg High Court and each of the claimants have a right to sue Anglo in this court. It therefore has to be in the interest of justice for the court to exercise jurisdiction over the matter.²⁷⁷ Anglo, however, has submitted that it would be in the interest of justice for the Johannesburg High Court to refuse certification. Interestingly, in *Vedanta*, the UK Supreme Court held that they could exercise jurisdiction over the claim even though Vedanta had offered to submit to the jurisdiction of Zambian Courts, thereby limiting the risks of parallel proceedings and conflicting judgments, Anglo on the other hand, has been silent on submitting to the jurisdiction of Zambian Courts.

Significantly, the defence of *forum non conveniens*, which sealed the fate of most BHR litigation against MNCs, is not a recognised defence in South African law.²⁷⁸ This means that SA courts may not decline to hear a case that falls within their jurisdiction even if another court may be closer connected or the matter also falls within their jurisdiction. The applicants have alleged that Anglo has attempted to “recast the *forum non conveniens*” principle by stating that Zambia would be the more appropriate forum for the case to be heard. By doing so, the applicants allege that Anglo is subverting the interests of justice principle which is central to the right to access courts in SA. The point on access to justice featured prominently in the *Vedanta* judgment, and the claimants have emphasised that Zambian law does not allow for class actions, of which Anglo is aware.

Another similarity between the cases is that Anglo, like *Vedanta*, states that the claimants are suing the incorrect defendant. Anglo submitted that instead of suing ZCCM, which indicated that they would settle all cases related to the mining operation, they have pursued Anglo as a defendant despite

²⁷⁶ In October 2022, the eight sessions of the IGWG had concluded that claimants in transnational litigation cases can face significant barriers to accessing justice due to the failure of international law to keep pace with development. See: Elodie Abo *Proposed binding treaty on business and human rights: Taking stock 8 years into negotiations* (2022) available at <https://www.business-humanrights.org/en/blog/proposed-binding-treaty-on-business-and-human-rights-taking-stock-8-years-into-negotiations/>, accessed 15 November 2022.

²⁷⁷ The Interest of justice is the overarching consideration when a court has to decide if a class action should be certified as confirmed in the case of *Mukaddam v Pioneer Foods (Pty) Ltd and Others*.

²⁷⁸ *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* 2013 (5) SA 484 (SCA) at paragraph 19.

the mine being owned and operated by ZCCM.²⁷⁹ In Vedanta, there were clear reasons for the claimants to pursue them as the parent company as their Zambian subsidiary was almost bankrupt. This, however, is not the case with ZCCM. Anglo contends that ZCCM is currently listed on the Lusaka and London stock exchanges and has a market capitalisation of almost five billion rands.²⁸⁰ Therefore, Anglo contends that they were and remain obliged by both the assumption of liability to rehabilitate the surrounding environment of the mine in Kabwe.

(c) The position of the Kabwe Case in Business and Human Rights Litigation

In the absence of a binding BHR treaty, the UNGPs remain the key framework for dealing with corporate conduct that breaches human rights. The complimentary responsibilities posited in Ruggie's "respect, protect and remedy" framework goes to the core of the international human rights regime.²⁸¹ The three inter-connected pillars remain central to addressing corporate conduct. To fill the governance gap created by globalisation, claimants have had to use civil law remedies to hold MNCs accountable. In this way, the Kabwe case is no different.

NGPs. And while the status of the UNGPs remains 'soft law' – courts have begun to incorporate soft law instruments into judgments. The recent Dutch Court ruling in the *Miliedefensie v Royal Dutch Shell case* is one such example of this.²⁸² In finding that Royal Dutch Shell owed the claimants a duty of care, the court relied heavily on the UNGPs. In doing so, the court held that the UNGPs were an 'authoritative and internationally endorsed "soft law" instrument.'²⁸³ The UNGPs make it explicitly clear that States are obliged to take "appropriate steps to prevent, investigate, punish and redress" corporate harm within their territory and/or jurisdiction.²⁸⁴ Additionally, the UNGPs provide that when human rights abuses occur within their territory and/or jurisdiction, States must "take

²⁷⁹ In ZCCM's decommissioning plan for the mine, their documents indicated that they were aware of soil contamination in the surrounding environment that could last for decades.

²⁸⁰ Prior to *Vedanta* reaching the UK Supreme Court, the decision of the High Court deemed Vedanta to be the "real architects of the environmental pollution," and noted that Vedanta "making millions of pounds out of the mine" should also be considered when determining the matter. See: Adeline Michoud 'Mind the (Liability) Gap: The Relevance of the Duty of Care to Hold Transnational Corporations Accountable' (2019) 40 *Windsor Rev. Legal & Soc. Issues* at 149.

²⁸¹ Doug Cassel op cit note 25 at 180.

²⁸² *Milieudefensie* Supra note 99.

²⁸³ Ibid at para 4.4.11.

²⁸⁴ UNGPs op cit note 13, principle 1 at 3

appropriate steps to ensure, through judicial [or other appropriate means], that ... those affected have access to effective remedy”.²⁸⁵

One of the other striking similarities between *Vedanta* and the Kabwe case is that like Vedanta, Anglo had made numerous corporate social responsibility statements and even publicly endorsed the UNGPs.²⁸⁶ Subsequently, the claimants have relied on principle 13 which obliges Anglo to:

- “(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”²⁸⁷

Furthermore, Principle 22 states that Anglo has a duty to remediate any harm caused: “Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”²⁸⁸ It is also remarkable that this principle is in fact mirrored in Anglo’s own Human Rights Policy which acknowledges: “[w]here we have caused or contributed to adverse human rights impacts we will contribute to their remediation as appropriate.”²⁸⁹ Despite this, Anglo contends that the UNGPs are of no relevance to the current proceedings. Their argument is based on the fact that the UNGPs were adopted in 2011, whilst Anglo’s involvement in the mine ceased in 1974. Anglo further argues that the UNGPs are not retrospective and any other interpretation of the UNGPs would then create new international law obligations which is against the general principles of the UNGPs which state that: “Nothing in these Guiding Principles should be read as creating new international law obligations...”²⁹⁰

Cassel, however, has argued that the imposition of a “duty of care” is not a novel mechanism, but simply an incorporation of a common law duty into delictual claims.²⁹¹ Cassel further states that this

²⁸⁵ Ibid, principle 25 at 27.

²⁸⁶ Ibid. It is possible that this finding in *Vedanta* may now lead to more parent companies getting less involved in the operations of their subsidiaries to avoid potentially being held liable for the actions of their subsidiaries.

²⁸⁷ UNGPs op cit note 13, principle 13 at 14-15.

²⁸⁸ UNGPs op cit note 13, principle 22 at 24.

²⁸⁹ Anglo-American PLC *Group Human Rights Policy*, available at <https://www.angloamerican.com/~media/Files/A/Anglo-American-Group/PLC/sustainability/our-strategy/hr-policy-document-english.pdf>, accessed on 09 November 2022.

²⁹⁰ UNGPs op cit note 13 at 1.

²⁹¹ Doug Cassel op cit note 25 at 180.

incorporation would then allow courts to reflect the norms of business conduct and would contribute to “fulfilling the remedial goals of the Guiding Principles”.²⁹²

(i) Amicus Interventions in the Case

Unsurprisingly, this case has garnered wide public interest. A number of parties have applied to intervene in the case as amicus curiae. International NGOs Human Rights Watch and Amnesty International are among these parties and have made submissions based on South Africa’s international law obligations. It is notable that SA is a party to the International Covenant on Economic, Social and Cultural rights (ICESCR). Slye has argued that SA has played a foundational role in the development of international human rights law, as the struggle against Apartheid gave rise to a significant amount of debate within the UN General Assembly regarding the legitimacy of sanctions.²⁹³ He further argues that post-apartheid, “South Africa moved from one of the most morally suspect nations in modern history to the poster child of the international human rights movement; because of its peaceful transition from apartheid to democracy, South Africa is often cited as the ultimate success story of the triumph of the human rights ideal.”²⁹⁴

Amnesty International (AI), one of the amici, submitted that the international jurisprudence on MNC litigation, such as *Vedanta*, has illustrated that SA has a duty to regulate the conduct of corporations who are domiciled in their jurisdiction. Additionally, SA is obliged to prevent as well as remedy any human rights violations that occur as a result of corporate conduct. They further highlight that civil claims against MNCs for human rights abuses have often been dismissed on jurisdictional grounds. This is especially the case where MNCs have been able to evade liability through the corporate structure or where courts have recognised *forum non conveniens* as a defence. According to AI, this dismissal was made based on the erroneous assumption that the claimants would be able to sue to the defendant in their home State.

(ii) The Centrality of Access to Justice

²⁹² Ibid at 182.

²⁹³ Ronald Slye 'International law, human rights beneficiaries, and South Africa: some thoughts on the utility of international human rights law' (2001) 2 *Chicago Journal of International Law* at 61.

²⁹⁴ Ibid.

Access to justice is a central part of the UNGPs and is encapsulated in the third pillar under the “remedy” part of the framework. A significant part of the *Vedanta* judgment dealt with the fact that if the English court declined to exercise jurisdiction over the matter, the claimants in *Vedanta* may not have access to substantial justice.²⁹⁵ The UK Supreme Court acknowledged that the claimants in *Vedanta* faced significant hurdles to bring the case before the Zambian courts ranging from the lack of funding for indigent claimants to the Zambian legal system being unable to accommodate claims of this nature.²⁹⁶ These limitations would prevent the claimants from accessing justice, therefore they were forced to seek recourse abroad.

AI further highlight that a significant focal point in *Vedanta* was that the company had made public commitments regarding their subsidiaries and their involvement in the operations of that subsidiary. In paragraph 53 of the judgment, Lord Briggs held “it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so.” Other significant parts of the judgment were the focus on the claimant’s access to substantial justice. As discussed in Chapter 4, Lord Briggs had to tread carefully on the issue of stating that the Zambian legal system would not offer the claimants access to justice. In assessing this, Lord Briggs highlighted that under the rules of Private International Law, Zambia was the closest connecting factor as the harm occurred there and the claimants are Zambian. However, there was a risk that the claimants would not have access to justice if the claims were brought before the Zambian Courts. Similarly, the Amici have submitted that unlike SA, Zambia does not make provision for opt-out class actions.²⁹⁷ Additionally, as emphasised in *Vedanta*, contingency fee agreements are prohibited which poses a significant barrier to finding legal representation for claimants who are destitute.²⁹⁸

At paragraph 89 of the *Vedanta* judgment, Lord Briggs held:

²⁹⁵ Post-Brexit, the defense of forum non conveniens may be raised in future trans-national litigation claims unless the UK joins the Lugano convention. However, in South Africa, the forum non conveniens defense is not accepted by our courts.

²⁹⁶ This issue was similarly highlighted in Chapter 3 where while civil claims are being increasingly used to litigate human rights abuses, it does require the claimants to mould their claims within the parameters of the legal system in which they are bringing the claims.

²⁹⁷ For more on opt-out class actions see: Estelle Hurter ‘Opting in or opting out in class action proceedings: from principles to pragmatism?’ (2017) 50 *De Jure Law Journal* at 62. The Zambian Supreme Court confirmed that there is no provision for opt-out class actions that mirrors that in South African in the case of *Kuta Chambers v Concillia Simbulu*.

²⁹⁸ *Vedanta* supra note 31 at para 90-93.

“In the present case the judge described this as an “access to justice” issue. By this he meant that the real risk (in his view a probability) that substantial justice would be unavailable in Zambia had nothing to do with any lack of independence or competence in its judiciary or any lack of a fair civil procedure suitable for handling large group claims. Rather, it derived essentially from two factors: first, the practicable impossibility of funding such group claims where the claimants were all in extreme poverty; and secondly, the absence within Zambia of sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively, in particular against a defendant (KCM) with a track record which suggested that it would prove an obdurate opponent. The judge acknowledged that in the large amount of evidence and lengthy argument presented on this issue there was material going both ways, giving rise to factual issues some of which he had to resolve, but others of which he could not resolve without a full trial. Nonetheless he concluded not merely that there was a real risk but a probability that the claimants would not obtain access to justice so that, in his view, and notwithstanding the need for caution and cogent evidence, this reason for preferring the English to the Zambian jurisdiction was established by “a substantial margin beyond the real risk which the law requires...”²⁹⁹

In addition to the above, AI have outlined in their amicus submissions that the responsibility of corporation to remediate applies to past harm and cannot be absolved through mere changes in ownership. They draw on a report from the UN Special Rapporteur on Toxics which has urged States to “[e]nsure that corporate structures and acquisitions do not prevent victims from accessing justice or remedy for human rights abuses linked to toxic exposure”.³⁰⁰ They also rely on the Zambian case *Kankola Copper Mines and Others v James Nyansulu and Others* in which the Zambian Supreme Court stated that the need for claimants to produce expert evidence related to environmental harm is a major challenge to claimants who are destitute. Furthermore, experts may be hesitant to step forward and provide expert reports for claimants as some of their work may come from large MNCs.³⁰¹ In accordance with existing international human rights standards, the Constitution imposes obligations on corporate actors derived from the Bill of Rights. The *amici* submit that both the horizontal and

²⁹⁹ Ibid at para 89.

³⁰⁰ UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes *The human right to an effective remedy: the case of lead-contaminated housing in Kosovo* (2020) available at <https://www.ohchr.org/en/documents/thematic-reports/ahrc45crp10-human-right-effective-remedy-case-lead-contaminated-housing>, accessed on 20 November 2022.

³⁰¹ On face value, this may not seem like a major procedural hurdle. However, many experts are reluctant to be a part of litigation against corporations which may threaten their future job security. This interdependence was briefly discussed in Chapter one which is the interdependence of people on corporations.

extraterritorial application of the Bill of Rights are instrumental in the realisation of the right to remedy in the context of corporate human rights abuses.³⁰²

(c) The Certification of the Kabwe class action

The certification of the class action will determine whether the claim against Anglo is allowed to proceed before the Johannesburg High Court. Despite the relatively recent development of class actions in South Africa, class actions have already proved to be a valuable vehicle for redress in matters affecting a large number of claimants.³⁰³ The requirements for certification were laid out in *Mukaddam v Pioneer Foods (Pty) Ltd and Others*, where the Constitutional Court confirmed that section 173 of the Constitution “does not limit the exercise of the power nor does it lay down any condition, except what is done must be in the interests of justice”.³⁰⁴

Anglo had submitted that it would not be in the interest of justice for the court to certify the class action for a number of reasons. The first reason stated is that the class action would require significant judicial resources, and this would then deny “access to justice” to other claimants who wish to approach the SA courts. Anglo states that there are three issues with the formulation of the class. First, they state that the class, as crafted by the claimants, is “geographically overboard” in that it would include people residing anywhere in the Kabwe district. Anglo instead, submits that even with a generous interpretation of the claimant’s case, there would only be justification to include people residing in the townships around the mine, namely Kasanda, Makulu and Chowa. Secondly, Anglo submits that the class is crafted in such a way that it would include people who have not suffered any actual injury as a result of exposure to lead. And thirdly, the category of “women of child-bearing age” would then have to include people whose claims would be otherwise time barred.

A group of UN Special Rapporteurs have also applied to be amicus and have made submissions on the disparity between Anglo’s public commitments to the UNGPs and their actions, in this case their decision to oppose the certification of the class action. They submit that “Anglo should not be

³⁰² Section 8(2) of the South African Constitution states that: “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and nature of any duty imposed by the right.”

³⁰³ As highlighted by Budlender et al., whilst there is no class action litigation statute, the SCA and Constitutional Court have developed a framework for these claims to be heard in SA. S38(C) of the Constitution lays the groundwork for class actions.

³⁰⁴ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* at para 37.

permitted to obtain the commercial and public relations benefits for its brand of espousing commitment to the Guiding Principles, while in the same breath opposing the certification of this class action. It cannot both claim to be committed to respecting the rule of law and remediating the adverse impacts of its business activities, while at the same time actively resist the certification of a class action in circumstances in which doing so will effectively deny the prospective class members any prospect of litigating their claims.”

Because Anglo is domiciled in South Africa, AI have submitted there is no debate that South African courts would have jurisdiction over a claim brought by an individual victim of lead poisoning in Kabwe against Anglo. AI therefore submitted that the only question before the court is whether it would be in the interest of justice for them to refuse to certify the class action, as Anglo has requested. Furthermore, AI highlight that access to courts is not only enshrined in the South African Constitution, but also in various international law instruments such as “Article 14(1) of the International Covenant on Civil and Political Rights of 1996 (which guarantees a “fair and public hearing by a competent, independent and impartial tribunal established by law”) and Article 7 of the African Charter on Human and Peoples Rights (which guarantees the right of “every individual...to have his cause heard”)”.

Beyond this, the UNGPs urge States to take steps towards ensuring that there are effective judicial remedies within their borders in order to properly address human rights abuses carried out by corporations. Notably, the commentary to Principle 26 deals with class actions and states: “Practical and procedural barriers to accessing judicial remedy can arise where, for example ... [t]here are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants.”³⁰⁵

Anglo’s contention that the certification of this class action will ironically lead to the denial of access to justice for others does not hold ground as discrimination on the basis of national origin would be a violation of the obligation to ensure non-discrimination and equality before the law. Instead, the inability of the claimants to access justice in Zambia, should be a central consideration in the certification application as group claims often reduce legal costs, thereby reducing potential barriers

³⁰⁵ UNGPs op cit note 13 at principle 26.

to accessing legal representation. On this point, AI have submitted that other courts have certified international class actions and exercised jurisdiction over extraterritorial corporate human rights abuses to provide a forum for marginalised groups to seek justice.³⁰⁶ The IGWG has further emphasised that:

“As part of their extraterritorial obligation to respect, protect and fulfil human rights, States should provide access to effective remedies even to foreign victims in appropriate cases. Doing so will be consistent with States signalling to enterprises ‘domiciled in their territory and/or jurisdiction’ to ‘respect human rights throughout their operations’.”

AI’s submissions are in favour of the class action being certified. They have reiterated that SA has an international law obligation which obliges them to foster access to justice and especially so in the case where claimants would otherwise face significant hurdles to having the claims adjudicated. They submit that SA has a “duty to remediate the alleged corporate harm forming the basis of this dispute, requires, at a minimum, its courts to provide judicial remedies to give victims of human rights abuses associated with the activities of South African companies access to justice”³⁰⁷

(d) Chapter Conclusion

The pleading of the Kabwe case is of immense interest to both academics and practitioners based on the framing of the claim. The claimants have alleged that Anglo breached their ‘duty of care’ through their negligent action which has now resulted in the present-day lead levels in Kabwe. They further submit that Anglo had knowledge of this, and the widespread environmental harm was reasonably foreseeable. Despite this, they allege that Anglo failed to take reasonable steps to prevent this harm. They further state that this meets the “but for” test of causation in the South African law of delict. In the alternative, they state that even if the chain of causation was interrupted due to Anglo transferring ownership of the mine to the Zambian State, their negligence materially contributed to the harm. Furthermore, they allege that Anglo was responsible for 66% of the lead pollution over the lifetime

³⁰⁶ The South Bangkok Civil Court in Thailand certified, and international class action made up of Cambodian claimants against a Thai Sugar corporation after they were forcibly evicted from their homes in the case of *Smin Tit, Hoy Mai and Others v Mitr Phol Co. Ltd.* (2020).

³⁰⁷ Notably, South Africa, as a party to the International Covenant on Economic, Social and Cultural rights and S39(b) of the Constitution says that a court *must* consider international law when interpreting the Bill of Rights.

of the Mine, broadly resulting in the current high levels of lead pollution in Kabwe today.³⁰⁸ Cassel has emphasised that the responsibility of corporations to fulfil their due diligence obligations is an international law norm, as opposed to a delictual principle, and this was indeed confirmed by 47 member States of the UN who endorsed this without dissent.³⁰⁹

As discussed in Chapter five, *Vedanta* is not a silver bullet for the governance gap, as there is still a possibility of forum non conveniens to be a defence in future cases. It is, however, a significant development as the judgment highlighted the centrality of access to substantive justice when considering the barriers to litigating against MNCs. Academics have argued that *Vedanta* will have a significant impact on corporate policies, such as human rights group policies, going forward and parent companies may be less willing to be involved in the affairs of their subsidiaries.³¹⁰ It is likely that many corporate defendants will move towards the settlement of suits, as consumer-awareness and shareholder activism becomes more common. Settlements, while providing some consolation to the claimants, does not always result in substantive justice. It often fails to correct past practices and most corporations write this off as the ‘cost of doing businesses’. The Kabwe case provides SA with a unique opportunity to put into practice their international stance on corporate accountability. As a co-sponsor of the proposed binding BHR treaty, there is an obligation on SA to foster access to justice for the claimants in the Kabwe case, especially in light of the fact that Anglo is domiciled in its jurisdiction. It is arguable that there is somewhat of a return to the Nuremberg-era jurisprudence on corporate accountability and we are likely to see this influence in the court’s decision on the Kabwe class action, at least in certifying the class.

³⁰⁸ Anglo’s defence was that once ownership was transferred to ZCCM, this was a novus actus interveniens. Essentially breaking the chain of causation required to establish liability. The claimants contend that the operational transfer of the mine’s operation was simply a continuation of the “pattern of neglect that was established under” Anglo’s ownership. As discussed above, the chain of causation in environmental damage cases are often complex and claimants may be unable to locate the resources, such as experts, in order to successfully prove their claims. Bertram argues that this is the converse for MNCs, who often benefit from the complex nature of environmental damage.

³⁰⁹ Cassel op cit note 25 at 180.

³¹⁰ Ibid at 135.

CHAPTER SIX

VI CONCLUSION

“The idea of human rights is both simple and powerful. The operation and effectiveness of the global human rights regime is neither...There is a long way to go before we can speak of business enterprises being “embedded” in transnational social norms and institutional practices... Scholarly debates must learn to understand better how these two dimensions are and could be combined in order to make the business and human rights project stick.”³¹¹

It is now accepted that MNCs wield tremendous power, which has significant implications for both domestic and international human rights regimes.³¹² Unlike States, which undertake international legal obligations, MNCs are no longer able to argue that human rights norms do not apply to them and that they are simply bound by the domestic law of the countries in which they operate.³¹³ Whilst this is now the case, the governance gap created by the absence of a binding business and human rights treaty leaves regulation to the whims of States and the effectiveness of their legal systems. This poses significant problems for victims of corporate abuse as well as the legitimacy of the international legal system. In this absence, some claimants have found success by litigating business and human rights cases through common law “duty of care” claims. This “duty of care” can be understood as a responsibility on the part of parent companies who are intimately involved in the affairs of their subsidiaries. In doing so, they have managed to (momentarily) bridge the business and human rights gap with private law remedies. The incremental developments in the business and human rights arena have highlighted the need for creative litigation methods to be deployed in the absence of a binding business and human rights treaty. Bertram, however, has argued there is a disjuncture in framing delictual claims in the “universal language of civil rights and wrong”.³¹⁴ This framing, according to him, often obscures collective rights to private wrongdoings. For example, delictual claims based on widespread environmental harm would be covered under the right to a healthy environment, however, when litigated through a delictual claim it then privatises the harm. Bertram further states that the standing requirements for claimants in a delictual action then frames the harm as a private as opposed

³¹¹ John Gerard Ruggie ‘The social construction of the UN Guiding Principles on Business and Human Rights’ in *Research handbook on human rights and business* Edward Elgar Publishing (2020) at 23.

³¹² David Bilchitz op cit note 1 at 205.

³¹³ Ibid.

³¹⁴ Daniel Bertram op cit 191 at 752.

to a collective loss, which may then also deny standing to public interest organisations.³¹⁵ He instead argues for a rights-based approach. Indeed, there are patterns emerging from contemporary BHR litigation that indicate that practitioners are opting to plead cases in a way that centres the harms to the human rights of the claimants. It is therefore important for judges to recognise this, as well as the obstacles claimants face in getting a BHR case before a court and the significance of the imposition of a ‘duty of care’ on parent companies in fostering access to justice.

A binding treaty, nevertheless, remains a significant part of the move towards corporate regulation and despite continuous opposition by countries in the Global North, there continue to be many legislative developments, particularly in European countries that are in-step with the aims of the treaty.³¹⁶ For example, France has enacted the “Corporate Duty of Vigilance” statute in 2017. This requires large French companies to “identify, address and report on human rights impacts across their operations and value chains” and provides an opportunity for those harmed by such impacts to seek remedy in French courts. While this is a welcomed development, it does not address the more systematic issue of BHR. In the interim, it remains important for courts to be willing to impose a “duty of care” on parent companies who are complicit in the harm carried out by their subsidiaries.³¹⁷ Similarly, legislative developments in the US on the ATCS may mark the start of a new era of business and human rights litigation against corporations domiciled in the US. While it is uncertain what the final text of the binding business and human rights treaty will be, what is clear is that voluntary assumptions and self-regulation have failed to cure the business and human rights governance gap. It is also notable that the treaty is not the solution to the current problem but rather the first step in addressing the issue of an adequate remedy.

Landmark rulings such as the UK Supreme Court ruling in *Vedanta* highlights the shift in the socio-political landscape on corporate impunity and has in many ways re-ignited hope for claimants who wish to hold corporations accountable for human rights abuses. The *Vedanta* case has of course paved

³¹⁵ Daniel Bertram op cit 191 at 752. Bertram further argues that delictual claims may not always be suitable especially “Given the complex systems of property law in postcolonial societies, affected individuals may not possess a formal title to their land, thereby styming recourse to property-based torts such as nuisance or trespass.”

³¹⁶ There is mounting pressure from civil society organisations in the EU for a binding treaty and corporate accountability. Hamm argues that this could possibly be one explanation for why the EU has also taken steps towards legislative developments dealing with human rights due diligence. See: Brigitte Hamm ‘The struggle for legitimacy in business and human rights regulation—a consideration of the processes leading to the UN Guiding Principles and an international treaty’ (2022) 23 *Human Rights Review* at 119.

³¹⁷ Florian Wettstein ‘Business and Human Rights: Overcoming Old Paradigms, Pushing for New Frontiers’ (2022) *E-International Relations*.

the way for future “duty of care” cases, and whilst it is unclear if *forum non conveniens* defences will be accepted in future BHR litigation, *Vedanta* marks an important departure from the previous *Kiobel*-era court decisions which have allowed corporations to avoid accountability for human rights violations. Post-*Vedanta*, the question of whether a MNC owes a ‘duty of care’ to its subsidiary who operated abroad has been settled, and whilst *Vedanta* does not provide a prescriptive criterion for when a parent company will owe a duty of care to their subsidiary, it does lay down some principles that a court could consider when deciding when a parent company will owe a duty of care. One of these principles is the sufficient intervention in the management of the subsidiary. This then allows claimants to hold parent companies liable for fault-based liability under their common law duties. This is particularly important, especially for cases such as the Kabwe class action that is before the Johannesburg High Court.

As briefly explained in the Introduction, the UNGP’s three pillars: “Protect, Respect and Remedy” is an attempt to make clear which roles business actors and government representatives have in safeguarding human rights: who should do what and how are the different roles related? Regarding the first pillar of the Framework, which is the State’s duty to protect against human rights abuses by third parties, including corporations, Ruggie points out that this should be realised by adopting and effecting appropriate policies, regulation, and adjudication. The second pillar is put in the light of CSR: companies should respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. And the third pillar gives due regard to the need for greater access by victims to effective remedies, including both judicial and non-judicial remedies. It is important to note that Ruggie has emphasised that each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures. The State’s duty to protect lies at the heart of the international human rights regime; the corporate responsibility to respect underlines the most basic expectation of corporations in our society and of course, access to remedy, as even the most concerted effort cannot prevent all forms of corporate abuse.

These developments are significant as there are many nameless and faceless victims of corporate human rights violations, particularly in the Global South, who have not been able to find recourse due to weak judicial institutions and the recurrent problems with trans-national litigation.³¹⁸ Wettstein

³¹⁸ Florian Wettstein op cit 311.

has argued that old paradigms of corporate responsibility and human rights have obstructed our view and, in many ways, prevented us from addressing the ‘human rights aspect’ of BHR.³¹⁹ He and many other scholars are, however, optimistic that the UNGPs mark the start of this journey. In many ways, they have been proved right as there has been significant movement on the development of legislation, particularly in Europe. In the absence of a binding business and human rights treaty, the imposition of a ‘duty of care’ on parent companies will provide claimants with a route to possibly holding corporations accountable. Conclusively, the current BHR movement is the culmination of decades of activism both in and outside of the court room. Even the early losses under the ATCS have laid the foundation for the trajectory of current BHR litigation. The work however, to make the ongoing global project of human rights “stick” still remains in progress.

³¹⁹ Ibid.

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