# *The Right to a Remedy: How States Must Address the Barriers to Remedy Faced by Victims of Corporate Human Rights Violations*

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*The right to a remedy is a fundamental legal principle that should be available to all whose rights have been violated. Multinational corporations frequently operate through subsidiary companies in countries that have weak governance structures and judicial mechanisms. When these subsidiaries breach human rights, victims are often unable to receive a fair trial in the host state, and a number of legal and practical barriers prevent them from accessing remedies in the multinational corporation's home state. Although recent landmark decisions have begun to address these barriers, civil litigation and the judiciary alone are not enough. States must also act if the right to remedy is to be effectively upheld. I analyse the advantages and disadvantages of three courses of state action that have the potential to address these barriers. First, imposing human rights due diligence obligations; secondly, creating corporate criminal offences for human rights violations; and thirdly, creating a multilateral treaty to uphold the right to a remedy for corporate human rights abuse victims. Overall and in practice, imposing human rights due diligence obligations on large multinational corporations within their jurisdiction is the most effective way for states to address the barriers to remedy and ensure they uphold the right to a remedy.*

## I INTRODUCTION

The right to a remedy is a fundamental principle of domestic and international law.[1] It requires individuals have access to impartial

1 *Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (The Merits) (1928) PCIJ (series A) No 13 at [72]-[73].

courts to have their rights vindicated if they are breached. Upholding this fundamental principle is becoming increasingly complicated as the world globalises and as multinational corporations (MNCs) perpetrate human rights violations across borders.

Human rights law, and international law more generally, was conceived to apply to states, and protect individuals from coercive state power.[2] However, there is growing recognition of the significant effect MNCs have on human rights,[3] particularly in global supply chains.[4] The growth of corporates' economic and political power has not been matched with corresponding obligations to ensure they do not violate human rights law. Where MNCs have committed human rights violations, their victims have had little success in holding them liable and have been left without a remedy.

Against this background, in 2011, the United Nations Human Rights Council (UNHRC) endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs) in response to increasing reports of abuse and amid growing calls for corporate accountability.[5] The UNGPs are a non-binding, soft law instrument divided into three pillars.[6] Relevantly, the third pillar emphasises a state's duty to realise the right to a remedy for victims of corporate human rights breaches.[7]

The home state is where the parent company of an MNC is incorporated, the host state is the state where a subsidiary of that company is incorporated. Where a victim's human rights are violated by a local subsidiary in a host state, civil remedies are commonly sought against the parent company in the home state. The home state is often a developed country, such as the United Kingdom or Canada. In both of these jurisdictions, victims have faced several setbacks at the procedural stage of litigation. Nevertheless, recent judgments of the Supreme Courts of both the United Kingdom and Canada have

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2 See Universal Declaration of Human Rights GA Res 217A (1948), preamble; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), preamble [Universal Declaration Human Rights].

3 This article understands human rights as the rights protected by various international instruments such as Universal Declaration of Human Rights, above n 2; the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR]; the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

4 *Improving Access to Remedy in the Area of Business and Human Rights at the EU Level* (European Union Agency for Fundamental Rights, FRA Opinion 1/2017, 10 April 2017) at 4.

5 *Human Rights and Transnational Corporations and Other Business Enterprises* UN Doc A/HRC/RES/17/4 (6 July 2011).

6 *Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc HR/PUB/11/04 (2011) [UNGPs].

7 At 27.

suggested support for imposing civil liability on parent companies for human rights violations committed abroad.[8] In the United Kingdom, the Supreme Court has allowed two appeals where the claimants grounded their claims in the tort of negligence and alleged that the parent companies owe them a direct duty of care.[9] The claimants in the recent Canadian case made several claims against the parent company, including in negligence. [10] Their claim that the parent company could incur civil liability for breaches of customary international law (CIL) was successfully appealed all the way to the Supreme Court of Canada.[11]

Despite these victories for claimants, states must still act to meaningfully realise the right to a remedy. States should prioritise enacting legislation that imposes proactive duties on MNCs to prevent or reduce the risk of human rights breaches occurring within their supply chains.

In Part II, I will look at the history of the right to a remedy and why it is a fundamental principle of international and domestic law. In Part III, I will examine some of the main barriers that prevent the right to a remedy from being realised. Part IV will explore case law in the United Kingdom and Canada and consider the effect of recent Supreme Court judgments in both jurisdictions. I will look at how the judgments address some of those barriers to make it easier for victims to receive a remedy, but ultimately how this progress is inadequate to effectively address the barriers that victims face. Finally, Part V will consider three proposals that aim to address the remaining barriers: imposing human rights due diligence (HRDD) obligations; imposing criminal sanctions; and creating a multilateral treaty.

## II BACKGROUND

### The right to a remedy

The right to a remedy is a longstanding principle in first domestic, and now international, law. Blackstone articulated the importance of the right to a remedy in the 18th century.[12] The principle has two

8 As the judgments relate to procedural issues, the cases have not yet been heard on the merits.

9 *Vedanta Resources plc v Lungowe* [2019] UKSC 20, [2020] AC 1045 at [49]; *Okpabi v Royal Dutch Shell* [2021] UKSC 3, at [160].

10 *Nevsun Resources Ltd v Araya* 2020 SCC 5, [2020] 4 WWR 1.

11 At [132].

12 William Blackstone *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1765–1769) vol 3 at 109.

purposes: (i) to compensate victims by restoring them to the position they would have been in but for the breach; and (ii) to deter actors from breaching protected rights.[13]

International recognition of the right has taken various forms. The Permanent Court of International Justice declared that "any breach of an engagement involved an obligation to make reparation".[14] The right to a remedy has been similarly confirmed by the United Nations,[15] incorporated into treaties and upheld by national and supra-national courts.[16] The ubiquity of this right across domestic and international jurisdictions has led many to consider it to be a norm of CIL.[17] A principle becomes a CIL norm where there is sufficient state practice treating it as law and a belief that it is law.[18] Furthermore, rights would be meaningless if their violations could not be remedied, meaning the right to a remedy is inherent in the notion of rights.

## The interaction of business and human rights

MNCs affect human rights in global supply chains either by directly breaching rights themselves or by engaging rights-breaching actors. Beyond the cases examined in the following section, various examples of such breaches have made headlines in recent years. In 2013 the Rana Plaza building in Bangladesh collapsed killing over 1100 garment workers.[19] A report by the New York University Stern Business School found that the Bangladeshi government lacks the resources to protect the basic human rights of factory workers and that public governance in Bangladesh is "extremely weak".[20] This coupled with corruption and the power of the local garment industry make it

13 Dinah Shelton *Remedies in International Human Rights Law* (3rd ed, Oxford University Press, Oxford, 2016) at 13.

14 *Factory at Chorzów*, above n 1, at [73].

15 The right to remedy was confirmed by the United Nations in Universal Declaration of Human Rights above n 2, art 8. This right was then incorporated into treaties under ICCPR, above n 3, art 2(3)(a); and American Convention on Human Rights 1144 UNTS 144 (opened for signature 22 November 1969, entered into force 18 July 1978), art 63(1).

16 *Lustig-Prean v United Kingdom* (2000) 29 ECHR 548 at [22].

17 Max Planck *Encyclopaedia of Public International Law* (2015, online ed) Human Rights, Remedies at [24].

18 For further discussion of CIL see cases such as *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and The Netherlands)* [1968] ICJ Rep 14 at 73; and texts such as James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019), at 18.

19 Julhas Alam and Farid Hossain "Bangladesh Collapse Search Over; Death Toll 1,127" Associated Press (Online ed, 13 May 2013).

20 Sarah Labowitz and Dorothée Bauman-Pauly *Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza* (NYU Centre for Business and Human Rights, April 2014), at 46.

very challenging to regulate and enforce human rights in Bangladesh itself.[21]

Other high-profile examples include the allegations that construction companies in Qatar are using forced labour and exploiting migrant workers to build stadiums for the 2022 FIFA world cup.[22] Human rights violations are frequently reported in the extractive industries. For example, documented reports of murders, sexual violence and breaches of international labour laws have been linked to Canadian mining companies in Latin America.[23] Violations are usually perpetrated in host states with inadequate state regulations to protect and enforce human rights, and justice systems which are unable or unwilling to provide victims with remedies for the violations of their human rights.[24] The lack of liability in the home state, combined with the inadequacy of remedies in the host state means that victims are caught in an accountability gap without access to any remedy.[25]

## Creation of the UNGPs

This accountability gap led to the creation of the UNGPs, which summarised the existing duties and responsibilities to protect human rights in business.[26] Under the UNGPs, business enterprises have a moral obligation to respect human rights, but no legal responsibility to protect or uphold them.[27] In general, treaties directly regulate the conduct of states only, and not private actors such as corporations.[28] As such, the UNGPs do not directly regulate the activities of business enterprises. Instead, as part of the states' responsibility to protect human rights, the state would impose suitable obligations on private actors within their jurisdiction.[29]

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21 At 46.

22 Pete Pattisson "Revealed: Qatar's World Cup Slaves" The Guardian (online ed, London, 26 September 2013).

23 Justice and Corporate Accountability Project *The "Canada Brand": Violence and Canadian Mining Companies in Latin America* (October 2016); Felicitas Weber and Olivia Watson *Human Rights and the Extractive Industry: Why Engage, Who to Engage, How to Engage* (Principles for Responsible Investment, 2015).

24 For further analysis of the barriers that victims face within host countries, see also Gwynne Skinner "Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law" (2015) 72 Wash & Lee L Rev 1769 at 1799–1803.

25 Anita Ramasastry "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability" (2015) 14 Journal of Human Rights 237 at 240.

26 UNGPs, above n 6, at 1.

27 Olga Martin-Ortega, "Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last" (2014) 32 NQHR 44 at 55.

28 Andrés Felipe López Latorre "In Defence of Direct Obligations for Businesses Under International Human Rights Law" (2020) 5 BHRJ 56 at 57.

29 At 57.

However, as the UNGPs are a soft law instrument, there is no enforcement mechanism to ensure that states enact the recommended obligations on businesses. Nor is there any mechanism to ensure that businesses comply with their responsibility to respect human rights. As a result, groups such as the UNHRC have moved to prioritise the third pillar of the UNGPs, relating to access to remedy.[30] Principle 25, the third pillar's foundational principle, emphasises that states have a duty to ensure that victims can access remedies when human rights abuses occur within their jurisdiction.[31] To realise this duty, Principle 26 directs states to consider ways to "reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."[32] While the UNGPs symbolise an attempt to address the accountability gap and encourage states to impose domestic obligations on MNCs, they have had little real effect due to their non-binding nature. Therefore, victims still encounter barriers to remedy.

## III THE BARRIERS TO REMEDY

In a 2014 study commissioned by the Office of the United Nations High Commissioner for Human Rights, Zerk identified various barriers that prevent victims from accessing effective remedies in the domestic courts of a company's home state.[33] For the purposes of this article I will focus on the four most common barriers: the limited liability doctrine; the cost of litigation; jurisdictional rules; and legal uncertainty.

### The Limited Liability Doctrine

A significant barrier to holding MNCs liable for human rights breaches abroad is the limited liability doctrine. This doctrine is a foundational principle of modern company law dating back to the 19th

30 For example, the theme of the 2017 UN Forum on Business and Human Rights was realising access to an effective remedy. See *Report of the Working Group on the issue of human right and transnational corporations and other business enterprises on the sixth session of the Forum on Business and Human Rights* UN Doc A/HRC/38/49 (23 April 2018) at [4]. See also the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* UN Doc A/72/162 (18 July 2017) at [1]–[2].

31 UNGPs, above n 6, at 27.

32 At 27–28.

33 Jennifer Zerk *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies* (Office of the UN High Commissioner for Human Rights, July 2014) at 7.

century.[34] It provides that corporations have a legal personality separate from the individual members or shareholders of that corporation, meaning shareholders will not usually be liable for the actions of their corporation.[35] This separation of liability between a corporation and its shareholders is often referred to as the "corporate veil".[36]

The doctrine applies to groups of corporations or companies linked by ownership. Each subsidiary within the group is considered a separate entity. As such, the actions of one subsidiary company cannot be legally attributed back to its parent company, except in very limited circumstances.[37] This group structure is commonly used to support multinational operations. The group will employ different legal entities, usually subsidiary companies, for each country that it operates in. Except for the few instances where a court can pierce the corporate veil, the doctrine allows a parent company to receive a large share of the profits earned by its subsidiaries abroad while not being responsible for any of their actions.[38] Thus, parent companies are effectively able to operate in host countries with near impunity.

The limited liability doctrine was intended to encourage investment and promote freedom of trade without individuals taking on potentially unlimited liability.[39] For this reason, scholars generally argue that the principle of limited liability is an essential element of company law and economic activity and should be upheld by courts.[40] Nevertheless, in 1986, Blumberg criticised the extension of limited liability to corporate shareholders, suggesting that it emerged as a historical oversight.[41] Blumberg cautioned that the doctrine could be used to shield companies from liability for their human rights abuses. Yet, despite his warning, the courts have identified very few circumstances in which they can pierce the corporate veil and assign liability to a parent company for its subsidiary's conduct.[42] Moreover, courts have explicitly rejected the interests of justice as justifying such

34 See generally Limited Liability Act 1855 (UK) 18 & 19 Vict c 133; *Salomon v Salomon and Co* [1897] AC 22; and Stefan HC Lo *In Search of Corporate Accountability: Liabilities of Corporate Participants* (Cambridge Scholars Publisher, Cambridge (UK), 2015) at 114–115.

35 *Halsbury's Laws of England* (5th ed, 2016, online ed) vol 14 Companies at [116]; see also *Salomon*, above n 34, at 51–54.

36 *Chandler v Cape plc* [2012] EWCA Civ 525, 1 WLR 3111 at [69].

37 Lo, above n 34, at 116.

38 Ian Binnie "An Interview with the Honourable Justice Ian Binnie" (2013) 44 Ottawa L Rev 571 at 588.

39 Lo, above n 34, at 114.

40 Martin Petrin "Assumption of Responsibility in Corporate Groups: *Chandler v Cape plc*" (2013) 76 MLR 603 at 619.

41 Phillip I Blumberg "Limited Liability and Corporate Groups" (1986) 11 J Corp L 573 at 610, and 616-617.

42 See Lord Sumption's comments where he surveys previous cases that have discussed piercing the corporate veil and concludes that the corporate veil may be pierced in "a small residual category of cases" where it is being abused to deliberately evade or frustrate the law *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [35].

an assignment of liability.[43] Therefore, the limited liability doctrine effectively prevents any liability for a subsidiary's human rights violations being attributed back to its parent company. This represents a clear barrier to remedy that must be overcome before any of the practical difficulties of litigation may even be considered.[44]

## The Cost of Litigation

A clear and major practical barrier to remedy is the unavoidably high cost of conducting complex litigation in a foreign country.[45] Extraterritorial cases are expensive to litigate as they usually require gathering evidence from another state, hiring expert witnesses, and frequently result in years of litigation and multiple trials dealing with complex legal issues.[46]

The cost of litigation is especially obstructive given the wealth inequality between the parties in such cases. This is reflected in Principle 26 of the UNGPs and its supporting commentary. It states that the individuals who are likely to be the victims of human rights violations are similarly likely to have "financial impediments to accessing, using and benefitting from these [judicial] mechanisms."[47] Victims are relatively disadvantaged in litigation as they often reside in developing countries and have limited resources or means of accessing legal aid.[48] In contrast, the defendants in these cases are significantly better resourced MNCs. This creates a considerable inequality of arms between victim claimants and corporate defendants.[49]

In most states, little to no legal aid is available for foreign claimants in civil cases. In a number of jurisdictions, such as China and the United States, legal aid is either unavailable to foreign claimants or only available in limited circumstances.[50] Furthermore, in the countries where legal aid is available to foreign claimants, the

43 *Adams v Cape Industries plc* [1990] Ch 433 (EWCA Civ) at 537.

44 Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse A/HRC/32/19 (10 May 2016) at [22].

45 Gwynne Skinner, Robert McCorquodale and Olivier De Schutter *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (European Coalition for Corporate Justice, December 2013) at 64.

46 At 64.

47 UNGPs, above n 6, at 30.

48 Mark Taylor, Robert Thompson and Anita Ramasastry *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses* (2010) at 22 and 27.

49 Jonas Grimheden "Civil Litigation in Response to Corporate Human Rights Abuse: The European Union and its Member States" (2018) 50 Case W Res J Intl Law 235 at 237.

50 Zerk, above n 33, at 79. See also, Liora Lazarus and others *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse* (University of Oxford Pro Bono Publico, November 2008) at 138, 200 and 327–328.

amount is usually insufficient to fund costly international human rights litigation.[51] Other features, like the loser pays rule, act as a deterrent to under-resourced victims bringing cases to court.[52] The loser pays rule requires the losing party in litigation pay other parties' legal costs and is the default position in most Western jurisdictions (except the United States).[53] In human rights litigation the loser pays rule likely inhibits victims pursuing litigation as it creates an unknown financial risk for an already under-resourced group.[54]

## Jurisdictional rules

Jurisdictional rules act as a barrier to prevent victims from accessing effective judicial remedies. A court may only hear a claim if it has jurisdiction, which is complicated when the parent company is in the home state and the harm has occurred in the host state. Victims usually seek to bring a claim in the home state, as the parent company is usually better able to pay damages than their subsidiary.[55] Moreover, victims have raised concerns over the influence that corporations can have on regulatory bodies and judicial processes in some host states.[56] In such cases, victims will again prefer to bring their claim in the home states, where they perceive the process to be fairer.[57]

Although the law on jurisdiction varies between states, most will provide for jurisdiction if there are "connecting factors" between the claim and the jurisdiction, such as if the defendant is domiciled there.[58] Claimants in business and human rights cases can usually meet this requirement as they will be suing the parent company in its home state. Nevertheless, jurisdictional challenges associated with parent company defendants are commonplace and frequently require pre-trial hearings; this delays any access to remedy and increases the cost of litigation.

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51 At 79.

52 At 80.

53 Theodore Eisenberg and Geoffrey P Miller "The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts" (2013) 98 Cornell L Rev 327 at 329.

54 Skinner, McCorquodale and De Schutter, above n 45, at 70.

55 Daniel Blackburn *Removing Barriers to Justice: How a treaty on business and human rights could improve access to remedy for victims* (Centre for Research on Multinational Corporations, August 2017) at 40.

56 'High Court blocks Nigeria oil spill case against Shell' Al Jazeera (online ed, 26 January 2017).

57 For further discussion of why litigating in the home state is preferable, see also Daniel Blackburn *Removing Barriers to Justice: How a treaty on business and human rights could improve access to remedy for victims* (Centre for Research on Multinational Corporations, August 2017) at 39.

58 Zerk, above n 33, at 68.

### Legal uncertainty

The rule of law requires the law be certain so that those bound by it understand and can perform their obligations under it. [59] Where the law is uncertain it negatively affects all parties. Business enterprises value legal certainty so that they can predict the extent of their obligations and potential liabilities.[60] For instance, a United Kingdom study reported that businesses were dissatisfied with the lack of clarity and legal certainty around their human rights obligations.[61] Legal uncertainty also prejudicially affects victims of human rights abuses as it may dissuade them from entering proceedings where the outcome is unpredictable.[62]

Legal uncertainty also exacerbates existing barriers for victims.[63] If issues need to be litigated extensively, it increases the time and cost of the litigation.[64] If the law were more certain, it would mean businesses could perform their obligations and victims could more confidently bring litigation against businesses in breach of these obligations.

## IV USING CIVIL LITIGATION TO REALISE THE RIGHT TO A REMEDY

Victims of human rights abuses have often used civil litigation to try and obtain remedies. In this section, I review cases brought by victims against parent companies domiciled in the UK and Canada. For both jurisdictions, I discuss the development of case law and consider the recent landmark judgments issued by the Supreme Courts. I analyse how the cases are indicative of the barriers to remedy faced by claimants. Finally, I examine how the recent judgments address certain barriers for claimants but ultimately are insufficient to create meaningful change.

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59 Max Planck *Encyclopaedia of Public International Law* (online looseleaf ed, Oxford University Press) Rule of Law at [2].

60 Irene Pietropaoli and others *A UK Failure to Prevent Mechanism for Corporate Human Rights Harms* (British Institute of International and Comparative Law, February 2020) at 18.

61 At 18.

62 Zerk, above n 33, at 99.

63 Zerk, above n 33, at 103.

64 *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse*, above n 44, at [23].

## Cases in the United Kingdom

Since 2010, several claims in negligence against parent companies incorporated in the United Kingdom have been brought before the English courts.[65] The claimants alleged that United Kingdom-based parent companies owed a duty of care to those affected by their activities in host states. Until very recently, claimants had limited success convincing courts to support their claim. However, recent United Kingdom Supreme Court decisions — *Vedanta Resources plc v Lungowe*,[66] followed by *Okpabi v Royal Dutch Shell plc*[67] — mark a significant change in judicial thinking.

### *1 Case analysis*

#### (a) *Chandler v Cape plc*[68]

This is the first case where an English court held that a parent company could incur a duty of care to those affected by the actions of its subsidiaries. Mr Chandler contracted asbestosis because of working for a subsidiary of Cape plc (Cape), the parent company and defendant.[69] The central issue was whether Cape owed a direct duty of a care to the employees of its subsidiary to ensure a safe place of work.[70] The Court of Appeal applied the three-part *Caparo* test for establishing novel duties and found that Cape, through its actions, had assumed responsibility for the employees of its subsidiary company.[71]

The Court stressed that a parent company could assume responsibility for its subsidiaries' employees without requiring the court to pierce the corporate veil or violate the doctrine of limited liability.[72] The claimant must point to conduct that shows the parent company took on a direct duty, or assumed responsibility, for the employees of the subsidiary.[73] This decision is the foundational case for parent company liability in the United Kingdom.

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65 I will consider four of them in detail: *Chandler v Cape plc*, above n 36; *AAA v Unilever plc* [2018] EWCA Civ 1532, [2018] All ER (D) 87 (Jul); and *Okpabi v Royal Dutch Shell plc* [2018] EWCA Civ 191, [2018] Bus LR 1022 [*Okpabi CA*].

66 *Vedanta*, above n 9.

67 *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3, [2021] 1 WLR 1294 [*Okpabi SC*].

68 *Chandler*, above n 36.

69 At [1].

70 At [1].

71 At [62]–[63] and [78]–[79]; [77] citing *Caparo Industries plc v Dickman* [1990] 2 AC 605.

72 At [69].

73 At [70].

(b) *AAA v Unilever plc*[74]

This case concerned a parent company incorporated in the United Kingdom, Unilever plc (Unilever); its Kenyan subsidiary, Unilever Tea Kenya Limited (UTKL); and UTKL's employees, who lived and worked on UTKL's tea plantations. In the wake of the 2007 Kenyan presidential election, inter-tribal violence incited mobs that invaded the plantations and committed violent assaults against UTKL employees who came from rival tribes.[75] The employees appealed their unsuccessful claim against Unilever to the Court of Appeal, arguing that Unilever owed the employees of its subsidiary a duty of care to take steps to protect them from the violence.[76] Sales LJ considered *Cape* and held (in what has become a frequently cited passage) that there was no special test beyond general principles of tort for determining whether a parent company was to be held liable for the actions of its subsidiaries.[77] He went on to state that a parent company may incur such liability in two general circumstances:[78]

> ... (i) where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with ...) the subsidiary's own management; or (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.

After applying general tort principles, the Court dismissed the appeal, finding there was no triable issue as Unilever was not sufficiently proximate to the UTKL employees.[79] Moreover, there was insufficient evidence to show that Unilever fit into either of the above circumstances described by Sales LJ; Unilever had left UTKL to conduct its own risk management, and it had not given any specific advice to UKTL on how to manage the risk of violence.[80]

(c) *Okpabi v Royal Dutch Shell plc in the Court of Appeal*[81]

This case related to a claim brought on behalf of over 40,000 Nigerian citizens against Royal Dutch Shell plc (RDS). The claimants alleged

74 *Unilever*, above n 65.

75 At [11].

76 At [2].

77 At [36].

78 At [37].

79 At [40].

80 At [40].

81 *Okpabi CA*, above n 65.

that leaks in oil pipelines operated by a subsidiary of RDS caused serious environmental damage in the Niger Delta, significantly polluting the water to the extent that it could no longer be used for drinking, farming, washing or recreation.[82] The pipelines were operated by a subsidiary of RDS. The claim was made against both the subsidiary and RDS. The claim alleged both companies had a duty of care to take all reasonable steps to ensure oil spills from the pipelines did not cause foreseeable damage to the surrounding area.[83]

The Court of Appeal held that, although the harm was foreseeable, the claim was not allowed to proceed at trial. There was not enough evidence that the parties were sufficiently proximate. RDS did not have sufficient control over the maintenance of the pipelines;[84] it only issued guidelines to its subsidiary to ensure there were proper controls in place. In other words, RDS did not itself control the material operations.[85] Thus, it would not be fair, just and reasonable for the law to impose a duty of care on RDS.[86] In this respect, the Court held that a parent company must do more than simply issue mandatory policies to its subsidiaries in order to assume responsibility for its employees or actions.[87]

(d) *Vedanta Resources plc v Lungowe*[88]

*Vedanta* expanded on the circumstances in which the law may impose a duty of care on a parent company. Approximately 1,800 Zambians alleged that their water source was polluted by toxic materials discharged by the Nchanga Copper Mine. The mine was operated by a Zambian company, Konkola Copper Mines plc,[89] of which Vedanta Resources plc, a United Kingdom incorporated company, was the majority shareholder.[90] The claimants argued that both companies owed them a duty of care to take all reasonable steps to prevent the discharge of toxic chemicals, and that this duty had been breached.[91]

82 At [8]–[9].

83 At [35].

84 At [205]–[206] per Sir Geoffrey Vos C.

85 At [195] per Sir Geoffrey Vos C.

86 At [206] per Sir Geoffrey Vos C.

87 At [89] per Simon LJ.

88 *Vedanta*, above n 9.

89 At [1].

90 At [2].

91 At [1] and [3].

The Supreme Court emphasised that there is no special question or set of circumstances that must exist for a company to incur a duty of care. Rather, the matter simply depends on:[92]

> ... the extent to which, and the way in which, the parent 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.

Thus, the Court moved away from the narrow categories of management outlined by Sales LJ in *AAA v Unilever plc*, stating there is no limit to the models of control and management used by MNCs that may give rise to a duty of care, depending on the specific facts of the case.[93] The Court rejected the proposition that the Court of Appeal's *Okpabi* decision meant that a parent company could never incur a duty of care for the activities of their subsidiary simply by creating group-wide guidelines.[94] The parent company could not automatically absolve their responsibility in this way.

(e) *Okpabi v Royal Dutch Shell plc* in the Supreme Court[95]

In light of the *Vedanta* judgment, the claimants from *Okpabi* appealed to the Supreme Court.[96] The Court issued a resounding restatement of their *Vedanta* decision and confirmed that whether a duty of care exists is a highly fact specific question, that group-wide policies could lead to a duty of care and that the Court of Appeal had erred by focusing too heavily on whether RDS had control over its subsidiary.[97] The appeal was allowed, and the case may now proceed to trial.[98]

*2 How the cases illustrate and attempt to address the barriers to remedy*

While these recent claimants have had some success, the cases still illustrate the challenges faced by foreign victims in United Kingdom

92 At [49].

93 At [51].

94 At [52].

95 *Okpabi SC*, above n 67.

96 At [1]–[2] and [26].

97 At [143]–[147].

98 At [160].

courts and the general shortcomings of bringing proceedings in an MNC's home state.

In particular, the limited liability doctrine makes it hard to hold parent companies liable. Courts can rarely pierce the corporate veil and attribute a subsidiary's conduct back to its parent company. *Cape* established an alternative path for claimants around the limited liability barrier, whereby a parent company can be held liable if they are found to have incurred a direct duty of care to the victims.[99] The two circumstances listed by Sales LJ in *Cape* for when a direct duty will be incurred are narrow. [100] The Court of Appeal in both *Unilever* and *Okpabi* maintained the narrow circumstances in which a direct duty will be incurred by a parent company by stating that a parent company issuing mandatory guidelines to its subsidiaries was insufficient to incur a duty of care.[101]

It has been challenging for claimants to prove that their cases fell within these narrow circumstances. This was especially true at the procedural stage, where claimants likely only had access to public company documents and not internal company documents on allocations of risk and management functions.[102] Regardless, the Supreme Court in both *Vedanta* and *Okpabi* rejected the narrow circumstances reasoning, representing a turning point for claimants.[103]

The *Vedanta* decision is a milestone in improving access to justice for foreign claimants.[104] Lord Briggs made two findings that will make it easier for victims to access remedies. First, he expanded the previously narrow categories of control that would lead to a duty being incurred.[105] By broadening the categories of control, more victims will be able to use the alternative path established in *Chandler* to make a claim for compensation in courts in the United Kingdom. Secondly, Lord Briggs stated that the existence of a duty of care is very fact specific and will turn on materials disclosed at trial.[106] In doing so, he acknowledged the difficulties for claimants of proving their case at the procedural stage, before discovery has taken place.[107] This decision thus makes it less likely that claimants will fail at the

99 *Chandler*, above n 36, at [80].

100 At [80].

101 *Unilever*, above n65, at [40]; and *Okpabi CA*, above n 65, at [195].

102 *Vedanta*, above n 9, at [44].

103 *Vedanta*, above n 9, at [49]; and *Okpabi SC*, above n 67, at [145].

104 Samvel Varvastian and Felicity Kalunga "Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after *Vedanta v Lungowe*" (2020) 9 TEL 323 at 330.

105 *Vedanta*, above n 9, at [51]–[52].

106 At [44].

107 At [44].

procedural stage of proceedings and more likely that future claimants will be able to realise their right to a remedy.[108] It should also significantly reduce the cost of litigation on claimants, as they will be less likely to have to make lengthy pretrial arguments.

These cases represent a clear progression in the United Kingdom to uphold the right to a remedy. Increasing willingness to find that a parent company incurred a duty of care means that the Supreme Court of the United Kingdom has addressed some of the barriers faced by claimants.

### *3 Remaining barriers to remedy in the United Kingdom*

Despite this progress, significant barriers remain for victims wanting to make claims against parent companies domiciled in the United Kingdom. Legal certainty is still a major barrier because the existence of a duty of care is very fact specific and has yet to be successfully argued in a decision on the merits.

The victory for claimants in *Vedanta* may also be tempered by the possibility that corporate groups simply change their practice to avoid incurring a duty of care.[109] Such practice would hinder the ability of victims to be awarded remedies and would reduce parent company oversight on the activities of its subsidiaries. Oversight may particularly reduce in states where there is a higher possibility of human rights violations, likely leading to even more human rights abuses.

On the other hand, academics have argued that these concerns are overstated since parent companies need to produce group-wide policies anyway for commercial reasons.[110] In order to assure investors and secure continued investment, companies need to continue to claim responsibility over subsidiaries and publish materials on their structure.[111] Nevertheless, the uncertainty of when a duty of care will be imposed remains an obstacle for both victims and businesses.

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108 Dalia Palombo "The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals" (2019) 4 BHRJ 265 at 284.

109 Marilyn Croser, Martyn Day, Mariëtte Van Huijstee and Channa Samkalden "*Vedanta v Lungowe* and *Kiobel v Shell*: The Implications for Parent Company Accountability" (2020) 5 BHRJ 130 at 134.

110 John Sherman "Should a Parent Company Take a Hands-off Approach to the Human Rights Risks of its Subsidiaries?" (2018) 19 Business Law International 23, at 36; and Robert McCorquodale "*Vedanta v Lungowe* Symposium: Duty of Care of Parent Companies" (18 April 2019) OpinioJuris <www.opiniojuris.org>.

111 Tara Van Ho "*Vedanta Resources Plc and Another v Lungowe and Others*" (2020) 114 AJIL 110 at 115.

## Cases in Canada

Claimants in Canada face similar barriers to those in the United Kingdom. Initially, claimants followed the same route as claimants in the United Kingdom by arguing that parent companies owed them a direct duty of care. However, in *Nevsun* the claimants grounded their arguments against the Canadian parent company in CIL.[112]

I first review Canada's approach to parent company duties of care in *Choc v Hudbay Minerals Inc*.[113] Afterwards, I evaluate how the Supreme Court's *Nevsun* decision addresses some of the barriers that claimants have previously faced. Ultimately, like *Vedanta* in the United Kingdom, I conclude that this decision does not adequately address the barriers to remedy.

### *1 Case analysis*

#### (a) *Choc v Hudbay Minerals Inc*

A group of indigenous Mayan Q'eqchi' from Guatemala brought a claim against Hudbay Minerals Inc (Hudbay), a Canadian mining company, and its Guatemalan subsidiaries.[114] The claimants alleged that security personnel working for Hudbay's subsidiaries committed a number of human rights abuses against them, including gang rapes and the killing of a local critic of the mining project.[115] The claimants argued that Hudbay owed them a direct duty of care as it had direct control and responsibility over the operations at the mining project, including security policy.[116] Hudbay sought a motion to strike out the claim, arguing that negligence was untenable as no duty of care existed and that the claim also be dismissed for lack of jurisdiction.[117]

The Ontario Superior Court of Justice applied the *Anns* test — analogous to the *Caparo* test applied in *Cape* — to assess the establishment of a novel duty of care.[118] At trial, the Court found that the harm could be considered sufficiently foreseeable because Hudbay was aware of the risk of violence on the protestors and local community.[119] The Court also found that the parties could be

112 *Nevsun Resources Ltd v Araya*, above n 10, at [60].

113 *Choc v Hudbay Minerals Inc* 2013 ONSC 1414, 116 OR (3d) 674.

114 At [4].

115 At [4]–[7].

116 At [26].

117 At [1].

118 At [56].

119 At [63]–[65].

considered sufficiently proximate given Hudbay had made public representations about its commitment to human rights and the local communities.[120] Finally, the Court found no policy reasons to restrict a prima facie duty of care.[121] As such, the Court held that it was not plain and obvious that the negligence claim would fail. The motion to strike was dismissed, allowing the claim to proceed to trial.[122]

(b) *Nevsun Resources Ltd v Araya*[123]

The claimants, refugees from Eritrea living in Canada, brought a claim on behalf over 1,000 Eritrean workers against the Canadian mining and energy company, Nevsun Resources Ltd (Nevsun).[124] The claim for breach of CIL was appealed to the Supreme Court of Canada. The claimants alleged that Nevsun breached CIL prohibitions against forced labour and slavery, prohibitions on cruel, inhuman or degrading treatment; and that Nevsun committed crimes against humanity.[125] They alleged that they were forced to work indefinitely in conditions of slavery at a mine owned by an Eritrean corporation, 60 per cent of which was owned by Nevsun.[126]

Nevsun sought to strike out the proceedings, arguing that the claim concerning CIL had no chance of success.[127] It argued that, absent legislation, CIL did not form part of Canada's common law.[128] Even if CIL was part of Canada's common law, Nevsun further argued that CIL did not apply to private actors such as corporations and that Nevsun was, therefore, immune from its application.[129]

The Supreme Court dismissed the appeal. The majority held that CIL was automatically incorporated into Canada's common law due to the doctrine of adoption.[130] The doctrine of adoption is the principle that CIL automatically becomes part of the common law without parliamentary intervention.[131] The majority went on to hold that as CIL is part of the common law, the Canadian courts may be

120 At [69]–[70].

121 At [74].

122 At [75].

123 *Nevsun*, above n 10.

124 *Nevsun*, above n 10, at [3]–[4].

125 At [4].

126 At [7].

127 At [5].

128 At [20].

129 At [104].

130 This decision follows a previous Supreme Court of Canada decision, see *R v Hape* 2007 SCC 26, 2 SCR 292 at [39].

131 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2019) at 41, as cited in *Nevsun*, above n 10, at [86].

able to develop a civil remedy in domestic law for corporate violations of CIL.[132] The majority further held that CIL "may well apply to Nevsun", and that it is not plain and obvious that "corporations today enjoy a blanket exclusion under customary international law".[133]

*2 How the cases illustrate, and attempt to address, the barriers to remedy*

*Choc* and *Nevsun* highlight the legal barriers faced by claimants bringing cases against Canadian companies. Similar to the United Kingdom case law, these Canadian decisions address some of these barriers to remedy and make it easier for future claimants to bring cases in Canada.

The outcome of *Choc* was similar to that of the United Kingdom cases. *Choc* accepted the possibility that a parent company may incur a direct duty of care to a victim where the harm suffered was reasonably foreseeable and where the parent company was sufficiently proximate to the victim.[134] In *Choc*, the claimants pleaded that Hudbay exercised direct control over the security personnel.[135] As this case was heard as part of a strike out application, it does not set a precedent that parent companies will incur a duty of care to victims in such circumstances. It only establishes the possibility of such a duty.[136]

*Choc* could also have a negative effect on future claimants. The parent company was deeply involved in the subsidiary's activities; in particular, the claimants plead that Hudbay exercised direct control over the security personnel that had allegedly breached CIL.[137] A similarly high level of control might, therefore, be required in future cases before a duty of care is incurred.[138] Such a high standard will be hard for further claimants to meet,[139] in contrast to *Vedanta* where the United Kingdom Supreme Court held that a broader set of management structures may give rise to a duty.[140]

The majority decision in *Nevsun* marks the first time that an apex court of a common law state has supported corporate liability for

132 *Nevsun*, above n 10, at [122].

133 *Nevsun*, above n 10, at [113]-[114].

134 *Choc*, above n 113, at [70].

135 At [4].

136 At [87].

137 At [67].

138 *Choc*, above n 113, at [60]-[61].

139 Adeline Michoud "Mind the (Liability) Gap: The Relevance of the Duty of Care to Hold Transnational Corporations Accountable" (2019) 40 Windsor Rev Legal & Social Issues 141 at 155.

140 *Vedanta*, above n 9, at [51].

breaches of CIL.[141] Allowing a breach of CIL to ground a private law claim gives victims greater opportunities to argue that their rights have been breached and, hence, greater opportunities to be awarded a civil remedy. Claimants are not confined to grounding their claims in negligence if the alleged conduct is better suited to a breach of CIL claim. Thus, the claimants in *Choc*, for example, could have also made a claim for a breach of CIL.

The finding that corporations are likely bound by CIL further improves victim access to a remedy: victims now may be able to obtain private law remedies from corporations if they are found to have breached CIL.[142] The application of CIL to corporations is ground-breaking and has long been the subject of judicial and academic debate.[143] The willingness of the Supreme Court of Canada to recognise this new cause of action and the Court's emphasis on the right to a remedy could result in more victims bringing claims against Canadian parent companies.

### *3 Remaining barriers to remedy in Canada*

Despite the ground-breaking outcome in the Supreme Court of Canada, *Nevsun* leaves unresolved issues that may continue to hinder the right to a remedy. The most significant of these is the legal uncertainty for claimants. There are major points of disagreement on the law between the majority judgment and the two strongly written dissenting judgments.

The majority decision left two significant issues for the trial judge to resolve. The first is whether the pleaded CIL norms apply to corporations or only to states. The majority stated that while corporations do not enjoy a blanket exclusion under CIL, there will be norms that only bind states; whether a pleaded CIL norm does not bind a multinational corporation is to be determined by the trial judge.[144] Thus, while the development that corporations may potentially be bound by CIL norms is positive, it creates uncertainty and will require further litigation before victims may be awarded a remedy for breach of CIL.

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141 Julianne Hughes Jennett and Marjun Parcasio "Corporate civil liability for breaches of customary international law: Supreme Court of Canada opens door to common law claims in *Nevsun v Araya*" (29 March 2020) EJIL:Talk! <www.ejiltalk.org>

142 *Nevsun*, above n 10, at [122].

143 See generally William S Dodge "Corporate Liability Under Customary International Law" (2012) 43 Geo J Intl L 1045; and Alan Franklin "Corporate Liability Under Customary International Law: Is the Tail Wagging the Dog?" (2019) 25 ILSA J Intl L 301.

144 *Nevsun*, above n 10, at [113].

The second unresolved issue left by the majority is whether the doctrine of adoption creates new torts inspired by CIL or whether it creates a new cause of action specifically for breaches of CIL. This subtle difference will result in varied and lengthy arguments for claimants. If the doctrine of adoption creates new torts inspired by CIL, claimants will need to prove that the new torts are materially different to existing torts such as battery.[145] If the claimants argue the doctrine of adoption creates a new cause of action for CIL separate from tortious liability, it will be a cause of action previously unknown to the Canadian common law and may fail on that basis alone.[146] In either case, the exact effect of the doctrine of adoption and the form of civil liability it creates will be the subject of substantial debate at trial and in academia.

## The shortcomings of using civil litigation to address barriers

These cases display the top courts of two common law states supporting access to remedy for victims. The courts of the United Kingdom and Canada took different routes, using either negligence or CIL norms, to suggest that corporations could be held liable at trial. But while *Nevsun* and *Vedanta* represent significant steps forward in ensuring that MNCs do not act with impunity, an examination of these cases reveals the limitations of only using civil litigation to realise the right to a remedy. Courts in the United Kingdom and Canada have confidently asserted they have the jurisdiction to hear claims against locally domiciled parent companies.[147] This means that the barriers to remedy caused by the limited liability doctrine and jurisdictional rules have been mitigated. Consequently, the two significant remaining barriers for claimants are legal uncertainty and the cost of litigation.

For claimants in either the United Kingdom or Canada, the uncertainty around the extent of a company's duty of care, or whether they are bound by certain CIL norms, acts as a barrier to remedy by making it harder for victims to confidently commence litigation. The conditions that victims must satisfy in either jurisdiction are vague and leave considerable discretion to judges.[148] This introduces further unpredictability, which might dissuade potential litigants.

Uncertainty also exacerbates the costliness of litigation for claimants. Courts are slow and the common law develops gradually. Even if the uncertainty barrier could be resolved by courts, the cost of

145 At [215].

146 At [137].

147 *Nevsun*, above n 10; *Choc*, above n 113.

148 Michoud, above n 139, at 176.

litigation would still likely be excessive. It follows that states must take further action to uphold the fundamental principle of the right to a remedy, rather than leaving it to victims and the judiciary to resolve through civil litigation.

## V HOW TO EFFECTIVELY ADDRESS THE BARRIERS TO REMEDY

Civil litigation alone is unable to effectively realise the right to remedy. States then must do more to fulfil their obligation under Principle 25 of UNGPs to address the barriers to remedy. I examine three strategies aimed at fulfilling Principle 25 and analyse their advantages and disadvantages. The first strategy is to impose HRDD obligations on MNCs. The second is to create criminal sanctions for corporations when they breach human rights. The final proposal is the creation of a business and human rights treaty. I argue that the first strategy, imposing HRDD obligations on MNCs, is the most effective and pressing way to realise the right to a remedy.

### Imposing HRDD obligations on corporations

#### *1 What is HRDD?*

Due diligence is a business management term that describes the "process of investigation conducted by a business to identify and manage commercial risks".[149] HRDD obligations would require businesses to conduct ongoing processes to investigate potential risks to human rights within their supply chains and subsidiaries.[150] The UNGPs provide a comprehensive framework and extensive commentary on HRDD.[151] In particular, Principle 17 recommends that business enterprises carry out HRDD to assess actual and potential human rights impacts.[152]

149 Robert McCorquodale and Lise Smit "Human Rights, Responsibilities and Due Diligence: Key Issues for a Treaty" in Surya Deva and David Bilchitz (eds) *Building a Treaty on Business and Human Rights* (Cambridge University Press, Cambridge (UK), 2017) 216 at 220.

150 *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* UN Doc HR/PUB/12/02 (2012) at 23.

151 UNGPs, above n 6, at 17–24.

152 UNGPs, above n 6, at 17–18.

### *2 Examples of jurisdictions supporting HRDD*

Several states have begun to use the UNGPs' HRDD requirements as a model for legislation imposing mandatory obligations on parent companies. Moreover, there is growing recognition that imposing HRDD obligations is a necessary and effective means to prevent human rights violations by corporations and to promote access to remedies for victims.

The 2017 French "duty of vigilance" law is the first of its kind to impose a duty on corporations to monitor human rights abuses in their supply chains.[153] It requires French companies to create and publish vigilance plans that identify risks of harm to human rights and the environment in their business activities and those of their subsidiaries or subcontractors with whom they have an "established commercial relationship".[154] However, the duty only applies to companies with a certain number of employees.[155] Any breach of the duty to make a vigilance plan renders the company liable for damages where performance of the duty would have prevented the harm.[156] Conversely, if a company can demonstrate it has an adequate vigilance plan and exercised its duty of care, it will not be liable for any damage arising from its conduct.

Other jurisdictions are beginning to enact or consider enacting similar obligations. On 10 March 2021, the European Parliament adopted a report that recommends the European Commission prepare legislative proposals for EU-wide, mandatory HRDD obligations.[157] The report has been tabled and the European Commission has invited input from stakeholders.[158] Switzerland held a referendum in November 2020 to decide whether to introduce a new article into its constitution that would require companies to carry out HRDD similar to the processes set out in the UNGPs.[159] The article would make

153 Palombo, above n 108, at 275.

154 Loi n° 17-399 du 27 mars 2017 (France) [Law No 17-399 of 27 March 2017 (France)] [French Law], art 1.

155 The law will apply to any company who, by the end of two consecutive financial years, employs at least 5,000 employees itself and in its direct or indirect subsidiaries in France, or any company that employs at least 10,000 employees itself and in its direct or indirect subsidiaries in France or abroad.

156 French Law, above n 154, art 2.

157 European Parliament Committee on Legal Affairs *Corporate due diligence and corporate accountability* (10 March 2021).

158 See for example Office of the High Commissioner for Human Rights *EU Mandatory Human Rights Due Diligence Directive: Recommendations to the European Commission* (Office of the High Commissioner, 2 July 2021).

159 Silke Koltrowitz and Emelia Sithole-Matarise (ed) "Swiss to vote on companies' global liability for rights abuses" (5 June 2020) Reuters < https://www.reuters.com>; and for further discussion on this Swiss referendum see Nicolas Bueno and Claire Bright "Implementing Human Rights Due Diligence Through Corporate Civil Liability" (2020) 69 ICLQ 789 at 804–806.

parent companies liable for damage caused by their subsidiaries, unless they can prove that they took all due care to avoid the harm or that the harm would have occurred even if all due care was taken.[160] The referendum won a majority of votes overall but did not win a majority of votes in enough different regions.[161] Instead, a watered-down version of the article was passed; it requires human rights reporting from Swiss companies but does not impose any liability.[162]

The United Kingdom Joint Committee on Human Rights (UK Human Rights Committee) supported the introduction of a form of HRDD. In 2017, it published a report proposing that United Kingdom enact a "failure to prevent" mechanism based on s 7 of the Bribery Act 2010 (UK).[163] This mechanism would impose a duty on a company to identify and prevent human rights violations, both in the company's own activities and in the activities of business entities with which it has a business relationship.[164] A company would not be liable if it could demonstrate that it undertook a reasonable HRDD process.

### *3 How would HRDD obligations address the barriers?*

The introduction of mandatory HRDD is the most effective way to realise the right to a remedy as it has the potential to comprehensively address the barriers to remedy. Legal certainty would be improved as HRDD would clarify in what circumstances a company may be liable for human rights abuses abroad, specify which companies need to undertake HRDD, and provide those companies with a defence if they take reasonable steps to prevent human rights violations in their supply chains. This clarity would be of mutual benefit to both business and claimants by making litigation less costly. The HRDD legislation would clearly identify the courts' jurisdiction to hear cases concerning parent companies in their home state, saving claimant's time and money litigating jurisdictional issues at the procedural stage.

Providing clarity regarding the duty of parent companies would address the imbalance of power between potential claimants and MNCs by removing the ability of parent companies to use the

160 Bueno and Bright, above n 159, at 804–805.

161 Jessica Davis Plüss "Responsible business initiative rejected at ballot box" Swissinfo (online ed, Switzerland, 29 November 2020).

162 Jessica Davis Plüss "Switzerland: Responsible Business Initiative rejected at ballot box despite gaining 50.7% of popular vote" (28 November 2020) Business & Human Rights Resource Centre < www.business-humanrights.org>.

163 House of Lords and House of Commons *Joint Committee on Human Rights and Business 2017: Promoting responsibility and ensuring accountability – Sixth Report of Session 2016–17* (HL Paper 153, HC 443, 5 April 2017) [JCHR Report], at [193]; and Bribery Act 2010 (UK), s 7.

164 At [187].

limited liability principle to shield them from liability.[165] A significant obstacle for claimants is that they are unable to access internal company documents at the procedural stage of litigation. HRDD would reduce this litigation power imbalance by requiring companies to publish reports on their due diligence processes. If these reports were required to be publicly available, it would be easier for claimants to establish that the parent company either failed to identify and prevent human rights violations in their supply chain or took actions that were inadequate. Finally, legislation imposing HRDD would address the concern that, in the wake of cases like *Nevsun* and *Vedanta*, parent companies are now more likely to reduce oversight on conduct of their subsidiaries to avoid incurring a duty of care. HRDD would provide a clear statutory duty of due diligence.[166]

Aspects of the French duty of vigilance law have been criticised for not adequately addressing the barriers to remedy for victims. For example, Bright was critical of the fact that only companies with a very high number of employees are bound by the duty, such that only 237 French corporations are bound by this law at the date of publication.[167] Bright instead argues that law's application ought to be determined by annual revenue rather than by number of employees, because this would greatly increase the number of companies captured.[168]

Currently under French law the onus rests with the claimants to demonstrate a causal link between the failure of the defendant company to make an adequate vigilance plan and the harm suffered.[169] Corporations do not have to prove that they took all reasonable steps to monitor and prevent harm. One academic warned that even with due diligence reports being public, victims would still struggle to meet this burden and consequently be denied the right to remedy.[170] Future HRDD obligations could reverse the onus so that companies accused of human rights abuses must prove they met their obligations. HRDD nevertheless offers a very effective means of both preventing human rights abuses and providing victims with a remedy, so long as it is drafted carefully to avoid the issues raised by these critiques.

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165 *Vedanta*, above n 9, at [44] as per Briggs LJ.

166 Bright and Bueno, above n 159, at 816.

167 Claire Bright "Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is the French Law on the Duty of Vigilance the Way Forward?" (8 August 2018) Social Science Research Network <www.ssrn.com> at 12.

168 At 12.

169 Palombo, above n 108, at 286.

170 At 284.

## Imposing criminal sanctions on corporations for human rights breaches

The second strategy suggests that corporate accountability could be increased by holding corporations criminally liable for violations of human rights. To achieve this, states would ensure that international crimes, such as crimes against humanity, constitute criminal offences within their domestic legislation and ensure that legal persons can be held criminally liable for them.[171] Recognising this strategy, the UNHRC has recommended that states make "appropriate provisions for corporate criminal liability" for severe breaches of human rights law by businesses.[172] The minority opinion of Brown and Rowe JJ in *Nevsun* argued that criminal law is better suited to addressing corporate human rights breaches than civil law.[173] I will examine the practical advantages and disadvantages of using criminal law to realise the right to a remedy for victims.[174]

### *1 Advantages of using criminal law*

There are a number of advantages to holding corporations criminally liable. First, it would act as strong deterrent on corporations. It would also reduce the barriers caused by the limited liability doctrine, jurisdiction and legal uncertainty by clearly empowering state prosecutors to bring cases against parent companies if they are complicit in human rights abuse. The principal advantage, however, is that it would remove the financial barrier to litigation for victims. In criminal trials, state prosecutors bring and conduct the trials against the defendants, rather than the victims. This means corporations can be held liable for breaching human rights law without the victims needing to gather the capital or obtain the legal aid necessary for a civil claim.

As criminal law is statutory, the offences would need to be clearly defined. The laws would need to specify the circumstances in which a parent company would be held criminally liable for the acts

171 For example, the International Law Commission has been working on draft articles to achieve this. See *Crimes against humanity: Texts and titles of the draft preamble, the draft articles and the draft annex provisionally adopted by the Drafting Committee on second reading — Prevention and punishment of crimes against humanity* UN Doc A/CN.4/L.935 (15 May 2019) at 3–4.

172 *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse*, above n 44, at 12.

173 *Nevsun*, above n 10, at [217]–[218].

174 It is outside the scope of this article to formulate the elements of corporate criminal liability, for an examination of conceptual issues around the criminal responsibility of legal persons, see generally Guy Stessens "Corporate Criminal Liability: A Comparative Perspective" (1994) 43 ICLQ 493; and Cristina De Maglie "Models of Corporate Criminal Liability in Comparative Law" (2005) 4 Wash U Global Stud L Rev 547.

of its subsidiaries.[175] The laws would clearly need to give the domestic courts of the company's home state the jurisdiction to hear crimes committed by that company in host states abroad.[176] Legislation would also need to establish whether or when the corporate veil may be pierced to hold parent companies liable for acts of their subsidiaries. This would mean that parent companies could no longer use subsidiaries to shield themselves from liability.

Another advantage of using criminal law to sanction corporations is the strong condemnatory and deterrent effect attached to criminalisation.[177] Brown and Rowe JJ argued that labelling a corporation's conduct as criminal has a much stronger symbolic effect than labelling it a tort.[178] If a corporation is found guilty of a crime they may be made to pay a financial penalty.[179] The financial consequences would also likely extend beyond the penalty, since being found guilty of human rights abuse often leads to consumer boycotts.[180] Certain companies, such as energy companies, may be harder for consumers to boycott because their product is a necessity. Accordingly, the UK Human Rights Committee emphasised the need to ensure monetary penalties for convicted corporations are sufficiently high so that they are an effective deterrent rather than just a fine.[181] The strong deterrent effect of criminal sanctions may not directly impact a victim's right to a remedy, but it may reduce the instances where their rights are breached.

### *2 Disadvantages of using criminal law*

Criminal law may address barriers to justice and provide a strong deterrent, but it may not be the most effective approach if the central goal is to address barriers to remedy for victims. There are significant practical issues when using criminal law to hold corporations liable. A principal difficulty is whether corporations can even attract criminal liability. Different states and international judicial bodies have different rules as to whether a corporation can be held criminally

175 See the International Law Commission draft articles, above n 171 at 2.

176 At 4–5.

177 *Nevsun*, above n 10, at [221].

178 At [218].

179 There is also the possibility of holding the directors of the corporations liable in certain circumstances. It is beyond the scope of this article to examine this. See Peter Muchlinski "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation" (2012) 22 BEQ 145. See also Corporate Manslaughter and Corporate Homicide Act 2007 (UK), s 1(6).

180 Anne Peters and others "Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law" (2020) 2020-06 MPIL Research Paper Series 1 at 15.

181 JCHR Report, above n 163 at [198]–[199].

liable. In jurisdictions such as Germany[182] and the International Criminal Court, only natural persons can be guilty of crimes.[183] However, in many common law states, such the United Kingdom, and in the Special Tribunal for Lebanon, legal persons can be held criminally liable.[184] In jurisdictions where corporations are unable to attract criminal liability, criminal law clearly cannot be used to realise a victim's right to a remedy. While it could be argued these states should make significant reforms to their criminal justice system to permit this, it would be more effective to focus on other ways to realise the right to a remedy.

Even in states where legal persons can attract criminal liability, there remain practical impediments to holding corporations criminally liable. Importantly, the higher standards required for establishing guilt in criminal law may make accessing remedies more difficult for victims.[185] The elements of the offence (including a mens rea element) must be proved beyond reasonable doubt and intent to the harm must be demonstrated.[186] Given that claimants in civil cases already struggle to meet their evidentiary burden to establish fault on the balance of probabilities it is likely to be very challenging for prosecutors to meet an even higher burden of proof. State prosecutors can also face similar financial barriers to claimants, especially in the case of extraterritorial crimes as investigating and gathering evidence from other states is very costly.[187] When combining this under-resourcing and low chances of success, prosecutors may be less willing to take on these cases.

Given that the goal is to uphold the right to a remedy for victims of human rights violations, using corporate criminal liability to achieve this seems unlikely to be the most effective means. Using criminal law has the disadvantage of placing cases at the discretion of the state and prosecutors.[188] It removes victims from decision-making roles and gives prosecutors the power to decide how the victim's case is litigated.[189] Unlike in civil law, where successful claimants are

182 Zerk, above n 33, at 71.

183 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 25(1).

184 Corporate Murder and Corporate Homicide Act 2007 (UK); and *Prosecutor v Akhbar Beirut (Reasons for Sentencing Judgment)* STL STL-14-06/S/CJ, 5 September 2016, at [21].

185 Zerk, above n 33, at 31.

186 JCHR Report, above n 163, at [183].

187 Zerk, above n 33, at 43.

188 Hassan B Jallow "Prosecutorial Discretion and International Criminal Justice" (2005) 3 JICJ 145 at 147–48.

189 Zerk, above n 33, at 75. Note that Zerk indicates that prosecutors have a discretionary power to decline pursuing a claim in certain circumstances.

awarded damages for the breach, criminal law victims are not guaranteed a remedy following a guilty verdict.[190] Reparations are awarded at the court's discretion, with no guarantee that the reparation will sufficiently reflect the harm. Victims of multinational human rights violations will likely be unable to observe the trial if it is takes place in a foreign jurisdiction. Accordingly, using criminal law in this context risks denying victims the right to a remedy and the ability to observe justice being done.

### *3 Conclusion*

Imposing criminal liability on MNCs where they breach human rights law has advantages and disadvantages. The suggestion by Brown and Rowe JJ in *Nevsun* that criminal law is wholly better suited than civil law to address corporate human rights violations is questionable.[191] Relying on criminal law alone to realise the right to a remedy for victims is unlikely to be successful. The United Kingdom Joint Committee on Human Rights argues that both criminal sanctions and civil remedies are needed to provide access to justice for victims of human rights abuses.[192] In jurisdictions where legal persons can attract criminal liability, the best way to realise a victim's right to a remedy is to have criminal and civil trials to operate in parallel. Such an approach is supported by the European Agency for Fundamental Rights, which argues that victims be compensated through civil proceedings that are embedded in, or conducted parallel to, the criminal trial.[193] This would provide all the advantages of using criminal law while ultimately ensuring that victims receive a remedy.

## Treaty

The final strategy to uphold the right to a remedy that I consider is the creation of a multilateral treaty. While the UNGPs proved to be a milestone in recognising the effect that businesses have on the enjoyment of human rights, their non-binding nature hinders their actual impact. In 2014, the UNHRC established the Open-Ended Intergovernmental Working Group (OEIGWG) to create "a legally binding instrument on transnational corporations and other business

190 JCHR Report, above n 163, at [182].

191 *Nevsun*, above n 10, at [218].

192 JCHR Report, above n 163, at [181].

193 Improving Access to Remedy in the Area of Business and Human Rights at the EU Level, above n 4, at 11.

enterprises with respect to human rights" (the UN Treaty).[194] In this subpart, I examine the progress of the OEIGWG in creating the UN Treaty and how it would address the barriers to remedy to victims. I then analyse the advantages of using a treaty to realise the right to a remedy and, finally, look at the challenges the UN Treaty faces and issues with treaties generally. I argue that, while it would promote policy coherence and comprehensively address the barriers to remedy, the UN Treaty's development has been slow and states should act now to uphold the right to a remedy.

### *1 What is the UN Treaty?*

Since its creation in 2014, the OEIGWG has published three draft treaties on business and human rights. Most recently, in August 2020, it published the second revised draft of the UN Treaty, titled "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises".[195] The UN Treaty builds on the UNGPs to strengthen the indirect obligations of corporations to respect human rights.[196] States are the subject of the UN Treaty; it does not place direct obligations on business enterprises. Rather, it mandates that state parties impose legal obligations on business enterprises to uphold human rights law.[197]

One of the purposes of the UN Treaty is to confront and reduce the barriers faced by victims of corporate human rights violations.[198] The Treaty seeks to achieve this goal in three significant ways. First, it mandates states to ensure that international crimes are recognised as criminal offences within their domestic criminal legislation and that, subject to the state's legal principles, legal persons can be held criminally liable for such offences.[199] Secondly, it requires states to enact HRDD legislation similar to that outlined in the UNGPs.[200] Finally, it requires states to take several actions to directly uphold the victim's right to remedy.[201]

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194 *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* UN Doc A/HRC/RES/26/9 (25 June 2014).

195 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (draft published on 6 August 2020, not yet in force) [Second Revised Draft Treaty].

196 Anne Peters and others, above n 180, at 37.

197 Second Revised Draft Treaty, above n 195, art 8(1).

198 Sarah Joseph and Mary Keyes "BHR Symposium: The Business and Human Rights Treaty and Private International Law" (9 September 2020) OpinioJuris <www.opiniojuris.org>.

199 Second Revised Draft Treaty, above n 195, art 8(9).

200 Art 6(2)–(3).

201 Art 7.

### *2 Advantages of using a treaty*

There are advantages to using a multilateral treaty. Primarily, treaties can comprehensively address the barriers to remedy by mandating a wide range of actions. Multilateral treaties also ensure policy coherence providing victims the same, or very similar, remedies regardless of the jurisdiction.[202]

The UN Treaty's mandated actions that address barriers to remedy are comprehensive and multifaceted. These actions include using mechanisms like criminal law and HRDD obligations. I have previously examined how criminal law and HRDD obligations can be used to address the barriers, and the limitations of these methods. There is unlikely to be any silver bullet reform able to effectively address the barriers to remedy faced by victims, therefore comprehensive reforms are needed. Accordingly, the UN Treaty mandates that states must use a wide range of strategies to realise the victim's right to a remedy.

Another advantage of adopting a treaty on business and human rights is that it favours policy coherence.[203] That is, consistency in laws and regulations across states. Inconsistency of policies across jurisdictions threatens the efficacy of domestic legal regimes by creating uncertainty and increasing the complexity and costs of enforcing the rights of victims.[204] Laws aimed at preventing businesses committing human rights abuse should be internationally consistent in order for victims to have effective access to remedy. A treaty provides an opportunity to achieve this by coordinating domestic legal developments and creating a convergence of standards.[205] The UN Treaty is the best means to effectively address the barriers and to ensure victims have consistent enjoyment of the right to a remedy across jurisdictions.

### *3 Issues with using a treaty*

While the UN Treaty could effectively address the barriers to remedy I have outlined, it is not without problems. There are issues inherent to treaty making, especially where human rights are concerned, that limit the practical effectiveness of the UN Treaty. Since the release of its

202 David Bilchitz "The Necessity for a Business and Human Rights Treaty" 1 Business and Human Rights Journal (2016) 203, at 206.

203 Bilchitz, above n 202 at 208.

204 Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, above n 44, at [29]–[30].

205 Blackburn, above n 55, at 10.

second draft in August 2020, the UN Treaty has already attracted criticism for being overly prescriptive and using a "one size fits all" approach.[206] For instance, the UN Treaty mandates that states make a significant number of specific legislative changes to their domestic laws.[207] These proposed changes would help realise the right to a remedy, but a number of state delegations criticised them for not taking account of institutional variations across states.[208] Such challenges are common to the development of all treaties, especially those concerned with human rights. An overly prescriptive treaty risks gaining little state support or being plagued by reservations, whereas an overly vague treaty will be ineffectual.[209] The two main advantages of the UN Treaty are therefore at odds with one another. To ensure that there is policy coherence and wide ratification, it would need to be watered down so that it mandates fewer reforms. But this would make it a less comprehensive, and therefore less effective, instrument.

A further issue is that treaty making is a slow and lengthy process that requires widespread support. Previous versions of the UN Treaty have struggled to gain support from states during sessions of OEIGWG. Major states such as the United States, Australia, Japan and Canada did not participate in the fifth session in 2019.[210] A number of states have also expressed concern with the UN Treaty's provisions as well as its overall purpose.[211] In spite of amendments made to the UN Treaty in response to states' concerns, it seems that popular support for the UN Treaty — let alone ratification — is a distant prospect.[212] The UN Treaty has already been in development for over six years, highlighting the protracted nature of treaty making.[213] Victims deserve access to a remedy now. Otherwise,

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206 Claire Methven O'Brien "Transcending the Binary: Linking Hard and Soft Law Through a UNGPs-Based Framework Convention" (2020) 114 AJIL Unbound 186 at 188. See also US Mission to International Organizations in Geneva "The United States Government's Continued Opposition to the Business and Human Rights Treaty Process" (press release, 16 October 2019).

207 Such as those set out art 8 of the Second Revised Draft Treaty.

208 Pierre Thielborger and Tobias Ackermann "A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?" (2017) 24 Ind J Global Legal Studies 43 at 68. See also John Ruggie "The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty" (8 July 2014) Institute for Human Rights and Business <https://www.ihrb.org/library/publications/treaty-on-business-human-rights>.

209 Claire Methven O'Brien "BHR Symposium: The 2020 Draft UN Business and Human Rights Treaty–Steady Progress Towards Historic Failure" (11 September 2020) OpinioJuris <www.opiniojuris.org>.

210 Claire Methven O'Brien "Confronting the Constraints of the Medium: The Fifth Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty" (2020) 5 BHRJ 150 at 152.

211 At 153–154.

212 For some examples of the amendments, see Surya Deva "BHR Symposium: The Business and Human Rights Treaty in 2020–The Draft is "Negotiation-Ready", but are States Ready?" (8 September 2020) OpinioJuris <www.opiniojuris.org>.

213 Thielborger and Ackermann, above n 208, at 69–70.

human rights violations by corporations will remain ongoing and victims will continue to be denied remedies. While the legislative changes the UN Treaty mandates are important and necessary, it is possible for states to enact many legislative changes now. There is no need to wait for completion of the Treaty negotiation process.

## VI CONCLUSION

Weak governance in host states and legal barriers in home states creates an accountability gap that is easily exploited by MNCs. By operating through subsidiary companies, MNCs escape liability for their human rights abuses in foreign states. This has created a situation where victims are denied the right to a remedy. The Supreme Court judgments of *Nevsun* in Canada and *Vedanta* and *Okpabi* in the United Kingdom illustrate the judiciary's intention to meaningfully uphold the right to a remedy. Yet, despite these milestone judgments, victims continue to face barriers to remedy such as the doctrine of limited liability, jurisdictional rules, the cost of litigation and legal uncertainty. If states are to fulfil the fundamental principle of no right without a remedy, several actions must be urgently implemented to address these barriers, instead of continuing to rely on civil litigation.

There is no doubt that the barriers to remedy for victims are complex, but a list of priorities clearly emerges from analysis of the three proposed strategies. Most importantly, states should enact legislation mandating HRDD to ensure that corporations act to prevent human rights violations within their supply chains. HRDD obligations will more successfully address the barriers to remedy victims than using criminal law sanctions and will also ensure that victims receive a remedy when the corporation is proved to be at fault. Moreover, support for HRDD obligations is growing as more jurisdictions start to enact them.

States should ensure that international crimes are criminalised within their domestic legislation and, where consistent with their legal regimes, ensure that legal persons can attract criminal liability for such offences. In conjunction, civil proceedings should be embedded within the criminal justice process to ensure victims receive compensation for the violations. However, this reform is only a secondary priority. Having the state prosecute corporations for committing human rights violations would increase corporate accountability and have a deterrent effect. This accountability,

however, is unlikely to directly enable victims to access remedies unless civil proceedings occur in parallel.

Finally, states should support and ratify the UN Treaty which ensures measures are binding on all states to ensure consistency and accountability. The most recent draft of the UN Treaty would comprehensively address the barriers to remedy for victims of corporate human rights abuses, but its ratification seems a distant prospect. There is also the very real risk that the Treaty may be weakened in subsequent negotiations. This does not prevent states from enacting the actions it mandates now rather waiting for its final draft. If states use these strategies to address the barriers to remedy faced by victims, they will effectively uphold the right to remedy, helping prevent corporations from committing human rights violations.