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CASE REPORT

Broken English: a critique of the Dutch Court of Appeal decision in *Four Nigerian Farmers and Milieudefensie v Shell*

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ABSTRACT
In 2021, a Dutch Court of Appeal was the first court to hold that the parent company of a transnational corporate group incurred a duty of care to victims in a third state, who had been harmed by activities of the company's subsidiary. While this signals significant progress for the movement towards more accountability of parent companies, and better prospects for remedies for victims, the decision is in some respects also a missed opportunity. This contribution examines the decision from a transnational law perspective, provides a critique of how the Court of Appeal misconstrues relevant English precedent, and discusses the public dimensions of this decision and cases like it.

KEYWORDS Shell Nigeria; duty of care; liability; Lungowe; Okpabi; Royal Dutch Shell

If one looks for a legal problem where the transnational legal narrative is not just present but almost self-evident,[1] one could do worse than to consider the impacts of transnational corporate activities on human rights, labour rights and environmental rights. 'Transnational perspective' is construed broadly here, referring to legal interactions that crosses boundaries between fields of law, national jurisdictions and the 'domestic' and 'international' legal spheres, in the broader context of economic globalisation. These interactions also involve a variety of actors: state actors, transnational corporations and their subsidiaries, local victims and their representatives, supported by NGOs and lawyers from the home states of the corporations involved. In that respect, the most relevant policy framework applicable to this problem, the United Nations Guiding Principles on Business and Human

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[1] See generally Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012) 21 *Transnational Law and Contemporary Problems* 305.

Rights (UNGPs), are inherently transnational in that they engage with the obligations, responsibilities and rights of these actors across all levels where they impact human rights.

Allocating accountability and liability within the organisational and governmental structures of transnational corporate groups and global supply chains, and obtaining remedies for victims may often require an approach beyond the confines of national legal systems, and beyond the borders of 'public' and 'private'; in a way that can hardly be reduced to a single territory or jurisdiction.[2] Like the modern transnational corporation itself, this is a product of interactions and dialogues between actors and institutions from different jurisdictions, and between normative frameworks from domestic and international law.[3] However, those interactions may be flawed, resulting in imperfect understandings and incomplete narratives. This contribution discusses one recent case where, in spite of a clear step towards increased accountability of parent corporations, important factors were lost in translation.

The focus of this contribution is the recent decisions by the Hague Court of Appeal in the case of *Four Nigerian Farmers and Stichting Milieudefensie v Shell*.[4] The case was brought by a group of Nigerians, supported by Dutch NGO Milieudefensie, with respect to three separate oil spills from pipelines and wellheads operated by Shell, located near the Oruma, Goi and Ikot Ada Udo villages in the Niger Delta. The claimants held that Shell Nigeria and its parent company Royal Dutch Shell are liable for damage to their farmlands and fishing grounds; in particular, they alleged that the companies had been negligent in maintaining the pipelines, responding to the spills and cleaning up the pollution afterwards. In a landmark ruling, the Court of Appeal held that Shell Nigeria was strictly liable for damage caused by two of the spills (the *Oruma* and *Goi* cases), [5] and had acted negligently in its initial response to those spills.[6] It further ruled that parent company, Royal Dutch Shell, had a common law duty of care to ensure that particular safety measures were

[2] See ie Philip Liste, 'Transnational Human Rights Litigation and Territorialised Knowledge: *Kiobel* and the "Politics of Space"' (2014) 5 *Transnational Legal Theory* 1. See also Samuel Baumgartner, 'Is Transnational Litigation Different?' (2004) 25 *University of Pennsylvania Journal of International Law* 1279, 1378–84 for an early critique on 'domesticized' analysis of transnational litigation and the need for a more distinct category.

[3] The concept of legal dialogues has been explored extensively in relation to climate change governance and litigation, as discussed in this journal in Philip Paiement, 'Urgent agenda: how climate litigation builds transnational narratives' (2020) 11 *Transnational Legal Theory* 121, citing Hari M Osofsky, 'Is Climate Change "International"? Litigation's Diagonal Regulatory Role' (2009) 49 *Virginia Journal of International Law* 585, 634–7 and more generally Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99.

[4] The Hague Court of Appeal, 29 January 2021, ECLI:NL:GHDHA:2021:132 (*Oruma*), ECLI:NL:GHDHA:2021:133 (*Goi*) and ECLI:NL:GHDHA:2021:134 (*Ikot Ada Udo*).

[5] The Court's decision on the Ikot Ada Udo spill was an interlocutory decision on the alleged cause of the spill.

[6] *Oruma* (n 3) [5.28]–[5.30] and *Goi* (n 3) [5.27]–[5.29].

installed in pipelines operated by its Nigerian subsidiary.[7] The defendants were not liable for the remaining pollution as the clean-up activities already undertaken had met the relevant industry standards. Determination of damages has been reserved for a later hearing.

That Shell Nigeria was liable for the damage is itself remarkable. It is the first time a court of the home state of a transnational corporation has found a subsidiary located outside of its jurisdiction liable on the basis of harmful acts.[8] Applying Nigerian law,[9] the court held that with regard to damage out of causation of the spills, the company was subject to strict liability according article 11(5)(c) of the Nigerian Oil Pipelines act,[10] and that Shell had failed to demonstrate 'beyond reasonable doubt' that an exception to this strict liability standard applied.[11] With regard to damage arising out of the company's response, the court ruled it had committed a tort of negligence under Nigerian common law.[12]

However, it is the finding that the parent company also incurred a duty of care that may have a more significant legal impact. The court relied on English precedent[13] (in particular the 2019 UK Supreme Court decision in *Lungowe v Vedanta*[14]), which the court notes can have persuasive authority when interpreting Nigerian common law.[15] In the *Oruma* case the court held that since at least 2011, Royal Dutch Shell had significantly intervened in its subsidiary's operations in pipeline safety and leak prevention. Royal Dutch Shell had thus undertaken a duty of care toward third parties to ensure that leak detection technology was installed in Shell Nigeria's pipelines, in conformity with Royal Dutch Shell's policies.[16]

In contrast to the liability of Shell Nigeria, which was mostly based on specific provisions of Nigerian statutory law, this finding may have a much broader impact: while the duty found in these cases is relatively limited and does not extend to payment of damages for the spills, it is the first time a duty of care under common law has been established on the merits, and not just contemplated as a hypothetical ground for liability.[17] This

[7] *Oruma* (n 3) [7.24]–[7.29].
[8] Both in the US and in the EU, all comparable cases have thus far been dismissed or settled.
[9] In an interlocutory decision, the court had previously determined that as Nigeria was the place where the damage occurred, Nigerian law should be applied. See The Hague Court of Appeal, 18 December 2015, ECLI:NL:GHDHA:2015:3588 [1.3], as discussed in Lucas Roorda, 'Adjudicate This! Foreign Direct Liability and Civil Jurisdiction in Europe' in Angelica Bonfanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Routledge, 2019).
[10] *Oruma* (n 3) [5.28]–[5.30] and *Goi* (n 3) [5.27]–[5.29].
[11] *Oruma* (n 3) [5.17] and *Goi* (n 3) [5.17].
[12] *Oruma* (n 3) [6.30]–[6.31] and *Goi* (n 3) [6.14]–[6.18].
[13] *Oruma* (n 3) [3.18] and *Goi* (n 3) [3.19].
[14] *Lungowe v Vedanta Resources plc* [2019] UKSC 20.
[15] *Oruma* (n 3) [3.27] and *Goi* (n 3) [3.13].
[16] *Oruma* (n 3) [7.24].
[17] Note that the possibility of parent companies incurring a duty of care was already raised by the UK House of Lords in *Lubbe v Cape Plc* [2000] UKHL 41, and was accepted in a domestic case in *Chandler v Cape plc* [2012] EWCA Civ 525. For an overview, see Richard Meeran, 'Tort Litigation against

then may lower the barrier for other courts seized of cases where common law is the applicable law, to find similar duties of care for other parent companies.

It is however unfortunate that in establishing a duty of care, the Court of Appeal relies on an incorrect, overly strict interpretation of English precedent. First, the Court held that a parent company can only incur duty of care if the subsidiary was also liable for negligence. This seems to misinterpret English law on duty of care, which – as discussed below – may be established by an assumption on responsibility or the existence of control; only after that duty is established, the question of whether the defendant breached the duty through its own conduct is assessed, and the causal link between the defendant's activities and the harm.

The Court of Appeal nevertheless relied on this interpretation to reject the claim that Royal Dutch Shell incurred a duty of care with regard to causation of the spills.[18] While the court did find Shell Nigeria liable under the 'causation' heading, it based that finding on strict liability under Nigerian statutory law rather than on negligence – and thus concluded that Royal Dutch Shell could not incur a duty of care with respect to its subsidiary's conduct. Apart from having a questionable legal basis, this interpretation creates a Catch-22 for claimants: demonstrating that a corporation is under strict liability is easier from an evidentiary point of view than showing wrongful conduct, as the burden of proof shifts to the defendant to show that there was an exception to strict liability. But this would then absolve a parent company from any liability beforehand. Moreover, this would arguably undermine the purpose of imposing strict liability for risky activities like oil exploration.

Second, to the extent that the Court did rely on English precedent, it misread how the UK Supreme Court in *Lungowe v Vedanta* departed from the previously followed standard of *Caparo v Dickman*.[19] From the Dutch case, one would get the impression that *Lungowe* builds on and clarifies the general precedent establishing duties of care in the specific context of transnational parent-subsidiary relationships. In fact, the UK Supreme Court in *Lungowe* explicitly held that the *Caparo* test is *not* the correct test, as it was intended for the creation of new categories of negligence

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* 1 and Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing, 2012).

[18] *Oruma* (n 3) [3.33], [5.31]–[5.32].

[19] *Caparo Industries plc v Dickman* [1990] UKHL 2, holding that a duty of care arises when there is foreseeable harm as a result of the defendant's conduct, the parties must be in a relationship of proximity and it must be fair, just and reasonable to impose liability. The application of the proximity test to situations involving parent companies intervening in their subsidiary's operations had been clarified earlier in *Chandler*.

liability – whereas parent company liability for foreign harms was neither new nor special.[20] The *Lungowe* decision instead provided a general guidance as to when parent companies could incur duties of care, while emphasising that these were not intended to be exhaustive and closed categories.[21] Yet, the Dutch court stuck to the more stringent *Caparo* test, and made little to no reference to the *Lungowe* guidance.

That the Dutch court misapplied *Lungowe* was confirmed when, two weeks after the *Milieudefensie* judgment, the UK Supreme Court issued its decision in *Okpabi and others v Shell and others*.[22] *Okpabi* mirrors the Dutch case in several respects: its facts are very similar – oil pollution in the Niger Delta as a result of spills allegedly caused by negligent maintenance; it deals with the same defendants; and it contains the same legal basis for liability of parent company Royal Dutch Shell. In a decision on whether the claimants actually had an arguable claim (or 'triable issue'), the UK Supreme Court reiterated its finding in *Lungowe,* that parent company liability should be assessed under ordinary principles of tort law, possibly – but not necessarily – according to the guidance given by the Court in *Lungowe*.[23] Interestingly, the UK Supreme Court acknowledged the recent Dutch case when it discussed some of the evidence obtained by the claimants in the Dutch litigation and presented to English courts[24]; however, the court did not comment on its application of *Lungowe* or *Caparo*.

Which test a court applies to establish a duty of care matters beyond just the chances of success in a particular claim. If non-UK courts applying common law stick to the *Caparo* criteria, parent companies can in principle only incur a duty of care if they actively intervene in their subsidiaries with respect to potentially harmful activities. This could encourage parent companies *not* to intervene and potentially reduce the subsidiary's risks, lest they are liable for damage caused as a result of that activity later. The broader guidance given by *Lungowe* reduces this risk by retaining the possibility of liability, even when companies do not actively manage their subsidiaries directly but do institute (defective) group-wide policies, or when it holds itself out to exercise oversight and supervision.[25] Especially in an integrated corporate group with a strong brand – like Shell – one will be hard pressed to find a parent company that does *not* set and enforce group-wide policies, or states to its shareholders that it is in control of the group's operations. Moreover, in recent English litigation claimants are arguing that duties of care are

[20] *Lungow* (n 9) [49].
[21] *Ibid*, [51].
[22] *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.
[23] *Ibid*, [24]–[27].
[24] *Ibid*, [137].
[25] *Ibid*, [26].

not exclusive to relations of ownership, ie between parent and subsidiary, but could also arise in transnational supply chains, ie between contract partners and through other forms of business relations.[26]

At this point one should recognise the public law dimensions of the Shell litigation. This case is one example of where claimants have brought their claims abroad; because a parent company is domiciled elsewhere, and/or because victims have little prospects to get adequate remedies domestically.[27] In the cases related to oil exploration in the Niger Delta, like the case discussed here and the *Okpabi* case, litigation takes place against the background of long-running disputes between the Niger Delta communities and the Nigerian federal government. These cases also illustrate how host states sometimes do not, or cannot take adequate public action to protect human and environmental rights against corporate impacts. While oil companies are increasingly also being sued in Nigerian courts for polluting activities, enforcement of these decisions is often lacking.[28] Shell has also responded to one such decision by filing an investment claim against Nigeria, which could have a further chilling effect on enforcement.[29]

One response to these issues is the development of due diligence obligations for parent and lead companies,[30] which are consistent with existing expectations under the UNGPs.[31] The growing recognition and elaboration of corporate duties of care such as the cases above can contribute to this development; for it creates a multidimensional governance patchwork of expectations and accountability that can guide transnational corporate conduct.[32] At the same time, there is a risk that these developments create parallel tracks and conflicting standards if the interaction with developing

[26] *Hamida Begum (On behalf of MD Khalil Mollah) v Maran (UK) Ltd* [2021] EWHC 1846 (QB).

[27] Gwynne L Skinner, Rachel Chambers and Sarah McGrath, *Transnational Corporations and Human Rights Overcoming Barriers to Judicial Remedy* (Cambridge UP, 2020) 28–33, and Gwynne L Skinner, 'Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World' (2014) 46 *Columbia Human Rights Law Review* 158, for a discussion of barriers to remedy in host states: these could include lack of availability of legal representation, insufficient funding options, corruption in the judiciary and inadequate enforcement measures.

[28] Barisere Rachel Konne, 'Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland' (2014) 47 *Cornell International Law Journal* 181. In one case, Shell has successfully applied to block enforcement of Nigerian courts' judgments in the UK. See *Chief Isaac Osaro Agbara and ors v SPDC and ors* [2019] EWHC 3340 (QB).

[29] *Shell Petroleum NV and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria*, ICSID Case No. ARB/21/7.

[30] See specifically LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (*Due Diligence Act*). Similar legislation is now considered in Germany and the Netherlands, and in the EU. See for the latter, European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

[31] United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011) Principles 11–13.

[32] 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* 265.

duty of care case law is not adequately accounted for, leading to legal uncertainty for rights-holders and corporations alike.[33]

It is unfortunate, then, that this public dimension is hardly acknowledged in the Shell decisions themselves. As these were civil cases, the Court of Appeal had to base its holdings the parties' submissions, which did not engage much with the broader public framework. Dutch law also does not contain formal avenues through which interested third parties can intervene and raise aspects of cases that transcend the interests of the parties involved, such as the clarification and enforcement of human rights and environmental standards. But even having this option by no means guarantees that courts would have been more receptive to the human rights angle: both in the *Lungowe* and *Okpabi* cases in the English courts, the International Commission of Jurists and the Corporate Responsibility Coalition filed external submissions alerting the UK Supreme Court to the human rights background of these cases and the relevance of expectations on corporations under the UNGPs, which could be relevant for informing a duty of care. But in neither case did the UK Supreme Court refer to these submissions, other than a short acknowledgement that they had been filed in *Okpabi*.[34]

To conclude, accountability of parent corporations for extraterritorial harms is not just a product of a single norm and accompanying enforcement mechanism; it comes from a patchwork of overlapping decisions and legislative initiatives that transcends borders, both territorial and doctrinal. The Court of Appeal's decision in *Four Nigerian Farmers and Stichting Milieudefensie v Shell* is an important step, not least because how it is linked to developments in other jurisdictions. At the same time, a better understanding of how the law has developed in those jurisdictions, and a broader view of the public law background of cases like this may be needed.

Disclosure statement

No potential conflict of interest was reported by the author(s).

[33] Jan von Hein, Conflict of Laws.net, 'A Step in the Right Direction, but Nothing More – A Critical Note on the Draft Directive on Mandatory Human Rights Due Diligence' (26 October 2020) online: <https://conflictoflaws.net/2020/a-step-in-the-right-direction-but-nothing-more-a-critical-note-on-the-draft-directive-on-mandatory-human-rights-due-diligence/>.

[34] *Okpabi* (n 17) [73].