ENFORCING INTERNATIONAL HUMAN RIGHTS LAW AGAINST CORPORATIONS

Barnali Choudhury, Professor of Law, Osgoode Hall Law School; Director, Nathanson Centre on Transnational Human Rights, Crime & Security
THE MARLIN MINE
DIFFICULTIES OF REDRESS FOR VICTIMS
ENFORCING ACTIONS AGAINST PARENT COMPANIES

Goldcorp (Canadian Co)

Montana (Guatemalan Co)
HOW TO HOLD PARENT COMPANIES LIABLE FOR HUMAN RIGHTS VIOLATIONS
ESTABLISHING LIABILITY FOR PARENT CO

VEIL PIERCING

Parent Co. → Subsidiary

DIRECT DUTY

Parent Co. → Subsidiary
DIRECT DUTY OF CARE

- **Vedanta v. Lungowe (2019)**
  - UKSC
  - UK courts have jurisdiction over the matter – i.e. no substantial justice due to the scale and complexity of case and because of limited funding and legal resources in Zambia
VEDANTA V LUNGO WE

- Liability of parent companies depends on extent to which the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of...the subsidiary

- Parent companies could be liable where “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” and “where parent has given relevant advice to the subsidiary about how it should manage a particular risk”

- Group wide policies – liability where policies contain systemic errors; parent actively ensures sub implements policy and where parent holds itself out as exercising control of sub
Focus should be on “the extent to which the parent did take over or share with the subsidiary the management of the relevant activity” that gave rise to the harm, which could, but need not be, “demonstrated by the parent controlling the subsidiary.”
ROUTES FOR PARENT COMPANY LIABILITY

1. Where the parent company takes over the management or joint management of the relevant activity of the subsidiary;

2. Where the parent company provides “defective advice and/or promulgates defective groupwide safety/environmental policies which were implemented as of course” by the subsidiary;

3. Where the parent company “promulgates group-wide safety/environmental policies and takes active steps to ensure their implementation” by the subsidiary;

4. Where the parent company “hold[s] out that it exercises a particular degree of supervision and control” of the subsidiary
CUSTOMARY INTERNATIONAL LAW APPROACH:
NEVSUN RESOURCES LTD V ARAYA, 2020 (SCC)
CORPORATE LIABILITY FOR BREACH OF CUSTOMARY INTERNATIONAL LAW

• Forced labour, slavery; cruel, inhuman or degrading treatment; and crimes against humanity part of CIL, even jus cogens

• CIL is part of domestic law

• Corporations can be liable for violations of international human rights norms

• Nothing precludes Canadian courts from developing “a civil remedy in domestic law for corporate violations of ... customary international law norms”
• Not clear which norms of customary international law applicable to corporations,
• Not clear whether the common law should evolve to hold a corporation liable for violations of interstate norms
• Not clear what mechanism should be used to determine how a violation of adopted norms of customary international law could be compensable under domestic law.
• Not clear what evidence needed to demonstrate breach of CIL
ARE CORPORATIONS LIABLE FOR BREACHES OF CIL?

- There is no “uniform and consistent state practice establishing corporate responsibilities under customary international law”
- UN Special Rep on Business and Human Rights
- UN Guiding Principles on Business and Human Rights: corporations have responsibilities, not legally binding obligations, for respecting human rights
JUS COGENS

- State jurisdiction over jus cogens violations: criminal, not civil
- Corporate law problem: acts committed by an Eritrean company, not a Canadian company
- International law does not make provision for states to exercise jurisdiction over jus cogens violations that were committed by individuals who were effectively controlled by third parties
DUTY OF CARE: THE BETTER APPROACH

- Easy to minimize liability by going around the four routes
- Too much insistence still on control
- Broad appeal: Milieudefensie et al. v Royal Dutch Shell Plc (2021) (Dutch court)
LEGISLATIVE APPROACH
DUE DILIGENCE LAWS

Require corporations to engage in human rights and environmental due diligence, as a way “to identify, prevent, mitigate and account for how they address... adverse human rights impacts.”
SCOPE OF SUBJECTS

Due diligence laws should be broad in scope and include both human rights and environmental and climate change issues.

- Japan: human rights and labour rights
- Canada: forced and child labour
- Norway: human rights and decent working conditions;
- UK: forced labour and human trafficking
- Switzerland: human rights, environmental, social, anti-corruption and labour issues
- France: human rights, the environment and health;
- Germany: human rights and environmental issues
- EU: human rights and environmental issues
APPLICATION

- UNGPs provide that businesses should carry out due diligence for adverse impacts that it causes or contributes to through its own activities as well as those that can be linked to it through its “business relationships”

- Germany: due diligence requirements apply to “all products and services of an enterprise” from “the extraction of the raw materials to … delivery to the end customer.”

- Japan: applies to business enterprises, including sole proprietors; group companies; suppliers; and business partners
OBLIGATIONS

• UNGPs prescribe that businesses should enact a human rights policy commitment; have in place a “human rights due diligence process to identify, prevent, mitigate and account” for how the business addresses human rights impact; and a process to enable remediation for adverse human rights impacts caused.

• Germany: companies must: enact a policy statement; create a risk management system; perform regular risk analyses; implement preventive measures for its own business and its direct suppliers; implement measures for risks resulting from its indirect suppliers; provide remedial action; and establish a complaints procedure, among other obligations.
OBLIGATIONS

- Norway: requires companies to: “embed responsible business conduct” into corporate policies; identify and assess human rights impacts; put in place measures to prevent or mitigate adverse impacts; track the results of the measures; and provide remediation and compensation, among other requirements

- Switzerland, Canada, UK: only reporting obligations

- Japan: “Requests” companies to engage in certain activities
ENFORCEMENT

• Germany, Norway, EU: supervisory body; penalties imposed
• Canada, UK, Switzerland: no supervisory body; enforcement only for not reporting
• Japan: no enforcement at all
DUE DILIGENCE LAWS AS PANACEA?

• Ex ante specify issues
• Not all due diligence laws equal; German law as gold standard
• Court enforcement: example of Total in France
CONCLUSION

• Due diligence laws are unlikely, in and of themselves, to fully address the problem of corporate harms.

• But they are better than relying on domestic court enforcement of human rights abuses by corporations.