

Dear Lord and Lady Justices,

We, the undersigned, are United Kingdom (UK) and international human rights, development and environmental NGOs concerned about the negative impacts that UK companies' international operations can have on human rights and the environment globally. We write in support of the Claimants' application for permission to appeal in *Okpabi and others v Royal Dutch Shell plc and another* [2018] EWCA Civ 191 (*Okpabi*), which raises serious issues relating to: the duties of UK-headquartered parent companies to those affected by their subsidiaries' global operations; and access to justice for people allegedly harmed by these operations.

Since 2002, London-based NGO Business & Human Rights Resource Centre has collated thousands of allegations of human rights and environmental abuse related to business operations internationally. Of the 303 company responses sought from UK-linked businesses between 2005 and 2014, 95% concerned company operations outside Western Europe. The high volume of allegations against UK companies abroad demonstrates that while they are comparatively better regulated in Western Europe, they are frequently implicated in jurisdictions where regulatory regimes are not as robust and options for remedy are more limited.

Over the last 24 years, a series of cases has been brought in the UK relating to alleged harm suffered by people in developing countries as a result of the operations of UK multinational companies. These cases have related to: mercury poisoning, mesothelioma, asbestosis and silicosis suffered by workers in South Africa; the health effects of toxic waste dumping in Ivory Coast; allegations of corporate complicity in torture and ill-treatment by the Peruvian police; and injuries and deaths at a mine site in Tanzania. Often, it is extremely difficult to pursue such cases in the local courts of the jurisdiction where the harm occurred and where the subsidiary operations are located, due to corruption, fear of persecution and lack of access to information. Funding for appropriately-resourced legal representation is virtually impossible to access. In such cases, bringing a claim in the UK against the parent company offers a vital route to justice. Yet the judgment in *Okpabi* suggests a highly restrictive approach to parent company liability and should it stand, is likely to drastically limit the options that victims of abuse have to access justice, and potentially encourage further irresponsible business behaviour.

In *Okpabi* the Court of Appeal erred in a number of ways that will, additionally, have extremely negative consequences. Further, as indicated by the geographically diverse signatories to this letter, this case is of global significance. We therefore believe the case merits analysis by the Supreme Court. Set out below are the details behind our reasoning:

1. The Court of Appeal ruled that international standards on corporate responsibility are irrelevant to the existence of an arguable duty of care. As NGOs with a concern for the global negative impacts of multinational companies on human rights and the environment, we have worked to support the development and promotion of international standards on corporate responsibility and consider this analysis erroneous. We believe that contemporary international standards on corporate human rights responsibility must be taken into account in the way the legal system regards acceptable business behaviour. Those standards are, for instance, developed in the UN Guiding Principles on Business and Human Rights (UNGPs) which were unanimously endorsed by the UN Human Rights Council in June 2011. At the heart of the UNGPs is the business responsibility to carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts. This due diligence should cover impacts that the business enterprise 'may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'. The UNGPs also outline that states should take steps to minimise barriers to judicial access to remedy, including when access is restricted by jurisdictional obstacles or separate corporate personalities. The UNGPs therefore regard home-state parent companies responsible for identifying, preventing and mitigating the adverse impacts of their host-state subsidiaries, and require states to facilitate remedial justice when the corporate structure precludes appropriate accountability.

Other relevant standards include the UN Committee on Economic, Social and Cultural Rights General Comment 24 which provides that States should require parent companies to ensure their subsidiaries, including those registered under the laws of another State, respect Covenant rights and conduct human rights due diligence. General Comment 24 also makes clear that States must facilitate access to justice in the face of challenges posed by the ‘corporate veil’. In addition, General Comment 16 on Child Rights and Business from the UN Committee on the Rights of the Child outlines that States should require businesses to undertake child-rights due diligence, ensuring that business enterprises identify prevent and mitigate their impact on children’s rights ‘including across their business relationships and within global operations’.

The UK government reaffirmed its commitment to implement the UNGPs in 2016, originally made in 2011, stating its expectation that companies ‘treat as a legal compliance issue the risk of causing or contributing to gross human rights abuses wherever they operate’ and ‘adopt appropriate due diligence policies to identify, prevent and mitigate human rights risks, and commit to monitoring and evaluating implementation’. The UK has ratified both the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. As such, the UK courts should have no difficulty in recognising these principles and drawing upon them in determining whether a parent company has an arguable duty of care to those affected by the operations of its subsidiaries. This would be in line with other jurisdictions that have found such standards arguably relevant, for instance the Ontario Superior Court of Justice in *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414. Parent companies must not be left to decide whether they owe a duty of care to those affected by the operations of their subsidiaries by taking a hands-off approach. Relevant normative frameworks on corporate responsibility, widely adopted by states, business and international organisations, should inform the human rights and environmental obligations owed by parent companies.

2. The decision by the Court of Appeal placed an impossibly high evidential burden on the Claimants in its restrictive interpretation of the test in *Chandler v Cape plc* [2012] 1 WLR 3111. The developing UK parent company liability jurisprudence is being relied on to bring corporate accountability cases in many other jurisdictions, including Canada, the Netherlands, Italy, and Germany (e.g. *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 – CanLII; *Yaiguaje v. Chevron Corporation*, 2015 SCC 42, [2015] 3 S.C.R. 69; *Ododo Francis v. ENI and Nigerian Agip Oil Company (NAOC)*; *Friday Alfred Akpan et al v. Shell*, Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3587; *Jabir et al vs. KiK Textilien und Non-Food GmbH*, Landgericht Dortmund, 2016) in which a number of the undersigned have been involved. Establishing that parent companies may have a duty of care to those impacted by the operations of their subsidiaries is an important global development. We are therefore concerned about the significant ramifications of the highly restrictive interpretation of *Chandler v Cape plc* in *Okpabi*.

In *Okpabi*, the Claimants were required to show that Royal Dutch Shell plc had active control of the subsidiary’s operations and/or actively enforced group-wide mandatory standards. However, this is at odds with the guidance in *Chandler v Cape plc* which does not require proof of active control or enforcement. The restrictive interpretation in *Okpabi* will have two deleterious consequences:

i) In the first place, it places an extremely high evidential burden on the claimants at a stage in the proceedings in which they could not rely on disclosure rules. When the actual relationship between corporate entities is generally not in the public domain, it is enormously difficult to prove the *de facto* control one entity has over another. We fear that so long as this high evidential burden remains in place, victims will not be able to hold those truly responsible to account in the UK courts. Corporate groups must not be able to use court procedures to obstruct the examination of their hierarchies of responsibility.

ii) And secondly, if the parent company must be in the practice of intervening in the affairs of its subsidiary for a duty of care to arise, this will create a perverse incentive for parent companies to avoid

improving the environmental, security and health and safety standards of specific subsidiaries. It has already been brought to our attention that oil and gas groups have been advised in accordance with *Okpabi* to reduce their involvement in emergency response planning to avoid incurring liability. This runs contrary to the prevailing move towards companies taking on more responsibility for standards in their subsidiaries and supply-chains.

3. The Court of Appeal opined that the size of a corporate group was relevant to the issue of legal responsibility. The Court held that since Royal Dutch Shell plc had established a large network of subsidiaries, it could not have intended to assume responsibility for the operations of each of those subsidiaries. We believe that it cannot be presumed from the size and geographical presence of a corporate group that the parent company has no or diminished legal responsibility for wrongful conduct of its subsidiaries or other commercial associates. Such responsibility depends on the specific facts of the case, but should the Court of Appeal's ruling stand, its consequence will mean a presumption that the larger the corporate group, the more its parent company is shielded from incurring liability. While the size of a corporate group does not necessarily determine the scale of its impacts, larger firms have more resources at their disposal to develop and implement policies and procedures to prevent harms occurring. Their position as market leaders means they are also in a position to influence practices throughout their sector.

The actions of UK-based multinationals can have enormous impacts, positive and negative, across the world. As UK and international human rights, development and environmental organisations, we consider this to be case of real significance with widespread ramifications which therefore warrants the analysis of the Supreme Court. Taking into account all the above, we believe there is strong reason for the Supreme Court to accept the Claimants' application for permission to appeal.

We look forward to being notified in accordance with practice direction 3 (3.3.18) should the appeal be granted and the intervention taken into account.

Yours Sincerely,

Corporate Responsibility Coalition (CORE)
Friends of the Earth England, Wales and Northern Ireland (FoE EWNI)
Christian Aid
Traidcraft Exchange
Catholic Agency for Overseas Development (CAFOD)
Rights and Accountability in Development (RAID)

African signatories

Friends of the Earth Nigeria/ Environmental Rights Action, Nigeria
Green Alliance Nigeria (GAN)
African Resource Watch (AFREWATCH), Democratic Republic of Congo
Centre de Recherche Sur l'environnement, la Démocratie et les Droits de l'homme, Democratic Republic of Congo
Green Advocates International /Monrovia, Liberia
Narasha Community Development Group, Kenya
Professor Jackie Dugard, University of the Witwatersand, South Africa

International signatories

International Commission of Jurists (ICJ)
International Federation for Human Rights (FIDH)
International Corporate Accountability Roundtable (ICAR)
Business and Human Rights Resource Centre (BHRRC)
Environmental Defender Law Center (EDLC)
Global Legal Action Network (GLAN)
Global Initiative for Economic, Social and Cultural Rights

Center for International Environmental Law
International Network of Human Rights
Franciscans International
Association for Women's Rights in Development (AWID)
The Democracy Center

European signatories

Friends of the Earth Europe (FoEE)
European Coalition for Corporate Justice (ECCJ)
European Center for Constitutional and Human Rights (ECCHR)

American signatories

Dejusticia, Colombia
Above Ground, Canada
Asociación Interamericana para la Defensa del Ambiente, (AIDA)
The Social Rights Advocacy Centre, Canada
Comité Ambiental en Defensa de la Vida, Colombia
Center for Constitutional Rights, United States
Justica Global, Brazil
Inclusive Development International, United States
Due Process of Law Foundation
Proyecto sobre Organización, Desarrollo, Educación e Investigación (PODER)
Tlachinollan Human Rights Center of the Mountain, Mexico

Asian signatories

Equitable Cambodia, Cambodia
Human Rights Law Network (HRLN), India
National Fisheries Solidarity Movement, Sri Lanka
Centre for Human Rights and Development, Mongolia
POSCO Pratirodh Sangram Samiti (Anti-POSCO Movement), Odisha, India

Australian signatories

Human Rights Law Centre, Australia