1. **Introduction**

1.1 Peace Brigades International ("PBI") provides protection, support and recognition to human rights defenders ("HRDs") who work in areas of repression and conflict, and who have requested support. This may involve assisting HRDs in situations in which mass tort claims have arisen.

2. **What are Mass Tort Claims?**

2.1 A tort is a civil (as opposed to a criminal) wrong that causes someone else to suffer loss or harm, resulting in legal liability for the person who commits the tortious act (the "tortfeasor").

2.2 A mass tort claim arises where a civil wrong (a "tortious act") results in harm to numerous victims, and therefore, leads to multiple claimants bringing a claim against the tortfeasor(s).

2.3 This Fact Sheet focuses on the jurisdiction of the English courts to hear mass tort claims against English parent companies in relation to the overseas acts of their overseas subsidiaries.

3. **Issues faced by HRDs in relation to Mass Tort Claims**

3.1 The question of whether or not an English parent company can be sued for the actions of its overseas subsidiaries is relevant to the work of HRDs, as the victims of such torts often face access to justice barriers. For example, overseas claimants may seek to bring a claim in the English courts in circumstances in which:

   (A) their local courts are unable or unwilling to grant appropriate relief (for example, due to corruption, limited enforcement powers etc.); and/or

   (B) the claimants do not have adequate financial resources: the availability in England and Wales of funding arrangements such as Conditional Fee Arrangements, damages-based agreements (DBAs) (little-used at present) and a variety of third-party sources of funding can enable claimants to bring claims notwithstanding a lack of personal financial resources.

3.2 If claimants can establish parent company liability, it offers a chance to hold multinationals to account in their home jurisdiction. This often imposes far greater financial and...
reputational pressures, and may help to ensure that the parent company takes steps to improve its governance and overseas operations in future.

4. **The Legal Framework**

4.1 Demonstrating parent company liability is a key hurdle to establishing jurisdiction in mass tort claims. There is limited case law on the jurisdiction of English courts to hear claims against English parent companies relating to the alleged overseas acts of an overseas subsidiary.

4.2 However, the English courts have examined this question in three recent cases:

(A) **Okpabi**: In this case, two Nigerian communities have commenced separate High Court proceedings against Royal Dutch Shell PLC (“RDS”) and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Ltd (“SPDC”), a joint venture with Nigerian shareholders and the Nigerian government. The Ogale and Bille communities sought damages and remedial works in respect of oil spills from SPDC-operated pipelines.

(B) **Unilever**: In this case, 218 Kenyan nationals have brought claims against Unilever Plc (“UPLC”) and its Kenyan subsidiary, Unilever Tea Kenya Limited (“UTKL”). Following the 2007 Kenyan elections, the claimants suffered ethnic violence carried out by third-party criminals at a plantation. The claimants alleged that: (i) the risk of this violence was foreseeable by the defendants; (ii) the defendants owed them a duty of care to protect them from the risks of such violence; and (iii) the defendants breached that duty of care.

(C) **Vedanta**: In this case, 1,826 Zambian villagers have brought proceedings against Vedanta Resources Plc (“VRP”) and Konkola Copper Mines Plc (“Konkola”) alleging personal injury, damage to property and loss of income, amenity and enjoyment of land, due to alleged pollution and environmental damage caused by discharges from the Nchanga copper mine, which is owned and operated by VRP.

4.3 In all three cases the central issue for the court’s jurisdictional analysis has been whether there is an arguable duty of care between the parent company and the claimants, such that there is a real issue to be tried by the court between the claimants and parent company.

4.4 In each of the three cases the court identified the relevant law for establishing a parent company duty of care as follows:

(A) The claimants need to satisfy the three-part test (the “**Caparo Test**”) established in **Caparo v Dickman**:

1. harm must be reasonably foreseeable as a result of the defendant’s conduct;
2. the parties must be in a relationship of proximity; and
3. it must be fair, just and reasonable to impose liability.

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(B) Depending on the facts, a parent company may be liable for the operations of its subsidiary. The case of Chandler v Cape provides four descriptive factors that may indicate the presence of a duty of care owed by the parent company, which are relevant to the proximity and reasonableness limbs of the Caparo Test:

1. the business of the parent and subsidiary are in a relevant respect the same;
2. the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
3. the subsidiary’s system of work is unsafe and the parent company knew, or ought to have known; and
4. the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection.

(C) Such a claim is more likely succeed if advanced by former employees, but claims made by residents are still arguable.8

4.5 This is a factual analysis which turns on the particular circumstances in each case.

5. **The Cases**

5.1 In Unilever the High Court declined jurisdiction; this decision was upheld by the Court of Appeal. In Okpabi, the High Court declined jurisdiction; this decision was upheld by the Court of Appeal. However, in the potentially landmark Vedanta judgment, the Court of Appeal and subsequently the Supreme Court upheld the High Court’s decision to accept jurisdiction.

*Unilever*

5.2 The High Court granted the defendants’ applications to strike out the claim on the basis that the first (foreseeability) and third (reasonableness) limbs of the Caparo test were not made out.

5.3 It was held that UPLC had no means of foreseeing what would happen at the plantation and nothing comparable had ever happened before. It was also not foreseeable that law and order would break down generally and that the Kenyan police would then fail to protect the claimants.

5.4 In addition, it would not be fair, just and reasonable to impose a duty on UPLC because the claimants were seeking to impose liability on UPLC for the criminal acts of third parties, rather than the tortious acts of UTKL. Such a duty would be wider than the duty imposed on UTKL as the actual occupier of the plantation.

5.5 An appeal against this decision was heard in April 2018; the Court of Appeal upheld the High Court’s decision. The Supreme Court has since refused to grant the claimants permission to appeal.

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4 For example, see Lubbe and Others v Cape Plc and Related Appeals [2000] UKHL 41 (20 July 2000) [http://www.bailii.org/uk/cases/UKHL/2000/41.html](http://www.bailii.org/uk/cases/UKHL/2000/41.html)
Currently, this is the most recent decision in this line of cases. The Supreme Court held that the case could proceed in the English courts, as it was sufficiently arguable that the English parent company owed a duty of care to the overseas claimants. Although VRP did not own the relevant mine licence or have day-to-day control of the mine’s operations, several key factors evidenced a material level of control by VRP over Konkola.

Although VRP did not have material control of the mine’s operations, the Supreme Court held that the claimants’ case on VRP’s duty of care was arguable. The claimants had identified multiple circumstances which indicated that VRP had superior knowledge and expertise regarding, and control over, Konkola’s operations. In particular, VRP had:

(A) provided extensive financial support for Konkola;
(B) exercised a high degree of control over Konkola’s operational affairs;
(C) entered into a management and shareholders’ agreement by which VRP had a contractual obligation to provide Konkola with various support and supervisory functions; and
(D) published a public sustainability report that stressed that the oversight of all VRP’s subsidiaries rests with the board of VRP itself, and made express reference to the particular problems at the mine in Zambia.

The Supreme Court emphasised that it would not engage in a mini-trial regarding the actual existence of a duty of care. It ruled that a trial judge’s decision - a summary finding of fact derived from a limited body of available evidence at the pre-disclosure stage - cannot be overturned by appellate courts. No further fact-finding or analysis beyond that conducted by the trial judge was necessary in order to uphold his summary decision.

One key issue on appeal was access to justice. In the present case, access to justice arguments persuaded the Supreme Court that there was not only a real risk, but a probability, that the claimants would be unable to obtain substantial justice before the Zambian courts.

The Supreme Court focused on two points: (i) the practical difficulties involved in funding mass tort claims being brought by claimants unable to fund their claims themselves in the absence of legal aid, conditional fee arrangements (which are unlawful in Zambia) and other funding mechanisms which are at the disposal of claimants before the English courts; and (ii) the lack of legal practices in Zambia with the requisite level of experience and resources to mount and sustain mass tort claims against defendants which, on the other hand, are sufficiently resourced to instruct such firms.

Interestingly, the Supreme Court’s closing remarks suggested that, had it not been for VRP’s and Konkola’s failure on this access to justice issue, it may have been minded to allow their appeal.

The case will now return to the High Court for a full substantive trial.

Before the Court of Appeal, the parties agreed that the first limb (foreseeability) of the Caparo Test had been established. The focus was whether RDS exercised sufficient control over SPDC to establish the necessary level of proximity in order to satisfy the second limb of the Caparo Test. The Court gave limited separate consideration to the third
limb (reasonableness) of the *Caparo* Test (as it was accepted that the issues of proximity and reasonableness tend to run together).

5.14 All three judges in the Court of Appeal confirmed a primary distinction between:

(A) instances where a parent company exercises control over the material operations of a subsidiary; and

(B) instances where a parent company issues mandatory policies and standards that are intended to apply throughout a group of companies to ensure conformity with those standards.

This distinction formed the heart of the Court's analysis and disagreement as to whether RDS owed a duty of care to the claimants. The majority held that this was an instance that fell into the latter category (although one judge considered that it fell in the former category).

5.15 The claimants relied on five main factors to demonstrate RDS’s arguable control of SPDC’s operations:

(A) the issue of mandatory policies, standards and manuals that applied to SPDC;

(B) the imposition of mandatory design and engineering practices;

(C) the imposition of a system of supervision and oversight of the implementation of RDS’s standards, which bore directly on the pleaded allegations of negligence;

(D) the imposition of financial control over SPDC; and

(E) a high level of direction and oversight of SPDC’s operations.

5.16 The judgment concluded that, based on the evidence, none of the five factors demonstrated a sufficient degree of control by RDS of SPDC’s operations in Nigeria, either individually or cumulatively. As such, the claimants had not demonstrated an arguable case that RDS controlled SPDC’s operations, or that RDS had direct responsibility for the practices or failures that were the subject of the claim.

5.17 Crucially, SPDC retained autonomy in relation to the imposition of group standards, policies and practices. Although it was clear that RDS was keen to ensure that there were proper controls and policies in place within SPDC, the claimants had not demonstrated that RDS actively attempted to impose those controls and polices on SPDC. Instead, RDS simply expected SPDC to apply them itself. It was also noted that reporting requirements between a subsidiary and its parent do not imply the existence of control.

5.18 The claimants have been granted permission to appeal the Court of Appeal’s decision to the Supreme Court.

6. **Practical Steps for HRDs**

6.1 If (in any of these cases) the court finds at substantive trial that a duty of care was owed by a parent company to the claimants, it would be the first reported case in which a parent company has been found to owe a duty of care to a third-party/non-employee affected by the operations of a subsidiary (overseas or domestic).

6.2 This would open the door to HRDs launching further cases against English parent companies whose subsidiaries have committed tortious acts that have resulted in harm to victims and would put pressure on English parent companies to take greater care to
ensure that their subsidiaries do not cause harm to third parties when carrying out their operations.

6.3 However, this area of law is very uncertain and fact-specific. Even if the claimants are successful in these test cases, comments by the Court of Appeal in the Vedanta case indicate that the English courts may be reluctant to become a long-term forum for this type of dispute and consider that it would be preferable for such cases to be tried locally.⁹

6.4 This Fact Sheet sets out the current position on mass tort claims and parent company liability in England and Wales. However, this is a developing area of law and it is crucial that an HRD seeks legal advice in the relevant jurisdiction should they wish to consider such an action.

⁹ “There must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally”. Lungowe and Ors v Vedanta Resource Plc and Konkola Copper Mines Plc [2017] EWCA Civ 1528 at [133]; http://www.bailii.org/ew/cases/EWCA/Civ/2017/1528.html