

Business and human rights – access to remedy

United Kingdom – Country report 2019

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1. Introduction

The fieldwork conducted in the UK consisted of four individual interviews. All the interviews were recorded, and both transcripts and summaries have been made.

The first interview was with a senior lawyer who acts for claimants bringing cases in the UK on the basis of abuses of human rights by business enterprises in their activities. This was a face-to-face interview at their offices in London. They were very willing to discuss some of the cases in which they were involved, many of which were landmark cases in the business and human rights field.

The second interview was with an experienced lawyer who works for one of the major global NGOs with expertise in this area. This was a phone interview. They discussed their work in gathering information on the ground in host states about human rights abuses by business activities. This information was used as a means of public pressure to change business activities and was then often used by the lawyers for claimants in their legal claims.

The third interview was with the director of one of the leading specialist NGOs in the business and human rights field. This was a face-to-face interview at London offices. They discussed their work as an advocacy and coordinating organisation, and their role in cases, including as interveners in key cases, and why they had intervened to put the international contexts for these cases.

The fourth interview was with a legal counsel, who had been legal counsel for a number of large transnational companies. This was a phone interview. They discussed the issues which they had faced in their role and the issues they encountered in relation to remedies for victims arising from the business activities. They discussed how they considered the law could be changed in this area.

(...)

2. General assessment of remedies in business related human rights abuses

The judicial remedies provided in the UK by civil law, especially through tort claims, are available and have been used in regard to abuses of human rights by

business enterprises in the UK and overseas.¹ The relatively large number of cases in this area brought in the UK is significant in this regard. The interviewees were generally positive about the judicial mechanisms available for access to remedy in the UK and the UK courts' engagement in this area. Interviewee 1 stated:

"[W]hen we talk about judicial mechanisms, I would say our experience with the last 25 years has been a positive one in terms of the ability of claimants to get a fair hearing and justice in the English courts."

These tort cases are often brought against a parent company for harms, which took place through the activities of its subsidiary, and raise questions of parent company liability and duty of care. The UK Courts have been willing to assume jurisdiction over cases where harms have occurred outside the parent company's home state by subsidiaries of the defendant parent company. There have been a number of UK cases² which over time had indicated that a parent company may owe a duty of care to an employee of a subsidiary, or a party directly affected by the operations of that subsidiary. This culminated in a decision in 2019 by the UK Supreme Court in *Vedanta Resources PLC v Lungowe*.³ There the Court held that there is a duty of care by a parent company towards those affected by the actions of its subsidiary and that the corporate veil was not relevant for these purposes. Whether the duty of care has been breached in a particular instance is a matter of evidence, including as to the degree of control of the subsidiary by the company, for which the company's public statements (such as under sections 172 and 414C of the UK Companies Act) are relevant, as were its actions and omissions. The Court also held that the matter could be heard in UK courts where the host state did not have appropriate procedures and remedies available.

These cases are important as they enable claimants to hold a company liable for actions of third parties, and allows claimants to seek a remedy in one jurisdiction for actions which took place in another jurisdiction. This trend in the UK jurisprudence could potentially extend beyond the corporate group and into the supply chain. However, in all instances, establishing liability by the parent and in the supply chain context in common law would by no means be straightforward.⁴

In some of these cases, once the jurisdictional hurdles - being whether the UK courts would hear these types of cases due to *forum non conveniens* (i.e. the court is not the correct one for the claim as the claimants and the damage are in another jurisdiction) the existence of a parent company duty of care and application of the corporate veil (i.e. each company is a separate legal entity) - were overcome, there have been settlements between the claimants and the companies. One of these cases, *Bodo Community v Shell*,⁵ was mentioned by three interviewees as an important case, in the fact that the victims received monetary compensation and the company had an obligation to clean up the pollution.

¹ There are different jurisdictions in the United Kingdom. This Report focusses on the largest one, being England, unless otherwise noted.

² See, for example: *Chandler v Cape Plc* [2012] EWCA Civ 525 available at: www.bailii.org/ew/cases/EWCA/Civ/2012/525.html and *Okpabi & Ors v Royal Dutch Shell Plc & Anor* [2018] EWCA Civ 191 available at: www.bailii.org/ew/cases/EWCA/Civ/2018/191.html.

³ UK, *Vedanta Resources PLC v Lungowe* [2019] UKSC 20, available at: www.supremecourt.uk/cases/uksc-2017-0185.html.

⁴ For further analysis of the requirements under UK tort law, see Essex Business and Human Rights Project, University of Essex *Improving Paths to Business Accountability for Human Rights Abuses in the Global Supply Chains: A Legal Guide*, December 2017.

⁵ UK, *Bodo Community v Shell Petroleum Development Company of Nigeria*, Case No HQ11X01280, available at: www.bailii.org/ew/cases/EWHC/TCC/2014/1973.html

There has been an expansion in recent years in the UK of statutory bases for matters that are directly or indirectly human rights abuses. The Bribery Act 2010⁶ and the Modern Slavery Act 2015⁷ are two examples that are broadly relevant to abuses of human rights by business enterprises. However, there have been few prosecutions under the Bribery Act to date, which the UK House of Lords, which undertook an extensive review of the Bribery's Act operation in 2019, considered was due to the lack of awareness of and training on the Bribery Act, and lack of sufficient cooperation and coordination between the various governmental authorities.⁸ This inquiry considered that the "failure to prevent" offence in the Bribery Act was a good initiative and should be extended to other economic crimes, and that the defence of due diligence should be allowed where procedures were "reasonable in all the circumstances".⁹ It is also relevant that the remedy provided for under the Bribery Act is a fine against the company or imprisonment of an individual, so a victim of bribery by a company does not have any automatic remedy, unless the prosecution expressly agrees to include this.¹⁰ .

The Modern Slavery Act consolidates and clarifies the existing offences of slavery, servitude and forced or compulsory labour, and human trafficking (the principal offences). It requires all companies which carry on business, or part of a business, in the UK, and supply goods or services and have annual turnover of £36 million or more (globally) to prepare a slavery and human trafficking statement,¹¹ which must be approved by the company's board and signed by a director.¹² The statement must describe the steps they have taken to prevent slavery and human trafficking in their businesses and supply chains during the relevant financial year.¹³ This statement is voluntary and there is no mandatory monitoring of them. While a failure by a business to prepare a slavery and human trafficking statement can lead to a fine, it can only occur if the government brings a successful action to the courts,¹⁴ which has not yet occurred.

Other judicial mechanisms are found with the UK employment tribunal mechanism, which is available for abuses of labour rights by business enterprises. Employment tribunals only have jurisdiction in respect of those claims prescribed

⁶ UK, HM Government (2010), *Bribery Act 2010*, 8 April 2010, available at: www.legislation.gov.uk/ukpga/2010/23/contents

⁷ UK, HM Government (2015), *Modern Slavery Act 2015*, 26 March 2015, available at: www.legislation.gov.uk/ukpga/2015/30/introduction

⁸ UK House of Lords, *The Bribery Act 2010: Post-Legislative Scrutiny*, 14 March 2019, Conclusions, available at <https://publications.parliament.uk/pa/ld201719/ldselect/ldbriact/303/30302.htm>.

⁹ *Ibid*, paras 227-232.

¹⁰ See, S. Hickey, "Providing Reparations to the Victims of Foreign Bribery: What Criteria Are Appropriate?" <https://globalanticorruptionblog.com/2019/05/13/providing-reparations-to-the-victims-of-foreign-bribery-what-criteria-are-appropriate/>

¹¹ UK, HM Government (2015), *Modern Slavery Act 2015*, 26 March 2015, Section 54(2), available at: www.legislation.gov.uk/ukpga/2015/30/introduction.

¹² UK, HM Government (2015), *Modern Slavery Act 2015*, 26 March 2015, Section 54(6), available at: www.legislation.gov.uk/ukpga/2015/30/introduction.

¹³ UK, HM Government (2015), *Modern Slavery Act 2015*, 26 March 2015, Section 54, available at: www.legislation.gov.uk/ukpga/2015/30/introduction. More generally, see *Transparency in Supply Chains etc. A practical guide*, first published on 29 October 2015 and updated on 22 October 2018; available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf.

¹⁴ UK, HM Government (2015), *Modern Slavery Act 2015*, 26 March 2015, Section 54(11), available at: www.legislation.gov.uk/ukpga/2015/30/introduction. The Modern Slavery Act empowers the Secretary of State to bring civil proceedings in the High Court for an injunction for specific performance under section 45, Court of Session Act.

by legislation,¹⁵ with the primary relevant types of claims for which a remedy can be sought being: unfair dismissal, if the person has been an employee for a designated period; payment claims, e.g. for unpaid wages, salary and redundancy payments; breach of contract; claims concerning working conditions, such as to make reasonable adjustments to help disabled employees and job applicants in the work place; and protection from discrimination. The employment tribunals do provide a remedy direct to the victim of a human rights abuse involving employment by a business enterprise. This can be in the form of compensation, reinstatement, an apology and/or other forms of reparation. Appeals are possible from the employment tribunals to the Employment Appeals Tribunal and then on judicial review in the general court system.

In relation to State-based non-judicial mechanisms, the most pertinent is the UK National Contact Point (NCP), which implements the OECD Guidelines on Multinational Enterprises. The NCP can undertake an investigation into human rights abuses by a business enterprise in the UK or overseas, and offer recommendations for action to redress these abuses, especially for those claims for which a judicial remedy is very difficult to attain.¹⁶ Nevertheless, it does not provide any enforceable remedy at all against the business enterprise or any remedy directly to the victim. It is also not the appropriate mechanism for dealing with those human rights abuses where the business enterprise is unwilling to engage in the issues with the claimants. While the UK NCP has been seen externally as better than some others, it has been deeply criticised by civil society¹⁷ and by a UK Parliament Joint Committee on Human Rights, which concluded:

*"The UK National Contact Point for the OECD Guidelines has the potential to provide meaningful non-judicial access to justice, alongside the more traditional routes of civil and criminal law. The findings of the NCP also have the potential to feed into judicial cases. In its current form, however, the NCP is largely invisible, and lacks the resources and essential human rights expertise necessary to undertake such a role."*¹⁸

Those interviewees who discussed the UK NCP were also critical of it. For example, Interviewee 3 stated their concern about the lack of independence of the UK NCP

"I think the positioning of the NCP within a government department that is responsible for trade promotion must make it quite a challenging task for the people that work there quite frankly."

That interviewee also noted that there is a difference between what the UK NCP felt was a "successful outcome" – which was a mediated outcome – and

¹⁵See, Employment Tribunals Act 1996, as amended by subsequent legislation. The full list of claims is set out here: www.gov.uk/employment-tribunals.

¹⁶ *Bringing a complaint under the OECD Guidelines for Multinational Enterprises*, 11 June 2008, updated on 14 January 2011, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/31723/11-650-bringing-a-complaint-form-oecd-guidelines.pdf, at p. 2. Complainants may also act on behalf of other interested parties.

¹⁷ See Amnesty International, *Obstacle Course* (2018), available at: www.amnesty.org.uk/files/uk_ncp_complaints_handling_full_report_lores_0.pdf?eHZjEXH9mk6pJMnaNhd33kDJ1A6K6xMo=.

¹⁸ UK Parliamentary Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, April 2017, paras 201-221, available at www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/human-rights-business-report-published-16-17.

what the claimants might want. The UK NCP, in their view thought that having mediation where there was an agreement that the company would introduce human rights due diligence was “successful”, while the claimants wanted an outcome which stated that the company breached the Guidelines and that there was a remedy awarded to the claimants. Interviewee 1 indicated concern about the lack of transparency of the UK NCP process. This is consistent with the criticisms of the UK NCP set out above.

Other non-judicial mechanisms available in the UK include the Gangmasters and Labour Abuse Authority,¹⁹ government Ombudsmen, the Equality and Human Rights Commission and the Groceries Code Adjudicator.²⁰ Despite their breadth of activities, and an ability to provide some guidance to business enterprises, none of them are focussed on providing access to remedy for victims of human rights abuses by business enterprises, and few consider abuses occurring across borders.

3. Major obstacles for victims of related human rights abuses

Obstacles

The main obstacles to access to a remedy by victims of human rights abuse by business enterprises in the UK in judicial proceedings are in relation to procedure: obtaining evidence about the business; gathering evidence for the claim; the nature of the claim; and bringing claims by a group of victims. There are also obstacles in relation to legal costs.

The task of gathering information for the claimants can be considerable, especially in cases where the claimants are in a host state and the forum state is the UK. This requires identification of possible victims, which usually requires considerable locational, language and logistical efforts. It also requires statements and lawyer/client agreements to be drafted, which may be more difficult if the case is based on an abuse of human rights which took place outside the UK. Interviewee 1 stated it this way in relation to a claim where the claimants were in a remote part of northern Peru:

"There was obviously evidence that we [claimants' lawyers'] needed from claimants and witnesses about what had happened at the incident so that was a very resource-intensive detailed process which entailed lawyers from the firm travelling to Peru to interview claimants, to develop a picture. You can imagine this is quite a big site. The incidents occurred over a period of a couple of days. So you need to develop a picture of what was going on, chronologically and who was placed where

¹⁹ The Gangmasters and Labour Abuse Authority is a government authority, which operates under legislation a licensing scheme for labour providers in order to regulate, inspect and prosecute offences of exploitation of workers in, for example, the agriculture, horticulture, dairy farming, livestock, shellfish gathering and associated food processing and packaging sectors; see <https://www.gla.gov.uk/>.

²⁰ The Groceries Code Adjudicator is an independent arbitrator within a government department, whose role (provided by legislation) is to take action with regard to obligations of large retailers owed to groceries suppliers across a range of supply chain practices, including: making payments on time; no variations to supply agreements without notice; compensation payments for forecasting errors; no charges for shrinkage or wastage; restrictions on listing fees marketing costs and delisting; see <https://www.gov.uk/government/organisations/groceries-code-adjudicator>.

and moving to what position and to identify the flash points of exactly what had given rise to that. So that was one area. Then we needed to know about the injuries that the claimants had sustained and in what circumstances, the way in which they had been captured, what abuses they had been subjected to, if they have been detained, in what circumstances and the impact on them."

There can also be the complexities of language, as Interviewee 1 explained:

"Most of the people [claimants] did speak Spanish. But some of them didn't and so for those we had to use a local interpreter who would speak Spanish and some of our staff speak Spanish. That's certainly a challenge in these cases and makes them much more expensive and complicated. Because you have to go through the whole process of interpreters translating sometimes quite detailed information and checking that people have understood things correctly again by getting things translated back into their own language which in itself can cause another problem with the translation, if it isn't accurate. But yes that's certainly a complicated factor."

The need to have interpreters, as stated by Interviewee 1, is clearly an added cost and complexity for claimants seeking to bring a claim in the UK.

In addition, in relation to evidentiary matters, the corporate structure of business enterprises, especially transnational ones, is so varied that identifying the correct defendant can sometimes be very difficult and complex.²¹ Once the correct defendant is identified, it is necessary to prove the claim through use of relevant evidence. This evidence is very often contained in documents – such as letters, reports and emails – that are in the sole possession of the company, whether in the UK or overseas. As Lord Bingham noted in *Lubbe v. Cape*:

"Resolution of this issue [of a duty of care] will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence."²²

This was confirmed by the interviewees. Interviewee 1 stated:

"[T]hat is often a difficulty with cases where you need to understand what was going on internally with the company. You often have to get documents, proper disclosure of documents or witnesses and the only witnesses who really were able to shed light on that part were employees and employees are usually going to be afraid of losing their jobs. In

²¹ See Taylor, M., Thompson, R., and Ramasastry, A. (2010), *Overcoming Obstacles to Justice*, Oslo, Fafo; and Queinnec, Y. and Bourdon, W. (2010) *Regulating Transnational Companies*, Forum for a new World Governance – FNWG, available at: http://www2.world-governance.org/IMG/pdf_Regulating_Transnational_Companies_web-3.pdf.

²² UK, *Lubbe v Cape*, [2000] 1 WLR 1545 (HL), available at: www.bailii.org/uk/cases/UKHL/2000/41.html.

some instances they – witnesses - may be afraid for their safety. Their personal safety.”

This concern about loss of their jobs by potential witnesses who are employees of a company is understandable. It would appear that this is generally not due to any direct pressure by a company but is a more general fear of loss of their job if their giving evidence to the claimants’ lawyer is discovered. Interviewee 2, from an NGO, stated:

“We pressed the company for years to get it to release more information about its investigations and that is through a lot of campaigning, public shaming, putting pressure, meeting, so it is out of duress that eventually the company did release some out of public pressure and, you know, public shaming that it released some additional information.”

This shows the considerable efforts in time, cost and resources which can be spent by NGOs trying to persuade a company to release documents about the company’s internal investigations about an incident, in order to hold them publicly accountable. This lack of access to company documents is a reason why the process of disclosure of relevant documents in the control of the business can be a very important step for claimants in establishing which company had the requisite control of the particular company that abused human rights. UK court procedural rules provide for general and specific disclosure of relevant documents by parties to litigation.²³ However, as the court has discretion in ordering disclosure, there are two potential risks: that the claimant will not ask for relevant documents as they are unaware that they exist; and that the court may exercise its discretion not to order disclosure. As the courts have noted, without disclosure of documents there is a “very great risk that the claimants will be contesting jurisdiction at an unfair disadvantage”.²⁴

There does, though, still remain the issue of parent company liability for the human rights violations by its subsidiaries and suppliers. While, as set out above, the Supreme Court in *Vedanta*²⁵ did decide that there can be a duty of care for parent companies, the extent of this duty and the circumstances when it is breached is still to be clarified. There have been no cases yet in which a court has decided a case entirely on its merits in which issues of parent company liability were argued. This means that, as Interviewee 1 and 2 noted, it is not yet clear what a claimant needs to show where a parent company has breached the duty of care. The UK Supreme Court in *Vedanta* acknowledged this:

“Everything depends on 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..”²⁶

²³ UK, HM Government, *Civil Procedure Rules 1998*, rule 31(12), available at: www.justice.gov.uk/courts/procedure-rules/civil/rules/part31

²⁴ UK, *Vava v Anglo American South Africa Ltd* [2012] EWHC 1969 (QB), para. 69, available at: www.bailii.org/ew/cases/EWHC/QB/2012/1969.html. If the court does not order disclosure, there is a risk that the business enterprise may move its assets out of the jurisdiction: see, for example: UK, *Guerrero v. Monterrico Metals plc* [2009] E.W.H.C. 2475, available at: www.bailii.org/ew/cases/EWHC/QB/2009/2475.html.

²⁵ UK, *Vedanta Resources PLC v Lungowe* [2019] UKSC 20, available at: www.supremecourt.uk/cases/uksc-2017-0185.html.

²⁶ *Ibid* , para 49.

Hence it is not even clear if the test is one of “control”, “intervention”, “supervise”, etc., by a parent company of a subsidiary. The other obstacle mentioned by most of the interviewees was legal representation and legal costs. The general position in the UK is that legal costs are payable by the party that loses the case.²⁷ The UK judicial system does not have a mechanism for a claimant to obtain their legal costs for cases of abuse of human rights by business enterprises, such as through the use of contingency fees, punitive damages, class actions, and fee-shifting, though there is the possibility of a ‘no win no fee’ arrangement, with an uplift of fees for the lawyers, if the claim is successful.²⁸ As Interviewee 2 noted:

"So there is a multiplicity of costs involved in litigation that are not just the court fees, which is what one tends to think. And sometimes legal aid only covers the costs of the legal advice but it doesn't cover all of these other costs that are involved in bringing a claim and sustain it over time. Legal aid but also additional funding arrangements."

The earliest cases against business enterprises for abuses of human rights were funded by legal aid – a government funding scheme where those claimants with a good arguable case but insufficient funds – which paid the legal fees at a fixed rate. However, this changed significantly with the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)²⁹, effective as from April 2013. Legal fees for a successful claimant are now paid out of the claimant’s compensation and cannot exceed a specific percentage (25%) of the compensation.³⁰ This is an obstacle as it means that successful claimants and their lawyers incur expenses that cannot be paid by the defendant even if the claimants win the case. Yet these cases can be very costly to bring, due to the need to gather evidence from diverse claimants and about the business enterprise (which is not assisted by limited disclosure processes referred to above), especially if it concerns cross border abuses.³¹ Further, previously some claimants had taken out litigation insurance to protect themselves from being bankrupted if they lose the case but, under LASPO, any after the event insurance premiums will no longer be recoverable.³²

Indeed, the concerns over the effect of changes brought about by LASPO prompted John Ruggie, the main author of the UNGPs, to write to the UK Justice Minister raising his concerns about the “disincentives” being introduced, on the basis that:

"[LASPO may have a potential negative impact] on the position of legitimate claimants in civil actions, particularly in cases involving large multinational enterprises ... [and the reforms constitute an] effective barrier to legitimate business-related human rights claims

²⁷ UK, HM Government, *Civil Procedure Rules 1998*, Practice Direction to Part 44, sec. 9.1, available at: www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs/part-44-general-rules-about-costs2.

²⁸ UK, HM Government, *Courts and Legal Services Act 1990*, 1 November 1990, Sections. 58 and 58A, available at: www.legislation.gov.uk/ukpga/1990/41/contents.

²⁹ UK, HM Government (2012), *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, 1 May 2012, available at: www.legislation.gov.uk/ukpga/2012/10/contents.

³⁰ UK, HM Government (2012), *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, 1 May 2012, Section 44, available at: www.legislation.gov.uk/ukpga/2012/10/contents.

³¹ There are also costs in intervening in a case, see: UK, HM Government, *Criminal Justice and Courts Act 2015*, 12 February 2015, s.87, available at: www.legislation.gov.uk/ukpga/2015/2/introduction.

³² UK, HM Government (2012), *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*, 1 May 2012, Section 46, available at: www.legislation.gov.uk/ukpga/2012/10/contents.

*being brought before UK courts in situations where alternative sources of remedy are unavailable.*³³

In addition, due to the Rome II Regulation, for cases involving abuses of human rights overseas, damages will be assessed in accordance with the law and procedure of the State where the harm occurred,³⁴ which may mean that compensation is considerably lower than in the UK.

Interviewee 3 made a broader point about the imbalance of power between the claimants and a transnational company, including in the (in)ability to pursue a claim through the court systems:

"I mean ultimately actually, the major issue is the power imbalance between very poor communities and a giant multinational. You know even though these claims are possible here, there is a very significant imbalance of power. And you know the company can stretch it out using the legal avenues that are available to it and during that whole period the community just has to carry on."

Interviewee 1 summarised the position of the imbalance in legal costs and legal representation between claimants and companies as follows:

"[T]hen one comes to the whole question of legal representation and funding. Because any case like this is going to be strenuously defended, you have a company with all its legal and technical resources, they will employ the best lawyers and large numbers of them and in order to stand any chance of success you need some kind of equality of arms. How is that going to arise? The claimants in cases like this can't afford to pay for legal representation; legal aid is no longer available in practice for these cases."

The concern over legal representation is that so few lawyers take these cases in the UK due to the lack of being able to recover the substantial costs involved in investigating them and pre-trial costs. This is a cause for concern in terms of access to the UK legal system. In addition, it is apparent that, even when there are criminal claims, state prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes.³⁵

In relation to the NCP, the obstacles to access a remedy include the fact that there is no appeal against the initial assessment of the NCP not to proceed with a claim (except on narrow procedural grounds) and that assessment and subsequent investigation could be (though rarely have been to date) limited by the lack of powers by the NCP to compel the production of documents by business enterprises, and a high standard of proof on the complainants.³⁶ The fact that NCP decisions are not binding is a significant obstacle to a remedy, as business may

³³ Letter from the UN Special Representative of the Secretary General for Business and Human Rights, dated 16th May 2011: <http://www.guardian.co.uk/law/2011/jun/16/united-nations-legal-aid-cuts-trafigura>.

³⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L199, Articles 4 and 15.

³⁵ See Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Rights to a Remedy* (2014), available at: <https://www.amnesty.org/en/documents/POL30/001/2014/en/>.

³⁶ OECD Watch, *Remedy Remains Rare* (2015), available at: http://oecdwatch.org/publications-en/Publication_4201_ p.22-32.

choose to ignore the NCP's recommendations. Indeed, in a survey of all NCPs, a report in June 2015 concluded:

*"[O]ver the past 15 years [of the NCPs] only one per cent of the 250 NCP complaints filed by communities, individuals and NGOs have resulted in an outcome that directly improved the conditions for the victims of corporate misconduct... The rate of remedy-related outcomes has decreased since [2012]."*³⁷

The report only noted two instances where the UK NCP's actions had provided a remedy of any type: one concerning Formula One car racing, where Formula One agreed to respect human rights in all its operations and to develop a human rights due diligence policy; and one where its recommendations on that there had been insufficient consultations with indigenous people about a mine led to shareholder divestment that forced changes of policy by the business enterprise.³⁸

Proposals

In terms of proposals for ways to overcome these obstacles, access to a remedy, as expressed in the UN Guiding Principles (UNGPs), includes a range of matters, from compensation to the victims to fines on the business enterprise. The general aim of these remedies is stated to be "to counteract or make good any human rights harms that may have occurred".³⁹ However, this statement does not include the broader international human rights obligations on a State, which are to provide access to an effective remedy to the victim of a human rights abuse. A fine on a business enterprise does not necessarily mean that it will cease the abuse of human rights and it does not provide the victims of the abuse with an effective remedy. To provide a sanction against a business enterprise that does not also include some reparation for the victim or a clear non-repetition guarantee by the business enterprise does not comply with the international legal obligations on a State.

Indeed, Interviewee 2 noted:

"You know often people take these cases when they would actually really like the company to end its operations in the location concerned and this is a final avenue for them in a sense. Or they may, in some instances, be looking for an apology. It may be necessary to provide people with healthcare if they have been seriously physically or psychologically injured. It may be necessary to provide alternative employment etc. So there can be a range of interventions, if you like, that could come about as the outcome of these claims. And I think over time the discussion about that has developed and there have been developments in the type of remedy that is made available, so the clean-up example [of Bodo] is one"

It would improve access to a remedy in the judicial mechanisms if the processes and procedures for those bringing claims alleging human rights abuses by business

³⁷ OECD Watch, *Remedy Remains Rare* (2015), available at: http://oecdwatch.org/publications-en/Publication_4201, p.19 (their emphasis).

³⁸ OECD Watch, *Remedy Remains Rare* (2015), available at: http://oecdwatch.org/publications-en/Publication_4201, p. 17 and 32.

³⁹ United Nations (UN), Guiding Principles on Business and Human Rights, June 2011, available at: www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Commentary to Guiding Principle 25.

enterprises were made less complex and there were fewer obstacles. Interviewee 1 provided a range of proposals:

"The rule that requires costs to be less than or equal to damages [should be changed]. I think the requirement to assess damages according to local levels is undesirable first because it reduces the deterrent effect on a company and secondly because if its circumstances way heavily on the proportionality rule it makes it more difficult to comply with the proportionality rule. I think I would suggest that access to documents should be increased for claimants. The defendants should in certain circumstances be required to pay success fees. What I'm talking about is reverting to the old system. Reversal of the burden of proof would be an important progression. These are all things that I cannot really see happening. There are other things, which if you are interested in making companies properly accountable, in access to justice and deterring human rights abuse, these are all things you would introduce... [and] mandatory human rights due diligence... would be a very positive thing."

This range of proposals suggested includes changes to the LASPO legislation (considered above) on recovery of legal costs, allowance of success fees for a claimants' lawyers, reversal of the burden of proof and creating mandatory human rights due diligence. One specific proposal suggested is to enhance the powers of courts to order disclosure of all relevant documents of business enterprises. This was supported by Interviewee 4, who was from business, who stated:

"I think maybe you could do something around disclosure that didn't necessarily make overall reversal of the burden of proof. That just gives clear access to all of the information.... I think if businesses were required to be more open on their considerations, on their decision making about a particular situation and what they did in that situation – I think it would make them think more carefully in the first place about what they do. But I also think it would give potential access to information for those that have been aggrieved."

In terms of legislative change, the UK Parliamentary Joint Committee on Human Rights concluded, after lengthy consultations:

"We recommend that the Government should bring forward legislation to impose a duty on all companies to prevent human rights abuses, as well as an offence of failure to prevent human rights abuses for all companies, including parent companies, along the lines of the relevant provisions of the Bribery Act 2010. This would require all companies to put in place effective human rights due diligence processes (as recommended by the UN Guiding Principles), both for their subsidiaries and across their whole supply chain. The legislation should enable remedies against the parent company and other companies when abuses do occur, so civil remedies (as well as criminal remedies) must be provided. It should include a defence for companies where they had conducted effective human rights due diligence, and the burden of proof should fall on companies to demonstrate that this has been done."⁴⁰

⁴⁰ UK, Parliamentary Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, April 2017, paras 24 and 193, available at: www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/human-rights-business-report-published-16-17

This proposed change would be to create a duty on all companies to prevent human rights abuses (as in the Bribery Act (considered below) would be part of a mandatory human rights due diligence process through the supply chain with both civil and criminal sanctions. Interviewee 3, from an NGO, also supported the creation of a mandatory human rights due diligence law along the whole supply chain, with full reporting, and civil and criminal sanctions. as well as clarification of the parent company's duty of care:

In relation to criminal sanctions mentioned in this Interviewee's statement, the UK Parliamentary Joint Committee on Human Rights also recommended changes to criminal protections:

"We have heard that criminal prosecuting authorities sometimes lack the skills and resources to investigate human rights abuses by companies, and that, where there has been some action, such as under the GLA [Gangmasters and Labour Abuse Authority], the penalties are too low to be an effective deterrent. The Committee recommends that the prosecuting authorities be better trained and resourced in investigating breaches of human rights which are criminalised, including for cross-border crimes. Sentencing guidelines for these crimes should be created, to ensure that the penalties are high enough to provide an effective deterrent."⁴¹

In relation to the UK NCP, it is not generally seen as being an appropriate mechanism for dealing with many human rights abuses. The UK Parliamentary Joint Committee on Human Rights recommended the following actions to improve it: create an independent steering board, with power to review decisions; to ensure it had greater expertise; give it extra resources, and publicise its decisions better.⁴² It also linked it with public procurement and other public benefits:

In order for the Government to support, and not undermine, decisions of the NCP, we recommend that the Government gives clear guidance to procurement officers that large public sector contracts, export credit, and other financial benefits should not be awarded to companies who have received negative final statements from the NCP and who have not made effective and timely efforts to address any issues raised."⁴³

The need for independence of the NCP from a government department and a proposal for it to be comprised of an independent panel of experts was suggested by Interviewer 3.

Other proposals for the burden of proof, collective redress and cross-border claims are considered in the relevant section below.

⁴¹ UK, Parliamentary Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, April 2017, paras 26 and 199, available at: www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/human-rights-business-report-published-16-17.

⁴² UK Parliamentary Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, April 2017, paras 28-32, available at: www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/human-rights-business-report-published-16-17.

⁴³ UK, Parliamentary Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, April 2017, paras 29, available at: www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/human-rights-business-report-published-16-17.

4. Good practices

The decision of the UK Supreme Court in *Vedanta* (discussed above) that parent companies have a duty of care towards those affected by actions of their subsidiaries that breach human rights has generally been greeted with widespread approval by civil society and lawyers for companies.⁴⁴ This is a significant step towards assisting victims to have access to a remedy and reduce the length of proceedings. This was confirmed by Interviewee 2:

"If parent companies were made responsible by law, then cases would start to flourish. I do believe that there would be a lot more cases, lawyers would be a lot bolder and less hesitant about taking these cases forward. You would not litigate on parent company - that would be taken for granted that the company had a level, or you know, an amount of responsibility so that wouldn't be an issue - you could go straight into the merits. And I think that would just unlock access to remedy tremendously."

Interviewee 1, a lawyer who acts for claimants in these cases, was less certain there being good practices in these types of tort litigation, though they were aware of at least one time when the parties to the case did overcome differences to assist the claimants

"I can't think of any examples of good practice in relation to access to justice for victims. I think all our cases, virtually without exception, have been contested and hard fought. But I can think of examples of processes that worked well within a case due to the cooperation of the company, for instance the silicosis litigation against AngloAmerican. The company agreed at quite an early stage to provide medical monitoring for our clients. They were people who had contracted silicosis but where they were also at risk of contracting TB. TB is a disease which is endemic in SA and people who have silicosis, whose lungs are compromised, are particularly at risk of contracting TB. So, it's important that people who contract TB are identified quickly, because if they are identified quickly, they can be treated effectively, otherwise the combination of the two diseases can be fatal. So, at a fairly early stage in that case, AngloAmerican agreed to, and did provide periodic monitoring of quite a high standard, of a very high standard to each of the claimants. So that was certainly a beneficial and welcome process."

This good practice was one where the defendant company recognised that some of the claimants were likely to die during the litigation process and agreed to allow medical monitoring of the claimants, rather than allow their individual claim to fail due to their death. Interestingly, this positive stance taken by the company in that instance was endorsed by Interviewee 4, a general counsel of a multinational company:

⁴⁴ See, for example, the symposium by Opinio Juris - <http://opiniojuris.org/2019/04/17/symposium-on-vedanta-resources-plc-vs-lungowe-judgment-of-the-united-kingdom-supreme-court> - and the comments by Hogan Lovells LLP: www.hlregulation.com/2019/04/11/vedanta-uk-supreme-court-takes-the-straitjacket-off-claims-against-parent-companies-in-the-english-courts/.

"I feel that businesses have a big responsibility to actually grow up and take a grip of these issues and be less legalistic when they are assessing their next steps."

This quotation is important as it shows that a general counsel of a multinational company is in favour of companies being more open to negotiation and that they should be less willing to resolve the matter through the courts. In terms of practices in the UK from which good practices could be drawn, the drafting of the Bribery Act, both its "failure to prevent" obligation imposed on companies and its defence of due diligence are relevant. The failure to prevent bribery as an offence under the Bribery Act⁴⁵ - as is the failure to prevent the facilitation of tax evasion under the Criminal Finances Act 2017⁴⁶ - could provide a model for extending a company's potential liability to the acts of entities constituting "associated persons", where the company fails to prevent relevant improper conduct by such persons. Depending on the circumstances, "associated persons" could include subsidiaries and suppliers, so long as they are providing services "for or on behalf of" the company.⁴⁷ In this regard, the Guidance for the Bribery Act notes that "where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an 'associated' person".⁴⁸ Indeed, following an extensive consultation process, a UK House of Lords Select Committee concluded in a March 2019 report that:

*"[T]he new offence of corporate failure to prevent bribery is regarded as particularly effective, enabling those in a position to influence a company's manner of conducting business to ensure that it is ethical, and to take steps to remedy matters where it is not."*⁴⁹

The use of a defence of having used reasonable due diligence is found in the Bribery Act⁵⁰ and other UK legislation.⁵¹ These "due diligence" defences arise where the original offence is a strict (or no fault) liability offence and are meant to ensure that defendants are afforded due process where they may otherwise have little knowledge of the events which gave rise to the offence. Although the relevant statutory defences in the Bribery Act uses the language of "adequate procedures" rather than the term "due diligence", the official legislative guidance published by the Government on the Act expressly uses the term "due diligence" in various contexts (including when conducting risk assessments and engaging

⁴⁵ UK, HM Government (2010), *Bribery Act 2010*, 8 April 2010, Section 7(1), available at: www.legislation.gov.uk/ukpga/2010/23/contents.

⁴⁶ UK, HM Government (2017), *Criminal Finances Act 2017*, 27 April 2017, Sections 45(1) and 46(1), available at: www.legislation.gov.uk/ukpga/2017/22/contents.

⁴⁷ UK, HM Government (2010), *Bribery Act 2010*, 8 April 2010,), available at: www.legislation.gov.uk/ukpga/2010/23/contents and UK, HM Government (2017), *Criminal Finances Act 2017*, 27 April 2017, section 44(4), available at: <https://www.legislation.gov.uk/ukpga/2017/22/contents>.

⁴⁸ UK, HM Government, *The Bribery Act 2010 Guidance*, available at: www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf, page 16.

⁴⁹ UK, House of Lords Select Committee, *The Bribery Act 2010: post-legislative scrutiny*, page 3; available at: <https://publications.parliament.uk/pa/ld201719/ldselect/ldbriact/303/303.pdf>.

⁵⁰ UK, HM Government (2010), *Bribery Act 2010*, 8 April 2010, Section 7(2), available at: www.legislation.gov.uk/ukpga/2010/23/contents.

⁵¹ For example: UK, HM Government, *Consumer Protection Act 1987*, 15 May 1987, section 39, available at: www.legislation.gov.uk/ukpga/1987/43/contents; UK, HM Government, *Food Safety Act 1990*, 29 June 1990, section 21, available at: www.legislation.gov.uk/ukpga/1990/16/contents; and UK, HM Government (2017), *Criminal Finances Act 2017*, 27 April 2017, sections 45(2) and 46 (3), available at: www.legislation.gov.uk/ukpga/2017/22/contents.

business partners), for example, “due diligence is firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework”.⁵²

5. Burden of proof

In general, in the UK in civil tort cases the burden is on the claimant to show that the defendant’s conduct breached the requisite standard of care.⁵³ Therefore, even if a duty of care is found – as in the *Vedanta* decision - it is for the claimant to show that the duty was breached and that there was damage to the claimants as a result. In rare instances, specific legislation can shift this burden. For example, under the UK Bribery Act where bribery is found, then the burden shifts to the company to show (on the balance of probabilities) that, notwithstanding the occurrence of the bribery, the company nonetheless operated objectively sufficient risk mitigation measures.

In the relevant tort cases brought before the UK courts, the burden of proof remains on the claimants, even where there is limited disclosure of documents by the company (as discussed above). Interviewee 2 considered that these types of tort cases should reverse the burden of proof (i.e. requiring the company to show that it did not breach its duty of care) by reflecting on other situations of inequality where it could be reversed:

“I think there are some examples of reversal of the burden of proof in cases where the parties are incredibly unequal and where the information that is needed to resolve a claim or to rebut a claim is predominantly in the hands of the defendants. So for instance in discrimination cases, against employers or equality and discrimination against women for instance, in labour laws, this exists. And the rationale for this is the inequality of the parties and who holds the information. So I think in our cases of communities or individuals impacted by corporate activities I think there is an equal argument to be made, that parties are incredibly unequal and in particular in their ability to access the relevant information. So I think in these types of cases it would be fair to reverse the burden of proof.”

Interviewee 3 agreed with this approach, whereby the company had to show that it had assessed the risk and had a plan in place to manage the risk and communicated this to the corporate group. Interviewee I agreed that the burden of proof should be reversed mainly because the vast amount of relevant documents are in the hands of the company:

“I think the question of burden of proof arises around the issue of access to documents and information.... So one suggestion, which I am very much in favour of, is that, where documents are not forthcoming, or adequate disclosure is not possible, that the burden of proof should be

⁵² UK, HM Government, *The Bribery Act 2010 Guidance*, available at: www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf, page 27; see also UK, HM Revenue and Customs, *Tackling tax evasion: Government guidance for the corporate offences of failure to prevent the criminal facilitation of tax evasion*, 1 September 2017: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672231/Tackling-tax-evasion-corporate-offences.pdf.

⁵³ UK, *Blyth v The Company of Proprietors of The Birmingham Waterworks*, [1856] EWHC Exch J65, available at: www.bailii.org/ew/cases/EWHC/Exch/1856/J65.html.

shifted. Then the onus of proof should be shifted to the defendant, to demonstrate for instance in a parent company case that it wasn't in control of the relevant functions. That would then put the obligation on the company, if it wants to show that it wasn't in control, to produce the documents which confirm that that's the case. That I would suggest would be a fair and just solution to this problem."

Interviewee 4, although from a company, accepted that there should be some obligation of disclosure on the company, even if they would not wish to have a reversed burden of proof, as was discussed above. Therefore, there are both some existing practices of reversing the burden of proof in UK law and a degree of consensus that an obligation on a company to disclose documents are the ways forward in this area.

6. Collective redress

The UK does have only very limited provision for collective redress claims for abuses by business enterprises, and these are restricted to the procedures that exist under the Consumer Rights Act 2015 for consumer activity that does not amount to human rights abuses. The current UK approach is of representative actions⁵⁴ and the Group Litigation Order,⁵⁵ each of which require each individual claimant to complete a claim, and require all claimants agreement on a lead claimant. This process is very costly and time-consuming, as Interviewee 1 stated:

"Collective redress is crucial because it simply is not viable to run cases of this type individually. It's not financially viable to do it. This is the whole rationale for group actions or class actions is to enable a group of claimants whose claims raise common issues to join together in a case and to have those common issues determined in a more cost effective and speedy manner with the question of what happened in individual cases to be left over until those common issues are resolved. In some countries there are a form of class action - opt-out class actions - which are even more conducive to access to justice. We don't have those opt-out class actions here [in the UK], save in consumer and competition cases. That's only a relatively recent position with the changes in law but it doesn't apply to these multinational cases. The several litigations, like the class action in SA [South Africa] which involved 32 companies and potentially thousands of thousands or tens of thousands of victims, would have been impossible to run here. Not something of that scale."

As Interviewee 1 notes in this very helpful and clear summary above, a collective action - where all claimants are included automatically unless they decide to opt-out - is cheaper for the claimants, as each claimant does not need to file a claim, and it is more efficient where there are a large number of claimants. Such collective redress actions can have benefits for companies, as then the companies are not subjected to a series of cases on similar facts brought by different members of a community. Interviewee 4, from a company, acknowledged this:

⁵⁴ UK, HM Government, *Civil Procedure Rules 1998*, Part 19.6, available at: www.justice.gov.uk/courts/procedure-rules/civil/rules/part19.

⁵⁵ UK, HM Government, *Civil Procedure Rules 1998*, Part 19III, available at: www.justice.gov.uk/courts/procedure-rules/civil/rules/part19; and UK, HM Courts and Tribunal Services, *Group Litigation Orders Guidance*, July 2015, available at: www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders.

"We had group claims on a legal basis where it makes sense to deal with it together because actually the issues people are complaining about were the same. And I think if you move – if you forcibly move an entire village it would make complete sense for it to be a group claim.

A key proposal is for an "opt-out" collective action, so that all members of a community affected by the company's actions are automatically included in a claim unless they specifically choose not to be included. Overall, this would assist victims as well as business enterprises, and it might assist to make the legal costs of a claim fully recoverable from the other party in all mechanisms, as they are in most commercial claims. If this were the case, both parties could also insure against their costs, which would bring greater equality of arms in terms of access to a remedy.

7. Cross border liability

In all the UK tort cases on business and human rights, with one exception,⁵⁶ the issue has involved a cross-border one, i.e. one where the claimants and the original breach occurred in a different state from the forum state (being the UK). In addition, in all these cases the different state was outside the European Union (EU) and did not raise the issue of third country corporations in the EU.

The UK has civil and commercial jurisdiction over all legal persons domiciled in the EU, due to the effect of the EU Brussels I Regulation (now Brussels 1 Recast).⁵⁷ In terms of business enterprises, "domicile" is defined as the location of its 'statutory seat', 'central administration' or 'principal place of business'.⁵⁸ It is likely that the 'central administration' of a business is "where management decisions are taken and where entrepreneurial decisions take place irrespective of where its economic activities occur".⁵⁹ This was confirmed in the *Vedanta* decision.⁶⁰

The Brussels I Regulation only applies when there is an EU domiciled business enterprise. So it is possible that the common law principle of *forum non conveniens* (i.e. that the court hearing the case was not the appropriate forum for it to be heard as it has no real or substantial connection with the case) could be applied to business enterprises domiciled elsewhere. However, the development in the UK away from *forum non conveniens* has been significant⁶¹ (and should outlast any

⁵⁶ UK, *Chandler v Cape Plc* [2012] EWCA Civ 525, available at: www.bailii.org/ew/cases/EWCA/Civ/2012/525.html. This was a case brought within the UK for a subsidiary's actions in the UK.

⁵⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), OJ 2001 L 12, Article 2(1). Brussels 1 Recast was passed in 2012 – Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L 351 – and updates some areas but makes no substantive changes to the relevant part of Brussels I for our purposes. The relevant Article for Brussels I Recast is Article 4.

⁵⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L 351, Brussels I Recast, Article 63.

⁵⁹ UK, *Vava v Anglo American South Africa Ltd* [2012] EWHC 1969 (QB), para. 43, available at: www.bailii.org/ew/cases/EWHC/QB/2012/1969.html.

⁶⁰ UK, *Vedanta Resources PLC v Lungowe* [2019] UKSC 20, para. 29, available at: www.supremecourt.uk/cases/uksc-2017-0185.html.

⁶¹ UK, *Lubbe v Cape*, [2000] 1 WLR 1545 (HL), p. 1559-60 available at: www.bailii.org/uk/cases/UKHL/2000/41.html.

Brexit). While the UK Supreme Court in *Vedanta* still did consider the access to remedy of the claimants in their home state, the Court ultimately considered that justice would be done in the UK in that instance:

*"Even if the court concludes (as I would have in the present case) that a foreign jurisdiction is the proper place in which the case should be tried, the court may nonetheless permit (or refuse to set aside) service of English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction... If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice."*⁶²

Thus the Court held that the correct jurisdiction in which to bring a claim might be the place where the damage occurred unless there is – as they clearly state above – a “real risk of the denial of substantial justice” for the claimants in that jurisdiction. This approach by the UK courts facilitates a broader access to remedies for victims, wherever the business enterprise is located and wherever the abuse occurred.

The other factor that affects a case concerning an abuse of human rights by a business enterprise overseas is the applicable law, being the law that deals with the harm done by the business. The relevant applicable law in such cases is governed by the EU Rome II Regulation.⁶³ The Rome II Regulation provides a uniform rule for EU domiciled business enterprises that the applicable law of a claim shall be the law of the State where the damage occurred, irrespective of the State where the claim is being brought.⁶⁴ There are limited exceptions to this rule.⁶⁵ The Rome II Regulation also provides that damages will be assessed in accordance with the law and procedure of the State in which the harm occurred.⁶⁶

Hence, the courts in the UK must generally apply the law of the State in which the damage occurred when determining the consequences of a breach of human rights. This requires the claimant’s lawyers to investigate the particular relevant law in another State, which may not always be easy to ascertain. It also has a costs factor, as Interviewee 1 clarified:

"[The negative] effect of the Rome II Regulation, which means that for harm that occurred after January 2009 you are looking at receiving local damages. So that is going to depress the level of damages and the level

⁶² UK, *Vedanta Resources PLC v Lungowe* [2019] UKSC 20, para. 88, available at: www.supremecourt.uk/cases/uksc-2017-0185.html.

⁶³ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L199.

⁶⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L199, Article 4(1).

⁶⁵ The exceptions include: where a claimant and the business share a common ‘habitual residence’ (Article 4(2)); where the event is manifestly more closely connected with another State (Article 4(3)); and or where the application of that law would conflict with mandatory laws or public policy of the State in which the claim is brought (Articles 16 and 26). There is also a special exception for environmental damage, where the law will be that of the State where the damage occurred unless the claimant chooses the law of the State where the event giving rise to the damage occurred (Article 7). See further G. Skinner, R. McCorquodale, O. de Schutter and A. Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013).

⁶⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L199, Articles 4 and 15.

of cost that can be recovered still further. Now there are exceptions that can be made there, and the court has the power, the discretion not to strictly apply that rule in certain circumstances but nevertheless that was an important deterring factor. The other one is non-recoverability of success fees."

More generally, some other UK law in related areas do have transnational factors, such as the Modern Slavery Act and the Bribery Act.

By way of overall comment, Interviewee 2 made clear that any EU legislation must specifically apply transnationally, as otherwise it could be interpreted narrowly to be limited to the actions by a company within the territory of the Member State.

8. Conclusions and ways forward

There are a range of findings from this research, including from the interviews. The first is that the judicial mechanisms in the UK are largely working reasonably well to enable claims to be brought in the UK against companies for their action and those of their subsidiaries and, possibly, suppliers and other business relationships. The decision in *Vedanta* about the parent companies duty of care is seen as important in this respect. However, there still remain significant obstacles to access remedies for victims, in terms of evidence gathering, procedures and costs, which limit the possibility of bringing a claim. Indeed, Interviewee 3 noted that even the cases that do come before the UK courts are only a small part of all the cases of human rights abuse by business around the world:

"[T]here haven't been that many cases. It's only the most egregious, its either the most egregious harms or it's a very large group of people. And for people who are adversely affected by suppliers to UK companies, either directly in the course of their work for those companies or indirectly through just the suppliers activities, there is no route to them into this jurisdiction."

Second, there are some possibilities within existing UK legislation, which would mean that any new EU legislation in this area could fit within existing UK concepts. For example, the Bribery Act uses the terminology of a "failure to prevent" bribery as a strict liability (no fault) offence, which is not dissimilar to a mandatory due diligence requirement, and that Act also enables companies to rely on a defence of having undertaken reasonable due diligence procedures.⁶⁷ Interviewee 4, from a company, offered a way to link this with human rights due diligence:

"They [the EC] could require companies to issue – a statement on their salient human rights issues around their operations – and a requirement... Either an absolute requirement or a requirement on request to produce human rights' impact assessments.... If you do that, then you start getting information in a different way. You start to normalise something that can be very powerful."

This is a powerful statement by a legal counsel of a company that companies should be required to undertake mandatory human rights due diligence, including statements of what they consider to be their salient human rights concerns. They also suggested that operational grievance mechanisms need to be adopted by all companies, and possible links between public procurement, export credit and

⁶⁷ Bribery Act 2010, section 7.

other public financing of companies, where mandatory human rights due diligence should apply to these as well.

Third, there is broad consensus with the interviewees that companies should have an obligation to disclose all their documents that relate to the incident. This may not reverse the burden of proof but it would assist enormously in the clarify of the litigation and ensure that the proceedings may not take as long.

Fourth, there is similar consensus across the interviewees that collective redress provisions should be applied to business and human rights issues.

Fifth, that all interviewees accepted that law on this are must be applied transnationally in a global market which is itself transnational. Interviewee 4 summed this up:

"The single biggest problem..., in my view, is that cross-border will be an aspect in 80% or more of cases and if you don't get hard law that's applied consistently across the globe, you just going to have people forum shopping to avoid it."

Sixth, there is a general view that the EU has legal competence in this area of business and human rights. Interviewee 3 made clear:

"Our understanding is that this [all changes to increase access to remedies] is within the competence of the EU. Partly because it can be argued that if companies are operating to different standards then that undermines the functioning of the internal market."

This was also stated by Interviewee 2, when they considered that there is legislative power of the EU to require mandatory human rights due diligence based on a range of powers, including that of internal markets. They also suggested that an EU Fund for victims of gross large-scale abuses should be created so that these claimants can bring claims.

Finally, there is a consistent view that EU legislation would be a positive way forward. This would help companies, in terms of legal certainty; it would help governments, in terms of how to harmonise their laws; and it would help claimants in terms of clear provisions of means of protection and access to remedy within the EU.