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**SURVEY OF THE PROVISION IN
THE UNITED KINGDOM OF
ACCESS TO REMEDIES FOR
VICTIMS OF HUMAN RIGHTS HARMS
INVOLVING BUSINESS ENTERPRISES**

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**Survey of the Provision in the UK of Access to Remedies for
Victims of Human Rights Harms involving Business Enterprises**

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Survey of the Provision in the UK of Access to Remedies for Victims of Human Rights Harms involving Business Enterprises

Executive Summary

The objective of this report is to provide an analysis of the current State-based judicial and non-judicial mechanisms available in the United Kingdom to enable access to a remedy for victims of human rights abuses by business enterprises, whether the abuses occur in the UK or overseas. In identifying the remedies available, and the legislative and institutional framework enabling them, consideration is given to the barriers to accessing remedies. The overall aim of the report is to inform the review process of the UK's National Action Plan on Business and Human Rights.

The UK was the first State to produce a National Action Plan on Business and Human Rights to implement the United Nations Guiding Principles on Business and Human Rights. It did so with cross-government department support, which is to be commended. Part of the National Action Plan concerned access to a remedy for abuses of human rights by business enterprises occurring in the UK and overseas. The National Action Plan refers to the existing 'framework of legislation' and indicates that the 'range of remedy mechanisms is diverse', for both judicial and non-judicial remedies.¹ This report confirms that there are a range of mechanisms that are relevant to human rights abuses by business enterprises.

In considering the access to a remedy, the legal obligation on a State is to provide a remedy to the victim of the human rights abuse. A fine or other sanction against a business enterprise without any guarantee of non-repetition or without any reparation to the victim is not a remedy for these purposes. Barriers to accessing a remedy can be legal, social, financial, practical or procedural.

The judicial remedies provided 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. As a consequence, there has been compensation paid to some of the victims. However, there are procedural and financial barriers which inhibit the ability to bring these claims, such as restrictions on legal aid and insufficient disclosure requirements.

There has been an expansion in recent years of the criminal law judicial mechanisms for bringing a case against business enterprises. The Bribery Act and the Modern Slavery Act are two examples that are broadly relevant to abuses of human rights by business enterprises. However, there have been few prosecutions to date, partly due by the apparent reluctance of prosecutors to proceed with such cases. There is also no automatic remedy (and often none at all) available in criminal law to the victim of the human rights abuse.

Labour rights are human rights and the employment tribunal mechanism is available for abuses by business enterprises. These tribunals provide a range of effective remedies directly

¹ *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*: <https://www.gov.uk/government/publications/bhr-action-plan>, p.17.

to the victim. As those who wish to bring a complaint must now pay a fee, there is a financial, and possibly a social, barrier to access to a remedy for victims.

In relation to State-based non-judicial mechanisms (as distinct from the grievance mechanisms of business enterprises), the most pertinent is the UK National Contact Point, which implements the OECD Guidelines on Multinational Enterprises. This mechanism 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. 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.

Other non-judicial mechanisms include the Gangmasters Licensing Authority, government Ombudsmen, the Equality and Human Rights Commission and the Groceries Code Adjudicator. Despite their breadth of activities, and an ability to provide some guidance to business enterprises, none of them are focussed on providing access to victims of human rights abuses by business enterprises, and few consider abuses occurring overseas. The proposed regulations concerning Private Security Companies deal with abuses overseas but do not, of themselves, provide any access to a remedy for victims of human rights abuses.

Therefore, there are a range of State-based judicial and non-judicial mechanisms in the UK that could be relevant for claims of an abuse of human rights by a business enterprise occurring in the UK or overseas. Yet, as the report shows, the current access to a remedy in the UK for these types of claims is limited, with most of the non-judicial mechanisms unable to provide a remedy at all to the victims. Further, victims of such abuses, particularly abuses taking place overseas, face significant barriers.

A priority for future National Action Plans should be to include specific measures to increase the effective access to a remedy for victims of human rights abuses by business enterprises. These measures could include facilitating information of, and government coordination about, business and human rights issues, such as through a permanent cross-government unit, and enhancement of the National Contact Point's impacts and capacities - and its independence - with its investigations and recommendations publicly available and being relevant to those with responsibility for public procurement, export credit and related government business support activities. Other measures could include a focus on remedies for victims in each of these mechanisms, increased powers to order disclosure of documents and to enable collective actions by victims, and extensions of some criminal law legislation and training of prosecutors, which would be consistent with the UK policy to encourage the use of UK courts and tribunals in upholding the rule of law. There could also be increased use of the terminology of the UN Guiding Principles in all decisions and practices, and an obligation placed on all business enterprises to conduct human rights due diligence and to have grievance mechanisms. The latter actions would also assist in the ability of victims to access a remedy and could reduce the need for access by victims to judicial and non-judicial mechanisms.

Survey of the Provision in the UK of Access to Remedies for Victims of Human Rights Harms Involving Business Enterprises

A. Context

A1. Introduction

The United Nations Guiding Principles on Business and Human Rights make clear that its framework to ensure the responsibility of business enterprises for human rights abuses includes access to a remedy.² This “third pillar” includes access to judicial and non-judicial remedies by the State and access to non-judicial remedies by business enterprises. IN relation to the legal obligations on a State, Guiding Principles 25-27 provide:

25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Guiding Principle 26 is one of only two of the UNGPs that are expressed in mandatory terms.³ As the Commentary to the UN Guiding Principles (UNGPs) makes clear:

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.⁴

Thus there is an international legal obligation on the State, at least within its territory and its jurisdiction, to take steps to ensure that those who have had their human rights abused by business enterprises have access to an effective remedy.⁵

² United Nations Guiding Principles on Business and Human Rights, A/HRC/17/L.17/Rev.1 (21 March 2011), and http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

³ Guiding Principle 1 provides that: ‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises’.

⁴ Commentary to Guiding Principle 25.

⁵ The scope of a State’s transnational or extraterritorial jurisdiction in regard to the abuse of human rights by business enterprises was not finally determined by the UNGPs. There are arguments that States have some responsibilities extraterritorially: see J. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* (2010): http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf.

The UN Human Rights Council, when adopting the UNGPs, called on all States to introduce a National Action Plan (NAP) to implement their obligations under them. The government of the United Kingdom (UK) was the first State in the world to do so. Its NAP, called *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*,⁶ was published in September 2013. It set out a range of actions to implement the UNGPs.

In relation to access to remedies, the UK's NAP stated that it would 'support access to effective remedy for victims of human rights abuses involving business enterprises within UK jurisdiction'.⁷ The actions on access to remedy to be taken by the UK government were indicated in the NAP: to 'disseminate' lessons from the London Olympic and Paralympic Games; to 'advise' UK companies on establishing and reviewing their grievance mechanisms; to 'encourage' them to extend any UK grievance mechanisms to overseas operations, including in supply chains; to 'support' work to establish remedies in other States; and to 'keep the UK provision of remedy under review'.⁸ None of these actions created any new forms of access to an effective remedy. This aspect of the NAP was regarded by some commentators as being very weak.⁹

The reasons for the lack of new proposals aimed at providing access to an effective remedy are explained in the NAP:

The UK has a culture of human rights awareness and protection – much of which results from our framework of legislation described earlier - and our range of remedy mechanisms is diverse.... The UK sees its own provision of judicial remedy options as an important element in the remedy mix. Non-judicial grievance mechanisms based on engagement between the parties involved are also an important option.¹⁰

Thus the UK government was relying on some of its existing laws and practices to provide effective judicial and non-judicial remedies for abuses of human rights by business enterprises. It is these existing laws and practices that are the focus of this report.

⁶ *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* <https://www.gov.uk/government/publications/bhr-action-plan>.

⁷ *Ibid*, p.6.

⁸ *Ibid*, pp.17-18.

⁹ See, for example, CORE Coalition, 'Good Business?' http://corporate-responsibility.org/wp-content/uploads/2013/12/GoodBusiness_COREcommentonUKNAP_final_Dec2013.pdf; Rights and Accountability in Development, <http://www.raid-uk.org/sites/default/files/pr-uk-action-plan.pdf> and R. McCorquodale, 'Expecting Business to Respect Human Rights without Incentives or Sanctions': <http://ukhumanrightsblog.com/2013/09/04/expecting-business-to-respect-human-rights-without-incentives-or-sanctions-robert-mccorquodale/>

¹⁰ *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, op cit, p.17.

A2. Methodology

In early April 2015, Professor Robert McCorquodale, Director of the British Institute of International and Comparative Law (BIICL),¹¹ was commissioned by the UK Foreign and Commonwealth Office (FCO) and the Department of Business, Innovation and Skills (BIS) (whose Secretaries of State had jointly published the UK NAP) to undertake a survey of the current provision in the UK of access to a remedy for victims of human rights harms involving business enterprises. This commission was undertaken as part of the commitment in the NAP that the UK government would 'keep the UK provision of remedy under review'.¹² The aim was to provide a stocktake of the current remedies landscape in the UK, identifying the remedies available, and the legislative and institutional framework enabling them, so as to inform the NAP review process and provide a solid base for future consultation.

The report is to address the following questions:

- What options for accessing remedy exist for victims of human rights harms involving business enterprises within the UK?
- What options for accessing remedy exist for overseas victims of human rights harms involving UK business enterprises?
- What, if any, barriers are there to accessing these remedies?
- Policy options for future consideration.

This report is structured such that it considers the first two questions for each type of remedy, and offers some comment on the third question. It then draws together some brief policy options in the conclusions.

In answering these questions, the following areas were to be considered:

- Judicial remedies, including legal remedies in overview for criminal, tort and contract, and the judicial infrastructure giving effect to the remedies, including civil and criminal courts, and employment tribunals.
- Non-judicial remedies, including, the OECD Guidelines and the UK National Contact Point, the Equality and Human Rights Commission, the Gangmasters Licensing Authority, and relevant ombudsmen and government-run complaints offices.

In order to undertake this survey, the methodology employed was a combination of desk-based research and discussion based interviews. The desk-based research included reviewing the research literature, publications and also materials on websites, and email enquiries to experts.¹³ Interviews were conducted with specialists at BIS, FCO, Ministry of Justice (MoJ) and the Trade Unions Council (TUC), and with legal practitioners with knowledge of the remedies

¹¹ Robert McCorquodale is the Director of BIICL, Professor of International Law and Human Rights at the University of Nottingham and a Barrister at Brick Court Chambers, London. My sincere thanks to Lise Smit, Research Fellow at BIICL, and to Claire Jervis, Ali Khan and János Drienyovszki, interns at BIICL, for all their assistance.

¹² *Good Business*, op cit, p.18.

¹³ This included through a business and human rights database run by CORE, being a UK civil society network on corporate accountability: see <http://corporate-responsibility.org/about-core>.

in this area. These interviews were semi-structured, with questions to find out how the processes and procedures of various possible remedies operated in practice, and enabling the interviewees to expand on their comments as they wished.¹⁴ The extent of the work involved in the conducting of the interviews, and the follow-up required to clarify issues that arose, meant that the survey took slightly longer than the one month that had been requested to complete it.

The time allowed for this survey was limited, so that the results could inform the process of updating the NAP. It is therefore inevitable that possible remedies may have been overlooked or not clarified sufficiently.¹⁵

A3. Definitions

The survey was intended to examine the provision in the UK of access to remedies for victims of human rights harms involving business enterprises. Four key terms required clarification: “remedy”; “human rights”; “harms/abuses”; “business enterprises”; and “barriers”; as well as an explanation as to the jurisdiction covered by this report.

Remedy

A remedy is clarified by the UNGPs as having both procedural and substantive aspects:

The remedies provided by the grievance mechanisms discussed in this section [on Access to Remedy] may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual’s or a group’s sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought. State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be

¹⁴ My sincere thanks to all those who participated in these interviews. I have chosen not to list them or identify them in this report as that was not the purpose of the report.

¹⁵ It is hoped that the process of consultation for the updating of the NAP will provide opportunities for any such omissions to be identified and addressed.

judicial or non-judicial. In some mechanisms, those affected are directly involved in seeking remedy; in others, an intermediary seeks remedy on their behalf. Examples include the courts (for both criminal and civil actions), labour tribunals, national human rights institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development, many ombudsperson offices, and Government-run complaints offices.¹⁶

This definition was intended to include remedies through grievance mechanisms by the State and by business enterprises, and so is expressed in general terms.

There are a number of actions by a State that could be considered to assist in preventing a business enterprise from abusing human rights. For example, legislation requiring a business enterprise to report on an aspect of its activities that affect human rights could be seen as a means of preventing future abuses because it requires a business to reflect on its practices. However, this does not seem to be the type of remedy envisaged in the UNGPs, as its focus is on the effectiveness of the remedy and the need to 'make good any human rights harms' and so ensure an effective remedy for the 'victim'. Thus the focus is on the grievance or 'perceived injustice' of an individual or group for whom a remedy is needed. This is made clear in an earlier report by John Ruggie on which the UNGPs are based:

State regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress abuses. Victims face particular challenges when seeking personal compensation or reparation as opposed to more general sanction of the corporation through a fine or administrative remedies.¹⁷

Thus John Ruggie, who was the person responsible for the UNGPs, considered that there is a difference between a general sanction on a business enterprise (such as a fine), and a remedy to the victim. This is consistent with the general international human rights law obligations on a State to provide a remedy. The right to a remedy is set out in most of the major international human rights treaties,¹⁸ because '[f]or rights to have meaning, effective remedies must first be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.'¹⁹

Therefore, when considering the effectiveness of access to a remedy in this survey, close consideration is given to whether the victim of the human rights abuse has her/him/themselves an effective remedy. An effective remedy in terms of this report is one

¹⁶ Commentary to Guiding Principle 25.

¹⁷ Report of the Special Representative of the Secretary General (SRSG) on human rights and transnational corporations and other business enterprises to the UN Human Rights Council 'Protect, Respect and Remedy: a Framework for Business and Human Rights', Human Rights Council Eighth Session (7 April 2008) UN Doc A/HRC/8/5 <http://www.refworld.org/docid/484d2d5f2.html> ('UN Framework'), paras 82 and 88.

¹⁸ See for example, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 13 of the European Convention on Human Rights (ECHR), to both of which the UK is a party.

¹⁹ The UN Committee on the Rights of the Child, Effective Remedy and Corporate Violations of Children's Rights (2011): http://www.unicef.org/csr/css/effectiveremedy_10Oct11.pdf, para 1.2. See also, Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Rights to a Remedy* (2014) p. 16-20.

where the victim has a direct remedy for the abuse of human rights he/she/they have suffered by a business enterprise. This could be in the form of compensation, restitution, access or any other form of reparation for the victim that is effective to redress the abuse done to her/him/them. In addition, there is an obligation on States to ensure that victims of human rights harms by business enterprises are aware of the means of access to a remedy:

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.²⁰

Thus the availability of some form of enforcement or compliance mechanism against a business enterprise may not be sufficient by itself to meet the State's obligation to provide a remedy to a victim of a human rights abuse by a business enterprise in the sense required by international human rights law. There is, in a few instances, a possibility that the effect of a decision by a State mechanism concerning a business enterprise would clearly prevent a future abuse of human rights, and in that situation there may be a remedy in terms of structural or systemic improvement of the lives of victims or potential victims.²¹ Yet there would need to be substantial evidence of this preventative or non-repetition effect for it to be considered an effective remedy to the victim.²²

While the terminology of the UNGPs is to provide "access to remedy", the phrase "access to remedies" or "access to a remedy" will be used in this report as it is easier to comprehend.

Human Rights

The UNGPs make clear that business enterprises can abuse all human rights and not just some. Guiding Principle 12 provides:

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

Therefore, the meaning of "human rights" within this report is not limited to those rights set out in the Human Rights Act 1998 (HRA) – incorporating the European Convention on Human Rights (ECHR) - as these primarily address only civil and political rights. As the UK is a party - and so has international legal obligations – to the major international human rights treaties,²³

²⁰ Commentary to Guiding Principle 25.

²¹ See, for example, F. Capone, 'Remedies' in R. Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (2012).

²² This is sometimes termed a 'guarantee of non-repetition' – see F. Capone, K. Hausler, D. Fairgrieve and C. McCarthy, *Education and the Law of Reparations* (2013), pp.37-38.

²³ Such as the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC) and the Convention

as well as being a member of the International Labour Organization (ILO), all human rights are relevant. These include economic, social and cultural rights (e.g. labour rights health rights and education rights), collective rights (e.g. the right of self-determination and the prohibition on genocide), and rights that seek protection of those particularly vulnerable such as children, women and the disabled.²⁴ Therefore, all human rights will be considered in this report as applicable in relation to access to a remedy.

Consideration was given as to whether remedies that are aimed at consumer protection should be included within this report. It could be argued that consumer rights might be relevant to some human rights, such as the right to privacy, the right to property, the rights of children, and the rights to food and health.²⁵ However, as the protection of consumer rights is not directly about the protection of human rights as such, then it is not included within the scope of this report.

Harms/Abuses

The use of the term human rights “harms” indicates that under the UNGPs a business enterprise cannot “violate” or “breach” a human right as they have no direct legal obligations under any international human rights treaty. International human rights treaties place legal obligations on States alone and only States can violate a human right under such treaties.²⁶ In domestic law, a business enterprise can act in breach of the law and so could be considered to violate a human right. However, in order to ensure coherence between the international and domestic legal systems, the term human rights “harm” or “abuse” will be used in this report.

Business Enterprises

“Business enterprises” is the terminology used in the UN Guiding Principles and other UN documents. It refers to the range of corporate structures including corporations, partnerships, unincorporated associations, joint ventures, consortium, franchises, subsidiaries, etc.²⁷ In the UK, the usual term is “companies” or “corporations”. This report will use the term “business enterprise”, unless the context requires otherwise, to refer to all types of business enterprises, no matter how they are described in UK law.

on the Rights of Persons with Disabilities (CRPD). There are also regional human rights treaties, such as the ECHR and the European Charter of Fundamental Rights (CFR).

²⁴ This would also include indigenous people, as clarified in the UN Declaration on the Rights of Indigenous Peoples 2007.

²⁵ See M. Kingisepp, ‘The Constitutional Approach to Basic Consumer Rights’, *Juridica International Law Review*, pp. 49 and Joint Committee on Human Rights, ‘Any of our business? – Human Rights and the UK Private Sector (HL Paper 5-1/HC 64-1), First Report of Session 2009-2010, Vol. I, Report and Formal Minutes, 16 December 2009, p. 21. See also the Consumer Rights Act 2015.

²⁶ The terminology of business enterprise was confirmed in the first report: ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’ Human Rights Council 17th Session (21 March 2011) UN Doc A/HRC/17/315, http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

²⁷ See P. Muchlinski, ‘Limited Liability and Multinational Enterprises: A Case for Reform?’ (2010) 34 *Cambridge Journal of Economics* 915, 924.

Barriers

The UNGPs make clear that States should consider 'ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'.²⁸ The Commentary to the UNGPs clarifies the type of barriers that are relevant:

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable....

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, "market-based" mechanisms (such as litigation insurance and legal fee structures), or other means;
- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- 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.

Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

²⁸ Guiding Principle 26.

In considering the barriers to access to a remedy in this report, this report will consider these legal, practical and procedural barriers. Other barriers that have been considered include social barriers and financial barriers.²⁹

Jurisdictions Covered

This report covers the situation in the United Kingdom. The UK has a number of legal jurisdictions within it, being England and Wales, Scotland and Northern Ireland. Most of the relevant legislation being considered in this report is applicable to all these jurisdictions, though some important elements are not, including in particular the Civil Procedure Rules of England and Wales. Scotland has its own NAP covering all aspects of Human Rights and both Scotland and Northern Ireland have independent Human Rights Commissions. Therefore it is important to note that specific observations may not apply in all jurisdictions of the UK and that the Scottish Government and Northern Ireland Assembly can act independently of the UK government in respect of some of the matters described in this report. However, due to the limitations of time and space, it has been assumed that all legislation, case law and practices are applicable to all UK jurisdictions, even if there might be some variations in content, process and means of implementation.

It is also assumed that relevant European Union (EU) law applies to the UK unless clearly indicated. However, access to remedies available through the EU courts from the UK is outside the scope of this report. Similarly, access to remedies provided by the European Court of Human Rights, by other international human rights bodies, and by other international bodies, is outside the scope of this report.

The final aspect of the context of this report is that there is no one piece of legislation that is directed to the issue of the human rights harms caused by business enterprises in the UK. The HRA, while it can apply outside UK territory,³⁰ does not provide a direct cause of action against a business enterprise, as it only applies to the actions of public authorities.³¹ While the HRA might apply where a business enterprise undertakes a public function, and where the acts of a business enterprise can be attributed to a State, though then the harm is considered in law to be that done by the State, and the State has the legal responsibility.³² Further, there is no one government department or other institution that has the main responsibility for dealing with issues concerning the human rights harms done by business enterprises in the UK. This was exemplified by the fact that during the conduct of this research it was evident that a large number of government departments were found to have some responsibilities in relation to potential access to remedies for human rights abuses by business enterprises.³³

²⁹ For a useful approach, see the Baseline Approach for NAPs developed by the Danish Institute for Human Rights: <http://www.humanrights.dk/files/media/dokumenter/udgivelser/DIHR%20-%20ICAR%20National%20Action%20Plans%20%28NAPs%29%20Report.pdf>.

³⁰ *Al- Skeini and Others v the United Kingdom* App No 55721/07 (ECtHR, 7 July 2011)

³¹ See, for example, *YL v Birmingham City Council and others* [2007] UKHL 27 and *Callin, Heather and Ward v Leonard Cheshire Foundation* [2002] EWCA Civ 366.

³² *Amadou Nyang v G4S Care and Justice Services Ltd and Others* [2013] EWHC 3946 (QB).

³³ For example, the UK OECD National Contact Point is run from within BIS, judicial remedies and access to courts, including employment tribunals, fall within the remit of MoJ, the Gangmasters Licensing Authority forms part of the Home Office, which is also responsible for enforcement of the Modern Slavery Act, whilst non-judicial mechanisms and complaints procedures fall within various other departments.

B. Judicial Mechanisms

The first remedy to be considered in this report is that of access to judicial remedies for abuses of human rights by business enterprises. The four areas to be considered are tort, contract, criminal and employment law. In addition, there is a brief consideration of the judicial infrastructure in terms of barriers to access to a judicial remedy. There are some judicial remedies available in specific areas that might arise either from a non-judicial process, such as the Gangmasters Licensing Authority activity, or as a consequence of investigations by a non-judicial body, such as in competition law. These will be considered in the non-judicial mechanisms part of the report.

B1. Tort

The main causes of action for abuse of a human right by a business enterprise are likely to arise under the tort of negligence. In order to make out a negligence claim there are a number of key elements:

- The defendant acted or omitted to act.
- The act or omission caused loss and damage to the claimant.
- In all the circumstances the defendant owed a duty of care to act or not to act. In this regard: (a) the damage must be reasonably foreseeable; (b) there must be a sufficient relationship of proximity between the claimant and defendant; (c) it must be just, fair and reasonable to impose liability on the defendant.³⁴
- The defendant's actions or omissions breached the duty of care in that they were below the standard of care objectively expected in the circumstances.
- The loss and damage was sufficiently foreseeable and of a type which UK law recognises.³⁵

In relation to the duty of care, a particular issue may arise about the links between one business and another, especially concerning a parent business and its subsidiary. In *Chandler v Cape plc*,³⁶ the Court of Appeal held that, in appropriate circumstances, the law may impose on a duty of care on a parent business in relation to the health and safety of its subsidiary's employees. The Court held that the following factors could give rise to such a duty:

[In] appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses 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 as the parent company knew, or ought to have

³⁴ *Caparo v. Dickman* (1990) 1 All ER 568 (HL).

³⁵ See M. Jones and A. Dugdale, *Clerk & Lindsell on Torts* (2010), Chapter 8.

³⁶ *Chandler v Cape plc* [2012] EWCA Civ 525.

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. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.³⁷

In that case, the Court found that the parent business had a duty of care in relation to asbestosis contracted by employees of a subsidiary as result of exposure to asbestos dust.³⁸ In deciding this, it:

[E]mplicitly reject[ed] any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees.³⁹

This decision indicates that it is possible for a parent business itself to owe a duty of care for an abuse of human rights (in that case to the employee's rights to life and to health) depending on the particular facts.

Other causes of action for which a tort claim could be brought are:

- Nuisance: This is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of their right to property (a private nuisance); or a right belonging to them as a member of the public (a public nuisance).⁴⁰
- Trespass to the Person: This includes assault, battery and false imprisonment, (the right not to be ill-treated and the right to liberty), committed negligently or intentionally. There is also a tort of intimidation, where there is a threat of violence. These torts may be relevant where the business has committed or been complicit in acts such as wrongful arrest or torture/ill-treatment for its own purposes or on behalf of the state.
- Privacy: The right to privacy can arise in cases involving breach of confidence or misuse of personal information, as well as defamation. In *Campbell v MGN Ltd* the House of Lords developed a new private law cause of action against a business enterprise, where it considered that the protection of the claimant's right to privacy

³⁷ Ibid, para. 80.

³⁸ Ibid, paras 72-76.

³⁹ Ibid, paras. 69-70.

⁴⁰ See *Clerk & Lindsell on Torts*, op cit, Chapter 20. See also the unusual *Rylands v Fletcher*-type of torts: *Cambridge Water Co Ltd v Eastern Counties Leather Plc* [1994] 2 AC 264.

outweighed the defendant business' freedom of expression.⁴¹ The telephone "hacking" inquiry also raised issues concerning the breach of the right to privacy by business enterprises.⁴²

There are also a range of statutory torts, i.e. specific legislation that can be used against individuals or business enterprises that act negligently. These include: the Employers Liability (Defective Equipment) Act 1969 (where an employee suffers injury as a result of a defect in equipment supplied by the employer and the defect is due to the fault of a third party, the injury is deemed attributable to the negligence of the employer); the Occupiers Liability Acts of 1957 and 1984 (where the occupier of premises/land owes a duty to visitors and trespassers respectively to take such care as in all the circumstances is reasonable); and the Environmental Protection Act 1990 (which can extend to nuisances).⁴³

Thus, there are a number of causes of action that can be brought by victims of human rights abuses committed by business enterprises. However, it should be noted that the claim must be drafted in terms of the tort, rather than in the direct language of a "human rights" claim.

Overseas

The above tort actions (with the exception of the statutory torts) could be brought where the victim of the human rights abuse and the location of the abuse are overseas. However, there are two additional factors that must be shown before the case can proceed: jurisdiction; and applicable law.

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).⁴⁴ In terms of business enterprises, "domicile" is defined as the location of its 'statutory seat', 'central administration' or 'principal place of business'.⁴⁵ 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'.⁴⁶

Brussels I Regulation only applies for 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 general approach of the courts prior to the implementation of the Brussels I Regulation, was

⁴¹ *Campbell v MGN Ltd* [2004] 2 AC 457.

⁴² For information on the Leveson Inquiry:

<http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/>.

⁴³ My thanks to Sudhanshu Swaroop for these examples.

⁴⁴ European 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), Article 2(1). Brussels 1 Recast was passed in 2012 – EU Regulation 1215/2012 – 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.

⁴⁵ *Ibid*, Brussels I, Article 60; Brussels I Recast, Article 63.

⁴⁶ *Vava v Anglo American South Africa Ltd* [2012] EWHC 1969 (QB), para 43.

to interpret *forum non conveniens* narrowly, as seen in the words of Lord Bingham, speaking for a unanimous House of Lords:

[If] these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice.⁴⁷

This approach by the 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 now governed by the EU Rome II Regulation.⁴⁸ The Rome II Regulation provides a uniform rule for EU domiciled business enterprises⁴⁹ 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.⁵⁰ There are limited exceptions to this rule.⁵¹ 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.⁵²

Hence, the courts in the UK must generally apply the law of the State in which the damage occurred. This is largely consistent with the previous situation.⁵³ This simplifies claims but does require the claimant's lawyers to investigate to the particular relevant law in another State, which may not always be easy to ascertain.

Barriers

The main barriers to access to a remedy by victims of human rights abuse by business enterprises are in relation to procedure: obtaining evidence about the business; gathering evidence for the claim; and bringing claims by a group of victims. There are also barriers in relation to legal costs, which are considered later, as they are a result of government policy and not directly due to judicial requirements.

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

⁴⁷ *Lubbe v Cape*, [2000] 1 WLR 1545 (HL), 1559-60.

⁴⁸ Regulation (EC) 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II Regulation).

⁴⁹ 'Domicile' is defined in the same way as for Brussels I and Brussels I Recast – see Rome II, Article 60.

⁵⁰ *Ibid*, Article 4(1).

⁵¹ 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).

⁵² *Ibid*, Articles 4 and 15.

⁵³ Private International Law (Miscellaneous Provisions) Act 1995, section 11 (1).

difficult and complex.⁵⁴ Where the parent and subsidiary businesses are incorporated in different States, then, under international law, they have different nationalities and, under national law, they have different legal personality. A parent corporation is not generally liable in UK law, simply by virtue of being a shareholder, for the conduct of its subsidiaries,⁵⁵ even if it controls the activities of its subsidiaries. In such cases, the reluctance of the courts to lift the 'corporate veil' between corporations operating as one business enterprise,⁵⁶ represents a barrier to accessing remedies.

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 business, 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.⁵⁷

This 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 corporation had the requisite control of the particular corporation that abused human rights. Court procedural rules provide for general and specific disclosure of relevant documents by parties to litigation⁵⁸ and also for answers to be given on oath to a request for information.⁵⁹ 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'.⁶⁰

In addition, when commencing a claim under tort law, any duty of care must be owed to a defined individual or group.⁶¹ This requires identification of possible victims, which usually requires considerable locational, language and logistical efforts. It also requires statements

⁵⁴ See M. Taylor, R. Thompson and A. Ramasastry, *Overcoming Obstacles to Justice*, (Fafu, 2010) and Y. Queinnec and W. Bourdon, *Regulating Transnational Companies* (2010).

⁵⁵ See *Salomon v. Salomon and Co. Ltd* [1897] AC 22 and *Adams v. Cape Industries Plc* [1991] 1 All ER 929.

⁵⁶ See comment in *Chandler v Cape*, quoted above.

⁵⁷ *Lubbe v Cape*, op cit, p. 1546.

⁵⁸ Civil Procedure Rules 1998 (UK), rule 31(12) (CPR).

⁵⁹ Ibid, rule 18. Note however that disclosure need only be 'proportionate', in particular to the value, complexity and importance of the case.

⁶⁰ *Vava*, op cit, para. 69. 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, *Sithole v. Thor Chemicals Holdings and Desmond Cowley* 2000 WL 1421183; and *Guerrero v. Monterrico Metals plc* [2009] E.W.H.C. 2475; [2010] E.W.H.C. 3228.

⁶¹ See *Binod Sutradhar FC v National Environmental Research Council* (2006) UKHL 33, [2006] 4 All ER 490.

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. There may also be issues where a claim is rejected on the basis of the statute of limitations.

As the UK does not have a separate procedure for class actions or for collective redress for these types of cases,⁶² the process of bringing a collective action is determined by court procedural rules, such as the Civil Procedure Rules of England and Wales.⁶³ There are two possible routes: the representative action⁶⁴ and the Group Litigation Order (GLO),⁶⁵ each of which are complex, and create delays and uncertainty. All of this takes time and reduces the access to a remedy for many victims, as well as increasing costs for all parties.

Nevertheless, research has shown that, as at 2012, 80% of the cases heard in the UK courts which are based on tort claims for abuses of human rights by business enterprises overseas, have reached a final conclusion and resulted in payments to claimants.⁶⁶ In comparison, research in 2015 found that, although 13% of the 2000 responses to a request for information about abuses of human rights concerned UK business enterprises, only 5% of the claims were actually brought in the UK.⁶⁷ Therefore, there is a mixed picture of a system that can work to provide a remedy to those victims who are able to bring a case before the UK courts, and yet there are some barriers that can prevent access to remedies for all victims of abuse of human rights by business enterprises.

B2. Contract

It is possible to bring an action against a business enterprise based on contract law. This is not necessarily dependent on the location of the business or where the abuse of human rights occurred, as the contract will usually specify which legal system governs the contract and which courts resolve disputes under it. If the choice of law is specified as UK law (or, more likely, the law of England and Wales), then the UK courts will consider claims arising under that contract. However, the UK procedural and other rules still apply and so, for example, it might be that, in some instances, the applicable law is where the breach of contract occurred, in accordance with the Rome I Regulation.⁶⁸

⁶² See J. Sorabji, 'Collective Action Reform in England and Wales' in D. Fairgrieve and E. Lein, *Extraterritoriality and Collective Redress* (2012) 43, who notes that there is some specific representative action available in competition law.

⁶³ See D. Fairgrieve, 'Collective Redress Procedures: European Debates' in *ibid*, 15, 28-32. There are separate procedural rules in Scotland and in Northern Ireland.

⁶⁴ Civil Procedure Rules, Part 19.6.

⁶⁵ *Ibid*, Part 19.6, and Ministry of Justice, 'Group Litigation Orders', www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders.

⁶⁶ M. Goldhaber, 'Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard' (2013) 3 *UC Irvine Law Review* 127. He compares this to two default judgments and thirteen settlements from approximately 180 claims in the United States (US) brought under the Alien Tort Claims Act as at that date. Of the settlement figures that have been publically released, he estimates that settlements from UK cases are more favourable than in the US, with the settlement in the US *Unocal* case of \$US30 million compared to a settlement from the UK case against Trafigura of £30 million as well as fees.

⁶⁷ Business and Human Rights Resource Centre 'Briefing: Is the UK living up to its business & human rights commitments?' April 2015: <http://business-humanrights.org/en/is-the-uk-living-up-to-its-business-human-rights-commitments>, at p. 14.

⁶⁸ Regulation (EC) 593/2008 on the Law Applicable to Contractual Obligations (Rome I Regulation).

There are a range of contract claims that have been brought in the UK based on a human rights abuse by a business enterprise, though these have been primarily concerning employment issues, which are discussed below. Other contract claims relevant to human rights abuses by business have been successfully brought, for example, in relation to detention in a UK prison (concerning the rights of detainees), where the prison is owned by a business.⁶⁹ Very few cases have been brought in relation to a contract claim for human rights abuses by a business enterprise overseas.⁷⁰

The lack of contractual claims concerning an abuse of human rights by business enterprises (outside the employment context) is possibly explained by the fact that it is unusual for a contract term to include the direct protection of a human right, which would give rise to a breach of the contract claim by the victim.⁷¹

B3. Criminal

Any criminal law offence by a business enterprise would arise if the business enterprise acted contrary to a statutory (or, rarely, common law) criminal offence.⁷² However, there are many abuses of human rights that amount to a criminal offence, even if they are not always stated or perceived in these terms.⁷³ For example, a private security business might unlawfully kill, torture or detain someone, a technology business might use surveillance equipment or data to infringe the right to privacy, and a financial business may fund a person or business that uses forced labour, child labour or slaves, each of which are both human rights abuses and criminal offences.⁷⁴

Most criminal offences do not extend to a business enterprise, as they are designed for natural persons and not legal persons. Part of the reason for this is the difficulty of proving the intent (*mens rea*) of a business in contrast to that of an individual. The courts have addressed this, in those limited criminal offences for which a business enterprise is able to be found liable, by looking at the specific individuals who 'direct the mind and will' of a business, being primarily the directors rather than the intentions of those who are employed at less senior levels.⁷⁵ This

⁶⁹ See, for example, *Amadou Nyang v G4S Care and Justice Services Ltd and Others* [2013] EWHC 3946 (QB).

⁷⁰ *Arroyo v. Equion Energia Ltd* (formerly known as BP Exploration Company (Colombia) Ltd), (often known as *the OCENSA Pipeline Group Litigation*), Claim No. HQ08X00328 before the Technology and Construction Court, was a claim in relation to environmental damage (infringing rights to health and property), which included a claim based on a contract. For the first part of this case, see Robert Verkaik, 'BP pays out millions to Colombian farmers', *The Independent*, 22 July 2006.

⁷¹ There may be a possibility of a contractual claim by the contracting party, such as where a financial agreement or a supply agreement included human rights obligations.

⁷² I am indebted to the paper written by Rachel Chambers and Alex Batesmith, 'Options for Criminal Prosecution of UK Companies for Human Rights Abuses committed outside England and Wales', commissioned by Traidcraft, dated 22 May 2015. My thanks to Liz May for access to this report.

⁷³ My understanding is that neither the Director of Prosecutions nor the Attorney-General's Office considers their role as being one to protect human rights but rather in upholding the criminal law.

⁷⁴ For further examples, see S. Joseph and R. Chambers, *Human Rights Translated: A Business Reference Guide* (2008): http://www2.ohchr.org/english/issues/globalization/business/docs/Human_Rights_Translated_web.pdf.

⁷⁵ This position has been criticised: see C. Wells, 'Corporate Criminal Liability: 10 years On' [2014] *Criminal Law Review* 849.

'identification' approach has been criticised as it can be very difficult to discern such intent with large business enterprises and also:

As a method of establishing corporate culpability, tests based on organization, compliance and culture have a number of advantages over 'identification' theory. Not only does liability turn on more objective factors (which in many cases will be easier for the prosecution to establish), it also reflects a more preventative approach.⁷⁶

Some legislation does specifically provide for criminal prosecution of a business enterprise. The main one is the Corporate Manslaughter and Corporate Homicide Act 2007. Under this Act a 'corporation' can be convicted of corporate manslaughter when someone is killed as a result of the way the business is managed or organised. This management or organisation could constitute a gross breach of the 'relevant duty of care' owed to the deceased person, and a substantial element of the breach of duty is its senior management's actions.⁷⁷ Other areas of legislation that allow business enterprises to be convicted of a criminal offence include conspiracy,⁷⁸ torture,⁷⁹ and health and safety,⁸⁰ and directors of business enterprises can be separately liable.

Three recent pieces of legislation create criminal offences that can be committed by business enterprises, even if they are not aimed solely at this purpose. The Bribery Act 2010 includes offences for the bribery of another person, being bribed and bribing a foreign official,⁸¹ including by an 'associated person',⁸² as well as a form of strict liability offence for failing to prevent bribery, which can be committed by any 'relevant commercial organisation'.⁸³ This corporate offence circumvents the common law principles of corporate liability and the 'identification' approach, and places the burden firmly on corporations to ensure that their anti-corruption procedures are sufficiently robust to prevent bribery, even by third parties. It is a defence for the corporation to prove that it had in place adequate procedures to prevent bribery,⁸⁴ as the intention is to incentivise bribery prevention and corporate good governance.

⁷⁶ J. Zerk, 'Corporate Liability for Gross Abuses of Human Rights: Towards a Fairer and More Effective System of Domestic Law Remedies,' Report prepared for the Office of the UN High Commissioner for Human Rights, <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> June 2014, p. 35.

⁷⁷ Corporate Manslaughter and Corporate Homicide Act, 2007, section 19 (1) and 1(4). To date only a few corporations have been convicted and fined.

⁷⁸ Criminal Law Act 1977, section 1.

⁷⁹ Criminal Justice Act 1988.

⁸⁰ Health and Safety at Work Act 1974.

⁸¹ Ss. 1, 2, 6, Bribery Act 2010.

⁸² *Ibid*, section 8.

⁸³ *Ibid*, s. 7. s. 7(5) defines a relevant commercial organisation as, (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business.

⁸⁴ *Ibid*, s.9.

There is an issue about whether an act of bribery is an abuse of human rights, though the weight of opinion is that it does.⁸⁵

The other two pieces of legislation that are relevant in this regard are the Serious Crime Act 2007, which includes business activity offences,⁸⁶ and the Modern Slavery Act 2015. The latter empowers a court to make a slavery and trafficking reparation order against a convicted person/business enterprise and to award compensation to the victim,⁸⁷ with a preference to the compensation being given where there are insufficient means to pay a fine and compensation.⁸⁸

There are also examples of legislation for which the primary purpose was not to create criminal offences against business enterprises but which can, nevertheless, have that outcome.⁸⁹ In such cases, the prosecution will be initiated by a criminal prosecutor, such as the Director of Public Prosecutions, rather than the body with responsibility for supervising compliance with that legislation.

Overseas

A key aspect of criminal law jurisdiction is that, as a general rule, criminal law only extends to acts committed within the UK's territory.⁹⁰ However, the Court of Appeal in *R v Smith (Wallace Duncan) (No. 4)* held that courts may assume jurisdiction to try an offence if a substantial part of it took place within the UK's territory, provided that there is no reason of international comity why the court should not do so.⁹¹ Generally, only a statutory provision asserting extra-territorial jurisdiction will criminalise acts committed abroad and most of the criminal legislation does not do this. For example, the Corporate Manslaughter and Corporate Homicide Act 2007 does not apply extraterritorially.⁹²

In contrast, under the Bribery Act 2010, the corporate offence of failing to prevent bribery⁹³ can be committed by any 'relevant commercial organisation'⁹⁴ irrespective of where the act

⁸⁵ See, for example, M. Boersma, *Corruption: A Violation of Human Rights and a Crime Under International Law?* (2012), C.R. Kumar, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* (2011), and K. Annan, 'Forward, UN Convention Against Corruption: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (2004), cf M. Goodwin and K. Rose-Sender, 'Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse' in M. Boersma and H. Nelen (eds), *Corruption and Human Rights: Interdisciplinary Perspectives* (2010).

⁸⁶ Ss. 52-53 Serious Crimes Act 2007.

⁸⁷ S. 9 Modern Slavery Act 2015.

⁸⁸ *Ibid.*, s. 8(6).

⁸⁹ These include the Gangmasters (Licensing) Act 2004, which is discussed below.

⁹⁰ See C. Hooper, D. Ormerod et al, *Blackstones Criminal Practice 2015*, p.162, and P. Arnell, *Law Across Borders: The Extraterritorial Application of UK Law* (2015).

⁹¹ *R v Smith (Wallace Duncan) (No. 4)* [2004] Q.B. 1418.

⁹² S. 28 Corporate Manslaughter and Corporate Homicide Act 2007.

⁹³ s.7 Bribery Act.

⁹⁴ *Ibid.*, s. 7(5) defines a relevant commercial organisation as, (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a

occurred and irrespective of the identity of the person who committed the act.⁹⁵ There have been some cases brought that have been based on this offence, albeit against individuals.⁹⁶ Non-UK business enterprises can also commit these bribery offences if an act or omission, which forms part of the offence, takes place within the UK.⁹⁷ There have been instances where this has occurred, such as ones involving book publishing in Africa, though there the Serious Fraud Office chose to use civil remedies rather than criminal ones.⁹⁸ Therefore, a business incorporated, or carrying on business, in the UK may be prosecuted for a bribery offence no matter where the criminal act occurs due to the fact that the business has a 'close connection with' the UK.⁹⁹

In addition, the Serious Crime Act 2007 criminalises conduct that takes place in the UK, if that conduct is capable of encouraging or assisting the commission of an offence abroad.¹⁰⁰ While this could provide a mechanism to prosecute corporations for actions abroad, including those which might constitute human rights harm, it is still necessary to prove intent.¹⁰¹ Similarly, the Criminal Law Act 1977, which criminalises conspiracy to commit an offence, applies extraterritorially, as long as it is an offence in both States, and some aspect of the conspiracy took place in the UK.¹⁰² There is also legislation that provides the UK with universal jurisdiction over crimes, such as the Geneva Conventions Act 1957 and the International Criminal Court Act 2001, though these do not apply to business enterprises.

Barriers

While some legislation specifically creates corporate criminal liability, few cases have been brought, and none of these concerned actions occurring overseas. Part of the reason for this may be that any prosecution must be brought by an enforcement agency. These include the Crown Prosecution Service (under the Director of Public Prosecutions), the Serious Fraud

business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business.

⁹⁵ *Ibid*, ss. 8 and 12.

⁹⁶ For example, Sustainable AgroEnergy plc, involving a biofuels activity in Cambodia: Serious Fraud Office (SFO) Press Release, 'City directors sentenced to 28 years in total for £23m green biofuel fraud' 8 December 2014, <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/city-directors-sentenced-to-28-years-in-total-for-23m-green-biofuel-fraud.aspx>. There are also convictions for bribery under previous legislation, for example, the *Innospec* case, involving bribery of Indonesian and Iraqi officials: <https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/four-sentenced-for-role-in-innospec-corruption.aspx>, the Smith and Ouzman Ltd case for bribing government officials in Kenya and Mauritania: SFO Press Release, 'UK printing company and two men found guilty in corruption trial', 22 December 2014, <https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/uk-printing-company-and-two-men-found-guilty-in-corruption-trial.aspx>.

⁹⁷ s.12(1) Bribery Act.

⁹⁸ See <http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/action-on-macmillan-publishers-limited.aspx> and <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/oxford-publishing-ltd-to-pay-almost-19-million-as-settlement-after-admitting-unlawful-conduct-in-its-east-african-operations.aspx>.

⁹⁹ Bribery Act, s. 12 and 14.

¹⁰⁰ Serious Crime Act 2007 (SCA) ss.44-46 and s.52. Under s.52 and paragraph 2 of Schedule 4 of the SCA, a person who through his actions in the UK encourages or assists the commission of conduct which constitutes an offence in the territory in which that conduct occurs will be guilty of an offence under the SCA. In such a case there is no requirement for the conduct that was encouraged or assisted to constitute an offence in the UK.

¹⁰¹ s.53 SCA.

¹⁰² S. 1A, Criminal Law Act 1977 and see *R v Patel (Sophia)* [2009] EWCA Civ 67.

Office and the Health and Safety Executive. They must weigh up the evidence – including trying to establish the corporate management practices to show either the action or the intent of the corporation - and decide that such cases are in the public interest.¹⁰³ Indeed, as far as I am aware, in all cases to date when inquiries about the bringing of a criminal claim against a business enterprise for human rights abuses overseas have been made, no action has been taken as the various relevant prosecuting authorities refused to investigate. It is unclear if this lack of action on the part of the enforcement agencies is due to lack of resources to investigate these matters or a lack of specialist knowledge of this area. In any event, it creates a major barrier to a remedy for the victims.

The Bribery Act contains barriers in relation to parent and subsidiary enterprises. The guidance to the Bribery Act states:

[A] bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe.¹⁰⁴

The Bribery Act is also limited in terms of both being limited to acts of bribery and lack of automatic compensation to victims. Another barrier is the lack of any specific offence for corporate criminal actions that abuse human rights extraterritorially, other than s1A of the Criminal Law Act and the Serious Crimes Act (discussed above), and both require the 'identification' approach, which can be very hard to establish.

In addition, in contrast to the tort and contract cases above (and claims against a business performing public authority activity under the HRA), the standard of proof required to sustain a conviction is beyond reasonable doubt. While private prosecutions are possible, they are rarely brought against business enterprises, and there is no practice of a civil claim being directly linked to a criminal case (in contrast to the operation in the civil law system of *partie civile*). Further, in most criminal cases, the victim not receive compensation or any other direct remedy. While a court, under the Proceeds of Crime Act 2012, must consider whether to make a confiscation order against the offender, there is no similar requirement to consider making a compensation order. Indeed, 'if the prosecutor omits to ask for the court to make a compensation order the victim of the crime is left with no remedy [in the criminal courts]'.¹⁰⁵

¹⁰³ This is based on the Crown Prosecution Service, *The Code for Crown Prosecutors*, 2013.

¹⁰⁴ *Bribery Act 2010: Guidance about commercial organisations preventing bribery*, para.42: <http://www.justice.gov.uk/legislation/bribery>. Cf *Chandler v Cape* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111,

¹⁰⁵ A. Bodnar, 'The State vs. The Victim: What Happens When Proceeds of Crime Forfeiture Laws Collide With Victims' Rights; The Perspective of the United Kingdom' (2010): http://www.matrixlaw.co.uk/uploads/other/21_08_2013_11_32_31_Presentation%20on%20confiscation%20vs.%20victims%27%20rights%20at%20Offshore%20Alert%20conference,%20Miami%202010.pdf. Anti-Salvory International has stated:

'Although UK law provides routes for victims of trafficking to seek compensation through criminal, civil and labour law, only a minority of trafficked persons actually have the opportunity to pursue this right, much less receive compensation': Joint Committee on Human Rights 'Any of our business? – Human Rights and the UK Private Sector' (HL Paper 5-II/HC 64-II), First Report of Session 2009-2010, Vol. II, Oral and Written Evidence, 16 December 2009, Ev. 213.

B4. Employment Tribunals

The UNGPs made clear that labour rights are part of the human rights that business enterprises are to respect¹⁰⁶ and there is an obligation on States to protect these rights.¹⁰⁷ These rights include the right to safe conditions of work, fair remuneration, non-discrimination in work and freedom of association.¹⁰⁸ Therefore, the access to remedies for abuses of labour rights is within the scope of this report.

The primary judicial remedy in the UK in this area is provided by employment tribunals.¹⁰⁹ Procedure in the employment tribunals is governed by a separate set of rules to that of the civil courts,¹¹⁰ with the original intention being to provide a low cost and easily accessible mechanism to seek remedies. Employment tribunals only have jurisdiction in respect of those claims prescribed by legislation.¹¹¹ The primary relevant types of claims for which a remedy can be sought are:

- Unfair dismissal, if the person has been an employee for a designated period.¹¹²
- 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.
- Protection from discrimination.¹¹³

¹⁰⁶ Guiding Principle 12.

¹⁰⁷ The UK is a party to various International Labour Organisation (ILO) Conventions and the ILO Declaration on Fundamental Principles and Rights at Work is probably customary international law – see Commentary to Guiding Principle 12.

¹⁰⁸ The right of freedom of association and of collective bargaining has not been included in this report due to space constraints. There is some collective bargaining and trade union protection under Employment Relations Acts. See also, Ethical Trading Initiative, *Freedom of Association and Collective Bargaining* (2005): <http://www.ethicaltrade.org/sites/default/files/resources/ETI%20Freedom%20of%20association%20and%20collective%20bargaining%20guidance%20document.pdf>.

¹⁰⁹ Other possible labour mechanisms listed by the Trade Union Council are: Gangmasters Licensing Authority (see below); Employment Agencies Standards Inspectorate; Health and Safety Executive; HMRC National Minimum Wage enforcement team; and the Pay and Work Rights Helpline - see <https://www.tuc.org.uk/workplace-issues/basic-rights-work/basic-rights-work>.

¹¹⁰ See, the Employment Tribunals Rules of Procedure and the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237).

¹¹¹ See, Employment Tribunals Act 1996, as amended by subsequent legislation. The full list of claims is set out here: <https://www.gov.uk/employment-tribunals>.

¹¹² S. 94 (1) Employment Rights Act 1996, which limits claims to ‘employees’ or workers with a 2 year qualifying period of services with the employer or a job applicant, and, generally, the claimant has to submit a claim within 3 months of the relevant act, such as the dismissal.

¹¹³ In this regard there are nine protected characteristics - age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation. This includes direct and indirect discrimination, and discrimination by association (discrimination against someone because they associate with another person who possesses a protected characteristic). There are ongoing governmental discussions regarding reform to expand these characteristics and include “caste” as a separate protected characteristic, see D. Pyper, ‘The Equality Act 2010: Caste Discrimination’, 31 December 2014: <http://www.parliament.uk/business/publications/research/briefing-papers/SN06862/the-equality-act-2010-caste-discrimination>.

A prospective claimant who wishes to bring proceedings must in most circumstances first take the matter to the Advisory, Conciliation and Arbitration Service (Acas) for 'early conciliation'.¹¹⁴ If either party does not wish to engage in conciliation or the attempt at conciliation fails, the claimant receives an early conciliation certificate, which allows them to lodge a claim to the employment tribunal, provided they pay a lodging fee. Employment tribunal fees were introduced by the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013,¹¹⁵ as prior to that time there were no fees. The current total to the claimant of an issue fee and a hearing fee is between £390 and £1,200, depending on the nature of the claim.¹¹⁶ Appeals are possible from the employment tribunals to the Employment Appeals Tribunal and then on judicial review in the general court system.

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.

Overseas

An employment tribunal has jurisdiction to deal with claims where: (i) the respondent or one of the respondents resides or carries on business in the UK; (ii) one or more of the acts or omissions complained of took place in the UK; (iii) the claim relates to a contract under which the work is or has been performed partly in the UK; or (iv) there is a connection with the UK.¹¹⁷ It is, therefore, possible for a claim before an Employment Tribunal to relate to an abuse of labour rights occurring outside the UK. It would appear that there must be a strong connection with the UK for such a claim to be successful. Lady Hale clarified this in *Duncombe v Secretary of State for Children, Schools and Families (No 2)*:¹¹⁸

It is therefore clear that the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections both with Great Britain and with British employment law than with any other system of law.¹¹⁹

The courts have thus tended to allow a claim only where the employee has maintained a close connection with the UK.¹²⁰ There is also the possibility that a complaint alleging abuse of a

¹¹⁴ See the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. Guidance on Acas Conciliation: <http://www.acas.org.uk/media/pdf/c/1/Conciliation-Explained-Acas.pdf>. Acas argues that reaching a settlement through conciliation is quicker, cheaper and less stressful than a tribunal hearing.

¹¹⁵ The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893).

¹¹⁶ The fee amount differs depending on whether the claim is a Type A or Type B claim, the former being, for example, for unpaid wages, redundancy pay and breach of contract, and the latter being for more complex claims, such as for unfair dismissal, equal pay, discrimination and whistleblowing. Different fees are payable for multiple claims and vary according to the number of claimants. A fee remission scheme operates to exempt those with limited means from paying fees, provided they are able to satisfy defined capital and income criteria and, if the claimant obtains judgment in their favour, the employment tribunal may order the employer to reimburse them.

¹¹⁷ Employment Tribunals Rules of Procedure 2013, rule 8(2).

¹¹⁸ *Duncombe v Secretary of State for Children, Schools and Families (No 2)* [2011] ICR 1312 (Supreme Court).

¹¹⁹ *Ibid*, para 8.

¹²⁰ See also *Ravat v Halliburton* [2012] ICR 349 (Supreme Court) and J. Cavanagh, 'Territorial Jurisdictional Issues in Employment Tribunal Litigation', <http://www.11kbw.com/uploads/files/TerritorialJCPaper.pdf>.

labour right by a business enterprise could be taken to the International Labour Organisation (ILO) on the basis that a State failed to uphold its ILO obligations.¹²¹

Barriers

The introduction of fees payable by a claimant who wishes to bring a claim before an employment tribunal is a barrier to access to a remedy. Research has shown that there has been a significant decrease in claims being brought before employment tribunals since the introduction of fees, with 32,671 fewer single claim cases during October 2013 - September 2014 compared with the previous year (a 64% decrease) and the number of multiple claim cases was down 3,527 (a 67% decrease) in the same period.¹²² Since their introduction, employment tribunal fees have been the subject of judicial review proceedings in England and Wales, and in Scotland. These proceedings have been initially unsuccessful, with appeals pending.¹²³

In one of these cases, Lord Justice Elias noted that:

The figures demonstrate incontrovertibly that the fees have had a marked effect on the willingness of workers to bring a claim but they do not prove that any of them are unable, as opposed to unwilling, to do so.¹²⁴

Mr Justice Foskett in the same case added:

[T]he effect of the introduction of the new regime has been dramatic. Indeed it has been so dramatic that the intuitive response is that many workers with legitimate matters to raise before an Employment Tribunal must now be deterred from doing so because of the fees that will be demanded of them before any such claim can be advanced. For my part, I would anticipate that if the statistics upon which reliance is placed in support of this application were drilled down to some individual cases, situations would be revealed that showed an inability on the part of some people to proceed before an Employment Tribunal through lack of funds which would not have been the case before the new regime was set in place. However, that assessment has to be seen as speculative until convincing evidence to that effect is uncovered.¹²⁵

These two judicial comments indicate that they might be claimants whose labour rights have been abused by a business enterprise and for whom the existence of fees is a deterrent to

¹²¹ This can be through regular reporting by State and if a Commission of Inquiry is set up to review a particular State's practice (for which there have been none for the UK): see <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm>.

¹²² D. Pyper and F. McGuinness, 'Employment Tribunal Fees' Note SN07081, 12 January 2015 and Tribunal Statistics Quarterly July to September 2014: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385759/tribunal-grc-statistics-quarterly-jul-sep-2014.pdf. It should be noted that early conciliation was introduced on a mandatory basis on 5 May 2014 and see 'Balance shifts again as employment tribunal cases rise' *The Times* 1 June, 2015, p.36.

¹²³ See, for example, *R (on the application of Unison) v The Lord Chancellor (No 2)* [2014] EWHC 4198 (Admin).

¹²⁴ *Ibid*, para 60.

¹²⁵ *Ibid*, para 96.

bringing a claim. Thus the employment tribunal fees represent a barrier to access to an effective remedy for a victim.¹²⁶

In regard to abuses of human rights overseas, there are no UK mechanisms. There are also bilateral investment treaties and other international trade agreements entered into by the UK that do not protect labour rights or have no effective enforcement mechanism for the victims of human rights abuse by business enterprises. Indeed, these could allow a business enterprise to bring a claim against a State that changes its laws to protect labour rights.¹²⁷ Thus there are barriers to an effective remedy for those whose labour rights are abused overseas.

B5. Judicial Infrastructure

Judicial infrastructure refers to those aspects of the institutional management of the UK judicial system that concerns the access to a remedy. It is evident that the UK judicial system is highly regarded, as evidenced by the substantial volume of litigation by non-UK parties in its courts.¹²⁸ One factor may be that the UK courts use their discretion to ensure justice even when an abuse of human rights by a business enterprise occurred overseas.¹²⁹ However, there are elements of the judicial system that are not directly in the hands of the judges to decide. The main one concerns the legal costs of bringing a claim.

The general position is that legal costs are payable by the party that loses the case.¹³⁰ 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,¹³¹ 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.¹³²

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

¹²⁶ On 11 June 2015, the government announced that it will review the introduction of these fees: <https://www.gov.uk/government/publications/employment-tribunal-fees-post-implementation-review>.

¹²⁷ A discussion of this issue is outside the scope of this report. However, see the report by John Ruggie as part of his UN mandate: 'The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations With Respect to Human Rights: Background Note' (8–9 November 2007), <http://www.reports-and-materials.org/Copenhagen-8-9-Nov-2007-backgroundunder.pdf>, and A. Sheppard and A. Crockett, 'Stabilisation Clauses: A Threat to Sustainable Development?' in A. Newcombe, M. Gehring and M-C Cordonier Segger (eds), *Sustainable Development in World Investment Law* (2010) 338.

¹²⁸ See E. Lein, R. McCorquodale, L. McNamara, H. Kupelyants and J. Del Rio, *Factors Influencing International Litigants' Decisions to bring Commercial Claims to the London Based Courts* (2015): <https://www.gov.uk/government/publications/factors-influencing-international-litigants-decisions-to-bring-commercial-claims-to-the-london-based-courts>.

¹²⁹ See, for example, the decisions in *Connelly v. RTZ Corporation plc*, op cit, and *Lubbe v. Cape plc*, op cit, discussed above.

¹³⁰ Civil Procedure Rules, Practice Direction to Part 44, sec. 9.1.

¹³¹ See B. Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, (2002) 27 Yale JIL27-31, though note that the new Consumer Rights Act 2015 provides for some collective actions.

¹³² Courts and Legal Services Act 1990 (UK), ss. 58 and 58A.

significantly with the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), 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.¹³³ This is a barrier as it means that successful claimants and their lawyers incur expenses that cannot be paid by the defendant. 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 overseas abuses.¹³⁴ Further, previously some claimants had taken out litigation insurance to protect themselves from being bankrupted if they lose the case but, under LASPO, 'after the event insurance premiums' will no longer be recoverable in an environmental claim.¹³⁵

Indeed, the concerns over changes brought about by LASPO prompted John Ruggie, the author of the UNGPs, to write to the UK Justice Minister raising his concerns about the 'disincentives' being introduced, on the basis that they may have a potential 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 being brought before UK courts in situations where alternative sources of remedy are unavailable.¹³⁶

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,¹³⁷ which may mean that compensation is considerably lower than in the UK.¹³⁸

Thus there are barriers to access to judicial remedies for abuses of human rights by business enterprises in the UK, and even more so, where those abuses occurred overseas, due to the new system for the recovery of legal costs. Concern about this has been raised both by claimants' lawyers and by corporations' general counsel, as the latter may sometimes prefer the case to be brought before the courts for a judicial determination than left to the vagaries of the media.

¹³³ LASPO, op cit, s. 44.

¹³⁴ There are also now costs in intervening in a case: s.87 Criminal Justice and Courts Act 2015.

¹³⁵ LASPO, op cit, sec. 46.

¹³⁶ Letter from the SRSG for Business and Human Rights, dated 16th May 2011: <http://www.guardian.co.uk/law/2011/jun/16/united-nations-legal-aid-cuts-trafigura>.

¹³⁷ Rome II, op cit, arts.4 and 15.

¹³⁸ One reason a legal case is brought against a parent corporation in the UK is that the laws and practices (and rule of law) in the State where the violations of human rights occurred may not be in place, operating in any effective or fair manner, or have procedure rules that prevent these type of claims being brought. Thus any decisions on damages for these cases are likely to be absent, untested or even subject to political and other pressure. That is even if the victims can bring the case at all and is able to enforce any judgment.

C. Non-Judicial Mechanisms

There are a large number of State non-judicial mechanisms in the UK. This section considers the primary ones which could be available as a means of access to a remedy for victims of abuses of human rights by business enterprises. Those included are the ones requested for this report, as well as others selected as being relevant.

C1. National Contact Point

The Organisation for Economic Cooperation and Development (OECD) is an international body, whose membership includes the most industrialised States, including the UK, and whose mandate extends to 'promote policies that will improve the economic and social well-being of people around the world'.¹³⁹ In 2011 it incorporated a human rights chapter and policies on due diligence and business relationship management into its existing OECD Guidelines for Multinational Enterprises (OECD Guidelines).¹⁴⁰ These additions closely followed the wording of the UNGPs.

In terms of the OECD Guidelines, adhering States are required to set up National Contact Points (NCPs) to promote and implement the OECD Guidelines. The role of NCPs includes contributing to the implementation of the Guidelines and they are intended to be made available to 'the business community, worker organisations, other non-governmental organisations and other interested parties'.¹⁴¹ The Commentary to the OECD Guidelines notes:

Since governments are accorded flexibility in the way they organise NCPs, NCPs should function in a visible, accessible, transparent, and accountable manner.¹⁴²

The OECD Guidelines are not legally binding, and the recommendations of the NCP similarly do not have binding legal force.

Many of the OECD member States have established NCPs, including the UK. The UK NCP is based in BIS. It comprises two staff, with the occasional support of another member of staff, and is partly funded by the Department for International Development (DfID). It has a Steering Board, on which there are 5 representatives of government departments, and 4 non-government representatives, including one representative of trade unions, one of business and one of non-governmental organisations, with one independent.¹⁴³

Complaints can be brought by an interested party, which may be an individual or community, and can be brought by a trade union, NGO or other entity on behalf of a complainant. The

¹³⁹ <http://www.oecd.org/about>.

¹⁴⁰ OECD Guidelines on Multinational Enterprises: <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

¹⁴¹ Ibid, Part II.I.1, at p. 68.

¹⁴² Ibid, Part I.9 of the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, at p. 78.

¹⁴³ See <https://www.gov.uk/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-oecd-guidelines-for-multinational-enterprises>.

complaint must relate to one of the matters listed in the OECD Guidelines. Whilst these matters cover a wide range of issues, such as the environment, taxation and consumer interests, the significant majority of complaints since 2011 have related to human rights, including labour rights.¹⁴⁴

Once a complaint is made, the procedures are that the NCP will make an initial assessment as to whether to accept the complaint.¹⁴⁵ The NCP will consider, for example, the complainant's interest in the matter, and whether the issues raised are material and substantiated.¹⁴⁶ It will also normally have separate meetings with the complainants and the business enterprise before making its initial assessment.¹⁴⁷ The UK NCP may decide to forward the complaint to another NCP, which will decide whether to investigate or not under its own procedures, though with no guarantee that it will do so.¹⁴⁸ There is no substantive appeal available to any other forum (as is consistent with some other non-judicial processes) if the complaint is rejected at the initial assessment stage.¹⁴⁹

If the initial assessment concludes that the complaint should be pursued, the NCP will recommend that the parties resolve the matter through mediation. The NCP uses external mediators obtained through Acas and based in London, and pays for their services. Mediators used by the UK NCP are chosen for their wide experience of dealing with the issues raised by the Guidelines, though the information provided was that they generally have no direct expertise in non-labour human rights matters.

If no agreement is reached between the parties at mediation, or where one party is unwilling to participate in the mediation process, the NCP will undertake an investigation. In so doing it relies on the information provided by the complainant and by the business enterprise (though the NCP cannot compel the production of documents, most business enterprises do provide relevant information), all of which are often crafted like a legal argument. At the end of this

¹⁴⁴ This is based on a very brief review of the case statements set out in the UK NCP webpage: <https://www.gov.uk/government/collections/uk-national-contact-point-statements> and the review of cases across the OECD as set out in OECD Watch, *Remedy Remains Rare* (2015). The time available and the scope of this study meant that no detailed analysis of the complaints made to or investigations undertaken by the UK NCP was feasible.

¹⁴⁵ 'Bringing a complaint under the OECD Guidelines for Multinational Enterprises' 11 June 2008, updated on 14 January 2011: https://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.

¹⁴⁶ 'UK National Contact Point Procedures for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises', latest update 27 November 2013: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf, at para 3.4.1, p. 11.

¹⁴⁷ *Ibid*, at paras 3.1.3 and 3.1.4, p. 10.

¹⁴⁸ For example, when the complaint against C&A for its alleged negligence to protect garment workers from the Tazreen factory fire was referred by the German NCP to the Brazilian NCP, the latter did not take 'any steps to initiate the procedure': European Centre for Constitutional and Human Rights 'The OECD procedures regarding surveillance technology against Gamma and Trovicorand regarding working conditions in Asia against KiK, C&A and Karl Rieker' Berlin, March 2015: http://business-humanrights.org/sites/default/files/documents/OECD%20procedures_Evaluation_2015_03_10_0.pdf, at p. 5.

¹⁴⁹ A review is available to the NCP Steering Board but only for procedural errors in the investigation: 'Review Procedure for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises to the UK National Contact Point', updated on 14 January 2011: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31804/11-654-review-procedure-uk-national-contact-point.pdf, at para 3.3, p. 4.

investigation the NCP issues a final statement which sets out the issues raised, the merits and procedure, and the NCP's recommendations. These recommendations are normally published on the NCP's website, giving them some visibility, but the recommendations are not legally binding. There are no legal enforcement mechanisms and no compliance follow-up. These are, of course, features of the NCP framework as a whole and not just the UK NCP.¹⁵⁰

A report in June 2015 by OECD Watch showed that the UK NCP received 72 complaints between 2001 and 2015.¹⁵¹ This was the largest number of any NCP and comprises almost 30% of all NCP complaints worldwide, though is an average of less than 5 a year. The number of complaints is probably influenced by the relatively active public outreach programme of the UK NCP, which sets out the powers (and the limitations on the powers) of the NCP and the provision of on-line information by the UK NCP. Those who have dealt with the UK NCP note that the advice they received was that for complaints of serious human rights abuses, and especially where the relationship between the community and the business enterprise was poor or where compensation for the victims or criminal conviction was sought, then the NCP process was not the route to take.

Thus the NCP does provide a non-judicial mechanism for some complaints to be brought against business enterprises for some human rights abuses. In particular, it provides avenues for redress for claimants who would not automatically have standing to bring legal proceedings in court, such as an affected community or an NGO. As the UK NCP itself makes clear, it was not designed to be a substitute for judicial remedies in cases of serious human rights violations.

Overseas

The NCP is able to consider abuses of human rights by business enterprises that occur overseas. As long as there is a UK business involved, then it falls within the jurisdiction of the NCP, including when the UK business is operating through a subsidiary.¹⁵²

Barriers

The barriers to access a remedy through the NCP 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.¹⁵³ While the UK NCP is unusual in that it pays for external mediators, which is a considerable assistance to victims, it would assist victims if these mediators were chosen because of their expertise in human rights matters and were not solely located in London. In any event, while

¹⁵⁰ There are said to be instances where shareholder/s of a business enterprise have contacted the NCP to ask when the NCP's report is being published, as the share price might be affected.

¹⁵¹ OECD Watch, *Remedy Remains Rare* (2015): http://oecdwatch.org/publications-en/Publication_4201.

¹⁵² See, for example, the complaint by Global Witness against Afrimex: http://oecdwatch.org/files/global_witness_vs_afrimex_ncp_final_statement.

¹⁵³ *Remedy Remains Rare*, op cit, p.22-32. It criticises the situation where the UK NCP applied an 'inevitability' standard in relation to future harms (p.30), which was higher than its previous standards.

mediation can be an effective way forward in reaching a settlement during litigation, in non-litigious situations, mediation concerning a human rights abuse is both difficult and problematic as a remedy, as the UK NCP has acknowledged.

Access to remedy is hampered by the fact that just two or three people undertake the initial assessment and investigation. Despite their best endeavours, these people, being employees of BIS, might be seen as neither independent from government (despite the OECD Procedural Guidance)¹⁵⁴ nor objective - even if they are better than some other NCPs¹⁵⁵ - as they located in a part of a government department whose main aim is considered to be supporting business.¹⁵⁶ There is a concern that the Steering Board has a majority of government department representatives, is not appointed through an open, transparent process, and is constrained on its ability to review investigations.¹⁵⁷

The fact that decisions are not binding is a significant barrier to a remedy. Business may 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].¹⁵⁸

In their calculation of improvement of conditions for victims, the report included such matters as statements by business enterprises acknowledging wrongdoing, an improvement in corporate policy and/or due diligence procedures, directly improved conditions and compensation, with not a single case of compensation being provided.¹⁵⁹ The report noted two instances where the UK NCP's actions had provided a remedy: one concerning Formula One car racing; and one where its recommendations led to shareholder divestment that led to changes of policy by the business enterprise.¹⁶⁰

These are barriers that are inherent in the whole NCP process. However, the UK NCP could take some actions that could reduce these barriers. These would include making compliance

¹⁵⁴ Section I.A.2 of the Procedural Guidance, op cit, where they should include "independent experts".

¹⁵⁵ See *Remedy Remains Rare* p.33, which criticises the situation where a NCP is housed in a business ministry but considers the UK NCP as being more independent and European Centre for Constitutional and Human Rights, 'The OECD procedures regarding surveillance technology against Gamma and Trovicorand regarding working conditions in Asia against KiK, C&A and Karl Rieker': 'There are far fewer concerns about the impartiality of the NCP in the UK [compared to that of the NCP in Germany]. Although it is located in the Department for Business, Innovation & Skills, the supervision by the Steering Board consisting of representatives of ministries and business, trade unions and nongovernmental organizations, ensures that all interests are balanced', Berlin, March 2015: http://business-humanrights.org/sites/default/files/documents/OECD%20procedures_Evaluation_2015_03_10_0.pdf, at p. 10.

¹⁵⁶ NCP staff were originally drawn from BIS, FCO and DFID. The current NCP staff are part of the Trade Policy Unit, which is a tripartite division of BIS.

¹⁵⁷ *Remedy Remains Rare*, op cit, p.34. There is an example of an earlier UK NCP Steering Board taking action, where it reopened a case against the BP involvement in the Baku-Tbilisi-Ceyhan oil pipeline – ibid, p.35-36.

¹⁵⁸ Ibid, p.19 (their emphasis).

¹⁵⁹ Ibid.

¹⁶⁰ Ibid p. 17 and 32.

determinations in its recommendations, providing sanctions against a business enterprise that refused to participate in the NCP investigation, and having a stronger follow-up procedure with written reports to check compliance.¹⁶¹ The UK NCP recommendation could also include a recommendation of a direct remedy for the victims themselves.

C2. Gangmasters Licensing Authority

The Gangmasters Licensing Authority (GLA) was established pursuant to the Gangmasters (Licensing) Act 2004 (GLA Act).¹⁶² Initially, the GLA operated under the auspices of the Department of Environment, Food, Regions and Agriculture (Defra) but in 2014 it was transferred to operate under the Home Office in order to link it more directly to the law enforcement branches of government.¹⁶³

The GLA's purpose is to operate a licensing scheme for labour providers in order to regulate, inspect and prosecute offences of exploitation of workers in the agriculture, horticulture, dairy farming, livestock, shellfish gathering and associated food processing and packaging sectors. The Act was adopted following the death of 23 Chinese workers in Morecambe Bay in 2004 who drowned while cockle picking.¹⁶⁴ It applies to corporations, unincorporated associations and partnerships irrespective of their place of formation.¹⁶⁵

There are eight areas of good practice which must be satisfied before the GLA will grant a licence. These are: fit and proper test; pay and tax matters; prevention of forced labour and mistreatment of workers; accommodation; working conditions; health and safety; recruiting workers and contractual arrangements; and sub-contracting and using other labour providers.¹⁶⁶ The third standard includes physical and mental mistreatment, restricting worker movements, debt bondage, retaining identification documents and withholding wages.¹⁶⁷ Thus the GLA can be considered to deal with human rights abuse in terms of the prohibition against slavery, forced labour and torture, inhuman or degrading treatment and punishment, rights to work (safe conditions of work and fair remuneration), rights to an adequate standard of living freedom from unlawful detention, and possible rights of children and of non-discrimination.

The GLA Act creates four offences:

¹⁶¹ The Canadian NCP has imposed sanctions for lack of participation and an example where the follow-up could work is with a complaint against GCM Resources concerning the Phulbari coalmine in Bangladesh, where the UK NCP has sought a follow-up report from the business enterprise on whether it has carried out a human rights impact assessment.

¹⁶² S. 1(1) Gangmasters (Licensing) Act 2004.

¹⁶³ Prime Minister's Office Press release, 'Tougher enforcement action and stronger penalties for unscrupulous employers', 9 April 2014: <https://www.gov.uk/government/news/tougher-enforcement-action-and-stronger-penalties-for-unscrupulous-employers>.

¹⁶⁴ GLA Report 'Strategy for Protecting Vulnerable and Exploited Workers' at para 2.2: <http://www.gla.gov.uk/PageFiles/1027/GLA%20Strategic%20Plan%202014-17.pdf>.

¹⁶⁵ Ss. 20-22 GLA Act.

¹⁶⁶ GLA Licensing Standards, May 2012: <http://www.gla.gov.uk/PageFiles/1020/Licensing%20Standards%20-%20May%202012.pdf>.

¹⁶⁷ Ibid, p. 14

- s.12 (1): Operating as a gangmaster without a licence;
- s. 12(2): Obtaining or possessing a false licence or false documentation which is likely to cause another person to believe that a person acting as a gangmaster is licensed;
- s.13 (1): Entering into an arrangement with an unlicensed gangmaster; and
- s.18: Obstructing a GLA enforcement officer who is carrying out his duties under the GLA Act.

The penalties range from 6 months imprisonment and/or a fine, up to 10 years in prison.¹⁶⁸ When an offence is identified, a formal warning is issued to the gangmaster before a criminal investigation is undertaken to secure the evidence for prosecution. The number of convictions between 2008 and 2014 was 78, of which the majority were under section 12.¹⁶⁹

Inspections are conducted upon applications for licences as well as on a random basis throughout the duration of a licence on an 'intelligence-led basis' to ensure the licencing standards are being maintained. In addition to these compliance checks GLA investigate unlicensed activity. However, the number of GLA-initiated investigations of criminal gangmaster activities fell from 134 in 2011 to 68 in 2014.¹⁷⁰ The current number of licensed gangmasters is about 950.

The offence of entering into arrangements with unlicensed gangmasters enables the GLA to deal with business enterprises along the value chain. This includes, for example, supermarkets when they purchase products from an unlicensed gangmaster. There is a defence available of due diligence and reasonable steps taken by the third party to ascertain the gangmaster's status is licenced.¹⁷¹

The offence of entering into arrangements with unlicensed gangmasters was in issue in *Moss & Son Ltd v Crown Prosecution Service*.¹⁷² Moss & Sons Ltd were dairy farmers who obtained a herdsman from Marden Management Ltd, which was not a licensed gangmaster. Pursuant to their contract, Moss paid a fee to Marden, out of which the herdsman would be remunerated, but Marden failed to pay the herdsman the agricultural minimum wage. Moss was prosecuted for contracting with an unlicensed gangmaster, which resulted in financial exploitation of the herdsman, even though the herdsman was said to have been treated well by Moss. However, the offence under s. 13 does not require that the party that contracts with the unlicensed gangmaster knows that he is dealing with an unlicensed gangmaster or that the worker is being exploited, i.e. it is a strict liability offence. However, the Court noted the 'convoluted'

¹⁶⁸ S. 12(3) Gangmasters (Licencing) Act 2004. There are variations in penalties between England and Wales, and Scotland and Northern Ireland.

¹⁶⁹ See <http://www.gla.gov.uk/Our-Impact/Convictions>.

¹⁷⁰ 'Gangmaster prosecutions decline to four-year low, reports Home Office', *The Guardian*, 14 November 2014.

¹⁷¹ S. 13(2) Gangmasters (Licensing) Act 2004: In proceedings against a person for an offence under subsection (1) it is a defence for him to prove that he-

(a) took all reasonable steps to satisfy himself that the gangmaster was acting under the authority of a valid licence, and

(b) did not know, and had no reasonable grounds for suspecting that the gangmaster was not the holder of a valid licence.

¹⁷² *Moss & Son Ltd v Crown Prosecution Service* [2012] EWHC 3658 (Admin).

nature of the process of prosecuting GLA related offences, in which the GLA and the CPS had to review the matter over many stages. Hence it has been argued that it would be more efficient to have the GLA report to the CPS and have the CPS solely decide on whether to instigate prosecution.¹⁷³

These comments highlight that the GLA relies on other authorities for some of the regulation of its activities. This includes in the enforcement of some of their licensing standards, such as payment of tax and health and safety. Similarly, while the legal status of the worker is not directly in issue, if it appears to the GLA that most of the workers involved might be working without the requisite visas (which is not the usual situation), the GLA is likely to refer the case to other authorities.

It would appear that the creation of the licensing requirements for gangmasters has regulated their activities and provided a means to improve standards in the sectors covered. A Joseph Rowntree Foundation Report in 2013¹⁷⁴ considered that the GLA regime has generated a positive impact insofar as monitoring of the licensing standards and revoking of licences were concerned.¹⁷⁵ Its scope includes third party business enterprises which enter into contracts with unlicensed gangmasters, thereby increasing the atmosphere of pressure to comply with the GLA licensing standards with the ultimate goal to eradicate forced labour and worker exploitation.

Overseas

The GLA's responsibilities relate to any business within the defined sectors operating in the UK, UK coastal waters and UK shorelines.¹⁷⁶ This is irrespective of where the business may be registered. It does not deal with issues of human rights abuses overseas.

Barriers

The main barrier in this non-judicial mechanism is that there is no remedy provided to the worker, no matter how many abuses of human rights they suffered at the hands of the gangmaster. There was consideration given to introducing civil penalties and a requirement on the business to repay an exploited worker of wages or other payment which was taken by the gangmaster, but this has not been implemented.¹⁷⁷

The offences under the GLA Act are to be a gangmaster without a licence. It is not an offence to be a gangmaster who violates labour rights. So there appears to be a potential level of abuse of labour rights as being outside the GLA Act. Indeed, the approach of using warning

¹⁷³ See F. Stark, 'The Dairy, the Herdsman and the Gangmaster' 72 *Cambridge Law Journal* (2013).

¹⁷⁴ A. Geddes, G. Craig and S. Scott, *Forced Labour in the UK*, Joseph Rowntree Foundation Report, June 2013: <http://www.jrf.org.uk/sites/files/jrf/Forced%20Labour%20in%20the%20UK%20FINAL%20prog%20paper.pdf>

¹⁷⁵ In 2010-2011 the GLA revoked 33 licenses, three of which were revoked from Novair Ltd, OK Private Enterprises Ltd and Plus Staff 24 Ltd respectively, for the following reasons: workers' contracts contained clauses 'allowing for significant deductions from [their] wages', workers who complained were disciplined by the company by suffering reductions in their work days or hours, and making further deductions from low wages, *ibid*, p. 29.

¹⁷⁶ S.5 of the GLA Act.

¹⁷⁷ The GLA Strategic Plan 2014-2017, 'Strategy for Protecting Vulnerable and Exploited Workers': <http://www.gla.gov.uk/PageFiles/1027/GLA%20Strategic%20Plan%202014-17.pdf>, para 4.3, p. 5

letters and the level of penalties may be indicative of this. For example, a £500 fine was given to a Romanian gangmaster for subjecting workers to ‘appalling conditions’ of accommodation,¹⁷⁸ yet ‘[a] rap over the knuckles is, for your average villain, not going to be terribly worrying. They know the GLA don’t have the resources to follow them up.’¹⁷⁹ While the GLA does not determine the sentences, such responses from the courts do not assist the use of such a non-judicial mechanism by victims.

C3. The Equality and Human Rights Commission

The Equality and Human Rights Commission (EHRC) is recognised by the UN as the National Human Rights Institution (NHRI) for England and Wales.¹⁸⁰ It is a public body established under the Equality Act 2006, with a general mandate to reduce inequality, eliminate discrimination and to protect and promote human rights.¹⁸¹ It primarily does this through reports, investigations and public engagement.¹⁸² The Northern Ireland Human Rights Commission and Scottish Human Rights Commission (for devolved matters) carry out similar roles in those parts of the United Kingdom. The rest of this section describes the work of the EHRC.

The EHRC has some powers in relation to judicial matters. It can bring judicial review proceedings on the basis of breaches of the Human Rights Act 1998 and in relation to any matter in connection with its mandate (which could include international human rights law issues), as well as intervening in human rights proceedings taken by others.¹⁸³ The former power is, however, limited to public authorities, while the latter intervention would be where a case raises issues of public policy and general public concern. This might include the conduct of business enterprises where the alleged activities could be considered to affect adversely the wider community.¹⁸⁴ However, the ‘EHRC does not take up individual cases in human rights issues and it does not have the power to mediate in human rights issues.’¹⁸⁵

The EHRC has intervened in some cases involving complaints about the abuse of human rights by business enterprises. These have included cases where the business enterprise has been carrying out public activities, such as providing care services for local councils,¹⁸⁶ and, more rarely, in employment issues within a business. An example of the latter is SCA

¹⁷⁸ ‘Gangmaster Licensing Authority to appeal ‘shocking’ sentence’, BBC News, 9 October 2014: <http://www.bbc.co.uk/news/uk-northern-ireland-29547874>

¹⁷⁹ ‘Gangmasters caught running illegal labour teams escape prosecution’ *The Telegraph*, 6 June 2012.

¹⁸⁰ It is also the NHRI for Scotland in relation to matters reserved to the UK Parliament.

¹⁸¹ See EHRC: <http://www.equalityhumanrights.com/about-us/about-commission/our-vision-and-mission>.

¹⁸² See Compliance and Enforcement Policy, Revised in August 2012 to reflect the EHRC Strategic Plan 2012 -15, Updated in January 2015, pp. 5-6: <http://www.equalityhumanrights.com/legal-and-policy/commission/enforcement-powers>.

¹⁸³ <http://www.equalityhumanrights.com/legal-and-policy/commission/legal-powers>.

¹⁸⁴ *Ibid.*

¹⁸⁵ See the comment of A. Christie, Director of Policy, EHRC, to the Joint Committee on Human Rights, ‘Any of our business? – Human Rights and the UK Private Sector’ (HL Paper 5-II/HC 64-II), First Report of Session 2009-2010, Vol. II, Oral and Written Evidence, 16 December 2009, Ev. 52.

¹⁸⁶ For example, *R (South West Care Homes Ltd & Ors) v Devon County Council & Anor* [2012] EWHC 2967 (Admin).

Packaging v Boyle,¹⁸⁷ involving a claim alleging disability discrimination by an employee against a business, where the EHRC made submissions on the definition of “disability”, as it had wider implications for the community.

In relation to increasing compliance with human rights in the public and private sectors, the EHRC uses monitoring and seeks to cooperate with various sectors in order to promote compliance.¹⁸⁸ It can issue codes of practice and non-statutory guidance to address compliance on a sectoral basis.¹⁸⁹ For example, the EHRC issued an Equal Pay Statutory Code of Practice for the financial services sector, to help employers, advisers, trade union representatives, human resources departments and others,¹⁹⁰ and carried out investigations on human rights compliance in some sectors.¹⁹¹ For the first time, in June 2015, it sent out a tender for the provision of guidance on a range of business and human rights issues.¹⁹² This is an important initiative for a NHRI to take on business and human rights matters.

In practice, other than the instances of intervention and issuing of codes of practice on labour rights matters, the EHRC is primarily concerned with civil and political rights. However, its mandate does extend to other human rights treaties to which the UK is a party, such as the International Covenant on Economic, Social and Cultural Rights 1966.

Overseas

The mandate of the EHRC defines its territorial jurisdiction as being limited to acts committed within the UK,¹⁹³ and it has stated that: ‘[t]he mandate of the EHRC is Great Britain specific, and due to the limitations of its resources and the breadth and scope of its mandate, the EHRC’s priority is certainly very much focused internally in Great Britain’.¹⁹⁴ However, the Equality Act 2010 does contain provisions that might be seen to extend the application of the Act to actions occurring outside the UK,¹⁹⁵ and the case law and the practice of the EHRC

¹⁸⁷ *SCA Packaging Ltd v Boyle (Northern Ireland)* [2009] UKHL 37.

¹⁸⁸ See, for example, Inquiry into Sex Discrimination in the Finance Sector:

<http://www.equalityhumanrights.com/legal-and-policy/our-legal-work/inquiries-and-assessments/inquiry-sex-discrimination-finance-sector>, and Report on Employment Practices in the Cleaning Sector EHRC, August 2014: <http://www.equalityhumanrights.com/about-us/our-work/key-projects/invisible-workforce-employment-practices-cleaning-sector>, as well as its inquiry into the home care sector: <http://www.equalityhumanrights.com/legal-and-policy/our-legal-work/inquiries-and-assessments/inquiry-home-care-older-people>.

¹⁸⁹ See Compliance and Enforcement Policy, *op cit*, p. 6. Note that the EHRC entered into a formal agreement with a civil engineering company (‘T’ Engineering which is part of a large commercial group) following an Employment Tribunal case concerning the sexual harassment of an employee. Following an inquiry an agreement between the Commission and ‘T’ was signed in early 2009 detailing the way in which ‘T’ would deal with equality and diversity in its workplace.

¹⁹⁰ See http://www.equalityhumanrights.com/sites/default/files/publication_pdf/equalpaycode.pdf, p. 9.

¹⁹¹ See for example the EHRC’s inquiry into the meat and poultry processing sector at <http://www.equalityhumanrights.com/publication/meat-and-poultry-processing-review>

¹⁹² See http://equalityhumanrights.g2b.info/cgi-gen/profile.pl?action=view_noticev4&other_user=618895¬ice=146545076&type=CompetitiveContractNotice&oid=6405&ctype=2.

¹⁹³ Limited exceptions apply, see s.94 of the Equality Act 2006 and s. 217 of Equality Act 2010.

¹⁹⁴ See the comment by Mr A. Christie, Director of Policy, EHRC, *op cit*.

¹⁹⁵ See Part 3 s.29 (9) and (10); s.30(6); Chapter 4 s.8 (2), (6); s.82 (7); Part 10 s.35 (5) of the Equality Act 2010. See also submissions to the Joint Committee on Human Rights: ‘Any of our business? – Human Rights and the UK private sector’, First Report of Session 2009-2010, Vol. II, Oral and Written Evidence, 16 December 2009.

indicates some instances where it has intervened in cases where the jurisdictional reach of the HRA overseas has been in issue.¹⁹⁶

Barriers

The EHRC is primarily aimed at ensuring compliance with human rights by public authorities. Therefore, it is unlikely to provide a remedy to any significant extent for abuses of human rights by business enterprises. Indeed any access to a remedy it could provide is only to intervene in a case already brought by the victim, and that is within limited areas of human rights abuse. The EHRC does aim, through judicial and non-judicial means, to raise awareness and to nudge individuals and business towards compliance. It has carried out some sector-specific studies¹⁹⁷ and participates in the cross-government Steering Group on Business and Human Rights, as is appropriate for a NHRI and which could lead to government actions in relation to abuses of human rights by business enterprises.

C4. Ombudsman and Other Government Complaints Offices

There are a considerable number of ombudsman offices created by legislation.¹⁹⁸ These include the Local Government Ombudsman,¹⁹⁹ the Public Service Ombudsman for Wales,²⁰⁰ and the Parliamentary and Health Service Ombudsman.²⁰¹ In all these instances, there is no power to address complaints against the conduct of business enterprises, unless they are performing public functions.

There are some ombudspersons or commissioners whose mandates are wide enough to include the investigation of human rights abuses by business enterprises. These include the Children's Commissioners for England,²⁰² Scotland²⁰³ and Wales,²⁰⁴ and the Information Commissioner's Office (ICO),²⁰⁵ the latter of which deals with complaints concerning information and privacy rights, and can investigate the conduct of business enterprise. For example, the ICO fined a personal injury claims business £80,000 for breach of privacy in having targeted non-consenting members of the public with direct marketing calls,²⁰⁶ and instigated the prosecution of a former bank employee who had unlawfully accessed a former partner's bank account.²⁰⁷

¹⁹⁶ See, for example, *R (Smith) v Ministry of Defence* [2013] UKSC 41, concerning the extent of the application of the HRA to military forces overseas.

¹⁹⁷ See for example the EHRC's inquiry into the meat and poultry processing sector at <http://www.equalityhumanrights.com/publication/meat-and-poultry-processing-review>

¹⁹⁸ See <http://www.ombudsman.org.uk/home>.

¹⁹⁹ Created under the Local Government Act 1974: <http://www.lgo.org.uk/>.

²⁰⁰ Created under the Public Services Ombudsman (Wales) Act 2005: <http://www.ombudsman-wales.org.uk>.

²⁰¹ Established by the Parliamentary Commissioner Act 1967.

²⁰² See <http://www.childrenscommissioner.gov.uk>.

²⁰³ See <http://www.sccyp.org.uk>.

²⁰⁴ See <http://www.childcom.org.uk>.

²⁰⁵ See <https://ico.org.uk>.

²⁰⁶ See <https://ico.org.uk/action-weve-taken/enforcement/direct-assist-ltd>.

²⁰⁷ See <https://ico.org.uk/action-weve-taken/enforcement/yasir-manzoor>.

In certain sectors, ombudsperson-type mechanisms have been created to deal with complaints against business enterprises operating within that sector. Examples include the Financial Ombudsman Service,²⁰⁸ and the Financial Conduct Authority,²⁰⁹ both of which deal with complaints against banks, insurance and finance enterprises, and have the power to impose fines on business enterprises. There are also the Legal Ombudsman²¹⁰ and various property redress schemes which regulate the conduct of estate agents, auctioneers and other property professionals.²¹¹ These sector-specific mechanisms either investigate malpractice and unprofessional conduct, or attempt to resolve contractual or consumer disputes, without direct reference to human rights, and so are not within the scope of this report. In addition, there is the Citizens Advice Bureau, which acts as a platform for dealing with various types of complaints by referring the complainant to the relevant body and assisting with advice. Although it does not have a human rights-specific complaints mechanism, its activities deal with a wide range of human rights issues.

In addition, some sectors have their own regulatory bodies, which may have powers in relation to human rights abuses by business enterprises in their sector. For example, the Advertising Standards Authority (ASA) is a body created by the advertising sector under the UK Advertising Codes,²¹² whose work includes acting on complaints (by individuals and advertisers) with regard to misleading, harmful or offensive advertisements, sales promotions and direct marketing.²¹³ If the ASA decides that an advertisement is in breach of the UK Advertising Codes, it requests that it be withdrawn or amended.²¹⁴ In case of non-compliance the ASA can refer advertisers to the Trading Standards unit within BIS for further action²¹⁵ or it can refer a complaint to the Independent Regulator and Competition Authority for the UK Communication Industries (Ofcom), which can impose fines or can withdraw an advertiser's license to broadcast. However, its role is really about consumer complaints and not directly human rights issues.²¹⁶

Overseas

²⁰⁸ Established by the Financial Services and Markets Act 2000: <http://www.financial-ombudsman.org.uk/default.htm>.

²⁰⁹ Financial Conduct Authority: <http://www.fca.org.uk/>.

²¹⁰ See <http://www.legalombudsman.org.uk>.

²¹¹ For example, the Property Ombudsman, <http://www.tpos.co.uk/index.php>; the Ombudsman Services: Property, <http://www.ombudsman-services.org/property.html>; and the Property Redress Scheme, <https://www.theprs.co.uk>.

²¹² UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP) which applies to advertisements across media including newspapers, magazines, billboards, posters, leaflets, mailings, e-mails, texts and on UK based company websites. The CAP does not have the force of law and its interpretation will reflect its flexibility. The Code operates alongside the law; the Courts may make rulings on matters covered by the Code (Part IV (e) of the CAP). See also UK Code of Broadcast Advertising (BCAP) applies to the content and scheduling of television and radio advertisements (including teleshopping) and it also covers programme sponsorship credits on radio and television services, however complaints about the latter two are handled by Ofcom. It is also within the Unfair Commercial Practices Directive.

²¹³ <http://asa.org.uk/About-ASA/About-regulation.aspx>.

²¹⁴ *ibid.*

²¹⁵ The Trading Standards unit is the ASA's legal backstop for non-broadcast advertising and can initiate statutory interventions against advertisers that fail to co-operate with the self-regulatory system.

²¹⁶ Though it can have indirect impacts, such as in ASA's adjudication on advertisements appearing to sexualise children, on which the complaint was upheld: ASA Adjudication on American Apparel (UK) Ltd: http://www.asa.org.uk/Rulings/Adjudications/2012/12/American-Apparel-UK-Ltd/SHP_ADJ_212169.aspx#.VUnoxvIviko.

All of the government created bodies are limited in their activities to the UK and to actions occurring in the UK. In contrast, the private sector ASA does deal with overseas complaints but only with regard to external advertisements targeting UK consumers and not with UK advertisements overseas,²¹⁷ although it can refer a complaint, through the European Advertising Standards Alliance (EASA),²¹⁸ to the regulator in the State where the advertisement originated.

Barriers

The primary barrier to access to a remedy for these non-judicial mechanisms is that most of these bodies do not deal with business enterprises directly. They are focussed on public authorities, or their responsibility concerns regulating a sector in terms of its interaction with consumers as consumers. They do not provide remedies to the victims of human rights abuses.

C5. Groceries Code Adjudicator

The Groceries Code Adjudicator (GCA) was created by the Groceries Code Adjudicator Act 2013 (GCAA),²¹⁹ and is an independent adjudicator situated within BIS. It is funded by a levy placed on certain suppliers and retailers.²²⁰ The GCA can take action with regard to 'obligations of large retailers owed to groceries suppliers across a range of supply chain practices. These include: 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.²²¹ This is based on the Groceries Supply Code of Practice, which is set out in the Groceries (Supply Chain Practices) Market Investigation Order 2009.²²² It is aimed at those retailers with a turnover of over £1 billion in the supply of groceries.²²³

The GCA's legal enforcement powers include conducting investigations²²⁴ (which may result in making recommendations), requiring information to be published or the imposition of

²¹⁷ See <http://asa.org.uk/About-ASA/Working-with-others/Cross-border-complaints.aspx>.

²¹⁸ The European Advertising Standards Alliance (EASA) is the European body for advertising self-regulation. 24 European States are members of EASA while 7 States have links with it: see <http://asa.org.uk/About-ASA/Working-with-others/Cross-border-complaints.aspx>.

²¹⁹ S.1 Groceries Code Adjudicator Act 2013 (GCAA).

²²⁰ S. 19 GCAA.

²²¹ Annual Report and Accounts, GCA, 23 June 2013 – 31 March 2014, p. 4: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335127/10143-TSO-GCA-Annual_Report_2014-ACCESSIBLE02.pdf.

²²² Made by the Competition Commission under Section 161 of the Enterprise Act 2002: http://webarchive.nationalarchives.gov.uk/20111108202701/http://competition-commission.org.uk/inquiries/ref2006/grocery/pdf/revised_gscop_order.pdf.

²²³ Groceries (Supply Chain Practices) Market Investigation Order 2009, s.4(1)(a). A violation has to concern the supply of groceries to specific retailers designated by the independent competition authorities, including: Asda Stores Limited, a subsidiary of Wal-Mart Stores Inc; Co-operative Group Limited; Marks & Spencer plc; Wm Morrison Supermarkets plc; J Sainsbury plc; Tesco plc; Waitrose Limited, a subsidiary of John Lewis plc; Aldi Stores Limited; Iceland Foods Limited, a subsidiary of the Big Food Group; Lidl UK GmbH.

²²⁴ S. 4, GCAA. The GCA can investigate confidential complaints from any source about how supermarkets treat their suppliers.

financial penalties,²²⁵ as well as settling disputes through arbitration between suppliers and large retailers. While an investigation does not result in attributing liability or awarding reparation, arbitration can do so.²²⁶ The GCA can also issue guidance clarifying the applied criteria and practice of the GCA.²²⁷ Both direct suppliers and large retailers can refer a dispute to arbitration,²²⁸ yet the complaint must be about a direct supply agreement with a retailer, 'not about practices further up the chain',²²⁹ and it only has jurisdiction in respect of certain retailers and direct suppliers.²³⁰

An investigation will not happen unless the GCA has reasonable grounds 'to suspect' that a breach of the Groceries Supply Code of Practice has occurred.²³¹ The GCA has the power to impose fines. The level of each fine is calculated according to a five-step approach which considers: the seriousness of the infringement; the entity's turnover in the UK; the duration of the infringement; any aggravating factors, such as the existence of intentional and repeated breaches or failures to comply with recommendations; any mitigating factors, such as cooperation with the investigation or time taken to remedy the breach; the desired deterrent effect; and proportionality.²³² In so doing, it appears that the GCA tends to focus on practices which have become widespread rather than individual breaches.²³³

The research conducted so far on the GCA has indicated that its 'soft' measures and structural obligations, such as the use of compliance officers, and the incorporation of Groceries Supply Code of Practice into supply agreements, provide subtle pressure for suppliers and retailers to act in a compliant manner.²³⁴ There is also evidence that the Groceries Supply Code of Practice is already having an effect, as it is being referred to by suppliers in some cases where they feel they are being subjected to unfair practices, though there is not always a spirit of fair dealing between retailer and supplier.²³⁵

Overseas

The jurisdictional scope of the GCA is limited to the UK.²³⁶ However, Article 1 of the Groceries Supply Code of Practice defines a supplier as 'any person carrying on (or actively seeking to

²²⁵ S. 6-9, GCAA.

²²⁶ The Groceries Code Adjudicator Presentation, Slide 9: <https://www.gov.uk/government/publications/the-groceries-code-adjudicator-presentation>

²²⁷ S. 12 GCAA.

²²⁸ S. 2 GCAA.

²²⁹ 'Complaining to the Groceries Code Adjudicator': <https://www.gov.uk/government/publications/complaining-to-the-groceries-code-adjudicator>, p.3.

²³⁰ The Groceries Supply Code of Practice covers only direct suppliers (e.g. manufacturers), so indirect suppliers (e.g. primary producers such as farmers and intermediaries) are not covered by the Code see: Complaining to the Groceries Code Adjudicator, *ibid*, p. 3.

²³¹ See GCA, 'Statutory guidance on how the Groceries Code Adjudicator will carry out investigations and enforcement functions' (2014) s 8.

²³² Groceries Code Adjudicator Statutory Guidance, s 71.

²³³ Statutory guidance on how the Groceries Code Adjudicator will carry out investigation and enforcement functions, Consultation response summary, Groceries Code Adjudicator, December 2013, p. 10.

²³⁴ J. Stefanelli and P. Marsden, *Models of Enforcement in Europe for Relations in the Food Supply Chain* (2012) and J. Stefanelli and P. Marsden, *Fair Relations in the Food Supply Chain: Establishing Effective European Enforcement Structures* (2014).

²³⁵ British Brands Group, 'Retailers' GSCOP reports 2011' (12 December 2011): <http://www.britishbrandsgroup.org.uk/upload/File/GSCOP%20retailer%20compliance%20report%202011.pdf>.

²³⁶ Article 24 of the Groceries Code Adjudicator Act 2013.

carry on) a business in the direct supply to any Retailer of Groceries for resale in the United Kingdom, and includes *any such person established anywhere in the world*, but excludes any person who is part of the same group of interconnected bodies corporate as the Retailer to which it supplies'.²³⁷ Thus the GCA has the authority to take action where, for example, one of the large listed UK retailers commits an abuse against a supplier residing outside the UK.

Barriers

Although the GCA deals with disputes regarding consumers, those disputes are focused on a supplier/retailer agreement and, hence, on a contractual obligation, rather than on a human right.²³⁸ Thus the GCA's jurisdiction is very limited and does not directly concern the victim of human rights abuses.

C6. Private Security Companies

Private security companies (PSCs) being used by States and by non-State actors have been a matter of concern in regard to their abuses of human rights (and of international humanitarian law) for decades, with the illegal treatment of prisoners in Abu Ghraib detention centre in Iraq indicative of this.²³⁹ This led to the drafting of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (Montreux Document) in 2008, which, though not legally binding, sets out the existing legal obligations of States in relation to PSCs, as well as good practices in areas of insecurity and armed conflict.²⁴⁰ This has been followed by introduction of the International Code of Conduct for Private Security Providers (ICOC),²⁴¹ to which PSCs can commit. PSCs that are signatories of the Code 'commit to the responsible provision of Security Services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients',²⁴²

In 2013 the International Code of Conduct Association (ICOCA) was established to ensure increased compliance of PSCs with international standards, including international human rights and humanitarian law, through the use of a certification and audit processes. The aims of ICOCA are stated as:

The Association shall be responsible for certifying under the Code that a company's systems and policies meet the Code's principles and the standards

²³⁷Article 1 of the Groceries Supply Code of Practice, emphasis added.

²³⁸ 'News from the Adjudicator', Edition 3, p. 2: [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423697/News from the Adjudicator Edition 3 final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423697/News_from_the_Adjudicator_Edition_3_final.pdf).

²³⁹ See S. MacLeod, 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-“Plus”', SHARE Research Paper 64 (2015): <http://www.sharesproject.nl/wp-content/uploads/2015/03/64.-MacLeod-PSCs-ONSA.pdf> (Netherlands *International Law Review* (2015) forthcoming). See also M. Bina, 'Private Military Contractor Liability and Accountability after Abu Ghraib' (2005) 39 *John Marshall Law Review* 1237.

²⁴⁰ Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008.

²⁴¹ International Code of Conduct for Private Security Companies, 9 November 2010: <http://www.icoc-ppsp.org>.

²⁴² *Ibid*, Preamble.

derived from the Code and that a company is undergoing monitoring, auditing, and verification, including in the field.... The Association shall be responsible for exercising oversight of Member companies' performance under the Code, including through external monitoring, reporting and a process to address alleged violations of the code.²⁴³

The UK government is a signatory to the Montreux Document and the ICOCA, and has encouraged British PSCs to sign the ICOC.²⁴⁴ They have undertaken consultations with PSCs and civil society to develop appropriate auditable standards, which should be met by those PSCs that wish to obtain UK government contracts.²⁴⁵ The justification is stated to be:

Clarity on the standards against which PSCs should be audited is an important step forward in the drive to raise standards in this industry through voluntary action, but independently audited. It is also a practical illustration of the Government's commitment to human rights and to working with business and civil society to find effective ways to implement our commitments even in the most challenging environments.²⁴⁶

This is consistent with the "New Actions Planned" in the UK NAP that:

[The UK will begin] certifying Private Security Companies in the UK based on the agreed UK standard for land-based companies, by working with the UK Accreditation Service (UKAS) to take forward the certification process, ensuring this includes expert human rights advice.²⁴⁷

However, while standards have been produced,²⁴⁸ and a pilot scheme undertaken, the UK guidance has not yet been produced.

The intention of this auditing and certification process of PSCs is that to change the management systems and corporate culture of PSCs to ensure that human rights issues are part of their decision-making. The hope is that this will decrease the abuses of human rights by PSCs.

Overseas

The clear intention is that this certification and auditing process applies to all PSCs operating overseas, especially in armed conflict and insecure zones.

²⁴³ International Code of Conduct Association, Articles of Association (2013): http://www.icoca.ch/en/articles_of_association, Articles 11.1 and 12.1.

²⁴⁴ The other States that have signed the ICOCA are: Australia, Norway, Sweden, Switzerland, and the US: see <http://www.icoca.ch>.

²⁴⁵ The author has been a participant in some of these consultations.

²⁴⁶ Foreign Office Minister, Mark Simmons, Statement to Parliament, 12 December 2012: <https://www.gov.uk/government/speeches/private-security-companies>.

²⁴⁷ UK NAP, op cit.

²⁴⁸ These standards are ISO28007 for maritime operations of PSCs and PSC1 for land operations of PSCs.

Barriers

The barriers for this non-judicial mechanism are primarily that this is a certification process that checks if a PSC has the requisite policies in place. The UK accreditation certification procedure is not a process that checks directly on the practice of PSCs on the ground or that enables victims to bring a claim, although the ICOCA has such a process.²⁴⁹ As one of the people involved in the pilot scheme has noted:

[The proposed UK scheme provides] no specific guidance on how a PSC should consider and address 'adverse human rights impacts' within its operations, e.g. through the use of [human rights impact assessments]. Nevertheless, there appears to be no hierarchy of risks and it seems to be the case that human rights risks are to be regarded as a risk in the same way as health and safety or environmental risks. The question is, to what extent will defining human rights as a risk and assessing potential adverse human rights impacts be an effective way to ensure compliance with human rights standards, and ultimately prevent the occurrence of human rights violations?²⁵⁰

There is an opportunity for these barriers to be addressed within the UK before the application of this certification accreditation process is finalised.

²⁴⁹ Articles 12 and 13 of the ICOCA provides for a monitoring and grievance function.

²⁵⁰ S. MacLeod, *op cit*, p.20-21.

D. Conclusions

Access to a remedy, as expressed in the 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'.²⁵¹ 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. Further, the UNGPs note that:

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.²⁵²

This report considers the judicial and non-judicial mechanisms for remedies currently available in the UK for victims of human rights abuses by business enterprises, where those abuses occur in the UK or overseas. In considering the barriers to access to a remedy, this report has considered legal, social, financial, practical and procedural barriers.

The judicial remedies provided by civil law, especially through tort claims, are available and have been used for abuses of human rights by business enterprises in the UK and for abuses overseas. As a consequence, compensation has been paid to some victims for the abuse of human rights that they suffered from business enterprises. However, there are procedural evidentiary barriers, which include restrictive disclosure rules that enable business enterprises not to provide relevant information, which is compounded by the courts' hesitancy in extending the duty of care through 'lifting the corporate veil'.²⁵³ There is also the reluctance by the courts to enquire into the broader business management of an enterprise that has many subsidiaries and other business relationships, or to allow effective collective action by claimants, including for overseas harms. In addition, the fact that legal costs are not able to be fully recovered, even if the victim's claim is successful, is a significant financial barrier, and has been criticised by the main author of the UNGPs and by judges.²⁵⁴

There has been an expansion of the criminal law mechanisms for bringing a case against business enterprises in recent years. The Bribery Act and the Modern Slavery Act, as well as

²⁵¹ Commentary to Guiding Principle 25.

²⁵² Commentary to Guiding Principle 25.

²⁵³ Though see *Woodland v. Essex County Council* [2013] UKSC 66, per Lord Sumption paras 6-7 about a non-derogable duty of care.

²⁵⁴ See, for example, Lord Justice Elias in *Unison (no 2)*, op cit, para 43: 'There cannot be an effective denial of the right of access, however justified the restriction might otherwise be.... in an appropriate case cost can impose such an excessive restriction as to amount in substance to denial of the right of access to the court. It is not enough that there is a formal right of access; the cost of the litigation... was simply too much for impecunious litigants.'

the Serious Crimes Act to some extent, are intended to cover actions by business enterprises in the UK and overseas, that are broadly about abuses of human rights by business enterprises. However, other than a few cases under the Bribery Act, there have been no prosecutions to date. This barrier is heightened by the apparent reluctance of prosecutors to proceed with such cases. There is also no automatic remedy (and often none at all) to the victim of the human rights abuse. It is also of note that in both civil and criminal cases the claim is not argued as a “human right” action, as that terminology is not available for these claims.

Labour rights are human rights and the employment tribunal mechanism is available for their abuses by business enterprises. There is a two-step process, with arbitration being required before access to a tribunal is available, and certain criteria must be met. While these tribunals provide a range of remedies available directly to the victim, they do now require that those who wish to bring a complaint must pay a fee, which is a financial, and possibly social, barrier to access to a remedy.

In relation to State-based non-judicial mechanisms, the most pertinent is the UK NCP, which seeks to implement the OECD Guidelines on Multinational Enterprises. NCPs can investigate human rights abuses by a business enterprise occurring 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. They can also refer the situation to another country’s NCP if that is better placed to undertake an investigation. Nevertheless, the NCP does not provide an enforceable remedy against the business enterprise or directly to the victim.²⁵⁵ It is also not an appropriate mechanism for dealing with many human rights abuses for which a business enterprise is not willing to engage with the complainant or the type of human rights abuse makes it difficult to resolve without the provision of a remedy to the victim.

Other non-judicial mechanisms include the Gangmasters Licensing Authority and the Groceries Code Adjudicator. Both focus on specific sectors of business and review whether those in the relevant sectors are complying with their licences or their codes of practice. Both can consider the actions of third parties in the value chain, though not if the activity is overseas. They do not provide any remedy to a victim. The proposed regulations concerning Private Security Companies would provide accreditation licensing with an auditing of their procedures. The Equality and Human Rights Commission’s focus is public authorities, though they can report on business sectors and individual enterprises, or intervene in an existing case against a business enterprise where it is a matter of public interest. Their role may increase in this area.

Most of the various Ombudsman and government complaint mechanisms are not intended to deal with human rights abuses by business enterprises. Some private sector mechanisms do consider consumer issues. Most of these mechanisms are limited by sector and are not available where the abuse of human rights occurred overseas, and restrict who can bring a complaint. Their focus is on the continuing operation of the business enterprise and not the human rights of the victim of abuse. These non-judicial mechanisms all have a barrier to

²⁵⁵ Joint Committee on Human Rights, ‘Any of our business? – Human Rights and the UK Private Sector’, op cit.; ‘urge[d] the UK government to develop options to enhance access to a remedy and encouraged the OECD that in the meantime it should consider how the OECD Guidelines and the National Contact Point system can be strengthened to give greater capacity for individuals to secure an effective remedy’.

access to a remedy in so far as they do not provide any form of direct remedy to the victim of the human rights abuse by the business enterprise.

In conclusion, the current access to a remedy in the UK for a claim of abuse of human rights by a business enterprise is limited. This is confirmed by the Joint Parliamentary Committee on Human Rights, which after lengthy consultations about business and human rights issues, noted:

[The] difficulties for alleged victims of human rights abuses, in which UK companies are alleged to be complicit, to secure a remedy either in the host State or in the UK (due to an inability to access justice locally due to poverty, inadequate legal protection or corruption; presence of substantive and procedural barriers in civil and criminal law that make it difficult to bring cases against UK companies in the UK, etc.).²⁵⁶

Therefore the current judicial and non-judicial mechanisms have a range of barriers that mean that they do not provide wide-ranging or effective access to a remedy for most victims of human rights harms by business enterprises.

²⁵⁶ Ibid, and '[the Committee urges] the UK government to develop options to enhance access to a remedy and encouraged the OECD that in the meantime it should consider how the OECD Guidelines and the National Contact Point system can be strengthened to give greater capacity for individuals to secure an effective remedy'.

E. Future Policy Considerations

The primary objective of this report is to consider the existing remedies available for abuses of human rights by business enterprises. There was also a request to suggest some policy options for future consideration. This is distinct from dealing with the specifics of the updating of the UK's NAP. The following proposals are broad policy considerations which are recommended as options for consideration.

1. *Facilitate Increased Awareness of and Government Coordination around Remedies for Business and Human Rights Issues*

In order to ensure that both victims of human rights abuse and business enterprises are aware of the key issues and the remedies available for abuses of human right by business enterprises, a permanent cross-government Unit on Business and Human Rights could be established. This Unit would primarily be comprised of those in government departments with expertise in the area, with an independent advisory board. It would have a website to enable all the diverse mechanisms, activities and resources in this area to be easily accessible and coordinated. It would not need to be located in one department, although various people would have designated responsibilities and one department would have lead responsibility.

This Unit would also have an outreach role to assist in the clarification of the responsibilities of government and of business enterprises. It could assist, for example, in the clarification of reporting obligations on business enterprises in relation to human rights matters, including in non-financial reporting. It could be used to fund training to UK embassies and other missions overseas, and to assist foreign governments.

2. *Enhance the National Contact Point's Impacts and Capacities*

The activities of the UK NCP should have greater impact on business enterprises. The results of its investigations could be automatically passed to those with responsibility for public procurement, export credit and related government business support activities, with consequences to the business enterprise, such as loss of access to these facilities, if it does not comply with the NCP's recommendations. This would enable the NCP to have its recommendations enforced in a non-judicial but highly persuasive manner, and in the process assist with the UK's obligations in accordance with the UNGPs. The NCP's recommendations could always be publicly available and be able to be used in evidence before judicial bodies. A similar process could be considered for other non-judicial mechanisms that may make findings on the conduct of business enterprises with regard to human rights abuses.

The capacity of the NCP could be enhanced by further resources, such as including independent (and non-government department based) human rights experts as investigators and mediators. This would contribute some valuable human rights expertise for the purposes of the NCP's recommendations.

3. *Ensure Consideration of Remedies for Victims of Human Rights Abuses*

There should be a genuine and cross-government commitment to providing access to remedies to victims of human rights abuses by business enterprises. This should include

abuses both in the UK and overseas. It would require extensions of some criminal law legislation and training of prosecutors. This would be consistent with the UK policy to encourage the use of UK courts and tribunals in upholding the rule of law.

In all the judicial and non-judicial mechanisms, there could be a requirement to consider a remedy for the victim and/or their community directly as part of the responsibilities of the judicial and non-judicial procedures. For example, the Gangmasters Licensing Authority could always consider providing an appropriate remedy to a worker affected by the gangmaster, and the criminal courts could automatically consider appropriate compensation for the victim of a human rights abuse by a business enterprise, without the need for a submission by the prosecutor (as a similar provision is already available under section 8(6) of the Modern Slavery Act 2015). In acting on this, consideration of those who are especially vulnerable could be given special attention.

There could be an obligation on all business enterprises to conduct human rights due diligence and to have grievance mechanisms. Both of these actions would assist in the ability of victims to access a remedy and could reduce the need for access by victims to judicial and non-judicial mechanisms. If a business enterprise has conducted appropriate human rights due diligence then it could be a defence to a claim against it.

4. Use the Terminology of the Guiding Principles

The UNGPs use the terminology of “business enterprises”. It does so to ensure that the operation of a business is not seen in isolation from the reality of how businesses operate today. It is used to ensure that the UNGPs apply not just where a corporation is incorporated but also to where it is domiciled and its principal place of business, as well as to the subsidiaries over which it exercises control. The use of this terminology in interpreting legislation and common law would assist courts by highlighting the need to understand and address their decisions to a business enterprise in its totality. Its use could extend the duty of care within and across a business enterprise’s operations (perhaps as a non-delegable duty), and enable jurisdiction for overseas human rights abuses of that business enterprise.

The UNGPs also use the terminology of “human rights”. It does so to ensure that it is the human rights of victims that are at the centre of the State’s and business enterprise’s responsibilities, such as in undertaking human rights due diligence. This terminology could be used in procedures, claims and decisions – both judicial and non-judicial – to ensure that victims are central to the outcome and understand the process better.

5. Improving the Procedures for Access to Remedies before Judicial and Non-Judicial Mechanisms

It would improve access to a remedy if the processes and procedures for those bringing claims alleging human rights abuses by business enterprises were made less complex and there were fewer barriers. This could be done, for example, by enhancing the powers of the judicial and non-judicial mechanisms to order disclosure of all relevant documents of business

enterprises, and increasing the reporting obligations of business enterprises on human rights matters, including to the Financial Reporting Review Panel, with verification of the reporting.

The procedure for accessing a remedy could be improved by enabling collective redress claims for abuses of human rights by business enterprises, perhaps similar to the procedures that exist under the Consumer Rights Act 2015. This would assist victims as well as business enterprises, as the latter can sometimes face several successive claims under the current procedures. In addition, it could be made possible for the legal costs of a claim to be fully recovered 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, as is required under international law.