

Submission: Justice Committee inquiry into the future of legal aid

Introduction

The CORE Coalition is the UK civil society network on corporate accountability, with a membership spanning NGOs, trade unions and law firms. We work to ensure that British companies are held accountable for their impacts on human rights and the environment wherever in the world they operate, and that people and communities adversely affected by corporate abuses of human rights and the environment have access to justice. This submission is jointly endorsed by: **CORE Coalition, Amnesty International UK, Unison, the Business and Human Rights Resource Centre and Traidcraft Exchange.**

This submission focuses on the impact of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act on access to remedy in the context of international abuses of human rights by UK multinational corporations. It builds on our 2013 submission¹ outlining concerns about the obstacles to justice likely to arise as a result of LASPO. This echoed concerns about LASPO expressed by Professor John Ruggie, architect of the UN Guiding Principles on Business and Human Rights (UNGPs).

This submission focuses on: how LASPO has affected access to justice views on the post-implementation review and the criminal legal aid review, specifically for victims of human rights abuses by multinational corporations, and; what the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere. We will address these issues in the context of the changing framework of UK common law, as it relates to cases against UK multinational corporations' duty of care for harms committed by their subsidiaries.

Barriers to justice for victims of human rights abuses perpetrated by multinational corporations

Access to justice is a fundamental human right. Victims of human rights abuses perpetrated by UK companies must have access to justice and remedy, and all abusers of rights must be held to account; without justice there can be no accountability, and without accountability abuses will continue.

While the majority of human rights abuses perpetrated by UK corporations take place in poorer countries, a structurally unequal distribution of power makes it particularly difficult for people in those countries to hold UK corporations to account for abuses that occur.

Human rights cases are, by their nature, lengthy and complex, often involving language barriers, geographical distance and the application of foreign law by UK courts – they are, therefore, expensive. Compensation is invariably low in comparison. Companies are able to avoid liability through a combination of judicial strategies – including delay, complicating proceedings, withholding information, using jurisdictional barriers, and utilising the considerable financial resources at their disposal to exhaust the claimants' means and tip the existing disparity further in favour of the company. Granting legal aid would remove the incentive for defendants to be obstructive in the hope that opponents run out of money, saving court costs and time. It would also allow other smaller firms with relevant expertise to represent victims. As matters stand, only

¹ <https://corporate-responsibility.org/wp-content/uploads/2013/11/Legal-Aid-Bill-Briefing-Lords-3rd-reading-March-20121.pdf>

one or two firms have achieved a business model that allows them to frontload the costs of these kinds of claims.

Given that the English corporate liability regime makes it virtually impossible to prosecute companies under criminal law for their human rights abuses, it can often be the case that the only realistic route to accessing justice for victims of UK corporate abuse in poorer countries is to hold a UK corporation to account in the English civil law system.

Developments in UK common law

In recent years, there has been an increasing trend of victims bringing civil claims against UK-domiciled parent companies for the acts or omissions of their overseas subsidiaries. Crucially, since LASPO was introduced this has been matched by an evolution in UK common law, which now holds that UK parent companies can have a duty of care for harms caused by their overseas subsidiaries.

The Supreme Court's landmark judgment in *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Ors* found that a UK parent company could, under certain conditions, be held liable for the operations of its overseas subsidiary. A similar ruling in *Okpabi v Shell*, heard at the UK Supreme Court in June 2020, would consolidate the principles from the Vedanta case. The CORE Coalition acted as an intervener in both cases.

LASPO – preventing progress in civil cases

However, while the potential for such cases to be heard - and thus for victims of abuse to access justice - in the UK have increased, changes brought by LASPO, and how it intertwines with specific EU regulations, have produced a perverse outcome which undermines these advances: it is increasingly difficult for law firms to bring these cases due to a lack of financial viability.

As Leigh Day solicitor Richard Meeran explained to the Joint Committee on Human Rights for its 2017 report 'Promoting responsibility and ensuring accountability',² the EU Rome II Regulation (Rome II) requires damages in tort cases to be assessed by reference to local levels, which are very low in comparison to the damages awarded for the same torts occurring in the UK:

"Simultaneously, LASPO has caused a tightening of the 'proportionality' rule, generally requiring costs to be less than damages. With Rome II resulting in relatively low damages, the proportionality rule has often been relied upon by defendant companies to seek to restrict the incurrance of costs in these complex international cases, most specifically in relation to the costs of disclosure, which is an essential tool for victims' access to evidence."

LASPO has removed the ability to recover success fees from defendants and has, "thereby reduced the levels of compensation available to victims and concurrently, the financial viability of lawyers taking on the financial risk in pursuing the claims."³

As such, vital civil law cases against UK corporations for harms committed overseas are at extant risk of not being taken – in spite of common law changes enabling them to be potentially

² <https://publications.parliament.uk/pa/it201617/jtselect/jtrights/443/443.pdf> pp.50 - 51

³ Ibid

heard. Victims of corporate abuse are effectively being denied their fundamental human right to access justice due to reforms mandated by LASPO.

Progress on access to justice could be derailed further after Brexit unless vital EU regulations are retained in UK law, specifically regarding the use of *forum non conveniens*.

Article 2 of Brussels I Regulation (Recast) and its interpretation by the European Court of Justice (ECJ) in *Owusu v Jackson* prohibited the use of the *forum non conveniens* doctrine by English courts in civil liability suits filed against UK domiciled corporations. The ECJ held that jurisdiction conferred by Article 2 was mandatory, with no provision for English courts to decline jurisdiction on the basis of the English doctrine of *forum non conveniens*

As we have argued in a past submission to the European Commission, *forum non conveniens* "... has been used tactically by multinational defendants and frequently had the effect of obstructing, delaying and denying justice to human rights victims".⁴ As such, the ability to once again use this doctrine would foster corporate impunity, it "would lead in many cases to a denial of justice. It would, in particular, seriously impact on the ability of overseas human rights victims to obtain access to justice".⁵ Notably, the latest draft of the UN Binding Treaty on Business and Human Rights – currently under negotiation stipulates that state parties must "ensure that the doctrine of *forum non conveniens* is not used by their courts to dismiss legitimate judicial proceedings brought by victims".⁶

We also consider LASPO's provision of 'exceptional case funding' to have created a hierarchy of human rights through the provision of funding only for ECHR or EU rights, and in relation only to the actions of a public authority, and not for tort claims against companies.⁷

In summary, LASPO is actively inhibiting access to justice for victims of UK corporate abuse in the following ways:

- LASPO has negatively impacted access to justice generally, including by creating a two-tier system based on those who cannot afford to access justice and those who can.⁸ While the removal of legal aid for victims of human rights abuses by multinational corporations preceded LASPO, we view LASPO as generally undermining the principle of legal aid as a whole, and thus the ability to ensure legal aid for these groups in particular;
- The **success fee** must now be paid from the compensation awarded to victims of abuse, and the costs incurred by the winning side's legal team, which are recoverable from the losing side, must now be 'proportionate' to the amount awarded in compensation;
- **After the Event (ATE) insurance premiums**, which protects claimants from the risk of having to meet the opponent's costs, now have to be paid for out of the compensation awarded to victims;
- Both of the above issues are worsened by the **EU Rome II** which requires damages in tort cases to be assessed by reference to local levels - with the result that damages in

⁴ <https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/EU-Commission-submission-on-Owusu.pdf?ext=.pdf>

⁵ *Ibid*

⁶ https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

⁷ <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf> p.51

⁸ https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf

international corporate human rights abuse claims are generally very low compared to the damages awarded for the same torts occurring in the UK.

Meeting UK commitments on to access to justice

The aforementioned impacts of LASPO undermine UK commitments made in various international fora. Since LASPO was introduced in 2012, the UK has reaffirmed its commitments to implementing the 2011 **UNGPs**,⁹ including Pillar III, to, "take appropriate steps to ensure" that those affected by business-related human rights abuses within their territory and/or jurisdiction "have access to effective remedy". The UK is also committed to implementing the **Sustainable Development Goals (SDGs)**, including **SDG 16** to, "promote the rule of law at the national and international levels and ensure equal access to justice for all".¹⁰ The latest draft of the **UN Binding treaty on Business and Human Rights** – currently under negotiation – also stipulates that victims of abuses "be guaranteed access to information and legal aid relevant to pursue effective remedy" and that "State Parties shall provide adequate and effective legal assistance to victims throughout the legal process", including ensuring that "court fees and other related costs do not become a barrier to commencing proceedings... and that there is a provision for possible waiving of certain costs in suitable cases".¹¹

In recent years there has been an emerging global trend towards enacting laws to enable access to justice for victims of corporate human rights abuse. France was the first state to introduce a law obliging corporations to take preventative action through mandatory human rights due diligence, combined with legal liability when damage and loss occur - making it easier for victims of human rights abuses to bring cases against French companies. Similar laws are being developed in States across Europe and by the EU itself.

Civil society organisations,¹² legal institutions¹³ and the UK Parliament's Joint Committee on Human Rights¹⁴ have urged the UK to introduce similar legislation in order to impose a duty on all companies to prevent human rights abuses and an offence of "failure to prevent" human rights abuses for all companies, mirroring the provisions of the Bribery Act 2010, Section 7. This would build on and consolidate the advances in UK case law outlined above; give domestic legal force to the UNGPs; and help to overcome jurisdictional, legal and procedural barriers that prevent many civil cases against companies from being taken.

Recommendations

In order to retain its leadership on business and human rights and meet its commitments on access to justice in the context of Brexit, the UK must take the following steps:

1. Introduce a Human Rights Exception to the Legal Aid, Sentencing and Punishment of Offenders Bill, to ensure: the ability to recover success fees from defendants; that ATE insurance premiums do not have to be paid from compensation awarded to victims.

⁹ <https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update>

¹⁰ <https://www.un.org/sustainabledevelopment/peace-justice/>

¹¹ https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

¹² https://corporate-responsibility.org/wp-content/uploads/2019/04/190409_UK-mHRDD-campaign-statement_FINAL-with-logos.pdf

¹³ <https://www.biicl.org/publications/a-uk-failure-to-prevent-mechanism-for-corporate-human-rights-harms>

¹⁴ <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/44311.htm>

2. Ensure provision of legal aid for human rights cases brought by overseas claimants against UK multinational companies, in line with the aforementioned current draft of the UN Binding Treaty.
3. After Brexit, remove the Rome II provision stipulating that damages in tort cases must be assessed by reference to local levels.
4. After Brexit, retain Article 2 of Brussels I Regulation (Recast) stipulating that, “subject to this regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”.¹⁵
5. Introduce a ‘Failure to Prevent’ law on human rights and the environment, based on provisions in the 2010 Bribery Act, Section 7: mandate companies to undertake ‘human rights and environmental due diligence’ across their supply chains, and hold them liable when they fail to prevent harmful human rights or environmental impacts. In line with this, we urge you to strongly consider the establishment of a regulator, which could add value to the enforcement of our proposed new law by increasing the likelihood of UK companies being held accountable for cross-border human rights abuses, providing specialist advice relating to cross-border corporate human rights abuses, and offering another pathway for access to justice for victims of human rights abuses by multinational corporations.¹⁶
6. Support the UN Binding Treaty on Business and Human Rights.

¹⁵ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>

¹⁶ <https://static1.squarespace.com/static/59242ebc03596e804886c7f4/t/5f69fa52ccfcab6a566f1d39/1600780900693/Research+report+1.pdf>