

Delivering justice for overseas victims of corporate human rights violations: what the next Government can do

Summary

The UK is the fifth biggest overseas investor in the world¹. Our companies are increasingly global, with a growing presence in developing countries. This gives them enormous power and influence.

Many companies behave responsibly, but some take decisions which result in mistreatment or even abuse of people overseas. These companies need to be held to account. And the people who have been harmed need justice. Justice may involve financial compensation, but also means putting things right and changing business practices to prevent future wrongs.

The next Government should remove the barriers that currently prevent victims of corporate abuse overseas receiving justice and take decisive measures to ensure companies who do violate human rights are held to account in the UK.

Why this matters

British businesses have far reaching impacts around the world as investors, exporters and buyers of goods and services. In particular, investment in emerging markets and Africa has grown in recent years. This presents a real opportunity to help bring about growth and create jobs and business opportunities in less developed regions of the world, but it also brings very powerful enterprises into direct contact with vulnerable workers and communities.

The decisions taken by British companies on how they operate, and how they buy their goods and services can have profound impacts on the human rights² of workers, farmers and communities. The UK is home to many responsible businesses, leading the way in understanding and improving their impact and the Government supports them in doing this. However there also remain many companies for whom short-term gain and the bottom line are always the priorities. Companies who fail to properly assess whether their actions are likely to cause harm and fail to take adequate steps to prevent it must be held accountable and those harmed must be able to get justice. Unless steps are taken to ensure this happens the behaviour of laggard companies undermines the ability of the more responsible companies to operate and there is no deterrent to future bad practice.

¹ OECD 2013

² Throughout this paper we take a broad definition of human rights to reflect the issues at stake in Business and Human Rights comprising the Universal Declaration of Human Rights and the core human rights treaties and then a range of relevant rights such as Labour Rights and the Right to Livelihood and Property.

What the United Nations Says

In June 2011 the British Government endorsed the UN Guiding Principles on Business and Human Rights. This was a welcome move. The Principles set out a common understanding of the rights and obligations of Governments and businesses in protecting human rights. It includes three fundamental pillars: states have a duty to protect human rights; businesses have a responsibility to respect human rights; and those whose rights have been violated must have access to an effective remedy. However the 'Third Pillar' – access to an effective remedy – is extremely problematic for people outside the UK, particularly those in developing economies.

What do we mean by 'justice'?

We are using the term justice to mean redress, that is, putting right or providing compensation for a wrong caused by a breach of duties or a violation of rights. In practical terms this could mean:

- Reversing a decision (for example restoring land to communities or preventing a mine from proceeding);
- Requiring positive actions to prevent future harm, for example by systemically improving working conditions via better health and safety measures or wages;
- Cleaning up a community impacted by pollution;
- Financial compensation for individuals who have lost earnings or suffered serious injury or death.

Barriers to Justice

Victims of human rights abuses by UK companies³ operating overseas currently have a range of mechanisms through which they could attempt to seek redress. However they all at present have serious flaws. As a result practices that would be unthinkable in a UK context are permitted to go ahead unchallenged overseas.

1. *Company or Non-State Grievance mechanisms*

Company Grievance Mechanisms can have a useful role to play in identifying issues at an early stage. Ideally they prevent serious problems occurring by allowing issues to be aired and a mutually acceptable solution to be found. The UN Guiding Principles set out the characteristics of an effective non-state grievance mechanism that UK companies should seek to follow⁴. In addition it is extremely important that such mechanisms should not interfere with due legal process or require beneficiaries to waive any rights.

However once a situation has escalated to the point that human rights have been infringed, it is no longer appropriate to seek justice via a process that is under the control of the alleged

³ UK companies can mean those headquartered or listed in the UK or operating in the UK.

⁴ UN Guiding Principle 31 states that effective non state grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.

perpetrator. In such instances an independent or third party route is required, including through seeking judicial remedy.

2. Seeking justice where the harm took place

It would be ideal if it were possible for victims to seek redress in the country where the harm took place. This is certainly likely to be the more accessible and affordable route and also provides all concerned with the opportunity to demonstrate that a fair process has been followed to investigate and then to remedy a situation.

The avenues for redress could be non-judicial, for example bringing a matter to a labour inspectorate, tribunal, ombudsman, human rights body or environment agency. Victims may also seek to bring a case through their courts – the UN Guiding Principles note that having access to effective judicial mechanisms are at the core of ensuring access to remedy.

However there are significant barriers to seeking justice in the country of harm. These may include:

- An unstable judicial system, corruption, lack of trust in the national court system or concerns about political interference.
- Non-existent human rights law; lack of knowledge about citizens' rights and available procedures.
- Lack of local lawyers willing and able to take on complex, protracted and expensive litigation.
- Lack of national human rights bodies or where they do exist their mandate to look at business impacts may be new and so expertise has yet to be established.
- Countries competing for foreign investment could be reluctant to take on issues of corporate human rights abuses out of concern that it would reduce their attractiveness as a place to invest or do business.⁵

3. Seeking justice through the UK courts

a) Criminal cases

At present there is no specific UK law to regulate the criminal liability of companies for human rights violations overseas. This is a clear legal gap. Corporate criminal liability laws do exist in other countries, for example:

- In Switzerland businesses may be criminally liable under a new provision of the Criminal Code;
- In The Netherlands companies can be prosecuted for international crimes (but the public prosecutor has the power to decide whether to take forward the case).

⁵ These factors are elaborated further in 'The Reality of Rights' by London School of Economics , 2009 (corporate-responsibility.org/wp-content/uploads/2014/07/LSE_reality-of-rights.pdf) and also in 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' by G. Skinner, R. McCorquodale, O. de Schutter, 2013 (<http://corporate-responsibility.org/wp-content/uploads/2014/02/The-Third-Pillar-FINAL.pdf>)

Two recent relevant developments in UK law do however demonstrate a move towards companies themselves being held liable and allow for the application of UK criminal law to activities that take place overseas:

- The Corporate Manslaughter Act and Corporate Homicide Act (2007) provides a series of new offences by which companies can be held liable for serious management failures that result in gross breach of a duty of care. This was ground breaking and for the first time provided for a company (and not just the individual directors) to be liable. However at the moment the Act does not apply overseas.
- The Bribery Act (2010) also allows for criminal prosecution of companies for actions that take place overseas. The offense of failing to prevent bribery can be committed by any 'relevant commercial organisation' irrespective of where they are based.

Criminal prosecution would obviously only be applicable in very serious cases and it does require the consent of the Director of Public Prosecution. And while it can provide 'justice' in terms of punishment of the perpetrator, as well as a significant deterrent against future harm, further action would be required in order for victims to be compensated following a criminal prosecution.

b) Civil cases

The main route currently open in the UK for overseas victims of corporate human rights abuses is to bring a civil case for acts of negligence. The victim can allege harm caused by a Company's failure to take reasonable steps to avoid it. Despite a handful of successful cases, there are a number of practical and administrative hurdles problems in seeking access to justice via this route and the situation seems to be getting more challenging. Some of the main barriers are:

- ***Establishing duty of care transnationally (outside the UK).*** As case law builds there is a growing acceptance that parent companies owe a duty of care to those they impact overseas - for example workers for subsidiaries. But at present this has to be proven on a case by case basis which can be a very complicated and time consuming process. The Bribery Act (2010) provides a potentially interesting model that contains a presumption of direct extra-territorial liability. To avoid corporate liability for Bribery, the company has to have in place strong anti-bribery policies and processes which can be used as a defence. This principle could be applied to corporate human rights violations. Companies would be presumed to be liable for the human rights impacts of their subsidiaries and even supply chain partners and their defence would be to have strong human rights due diligence procedures in place.⁶
- ***Resourcing:*** It is extremely costly to bring transnational cases. The costs of gathering evidence in a foreign state, the cost of legal and technical experts and the time the cases take can be the most serious barrier to access to justice. Victims rarely have the necessary resources. Several of the successful cases in the UK to date have been brought with the assistance of legal aid funding. However recent developments (LASPO

⁶ Transnational Corporate Human Rights Abuses: Delivering Access to Justice Conference 17th July 2014. CORE, Business & Human Rights Resource Centre and British Institute for International and Comparative Law. Presentation by David Chivers QC (<http://corporate-responsibility.org/news/events/access-justice-conference-17-july-2014/>)

and the introduction of the Rome II Regulations (Jan 2009) has made funding future cases very problematic. Damages must now be assessed in accordance with the law and procedure of the country where the harm occurred which is often lower, success fees have to be deducted from the claimants' damages and cannot be more than 25% of the total.⁷ Together these changes are likely to skew the type of case taken up towards those where damages are likely to be high undermining access to justice for victims and allowing impunity to continue.

- **Class actions:** Corporate human rights violation cases often impact upon many victims but the UK makes it difficult to bring such cases. Australia, Canada and the United States have provision for 'opt out' class actions. These allow a number of 'lead cases' to be chosen to represent the characteristics of much greater numbers of victims. Instead the UK allows group actions in specific circumstances where victims have to all 'opt in' to pursuing the case. This means that the lawyers have to take instruction from every single victim, which raises the cost and therefore reduces the viability of such cases.

4. Justice via non-state based non-judicial mechanisms in the UK

Seeking justice via legal routes has delivered some results in the UK however the majority of these resulted in an out of court settlements and public disclosure of the settlement sum is rare. This limits the ability of these previous court cases to act as a deterrent to future company behaviour. Under current conditions, legal channels are slow, costly and potentially daunting for the victims. In the Cape case 1000 of the 7500 claimants died while the courts were in the process of trying to agree the appropriate forum.⁸

Under the OECD Guidelines for Multilateral Enterprises, all OECD members have been required to set up a National Contact Point. The purpose of this is to provide further information about the Guidelines and to institute a dispute settlement mechanism which can handle 'specific instances' of alleged breaches of the Guidelines. But it is operating with a number of fundamental drawbacks. It:

- can only provide mediation and adjudication with respect to disputes;
- has limited powers to investigate and crucially no enforcement mechanism - it can only publish a finding;
- is housed within the Department for Business, Innovation and Skills which compromises its independence;
- cannot impose penalties on companies or award compensation to victims.

There is a need for a simple, transparent and most of all accessible system that would be free from bias, could investigate cases, provide compensation, fine companies as well as direct them to cease harmful behaviour. However at present there is no independent non-judicial state-based system in the UK which has these powers.

⁷ There is a possible exception in the Rome II regulation that would allow the law of the home state to apply if the law in the host state "is not sufficiently protective of the human rights of the person harmed".

⁸ 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States', Richard Meeran, 2011

Pressure for access to justice is mounting

Public trust in big business is at an all-time low and the backlash against growing levels of inequality nationally and globally is gaining momentum. A recent survey by Populus for the Financial Times found widespread cross-party support for action with almost two thirds of voters wanting the next Government to be tougher on big business.⁹ Polling conducted by Traidcraft found that 71 per cent of MPs and 78 percent of the public wanted UK companies to be held to account in the UK for harm they caused overseas¹⁰. It is clear that the public want to see good standards of corporate behaviour – particularly from British businesses and Government has an important role to play in setting the framework to enable this. Access to Justice offers realistic opportunities or political parties wanting to respond to public concern and to take current thinking around responsible or moral capitalism beyond rhetoric.

Some leaders of powerful multinational businesses are also increasingly vocal on business and human rights issues. At the Davos Summit in 2014, the ‘B-team’ of businesses including Richard Branson of the Virgin group and Paul Polman of Unilever issued a statement calling for an end to the warped incentives and short termism that characterises the way much business is done. Their statement said “Decent working conditions, fair wages and stable communities could quickly become the norm, if encouraged by ethical purchasing decisions...” They ended the statement by saying “We all stand to gain when businesses makes human rights a priority. Where society thrives, so does business.”¹¹

Recent debates around the drafting of the Modern Slavery Bill have demonstrated business appetite for Government action in preventing and addressing trafficked and forced labour throughout companies’ supply chains. The Joint Committee drafting the Bill heard, “We were repeatedly told legislation could serve to “level the playing field” and raise the standards of companies that failed to tackle modern slavery in their supply chains voluntarily. This would ensure that companies who take eradication of modern slavery from their supply chains seriously would not be undercut by unscrupulous or ignorant competitors.”¹²

The British public and increasingly British business expects Government to play its role in encourage and supporting best corporate practice, but also to take decisive measures to prevent the worst.

The time is right for Government to act

The UK has been a strong supporter of the UN Guiding Principles on Business and Human Rights and took the lead as the first national government to publish an Action Plan on Business and Human Rights in September 2013. But the proposals on Access to Remedy are particularly weak with too much emphasis on company grievance procedures and few commitments for Government action. There is no commitment to improve judicial options or to create effective

⁹ ‘Voters Turn Against Big Business Culture’, Financial Times, 6th May 2014

¹⁰ MP polling by Dods, Public polling by Populus both for Traidcraft

¹¹ ‘B Team leaders call for business to stand up for human rights’, 21st January 2014

¹² Draft Modern Slavery Bill Joint Committee Report, 3rd April 2014

state based non-judicial solutions. Since other countries are looking to the UK's example when developing their own national action plans, there is an urgent need to address this weakness.

The French Parliament is reviewing proposed draft legislation that would require companies to demonstrate what preventive measures they have put in place to ensure human rights are respected overseas. As noted above the Dutch and Swiss systems already have criminal legislation for corporate abuses in place and in Canada there is a campaign for the Government to provide legal standing for foreign nationals harmed by Canadian companies.

This international momentum has been enhanced by the United Nations Human Rights Council's decision to begin the process of elaborating an international legally binding instrument on business and human rights, which if developed properly could present an important additional tool to encourage state action for communities seeking redress.

What needs to change

Traidcraft is a fair trade business and charity which believes passionately in the positive role that trade can play in fighting poverty. As a British company which sources from more than 30 countries worldwide, we want people who have been harmed by UK companies through their international trading activities to be able to seek and receive justice.

Whilst potential avenues to justice do exist there are some major flaws. We want the UK government to act to remove the legal and practical barriers preventing victims from accessing justice. An effective system of redress for victims of corporate abuse is a vital component of corporate responsibility. It enables those who have been harmed to receive justice and acts as a powerful deterrent to future bad practice.

What the next Government can do

Some welcome steps have been taken but any future UK government needs to take a more systematic approach to fulfilling our obligations under the UN Guiding Principles.

Victims of alleged abuse must be able to access both judicial and non-judicial state based routes to justice. At present there are serious problems with both. The lack of hard law ensuring extra-territorial accountability of UK companies is the most serious gap and weakens compliance with widely accepted standards such as the UN Guiding Principles on Business and Human Rights. Lack of resources and other practical and administrative factors must not be a bar for victims to be able to seek justice. Progress also needs to be made on improving non-judicial state-based routes to justice, including exploring the necessary powers and locations for any future system.

Traidcraft's Justice Campaign is calling for the next British Government to:

- Make it possible to bring criminal prosecutions in the UK against British companies that abuse human rights in other countries
- Remove the (legal, administrative and financial) barriers which stop people from poor communities bringing civil cases in the UK courts
- Ensure that companies can also be held to account effectively outside the court system.

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