**LEIGH DAY SUBMISSIONS TO THE OPEN-ENDED INTERGOVERNMENTAL WORKING GROUP FOR THE ELABORATION OF AN INTERNATIONAL BINDING LEGAL INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS, RESOLUTION A/HRC/26/9 (the “Working Group”)**

**11 October 2016**

**SUBMISSION 2 – ISSUES CONCERNING ACCESSIBILITY AND EFFECTIVENESS OF JUDICIAL MECHANISMS FOR HOLDING UK BUSINESS TO ACCOUNT FOR HUMAN RIGHTS VIOLATIONS COMMITTED OVERSEAS**

Introduction

1. The issues set out below were raised by Leigh Day in its written evidence to the UK Parliament Joint Committee on Human Rights (JCHR) Inquiry into Human Rights and Business dated 31 August 2016. The mandate of this Inquiry is set out at paragraph 4 of Submission 1. Whilst the matters discussed below were raised by Leigh Day in the UK context, the issues are relevant to the mandate of the Working Group as they consider existing difficulties and limitations associated with the use of national judicial mechanisms for holding business to account in relation to human rights violations committed overseas.

Overview of Access to Judicial Remedy in the UK in respect of Human Rights Violations Committed Overseas

1. In the UK National Action Plan updated in May 2016, the UK Government sets out the actions it has taken to promote access to remedy for human rights abuses by business. Those actions focus very heavily on advising and encouraging UK companies to establish grievance mechanisms. In our experience, such mechanisms can act as a hindrance to victims’ access to effective remedy. In particular, such grievance mechanisms are an entirely inappropriate forum in which to seek to provide remedy for human rights abuses such as extrajudicial killings, rape or other serious harms. Such harms ought to be remedied via judicial mechanisms.
2. A variety of factors, however, generally preclude human rights claims being pursued in the local courts of the jurisdiction where the harm and the relevant multinational subsidiary operations are located. These include corruption, fear of persecution and lack of access to information.
3. More broadly, the principal overriding impediment to victims of corporate human rights abuse being able to access judicial remedy is their inability to access lawyers with the expertise, resources, financial ability and inclination to bring complex litigation of this type in light of very significant financial risks.
4. Funding for legal representation is specifically referred to in the UNGPs, with regard to the costs of such claims and also the paucity of lawyers who are willing to undertake them.  It is an issue of paramount importance to practical access to justice both at the host and home state levels.
5. Victims of human rights abuses by multinational companies operating in developing states frequently find the impediments to accessing local courts insurmountable. The ability to pursue claims in the multinational home state (whose courts will have jurisdiction over claims against the MPC), such as in the UK, may often be the only feasible avenue for victims to seek access to justice. Nevertheless, there are multiple barriers to accessing the UK courts in such cases.
6. The doctrine of separate corporate personality means that the circumstances in which the “corporate veil” may be pierced so as to make a shareholder liable for the conduct of companies in which it invests is very limited. In the UK, the current legal framework for pursuing claims against MPCs has focused on the direct causative acts and omissions of the MPC itself rather than the acts and omissions of its subsidiaries.
7. Claims against MPCs in the UK have also been faced with the prospect of overcoming jurisdiction hurdles, procedural issues (such as gaining access to internal corporate documents to prove the case, or case management procedures for running group claims) and practical issues (such as the logistics of dealing with cases where clients may be thousands of miles away and where witnesses may be afraid to come forward).
8. MPC claims are therefore complex and resource-intensive. They require extensive evidence-gathering as to the conduct of the MPC, the relationship between the MPC and the subsidiary, and the extent to which the MPC’s conduct or omission caused the harm complained of. They require instruction of specialist, effective lawyers to prosecute the claims and of experts upon whose evidence claimants would need to rely. Accordingly, pursuing these claims requires significant financial resources.
9. Victims of corporate human rights abuses invariably do not have the necessary financial resources and public funding is in practice unavailable for such cases. At present, the only option available to victims is to find lawyers who are willing to act on a "no win no fee" basis, under which the claimants' lawyers are entitled to payment if the case succeeds.  This system, however, places potentially overwhelming financial strain and risk on claimants’ lawyers. Cases typically last from three to five years. During that entire period, it is the claimants’ lawyers who must fund the litigation. They must cover the costs of legal teams that must be sufficiently large, well-resourced and specialised to compete with the top commercial firms instructed by companies to defend the claims. They must also cover the substantial costs inherent in litigation against MPCs, such as the fees of a raft of technical experts, and extensive travel to collate evidence and witness statements, and to obtain instructions.
10. The result is that small public interest firms that would be inclined to act in such cases simply do not have the financial ability to undertake the level of risk that these cases entail. Large commercial firms would have the ability but not the inclination due to the conflict that would arise with their corporate clients. As a result of strategic decisions and changes in the legal environment over the past 25 years, Leigh Day has grown to a size and developed a mixture of work streams, which have enabled the firm to undertake the risk of the multinational claims. This explains why the firm has ploughed virtually a lone furrow in this area.
11. In recent years, there have been developments that have reduced some of the practical and legal impediments to bringing such claims. For example, removal of the *forum non conveniens* (“*FNC”)* obstacle to claims against MPCs, following the 2005 ruling of the ECJ in the case of *Owusu v Jackson* regarding the Brussels I Regulation,[[1]](#footnote-1) significantly reduced the risk, resources and costs and hence enhanced the viability of claims. Similarly, there has been an increased receptiveness of the courts to the notion of a parent company duty of care.
12. Conversely however, changes to the civil costs regime introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2013 (LASPO), combined with European Regulation 864/2007, better known as "Rome II", have reduced the viability of international claims, particularly of smaller claims with less overall value.
13. Since 2009, Rome II has required damages in tort cases to be assessed by reference to local levels. The effect is that damages in international corporate human rights abuse claims are generally very low compared to the damages awarded for the same torts occurring in the UK.
14. Simultaneously, LASPO has caused a tightening of the "proportionality" rule, generally requiring costs to be less than damages.[[2]](#footnote-2) With Rome II resulting in relatively low damages, the proportionality rule has often been relied upon by defendant companies to seek to restrict the incurrence 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.[[3]](#footnote-3)
15. LASPO has also resulted in the removal of recovery of success fees from defendants, such success fees now only being recoverable from the Claimants themselves. LASPO 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.
16. The combined effect of LASPO and Rome II is to reduce the viability of cases by (a) limiting the disclosure obligations of defendants (discussed further below) and hence the prospects of success, and (b) the amount of recovery of claimants’ legal costs and hence their profitability.
17. Unless and until the complexity of pursuing such claims in the UK and the barriers referred to above are addressed, few UK lawyers or law firms will be willing or able to shoulder the financial burden or be capable of prosecuting such claims effectively, and the ability of victims of corporate human rights abuse to access judicial remedy will therefore remain limited.

*Liability of UK-domiciled parent companies*

1. In the absence of an overarching legal framework and regulatory regime relating to human rights abuses by business, tort law has provided an important source of redress. Indeed, all of the corporate accountability cases that have been brought by Leigh Day have been tort-based claims in the High Court.[[4]](#footnote-4)
2. Although the foreign operations of UK businesses are usually conducted through local subsidiaries or joint ventures, Leigh Day has brought these cases against the UK-domiciled entity within a multinational group (usually the parent company) by arguing that the UK entity is directly liable by virtue of the MPC’s *de facto* control over functions, deficiencies in which caused the harm in question. This control is alleged to give rise to a legal duty if harm to individuals such as the victims should have been reasonably foreseen.
3. For example, in two on-going cases brought by Nigerian communities who suffer from chronic oil pollution caused by Shell’s Nigerian subsidiary, it is contended by the Claimants that the MPC, Royal Dutch Shell plc is also liable by virtue of the extensive direction and control they exercise over Shell Nigeria.[[5]](#footnote-5)
4. In bringing such claims, victims of human rights abuses are tasked with the challenge of evidencing the extent to which the UK-domiciled entity knew or ought to have known of the risk of the harm alleged, and the steps that could or should have been taken to prevent or mitigate that harm.
5. Quite clearly, the extent of the MPC’s role in subsidiary functions which led to harm is within the MPC’s knowledge. Accessing the corporate documents evidencing that role is central to the Claimants being able to prove their case.[[6]](#footnote-6) This is all the more so where other forms of evidence are difficult to ascertain, such as from witnesses such as employees or police who are often reluctant to come forward.
6. There are several factors that currently impede access to such information:
   1. Some companies have not made and will not make use of the UK Government’s support for human rights reporting (as set out in the National Action Plan);
   2. MPCs often contend that they have no control over documents in the possession of overseas subsidiaries; and
   3. engaging in electronic disclosure exercises is very costly and strict application of the proportionality principle means that the opportunity for victims to elicit relevant documents may be substantially curtailed.

1. *Owusu v Jackson and Others* Case C-281/02. The effect of this ruling was to reduce the time and legal costs that were previously expended in order to establish the jurisdiction of the English courts at the outset of the litigation. The reduction in delays in accessing the courts has had an immediate effect in ensuring greater access to justice, particularly in cases seeking redress for debilitating and life-threatening injuries or disease. For example, in the past, many victims of asbestosis did not survive the long delays causes by jurisdictional challenges by corporate defendants: see eg *Cape plc v Lubbe* [2000]. It may be that the UK will remain a party to the Brussels I Regulation after Brexit if the UK wishes to retain access to the single market (Norway, Switzerland and Iceland are all signatories to the Lugano Convention which mirrors the provisions of Brussels I for non-EU members). However, a serious concern is that the UK will cease to be a party to Brussels I and that this will result in FNC applications and a return to the injustice created by this principle prior to 2005. [↑](#footnote-ref-1)
2. While LASPO allows consideration of other issues in determining proportionality (including public importance), post-LASPO Defendant companies have invariably argued that costs are entirely disproportionate in cases brought by (largely impecunious) claimants in international business and human rights cases. [↑](#footnote-ref-2)
3. There has been one case in which there has been judicial recognition of the importance of business and human rights abuses being aired despite the costs of disclosure being large as compared to potential quantum: *Vilca v Xtrata Ltd* [2016] EWHC 389. However, in other cases, judges have been persuaded by defendants arguing that the costs of disclosure would be disproportionate to quantum. [↑](#footnote-ref-3)
4. While Rome II provides that the applicable law will generally be that of the country where the harm occurred, in Leigh Day cases for victims in Nigeria, South Africa, Tanzania and Namibia, it has been argued that since these countries have adopted English-based tort law, the applicable law will essentially be the same as English law. In other cases, eg the Monterrico case, allegations have been based on provisions of the Peruvian Civil Code, which perhaps unsurprisingly are remarkably similar in practice to the English law. [↑](#footnote-ref-4)
5. *Okpabi & others, Alame & others v. 1) Royal Dutch Shell plc and 2) SPDC Ltd* [HT-2015-000241]. [↑](#footnote-ref-5)
6. The paucity of cases that have been pursued in the national courts of other EU countries is noteworthy. Key reasons for this are the extremely limited procedures for disclosure of documents, and limited scope for recovery of profit costs by victims' lawyers.  For example we note in Germany that disclosure is limited to documents specifically identified by claimants. [↑](#footnote-ref-6)