

UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: DOES THE UNITED KINGDOM FULFILL THE THIRD PILLAR?

*Hayley Alexandra Nicolich**

I. INTRODUCTION.....746

II. BACKGROUND750

 A. *Development of the United Nations Guiding Principles on Business and Human Rights*750

 B. *Access to Remedy Under the United Nations Guiding Principles on Business and Human Rights Framework*....751

 C. *The United Kingdom’s Response to the United Nation’s Guiding Principles*.....754

 1. *Judicial Remedies*.....757

 2. *Non-Judicial Remedies*.....759

 3. *Business/Internal Grievance Mechanisms*762

III. ANALYSIS.....763

 A. *Limitations on Judicial Remedies in the United Kingdom* 763

 B. *Limitations on Non-Judicial Remedies*.....769

 C. *Limitations on Business/Internal Grievance Mechanisms in the United Kingdom*.....774

IV. CONCLUSION775

*J.D. Candidate, University of Georgia School of Law, 2019. B.A. in English Literature and Minors in History and Spanish, Louisiana State University, 2016.

I. INTRODUCTION

It seems intuitive that all inhabitants of the earth are inherently entitled to the protection of their human rights. The term human rights contemplates a range of privileges, such as the right to life, the right to freedom of assembly, the right to privacy, the right to freedom of movement, the right to form and join trade unions and the right to strike, among a multitude of others.¹ States previously shouldered the full responsibility of protecting human rights for their respective citizens.² With the rise of big business in the last century, an interplay has naturally arisen between transnational corporations and the human rights of citizens whose countries the corporations inhabit. Therefore, international law has been forced to become more involved in the protection of human rights and the regulation of potentially harmful actions by multinational corporations.³ Recent studies estimate that transnational corporations currently compose over one-half of the world's 100 largest economic entities.⁴ To give an example of the growth of these massive transnational corporations, Exxon was ranked forty-fifth on the list of the 100 largest economic entities, "making it comparable in economic size to the economies of Chile or Pakistan."⁵

With this great economic influence comes great responsibility. Multinational corporations are, and should be, expected to comply with basic human rights standards. Multinational corporations, however, "enjoy a *de facto* immunity that protects them against . . . challenges."⁶ Individuals must invoke civil liability of a multinational corporation at the national level "either in the corporation's country of origin or in its host country."⁷ With this in mind, the United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights (UNGP) in June 2011 in an attempt to broaden regulation of multinational corporations, to heighten

¹ *How Can Businesses Impact Human Rights?*, SHIFT (Feb. 2015), <https://www.shiftproject.org/resources/publications/how-can-businesses-impact-human-rights/>.

² Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1, 1 (2003).

³ *Id.*

⁴ Sarah Anderson & John Cavanaugh, *Top 200: The Rise of Global Corporate Power*, GLOB. POLICY FORUM, <https://www.globalpolicy.org/component/content/article/221/47211.html>.

⁵ Press Release, *Are Transnationals Bigger Than Countries?*, UNITED NATIONS CONF. ON TRADE AND DEV. (Aug. 12, 2002), <https://unctad.org/en/pages/PressReleaseArchive.aspx?ReferenceDocId=2426>.

⁶ *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms, Section II: Judicial Mechanisms* 179, INT'L FED'N FOR HUMAN RIGHTS (May 2016), https://www.fidh.org/IMG/pdf/guide_entreprises_uk-sectionii.pdf.

⁷ *Id.*

standards at the corporate level, and to facilitate easier access to remedies for victims of human rights violations by these types of corporations.⁸

The inception of guidelines regarding corporations and human rights followed egregious violations of human rights by multinational corporations. For example, in 2005, Nike released information relating to human rights violations perpetrated in its own factories.⁹ Nike owns factories in Asia, South America, Australia, Canada, Italy, Mexico, Turkey, and the United States, just to name a few.¹⁰ Nike admitted that, after performing an audit of hundreds of factories in 2003 and 2004, it found cases of physical and verbal abusive treatment as well as 25% to 50% of factories restricting access to toilets and drinking water during the workday.¹¹ The same percentage of factories required employees to work seven-day weeks, and in up to 25% of the factories, wages were below the legal minimum.¹² Sadly, Nike is a salient example of the human rights abuses that occur in many of the multinational corporations that exist today.

Despite the promulgation of the UNGP, human rights violations continue to occur across the globe. According to written evidence by the Business and Human Rights Resource Centre, the majority of human rights violations occur extraterritorially in regions where victims have trouble attaining a remedy.¹³ For example, as recently as 2016, British multinational corporation BK Gulf, co-owned by Balfour Beatty and one of Britain's largest construction firms, has been accused of human rights violations in Qatar.¹⁴ Nepalese laborers in Qatar claimed that for almost three months they endured dire living conditions, were not paid for their labor, had their passports confiscated, and were not allowed to leave Qatar against their will.¹⁵ Even more recently, the United Kingdom High Court dismissed a case against Shell brought by two destitute

⁸ *UN Guiding Principles on Business and Human Rights*, SHIFT, <https://www.shiftproject.org/un-guiding-principles/> (last visited Oct. 8, 2017).

⁹ David Teather, *Nike Lists Abuses at Asian Factories*, THE GUARDIAN (Apr. 14, 2005), <https://www.theguardian.com/business/2005/apr/14/ethicalbusiness.money>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Written Evidence from the Business & Human Rights Resource Centre*, BUS. & HUMAN RIGHTS RES. CTR. (July 2016), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/human-rights-and-business/written/34977.html>.

¹⁴ Stephen Russell, *British Companies Accused of Human Rights Abuse in Qatar*, PLAY FAIR QATAR (Apr. 13, 2016), <http://www.playfairqatar.org.uk/british-companies-accused-of-human-rights-abuse-in-qatar/>.

¹⁵ Pete Pattison & Gyanu Adhikari, *BK Gulf Dragged Its Heels over Qatar Labour Abuses, Claim Migrant Workers*, THE GUARDIAN (Aug. 25, 2016), <https://www.theguardian.com/global-development/2016/aug/25/bk-gulf-labour-abuses-qatar-migrant-workers-nepal-balfour-beatty>.

communities in the Niger Delta.¹⁶ Tens of thousands of Nigerians were affected by oil pollution that occurred due to the operations of Shell's subsidiary, Shell Petroleum Development Company (SPDC).¹⁷ The United Kingdom High Court decided that the suit could not proceed in the United Kingdom due to jurisdictional issues.¹⁸ These are only a few examples of the obstacles that individuals, hurt by multinational corporations and their subsidiaries domiciled in the United Kingdom, encounter when they seek a remedy for human rights violations.

According to John Ruggie, the creator of the UNGP, the root of the problem that exists in business and human rights "lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences."¹⁹ Ruggie's tripartite framework, developed to address the problem of human rights violations perpetrated by multinational corporations, includes the state's duty to protect against human rights abuses by third parties, the corporate duty to respect human rights, and the need for access to effective remedy for victims of these violations.²⁰ Studies have shown that States have fallen short of the remedy requirement of the UNGP.²¹ Ruggie himself has commented on the obstacles victims face in attempting to attain remedy, stating:

Some complainants have sought remedy outside the State where the harm occurred . . . but have faced extensive obstacles. Costs may be prohibitive . . . non-citizens may lack legal standing; and claims may be barred by statutes of limitations. Matters are further complicated if the claimant is seeking redress from a parent corporation for actions by a foreign subsidiary. . . . These obstacles may deter claims or leave the victim with a remedy that is difficult to enforce.²²

¹⁶ Joe Westby, *An Elusive Justice: Holding Parent Companies Accountable for Human Rights Abuse*, TRUTHOUT (Feb. 26, 2017), <http://www.truth-out.org/opinion/item/39623-an-elusive-justice-holding-parent-companies-accountable-for-human-rights-abuse>.

¹⁷ Adam Vaughan, *Nigerian Oil Pollution Claims Against Shell Cannot Be Heard in UK, Court Rules*, THE GUARDIAN (Jan. 26, 2017), <https://www.theguardian.com/business/2017/jan/26/nigerian-oil-pollution-shell-uk-corporations>.

¹⁸ *Id.*

¹⁹ John Ruggie, *Protect, Respect, and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

²⁰ Harri Kalimo & Tim Staal, "Softness" in *International Instruments: The Case of Transnational Corporations*, 41 SYRACUSE J. INT'L L. & COM. 257, 309 (2014).

²¹ Caitlin Daniel et al., *Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct*, OECD WATCH 1, 5 (June 2015), <https://www.oecdwatch.org/wp-content/uploads/sites/8/2015/06/Remedy-Remains-Rare.pdf>.

²² Ruggie, *supra* note 19.

The significance of the States' failure to comply with the remedy requirement is reflected in the central theme of the Sixth Annual Forum on Business and Human Rights: "Realizing Access to Effective Remedy."²³

This Note will discuss the background of the UNGP, will analyze whether the United Kingdom's response to the UNGP adequately fulfills the third prong: providing access to remedy, and will suggest solutions to fill the gaps through which some victims of human rights abuses by multinational corporations seeking a remedy might slip. Although the United Kingdom was the first nation to promulgate and update a National Action Plan in response to the UNGP²⁴ and has since updated that plan,²⁵ the language of both plans is relatively vague as to the steps the United Kingdom has taken, and will take, to provide an accessible remedy to individuals who are subjected to human rights violations by multinational corporations domiciled in the United Kingdom. It is the position of this Note that the current remedies available to victims in the United Kingdom fall short of the UNGP. However, these shortcomings could potentially be solved by broadening liability of parent corporations for tortious actions of their foreign subsidiaries, narrowly revising regulations that make it difficult for claimants to pursue remedy in UK courts, expanding funding for the National Contact Point System, bolstering its ability to provide an enforceable remedy, and creating hard law that requires multinational corporations to have sufficient operational-level grievance mechanisms in place.

First, this Note will discuss the political and social landscape that gave rise to the UNGP, and the initial purpose of the guidelines. Next, it will examine the UNGP's specific requirements regarding the remedy that the UNGP encourage states and individual corporations to provide. Then, this Note will explore how the United Kingdom has responded to the UNGP, both judicially and non-judicially. The Note will then analyze the limitations that exist in the United Kingdom's provision of remedy under the UNGP and further discuss alternative solutions that might maximize the provision of remedy for human rights violations perpetrated by multinational corporations. Finally, this Note will conclude by summarizing the shortcomings and possible solutions regarding remedy for human rights violations by multinational corporations in the United Kingdom.

²³ *Programme*, 2017 U.N. FORUM ON BUS. AND HUMAN RIGHTS, <http://www.ohchr.org/Documents/Issues/Business/ForumSession6/PoW.pdf> (last visited Aug. 24, 2019).

²⁴ Leslie Esbrook & Emily Holland, *New National Action Plan on UN Guiding Principles on Business and Human Rights Launched*, LEXOLOGY (Mar. 22, 2016), <https://www.lexology.com/library/detail.aspx?g=523ee1a7-76a3-4381-b17c-d998137db12e>.

²⁵ *UK Publishes Updated National Action Plan on Business & Human Rights*, HUMAN ANALYTICS (May 12, 2016), <http://human-analytics.net/uk-publishes-updated-national-action-plan-business-human-rights/>.

II. BACKGROUND

A. *Development of the United Nations Guiding Principles on Business and Human Rights*

The need for a framework on businesses' behavior regarding human rights arose in the 1990s with the expansion of oil, gas, and mining companies as well as the offshore production of clothing and footwear.²⁶ These developments provoked concern about working conditions in these multinational corporations.²⁷ In 2005, following a failed initiative to set forth a code of conduct for transnational corporations and human rights, the Secretary General appointed John Gerard Ruggie as Special Representative for Business and Human Rights with the hope that he would reattempt to create a comprehensive guide for business behavior in the realm of human rights.²⁸ Ruggie's formulation of the UNGP framework occurred in three phases: the first phase focused on identifying and clarifying existing standards and practices; the second phase created a cohesive and comprehensive system for regulating business and human rights; and the third phase required Ruggie to provide "concrete and practical recommendations" for implementing the framework.²⁹ As a result of the second phase of this process, Ruggie proposed a framework on business and human rights to the UN Human Rights Council in 2008 that eventually became the UNGP.³⁰ Ruggie's formulation of these preliminary principles included what has become known as the "Protect, Respect and Remedy Framework."³¹ The proposed framework included three pillars: "1) the state duty to protect against human rights abuses by third parties, including business; 2) the corporate responsibility to respect human rights; and 3) greater access by victims to effective remedy, both judicial and non-judicial."³²

²⁶ Ruggie, *supra* note 19.

²⁷ *Id.*

²⁸ John Ruggie, HARVARD KENNEDY SCHOOL, <https://www.hks.harvard.edu/faculty/john-ruggie> (last visited Aug. 14, 2019); *Business and Human Rights: Together at Last? A Conversation with John Ruggie*, THE FLETCHER FORUM OF WORLD AFFAIRS, <http://www.fletcherforum.org/home/2016/9/6/business-and-human-rights-together-at-last-a-conversation-with-john-ruggie> (last visited Oct. 5, 2017).

²⁹ John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, UN Doc A/HRC/17/31 (March 21, 2011), http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AE_V.pdf.

³⁰ UN "Protect, Respect and Remedy" Framework and Guiding Principles, BUS. & HUMAN RIGHTS RES. CENTRE, <https://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles> (last visited Oct. 5, 2017).

³¹ *Id.*

³² *Id.*

The Human Rights Council unanimously accepted the framework. This was the first time a UN intergovernmental body had taken a position on this policy issue.³³ One country from each UN regional group sponsored the resolution authorizing Ruggie's framework, including Norway as the primary sponsor, and Argentina, India, Nigeria, and Russia as co-sponsors.³⁴ Ruggie was then tasked with the third phase of the process, putting the framework into action, and three years later he proposed the UNGP as a manifestation of that framework. The Human Rights Council officially endorsed the UNGP in 2011.³⁵

B. Access to Remedy Under the United Nations Guiding Principles on Business and Human Rights Framework

The UNGP for Business and Human rights set forth the remedy requirement in plain terms.³⁶ Guiding Principle 25, the foundational principle regarding the remedy, asserts that “[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.”³⁷

The principle makes plain that the provision of the remedy is mandatory. In fact, each State has an international legal obligation, within its territory and jurisdiction, to ensure that a remedy exists for those who are victims of corporate human rights violations.³⁸ The commentary to the foundational principle further clarifies that states have an affirmative duty to protect against human rights abuse perpetrated by multinational corporations and provides examples of remedies that states may provide.³⁹ According to the commentary, states have a variety of options when it comes to remedies, such as “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions . . . as well as the prevention of harm through . . . injunctions

³³ Ruggie, *supra* note 19.

³⁴ *Id.*

³⁵ Human Rights Council Res. 17/4, 17th Sess., U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), <https://business-humanrights.org/sites/default/files/media/documents/un-human-rights-council-resolution-re-human-rights-transnational-corps-eng-6-jul-2011.pdf>.

³⁶ Human Rights Council Res. 17/31, 17th Sess., U.N. Doc. A/HRC/RES/17/31 (March 21, 2011), <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

³⁷ *Id.* at 22.

³⁸ Robert McCorquodale, *Survey of the Provision in the United Kingdom of Access to Remedies for Victims of Human Rights Harms Involving Business Enterprises*, BRITISH INST. INT'L & COMP. L. (July 17, 2015), https://www.biicl.org/documents/724_uk_access_to_remedies.pdf?showdocument=1.

³⁹ Human Rights Council Res. 17/31, *supra* note 36, at 22.

or guarantees of non-repetition.”⁴⁰ The state must provide remedies that effectively prevent the harm from occurring again.⁴¹

The commentary also defines what constitutes a harm committed by a multinational corporation.⁴² Grievances are defined by the commentary as “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.”⁴³ The commentary also provides that grievance mechanisms may be judicial or non-judicial and that states must make a good-faith effort to “facilitate public awareness” about these grievance mechanisms so that injured parties are aware of the remedies available to them.⁴⁴

“Barriers to . . . remedy can be legal, social, financial, practical or procedural.”⁴⁵ Legal barriers may include claimants’ inability to access home state courts even with a meritorious claim or the exclusion of particular groups from the same protections afforded to other groups in society.⁴⁶ Practical or procedural barriers are issues such as costs deterring one from bringing an action, a lack of resources or incentive for advocates to represent claimants, or inadequate options for class action or collective action proceedings.⁴⁷ The UNGP require states make the remedies they provide to victims of human rights violations effective and accessible in order to avoid these barriers.⁴⁸ Guiding Principle 26, the first of the Operational Principles, and notably the only Guiding Principle that is stated in mandatory terms,⁴⁹ addresses state-based judicial mechanisms, and provides that:

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.⁵⁰

To an extent, the UNGP also define how the judicial mechanisms should operate.⁵¹ Effectiveness of judicial mechanisms, according to the principle,

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ McCorquodale, *supra* note 38, at 3.

⁴⁶ Human Rights Council Res. 17/31, *supra* note 36, at 23-24.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 22.

⁴⁹ McCorquodale, *supra* note 38, at 5.

⁵⁰ Human Rights Council Res. 17/31, *supra* note 36, at 23.

⁵¹ *Id.*

depends on “impartiality, integrity, and ability to accord due process” to victims.⁵² This due process is afforded in three stages: access, procedures, and outcome. The UNGP indicate that States should afford “particular attention” to marginalized groups of people who might “face additional cultural, social, physical and financial impediments to accessing, using and benefitting from these mechanisms.”⁵³ For example, studies show that women in the cocoa sector are paid significantly less than men, are less available to participate in training due to their commitments at home, and do not complain about violations of their human rights for fear of being fired.⁵⁴ Women in these situations are both more vulnerable to human rights abuses and less likely to feel incentivized to report them.⁵⁵ According to the UNGP, corporations are to have a heightened sensitivity and a protocol in place to respond to these types of situations.⁵⁶

Guiding Principle 27, which addresses state-based non-judicial grievance mechanisms, explains that States must provide “effective and appropriate non-judicial grievance mechanisms . . . as a part of a comprehensive State-based system for the remedy of business-related human rights abuse.”⁵⁷ Non-judicial mechanisms include administrative and legislative mechanisms and are meant to supplement judicial mechanisms in order to provide a comprehensive system of remedies.⁵⁸ According to Guiding Principle 28, states are also responsible under the third pillar of the framework for facilitating “access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.”⁵⁹ This principle contemplates mechanisms that operate within a business enterprise.⁶⁰ These types of mechanisms are extremely valuable because they offer a quicker outcome, lower costs, or transnational reach.⁶¹ Another type of non-State-based mechanism offers a remedy through regional and international human rights bodies.⁶² A state’s duty in relation to these organizations is to raise awareness and facilitate access to these options.⁶³

⁵² *Id.*

⁵³ *Id.* at 24.

⁵⁴ Rachel Wilshaw et al., *Business and Human Rights: An Oxfam Perspective on the UN Guiding Principles*, OXFAM TECH. BRIEFING 1, 5 (June 2013), <https://www.oxfam.org/sites/www.oxfam.org/files/tb-business-human-rights-oxfam-perspective-un-guiding-principles-130613-en.pdf>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Human Rights Council Res. 17/31, *supra* note 36, at 24.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 25.

The UNGP also specifically address duties that business enterprises have regarding the provision of remedy for human rights violations.⁶⁴ According to Guiding Principle 29, business enterprises have the opportunity to directly address and remedy the harm that results from a human rights violation by “establish[ing] or participat[ing] in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”⁶⁵ There are two key functions that operational-level grievance mechanisms must perform: they must

- 1) . . . support the identification of adverse human rights impacts as a part of [the] enterprise’s on-going human rights due diligence . . . by providing a channel for those directly impacted by the enterprise’s operations to raise concerns when they believe they are being or will be adversely impacted [and]
- 2) . . . make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.⁶⁶

Corporations are also required to have initiatives that advance human rights-related standards, and these initiatives should make remedies accessible.⁶⁷ The final guiding principle sets forth effectiveness criteria for non-judicial grievance mechanisms.⁶⁸ The criteria states that in order for non-judicial grievance mechanisms to be effective, they must be legitimate, accessible, predictable, equitable, transparent, rights-compatible (meaning they ensure that outcomes are in line with recognized human rights), a source of continuous learning, and based on engagement and dialogue.⁶⁹

C. The United Kingdom’s Response to the United Nation’s Guiding Principles

Following the United Nation’s endorsement of the UNGP, the United Nations Human Rights Council called on all member states of the United Nations to develop a National Action Plan to organize the implementation of the

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 26.

⁶⁸ *Id.*

⁶⁹ *Id.*

UNGP.⁷⁰ On September 4, 2013, the United Kingdom was one of the first nations to release a National Action Plan to implement the UNGP.⁷¹ According to Foreign Secretary William Hague, the goal of the National Action Plan was to “ensure that British companies succeed . . . in a manner that is consistent with this country’s deeply held values of human rights and individual dignity.”⁷² The United Kingdom’s National Action Plan begins with an introduction that details how protecting human rights actually benefits businesses.⁷³ The document states that businesses receive benefits by respecting rights. These benefits include enhancement of the company’s reputation and brand value, an increase in customer base, an increase and retention of staff, maintenance of longevity, reduction of the risk of costly litigation, and increased appeal to institutional investors.⁷⁴ The primary purpose of the National Action Plan, according to its text, is to help companies achieve these benefits by providing a clear delineation of the Government’s expectations of companies regarding human rights.⁷⁵

The National Action Plan addresses each of the three pillars of the UNGP individually.⁷⁶ Regarding remedy, the document first states that the United Kingdom currently provides remedies through its judiciary system, through non-judicial grievance mechanisms such as internal company grievance procedures, arbitration, adjudication, mediation, conciliation, and negotiation.⁷⁷ The action plan addresses remedy briefly in comparison to its treatment of the other two pillars. In addition to the existing judicial and non-judicial

⁷⁰ *Assessments of Existing National Action Plans (NAPs) on Business and Human Rights*, INT’L CORP. ACCOUNTABILITY ROUNDTABLE (Aug. 2017), <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/599c543ae9bdfd40b5b6f055/1503417406364/NAP+Assessment+Aug+2017+FINAL.pdf>.

⁷¹ Sec’y of State for Foreign and Commonwealth Affairs by Command of Her Majesty, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, HM GOV’T 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf (last updated May 2016).

⁷² William Hague, *Speech: UK Action Plan on Business and Human Rights* (Sept. 5, 2013), <https://www.gov.uk/government/speeches/uk-action-plan-on-business-and-human-rights--2>.

⁷³ Sec’y of State for Foreign and Commonwealth Affairs by Command of Her Majesty, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, HM GOV’T (Sept. 2013), <https://www.business-humanrights.org/sites/default/files/media/documents/uk-national-action-plan-sep-2013.pdf>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

mechanisms already in place, it states that the United Kingdom has promoted access to remedy in that it has:

task[ed] UK Trade and Investment (UKTI) teams in the markets where they operate to advise UK companies on establishing or participating in grievance mechanisms for those potentially affected by their activities and to collaborate with local authorities in situations where further State action is warranted to provide an effective remedy[;]

encourage[d] companies to extend their domestic UK practice of providing effective grievance mechanisms to their overseas operations, adapting them where necessary according to local circumstances and consulting interested parties. . . . [and]

support[ed] projects through the FCO Human Rights and Democracy Programme Fund relating to work on remedy procedures in other countries⁷⁸

In response to the UNGP's requirements regarding corporations, the National Action Plan "encourages companies to review their existing grievance procedures to ensure they are fair, transparent, understandable, well-publicised [sic] and accessible by all, and provide for grievances to be resolved effectively without fear of victimization."⁷⁹

In May 2016, the United Kingdom updated its National Action Plan for four purported reasons:

- 1) to "record the achievements the Government has made, and actions . . . taken" since the National Action Plan was initially promulgated;
- 2) to "reflect the developments which have taken place at the international level since the UK's National Action Plan was first published, including guidance on implementation and the experience of other countries;"
- 3) to "set out the role Government can play in helping business[es] to fulfill [their] responsibility to respect human rights . . . ;" [and]

⁷⁸ *Id.*

⁷⁹ *Id.*

4) to “support the role Government can play in . . . the provision of remedy which is available to those who feel they are victims of business-related human rights abuses.”⁸⁰

Although the updated National Action Plan explicitly states that part of the motivation behind the update is to focus on providing victims with access to remedy and reducing barriers to judicial and non-judicial remedies, the National Action Plan offers little in the way of material steps that the U.K. government has taken to follow through with this promise.⁸¹ The Update restates the remedies already provided judicially and non-judicially and discusses how it has attempted to encourage corporations to make remedies available to victims on an operational-level.⁸² Some of these efforts include working with UK Trade and Investment to “advise UK companies on establishing or participating in grievance mechanisms,” “encourag[ing] companies to extend their domestic UK practice of providing effective grievance mechanisms to their overseas operations,” and “support[ing] projects through the FCO Human Rights and Democracy Programme Fund on work on remedy procedures in other countries.”⁸³ These efforts will be analyzed later in this Note along with the current available remedies provided by multinational corporations.

1. *Judicial Remedies*

It is necessary to briefly discuss these judicial and non-judicial mechanisms, as the UK’s National Action Plan relies heavily on remedies already provided judicially and non-judicially. The first judicial mechanism available is a tort claim.⁸⁴ For these types of wrongs, claimants will most likely bring a negligence claim, and must prove that:

- 1) The defendant acted or omitted to act.
- 2) The act or omission caused loss and damage to the claimant.

⁸⁰ Sec’y of State for Foreign and Commonwealth Affairs by Command of Her Majesty, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, HM GOV’T 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf (last updated May 2016).

⁸¹ *Id.* at 20-21.

⁸² *Id.* at 21.

⁸³ *Id.*

⁸⁴ McCorquodale, *supra* note 38, at 14.

- 3) In all the circumstances the defendant owed a duty of care to act or not to act. . . .
- 4) The defendant's actions or omissions breached the duty of care [and]
- 5) The loss and damage was sufficiently foreseeable⁸⁵

A tort claim could also be brought on the basis of nuisance, trespass to the person, or privacy.⁸⁶ If the abuse occurs in the United Kingdom, the claimant may be able to invoke a range of statutory torts, under laws such as the Employers Liability Act 1969, the Occupiers Liability Acts of 1957 and 1984, or the Environmental Protection Act of 1990.⁸⁷ In any tort claim where both the victim and location of the abuse is overseas, which is highly likely in the context of a multinational corporation's violation of human rights, the claimant must also prove jurisdiction and applicable law.⁸⁸ The Brussels I Regulation allows EU member states in which the defendant is domiciled to obtain jurisdiction to hear a dispute no matter the defendant's nationality.⁸⁹ Therefore, companies who are incorporated in the United Kingdom may be liable to injured parties under UK law.

Claimants may also have the opportunity to bring an action against a corporation based on contract law.⁹⁰ These claims will be limited to contract terms that may define venue and choice of law.⁹¹ Contract claims relevant to human rights abuses may arise under employment issues or in regard to detention in a UK business-owned prison.⁹²

A claimant might also pursue a judicial remedy under criminal law⁹³ if a corporation violated a criminal statute in its commission of a human rights offense.⁹⁴ For example, the Corporate Manslaughter and Corporate Homicide Act 2007 is a statute that might apply to a corporate human rights violation.⁹⁵ This statute provides that a corporation can be convicted of corporate manslaughter when someone dies as a result of the way the business is managed.⁹⁶

⁸⁵ *Id.*

⁸⁶ *Id.* at 15-16.

⁸⁷ *Id.* at 16.

⁸⁸ *Id.*

⁸⁹ Council Regulation 1215/2012, 2012 O.J. (L 351) 1.

⁹⁰ McCorquodale, *supra* note 38, at 19.

⁹¹ *Id.*

⁹² *Id.* at 20.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 21.

⁹⁶ Corporate Manslaughter and Corporate Homicide Act 2007, c.19, §§ 19(1), 1(4) (Eng.).

Other statutes that may allow claims for human rights abuses by corporations include the Bribery Act 2010, the Serious Crime Act 2007, and the Modern Slavery Act 2015.⁹⁷

Employment tribunals are another form of judicial structure that claimants might utilize. Labor condition violations are most likely to fall into this category.⁹⁸ The UNGP, in Principle 12, makes clear that States are to protect labor rights, which include the right to safe conditions of work, fair remuneration, non-discrimination at work, and freedom of association.⁹⁹ Employment tribunals have jurisdiction solely for claims that arise under legislation.¹⁰⁰ These claims are typically for violations such as unfair dismissal, payment claims, claims about working conditions, and protection from discrimination.¹⁰¹ Employment tribunals have jurisdiction for claims where: 1) one of the respondents conducts business in the United Kingdom, 2) one or more of the violations took place in the United Kingdom, 3) the claim arises under a contract that concerns work that has been performed at least partly in the United Kingdom, or 4) there is a connection with the United Kingdom, which considerably broadens the scope of claims that can be brought.¹⁰²

2. *Non-Judicial Remedies*

There are also a variety of non-judicial mechanisms available to victims of human rights violations by multinational corporations.¹⁰³ The National Contact Point system is the primary mechanism that allows injured parties to bring a claim.¹⁰⁴ The Organisation for Economic Cooperation and Development (OECD), an international body whose mission is to “promote policies that will improve the economic and social well-being of people around the world,”¹⁰⁵ promulgated a human rights chapter and policies on due diligence into its OECD Guidelines for Multinational Enterprises, which are similar in content to the UNGP.¹⁰⁶ The OECD Guidelines require States to set up National Contact Points to “promote and implement the OECD Guidelines.”¹⁰⁷ Governments are afforded flexibility in how they set up their National Contact Points, but they are required to be “visible, accessible, transparent, and

⁹⁷ McCorquodale, *supra* note 38, at 21-22.

⁹⁸ *Id.* at 25.

⁹⁹ Human Rights Council Res. 17/31, *supra* note 36, at 13.

¹⁰⁰ See Employment Tribunals Act 1996, c. 17, § 2 (UK).

¹⁰¹ McCorquodale, *supra* note 38, at 25.

¹⁰² *Id.* at 26.

¹⁰³ *Id.* at 30.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citation omitted).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

accountable.”¹⁰⁸ This mechanism has proven to be important in the realm of human rights. For example, most actions brought under the National Contact Point system since 2011 have involved human rights violations.¹⁰⁹ The United Kingdom National Contact Point is housed in the Department of Business, Innovation, and Skills, and is maintained by a Steering Board.¹¹⁰ Complaints can be brought to the United Kingdom National Contact Point system by an interested party, a trade union, a NGO or other entity on behalf of the injured party.¹¹¹ The complaint must be in accordance with the OECD Guidelines.¹¹² The National Contact Point will perform an initial assessment of the merits of the complaint, then confirm the acceptance of the complaint with the complainant, notify the company named in the complaint, and afford the company twenty days to respond.¹¹³ The National Contact Point will often offer mediation to the parties in hopes to resolve the issue and remedy the wrong.¹¹⁴ Following the resolution of the issue, a final statement will be released by the National Contact Point.¹¹⁵

Another non-judicial remedy available to victims of human rights abuses by corporations in certain industries domiciled in the United Kingdom is the Gangmasters Licensing Authority (GLA), which was created following the promulgation of the Gangmasters Licensing Act of 2004 (GLA Act).¹¹⁶ Since 2014, the GLA has operated under the Home Office “in order to link it more directly to the law enforcement branches of government.”¹¹⁷ The GLA enforces proper labor standards in the agriculture, horticulture, and shellfish gathering industries, as well as any industry that deals with processing and packaging.¹¹⁸ Companies doing business in these areas must obtain a license through the GLA, and in order to do so, must show that they satisfy eight areas

¹⁰⁸ *Id.* (quoting *OECD Guidelines for Multinational Enterprises*, ORGANISATION FOR ECON. CO-OPERATION AND DEV. 78 (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>).

¹⁰⁹ *Id.* at 31.

¹¹⁰ *Id.* at 30 (citing *UK National Contact Point (UK NCP) for the OECD's Guidelines for Multinational Enterprises*, GOV.UK, <https://www.gov.uk/government/groups/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-guidelines>).

¹¹¹ *Id.*

¹¹² *Id.* at 30-31.

¹¹³ *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, DEP'T FOR BUS. INNOVATION & SKILLS 1, 10 (Jan. 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf.

¹¹⁴ *Id.* at 15.

¹¹⁵ *Id.* at 18.

¹¹⁶ McCorquodale, *supra* note 38, at 34.

¹¹⁷ *Id.* (citation omitted).

¹¹⁸ *What We Do*, GANGMASTERS & LABOUR ABUSE AUTH. (2017), <http://www.gla.gov.uk/who-we-are/what-we-do/>.

of practice: “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 subcontracting and using other labour providers.”¹¹⁹ The GLA Act created four offenses for human rights violations under the Act:

- 1) Operating as a gangmaster without a license;
- 2) Obtaining or possessing a false license or false documentation which is likely to cause another person to believe that a person acting as a gangmaster is licensed;
- 3) Entering into an arrangement with an unlicensed gangmaster; and
- 4) Obstructing a GLA enforcement officer who is carrying out his duties under the GLA Act.¹²⁰

Penalties for violations of the GLA range from six to ten years imprisonment and/or a fine.¹²¹ To ensure that the licensing standards are being upheld, inspections are conducted on a random basis.¹²²

Victims may also bring claims through the Equality and Human Rights Commission (EHRC), a public body created under the Equality Act of 2006 that has the purpose of “challeng[ing] discrimination, promot[ing] equality of opportunity and protect[ing] human rights.”¹²³ The EHRC is technically a non-judicial body, but it can bring judicial review proceedings “to provide legal assistance to victims of discrimination, to intervene in or institute legal proceedings, including judicial review, and to make applications to court for injunctions” for a range of issues, including employment.¹²⁴

In some circumstances, Ombudsman Offices also serve as a forum for victims of human rights violations by multinational corporations to file complaints. Parliament created the Ombudsman to serve as a complaint handling service for complaints that have not been resolved by government departments of the United Kingdom.¹²⁵ The Ombudsman’s services are reviewed

¹¹⁹ McCorquodale, *supra* note 38, at 34.

¹²⁰ *Id.* at 34-35 (citing Gangmasters (Licensing) Act 2004, c. 11, §§ 12-13, 18 (UK)).

¹²¹ *Id.* at 35 (citing Gangmasters (Licensing) Act 2004, c. 11, § 12 (UK)).

¹²² *Id.*

¹²³ *Who We Are*, EQUALITY AND HUMAN RIGHTS COMM’N, <https://www.equalityhumanrights.com/en/about-us/who-we-are> (last visited Nov. 4, 2017).

¹²⁴ *Court Action*, EQUALITY AND HUMAN RIGHTS COMM’N, <https://www.equalityhumanrights.com/en/court-action> (last visited Nov. 4, 2017).

¹²⁵ *What We Do*, PARLIAMENTARY AND HEALTH SERV. OMBUDSMAN, <https://www.ombudsman.org.uk/about-us/what-we-do> (last visited Sept. 1, 2019).

by the Public Administration and Constitutional Affairs Committee.¹²⁶ Ombudsman offices that can hear human rights violations are the Children's Commissioners for England, Scotland, and Wales and, importantly, the Information Commissioner's Office, which "deals with complaints concerning information and privacy rights."¹²⁷

The final non-judicial mechanism providing a remedy to victims of human rights violations by multinational corporations is the Groceries Code Adjudicator (GCA). The GCA was established by the Groceries Code Adjudicator Act of 2013.¹²⁸ The GCA can address violations specifically in reference to supermarkets and their suppliers, and it ensures "that regulated retailers treat their direct suppliers lawfully and fairly."¹²⁹ Parties can complain to the GCA through a formal process, and if they are unhappy with the decision made by the Head of Office, the complaint will be reviewed by an Adjudicator who reviews the complaint and issues a final outcome letter.¹³⁰ If the complainant is still unhappy, he or she will be given details of how to complain to the Ombudsman.¹³¹

3. *Business/Internal Grievance Mechanisms*

The UNGP also mandate that corporations facilitate access to remedy at an operational-level.¹³² According to the UNGP, operational-level grievance mechanisms must be "legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning."¹³³ Many UK companies have only just begun to develop operational-level grievance mechanisms in the last decade in response to the promulgation of the UNGP.¹³⁴

¹²⁶ *The Public Administration and Constitutional Affairs Committee (PACAC)*, PARLIAMENTARY AND HEALTH SERV. OMBUDSMAN, <https://www.ombudsman.org.uk/making-complaint/information-mps/our-role-and-relationship-parliament/public-administration-and-constitutional-affairs-committee-pacac> (last visited Sept. 1, 2019).

¹²⁷ McCorquodale, *supra* note 38, at 39.

¹²⁸ *Id.* at 41 (citing Groceries Code Adjudicator Act 2013, c. 19, §1 (UK)).

¹²⁹ *About Us*, GROCERIES CODE ADJUDICATOR, <https://www.gov.uk/government/organisations/groceries-code-adjudicator/about> (last visited Sept. 23, 2019).

¹³⁰ *Groceries Code Adjudicator Complaints Policy*, GROCERIES CODE ADJUDICATOR, 1, 2, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/557614/GCA_Complaints_Policy_-_Final.pdf (last visited Nov. 4, 2017).

¹³¹ *Id.*

¹³² Sec'y of State for Foreign Commonwealth and Affairs, *supra* note 73.

¹³³ Civil Society and Corporate Lawyers Should Work Together on Human Rights Due Diligence, BUS. & HUM. RIGHTS RESOURCE CTR., <https://www.business-human-rights.org/en/civil-society-and-corporate-lawyers-should-work-together-on-human-rights-due-diligence> (last visited Sept. 1, 2019).

¹³⁴ JUAN JOSÉ ÁLVAREZ RUBI & KATERINA YIANNIBAS, HUMAN RIGHTS IN BUSINESS: REMOVAL OF BARRIERS TO ACCESS TO JUSTICE IN THE EUROPEAN UNION 81 (Routledge ed., 1st ed. 2017).

Unfortunately, as noted by the United Nations Working Group “research in the field of business and human rights lacks comprehensive data on the number and nature of complaints against companies for their adverse impacts and the effectiveness of the bodies tasked with investigating and remediating those impacts.”¹³⁵ Although operational-level grievance mechanisms will look different from company to company, under the UNGP, UK corporations have relatively stringent guideposts as to how these remedial structures should operate.

III. ANALYSIS

A. *Limitations on Judicial Remedies in the United Kingdom*

John Ruggie himself has commented on the difficulty victims of human rights violations face in attaining a remedy, even after the promulgation of the UNGP, stating that the “patchwork of mechanisms,” including judicial, non-judicial, and corporate-level, “remains incomplete and flawed” and “must be improved in its parts and as a whole.”¹³⁶ In order to evaluate the efficacy, or lack thereof, of access to remedy for human rights violations by multinational corporations in the United Kingdom, it will be useful to follow the path one might take through the available remedies.

A victim of a severe human rights violation by a multinational corporation would most likely turn to the judicial system.¹³⁷ In evaluating judicial remedies, it is crucial to bear in mind that the UNGP require States to “ensure the effectiveness of domestic judicial mechanisms” and consider methods to reduce barriers to remedy.¹³⁸ Because human rights violations often occur beyond the jurisdiction of the multinational corporation’s domicile, victims sometimes have difficulty attaining remedy for these types of claims.¹³⁹ The UK’s provision of remedies extends to claims brought by victims who suffered human rights violations outside of the United Kingdom, although there is no specific legislation that allows these claims.¹⁴⁰

¹³⁵ U.N. Secretary-General, *Rep. of the Working Group*, U.N. Doc. A/70/216 (July 30, 2015).

¹³⁶ Ruggie, *supra* note 19, at 22.

¹³⁷ *Improving Access to Remedy in the Area of Business and Human Rights at the EU Level: Opinion of the European Union Agency for Fundamental Rights*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS 5 (Apr. 10, 2017), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf.

¹³⁸ Human Rights Council Res. 17/31, *supra* note 36, at 23.

¹³⁹ *Id.*

¹⁴⁰ Olivier De Schutter, Robert McCorquodale & Gwynne Skinner, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Businesses*, BRITISH INST. INT’L & COMP. L. 35 (Dec. 2013), https://www.biicl.org/documents/182_the_third_pillar.pdf?showdocument=1.

The primary way for claimants to bring claims for corporate-related human rights violations perpetrated in other jurisdictions is through tort law.¹⁴¹ The Brussels I Regulation applies to civil and commercial disputes, “regardless of the court or tribunal,” and to any individual “domiciled in one of the EU Member States.”¹⁴² Pursuant to Article 63 of the Brussels I Regulation, “companies are considered to be domiciled in the place where they have their statutory seat, central administration, or principle place of business.”¹⁴³ Therefore, victims of extraterritorial human rights violations can typically bring a tort claim against a corporation domiciled in an EU member state, such as the United Kingdom.¹⁴⁴ However, these types of human rights violations are often perpetrated by subsidiaries of multinational corporations that are technically domiciled in the United Kingdom. Brussels I Regulation does not apply to subsidiaries.¹⁴⁵ This is one of the major barriers that victims run into.

This Note previously mentioned the recent decision by the UK High Court to dismiss a case brought against Shell by communities in the Niger Delta. These victims were seriously injured by oil spills caused by the alleged negligence of Shell Petroleum Development Company of Nigeria, Ltd., a subsidiary of Royal Dutch Shell.¹⁴⁶ The victims were unable to attain a remedy in the High Court, “despite the company having profited from decades of abuses and environmental destruction in the Niger Delta.”¹⁴⁷ The primary reason for the claim’s dismissal was the judge’s conclusion that there was no connection between the United Kingdom and what the judge determined to be a Nigerian company, though the company was a subsidiary of a corporation domiciled in the United Kingdom.¹⁴⁸ The Shell case presents an example of a claim “[w]here claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim.”¹⁴⁹ Here, victims of human rights abuse were unable to pursue a claim in the United Kingdom based on the fact that it was the subsidiary, not Shell itself, that perpetrated the human rights abuse. This appears to be what the UNGP document defines as a legal barrier.

In cases involving very specific fact patterns, UK courts have chosen to hold parent companies liable for harmful actions of subsidiaries. In the

¹⁴¹ *Id.* at 36.

¹⁴² Rubio & Yiannibas, *supra* note 134, at 17.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 18.

¹⁴⁶ *UK: Shell Ruling Gives Green Light for Corporations to Profit from Abuses Overseas*, AMNESTY INT’L (Jan. 26, 2017), <https://www.amnesty.org/en/latest/news/2017/01/uk-shell-ruling-gives-green-light-for-corporations-to-profit-from-abuses-overseas/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Human Rights Council Res. 17/31, *supra* note 36, at 23.

landmark decision of *Chandler v. Cape plc*,¹⁵⁰ the plaintiff suffered from asbestosis as a result of his exposure to asbestos fibers while working for Cape Building Products Limited, a subsidiary of Cape PLC.¹⁵¹ The Court of Appeals held the plaintiff had a valid claim against the parent company because Cape PLC owed a direct duty of care to the plaintiff, despite the general rule that parent companies cannot be held liable for the actions of their subsidiaries.¹⁵² The Court created a new rule, stating that responsibility of a parent company for the health and safety of its subsidiary's employees may be imposed where:

1. [T]he 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 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.¹⁵³

The Court of Appeals allowing this exception to the general no-liability-for-subidiaries rule begs the question of whether liability can be broadened to hold more corporations accountable for the transgression of their subsidiaries, like in the *Shell* case. On the other hand, creating liability for parent corporations who are more involved in the operations and specifically, in the promotion of health and safety of their subsidiaries, might create an incentive for corporations to take a more hands-off approach. This is dangerous because it could lead to even more egregious violations of human rights by multinational corporations. However, if the rule is altered to implicate multinational corporations, including their subsidiaries, even where they do not have as

¹⁵⁰ *Chandler v. Cape plc* [2012] EWCA (Civ) 525 (Eng.).

¹⁵¹ *Chandler v Cape: Piercing the Corporate Veil: Lessons in Corporate Governance*, MAYER BROWN (May 2011), https://www.mayerbrown.com/files/Publication/3afefd67-6cd6-4697-ac33-b25564d1ff65/Presentation/PublicationAttachment/663d94ed-250d-467a-a303-138edc334847/chander_cape_120510.pdf.

¹⁵² *Id.*

¹⁵³ Wedlake Bell, *The Impact of Chandler v Cape plc on Corporate Holding Structures*, LEXOLOGY (July 13, 2012), <https://www.lexology.com/library/detail.aspx?g=6aff6929-e2e7-4eac-a68b-9930f2d6e8c4>.

much of a hands-on approach, multinational corporations will be incentivized to focus more on preventing human rights abuses by their subsidiaries.

The UNGP advise “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.”¹⁵⁴ Given the importance of ensuring access to remedy under the UNGP, the courts of the United Kingdom should expand the *Chandler v. Cape* rule, and lower the standard that currently exists for claimants to bring a claim against subsidiaries of multinational corporations. The result would be that corporations domiciled in the United Kingdom that have subsidiaries in foreign countries would become more incentivized to act carefully and to ensure that their subsidiaries were taking the proper precautions to guard against human rights violations.

Another barrier that a victim seeking redress for a human rights violation in the judicial realm might encounter relates to the applicable law.¹⁵⁵ Under the Rome II regulation, when a business domiciled in the European Union is sued for human rights abuse abroad, the applicable law is the law of the State where the violation occurred.¹⁵⁶ For the most part, damages will also be determined based on the law of the state where the abuse occurred.¹⁵⁷ This can have the effect of limiting the types of claims a plaintiff may bring and the amount of damages a plaintiff may receive in UK courts. Additionally, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 made two crucial changes to Conditional Fee Agreements.¹⁵⁸ These changes have negative implications for victims seeking remedy from human rights violations. First, the success fee, which is 100% except in personal injury cases, where it is 25%, must now be paid from the compensation awarded to the victims of abuse.¹⁵⁹ Second, “the costs incurred by the winning sides’ legal team, which are recoverable from the losing side must now be ‘proportionate’ to the amount awarded in compensation.”¹⁶⁰ These changes have enormous implications for claimants pursuing a remedy for human rights violations because, given the complex nature of these claims and the fact that they might involve up to thousands of claimants, costs might easily exceed the compensation awarded.¹⁶¹

On a broader level, victims pursuing tort claims experience difficulties with the logistics of pursuing a claim that may involve two states.¹⁶² For

¹⁵⁴ Human Rights Council Res. 17/31, *supra* note 36, at 23.

¹⁵⁵ McCorquodale, *supra* note 38 at 17.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ BUS. & HUMAN RIGHTS RES. CTR., *supra* note 13.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² McCorquodale, *supra* note 38, at 17-18.

example, obtaining evidence in cases where an individual sues a subsidiary of a parent corporation is difficult because individuals might have difficulty identifying the correct defendant due to the “transnational nature of large corporate groups, especially when coupled with a lack of transparency as to the ultimate ownership or control of companies.”¹⁶³ Plaintiffs might also have trouble identifying all potential victims, especially where there may be “considerable locational, language and logistical efforts” involved when attempting to sue a foreign subsidiary of a UK parent corporation.¹⁶⁴ Additionally, victims occasionally run into problems when attempting to file a class action suit, as the processes for doing so under the Civil Procedure Rules of England and Wales are complex and have the potential to slow down litigation and increase costs.¹⁶⁵ Unfortunately, this proves to be a profound problem for claimants such as Mr. John Gbei, who was one of the victims of Shell’s oil spill in Nigeria.¹⁶⁶

We decided to give it to a Nigerian lawyer . . . but unfortunately the matter was with him for two years. He tried to go into negotiation with Shell rather than instituting the case in the court. There was no outcome, no nothing, so after two years of the matter being with him the Bodo people decided to withdraw the power from him and give it to a London law firm, Leigh Day & Co . . . Also, given the Nigerian legal system, there would be delay, and it was a matter that needed urgent attention . . . If you had been to Bodo at that early stage of the spill, you would have discovered that the people were in a bad situation. You would have pitied us. A matter of such magnitude needed not to be delayed in the court.¹⁶⁷

Mr. Gbei’s testimony speaks to the real-life issues that claimants encounter when attempting to navigate jurisdiction, choice of law, and aggregating claims. Human rights violations are often time-sensitive and the current legal landscape for these types of claims does not offer much expediency, to say the least.

¹⁶³ Mark B. Taylor et al., *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses*, FAFO 10 (Sept. 11-12, 2009), http://www.fafon.org/media/com_netsukii/20165.pdf.

¹⁶⁴ McCorquodale, *supra* note 38, at 18.

¹⁶⁵ *Id.* at 19.

¹⁶⁶ House of Lords, House of Commons, & Joint Comm. on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, BRITISH INST. INT’L & COMP. L. 49 (Apr. 5, 2017), https://www.biicl.org/documents/1647_jchr_business_and_human_rights_inquiry_2017_final.pdf?showdocument=1.

¹⁶⁷ *Id.* at 49-50 (quoting John Gbei).

While amending regulations to increase the speed of the judicial system and expand access to evidence in these types of cases would admittedly be difficult, the United Kingdom could, at the very least, make changes that would allow claimants to bring claims in UK courts using UK law. This ability would allow claimants the opportunity to obtain a reasonable judgment and retain the majority of the damage award given in these cases. To confront the difficulties that claimants like Mr. Gbei and his co-claimants might face, both the Rome II Regulation and the Legal Aid, Sentencing and Punishment of Offenders Act should be reconsidered to promote fair and reasonable access to remedy in the United Kingdom. The Rome II Regulation could be revised only as it pertains to claims made by victims of human rights violations perpetrated by multinational corporations that are domiciled in the United Kingdom and could allow for the utilization of UK law in situations like these, where claimants would be adversely impacted by having to use the law of the country where the abuses occurred. Similarly, the damages scheme of the Legal Aid, Sentencing and Punishment of Offenders Act could be amended to provide that where, specifically in cases involving human rights violations perpetrated by multinational corporations, legal costs exceed the compensation awarded, the percentages allocated from the judgment are discretionary instead of mandatory. In that case, judges would be able to prevent victims of human rights violations from leaving extremely expensive legal proceedings with essentially no remedy for the severe damage they suffered at the hands of a multinational corporation.

In very specific situations, victims of human rights violations might attempt to sue under contract law. This is only feasible where a contract specifies the choice of law and jurisdiction that governs the contract.¹⁶⁸ Similarly, victims typically have limited ability to invoke criminal law for these types of offenses because criminal offenses “are designed for natural persons and not legal persons,” and proving mens rea of a corporation is difficult.¹⁶⁹ In the limited circumstances where a corporation is found guilty of violating a statutory criminal offense, such as when a private security business “unlawfully kill[s], torture[s] or detain[s]” someone, or a financial entity subsidizes a company that participates in forced labor, courts will look to the individuals that “direct the mind and will” of the business.¹⁷⁰ In 2015, the United Kingdom created criminal liability, through the Modern Slavery Act of 2015, for corporations who are found to have dealt in human slavery and trafficking.¹⁷¹ Aside from this and a few other pieces of legislation that relate directly to the human rights context, victims do not have many available methods of recourse against multinational corporations in the criminal realm. This is especially

¹⁶⁸ McCorquodale, *supra* note 38, at 19.

¹⁶⁹ *Id.* at 20.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 22 (citing Modern Slavery Act 2015, c. 30, § 9 (UK)).

true given that criminal law cannot be applied extraterritorially,¹⁷² which is problematic considering the majority of these human rights claims are based on actions by corporations acting in foreign countries. The barrier faced by claimants who wish to hold multinational corporations accountable for criminal actions should be mitigated by the fact that claimants may bring tort claims against multinational corporations and their subsidiaries where they have been injured by their criminal actions, especially if the suggestions made previously in this Note regarding barriers to tort claims are taken into consideration.

Victims of human rights violations, specifically relating to labor rights, have the opportunity to bring a claim within the employment tribunals. Although it is less complicated to bring a claim where injury is caused by a foreign subsidiary of a United Kingdom corporation,¹⁷³ bringing a claim in this forum used to be expensive.¹⁷⁴ In 2017, however, the UK Supreme Court ruled that requiring fees for employment tribunals was unconstitutional.¹⁷⁵ The Court made this decision based on the fact that 79% fewer cases were brought for three years following the government's introduction of fees up to £1,200.¹⁷⁶ The United Kingdom, therefore, has actually improved access to remedy for employment-related cases in the past year. Considering the previously mentioned shortcomings in the UK's remedial scheme, this is the best example of how the United Kingdom has heeded the requirements of the UNGP by facilitating access to remedy for victims of human rights violations.

B. Limitations on Non-Judicial Remedies

The primary non-judicial method for victims to bring claims for human rights violations by multinational corporations is the National Contact Point system. From 2001 to 2015, the United Kingdom had the highest amount of complaints filed of any other country with a National Contact Point System.¹⁷⁷ This statistic is encouraging because it suggests that the UK's National Contact Point System is accessible to victims of human rights violations and that

¹⁷² *Id.*

¹⁷³ 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.

Id. at 26.

¹⁷⁴ *Id.*

¹⁷⁵ *Employment Tribunal Fees Unlawful, Supreme Court Rules*, BBC NEWS (July 26, 2017), <http://www.bbc.com/news/uk-40727400>.

¹⁷⁶ *Id.*

¹⁷⁷ See Daniel et al., *supra* note 21, at 15.

the United Kingdom is adequately informing potential victims of this method of attaining remedy. The National Contact Point is particularly relevant for claimants who may not have standing to bring their claim in court.¹⁷⁸ Also, the National Contact Point can actually be more inclusive than the judicial system because it does not discriminate against claims filed against subsidiaries of businesses domiciled in the United Kingdom.¹⁷⁹ Although the UK National Contact Point system may be more accessible than the systems of other countries, claimants still face major barriers. One barrier that claimants encounter when they go through the National Contact Point system is that there is no appeal process after the National Contact Point chooses not to proceed with a claim.¹⁸⁰ And if the claimants are allowed to proceed with the claim, they might incur exorbitant costs.¹⁸¹ National Contact Points often require claimants to pay for “services that are a necessary part of the complaint process and should be provided by the mechanism itself, such as the translation of key documents.”¹⁸²

Victims of human rights violations seeking redress through the United Kingdom National Contact Point also may be stalled by “high evidential thresholds.”¹⁸³ The National Contact Point System requires that complainants:

- [1.] Show that the link between the activities of the company and the issue raised is substantiated;
- [2.] And/or show that the link between the company’s obligations under the Guidelines and the issue raised has been substantiated;
- [3.] Have adequate sources and sufficient evidence; and
- [4.] On occasion, to meet additional evidential burdens.¹⁸⁴

¹⁷⁸ McCorquodale, *supra* note 38, at 32.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Daniel et al., *supra* note 21, at 22.

¹⁸² *Id.*

¹⁸³ *Obstacle Course: How the UK’s National Contact Point Handles Human Rights Complaints Under the OECD Guidelines for Multinational Enterprises*, AMNESTY INT’L 1, 38 (Feb. 2016), https://www.amnesty.org.uk/files/uk_ncp_complaints_handling_full_report_lores_0.pdf.

¹⁸⁴ *Id.*

This high threshold was evidenced by the case of *Crude Accountability et al v. KPO Consortium*,¹⁸⁵ in which the National Contact Point decided that the environmental and social impacts of an oil and gas company's activities on a village in Kazakhstan "were not directly related to the company's operations but to the state, because the obligations to resettle under Kazakh law fell to the government."¹⁸⁶ As Amnesty International astutely pointed out in its assessment of the UK's National Contact Point System, "[t]his misses the point that the human rights impacts were caused by the consortium's activities."¹⁸⁷ It is essential and commonly understood that companies can contribute to human rights abuses,¹⁸⁸ and in this case, it appears that the National Contact Point was attempting to skirt around that basic truth by finding claimants had not satisfied the burden of proof because fault actually belonged to the government.

In contrast to how the UK's National Contact Point is conducting itself, the OECD guidelines require National Contact Points to deal with complaints in a way that is impartial, predictable, equitable, and compatible with the guidelines.¹⁸⁹ The UK's National Contact Point System is primarily run by civil servants with no specific human rights expertise.¹⁹⁰ This could be a contributing factor to the requirement of such a high evidentiary threshold because individuals with no experience in human rights might not have an awareness of the difficulties victims face in attaining all the relevant evidence. If complainants do provide sufficient evidence and the National Contact Point system finds in their favor, the National Contact Point system will release a statement that might include a recommendation on how the company can improve; however, this statement has no binding effect on companies and the corporation might therefore not have an incentive to discontinue their harmful behavior.¹⁹¹

The National Contact Point System could be modified in a few ways that would reduce the barriers that claimants currently face when attempting to utilize this system. First, the United Kingdom should provide an appeal

¹⁸⁵ *Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Crude Accountability and Others Against Companies in the KPO Consortium in Kazakhstan*, ¶¶ 17-25 (Nov. 2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/265357/bis-13-1332-initial-assessment-uk-national-contact-point-kpo-consortium-kazakhstan.pdf.

¹⁸⁶ AMNESTY INT'L, *supra* note 183, at 5.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 32.

¹⁹⁰ *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, WWW.PARLIAMENT.UK, ¶ 207 (Apr. 5, 2017), https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/44309.htm#_idTextAnchor082.

¹⁹¹ *Id.* at ¶ 212.

process that would allow claimants whose claims are initially denied to have a second attempt to convince the National Contact Point that they have a meritorious case. This would provide claimants with limited resources more time to gather sufficient evidence to prove their injury and the multinational corporation's liability. To implement an appeals process, the United Kingdom may have to provide more funding for the National Contact Point System. This would be advisable for many reasons. The National Contact Point System is potentially the only venue for claimants to obtain relief, especially if they are unable to prove standing in the UK court system. Therefore, it is extremely important claimants have a fair shot at successfully bringing a claim in this system. Providing more funding would also potentially allow the National Contact Point to institute an appeals process, making the system more equitable, which is required by the OECD Guidelines.¹⁹² Additionally, bolstered funding would allow the National Contact Point to hire staff with specific human rights experience, which would ensure impartiality and guard against inequity in the process. The United Kingdom should also consider lowering the burden of proof on behalf of claimants attempting to obtain remedy through the National Contact Point System. Again, one way to do this would be to allow individuals with human rights experience to participate in deciding the merit of claims. This would guarantee that meritorious claims are not being filtered out by unreasonably high evidentiary standards and would provide more predictability, per the OECD guidelines,¹⁹³ because informed individuals would most likely be able to set a consistent evidentiary standard.

Although the National Contact Point System is incapable of binding multinational corporations to its decisions, there are concrete steps it could take to deter corporations from violating human rights in the future. One way the National Contact Point System could hold companies accountable is by making an effort to publicize a multinational corporation's refusal to cooperate with the decision and recommendations made by the National Contact Point System. Currently, the National Contact Point publishes a final statement as to its conclusions.¹⁹⁴ In order to deter companies from behaving in violation of human rights, it would be wise for the National Contact Point to make it publicly known when a multinational corporation ignores the suggestions

¹⁹² *OECD Guidelines for Multinational Enterprises*, ORGANISATION FOR ECON. CO-OPERATION AND DEV. 82 (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

¹⁹³ *Id.*

¹⁹⁴ Dr. Kate Macdonald, Dr. Shelley Marshall & May Miller-Dawkins, *Redress for Transnational Business-Related Human Rights Abuses in the UK*, NON-JUDICIAL REDRESS MECHANISMS REPORT SERIES 1, 25 (2016), https://www.google.com/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKewjG-5rLorDkAhXknuAKHQq0ATkQFjAAegQIABAC&url=http%3A%2F%2Fcorporateaccountability.squarespace.com%2Fs%2FNJM02_uk-govt.pdf&usg=AOvVaw0yVukuskRaOccYOoup3YNc.

made by the National Contact Point. This would incentivize corporations to address their mistakes because the consequences of not doing so may include major reputational harm. Other countries have also allowed their National Contact Point Systems to “exert greater leverage by preventing or enabling access to support including import or export licenses, government subsidies, qualification for government procurement, and export credit and trade financing support.”¹⁹⁵ The UK National Contact Point should utilize this method as a consequence for companies not responding to recommendations because it would serve as an excellent deterrent for future harmful conduct.

Victims who pursue claims through the Gangmasters Licensing Authority do so specifically in the context of the “agriculture, horticulture, dairy farming, livestock, shellfish gathering and associated food processing and packaging sectors.”¹⁹⁶ Under the Gangmasters Licensing Act, a gangmaster can be held liable for operating without a license, but not for violating human rights.¹⁹⁷ The primary barrier in this remedial scheme is simple: individuals cannot pursue human rights violations perpetrated by gangmasters. Individuals can, however, bring claims for serious human rights violations through a tort claim, and if not, potentially through the National Contact Point System. Therefore, this barrier is negligible in comparison to the more serious limitations considered elsewhere in this Note.

In certain circumstances, victims of human rights abuses might bring a claim through the Equality and Human Rights Commission. The Equality and Human Rights Commission operates specifically to hold public bodies accountable for human rights violations. Claimants pursuing remedy through this structure are limited in the sense the Commission only intervenes regarding claims against public bodies or where a case taken by another entity raises an issue of public concern.¹⁹⁸ A claim brought through an Ombudsman office is similarly limited in that this grievance mechanism is only applicable against public authorities. This is not really a barrier at all, because claimants to whom this limitation applies will most likely be more successful in bringing a claim through the judiciary or through the National Contact Point System.

The only barrier claimants might encounter when dealing with the Groceries Code Adjudicator is that these types of claims are specifically for a supplier/retailer agreement, and therefore for a contractual obligation.¹⁹⁹ As is the case for all claims based on contract, this barrier is negligible because claimants who want to bring a claim outside of the contract-based context may do so through the judicial system or the UK National Contact Point.

¹⁹⁵ *Id.* at 43.

¹⁹⁶ McCorquodale, *supra* note 38, at 34.

¹⁹⁷ *Id.* at 36.

¹⁹⁸ *Id.* at 37.

¹⁹⁹ *Id.* at 43.

C. Limitations on Business/Internal Grievance Mechanisms in the United Kingdom

According to the UNGP, in order for grievance mechanisms to live up to the standards of the framework, they must be “[l]egitimate . . . [a]ccessible . . . [p]redictable . . . [e]quitable . . . [t]ransparent . . . [r]ights-compatible [and a] source of continuous learning.”²⁰⁰ According to the Institute for Human Rights and Business, operational-level remedial mechanisms should “identify problems early, before they escalate, and provide solutions that include remedy to anyone impacted.”²⁰¹ Data is limited as to particular grievance mechanisms that exist in UK multinational corporations. Although multinational corporations might have some incentive to provide grievance mechanisms to avoid judicial redress, the United Kingdom does not have any hard law that requires corporations to implement and maintain grievance mechanisms for victims of human rights violations. The United Kingdom does have statutes that require due diligence, such as the Modern Slavery Act of 2015, which requires UK companies with a turnover threshold of more than £36 million to provide an annual public statement which details the efforts the company has made to ensure that it is not promoting slavery or human trafficking.²⁰² It would be feasible for other countries to follow the UK’s example and implement similar hard law aimed at ensuring that multinational corporations are providing adequate operational-level remedies.

The UK’s National Action Plan promised to “support, motivate and incentivise [sic] UK businesses to meet their responsibility to respect human rights throughout their operations both at home and abroad.”²⁰³ As previously stated, the Updated National Action Plan affirmed the government of the United Kingdom would implement this support, motivation, and incentive system by disseminating lessons from the 2012 experience of the London Organising Committee of the Olympic and Paralympic Games, working with the UK Trade and Investment (UKTI) teams to inform UK companies about grievance mechanisms, encouraging companies to provide grievance mechanisms for victims harmed in other jurisdictions, and supporting projects relating to work on providing remedies in other countries.²⁰⁴ Although the United Kingdom promised to follow through with this system of informing UK companies on proper grievance mechanisms, it is unclear how it has done so and whether or not there has been any success in this program. The United Kingdom would be wise to follow through with this regime. However, the more

²⁰⁰ Human Rights Council Res. 17/31, *supra* note 36, at 26.

²⁰¹ *Remediation and Operational-Level Grievance Mechanisms*, INST. FOR HUMAN RTS. AND BUS. 69, 71, https://www.ihrb.org/uploads/reports/EC-Guide_OG-12_Part-3_Section-VI.pdf (last visited Nov. 4, 2017).

²⁰² Modern Slavery Act 2015, c. 30, § 54 (UK).

²⁰³ Sec’y of State for Foreign and Commonwealth Affairs, *supra* note 73.

²⁰⁴ Sec’y of State for Foreign and Commonwealth Affairs, *supra* note 80, at 21.

effective method of ensuring that businesses comply with the UNGP as to operational-level grievance mechanisms would be to implement some hard law requiring corporations to adhere to a set of standards that would ensure claimants have a fair chance of attaining a remedy at the company-level.

IV. CONCLUSION

Human rights violations by multinational corporations still occur at an alarming rate, despite the promulgation of the UNGP. A huge part of the problem is that states are not providing adequate remedy to victims and are therefore not deterring multinational corporations from carrying on harmful behavior. The United Kingdom's response to the UNGP in particular has been insufficient in regard to remedy. First, victims of human rights violations by multinational corporations that are domiciled in the United Kingdom encounter difficulty when attempting to bring a tort claim against foreign subsidiaries of major multinational corporations. This limitation could be avoided by expanding liability for multinational corporations and encouraging these businesses to exercise greater care in ensuring that human rights violations do not occur. Additionally, the United Kingdom should consider amending statutes such as the Rome II Regulation and the Legal Aid, Sentencing and Punishment of Offenders Act, even if only provisions specifically pertaining to human rights violations. Doing so will allow claimants to have a fair shot when bringing a human rights claim in the United Kingdom and to obtain a sufficient award of damages.

In the non-judicial realm, the National Contact Point System is the primary mechanism that needs to be reformed so the United Kingdom will live up to the standards set by the UNGP. The United Kingdom would be wise to provide more funding to the National Contact Point, making it possible for the system to hire individuals with experience in human rights. This would also potentially allow for the extremely high burden of proof to be lowered, and for claims to be brought more easily. Additionally, bolstering funding for the National Contact Point would allow for an appeals process to be put into place, making the system more equitable and predictable. Because National Contact Point decisions are non-binding, the United Kingdom should also consider taking actions that would increase accountability for multinational corporations that have violated human rights. Finally, the United Kingdom should institute hard law, requiring corporations to meet certain standards for their operational-level grievance mechanisms. This would ensure the requirements of the UNGP are fulfilled and that victims of human rights abuses have adequate access to remedies.

