



The Registrar of the Supreme Court
The Supreme Court of the United Kingdom
Parliament Square
London
SW1P 3BD

18 January 2018

Dear Lord and Lady Justices,

RE: Rule 15 submission to the Supreme Court regarding *AAA & Others v Unilever Plc and Unilever Tea Kenya Limited A2/2017/0721*

The NGO co-signatories to this letter have developed extensive expertise on the rights of victims of serious human rights abuses (including victims of torture, and sexual and gender-based violence) to an effective remedy and full and adequate reparation. The human rights issues raised in *AAA & Others v Unilever Plc and Unilever Tea Kenya Limited A2/2017/0721* are of the kind central to this work.

A. Background

This case concerns claims brought by tea workers against Unilever PLC (Unilever) in which they seek redress for gross human rights violations which they suffered in Kenya whilst they were employees of Unilever Tea Kenya Limited (UTKL), as a result of violence against them following the 2007 elections.

The Appellant tea workers contend that Unilever owed them a duty of care and that this duty was breached. In February 2017, Laing J found at first instance that there was a sufficient degree of connection between Unilever and the Appellants to satisfy the text of proximity, however, in the circumstances, there was no ‘real issue’ to be tried (within the terms of CPR Practice Direction 6B, para. 3.1(3)(a)), so no duty of care was owed. The case was dismissed by Laing J prior to disclosure, service of a defence, or the testing of witness evidence at trial. On appeal, Laing J’s finding on proximity was overturned. The Court of Appeal dismissed the Appellants’ claim in full on the basis that there was insufficient evidence that Unilever was responsible for the failings of UKTL.

The seriousness of the abuses is evident from the Court of Appeal’s conclusion that

...rioters invaded the [Unilever Tea Kenya Limited (UTKL)] plantation in large armed mobs and targeted people... including the [claimants]. The mobs committed murders, rapes and other violent assaults and damaged property.¹

Laing J found at first instance that ‘there is cogent evidence... that the Cs [Claimants] will not get substantial justice in Kenya’ and face a real risk of ‘violence and intimidation’ in their home

¹ *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532, at §11.

jurisdiction.² Notwithstanding these findings, the Court of Appeal held that any trial should take place in Kenya. As submitted by the Appellants in their application for leave to appeal, these UK proceedings represent ‘the only potential avenue for legal remedy.’³

B. The right to reparation under international law

We respectfully submit that the Supreme Court should consider the UK’s obligations under international law when considering whether to grant this application for leave to appeal.

The Permanent Court of International Justice (PCIJ) held in the landmark *Chorzów Factory* case in 1928 that it is ‘a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.’⁴ Consistent with the classical understanding of international law as a set of rules applicable to States in their relations to each other,⁵ the international law of reparation for human rights and international humanitarian law abuses first developed through inter-State claims, pursuant to the law on injury to aliens and diplomatic protection. Under this framework, the State of nationality may seek reparation from the offending State for the violation of its rights; the injured alien is not understood to possess individual rights separate from the State of nationality.⁶

Victims’ right to a remedy and reparation under international law has evolved considerably since the 1928 judgment in the *Chorzów Factory* case. The focus of the PCIJ – and of international law at the time – was on the rights and obligations owed by one State to another State, rather than on the obligations of States vis-à-vis an individual. Following World War II, however, individuals were increasingly recognised as subjects of international law, and as right-holders, as reflected in the Universal Declaration of Human Rights (UDHR), adopted in 1948 as a response to the horrific crimes committed in World War II. The right to an effective remedy and to reparation for those whose rights have been violated has been an integral part of these progressive developments and efforts to make the system of human rights protection effective.

The right to reparation and the corresponding obligation upon States to provide reparation is now widely acknowledged by international treaties,⁷ international humanitarian law,⁸ international criminal law⁹ and other international instruments.¹⁰ It is a ‘well-established and basic human right’¹¹ and is firmly embodied in human rights treaties to which the UK is signatory, including the *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.¹²

² Para. 168

³ Application for Leave to Appeal, para 6.

⁴ *Chorzów Factory* (Merits) [1928] PCIJ Rep Series A No. 17, 29.

⁵ Lassa Oppenheim, *International Law: A Treatise* (Ronald Roxburgh ed, 3rd edn, Longmans Green & Co 1920) vol I, 18-19.

⁶ PCIJ, *Mavrommatis Palestine Concessions (Greece v. United Kingdom)* [1924] PCIJ Rep Series A No 2, 12; *Nottebohm Case* (Liechtenstein v Guatemala) [1955] ICJ Rep 24.

⁷ *Universal Declaration of Human Rights*, 10 December 1948, Article 8; *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, Article 6; *International Covenant on Civil and Political Rights*, Article 2; UNCAT, Article 14; CRC, Article 39; *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Article 24(4).

⁸ *The Hague Convention respecting the Laws and Customs of War on Land*, 18 October 1907, Article 3; *Additional Protocol I to the Geneva Conventions*, 12 August 1949, Article 91.

⁹ *Rome Statute of the International Criminal Court*, 1 July 2002, Articles 68 and 75.

¹⁰ *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34, 29 November 1985; *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UNGA Res 60/147, 16 December 2005 (UN Basic Principles on Reparation); committee against Torture, *General Comment No. 3: Implementation of article 14 by States parties*, CAT/C/GC/3, 13 December 2012 (CAT General Comment No. 3); UN Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 16.

¹¹ International Criminal Court, *The Prosecutor v Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, No. ICC-01/04-01/06, 7 August 2012, § 185.

¹² Article 14. See also *International Covenant on Civil and Political Rights*, Article 2(3).

The right to reparation obliges States to ensure that victims of gross human rights violations, such as the Appellants in this case, are able to obtain reparation in law and in practice, including in situations where the entity responsible is a non-state actor such as a corporation. States are obliged to remedy human rights violations to the fullest extent possible.

The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (the UN Basic Principles on Reparation)¹³ provide further content to the State's obligations. Paragraph 3 provides that the scope of the obligation to respect and implement international human rights law includes, *inter alia*, a duty to '[p]rovide effective remedies to victims, including reparation',¹⁴ '...irrespective of who may ultimately be the bearer of responsibility for the violation'.¹⁵ Paragraph 11 provides that the duty to provide effective remedies in turn includes a duty to provide victims with 'effective access to justice', and paragraph 15 states that, if found liable, non-state actors (such as the respondent company in this action) 'should provide reparation to the victim'.¹⁶ As emphasised in the preamble of the text, the UN Basic Principles on Reparation do not 'entail new international or domestic legal obligations, but identify mechanisms... for the implementation of existing legal obligations under international human rights law and international humanitarian law'.¹⁷

In terms of this 'right to remedy', it is worth noting that the *UN Guiding Principles on Business and Human Rights* (UNGPs),¹⁸ unanimously endorsed by the UN Human Rights Council in 2011,¹⁹ provide 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.*²⁰

In response, the UK Government's national action plan on business and human rights states that it will 'continue to ensure that the UK provides access to judicial and non-judicial remedies to victims of human rights harms linked to business activity.'²¹

The UK has a duty, binding in international law, to comply with treaties to which it is a State party. We submit that there is an ensuing general duty of the courts, as a public organ of the State, to act so far as possible in a manner consistent with the UK's international obligations.²² The efficacy of the international treaties to which the UK is signatory (and, by extension, of the UN Basic Principles on Reparation), depends on the loyal observance by states of the obligations they have undertaken and

¹³ Adopted by General Assembly resolution 60/147, 16 December 2005, at <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>

¹⁴ *Ibid.*, para. 3(d).

¹⁵ *Ibid.*, para. 3(c).

¹⁶ See also Van Boven, T, 'The United Nations Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Gross Violations Of International Human Rights Law And Serious Violations Of International Humanitarian Law', United Nations Audiovisual Library of International Law, 2010, available at: http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf [accessed 17 December 2018], para. 2(e).

¹⁷ Other instruments adopted by the UN human rights Charter based and treaty bodies include the *UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*, UN GA Resolution 40/34 of 29 November 1985 and the *Independent Study on Best Practices, including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat all Aspects of Impunity*, E/CN.4/2004/88, 24 February 2004.

¹⁸ Available here: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹⁹ A/HRC/RES/17/4, 6 July 2011.

²⁰ UNGPs, Principle 26.

²¹ *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (Updated May 2016), Cm 9255, available at:

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, p.22

²² As submitted by the appellants in *R v Lyons* [2002] UKHL 44, [2003] 1 AC 967, [12].

on the readiness of all exercising authorities (whether legislative, executive or judicial) to seek to act consistently with these obligations so far as they are free to do so.²³

UK courts should, so far as they are free to do so (that is, so far as this does not contradict domestic law), seek to act in a manner consistent with the obligations of the State which are binding in international law. Whilst international treaties do not form part of UK law, and it is acknowledged that UK courts apply domestic law and not international treaties, ‘there is a strong presumption of interpreting domestic law in a way which does not place the UK in breach of an international obligation’.²⁴

The obligation to apply the law in a way which respects the right to access to justice and right to reparation is, we submit, enhanced when, as in the present case, opportunities to obtain access to justice abroad are restricted or non-existent.²⁵

C. The dismissal of the case prior to a full hearing hinders the Appellants’ ability to obtain justice and reparation

In the present case, the Appellants’ claim has been dismissed at an interlocutory stage. This decision has been called into question by the Claimants both in their appeal to the Court of Appeal and in their appeal to the Supreme Court. We understand that no Defence has yet been filed, that witnesses have not yet been cross-examined, and that the Respondents have failed to provide disclosure in response to specific requests from the Appellants (still less that there has been a full process of disclosure). In the circumstances, therefore, the full evidential picture could not have been available to either court.

The events that gave rise to this case included torture and other gross human rights violations. We submit that when considering the question of whether this case should have been dismissed at an interlocutory stage, the Supreme Court should be cognisant of the international law right to a remedy and right to reparation. The Court should, so far as it is free to do so, interpret domestic law (including that allowing a dismissal of the case at an interlocutory stage) in a way which does not place the UK in breach of its obligation to respect these rights under international law.

Further, the House of Lords held in *R v Lyons* that summary procedures ‘ought not to be applied to an action involving serious investigation of ancient law and questions of general importance’.²⁶ We submit that the question of whether or not there is corporate responsibility for the human rights violations suffered by the tea workers is a question of general importance. We submit that Laing J’s decision at first instance to dismiss the claim before a full hearing of the evidence has, in effect, denied the Appellants access to justice and, in turn hindered their ability to realise their right to reparation because it has deprived them of the opportunity to present their case supported by the relevant evidence. It is often the case that additional evidence emerges as result of the disclosure process, yet this case was concluded before that stage was reached.

In addition, the premature dismissal of the case may unwittingly serve to reinforce the general climate of impunity that has prevailed in Kenya for the crimes arising from the post-election violence. Due to lack of cooperation from the Kenyan Government and allegations of witness interference, the cases brought before the International Criminal Court against senior government officials, including the President and Vice-President, have either been withdrawn by the Prosecutor or terminated by the Court and none has been determined on the merits.²⁷ The Kenyan authorities have convicted only a

²³ *R v Lyons* [2002] UKHL 44, [2003] 1 AC 967, [13].

²⁴ *R v Lyons* [2002] UKHL 44, [2003] 1 AC 967, [27].

²⁵ See Judgment of Laing J, paras. 154-166, and her conclusions at paras. 167-172.

²⁶ *R v Lyons* [2002] UKHL 44, [2003] 1 AC 967 [84].

²⁷ The Prosecutor v William Samoei Ruto and Joseph Arap Sang, [Decision on Defence Applications for Judgments of Acquittal](#), ICC-01/09-01/11-2027-Red-Corr; The Prosecutor v Uhuru Muigai Kenyatta, [Decision on the withdrawal of charges against Mr Kenyatta](#), ICC-01/09-02/11-1005.

handful of individuals for crimes of sexual violence related to the post-election violence,²⁸ and cases before the Constitutional Court have been marred by delays.²⁹ The limited number of convictions for sexual violence offenses mirrors the broader context in which the Kenyan authorities have shown apathy and reluctance to initiate genuine, credible, and effective measures to investigate, prosecute, and punish perpetrators of the violence.³⁰

D. The Court of Appeal's decision also has the potential to erode the right to remedy for other victims of human rights abuses

The *UN Guiding Principles on Business and Human Rights* (UNGPs)³¹ emphasise that the state duty to protect human rights sits firmly alongside the responsibility of multi-national corporations to respect human rights. The UNGPs similarly stress the importance of access to a remedy. This is principally an obligation on States under Principles 25 and 26 of the UNGPs, however, crucially, corporations also have the following obligation under Principle 22:

Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

The commentary on Principle 22 states that a company's 'responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors', typically requiring 'cooperation with judicial mechanisms.'

International standards such as the UNGPs, whilst not binding, are useful in setting out expected standards of conduct, and may be relevant to the court in considering the question of remedy. In this regard, we understand that Unilever has not provided to the Claimants various documents that they have requested, and that, by seeking disposal of this matter at this early stage of the proceedings, has effectively prevented the court from having the opportunity to determine the company's responsibilities.

We submit that the 'cooperation with judicial mechanisms' required of corporations under Principle 22 should require a positive commitment from corporations to cooperate with early disclosure requests and not to risk obstructing access to the very remedies the UNGPs are designed to promote.

E. Conclusion

This case offers an important opportunity for UK courts to engage on the issue of parent company liability for acts and omissions of their foreign subsidiaries, and the ability of victims to obtain redress for human rights violations suffered as a result. We submit that the Supreme Court should take the opportunity to grant permission to appeal, reach a determination on the issues in dispute, and thus enable the possibility of a full examination of the issues and evidence at trial.

Please note that, in accordance with Rule 15(2), Practice Direction 3 (3.3.17) and Rule 6, a copy of this letter was served on the following by first class post on 18 January 2019:

(1) the Appellants (via their Solicitors: Leigh Day, Priory House, 25 St John's Lane, London EC1M 4LB (Ref: DLE/88988/1));

(2) the Respondents (via their Solicitors: DLA Piper UK LLP, 3 Noble Street, London EC2V 7EE (Ref: AKJ/SMCM/114875/12022)).

²⁸ Human Rights Watch Report, [I Just Sit and Wait to Die: Reparations for Victims of Kenya's 2007-2008 Post-Election Sexual Violence](#)

²⁹ See for example, Coalition on Violence Against Women and Others v. the Attorney-General of Kenya and Others, Nairobi High Court Constitutional Petition No. 122 of 2013, summary available at <https://www.opensocietyfoundations.org/litigation/coalition-violence-against-women-and-others-v-attorney-general-kenya-and-others>. See also FIDH and Kenya Human Rights Commission Report, [Kenya's Scorecard on Security and Justice: Broken Promises and Unfinished Business](#), at pp 49-53

³⁰ HRW Report, supra n.19

³¹ Available here: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

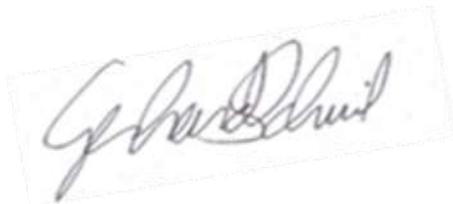
Yours sincerely,



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