

# Joint Committee on Human Rights

Oral evidence: [Human Rights and Business](#),  
HC 443

Wednesday 19 October 2016

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Written evidence from witnesses:

- Shanta Martin and Richard Meeran, [Leigh Day](#)
- Sue Willman, [Deighton Pierce Glynn](#)
- Ingrid Gubbay, Hausfeld LLP

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Members present: Ms Harriet Harman (Chair); Fiona Bruce; Ms Karen Buck; Jeremy Lefroy; Mark Pritchard; Baroness Hamwee; Lord Henley; Baroness Lawrence of Clarendon; Baroness Prosser; Lord Trimble; Lord Woolf.

Questions 25 - 34

Witnesses: **Shanta Martin**, Leigh Day; **Richard Meeran**, Leigh Day; **Sue Willman**, Deighton Pierce Glynn; and **Ingrid Gubbay**, Hausfeld LLP.

**Q25 Harriet Harman MP, Chair:** Thank you very much for joining us. Could I remind you that this is a Joint Committee, which means that half the members are Lords and half the members are Commons? We are very grateful that you have come to give evidence today on human rights and business. Could I just start by asking you to introduce yourselves, starting with Ingrid?

**Ingrid Gubbay:** Thank you very much for having us and for this opportunity. It is very important to have these opportunities. I am Ingrid Gubbay. I am head of the human rights and environmental law practice at Hausfeld & Co. I should say that, of the three firms represented here, we are probably the newest kids on the block. We were established in 2007 primarily to push the competition side of things, private enforcement; we are a claimant-only firm. I went back to doing human rights environmental work, and developed that practice from 2010. In that time now we have a number of investigations ongoing in both east and west Africa and in south-east Asia and India. Those investigations are progressing. We are currently acting for a case in Zambia. I hope that what we have to say

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today will be of value but I will be just chipping in mostly on what is said here by the big two.

**Sue Willman:** My name is Sue Willman. I am a solicitor at Deighton Pierce Glynn, which practises in public law and human rights. I am also a member of the Law Society human rights committee and chair of the Colombia Caravana UK Lawyers Group. I work on a project called Oil Justice, which is aimed at supporting communities in Colombia affected by oil exploration. I am here, as I think we probably all are, because this is a great opportunity for the Committee to think about the fact that at present there is no effective remedy for human rights abuses by business, which can be some of the most egregious human rights abuses. As an example, one of the cases that my firm is working on at the moment with law students in Wales is the case of the North Mara mine in Tanzania. It is run by a British subsidiary of a Canadian company and the Government have found 65 people killed in an investigation by mine security. Leigh Day have in the past represented some of those people and found a settlement for them, but hundreds of those people are faced with no remedy other than the company grievance procedure. Firms such as mine, which are medium-sized or small, really struggle to be able to afford the millions of pounds which it takes firms like Leigh Day to represent those kinds of people.

**Chair:** We have Shanta and Richard from Leigh Day, and I must say, personally, because many of my constituents are from the Ivory Coast, the work that Leigh Day did in relation to Trafigura I thought was really important, and I think it is important for us to hear from you what role litigation plays. Obviously, in the Trafigura case, although I know that is not the sole focus of this, it was only litigation that brought these people to book. I just want to pay tribute to the work that you did on that, and thank you for that.

**Lord Woolf:** Chair, I want to make a declaration. I am not sure there is a need for it in these circumstances but in the past, the long past that I have had involving litigation, first of all a partner in Leigh Day was one of my advisers in my reforms of civil justice. Secondly, in the case you have just mentioned, I conducted a mediation where Leigh Day was one of the parties.

**Chair:** Thank you. Shanta and then Richard.

**Shanta Martin:** Thank you very much for those very kind words and for the opportunity to be here. My name is Shanta Martin. I am a partner at Leigh Day. I work very specifically on corporate accountability for human rights issues. I have done that both at

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Leigh Day and previously in a role at Amnesty International—and prior to that at Oxfam. I have been working on business and human rights issues for a good part of certainly the last decade and a fair bit of the decade prior to that.

I think it is really important today for us to be able to talk about access to remedy. I will leave it to Richard to give an overview of some of the work that Leigh Day has done. Obviously, many of you are already familiar with it. In addition to the broader business and human rights-type issues that we are litigating, specifically we are also litigating cases against businesses in the area of modern slavery, and that is an area that I will be able to provide you some more details on as the day progresses.

**Richard Meeran:** Thank you very much. I am Richard Meeran. I am a partner in the international section of Leigh Day. I have been a partner there since 1991. Over the last almost 25 years we have litigated a variety of cases against British multinationals for people in various developing countries in various areas. For instance, we have done cases involving occupational disease in South Africa, for asbestos miners and gold miners. We have done environmental cases such as the Trafigura cases in Côte d'Ivoire, and the Shell Nigeria case, which is still ongoing, although one lot of cases has been settled.

We have also done what you might call more conventional human rights-type cases, involving allegations of complicity between companies, corporations, and state security forces. An example of that would be the Monterrico Metals case, which involved injuries following an environmental protest by indigenous people at a British-owned mine in Peru.

There are a variety of cases in various places, and the fundamental issue that arises in all these cases is the allegation of a legal duty of care being owed by the parent company towards the victims. That has been a consistent theme of the cases which has developed throughout this period, I think quite positively, but still with significant obstacles. We would like to discuss in more detail the obstacles to the remedies, as Shanta said. A lot of progress has been made but at the same time as taking steps forward, we have also seen backwards steps that have resulted still in significant obstacles to justice.

**Chair:** Thank you very much. Harry is going to kick off the questioning for us.

**Q26 Lord Woolf:** What we have heard already indicates the importance you attach to the relevance of human rights in the area we are looking into, particularly with regard to UK businesses, domestically and abroad. Can you identify which are the most important issues that arise with regard to UK corporations, first of all operating globally?

**Richard Meeran:** Do you mean legal issues?

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**Lord Woolf:** Yes, human rights issues.

**Richard Meeran:** The cases we have been involved in have been brought as tort cases; they are cases alleging a common-law duty of negligence. The subject matter is very definitely human rights but they have not made allegations of human rights violations, just to clarify that. The key issue that arises is the question of whether a legal duty of care was owed and breached by the multinational parent company. Alongside that, obviously, there have been serious obstacles over jurisdiction, which have been litigated over the years but have also resulted in significant developments.

**Lord Woolf:** They may not have been focused on human rights and may have been focused, as you say, on breaching the duty of care, but intrinsically could you give us examples of where, if one were to drill down, one would see that it really was a human rights issue which you are concerned with, because this Committee is of course primarily concerned with not common law-type duties of care but human rights issues?

**Richard Meeran:** I will give you the example of the case against Cape plc that we litigated at the end of the 1990s and that went on for eight years. It was a case against a British asbestos company which was brought by 7,500 South African asbestos miners, many of whom had been employed as young children on asbestos mines in the most unsafe conditions you can imagine, in conditions that would not have been tolerated anywhere else in the world but which were tolerated in a place where there was no regulation and no assistance for the victims—with the result that literally thousands of people contracted serious and fatal diseases, including mesothelioma and asbestosis. Those were cases that were brought as tort cases but I do not think anyone could deny that they should be classified as human rights cases.

**Shanta Martin:** If I might just add slightly to that as well, if we are talking about the human rights issues faced by the individuals we end up representing in these types of cases, whilst we might not plead them as being violations of human rights, they will invariably raise issues, for example, such as the ones that Richard raised in terms of right to health, right to life, right to security of the person—but all of them raise the right to remedy, which is in itself obviously a human right. When we look at the variety of cases we are talking about, there are often issues to do with the ability of individuals to earn a living, and to be able to pursue their own ability to earn that living, whether that is because of environmental damage or whatever. So there is a huge spread of human rights issues that ultimately arise from these types of cases.

**Sue Willman:** I have brought some pictures, because I wanted to try to bring the subject to life. I have particular knowledge of northern Colombia, where there is a huge open cast coal mine, and there the human rights issues relate to socioeconomic rights and the environment. This is an indigenous man of 70. He has been living on the territory about two miles away from this open cast coal mine all his life. This is a bottle of rain water that has been gathered. As you can see, it is black. He is no longer able to fish in the river, his livestock are born with disabilities, and the crops are failing. In that area five children have died of malnutrition in the first three months of this year, and last year the UNICEF figures recorded around 800 children with malnutrition, whilst in the mines these two British companies have spent almost £2 billion on expansion. The kinds of difficulties that those people face in accessing human rights are that obviously there is no legal aid, they cannot easily gather evidence about damage to health or to their environment because the health clinics are run by the coal companies, and there is no source of funding to be able to investigate that kind of case, to decide if the deaths of the children are related to the activities—the coal mine, for example—so that they can then persuade someone like Leigh Day to be able to litigate.

**Shanta Martin:** If I might just add to all of that, we are setting the scene here and, for many of us working in these countries and in these environments, there is a very long history of contamination. Usually the operator—and it is often mines we are dealing with here, extractives, and agro-business and other businesses with a British parent and a subsidiary generally—may have inherited the mine at some point, having bought it at some time and not changed the legacy of contamination. But what we are describing is a very long baseline of contamination over a long period, from tailing waste from various other contaminations, from air pollution, from all of those things, so that you get chronic illness, kids not being able to go to school and not getting an education. The family is unable to make a livelihood because they are often on subsistence farms. In one case we are investigating there are heinous labour rights abuses as well, which are characterised as human rights.

One of the issues you raise here, Lord Woolf, is that we do not have a rhetoric of human rights as a cause of action in itself. Obviously, in US jurisprudence we hear about it all the time; in the UK we still have our existing causes of action around negligence. However, these are in fact gross human rights abuses.

**Baroness Prosser:** What role have other organisations played or brought into your deliberations in terms of gathering evidence and support? For example, the industries that

have been mentioned are all industries which are highly unionised. Mention was made of the lack of funding. Is there any opportunity for the international trade unions to help with funding—or certainly, if not that, to help provide evidence and support to the people concerned? I remember the Cape case because Cape was still operating in this country at the time and I worked for the relevant trade union then. So it was very close to us.

**Richard Meeran:** The Cape case was in fact referred to us by the National Union of Mineworkers, both here and in South Africa, and we worked quite closely with the NUM in South Africa during the case.

As far as funding goes, though, the problems over funding are a really central issue for us as practitioners because, in cases which are so complicated and where you have large multinationals with armies of technical and legal experts who fight tooth and nail to defend cases, the costs and the risks for lawyers are huge. This is one of the reasons why there are so few firms in a position to do the cases, even though there may be many more who would have the inclination if the funding were available. The costs are huge and the risks are huge. Legal aid is no longer available for these cases—we had legal aid for the Cape plc case but to all intents and purposes legal aid has gone. Cases now have to be run on a no-win, no-fee basis, which entails risk for lawyers because you have serious legal issues to overcome; enormous cash flow problems that face you whilst a case is ongoing, not knowing whether it will succeed or fail; experts to pay; and it is not feasible, unfortunately, even for a large trade union to underwrite the cost of that kind of case.

There need to be ways of reducing the legal barriers, which would result in the risks being reduced, and incentives, quite frankly, for lawyers to agree to take on the kinds of risks that these cases entail, if the situation in terms of access to justice and the number of lawyers willing to do these cases is to improve.

**Lord Woolf:** You have given examples of two problems. One is what is happening on the ground which is affecting the human rights of those working in particular industries, and you have also at the same time focused on the difficulty of getting access to justice. Are there examples you can cite of where things happen better? It may be somewhere like the UK, which is a base for global companies which go to other parts that are much less developed than the UK, or a country which has a problem dealing with it internally.

**Richard Meeran:** It is difficult to think of any developing countries where in cases like this victims have been able to get access to justice. The main reason for that is no access to legal representation of the type that would be required to pursue a case like this, given the opposition that would be faced.

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At the present time the UK is as good a place as anywhere to bring these cases, because the barriers to jurisdiction have been reduced by a decision from the European Court of Justice which meant that this hurdle of forum non conveniens, which Lord Woolf will be very familiar with, has gone since 2005. This is the obstacle that we used to face where, although the English court would have jurisdiction in a case against an English company, there was also a power to decline jurisdiction on the grounds that there was a more appropriate venue—namely the local, host state—to deal with the case. That resulted, in the Cape plc case, for instance, in 1,000 of our 7,500 clients dying whilst the issue of jurisdiction was being resolved. That fortunately has gone since 2005 because of a decision of the ECJ, and as a result it has made the UK a more attractive place to consider bringing these claims.

**Lord Woolf:** May I just interrupt you there? Is that an example of a situation where Brexit could have a material effect which you think is a matter of concern?

**Richard Meeran:** I think it is an issue. We flagged it in our paper. The law which stipulates that the courts in which a defendant is domiciled will have mandatory jurisdiction is the Brussels regulation. It is European law and it is not clear, if Brexit occurs, what the fate of that will be, and whether we might then possibly have to revert to the old days of arguing over forum non conveniens.

The other aspect which has made the UK an increasingly attractive venue is developments on the law relating to the duty of care owed by a parent company, which has developed quite nicely over the years, and which therefore overall at the moment makes the UK probably one of the most favourable jurisdictions, especially since the demise of—or what has happened with—the Alien Tort Statute in the US.

**Lord Woolf:** On that point, perhaps I may interrupt you, unless somebody particularly wants to mention something. Would you like to mention something?

**Sue Willman:** I just wanted to say that I think the best example has been the US with the Alien Tort Statute. That is an 18th century law against piracy which some adventurous human rights lawyers resurrected in the 1980s to be able to sue companies for torture and for egregious human rights abuses in the US. It worked very well for a couple of decades, until a Supreme Court case in the US a couple of years back called Kiobel, where its scope was reduced—which Ingrid may explain. But that idea of having a purpose-built statute or law to deal with these kinds of cases is shown by the US example to have worked. They also have another statute, called the Torture Victim Protection Act, which enables people to bring direct claims in relation to torture. Having spent a year in the US investigating

how it works there, I heard from lawyers for corporations that, once a claim was brought under either of these Acts, shareholders would be concerned and company behaviour would change. That is surely key to what we are talking about, because it does not make sense to just be bringing individual cases to get a small amount of compensation for some individuals. It is important to try to change the corporations' behaviour so that the human rights abuses do not keep happening—and the effect of these two Acts has been to change behaviour and to change the culture of human rights.

**Q27 Lord Woolf:** I am sorry; I do not mean to monopolise the questioning. I have been allocated certain questions, and perhaps it would be convenient there to ask you one of the matters we are interested in. That sort of statute can deal with something that you would regard as indefensible: that a company which trades or carries on manufacturing in the UK and elsewhere could use one standard in the UK and a different standard abroad. Is that right?

**Sue Willman:** Yes. If you think about the UK, if the kind of case I told you about with the pollution happened in the UK, we would have a planning inquiry. If children died, there would be inquests. Those are not available in Colombia for those people. Also, the companies conduct air quality monitoring, but the air standards in Colombia are a lot lower than EU standards: therefore, they are breaching EU standards of air quality, resulting in pollution of the water and the air. Obviously, the standards are lower. Also, if a civil claim is brought in the UK, it is brought under local law, not under UK law, and when we meet with Anglo American to talk about this scenario, they say, “Well, we are complying with all local laws”. Well, they are complying with local laws but obviously local laws leave a lot to be desired in many of these countries.

**Q28 Chair:** Thank you very much. Before I bring Mark in, can I just ask: do you have in your mind a Bill that could turn into an Act which could deal with the issues that you have come across in practical terms, in terms of accountability going all the way up the chain to the parent companies? Obviously, as litigators, you use whatever is to hand, whether it is some ancient piracy law or whatever—but, leaving that aside, is there some concept of a Bill that would make sure that UK companies could comply with these standards and that there would be clear remedies?

**Ingrid Gubbay:** First, great question. A Bill would be an interesting idea if you could get everything in it that would need to be addressed. You can have a Bill, and it might pass into law, and it might have direct duty of care, secondary liability and all sorts of great things, but the first thing we would have to address is the funding issue, which in many

ways may be a smaller exercise—which is getting to the LASPO. I think we will have suggestions around that in order to incentivise the legal community, because clearly, there are many more cases—that is a fact—there are very few of us who can do it, and we have to have a mix of business in our firms in order to be able to do them. We cannot fund them by third parties because we could expose our clients to direct costs in terms of recoverability of the ATE, so there are particular problems which could be addressed through a change of the LASPO. That would be the first thing.

In terms of a substantive Bill, we would be looking at what Richard has alluded to, which is the duty of care. The cases so far have certainly worked for employment-type cases, but what we would want to do is to try to look beyond that to the communities directly affected by the activities of the operation, so that the companies had a direct duty of care to those communities. I think that can be addressed in a number of ways, but I just wanted first to frame it.

**Shanta Martin:** One of the things we have obviously sought to do in our written submissions is to make very practical suggestions for areas of law that could be revised. We have not suggested an entire Bill and, as Ingrid says, there are a range of issues that need to be addressed. Certainly the funding issue is one aspect but, for example, we have proposed the enactment of legislation requiring that companies or any businesses over a certain size—and we have suggested that size could be aligned with existing legislation, for example, corporate enterprises with a turnover of more than £36 million, which is currently in the Modern Slavery Act—should be required to conduct and report on human rights due diligence.

Whilst that does not necessarily go all the way to the extreme of ensuring that we are able to give access to remedy to those affected, it is an important part of the process to, firstly, make UK companies take the steps necessary to prevent the types of activities that end up in the courts and, secondly, ensure that there is an evidential route so that if there is a requirement to bring some kind of litigation, the evidential stream is there.

We have also proposed amendments, as Richard was referring to, to Brussels I and Rome II, to ensure that these types of cases can be brought. On costs, we have suggested that qualified one-way cost-shifting, which currently applies in personal injury-type cases, be extended to cover the types of cases that are commonly at issue in these sorts of situations, which are environmental claims or claims arising out of modern slavery—so not restricted to protecting victims of personal injury-type cases but extending the cost protection that comes with qualified one-way cost shifting.

We have also proposed certain specific amendments to the Modern Slavery Act as it currently stands. One of the issues with that Act is that whilst, for example, it has a very positive introductory aspect to it, which is to require companies over the £36 million turnover threshold to report on what they are doing to eliminate slavery from their supply chains, they can comply with that reporting requirement by simply stating that they have done nothing to eliminate it—which is an extraordinary situation for the UK to be presenting as an acceptable position. It seems to us that, really, in order to ensure that victims of modern slavery-type offences can have access to remedy, it is insufficient to take a purely criminal law approach to these sorts of activities. It is a heinous crime. Unfortunately, the police are unable to ensure that all of those crimes are investigated. They are hardly even recorded as crimes to start with, and we know that from the Independent Anti-slavery Commissioner’s report recently, indicating that only a quarter of all cases referred to the national referral mechanism of instances of human trafficking have even been recorded as crimes by police. So clearly the police are struggling to do what is necessary to bring these cases through the criminal justice system—so why not ensure that victims of modern slavery are able to help themselves by accessing the civil remedies that could be available if a civil remedy were introduced into the Modern Slavery Act? Those are some very specific suggestions that we have come up with.

**Richard Meeran:** Can I just add one comment? If the purpose of a Bill is to increase access to justice for victims, as I was saying earlier, it has to be recognised that a lot of these things are interrelated. If you do things which, as Shanta outlined, improve the ability to obtain a legal remedy, or improve some of the practical obstacles to do with access to documents and so on, these cases then become more viable and less risky, and victims are more likely to obtain legal representation because cases will be easier to succeed in, and less costly. Any kind of Bill needs to have that in mind: what can the Bill address in terms of the legal obstacles, the procedural obstacles—for instance, class actions—and some of the practical and funding obstacles? What could a Bill cover in order to reduce the obstacles at each of those levels and thereby improve access to legal representation for victims?

**Ingrid Gubbay:** May I just add one thing to that, very briefly? You are probably aware that France has a corporate liability Bill, which in fact is about mandatory human rights due diligence requirements on companies.

**Lord Woolf:** Internationally?

**Ingrid Gubbay:** Yes, it would work extraterritorially through their supply chains. The situation is that, obviously, if we had one mandatory obligation on companies to introduce proper human rights due diligence into their operations, and reporting requirements on that, it would go a long way in terms of public access to information, which is what we are talking about in the end: information goes to the core of a successful case. There are big problems with getting information, with discovery and the cost of discovery—which is probably one of the biggest costs outside the expert costs. To have proper HDD, where it is not a tick box, where they do not have a get-out-of-jail-free card just because they have done it, but proper HDD, is probably one of the areas where we would say, if you would agree, that having one obligatory or mandatory Bill, or a provision, would go a long way.

**Mark Pritchard:** I wanted to ask Sue, if I may, where that mine is in Colombia, and the name of it.

**Sue Willman:** It is called Cerrejón. It is in La Guajira, in the north of Colombia, next to Venezuela.

**Mark Pritchard:** Thank you. I declare an interest: I have been to that mine on the Venezuelan-Colombian border, and I would say from my experience first hand, some years ago, that I was appalled at a company such as Anglo American, which has a huge stake in that second-largest open cast mine in Latin America, could not be bothered even to buy a simple football for the local village; it was left to somebody else to purchase a football for both the men's team and the women's team. There was not a single musical instrument in the small Catholic hut church in that village, despite being next to this huge open cast mining area, with a very wealthy company. Thankfully, some instruments found their way to that church some months later. I was appalled at what I saw first hand, so I wish you every success in getting justice for the local people in that area.

If I may, I wanted to touch on a word. We have heard funding mentioned several times, which I expect from top lawyers; you all have to earn a living, of course, and there is no access to legal aid, as has been mentioned. I just want to clarify something. Of course, your firms would not be taking on these cases—conditional fee arrangements, no-win no-fee—if you were not winning more than losing. So, yes, I am sure you went into human rights law for the right reasons; it is not the highest paid bit of the law, as I know. Nevertheless, is it right that your companies overall will be making a profit out of these cases?

**Richard Meeran:** Yes, of course that is right, because in the main these cases have ultimately been successful. The important point to note is that these cases take a long time before they reach a successful conclusion, and that in the intervening period there are

significant cash flow implications for a law firm that has to fund teams to research and investigate.

**Mark Pritchard:** I understand that. The point is, whether it be defamation or CFAs, the fact is that if you were not making money, even with the cash flow challenges, et cetera, you would not be doing this.

**Richard Meeran:** That is for a firm of our size. The important point to note here is that obviously, if you are a big commercial firm, for instance, this would be much easier to do. The problem is that big commercial firms act for companies, and they are all conflicted out, so they will not do these cases. The firms that would be very happy to do these cases, and interested in doing them, are small public interest firms, and there is no way they could do cases like this. We worked for 11 years with a public interest law centre in South Africa, running silicosis litigation for gold miners with silicosis. We ran those cases with the South African public interest firm, which had some fantastic lawyers, in the South African courts, and if it had not been for our involvement as a medium-sized firm, it would have been impossible for them to have done that case—and the same applies in this country. There is a reason why we are the only firm doing it.

**Ingrid Gubbay:** We do not make a profit. We have a different model. We do fewer cases but we have done them either pro bono or we have not recovered costs. We are in a different situation. We have not gone into the model of reinvesting.

**Mark Pritchard:** How is that subsidised?

**Ingrid Gubbay:** We have the commercial arm, which does the competition work, as a claimant-only side, but we decided to self-fund, because going to a third-party funder meant that it racked up the costs and we exposed our clients to ATE problems. So we do it on the CFA. We do not take money out of damages.

**Mark Pritchard:** Do you do charitable work?

**Ingrid Gubbay:** At the moment it has been pro bono and we may have to change that model.

**Mark Pritchard:** Thank you. We have heard about jurisdiction issues, workers' rights, and air quality earlier in the Cerrejón case. Do you think another approach, either independently or jointly, might be to try to change the legislation of the host country where these problems are, so that you increase air quality, increase regulation, and improve workers' rights?

**Sue Willman:** Absolutely. My firm has not made any money out of these cases but I take my hat off to Leigh Day, because it is the only firm which has been able to subsidise these cases, which is a big problem.

I have been acting for a trade unionist who in 2002 was kidnapped and tortured, and there is evidence that a company linked to BP, in which BP has a share, was involved in that. After three years of working on his case—many hours of work, many thousands of pounds-worth of work—we have had to stop his case and there will never be any payment. However, at the same time we have managed to set up this Oil Justice project, which is aimed at law reform in Colombia, and helping local people obtain access to information. But law reform is a long process and it is not really our function; our function as lawyers is to try to change the behaviour of multinationals so they do not commit appalling crimes. I would say this costs issue links back to Ms Harman's question about a Bill. At the moment we use rather distorted civil law, based on a snail in a bottle of ginger beer a couple of hundred years ago, to fight for human rights. Would it not be better to have purpose-built legislation? I fully support everything in Leigh Day's submission about changing civil law so that it works more efficiently, but if we had the equivalent of the Torture and Human Rights Act, which was purpose built, the process of these people accessing justice could be a lot cheaper. That is a major driver in trying to have better legislation.

**Shanta Martin:** Can I just add one further point to respond to your question? Aside from the issue that obviously Leigh Day is not just doing this work—obviously we subsidise what we are doing in this sort of area by the other work that we do—for every case that we look at there are multiple other cases that we would like to be able to bring but, because of all the issues we are talking about, it is not possible to bring those cases, even despite that. In relation to the quality of laws and the standards that exist in different countries, in some countries that we are looking at the standards and laws are better but there is a failure of implementation and of enforcement, and there is an activity or process whereby a lot of companies will use the complete impunity with which they can operate; that is often the problem.

**Mark Pritchard:** Thank you. We probably only have two minutes before a vote and we might have to take a break. We will wait and see. I will just say that I am fully signed up to what you are trying to achieve as solicitors, attorneys, advocates, but I want to be agent provocateur and ask some of the questions people ask me about this area. Can I ask you what

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support you get as law firms from the Government, specifically the FCO, or objections from the FCO in this area, and what support you might get from the UN specifically, and some of its agencies?

**Chair:** Or from the UK Government generally. Are they on your side, enforcing the rights of people suffering at the hands of British parent companies?

**Mark Pritchard:** Or do they get in the way? I will give you an example. You take a case, let us say, in Latin America, and you have somebody in the embassy, a human rights officer, but in fact somebody else in the embassy is perhaps shouting down the phone at you saying, “Why are you causing all this trouble?”

**Richard Meeran:** I do not think we have had that kind of experience, but in general I would say that we do not get support from government; in fact, the opposite. Ingrid has referred a couple of times to the LASPO Act. It provides a perfect case in point. There is a tightening up of the rules on proportionality, which makes it more difficult for us to have proper access to documents and to run smaller cases, which would be more viable if it were not for the proportionality rule. We now have a change in the law on recoverability of success fees, which means we can no longer recover success fees from a defendant; they have to come out of clients’ damages, which we would be very reluctant to do, which means the profitability of the cases has decreased. On top of that we have the Rome II regulation, which stipulates that local levels of damages will be recovered in cases for people in developing countries. That provides a disincentive for companies to behave properly but it also, again, reduces the financial viability of cases.

**Ingrid Gubbay:** I just wanted to remark that there has been a complete unravelling of Lord Woolf’s reforms. He must be sitting here listening to this in some despair. But I think the point we are making here is that when the LASPO reforms were conceived, and Rome II, Rome II was conceived on the basis of traffic accidents, skiing accidents across border, and the LASPO Jackson reforms were not contemplating these cases. It is what we would call an unintended consequence of other factors, which I think Lord Jackson may have acknowledged finally, but it was not looking at cases in this context. We made an approach to the Junior Minister for Justice at the time, Jonathan Djanogly, to bring this to his attention, with Amnesty and insurers and others around the table, but by then the cart had gone, the bird had flown, and the lobbying was all left terribly late. So that is why we are here today in this position.

**Sue Willman:** Could I use the example of Bahrain? We helped Bahraini activists make a complaint to the OECD, which is a voluntary mechanism for complaining about

companies, about Formula One's involvement in Bahrain despite protests, attacks, and the ill-treatment and torture of protesters. That went through a voluntary process, and it was useful in that the human rights activists were able to talk to Formula One about their concerns, but the UK NCP, as Amnesty has said, is a very weak process, with no enforcement, and at the same time the UK Government has been lobbying at UN and EU level for a weakening of criticisms that have been made of Bahrain. Aside from the UK's approach in relation to business abuses, there is also a level of political interference where there are countries with which have close economic relations.

**Mark Pritchard:** Coming back to jurisdiction, I think of the Foreign Corrupt Practices Act in the United States and the global jurisdiction of that, and we have had our own changes to legislation over the last 10 or 20 years in relation to corrupting by British business people and officials abroad, et cetera. Could we not have something similar in relation to this? Could we not have something similar to the corporate liability Bill that France is suggesting?

**Ingrid Gubbay:** Yes. On the first point, the Foreign Corrupt Practices Act, it is very robust in the way it is exercised, and we have agencies with fire in their belly and quite a bit of money which really make a difference. If we look at that as opposed to the Serious Fraud Office here, which seems to be constantly beleaguered, which is charged with looking at the Bribery Act as well, and at various other frauds. I do not think, at the last count, there was very much in the way of investigation that had gone into the end game and a conviction.

**Jeremy Lefroy:** Could I just intervene on that? Whereas I would have recognised that a couple of years ago, there has been a recent case against Standard Bank of South Africa and its London office, about a bribe paid in Tanzania, which has been repaid, I think \$6 million and a fine of \$20 million, so I think things have moved on and are not quite as you characterise them now.

**Ingrid Gubbay:** That is very good to hear but certainly that will only have bite where there are public officials when we are talking about bribery here. We know that in many cases where we are talking about big transnationals working in countries where there is a governance gap, where there are relaxed laws and regulation, coming back to the question about the state and states, receiving indemnities on tax, on water and electricity and so on, merely doing business has for many years included bribery. It is very difficult to get evidence when you are talking about bribery where there is something going on between public and private. That has been a big issue. Going back to your question, it is

extraterritorial in reach. There are pieces of legislation with that kind of extraterritorial effect that we could look at, such as the Criminal Justice Act and so on.

**Mark Pritchard:** Thank you. Finally, Shanta, if I may, you mentioned earlier the Modern Slavery Bill. There was a very long pre-legislative consultation on that and you said that you had some ideas for amendments to that. On a practical level, I just wanted to know why those amendments were not put in whilst it was going through the process rather than afterwards—unless you only discovered it after it became an Act.

**Shanta Martin:** No, I had some engagement in the discussions leading up to it, and there was a lot of engagement by other civil society organisations, who were very keen to see the introduction, for example, of a civil remedy article in the Act. It was debated. Ultimately it did not make it through the House of Lords. It seems that some of the Lords who voted against that have now changed their mind and, if it were to happen again, might support the introduction of a civil remedy into the Act.

It is also quite clear that transparency in the supply chain section of the Modern Slavery Act was a very late introduction. It was not where those who had written the Bill thought the focus would be but there was such an emphasis that came in quite late, managed to get the support of Parliament, and was passed through Parliament, but in a way that was a bit watered down. That is why there is this subclause that says that you can abide by the legislation by simply saying you did not do anything. It is a great first step to see that there is that kind of section in the Act, but there is quite clearly more that needs to be done. Without that hard law which requires companies to do these sorts of activities, whether that is reporting or whether we could introduce a Bill that required companies to respect human rights, in my view you need that legislative support, that legislative base, from which to build, rather than relying on the voluntary, good-natured approaches of companies to ultimately do what we think needs to be done.

**Chair:** Can I just follow up on the point Sue made about the different air quality rules in Colombia that open-mine companies comply with compared to what would be acceptable in this country? Bearing in mind those are about human health and the ability to breathe, do you think there is any moral justification for a British company which complies with decent air quality laws here to have a lower standard and to operate at a lower standard in other countries?

**Sue Willman:** That must be a question for all of you, I suppose, rather than for me. I even ask if there should be higher standards. This is an area where there are indigenous people whose traditional way of life is under threat. The communities are dying out. There are

also Afro-Colombian communities in that area who have been living there since the 19th century. These are quite vulnerable communities, yet we are exposing people who are vulnerable to worse standards than we would accept here, and that seems quite difficult to defend.

**Richard Meeran:** From our experience there are examples of countries where health and safety standards, environmental standards, may be lower, but in general, as Shanta alluded to, that is not so much the problem as companies operating in developing countries with impunity because there is no enforcement, no regulation, irrespective of the standards.

**Chair:** You would like them to be held to account here. Thank you very much.

**Q29 Fiona Bruce:** First, I declare that I am still a partner in a law firm, Fiona Bruce LLP. I have four questions. You have very effectively touched on all of them, some in depth, so do not feel tempted, as politicians always do, to just say something for the sake of responding, but if there is anything you would like to add, please do. My first question is, do you feel that litigation has a role in deterring human rights abuses, in changing the behaviour of companies, or only in perhaps securing compensation for victims? Sue, you talked about the two Acts in America which you felt were having an effect in this way, but do you think perhaps in this country at the moment litigation has any effect at all or not? What I am interested in is the present state in this country.

**Ingrid Gubbay:** Can I answer that question? We recently had the experience of representing a group of former workers in a mercury factory in India. It was a big British company, a household name, currently in Marmite wars—

**Chair:** Do you want to mention the household name?

**Ingrid Gubbay:** Yes, it is Unilever, and their subsidiary, Hindustan Unilever. It had inherited a factory and former workers, and it had known about the contamination for some time. The point I want to make is that for 15 years the workers had been trying to get justice, and had filed a writ in the Madras courts some eight or nine years ago. The Madras court appointed independent people to go and make an assessment of the factory and came out with a whitewash. It was seen to be a whitewash, a new report was made, and the new report came out with all the bells and whistles of all the terrible things that had happened and found the company criminally negligent.

Nothing happened for a long time, and, exhausted and at a loss, we were instructed through a civil society group representing that group, and we filed in the English court. We set out the pre-action letter, we did all the things that one does, and very quickly Hindustan Unilever approached the workers with new offers, always on the condition that

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we withdraw the claim in the English court. It kept going back and trying to persuade them to withdraw the claim, and would always make promises about settlement, but with nothing in writing.

Eventually, 13 months later, it came back to settle at a much higher level—everything that was wanted by the workers and more—and we withdrew the claim. All through that time it was very nervous about reputational damage. The activists put out a lot of media, there were a lot of hits on the site; they used social media hugely as a campaigning tool to assist the process of leverage. Nevertheless, it made a big impact, and we had a note from them afterwards thanking us and saying that the filing in the English court had accelerated hugely the whole process, and that they did not feel they would have had any other way of obtaining settlement for that.

So that is an example. Not only did it have an effect but I think it is a deterrent, in the sense that it was not the compensatory element but the complete exposure of the company. Companies are now wanting to champion their human rights in the English countryside.

**Shanta Martin:** I think on that it is interesting to read a report released just recently by the British Institute of International and Comparative law which looked at companies that do human rights due diligence—those companies that take the process forward and try to identify whether there are human rights risks and whether there are things that ought to be done to prevent those risks being realised. There were two main incentives for doing it. One was the legal risk and the other was reputation. With litigation you get both. You obviously have the litigation risk that you are certainly dragged through, but often the public's perception that what you have done is extremely negative.

**Fiona Bruce:** The question is, does that incentive produce a change in the company's procedures as well as a likely settlement of a legal claim?

**Sue Willman:** I think the problem is that with civil claims, settlements are often private and have to be kept secret. Undoubtedly these cases change the whole culture and influence company behaviour, but one of the reasons for having a statute is that, rather than just get a few thousand pounds for an individual, you might be able to have a river cleaned up or have new procedures introduced. There is a lot less flexibility for having alternative kinds of remedies that benefit a whole community—for example, a football pitch for a community. It is much harder to get those kinds of remedies if you are acting for individuals in individual cases, and it is very difficult to bring a claim on behalf of an indigenous community, for example, in the English courts or to get the kind of long-lasting change that you might want.

**Richard Meeran:** If I could just make a point, I think this type of litigation undoubtedly has a beneficial knock-on effect in terms of deterrence, and that indeed is one of the primary purposes of it. The main purpose, obviously, is to get redress for the victims and to get justice for the victims, but it is also to create a deterrent. Certainly, I can say, without naming the companies, that I have seen in disclosure documents that we have received references by companies to other litigation that has been brought and the need to take more stringent precautions. At the same time, companies have become more alive to the possibility of this type of litigation and therefore have been a bit more cautious sometimes in the way in which they express themselves in the documents—so there is that.

I do not think there is any doubt that the experience of going through litigation under which the company's processes and mechanisms are put under deep scrutiny as part of a court process is quite a salutary lesson for any company.

There is one amusing example, an extreme example, of a company that we sued many years ago—again, it involved mercury poisoning, although it was a different company—which changed its name to Guernica plc because of the fascist attacks they said we had made against it. That is an extreme example.

**Chair:** So you are basically saying, are you, Richard, that you know as a fact that it is having a deterring effect because you have seen documents that have been discovered in other legal cases which state, “We had better sort our act out because otherwise we will end up being litigated”?

**Richard Meeran:** A whole area of commercial law has developed where commercial lawyers are advising clients on the need to take all this much more seriously. They would not be able to do that and make their clients pay for that kind of advice unless they thought it was important.

**Shanta Martin:** They are certainly not doing it pro bono.

**Fiona Bruce:** You said that the UK was a relatively positive place to take litigation on, despite the restrictions.

**Chair:** Fiona, could I cut you off in the middle of that? Finish your question but do not answer it because we have to go and vote. You can think about answering it and answer it when we are back.

**Fiona Bruce:** Our question is whether, if the UK introduced legislation like the Alien Tort Statute, it would improve the likelihood of companies improving their behaviour and being

deterred, as well as obviously the opportunity for claims for compensation. You touched on it earlier but if there is anything further you want to add, we will return in five or 10 minutes.

*The Committee was suspended for a Division in the House of Commons.*

**Chair:** We are quorate again but I am just going to add a further question to the question that Fiona has put. The evidence that came in front of the Public Accounts Committee of various companies operating globally showed that, in order to avoid paying tax, companies organised their legal structure to shift themselves around the globe, and shift all sorts of different operations in order to avoid paying tax. Are there any examples of companies distorting their company framework in order to avoid being held to account legally for what they are doing? Is there that shifting around the globe in the same way? That is my question; perhaps you could answer that one first and then answer Fiona's when she comes back.

**Richard Meeran:** I do not think there is any doubt that companies have utilised or attempted to utilise the corporate veil, as they call it, to its full extent. This idea that different corporate entities, even within a multinational group, are separate legal entities, and that the parent company is merely a shareholder which is not liable for the conduct of its subsidiaries, is one that multinationals have relied on very heavily, including in defending the cases that we have brought.

It is somewhat at variance with the situation you have mentioned where companies use these structures for tax avoidance.

What we have tried to do throughout our cases is to hold parent companies liable, not because they are shareholders, not because of the structures they have set up, but because we have tried to identify functions, activities or actions that the head office has been responsible for which can be connected directly with the harm that has occurred on the ground. It might be, for instance, a head office company that was involved in designing the technology deficiencies which led to injuries, or it might be a head office company that had a responsibility for supervising health and safety on the ground and did not perform that correctly. So the issue of the corporate structure and the corporate veil is one that has certainly plagued this area of work.

**Chair:** They have made their corporate structure such that they can avoid legal liability? It is a conscious thing that they will structure their company so as to minimise their exposure to legal challenge?

**Richard Meeran:** Certainly. To limit liability: absolutely, yes.

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**Shanta Martin:** That is the purpose of having separate companies, because they can be liable only to the extent of the share ownership for whatever has happened.

**Chair:** The solution to that is to make the top vicariously liable—is that the right word? To make the top liable for everything that happens underneath, so you make sure you do not get caught in technicalities.

**Richard Meeran:** It is a bit more nuanced than that. We have not alleged that a head office company is liable for everything that goes wrong throughout its global network, but where we can identify—

**Chair:** Why are they not responsible for something that goes wrong within their global network? I am not asking you what the law is at the moment; I am asking whether they should be. Why should they not be? Back in the day, people said they were not responsible for sexual abuse in a children's home even though they ran the children's home because that was just the bad behaviour of somebody working in the children's home. That denied children the right to legal recourse, which allowed it all to stay covered up—so it was not until you had that responsibility at the top that you had a change of behaviour.

**Richard Meeran:** If they reap the financial benefits, why should they not also take the legal responsibilities?

**Chair:** That was my question. I think that is a rhetorical answer; they should.

**Jeremy Lefroy:** Just following up on that, Chair, increasingly these days the structure of a holding company and a multinational parent company with 100%-owned subsidiaries is not common. It is common but it is not the total picture at all. Increasingly, if you look, for instance, at sub-Saharan Africa, you have companies which are owned by funds based in Mauritius—or other places, but typically Mauritius—and those funds are then invested in by an awful lot of investors. In effect, you have a holding company based in Mauritius and a lot of investors based in London, New York, Paris, Frankfurt or wherever—maybe a dozen, 20, perhaps even 100 investors in that fund. So where will the liability be there? Would it not therefore be much more attractive for companies to establish themselves on those lines, as increasingly they are? A lot of the money, particularly private money now that there are more draconian regulations around, is seeking to invest not just behind one corporate veil but behind at least two corporate veils. How do you deal with that? You might get an Anglo American that says, “Look, you are picking on me but actually there are mines out there owned by funds in Mauritius owned by British, American, French and German individuals and businesses with directors who are not getting touched at all”.

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**Ingrid Gubbay:** I will say something to kick it off. Obviously we are faced with that now, and the first thing we would do, of course, is look to see whether there is in fact a number one, a plc, a particular controlling interest or whatever. There are at the moment legal theories being developed around joint and several liability, looking at them as one enterprise and looking at other jurisdictions. For instance, we should not have to be confined to bringing cases in England: could we bring them in other jurisdictions. For instance, we have one company with a major shareholding in Switzerland and in the UK, but has a New Jersey registration outside the UK, exactly on this point. We would want to try to bring a case there, so instead we have gone down the criminal route in Switzerland, looked at the criminal law where we can, and also looked at shareholder actions. So if we are talking global, and we are looking at not being able to get to them through the traditional entries of law, we have to start working with shareholder actions and people who are involved in that, and disinvestment, which we are starting to see increasingly.

We have to be creative, just as creative as many of these companies, which are changing their shape like a virus—excuse the analogy—and we have to try to be as creative as we can in the way that we approach that. So it might not be traditional tort claims; it might be shareholder actions, or the criminal law in another jurisdiction, or looking at an overall global strategy.

**Shanta Martin:** This is a similar point in the sense that it is a situation we currently face; looking at means of improving the transparency of the way in which companies structure themselves, and where liability lies, is what we have been proposing. Some propose that there should be enterprise liability, where the entire corporate group should potentially be able to be held accountable for something that happens in whichever part of the world—and that would face some of the issues that you referred to. It may be that some of the key decisions are being made somewhere else completely.

What we propose is that in those cases where there are multinational parent company structures, there are such specific barriers that are faced that there should be a reversal of the burden of proof regarding whether that parent company is said to have controlled the activities of its subsidiary. That is not to say it will automatically ultimately be held liable, but the burden of proof is reversed so it has to demonstrate the reasons why it was not making that decision or causing that action to occur.

**Lord Woolf:** That is what has happened in the Bribery Act. In the sorts of cases where there are attempts made to avoid liability, if the company is of international standing, is it not the fact that you are able through litigation to expose what is happening such a source of

reputational damage that you can, indirectly, at least for the future obtain improvements in that way with the help of the media?

**Shanta Martin:** That would be of general benefit. That is certainly true but it does not necessarily help you to ensure that there is the ultimate outcome for the clients that you are representing.

**Lord Woolf:** Yes, I appreciate that.

**Richard Meeran:** Just to add, as I said earlier, using currently available mechanisms, the issue is not so much about ownership and who owns what; it is about identifying who in fact was responsible for the decisions and the actions that caused whatever damage is the subject of the case. That is obviously going to be the company on the ground because it is the operating company but that is not the only possible target. If that company was dependent on advice and expertise or input from the head office, which is frequently the case, it is quite often possible to formulate a case against the parent company—but, as was said earlier, in order to do that, you are heavily dependent on access to often internal corporate documentation to make that out. That then raises other issues about disclosure: how effective the disclosure procedures are, the cost of obtaining disclosure and the impact on our ability to obtain disclosure of funding constraints and proportionality and so on.

**Q30 Fiona Bruce:** I have two separate questions. You talked about the current barriers enabling people to access remedies. First, do you think fines or sanctions against companies make any difference to victims gaining remedies? Secondly, would it help to make it mandatory for companies to have human rights grievance mechanisms in place? I am thinking, for example, of the parallel with employment tribunals, where claims have succeeded not because there was perhaps an original default but because the processes were not followed. Those are two separate questions bundled together there.

**Ingrid Gubbay:** Perhaps I might start, again—it is always good to start because if I miss anything, you can pick it up. On the first question, sanctions and so on, it is first of all salient to note that in England, under the current environmental law, knowing contamination of a water course or anything attracts a fine of £50,000 in the magistrates' court and up to 12 months' imprisonment—and in the Crown Court it is an indeterminate period of imprisonment and an indeterminate fine. It is interesting just for a minute to look at what we have here compared to anywhere else. Sanctions generally, and criminal law, are to be encouraged. However, the problem is, as we saw in Trafigura, where Amnesty

went to the CPS and to the Environmental Agency and said, “We have proof of conspiracy in this country”, they said, “We just don’t have the resource to run it”. So while it is to be applauded, and certainly with the Criminal Justice Act and those which have extraterritorial reach, we can certainly re-look at it in this way, but at the moment concentrations I think are here. We also have the different level of proof, of course, and attribution of fault. That has been a difficulty in the criminal law generally.

The other question was the grievance procedure. The fact is that many companies have grievance mechanisms, and I think we are all aware of that. Some are better at it than others. With many of them no one knows what goes on inside these grievance mechanisms; they are not transparent. Many civil society partners have worked with businesses on trying to improve their grievance mechanisms. I do not know whether any empirical work has yet been done or carried out across the board on companies and grievance mechanisms—I have not seen anything yet—to come up with how many have them, how effective they are and so on. Generally speaking, from our point of view, we can safely say that very few of these grievance mechanisms or voluntary mechanisms work unless you have the backbone working, which is the law, and then the fingers and toes will take care of themselves. Without the backbone, and without that leverage, you have very little happening inside the hallowed halls of grievance mechanisms without public exposure.

**Fiona Bruce:** So making them mandatory might give them more bite?

**Ingrid Gubbay:** Mandatory is one thing, but it may also have to come with reporting requirements, and come with some other areas so it is a more transparent process.

**Shanta Martin:** Just on that, I take a very different view as to the role of grievance mechanisms. There has been a lot of work done and a lot of emphasis put on grievance mechanisms, and if we look at the UK’s national action plan, that is almost entirely where the focus of the UK Government is; it is on encouraging companies to have grievance mechanisms, and on tasking the UK trade and investment teams in the markets where they operate to advise UK companies on establishing grievance mechanisms. There is clearly a lot of focus on grievance mechanisms, and I think we would say it is at the expense of looking at proper access to remedy.

Grievance mechanisms can be quite effective: for example, if there is a workplace environment where there might be unions. Where there is a system by which issues are raised with the corporate head office, they can be quite effective. Where they are used to try to deal with and supposedly provide remedy to victims, where either they or their families are being shot at and either killed or seriously injured, where there are issues they are trying

to deal with to do with gang rapes or any kind of rape, or any serious harm, it is improper, in my view, for that to be left to a company that is judge, jury and executioner when it comes to looking at its grievance mechanism, and how those who are victims of its activities are supposed to get remedy. In my view, mandatory grievance mechanisms are not the solution.

**Chair:** You talked about the evidence of fear of litigation improving standards. Do you have any evidence that there is a fear of being referred to the National Contact Point? We are going to see the National Contact Point shortly, so it would be interesting to see whether you see it operating as a lever for improving standards. Do you see it as such?

**Ingrid Gubbay:** I personally have not seen that.

**Chair:** Nobody is saying, “We’d better clean up our act because otherwise we will be taken off to the National Contact Point”?

**Richard Meeran:** We have not heard of anyone quaking in their boots.

**Ingrid Gubbay:** It has no sanctions.

**Sue Willman:** Yes, the difficulty is that we are back to the enforcement issue again. There is a community near this coal mine in northern Colombia called the Tabaco community. It took them years to go through the OECD procedure, and I think it concluded in 2010 by saying that some of the people who were displaced should be given alternative accommodation and finance, and some of them still have not had enforcement years and years after what happened. So even if the OECD were better, and it has many flaws, without enforcement—

**Chair:** So the difference between you and these others is that you have teeth, and actions can flow from a successful court case, whereas with the others, they might or might not flow because they do not have the teeth for the remedy; is that your point?

**Richard Meeran:** It is not only the remedy; it is also the ability to get to the bottom of what happened.

**Chair:** So it is the discovery as well.

**Richard Meeran:** It is the resources that are required to investigate that type of case properly.

**Jeremy Lefroy:** I would like to return to the issue of control, because it seems to me that you have two types of control of a business: operational control and financial control. With operational control, that typically will be a parent company, a Unilever, with its subsidiaries, where there is a fairly clear chain of responsibility, which enables perhaps best practice to be permeated throughout the organisation and subsidiaries and for there to be accountability, as

in the case you highlighted of mercury. Then you have financial control, which is increasingly the way companies and businesses are going, which is to say, “I don’t want all these risks of operating in a jurisdiction where people might get be hurt and might have their human rights abused, and therefore the way I am going to operate is to invest through at least one, if not two or three corporate veils, perhaps through a pension fund or a trust fund which invests in an offshore fund, which then invests in the business itself, and there is no perceived operational control”. Effectively, the investors are saying to the business—and it is probably a lot of different investors—”Get on with it. You make the returns. We expect you to operate in accordance with the law of the land but we’d like to see our dividend at the end channelled through the various routes”.

There it seems to me there is pretty much nothing that can be done other than some kind of local exposure, saying, “By the way, this company is owned by, as I say, a company with an offshore fund in Mauritius, and the investors in that fund, if you are able to find out who they are, are this, that and the other”—and, by the way, you may find that Parliament’s pension plan is invested in that particular fund. It may or may not be, depending on the rules. In that case, are we all liable?

What I am trying to say is, there is no operational control. The operational control is local. Therefore, if I were an unscrupulous person wishing to set up a business, I would say that that is a much better way. I would like to invest in that way. I do not want to invest as a corporate holding company, where I end up as the chief executive and I find myself in court because of what somebody in one of my subsidiaries has done in my name.

To me, there are risks in that. The case was referred to of North Mara, and African Barrick resources—I know about that case and I know there was a change of chief executive. There were substantial changes as a result of that, which I welcome.

**Chair:** Jeremy, I am afraid we have a Lords vote now. Sorry about this. We are going to have to break.

*The Committee was suspended for a Division in the House of Lords.*

**Jeremy Lefroy:** I had just asked about this difference between companies where there is clear operational control and where it was almost impossible to trace responsibility, and whether you felt this did not cause a real problem with what we are trying to do.

**Sue Willman:** Lawyers in the US have considered the idea, post the problems with the Alien Tort Statute, of shareholder liability. I can see the point that it may seem unfair, but once the shareholder realises that they are liable for somebody being killed or tortured in

another country, they will make sure things are done properly. I suppose that is the deterrent.

**Jeremy Lefroy:** How far have they gone on the prospect of shareholder liability?

**Ingrid Gubbay:** It is not just the US. We have it in Europe as well. I think that today there was an announcement of a Norwegian case being brought by Greenpeace and others. It is a shareholder case which has been in the works for quite a long time, and it is around climate justice.

What I was saying before is that we are now moving away from perhaps what we are talking about in terms of traditional tort. It may be that it is just too difficult. I think you are presenting a scenario where it is just impossible. We would then have to start moving into more creative thinking about shareholder action and disinvestment. Those civil society groups and others working in that area are becoming extremely robust; they are having a lot of very interesting feedback from shareholders, people are appearing at AGMs and making a lot of noise with the CEOs and the board, and making them aware of cases and human rights violations they were unaware of. It would seem there is a bit of a void in terms of communications. That is something we have discovered in all our cases: as soon as things get to the top-top, things change.

I am digressing. The shareholder action theme seems to fit this model more than anything else.

**Shanta Martin:** I did not quite understand. You made a reference to the North Mara case where there was some change. I was not sure how that fitted into your question.

**Jeremy Lefroy:** What I was saying was that I very much see the benefit in a case such as that of Barrick resources, where there was a clear ownership structure, and as far as I know there was a change of CEO. I met the new CEO here in Parliament when we were discussing it. I chair the All-Party Parliamentary Group on Tanzania, which is why I was very interested in this case when it was brought to our attention. As far as I understand, quite a considerable number of changes were made in the company's operating procedures and so on as a result, and indeed in its management. I can see that. What I was trying to do was draw a contrast between that, where there was clear control by a parent company, in this case based in Canada, possibly through the UK, and where you cannot establish that because it is all through a maze of funds which are not really interested in the control but simply in the returns, and the actual operational control is based in the operating country, but the financial returns end up elsewhere.

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**Shanta Martin:** There are two things I just wanted to raise. One is that the change of CEO that you mentioned occurred during the process of litigation that we were involved in, and I believe that Sue has been referring to the continuation of those problems, which were occurring well beyond that change. The difficulties that were raised in that case, as far as I understood it, have continued.

The second issue is, if we get to a situation where basically shareholders only want to invest their moneys in structures that prevent the kind of ability of whatever activity is going on on the ground potentially reaching them, it starts to make you wonder why people invest in companies. Why do people invest in companies that are listed on the London Stock Exchange? Generally, because they know how that company is going to manage risk, how it is going to ensure that it is being responsible—not necessarily thinking about social responsibility but about how they are going to ensure their money is properly managed so they receive the returns at the end of the day.

If what we are talking about is shareholders thinking “I don’t care where the money is made so long as it comes back to me”, they are still going to want some sense of reassurance that there is some control exercised by the entity in which they are investing. That is one point.

The other is, on the ability to move towards the enlightened shareholder-type approach, there is a significant role to be played by government. For example, the Norwegian Government pension fund is a fantastic example where the Norwegian Government have said, “We have this massive pension fund. We will ensure that we invest it only in companies that meet certain criteria”. They have led the way, in many ways, in ensuring that they are not only looking at where their money is invested for the return but at how it is invested and what types of activities their money might be propagating—whether they are good, bad, environmentally safe or environmentally damaging. There are a number of ways of looking at this that are not purely about whether there is operational control.

**Richard Meeran:** Can I just add one comment? Under the national action plan there is a strong commitment on the part of the Government to encourage companies to comply with the UN guiding principles and the duty of due diligence that is required for companies to look at the human rights impacts of their activities.

Using your example, even if it is a company or an outfit which only has a financial interest, it is nevertheless part of its activity to engage in that financial investment. So one would imagine that it would have an obligation to look at what is happening to its money, and what adverse human rights impact its investment is causing. It is not a big leap from

that—it is a leap but it is not an enormous leap—to say if that is done, and adverse impacts are identified but nothing is done to ameliorate them, there could be some liability imposed. I am not saying that reflects the current law, but it could do.

**Q31 Ms Karen Buck:** We have already touched on some of the issues arising from Brexit, and I just wondered if you could set out for us what you feel to be the areas that would be of potential concern, from your perspective, particularly—this slightly feeds back into the discussion we had about modern slavery and migrant workers—around the issue of workers’ rights.

**Ingrid Gubbay:** One of the things we touched upon briefly about Brexit was obviously this concern about moving away from the ability of these types of cases to be brought in the UK, without having forum non conveniens as a barrier. That is front and centre for us. There is absolute uncertainty at the moment as to the way in which access to the UK courts will be affected by Brexit in that sense.

**Ms Karen Buck:** Are those discussions going on with anybody? Are you beginning to have those discussions with anyone in government, with the relevant departments?

**Ingrid Gubbay:** Not presently. There are some schools of thought along the lines that, even if Brexit were to occur, we might still remain a party to the Lugano Convention, which underlies the Brussels I regulation, and thereby we might continue to be beholden to it. There are others who think that, even if we do that, the European Court of Justice decision to the effect that we do not have to apply forum non conveniens here any more might be progressively moved away from, and the courts will start to say, “We don’t have to abide by that decision”. So there is no certainty at this point as to whether or not we need to be concerned, but it is the lack of certainty which is the concern at the moment.

**Ms Karen Buck:** If you had to focus on one thing that would help facilitate the kind of work you do, would that be to remain committed to the ECJ, to Lugano, or would it be something else?

**Ingrid Gubbay:** If it were just one thing?

**Ms Karen Buck:** Your top priority. I know there will be lots.

**Richard Meeran:** That is the most significant issue as far as our work is concerned, I think: whether that ruling, which precludes the application of this forum non conveniens doctrine, is maintained. If it is not, it will set us back quite a long way.

**Chair:** Presumably, one of the ways to get certainty is, rather than waiting to see what happens, to bring forth certainty by getting the Government to make a commitment or to put

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some clauses in the great repeal Bill. Has there been any thinking about what level of reassurance there would be, rather than just waiting to see what happens? There are mechanisms afoot, including the great repeal Bill but also the Government giving assurances on various things. What assurances would you want the Government to seek? The whole nature of Brexit is that the Government are then the sole proprietors of this business and can make their own decisions. Has there been any offering to them as to what decisions they should make to reassure people that there is not going to be a slipping back on these issues of concern?

**Richard Meeran:** On this particular issue I am not aware of anything. I know that the last time it arose, over the last round of the Brussels negotiations, the position of the UK Government was that they were in favour of the reintroduction of *forum non conveniens*, and it was the other EU states that were against it because they do not apply that doctrine, and it would have meant the difference between the way British companies were treated as opposed to other EU companies in their state. That was the position before.

**Ingrid Gubbay:** You have given us a good idea. We have been busy in what we do. Quite often we talk to civil society—obviously they may have their sights on this already but, as far as I am aware, nothing has been coming forth. We have just been busy running down to the ICJ, looking at the Brexit case every other day to see what is happening. I think there is general concern about the changes to the Human Rights Act, the Bill of Rights, the things that are foreshadowed, whether the ECHR will stay as it is, and whether the referencing to Europe will stay as it is. We have had no real understanding yet of anything to react to—but, as you say, it is probably time for us to make an advance somewhere, and find a platform for doing that.

**Shanta Martin:** In respect of the connection with modern slavery, one of the difficulties we have at the moment is with even those who have a lawful right to work in the UK. For example, I represent 16 Lithuanian men in claims against a British company. They have been recognised as victims of trafficking; there is no doubt that they were subjected to labour exploitation. We have had a decision of the High Court in favour of the first six of those men, in respect of their not being paid even the basic amount of the minimum wage. Those men all had a right to be here, because they obviously had the freedom of movement rights, but they did not know that they had those rights; they did not know whether they were here lawfully, they did not know who they should go to if they wanted assistance, they did not speak the language and they were isolated. All of those things are not going to be made any better by Brexit. Obviously they will clearly become worse,

because those who may have had those freedom of movement rights will no longer have them, so those fears will be very justified and they will be any less likely to seek assistance and even less likely to be given that assistance.

Simultaneously, while we have some of the language that is occurring at the moment around Brexit and around foreigners, if you are a foreigner in that kind of circumstance, you will not feel that you would be given assistance if you were to seek it. So the problem that we are facing in the modern slavery-type issues regarding Brexit is not only the legal effect it will have but the perception effect, and the practical impact it has on people's ability to obtain the assistance they would be entitled to obtain.

**Q32 Ms Karen Buck:** I have one last question, going back to the issue of the trade deals that the EU strikes with third parties. At the moment is the assumption, from your point of view, that the preferred option would be simply to translate the EU human rights clauses in those trade deals into British law, or is there scope—and if so, what would be the key issues—for strengthening those human rights considerations in UK trade deals? There are a lot of assumptions underpinning that question.

**Ingrid Gubbay:** That is a massive question, and I am not feeling that qualified to answer that, but there are a lot of people working in the human rights and trade area at LSE and other places who would be well placed to answer.

**Chair:** From your perspective, do you see any beneficial effect of the EU human rights trade clauses, whereby if we were to lose them it would not make any difference? And, if we are entering into bilateral trade deals with countries all around the world, should there be some sort of human rights clause in those trade deals—and, if so, what should it be?

**Sue Willman:** I was working with some civil society organisations on the EU free trade agreement with Peru and Colombia, which the UK approved, and that was a lost opportunity to put human rights clauses into an agreement and also to have mechanisms to monitor human rights violations. That deal also allows low environmental standards. The argument was that there should be human rights impact assessments before further agreement, so if there are trade agreements which have human rights clauses, I think we would want to keep those agreements. The problem is that a lot of the EU agreements, which is a lot of the controversy around TTIP—sorry, I cannot remember what that acronym means; it is the trade deal between the EU and the US—is that there are inadequate human rights clauses.

**Chair:** Bearing in mind we are about to embark on a fresh load of negotiations with the rest of the world, has anybody drafted a standard clause which would have the right approach in it if it was in trade deals? Is there a model around the world or will we have to draft a new one?

**Ingrid Gubbay:** I know there has been work done on drafting these clauses, most definitely. I cannot point to a name today but I could back to you and provide that to the Committee.

**Richard Meeran:** Professor McCorquodale, probably.

**Q33 Baroness Lawrence of Clarendon:** This is a question for Leigh Day. You have already talked about the Government helping companies around the grievance mechanism. My question now is: would a human rights treaty assist in providing access to remedies for victims?

**Richard Meeran:** Do you mean the treaty we are hoping will arise?

**Baroness Lawrence of Clarendon:** Yes.

**Richard Meeran:** The legislation, you mean? Or the UN treaty that is currently being discussed at UN level? That is the objective. That is certainly the intention. Access to remedy is the focus of those discussions. There is a meeting next week and one in the middle of November to discuss this.

**Chair:** Do you think our Government should be supporting that because it would take things forward in terms of access to remedies?

**Richard Meeran:** Absolutely, yes.

**Baroness Lawrence of Clarendon:** Do you hold out hopes of it happening?

**Richard Meeran:** There is a much more positive attitude to it than when it was first proposed by Ecuador, South Africa and a couple of others. It has built up quite a lot of momentum, I think.

**Q34 Lord Trimble:** There have been a number of references in the course of the afternoon to the Modern Slavery Act, but what I do not think has been covered is the question of the reporting requirement in the Act. The question here is: do you have a view about that requirement and how it has operated?

**Shanta Martin:** Yes. This is about the reporting on supply chain responsibilities, effectively, and what steps companies over a certain turnover—£36 million—have taken to try to eliminate modern slavery from their supply chains. What we know at the moment is that the legislation is very new. There are a lot of companies still trying to get to grips

with having to abide by this requirement. As mentioned in the written evidence we have submitted, at the moment there is a subclause to that requirement that says that you can fulfil that obligation by simply stating that you have done nothing, which is fundamentally flawed. How does it assist in ensuring the eradication of modern slavery if you can abide by that requirement to report by saying, “Actually, I am not doing anything”, and that is enough? So there is that problem.

As we have also seen, reports have been produced very recently by CORE, a civil society organisation which I believe you have already heard from, and the Business & Human Rights Resource Centre. Of those 700 statements that have now been produced, how many of those even abide by the minimum requirements in the Modern Slavery Act? Those minimum requirements are simply that they have to be signed by a director, they have to have passed through the board and there has to be a statement saying they have passed through the board, and that has to be published on the website. They are not very onerous obligations. At the latest count—and I spoke to the Business & Human Rights Resource Centre just yesterday—out of the 700, fewer than 9% of companies meet those very basic standards.

So the reporting requirements are a good step forward; it is better to have those reporting requirements than not. But they are being inadequately fulfilled at the moment, and in any case there is a significant flaw in this ability to simply say, “We’re not doing anything”.

**Lord Woolf:** Just on that last point, if you know that they have done nothing and there is an obligation, it may make your case.

**Shanta Martin:** Yes, if they were to state, “We have done nothing to eradicate modern slavery”. But then there is the issue of how you bring a case. For example, if you are a Thai fisherman on a boat in Thailand and you are working for a boat owner who has purchased you from the broker who brought you over from Myanmar—this is based on actual individuals whom we have met—how do you demonstrate that the company here that is selling your products, which might be a very large corporate entity and potentially has the capacity to influence what is happening on those boats, is ultimately responsible? At the moment we would have to rely on negligence, or, alternatively, a very novel argument, “unjust enrichment”. We do not have, as they do in the United States, a piece of legislation that says if you are a victim in that circumstance, you can bring an action against a company that knowingly profits from the slavery that has occurred. So even if they state right now, “We have done nothing”, that does not lead to the ability of victims to obtain remedy.

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**Jeremy Lefroy:** A slightly off-piste question: what would happen if you had a UK company with a subsidiary in a country with a fairly poor record on rights over religious freedom, and the company was doing something which contravened its employees' human rights in respect of exercising their religious freedom? Would you take up a case in the UK against that British company because they had not allowed the workers of the subsidiary to exercise their rights in relation to religious freedom or some other type of freedom of expression?

**Richard Meeran:** The problem is what legal basis such a case would have. If you are talking about a country where the Human Rights Act does not apply, it will not extend outside the jurisdiction, save in certain exceptional places.

**Jeremy Lefroy:** Let us say they have signed up to the Universal Declaration of Human Rights.

**Richard Meeran:** That still does not give you any cause for action before a UK court. I think that is the problem. If you were to change the facts a little so that some harm occurred, some physical harm occurred—

**Jeremy Lefroy:** Some physical or psychological harm: perhaps they were sacked on the basis of their ethnic or religious background.

**Sue Willman:** It goes back to the heart of what Lord Woolf asked at the beginning: what kind of human rights cases can we bring abroad? At the moment we have to fit it into the kind of personal injury, damage, civil type of remit. The kind of cases you could bring in the UK under the Human Rights Act, on discrimination and religious freedom, we cannot bring if those things happen abroad. We can only do it, or it is more likely, if there is environmental harm or the kind of damage to health that we have been talking about.

**Richard Meeran:** There could be psychological harm. Let us say it was psychiatric harm: an injury that had arisen from this restriction that had been imposed. If that restriction was legal in the country where it was imposed, that would be the difficulty under the Rome II regulation. And even if, after Brexit, we do not have the Rome II regulation, we would be back to the old situation here, so we would still almost certainly be looking at the local law.

**Jeremy Lefroy:** That is very interesting. I wanted to tease that out because this is an issue which is going to be increasingly relevant to companies operating in various jurisdictions where British companies are often quite significant. Thank you.

**Chair:** It just remains for me to thank you very much indeed: to thank you for the memorandum you have already put in and to thank you for patiently taking us through your evidence. If there are any further thoughts that occur to you afterwards, we would very much

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like to hear from you, because you are practising it—you are in the business of doing the enforcement of rights—and therefore we are very interested in and concerned with your perspective. Thank you very much indeed.