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**ALLEGATION AGAINST UNILEVER PLC  
TO THE UNITED NATIONS WORKING GROUP ON HUMAN RIGHTS AND  
TRANSNATIONAL CORPORATIONS  
and THE UN SPECIAL RAPPORTEUR ON EXTREME POVERTY  
AND HUMAN RIGHTS**

**Submitted by SOMO, REDRESS, KITUO CHA SHARIA, CORE Coalition, The African  
Coalition for Corporate Accountability (ACCA) and LEIGH DAY  
on behalf of 218 current and former Unilever employees**

**28 July 2020**

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**A) Introduction**

1. This complaint is submitted on behalf of 218 Kenyan nationals (“**the victims**”) who were (and in some cases continue to be) employees and/or residents of a tea plantation owned and operated by Unilever Tea Kenya Ltd (“**UTKL**”), a subsidiary of Unilever plc (“**Unilever**”). This complaint is filed by SOMO, REDRESS, Kituo Cha Sharia, ACCA, CORE Coalition and Leigh Day who act on behalf of and pursuant to the instructions of the victims.<sup>1</sup>
2. The victims were targeted and attacked during serious political ethnic violence which broke out on Unilever’s vast Kericho plantation in Western Kenya in December 2007. They were targeted solely due to their ethnicity and subjected to extreme violence, including widespread rape, attacks with clubs and bladed weapons and, in seven instances, violence resulting in death. In many cases, the survivors continue to live with serious physical and psychiatric injuries arising out of the attacks they were subjected to.
3. In summary, with regard to this complaint, the victims make three allegations against Unilever:
  - i. Unilever placed them in a position of heightened risk of attack and thus contributed to the human rights impacts in question and yet has refused any form of remediation and/or mitigation. Put simply this was the most serious known human rights impact suffered by the largest concentration of Unilever workers anywhere in the world and yet Unilever failed to take adequate steps to remediate and/or mitigate those impacts;

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<sup>1</sup> The victims have withheld their identities from the public domain given the risk of further reprisals they face in Kenya. The victims are willing to disclose their identities to the UN Special Procedures on a confidential basis, if so required.

- ii. After the violence broke out Unilever entirely failed to provide appropriate assistance to the victims and instead unilaterally stopped their wages for a six-month period, thus further aggravating the human rights impacts they had already suffered;
  - iii. In the face of a specific request for remedy from 218 known victims of ethnic violence in 2016 in the form a civil claim for damages, Unilever refused any remediation and sought to block any prospect of access to remedy on the basis of the attribution of legal responsibility within their corporate group.
4. The victims further contend that Unilever failed to take adequate measure to protect them from the risk of harm which it had placed them in, although significant steps were taken to protect managers and expatriates. The accounts of, and concerns raised by, the victims have been the subject of a BBC Radio 4 documentary entitled *Bitter Brew*, which was first broadcast on 14 July 2019.<sup>2</sup>
5. Importantly, as explained below, the United Nations Working Group on Human Rights and Transnational Corporations (“UNWG”) and the Special Rapporteur on Extreme Poverty and Human Rights (together the “UN Special Procedures”) are not asked to consider whether Unilever failed to protect the residents of its plantation because this issue is highly contested and there is no need to resolve that dispute for the purposes of this complaint. Irrespective of whether there was such a failure, under the United Nations Guiding Principles on Business and Human Rights (“UNGPs”) Unilever has a clear responsibility i) to remediate any human rights impacts to which they have “*contributed*” (including those which were unforeseen and which is was unable to prevent) and ii) to mitigate any adverse impacts which are “*directly linked*” to the enterprises. On the facts, the victims submit that Unilever has manifestly failed either to remediate or mitigate these egregious human rights impacts, in breach of their commitments to the UNGPs. In fact, they punitively stopped the victims’ wages in the immediate aftermath of the attacks and have subsequently sought to block any prospect of remedy for the victims.

### ***The Litigation in England***

6. The victims initially sought redress via a claim for civil damages in the English courts. The case was brought on the basis that Unilever failed to protect its workers from the risk of violence and unlawfully withheld wages after the attacks. From the outset, the victims have been clear that they could not seek redress via the Kenyan courts primarily because such litigation in Kenya would have placed them at further risk of victimisation and harassment [See Section C paragraphs 42-46 below]. As a result, they instructed the international human rights law firm, Leigh Day (with the support of REDRESS and

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<sup>2</sup> For the BBC Radio 4 documentary see: <https://www.bbc.co.uk/programmes/m0006m3y>. For further background, see *I Say To You: Ethnic Politics and the Kalenjin in Kenya* by Dr Gabrielle Lynch, Chicago University Press [2011].

Kituo Cha Sharia),<sup>3</sup> to seek remedy in the English courts against the parent company, Unilever plc, given the substantial evidence that the parent company was intimately involved in crisis management and health and safety issues on the Kenyan plantation and ultimately responsible for the system of work which failed to protect the victims.

7. Despite Unilever’s high-profile public commitment to the UNGPs, Unilever has sought to extinguish any possibility of access to remedy.<sup>4</sup> Unilever relentlessly hid behind its corporate structure to prevent the claims from proceeding in England in the clear knowledge that the case could not proceed in Kenya (as confirmed in findings of the High Court – see paragraphs 39-44 below).<sup>5</sup> Further, in response to specific requests by the victims, Unilever plc failed to disclose key documents relevant to its role in crisis management on the Kenyan plantation. As a result, given the limited evidence as to the precise nature of the relevant corporate relationships in the victims’ possession, the English courts declined jurisdiction over the claims and Unilever has therefore succeeded in blocking any prospect of judicial remedy. While such a tactic may have proved effective in order to evade the jurisdiction of the English courts, it is impermissible in terms of the UNGPs. As set out below, Unilever as a corporate group is required to remediate all human rights impacts which it has caused or contributed, even those impacts which were unforeseen and which it was unable to prevent.

#### ***Alleged breaches of the UNGPs***

8. The victims submit that Unilever’s failure to provide any redress for the victims and their determination to block access to remedy in this case flatly contradicts its public commitment to and responsibilities under the UNGPs. Specifically, the victims contend that Unilever has acted in breach of:
- i. Guiding Principle 13 (Responsibility to avoid contributing to impacts and to address human rights impacts to which they have contributed);
  - ii. Guiding Principle 15 (Responsibility to have in place processes to enable remediation of human rights impacts to which they have contributed);
  - iii. Guiding Principle 17 (Human rights due diligence);
  - iv. Guiding Principle 19 (Responsibility to take appropriate action in order to mitigate impacts);
  - v. Guiding Principle 22 (Remediation of adverse human rights impacts to which they have contributed);

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<sup>3</sup> REDRESS is a leading international human rights NGO which brings legal cases on behalf of survivors of torture and international crimes ([www.redress.org](http://www.redress.org)). Kituo Cha Sharia is the oldest access to justice and human rights NGO in Kenya ([www.kituochasharia.or.ke](http://www.kituochasharia.or.ke)).

<sup>4</sup> See paragraph [52-60] below.

<sup>5</sup> The High Court held that : “*if the Cs [the Claimants] were to litigate in Kenya there is a real risk that... they would be exposed to further violence*” and that “*there is cogent evidence... that the Cs [the Claimants] will not get substantial justice in Kenya*”. *AAA & Ors v. Unilever plc & Unilever Tea Kenya Ltd* [2017] EWHC 371 (QB) paragraphs 168 & 169.

- vi. Guiding Principle 26 (Access to effective judicial remedy). Although Guiding Principle 26 applies to States, it describes the legal barriers the Guiding Principles aim to overcome and as such is informative of the alleged breaches of Guiding Principles 13, 15, 19 and 22.
9. The UN Special Procedures are not asked to re-consider the specific issues considered in the English legal claims, namely whether, pursuant to the relevant tests in English tort law i) the risk of harm to the victims was reasonably foreseeable or ii) whether Unilever’s intervention and supervision of the activities of UTKL gave rise to parent company liability (an arguable duty of care to the victims). The UNGPs’ application is broader than the relevant English law tests and is not restricted by the attribution of legal responsibility within a corporate group. Rather, the UNGPs apply to “*all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.*”<sup>6</sup>
10. Accordingly, the victims invite the UN Special Procedures to call on Unilever to provide the victims with effective remedy in accordance with the UNGPs. Specifically, the victims invite the UN Special Procedures to determine:
- i. Whether Unilever has a responsibility to provide remediation/redress to the victims. The victims contend that Unilever has contributed to the adverse human rights impacts they suffered and, therefore, Unilever is required to provide remediation/redress to the victims (pursuant to Guiding Principles 13, 15, 19 and 22); and
  - ii. Whether Unilever’s actions, including its reliance on its corporate structure, to block any prospect of judicial remedy in England (in the knowledge that no judicial remedy was possible in Kenya) represents a breach of Guiding Principles 13, 15, 17, 19, and 22 (read in conjunction with Guiding Principle 26).
11. It is understood that the UN Special Procedures will first seek dialogue with Unilever on the allegations raised in this complaint.
12. The submission below is divided into the following categories:
- i. Factual background to the claims;

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<sup>6</sup> UNGPs, page 1. See also commentary to General Principle 26 on the attribution of legal responsibility among members of a corporate group which “*facilitates the avoidance of appropriate accountability.*” Further GP14 makes it clear that “*the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.*” See also **The Corporate Responsibility to Respect Human Rights** at Question 17 on page 24: “*How is an enterprises’ structure relevant to its responsibility to respect human rights? The corporate group structure does not make any difference to whether entities within the group have to respect human rights. It simply affects how they go about ensuring that rights are respected in practice, for instance through their contractual arrangements, internal management systems, governance or accountability structures.*” [https://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf)

- ii. The English litigation, including the findings of the Court of Appeal;
- iii. The alleged breaches of the UNGPs.

The following documents have been annexed for reference:

No.	Document Title	Document Description
<b>Public Letters &amp; Statements</b>		
1.	NGO Letter to Paul Polman dated 19 April 2018	Letter on behalf of REDRESS, Kituo Cha Sheria, ACCA and CORE to then Unilever CEO Paul Polman regarding Unilever's response to the claims.
2.	Unilever Group Public Statement dated 23 July 2018	Unilever Group reply to CORE post ("Unilever: Time for real leadership on Human Rights")
3.	Complainants' Letter to Paul Polman dated 25 September 2018	Complainants' response to assertion made in Unilever Group Public Statement dated 23 July 2018
<b>Victims' statements and medical/psychiatric reports</b>		
4.	Witness Statement of AAO	Statement by victim which details their experience of the violence in 2007.
5.	Witness Statement of DDA	Statement by victim which details their experience of the violence in 2007.
6.	Witness Statement of HHL	Statement by victim which details their experience of the violence in 2007.
7.	Witness Statement of AAA	Statement by victim which details their experience of the violence in 2007.
8.	Redacted Psychiatric Reports for Victims 1 - 6	
9.	Redacted Orthopaedic Reports for Victims 1-7	
<b>Risk of Harm and statements from former Unilever Managers</b>		
10.	Witness Statement of Mr George Mong'are Kegoro	Statement by Executive Director of the Kenya Human Rights Commission and Secretary to the Waki Commission into post-election violence. Provides evidence on the risk of violence prior to the 2007 election.
11.	Witness Statement of Mr John Kimema Gitau	Statement by former UTKL manager.
12.	Witness Statement of ZZA	Statement by former UTKL manager.
13.	Witness Statement of ZZB	Statement by former UTKL manager.
14.	Witness Statement of ZZC	Statement by former UTKL manager.
15.	Waki Report	Relevant sections of Waki Report – Report of the Commission of Inquiry into Post Election Violence
<b>Access to Justice in Kenya</b>		
16.	Witness Statement of Fergal Gaynor	Statement by former Legal Representative for the <i>Victims</i> in the <i>Kenyatta</i> case at the International Criminal Court. Relevant to Access to Justice in Kenya.
17.	Expert Report of Wilfred Nderitu	Expert Report on Access to Justice in Kenya.
<b>Court Judgments and Documents with respect to Jurisdiction</b>		
18.	AAA v Unilever Plc [2017] EWHC 371 (QB)	First instance decision of the High Court on 27 February 2017.
19.	Skeleton Argument	Victims' Skeleton Argument to the Court of Appeal.
20.	Further Skeleton Argument	Victims' Further skeleton Argument to the Court of Appeal.
21.	AAA v Unilever Plc [2018] EWCA Civ 1532	Appeal decision of the Court of Appeal on 4 July 2018.
22.	Order of the Supreme Court	Refusal of permission to Appeal by the Supreme Court on 17 July 2019.

**B) Factual Background**

13. The Unilever Plantation in Kericho in Western Kenya is owned by UTKL and has an estimated residential population of over 100,000. In 2007/08, the numbers of employees alone represented 11% of Unilever's global workforce, the largest concentration of Unilever employees anywhere in the world.<sup>7</sup> According to the victims, who are primarily from the Kisii tribe, Unilever had placed their tea pickers in a position of serious risk because, as Unilever was aware, most were from tribes that are not indigenous to the area. This is because i) the Kisii tribe is not indigenous to Kericho and is the subject of considerable generalised hostility and ii) historically the Kisii are perceived to be the political opponents of the local majority tribe, known as the Kalenjin.<sup>8</sup> As a result, at times of social unrest (specifically during elections) they were, and remain, potential targets of ethnic violence.
14. Occurrences of serious ethnic violence in Kenya are a longstanding and persistent feature of Kenyan politics. Elections in Kenya are characterised by repeated patterns of serious ethnic tension and violence between tribal groups. Particularly serious violence had previously broken out in Kenya during the 1992 and 1997 elections, particularly in the Rift Valley where the Plantation is located. There were widespread warnings of impending serious violence prior to the 2007 election. As detailed below at paragraphs 25-33, this included multiple threats which were reported to local Unilever management and regular reports of mounting violence in the domestic and international media and by political risk agencies.
15. In December 2007, following the announcement of the general election result, ethnic violence broke out in Kenya. Large groups of attackers invaded Unilever's Plantation, freely roamed around the residential areas looking for members of the minority tribes and attacked workers and their families with clubs and machetes solely on the basis of their ethnicity. Hundreds of workers suffered brutal attacks, many were raped, and thousands fled the Plantation to reach places of safety. Significantly, the victims contend that the attackers included their fellow Unilever employees. The workers were left to fend for themselves when violence broke out. They contend that had a proper crisis management and preparedness plan been put in place, the tragedy would have been averted.
16. The victims contend that Unilever failed take adequate measures to protect them from the risk of ethnic violence in 2007. They allege that nothing was done to enhance the protection of residential areas, although the evidence shows that significant measures were taken to protect management housing and company assets. Although for the purposes of this complaint the UN Special Procedures are not asked

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<sup>7</sup> In 2007 Unilever's global workforce was around 180,000, the number of workers on the Plantation was in the region of 24,000. Together with dependents the total number of residents on the Plantation exceeded 100,000, which represents, by a considerable margin, the largest concentration of Unilever employees/residents anywhere in the world. In 2006-2007, Unilever also owned large tea estates in Tanzania and India. The Indian plantation had a workforce of 12,000 whilst the Tanzanian plantation has a workforce of 6,000.

<sup>8</sup> See paragraphs 34-36, 43-46, 52-53 and 60-62 of the Witness Statement of Mr George Mong'are Kegoro at [Tab 10].

to determine whether there was a failure to protect the victims by Unilever, for the avoidance of doubt, the victims maintain that the risk of violence was not appropriately assessed, no adequate precautions were taken to protect workers and their families from violent attack and, when the crisis hit, Unilever (whose senior local management was largely on holiday) failed to respond appropriately.

***Unilever's punitive response to the victims after the attacks***

17. Unilever's immediate response to the crisis was to shut down the Plantation and send workers back to their homelands. The victims were principally from the Kisii area, located about two hours from Kericho by road. Instead of seeking to provide the victims with emergency medical assistance and relief, the company immediately stopped all wages for a period of six months. Only if workers returned to the Plantation were any wages paid for future work, and no back payment was made with respect to the previous six months.
18. The victims lost their possessions when their houses were looted during the attacks. Some victims received very limited financial assistance from Unilever (a flat rate of around £80 or the equivalent of one month's wages) if they returned to the Plantation. This represented a small fraction of the loss of wages and possessions they had suffered. Those who did not return received nothing. Some were provided with maize, the cost of which was then deducted from their salary.<sup>9</sup>
19. Many of those who were injured sought medical treatment while they were absent from the Plantation, for which they had to pay themselves. Those who did not return to the Plantation received no medical or psychiatric support from Unilever. Even for those who returned to work at the Plantation, little further support was made available.
20. Expert reports with respect to a cross section of the victims were obtained from leading medical and psychiatric consultants, as set out below at paragraphs 22-24. The experts identified that the victims have significant ongoing medical and psychiatric needs. The victims submit that Unilever failed to provide them with any appropriate assistance in the immediate aftermath of the attacks and, in fact, responded punitively by immediately stopping their wages. Further, in the face of the cohort of 218 victims who have sought remedy from Unilever, they have again refused to provide any remediation or assistance.
21. The victims submit that they were put in a position of serious risk by Unilever. When that risk eventuated, Unilever entirely failed to provide them with any form of meaningful remedy or assistance. Instead, Unilever aggravated their situation by stopping their wages, and has sought to block any access

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<sup>9</sup> See at [Tab 3] victims' letter to CEO of Unilever plc dated 25 September 2018 and victim witness statements enclosed at [Tabs 4-7].



to remedy by hiding behind its corporate structure. The victims submit that this represents an egregious ongoing breach of the UNGPs (see Section D below).

### ***Medical and psychiatric evidence***

22. The victims include the families of 7 victims who were killed and 56 women who were raped. The remainder of the victim group was also subjected to serious physical attacks as detailed in the annexed particulars of claim. The continued physical and psychiatric injuries of a cross section of the survivors have been extensively documented by Dr Nuria Gene-Cos (Consultant Psychiatrist and Trauma Specialist at the Maudsley Hospital in London) and Dr Timothy Byakika (Consultant Orthopaedic and Trauma Surgeon at Nairobi University Hospital). Redacted copies of these reports, which are dated June 2015, are enclosed at Tabs [8-9].
23. Dr Byakika examined seven of the victims. He found that that all the victims had suffered serious injuries which were consistent with attacks and being beaten by blunt objects or machetes. Three of the seven victims have serious ongoing disabilities as a result of which they are no longer able to work and provide for their families. One of the victims has a serious ongoing disability which resulted in the downgrading of his job from a first aider to that of a labourer.
24. Dr Nuria Gene-Cos examined six victims. One of the victims had contracted HIV as a result of being raped. She found that all six victims have Post Traumatic Stress Disorder, five of whom were categorised as severe/chronic and require significant treatment with therapy and medication. Her concern was if trauma focused therapy could not be accessed then their “*symptoms most probably will continue and could even become more disabling and severe*”.<sup>10</sup>

### ***The risk of violence in 2007***

25. The evidence of the historical pattern of serious ethnic violence in Kenya around election periods is voluminous. Although this material is not central to the Working Group’s considerations, it is important contextually.
26. The complainants rely upon witness evidence from Mr George Kegoro, Secretary to the WAKI Commission, which was the judicial inquiry established by the Kenyan Government to investigate the facts and circumstances surrounding the 2007 post-election violence.<sup>11</sup> The victims also rely on a range of other public reports on ethnic violence in Kenya.

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<sup>10</sup> See, for example, paragraph 45 at [Page 76 of Tab 8].

<sup>11</sup> For the Witness Statement of Mr George Mong’are Kegoro see [Tab 10].

27. Mr Kegoro states that there was “*a well-established pattern of intense ethnic violence and civil unrest around elections in Kenya and that this pattern had been exhaustively investigated by previous commissions of inquiry*”.<sup>12</sup> He confirms that the Rift Valley Province is one of Kenya’s most politically volatile regions. Large scale violence occurred around the 1992 and 1997 elections, including in Kericho.<sup>13</sup> The WAKI Report found the South Rift valley area (where Kericho is located) to be “*a well-known hotspot for ethnic violence between Kisii and Kipsigis tribes...*”<sup>14</sup>. There are numerous examples during past elections of large-scale invasions by majority tribes in the Rift Valley, targeting minority ethnic groups and the police entirely failing in their duty to protect. That is precisely what happened in 2007.<sup>15</sup> Whilst 2007 was the most violent election, Mr Kegoro’s evidence is that political ethnic electoral violence of a similar scale and severity was not unprecedented in Kenya.<sup>16</sup>

28. In summary, Mr Kegoro concluded as follows:

*“The Waki Commission’s overall findings indicate that in its view, the risk of violence around the 2007 Election was foreseeable, and in fact was foreseen by the Kenyan security agencies. The Waki Commission makes clear in its report that by 2007, there was a well-established pattern of intense ethnic violence and civil unrest around elections in Kenya and that this pattern had been exhaustively investigated and analysed by previous commissions of inquiry, including the Akiwumi Commission.”*<sup>17</sup>

29. Indeed, Unilever’s own documentation evidenced the known risk of ethnic violence on the Plantation. UTKL’s Crisis Management Plan of 2007, identified the risk of “**Country Instability**”, “**Riot and Ethnic Clashes**”, “**Land invasion by indigenous people reclaiming historic land**” and “**Armed attack on company property or personnel**” and the need for special arrangements “**if there is a targeted ethnic group**”.<sup>18</sup> The Plan identified elections as posing a particular increased risk of ethnic clashes and civil unrest.<sup>19</sup>

### ***The growing risk of violence in 2007***

30. In the run up to 2007 there was widespread pre-election violence in Kenya, including in locations close to Kericho.<sup>20</sup> In 2007 violence between ethnic groups in Kenya before the election resulted in 200 deaths and the displacement of 70,000 people.<sup>21</sup> This violence was highly publicised, with numerous reports in both the national and international media including; the BBC, Reuters, Al Jazeera and the New York Times.<sup>22</sup> The risk of violence in Kericho itself was also clear. The WAKI Commission cited

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<sup>12</sup> See paragraph 23 of the Witness Statement of Mr George Mong’are Kegoro at [Tab 10].

<sup>13</sup> See paragraph 44 of the Witness Statement of Mr George Mong’are Kegoro at [Tab 10].

<sup>14</sup> See paragraph 24 of the Witness Statement of Mr George Mong’are Kegoro at [Tab 10].

<sup>15</sup> See paragraphs 37-64 of the Witness Statement of Mr George Mong’are Kegoro at [Tab 10].

<sup>16</sup> See paragraphs 41-42, 52-53 and 64 of the Witness Statement of Mr George Mong’are Kegoro at [Tab 10].

<sup>17</sup> See paragraph 10 of the Witness Statement of Mr George Mong’are Kegoro at [Tab 10].

<sup>18</sup> See paragraph 5 of the Appellants’ Further Skeleton Argument to the Court of Appeal [Tab 20].

<sup>19</sup> See paragraph 21 of the Appellants’ Skeleton Argument to the Court of Appeal [Tab 19].

<sup>20</sup> See pages 138-139 (Annex pagination pages 479-480) of the Waki Report at [Tab 15].

<sup>21</sup> See paragraph 66 of the Witness Statement of Mr George Mong’are Kegoro at [Tab 10].

<sup>22</sup> See paragraphs 66-68 of the Witness Statement of Mr George Mong’are Kegoro at [Tab 10].

warnings of ethnic violence in Kericho, including the circulation of leaflets warning non-Kalenjin to leave.<sup>23</sup>

31. The growing risk of violence in 2007 was also reported by global risk analysts, some of which reported regularly to Unilever. The complainants obtained contemporaneous reports of leading international risk management agency, iJET Integrated Risk Management (“iJET”). Those reports (from 19 January 2007 to 29 February 2008), repeatedly warned of serious ethnic and escalating violence in Kenya during 2007 and the escalating risk of violent civil unrest in the Rift Valley around the 2007 election. They advised organisations operating in Kenya to review their security protocols and to ensure that staff followed strict security guidelines in the months of November and December 2007.
32. Finally, the complainants have adduced four statements from four victims (former and current employees of UTKL) and five statements of former UTKL managers. In the run up to the 2007 election threats were made repeatedly against Kisiis on the estate.<sup>24</sup> The threat of violence against Kisiis was spoken about openly on the Plantation. Threats were reported to Plantation Management but not acted upon.<sup>25</sup> Those in management positions, including senior management, who were primarily from the Kalenjin tribe, themselves issued openly racist threats towards the Appellants.<sup>26</sup> Threatening posters calling for Kisii and Kikuyu to “*go home*” or “*there would be trouble*” were placed around Kericho.<sup>27</sup>
33. Crucially, this risk was anticipated by UTKL’s senior management (including the Managing Director, Richard Fairburn), which met on three occasions to discuss the heightened risk of violence and put in place measures to protect power plants, factories and management housing, but took no steps to protect the residential areas where the victims and other low paid employees lived.<sup>28</sup>

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<sup>23</sup> See paragraph 77 of the Witness Statement of Mr George Mong’are Kegoro at [Tab 10] and page 135 of the WAKI Report at [Page 476 of Tab 15].

<sup>24</sup> See paragraph 9 of the Witness Statement of DDA at [Tab 5], paragraphs 9-10 of the Witness Statement of HHL at [Tab 6] & paragraphs 10-13 of the Witness Statement of AAA at [Tab 7].

<sup>25</sup> See paragraphs 9-10 of the Witness Statement of DDA at [Tab 5] & paragraph 17 of the Witness Statement of AAO at [Tab 4].

<sup>26</sup> See paragraphs 9-10 of the Witness Statement of HHL at [Tab 6].

<sup>27</sup> See paragraph 3 of the Witness Statement of ZZC at [Tab 14].

<sup>28</sup> See paragraph 9 of the Witness Statement of ZZB at [Tab 13].

### C) The Litigation in the English Courts

34. To repeat, the UN Special Procedures are not asked to consider the substance or the merits of the English Courts' interlocutory judgments on jurisdiction. The relevant legal proceedings are summarised to assist with respect to the second issue the UN Special Procedures are asked to determine, namely whether Unilever's actions, and reliance on their corporate structure, to block any prospect of judicial remedy in England (in the knowledge that no judicial remedy was possible in Kenya) represents a distinct breach of Guiding Principles 13, 15, 17, 19, and 22 (read in conjunction with Guiding Principle 26).
35. The victims were clear that they could not pursue the litigation in Kenya since it would place them at further risk of victimisation and harassment. As a result, the case was filed in the London High Court in 2015 given the evidence of Unilever's involvement in health and safety and crisis management matters in UTKL. Instead of engaging with the substantive allegations, Unilever sought at each stage to persuade the English courts to decline jurisdiction in favour of the Kenyan courts. This litigation tactic was pursued, the victims understand, in the knowledge that the victims could not pursue the case in Kenya and, indeed, have not done so subsequent to the English court's decision to decline jurisdiction.
36. After a hearing in December 2016, the English High Court rejected the majority of Unilever's arguments and held i) that there was cogent evidence that the victims would not get justice in Kenya and that "*there was a real risk*" that they would be exposed to further violence if they sought to do so and ii) that Unilever had "*assumed apparent control of the content and auditing*" of the relevant policies and procedures and therefore arguably was legally responsible for the alleged failures.<sup>29</sup>
37. However, the judge in the High Court also held that, in her view, the risk of violence was not reasonably foreseeable on the Plantation (pursuant to the test in English tort law) because there had not been similar incidents of large-scale violence on the Plantation in the past. Further, the judge held that it was not foreseeable that law and order would break down generally and that the Kenyan police would fail to protect the victims when it did break down. However, she found (inconsistently) that the violence had been foreseeable in Kenya generally and even in Kericho, the town which borders directly onto the Plantation.
38. The victims appealed to the English Court of Appeal on the grounds that the judge was wrong to hold that the specific loss and damage actually suffered by the victims had to be foreseeable, as did the breakdown of law and order with the associated failure of the police to protect the victims. It is sufficient in English law that the risk of violence to the victims, as a class, was real, and that it was one which a reasonable person in the position of Unilever would not ignore. In response, Unilever cross-

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<sup>29</sup> See paragraph 103 of the High Court Judgment at [Tab 18].

appealed the first instance decision that Unilever was arguably legally responsible for any crisis management failings.

39. The appeal was heard by the Court of Appeal in April 2018 and the Court gave its judgment in July 2018. The Court of Appeal's judgment did not address the victims' appeal on foreseeability but instead overturned the finding of the High Court on the basis that there was insufficient evidence that Unilever was actively responsible for the alleged crisis management failings of its Kenyan subsidiary. Accordingly, the Court declined jurisdiction.
40. The victims appealed to the English Supreme Court on the grounds that the Court of Appeal's approach to the scope of parent company liability was too restrictive and at variance with the Supreme Court's recent decision in *Lungowe & others v Vedanta Resources plc and another* [2019] UKSC 20. However, on 17 July 2019 the Supreme Court refused to grant the victims permission to appeal. The primary reason given by the Supreme Court for rejecting the victims' appeal was not because it raised no issue of law to be considered, but because "*the application does not raise a point of law of general public importance which ought to be considered at this time. The relevant principles have now been clarified in Vedanta.*"<sup>30</sup> In other words, the law had already been clarified in *Vedanta* so, whatever the merits of the appeal, it did not raise a fresh point of law of general public importance which merited consideration by the Supreme Court.
41. As a result, the English courts have declined jurisdiction over the substantive case and the only remaining judicial avenue for the victims is the Kenyan courts. As explained below, that is not an option open to the victims and no case has subsequently been filed in the Kenyan courts.

### ***Access to Justice***

42. From the outset of their case the victims have been clear that there is no prospect of their case proceeding in Kenya without placing them at significant risk of violence and/or intimidation. Specifically, those workers who continue to work on the plantation are at risk of attack from hostile members of the majority tribe which surround the Plantation if it were to become known that they were seeking legal redress.
43. In evidence put before the Court, Mr Fergal Gaynor, former legal representative for the victims in the *Kenyatta* case at the International Criminal Court ("ICC"), said that he was "...aware of some efforts before the Kenyan courts to achieve justice for victims of the PEV (Post Election Violence)" but that he did "*not believe that any of these efforts have so far been successful*"<sup>31</sup> and that the "*question of risk to those who seek to pursue justice*

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<sup>30</sup> *Lungowe & others v Vedanta Resources plc and another* [2019] UKSC 20.

<sup>31</sup> See paragraph 35 of the Witness Statement of Fergal Gaynor at [Tab 16].

*in the Kenyan courts against those responsible for the PEV remains a subject of serious concern*".<sup>32</sup> Mr Gaynor's evidence was consistent with the evidence of Mr Wilfred Nderitu, who was appointed as a legal representative for the victims in the case against William Ruto (the current Deputy President) at the ICC, who states in his evidence that in his experience, victims of the PEV were "*very fearful of violent reprisals*" and that there is a "*climate of fear in Kenya around litigation related to the PEV*".<sup>33</sup>

44. The High Court Judge was "*shown much material on this issue*".<sup>34</sup> Having reviewed the evidence in detail, the Judge concluded that there was "*cogent evidence of two linked factors, and that there is a third, which, in combination with the first two, mean that there is a real risk that Cs [the victims] will not get substantial justice in Kenya*."
45. The three factors were:
- i. If the victims litigated this claim in Kenya there was a real risk that, unless anonymity orders were made, they would be exposed to further ethnic violence; but that even if such orders were made, there was no provision and no precedent for a confidentiality club in Kenya.<sup>35</sup> The judge concluded on the evidence before the court that the complainants, who were "*victims of terrible violence*" based on their "*ethnicity and perceived political affiliation*", would be at serious risk of physical harm if the case proceeded in Kenya.
  - ii. There is a continuing problem with judicial corruption in Kenya and a real risk that if anonymity orders were made in any litigation in Kenya, that those orders could be breached or circumvented by persons who "*were prepared to use corruption, and violence or intimidation*" to "*discourage Cs [the victims] from bringing this claim*".<sup>36</sup>
  - iii. There is a real risk that the victims would not be able to afford to bring these claims or fund them via other means within the Kenyan legal system.<sup>37</sup>
46. Unilever challenged this decision, but the Court of Appeal did not address their arguments or overturn the findings of the High Court.
47. The outcome is, therefore, clear. Unilever has succeeded in blocking any prospect of access to judicial remedy, by relying on its corporate structure, in the knowledge that it would be impossible for the case to proceed in Kenya.

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<sup>32</sup> See paragraph 36 of the Witness Statement of Fergal Gaynor at [Tab 16].

<sup>33</sup> See paragraph 63 of the Expert Report of Ngunjiri Nderitu at [Tab 17].

<sup>34</sup> See paragraph 154 of the High Court Judgment at [Tab 18].

<sup>35</sup> See paragraph 168 of the High Court Judgment at [Tab 18].

<sup>36</sup> See paragraph 169 of the High Court Judgment at [Tab 18].

<sup>37</sup> See paragraph 171 of the High Court Judgment at [Tab 18].

## D) Alleged Breaches of the UNGPs

48. Unilever joined the United Nations Global Compact (“**UNGC**”) on 26 July 2000. Principles 1 and 2 of the UNGC provide that “*Businesses should support and respect the protection of internationally proclaimed human rights; and make sure they are not complicit in human rights abuses.*”
49. Unilever endorsed the UNGPs in 2011 and stated that the “*Guiding Principles provide further conceptual and operational clarity for the two human rights principles championed by the Global Compact*”.<sup>38</sup>
50. Unilever was the first business enterprise to publish a Human Rights Report in 2015 which used the UNGPs Reporting Framework. Further, Unilever stated: “*We’re using the framework provided by the UN Guiding Principles on Business and Human Rights to monitor, influence and improve the business practices of our own operations, as well as those of our suppliers and business partners.*” Unilever claims that: “*Respect for human rights is core to our business, and examples of this can be found throughout our Sustainable Living Report.*”<sup>39</sup>
51. Unilever’s “*policy commitment*” to human rights is a matter of public record from which it has gained considerable reputational benefit.<sup>40</sup> Although the UNGPs post-date the events in question, the matters which the UN Special Procedures are asked to consider concern the failure to remediate/block access to remedy after the UNGPs came into effect and after Unilever committed to their implementation.

### ***First Breach: Failure to Mitigate and Remediate***

52. Guiding Principle 13 of the UNGPs states:

“13. The responsibility to respect human rights requires that business enterprises:

- (a) *Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;*
- (b) *Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”*  
(Emphasis added)

53. The Commentary to Guiding Principle 13 makes it clear that business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. Activities can include both “*acts and omissions*” and “*...its “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services*”.

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<sup>38</sup> See [https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/GPs\\_GC%20note.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf).

<sup>39</sup> See <https://www.unilever.com/sustainable-living/enhancing-livelihoods/fairness-in-the-workplace/advancing-human-rights-in-our-own-operations/>.

<sup>40</sup> For example, in 2018, the **Corporate Human Rights Benchmark** ranked Unilever second in the agricultural products sector and fifth overall. In the **GlobeScan/Sustainability Leaders Report** in 2019 Unilever was awarded the top corporate leadership running for the ninth year running.

54. Further, Guiding Principle 15 of the UNGPs states in clear terms that business enterprises have a responsibility to put in place policies and processes to enable remediation for any human rights impacts to which they contribute:

*“In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:*

...

- b) *A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;*
- c) *Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”*  
(Emphasis added)

55. Guiding Principle 19 requires business enterprises to “*take appropriate action*” with respect to human rights impacts. The Commentary states that:

*“Potential impacts should be prevented or mitigated through the horizontal integration of findings across the business enterprise, while actual impacts—those that have already occurred – should be a subject for remediation (Guiding Principle 22)”*.

56. The victims submit that Unilever clearly “*contributed*” to the adverse human rights impacts they suffered in two respects (in addition to the Second Breach below which represents in itself a contribution to an ongoing violation):

- i. It was Unilever that put the victims in a position of heightened risk. It was Unilever who decided to employ a large migrant workforce who lived in the midst of a hostile tribe and therefore rendered them potential targets of attack at times of unrest. The risk of adverse human rights impacts did not arise in isolation, it arose because of Unilever’s employment model. Indeed, UTKL’s own Crisis Management Plan 2007 (which was in place at the time) envisaged precisely this type of risk on the Plantation. The plan refers to the risk of “**Country Instability**”, “**Riot and Ethnic Clashes**” and “**Armed attack on company property or personnel**” and the need for special arrangements “**if there is a targeted ethnic group**”.<sup>41</sup> In those circumstances, it is not open to Unilever to claim that they were mere innocent bystanders, when they themselves put the victims in a position of risk, the nature of which is expressly acknowledged by their own policies.
- ii. The victims’ account is that not only did Unilever fail to provide them with any adequate assistance prior to, during and after the attacks, but that in fact Unilever responded punitively by immediately stopping their wages for six months, thereby aggravating the situation of the victims. In their public materials Unilever have claimed that they responded with an aid programme but in fact, in all the documents and public announcements that Unilever has produced about these complaints, they have never denied the fact that, in reality, they stopped

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<sup>41</sup> See paragraph 29 above.



the victims' wages. Further, those who did not feel able to return to work to the Plantation did not receive any wages or severance package. No medical assistance or psychiatric assistance was provided by Unilever to those who did not return to the Plantation. The victims lost all their possessions when their properties were looted during the attacks, and even those who returned to work at the Unilever Plantation received a risible level of compensation of £80 each (equivalent to just one month's wages). In those circumstances, Unilever's punitive response to the attacks in fact aggravated and further contributed to the human rights impacts suffered by the victims.

57. Guiding Principle 22 of the UNGPs states that:

*"Where business enterprises identify that they have caused or contributed to adverse impacts they should provide for or cooperate in their remediation through legitimate processes."* (Emphasis added)

58. The responsibility to remediate arises in relation to human rights impacts caused or contributed to, even those which have not been foreseen or which business enterprises were unable to prevent. The Commentary on Guiding Principle 22 states: *"Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent."* The fact that the risks to the victims were highlighted in UTKL's own crisis management plan demonstrates that the risks were clearly understood and articulated. However, irrespective of whether the risks were or could have been *"foreseen"* by Unilever, pursuant to Guiding Principle 22 the responsibility for Unilever to remediate adverse human rights impacts to which they have contributed remains critical. The Commentary to Guiding Principle 22 states that when a business enterprise has caused or contributed to adverse impacts, a business enterprise has *"responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors"* and *"where crimes are alleged typically [this] will require cooperation with judicial mechanisms"*.

59. Further and in the alternative, pursuant to Guiding Principle 13 Unilever should seek to prevent or mitigate adverse human rights impacts which are *"directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."* (Emphasis added) The Commentary to Guiding Principle 19 states: *"The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond...If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it."* (Emphasis added) On the facts of this complaint, the adverse human rights impacts were plainly *"directly linked to their operations"* and Unilever plainly have leverage over UTKL as the parent company, and yet no attempt has been made at mitigation by Unilever.

60. Therefore, in the face of the 218 victims who have specifically sought redress, Unilever has not only refused any form of remediation or mitigation but it has also sought to block any prospect of judicial remedy by hiding behind its corporate structure and the legal separation of the parent company from

its Kenyan subsidiary. While such a tactic may have proved effective in order to evade the jurisdiction of the English courts, it is impermissible in terms of the UNGPs. Unilever as a corporate group is required to remediate all human rights impacts which it has caused or contributed to, even those impacts which were unforeseen and which it was unable to prevent. Taking Unilever's argument at its highest, namely that the risk to the victims could not be foreseen (a contention which the victims flatly reject), the responsibility to remediate remains a central principle of the UNGPs. Unilever has failed to remediate the victims and so has acted in breach of Guiding Principles 13, 15, 19 and 22. As a result, we invite the UN Special Procedures to request that Unilever provide appropriate remediation to the victims in the form of appropriate rehabilitation, compensation and satisfaction for the harm and losses they have suffered.<sup>42</sup>

### ***Second Breach: Blocking Access to Judicial Remedy***

61. The UNGPs further state that victims of human rights abuses should not be denied access to effective remedy.
62. The complainants clearly accept that under the UNGPs Unilever is entitled to a legal defence in the face of allegations of negligence in the context of a civil action. The victims further accept that, in principle, a business enterprise is plainly entitled to contest jurisdiction provided that alternative avenues to judicial remedy remain open to the victims of human rights abuses. However, the victims allege that certain legal defences are incompatible with adherence to the UNGPs. For example, where a business enterprise blocks at an interlocutory stage any prospect of a claim from proceeding in a specific jurisdiction on the basis of corporate structure, in the knowledge that there is no other jurisdiction open to the claimants. Furthermore, Unilever's defence strategy to distance itself from its Kenyan subsidiary contrasts with its public commitments to the UNGPs, which include the responsibility to conduct human rights due diligence, to prevent human rights risks and address human rights impacts of subsidiaries (Guiding Principles 17 – 21).
63. This scenario is specifically highlighted in the UNGPs. Guiding Principle 26, which provides that access to effective remedy should not be denied because of “...*the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws (which) facilitates the avoidance of appropriate accountability.*” This is specifically the case “...*where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim...*”. Whilst Guiding Principle 26 applies to States, it is submitted that it is informative in construing the alleged breaches of Guiding Principles 13, 15, 19 and 22.

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<sup>42</sup> Pursuant to the remediation principles set out in ***Human rights and transnational corporations and other business enterprises, Note by the Secretary-General***, UN General Assembly (A/72/162), 18 July 2017

64. In the current complaint Unilever has done precisely that, namely relied on their corporate structure, and the attribution of legal responsibility among members of the corporate group, to prevent the substantive litigation proceeding in England in the knowledge that it cannot proceed in Kenya. Indeed, no case has ever been filed in Kenya and the victims remain clear that to do so would place them at risk of further harassment and victimisation.
65. Such conduct is also in breach of the requirement of “*active engagement*” or “*cooperation*” of Guiding Principle 22. In clear breach of Guiding Principle 22, read together with Guiding Principle 26, Unilever has sought to frustrate and obstruct any prospect of remediation of the human rights impacts at every stage. The UN Special Procedures are invited to declare whether such tactics which have the effect of extinguishing any access to remedy at an interlocutory stage represents a breach of Guiding Principles 13, 15, 19 and 22 read in conjunction with Guiding Principle 26.

### **Conclusion**

66. Several aspects of this case are beyond dispute. The 218 victims were employees (and family members) of Unilever in Kenya. They lived and worked on Unilever’s Kericho Plantation and they were subjected to human rights abuses of the worst kind by third parties and fellow Unilever employees. Many continue to suffer from ongoing serious physical and psychiatric disabilities which require treatment. Many can no longer provide for their families.
67. But for the fact that they had been employed by Unilever the victims would not have lived on the Plantation and, therefore, would not have faced the risk of violent attack in 2007. Unilever cannot wash their hands of the victims and, in the same breath, explicitly state their commitment to respecting human rights and implementing the UNGPs. Under the UNGPs, to which they are committed, Unilever is required to remediate the adverse impacts which Unilever caused or contributed to, or are linked with, whether or not such impacts were foreseen or whether or not they had been able to prevent them. In those circumstances Unilever is required to provide remediation and remedy. Instead they have done the opposite and, in fact, at the critical time they punitively stopped the income of the victims in question.
68. Further, in the face of victims’ attempt to access remedy, Unilever has sought to block any prospect of remedy by hiding behind their corporate structure. If the UNGPs are to maintain credibility it is vital that such corporate behaviour is held to account.
69. In all the circumstances, the victims invite the UN Special Procedures to i) call on Unilever to provide effective remedy to the victims pursuant to Guiding Principles 13 and 22 and ii) to issue a declaration that Unilever has acted in breach of Guiding Principles 13, 15, 17, 19, 22 (read in conjunction with and Guiding Principle 26).