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House of Commons
Joint Committee on Human
Rights

Any of our business? Human Rights and the UK private sector

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Oral and Written Evidence

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Oral evidence

Taken before the Joint Committee on Human Rights on Wednesday 3 June 2009

Members present:

Mr Andrew Dismore, in the Chair

Dubs, L
Morris of Handsworth, L
Onslow, E

Mr Virendra Sharma

Witness: **Professor John Ruggie**, UN Special Representative on human rights and transnational corporations and other business entities, examined.

Q1 Chairman: Good afternoon, everybody. This is the first of our formal witness sessions in our new inquiry on business and human rights and we are joined by Professor John Ruggie, who is the UN Special Representative on business and human rights. I believe, Professor Ruggie, you want to make some opening remarks.

Professor Ruggie: Thank you very much. It is a great pleasure to be here. Thank you for inviting me. I understand that I have about five minutes so let me just focus on one point that has come up on a number of occasions in the submissions to your Committee, and that is the whole issue of the debate around voluntary versus mandatory measures. I feel that the debate unduly bifurcates two categories and has become quite stale and an impediment to creative thinking and therefore I would encourage the Committee not to get trapped in that bifurcation. My responsibilities are essentially at the global level, as you know. I do not have a mandate that is specific to any country or to any particular company or industry. It addresses what ought to be the emerging global rules governing corporate behaviour in relation to human rights. From that perspective globally we have serious business and human rights challenges because fundamentally we suffer from a series of what I call governance gaps, and there are essentially four kinds of governance gaps as I see it. One is simply, if you will, the misalignment between globally integrated economies and globally integrated companies and a very fragmented system of public governance. Corporate strategy has one driver globally; the international community has 192 drivers, and therefore by definition there is a misalignment between those two that is just part of the nature of things which we have to try to overcome. Secondly, there is considerable lack of coherence or policy incoherence, if you will, within governments themselves. Government departments, agencies that directly shape business practices, whether it is securities regulations or whether it is trade, commerce or investment, are off doing their thing, the human rights people are off somewhere else and the twain rarely meet, so governments take on human rights obligations but you would not know it when you look throughout the rest of the government. The human rights obligations tend to be compartmentalised within a human rights body;

they never filter into other areas of the government. I am over-simplifying because we have very little time but that is essentially what I would describe as the second governance gap, the lack of a policy of coherence. Thirdly, governments take on human rights obligations without ever intending to fulfil them or making any effort to fulfil them. That, of course, creates yet a different gap, so there are laws on the books in many countries which the government either lacks the capacity to enforce, is afraid to enforce because it fears the competitive consequence, "We need this investment, therefore let us lower our standards or let us ignore our obligations", or because of corruption, or whatever the case may be. Finally, what we are finding is that corporate governance rules themselves rarely, if ever, address human rights related issues, the human rights impacts of companies, and that is a problem because it does not send the appropriate signals to companies. So you find the situation today. This week in the US a trial opens against Shell. Corporate regulations in the home countries of Shell, and there were two, made no signal to Shell that it had certain responsibilities with regard to human rights whether or not the Nigerian government chose to implement those. Result: it is in the courts. Chevron faces a potential \$27 billion award as a result of things that went on in Ecuador. These are very serious problems which corporate law in few, if any, corporate regulations, in few, if any, jurisdictions, signals to companies that they need worry about, and I think that is another serious element of what I call global governance gaps.

Let me turn to the mandatory versus voluntary. Overcoming these governance gaps requires creative thinking and innovative policies. As I have indicated, in my judgment the reification of the mandatory versus voluntary distinction is an impediment to creative thinking and innovative policies. For example, those advocating international mandatory measures, a treaty instrument, let us say, ignore the fact that treaties are inherently voluntary in character. You cannot force a government to adopt a treaty. It is a choice that governments make, and even if we were able to lock in an effective set of standards in an international treaty instrument the implementation of that *de facto* would be voluntary because there is no

international enforcement mechanism in place in the area of human rights and there is not likely to be one any time soon, and so this most mandatory of measures in fact relies on voluntarism on the part of states and on the part of companies. On the other side companies that argue pure voluntarism have not explained how one ever reaches sufficient scale to make a difference, turn markets around or how to pull laggards along. Governments add to the problem when they advocate voluntarism and fail to provide even non-legal guidance to what is expected, so governments will say, “We favour voluntary approaches to this, that and the other thing”, but then do not give business a clue as to what that means. There is never any consequence and therefore it signals to business that these voluntary standards really do not have very much practical consequence. They are there, they are nice, some people adhere to them and others do not. On top of that governments provide relatively little assistance to their companies operating overseas, even when they operate in very difficult environments, so you have an export credit agency, for example, and I do not want to pick on any in particular, actually supporting an investment abroad in a country where a civil war is taking place and requiring very little, if any, due diligence on the part of a company about what kind of problems they are likely to run into, are they prepared to deal with those problems, et cetera. At the end of the day, therefore, the promotion of voluntary approaches by governments often differs very little from *laissez-faire*. They are not really policies at all; they are just words on paper, and so I think this again adds to the problem that we face. Finally, quite apart from whatever the legal requirements are, what we have argued, with the support of business, is that companies ought to do an appropriate human rights due diligence process, especially big footprint companies, the extractive industries, for example, especially when they go into difficult environments, doing an appropriate process of due diligence, having a human rights policy, doing an impact assessment, looking at who are your business partners going to be, are they going to get you into trouble. What about the government forces that you are relying on to protect your assets, are they going to get you into trouble, are they going to shoot demonstrators, what is their record, do they have adequate human rights training, et cetera. These are all questions that need to be asked. A number of people have said, “Ah, but this is simply voluntarism again”, but what we have argued is that there is nothing voluntary about doing due diligence if a company is committed to respecting human rights because there is no other way to demonstrate respect for human rights except to look at whether or not you adversely impact human rights and then take that into account and develop remedial measures to deal with the potential adverse effects. My bottom line, and I will stop here, is that we clearly need a smart mix of national and international measures and voluntary and mandatory measures and we need to get on with the job of practical problem solving and end the doctrinal debates that have impeded progress and

creative thinking in this area. Let me stop there and I will be happy to respond to whatever questions or comments or queries or concerns you may have. Thank you.

Q2 Chairman: Thank you for a *tour de force* there, I think. Perhaps I could start with some of the devil’s advocate type questions. What do you say to the sceptics who argue that human rights laws and international obligations have nothing whatsoever to do with business and all you should do is make suggestions to corporations about being socially responsible?

Professor Ruggie: \$27 billion in Ecuador; a court case in New York. Both of those companies have highly developed CSR programmes and yet there they are. There has to be guidance, as I suggested, even if the measures are “voluntary”. What does it mean? What do you need to do in order to adhere to what you have committed yourself to? What is the process? Companies universally will say that they respect human rights. I have never come across a company website that said, “We do not respect human rights”. The question that we ask them is, “Okay, that is great. We are delighted that you respect human rights, but how do you know that you do? What steps do you go through to demonstrate to yourself that you do, and are those steps adequate?”, and most of the time there are no systems in place. What is the issue here? The issue here as far as the companies are concerned is having adequate risk management systems in place. That is really what the due diligence process, for example, is all about.

Q3 Chairman: We will come back to that later on. You also mentioned that the prospects of international agreement are probably somewhat remote in the immediate future. One of the arguments that has been put forward by witnesses to us is that regulation of companies in the human rights context, the human rights impact of businesses, has to be agreed internationally to be effective. Do you agree with that or not? I presume you do not from what you are saying. Basically, should the UK Government and UK business wait until you have finished your work in trying to produce an international regime? You mentioned earlier on the fact that Shell has not been hauled before the courts either here or in the Netherlands but in the US.

Professor Ruggie: Part of our work thus far has been to point out to governments in particular what they are already obligated to do and are not doing. The human rights regime fundamentally rests on obligations that governments undertake. Governments sign on to human rights instruments; companies do not. Governments, under the existing human rights treaties which they have ratified, are obliged to protect against human rights abuses by parties other than themselves, in addition to themselves, and third parties include businesses. We have tried to point out to governments, “Look: you have signed up to these things. Here is what they mean and here is what you ought to be doing given present obligations, let alone future ones”.

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Q4 Chairman: Has the economic downturn, the recession, affected the way that businesses and states relate to your work, and, if so, in what way?

Professor Ruggie: We get all sorts of stories of factories in China and elsewhere evaporating overnight and people who have not been paid for three months being left holding the bag, as it were. Also, at a more general level, I think to some extent the crisis has separated the wheat from the chaff a bit. Companies for whom CSR, corporate social responsibility, was largely rhetoric are pulling back but not companies that have made a serious commitment. Travel budgets are being cut down, people are not going to as many CSR meetings, but the risk management dimension of it is as important as ever, if not more so, because in times of crisis people do things that they otherwise would not do and it is even more important to manage your risks.

Q5 Chairman: Are states affected the same way as they were before?

Professor Ruggie: I came in this morning from Geneva. I spent yesterday presenting my latest report to the Human Rights Council. The level and diversity of support from different countries is quite encouraging. Yesterday the parade included not only the EU and those sorts of countries but also China, India, Brazil, the African Group, a number of countries that see quite positive advantages to making sensible progress in this area.

Q6 Lord Dubs: I was very interested in some of the things that you have written, and indeed what you said about legal obligations on the private sector when they undertake public functions or responsibilities, because there is a crossover from the public sector to the private sector and so on, and I wonder whether your framework has any lessons for situations when public services are privatised and what happens to the human rights obligations. In other words, can the state effectively contract out its responsibility to protect human rights?

Professor Ruggie: It is a very technical issue, Lord Dubs, but my non-technical answer—

Q7 Lord Dubs: Please!

Professor Ruggie:— would be that you cannot contract out of obligations; you can contract out of service delivery, so that if there were certain obligations when a prison was run by public authorities those state obligations do not go away when the service itself is privatised. It is the responsibility of the government to make sure that whatever contract it signs with the private service provider it continues to reflect the standards that prevailed previously. That would be my non-technical answer.

Q8 Lord Dubs: And your view is that that should be pretty well automatic, that when services are privatised the state ensures the obligations are not lost in the process?

Professor Ruggie: The state cannot contract out of standards that it is obligated to fulfil. It can contract out of service delivery.

Q9 Lord Dubs: May I move on to another issue. You talk about voluntary standards and you said that voluntary standards work up to a point. Is there room for what I would call a less legalistic approach to private sector involvement in human rights in an individual state? For example, would guidance be sufficient or is that rather weak, and do you have any examples of good practice that would cover this point?

Professor Ruggie: One example is that Denmark recently adopted a regulation requiring companies to report their CSR policy, and if they do not have one they are required to say that they do not have one. That is an interesting measure. It was not very draconian, it does not cost anybody very much but it does send signals to the market place that this particular country at least has bothered to adopt a CSR policy, but again it demonstrates why the voluntary/mandatory distinction does not work very well because it is mandatory for the company to say something but it is not mandatory to have a policy. It is simply mandatory to say whether or not it does.

Q10 Lord Dubs: We had a case in this country, and I know you are not necessarily talking about national obligations, where an individual was given by a local authority into private care for elderly people and at that point it was held by our courts that there were no human rights obligations on that because the local authority had transferred the person into the private sector. That is the subject of changes in government policy, but it does not happen automatically. It requires further action by the government.

Professor Ruggie: Yes, it does, and it is through the contracting provisions that it would have to happen.

Q11 Lord Morris of Handsworth: Professor Ruggie, in your opening statement you spoke quite forcefully about what you described as the governance gap and you went on to make the arguments about necessary measures, voluntary or mandatory. If there is no international legal obligation in the UK to deal with the human rights impacts of UK companies and their activities outside the UK, what incentive is there for the Government to act?

Professor Ruggie: Let me go back to the basic point that the government has already accepted obligations which in many cases, and I am not talking about the UK, it either does not fully understand or has not fully acted upon. On top of that, when governments themselves are involved in the promotion of business enterprises abroad you would think, not necessarily on legal grounds but just on policy grounds, that the government, using taxpayer money, would have a heightened sensitivity to the potential impact of that business activity and to the possibility that it itself may be indirectly involved in human rights abuses through those activities. There are already existing obligations and there are good policy grounds for arguing that governments ought to do in many cases more than they are currently doing.

Q12 Lord Morris of Handsworth: Is there any case here for international treaties to, if you like, regulate and influence behaviours of the international companies?

Professor Ruggie: The only elements of international law currently in my judgment that are directly applicable to companies have to do with the most egregious violations—the crimes against humanity sort of thing. That can certainly get companies into court in many jurisdictions.

Q13 Lord Morris of Handsworth: Are there any steps which the UK could take unilaterally which would not inhibit UK businesses or stand on the toes of other governments?

Professor Ruggie: If I may I would reframe the question. If what we are talking about is helping companies to manage risks then you are doing business a favour by providing assistance; you are not doing a favour to business by not providing guidance and assistance, so I do not see where the competitive disadvantage is by sensitising a company or requiring a company to have greater sensitivity when it goes into a difficult environment, for example, particularly if government funds are involved as export promotion or investment insurance.

Q14 Mr Sharma: In your experience does our Government speak with one coherent voice? Who do you deal with in the UK?

Professor Ruggie: I have many friends in the UK Government, so I deal with them.

Q15 Mr Sharma: Anyone important?

Professor Ruggie: They like to think so.

Lord Dubs: I am sure they do.

Q16 Lord Morris of Handsworth: What about the future?

Professor Ruggie: The Foreign Office, BERR, the Export Credit Agency; we deal with a variety of players. The UK Government is always fun to deal with because there are lots of smart people in the UK Government.

Q17 Mr Sharma: Who should lead—the human rights experts or the “business” experts? Do you have any experience of best practice that you could share with us?

Professor Ruggie: At the end of the day I do not think it matters who leads. The problem is one of linking things up, of getting the pipes connected. Who leads then becomes an administrative choice, it seems to me, as long as the basic principles on the basis of which coherence needs to be established are clear and clearly transmitted to the various arms of an administration.

Q18 Mr Sharma: You have expressed concern about a lack of international coherence, with states failing to learn and support each other to address concerns about business impacts on human rights. Is this a

problem that can only be addressed on an international level or can individual states do anything on their own?

Professor Ruggie: Individual states can do many things, sure. I do not want to make it sound as though there should not be any kind of international legal instruments; I just do not think an overarching business and human rights treaty is around the corner, and therefore we have to look to other measures if nothing else as an intermediate step to reduce the harm that companies can cause and to reduce the risks that they face. As I say, if a government provides assistance to help companies reduce human rights harms and the risks that they themselves face it is not a competitive disadvantage and therefore the debate should not be framed in that way. I am sure Chevron would rather not have to pay \$27 billion if that is how the Ecuador case comes out. Something like that can drive a company into bankruptcy. Those sorts of things can be avoided.

Q19 Lord Dubs: May I follow up on that? If you have companies operating in a third country and the companies themselves come from different governments, as it were, operating under different systems, is there not a lack of a level playing field then? Company A says, “We are subject to very tight laws”, and Company B says, “In our country it does not matter”.

Professor Ruggie: Your companies will be at an advantage because they are going to stay out of trouble, and the Chinese companies, or whatever they may be, who do not have the backing of a government to provide them with effective assistance and enhanced risk management concerns, will be in deeper trouble. We need to reframe this debate. It is not an imposition, it is not a competitive disadvantage. It helps companies stay out of trouble because in the current environment, as we saw with the financial sector meltdown, when incentives are fundamentally misaligned the market does not automatically produce optimal outcomes. There has to be some signalling device, there has to be assistance provided.

Q20 Lord Dubs: Maybe the world has got a bit tougher but some companies have got away with appalling human rights abuse for a long time, and I quote Shell in Nigeria, and there seems to be nothing that can be done about it. Maybe now there is but for many years there was not.

Professor Ruggie: That is precisely my point. Because they were able to get away with it and because no-one required them to do anything more at the time or no-one urged them to do more at the time you have the outcome that you have, and today—and I think it is today literally—the court case opens in New York against them.

Q21 Earl of Onslow: I have followed with interest what you have been saying since I arrived and I apologise for being late because I have been to

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another committee. One of the greatest problems for companies in human rights was Bhopal in India. If I remember rightly it was 60 per cent Indian owned.

Professor Ruggie: It was majority Indian owned, yes.

Q22 Earl of Onslow: The American company got very considerable stick for it. How do you get round the problem of a nominally outside company, independently owned inside, behaving as laxly as the Bhopal management obviously did; I do not know at what level it was the American management or whether it was the Indian management. That strikes me as a very serious problem. How do you address it?

Professor Ruggie: Actually, in the case of Bhopal almost all of the management was Indian. There were maybe one or two Americans left in the management of the Indian subsidiary at the time.

Q23 Earl of Onslow: But the blame went back to the American headquarters.

Professor Ruggie: Legally speaking, the reason that the US courts even entertained a case against the parent company was the charge that there were flaws in the design of the plant to begin with and the plant was designed by the parent company because the subsidiary did not exist at the time the plant was designed, and, secondly, that it had built into it lesser safety features than an American equivalent plant which was operating, I believe, in Virginia; I cannot remember exactly where. So there were fairly narrow technical legal reasons why a court would have contemplated a case against the parent company.

Q24 Chairman: Can I ask you a question relating to the different types of this? Are the things we are talking about here—corporate social responsibility, human rights obligations, the luxury of the multinationals? How do you see them related to the SME sector? I think 90-odd per cent of business in the UK is SMEs, and if you said to them, “You have got human rights responsibilities” and all the rest of it, they would look at you peculiarly and wonder what on earth you were talking about. You have previously said that the moral and social responsibilities of businesses are being universally accepted but I am not entirely sure that is right when we see how SMEs often kick against regulation which is not necessarily human rights but has that feel to it, such as health and safety or labour rights.

Professor Ruggie: That is certainly a good question. In general my argument would be that the basic principles of respecting human rights ought to apply to everybody but the modalities of implementation would surely differ. A company that has an annual turnover that is equivalent to the GDP of 80 per cent of the countries in the world has different capacities and also a different impact than a company that employs 50 people and operates in Manchester or wherever. So the modalities surely are different depending on the size and scope and impact of the company, but the basic principles ought to be similar. That would be my response.

Q25 Chairman: You were talking earlier on about due diligence. Can you see a position where businesses do due diligence—this is I suppose getting into the voluntary/compulsory debate which you thought was probably a false debate—but can I put it this way: how can we get companies to do due diligence without additional legal requirements or regulation, for example through reporting requirements in their annual reports or other changes to corporate law?

Professor Ruggie: I think some of those things would be good ideas. I think having various forms of reporting requirements would be a good idea. I also think that certain modifications in corporate law would be a good idea. In the case of my own country, the way in which the statutes and regulations are written, if a board of directors strays too far from maximising shareholder value in the short term they could actually be sued by a shareholder, so the more the company worries about its social impact, it potentially increases its liability, which is perverse, and therefore the regulations ought to be modified to encourage companies to pay greater attention on any potential adverse impact, so there are many areas of regulation that could be better aligned and should be better aligned.

Q26 Chairman: That form of regulation would act as a shield for the corporate bosses against their shareholders in terms of doing this due diligence and reporting and checking that things were being done properly?

Professor Ruggie: It would also, I believe, of course be in the long-term interest of the company itself. Short-term shareholder value, for all of the wonders that it has contributed to the world, also has significant adverse consequences, as we have seen in the last year.

Q27 Chairman: So I take it that your view is that businesses have nothing to fear from performing human rights impact assessments on their activities and in fact in the longer term they have got a lot to gain from doing that?

Professor Ruggie: I would think so. The only thing they would have to fear, apart from fear itself, is if they lie about what they find out and that fact gets out or if they suppress evidence and that gets out, otherwise they have nothing to fear.

Q28 Chairman: Unless they find bad things and do not do anything about them?

Professor Ruggie: Exactly.

Q29 Chairman: Whose responsibility is it to demystify these obligations for businesses? Is it your job, is it our job?

Professor Ruggie: It is everybody’s job. Mystification is a cultural phenomenon, a cultural product, and we all have roles to play in that, including parliaments.

Q30 Lord Morris of Handsworth: Can I just pick up the point of demystification, because the debate, such as it has been, has been at a fairly high level

intellectually, and I suspect that a huge tranche of the population, certainly in the UK, has been left behind. I just wonder whether we could simplify it somehow because essentially what we are talking about is a pattern of behaviour, how corporate Britain, corporate US and corporate France behave. In my house we have a simple approach to behaviour: we penalise breaches and we reward compliance. Taking it at a simple level, could that approach work?

Professor Ruggie: Sure, I would add a third element though and that is prevention.

Q31 Lord Morris of Handsworth: Yes, I take that point, absolutely.

Professor Ruggie: So we have a trilogy.

Q32 Chairman: Could I ask you this one—and it is drawing on something that you have said before about a distinction between the social responsibility of businesses to respect human rights and, your words I think, “worthy endeavours that may contribute to the enjoyment of human rights” but which do not go far enough. Going back to what you said earlier on, is that a realistic distinction and, if it is, can you give us an example of a company doing something desirable but failing to do what is required?

Professor Ruggie: Sure, you can have companies that have wonderful philanthropic programmes and yet do not go through the steps required to demonstrate respect for human rights.

Q33 Chairman: Can you give us an example?

Professor Ruggie: Again, let me not identify the country, it was a country I visited not long ago, where a huge, huge company in that country claims to have a very active CSR programme. To some extent they provide housing for workers and all sorts of things. And I asked, “Do you have any mechanism to actually allow people in the communities in which you operate to bring complaints against you?” and the answer was, “No, we don’t need to do that. We know what they need and want.” That to me is a classic example of a company that is doing wonderful things by providing housing but is disrespectful of the community by not taking seriously the need to engage with the community to find out what exactly are the issues that they may have with the company.

Q34 Lord Dubs: In answer to an earlier question you have partly answered this one, but can I just tie up any loose ends on this. If a state contracted out a public service and failed to provide the right for service users to go to court to claim that the private provider had acted in breach of human rights standards, would that, in your view, be a breach on the duty of the state to protect human rights? In other words, it may not always happen automatically, which is what I think we agreed a little while ago, but this would be a serious breach by the state, would it not, if they failed to make that provision?

Professor Ruggie: Lord Dubs, this is so heavily dependent on the particular case, what the statutes are, what the treaty obligations are, what reservations were lodged when the treaty was ratified, but, in principle, I would say yes.

Lord Dubs: Okay, fine, thank you very much.

Q35 Mr Sharma: In your latest report you discuss the role that national human rights institutions can play. Human rights institutions in the UK do not generally hear complaints about human rights breaches. Do you have any examples of good practice which our relatively new European Human Rights Commission and their colleagues in Northern Ireland and Scotland should learn from?

Professor Ruggie: What we are encouraging is for national human rights institutions to be permitted to take complaints and also to be permitted to address business issues. In many cases they are not. We have collected information on the performance of national human rights institutions, and many of them do both, and would certainly qualify for the category of good practice, and they range from Denmark to Kenya. You have them in a variety of countries, not only in Europe. I think the issue again is that they need to be permitted to accept complaints, not in a judicial sense necessarily, but in a mediation capacity and, secondly, they need to be allowed to address business-related issues. It is not simply state abuses that they should be concerned with.

Q36 Mr Sharma: Can in-house remedies alone satisfy the need for an effective remedy for alleged breaches of human rights?

Professor Ruggie: In-house meaning in the company?

Q37 Mr Sharma: Yes?

Professor Ruggie: No, I do not think so. I think at a minimum, to go back to a point I made before, you need public signalling as to what is expected of the company. Even if the government advocates voluntary corporate responsibility in a programme or policy, it needs to signal what that means, it needs to signal what the expectations are, otherwise it is not a policy. A policy at a minimum provides, if you will, a focal point around which expectations can converge, or on which expectations can focus, and if it does not do that it is a gesture, it is not a policy, so at a minimum a policy needs to signal what is expected and then you go up from there, if you will, on a regulatory ladder. If that does not work you move on to something else.

Q38 Chairman: Could I explore with you the issue of extraterritorial jurisdiction, which is something we are also looking at in a different context in relation to the law on compensation for torture and war crimes and crimes against humanity and all that sort of thing. I would like to raise it in this particular context. We have got the US Alien Torts Claims Act. Is the *Shell* case being brought in New York under those provisions?

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Professor Ruggie: Yes.

Q39 Chairman: Presumably we could have heard the case in the UK courts anyway theoretically, it being a UK-based company, but, presumably, they decided to go to the US because compensation is higher in the US than it is in the UK, the old rule that you will go where you are going to get the best money. Is there an argument in favour of extraterritorial jurisdiction, and what is it?

Professor Ruggie: It is an issue that needs to be handled with care. Let me make a couple of points, if I may, about it. Firstly, in my judgment, and I get whipped for this in some quarters, states are not legally required to exercise extraterritorial jurisdiction over their companies, although if the issue is crimes against humanity obviously they should do so. At the same time, states are generally permitted to do more than they are currently doing. One of the things that states are permitted to do, which relatively few do, is what we call parent-based regulation, where, let us say, the Canadian Government requires the Canadian parent company to exercise oversight of its own subsidiaries, and it holds the parent company responsible, as opposed to directly reaching out into another country and legislating directly for the subsidiary. Developing countries in particular get all huffed up when confronted with extraterritorial jurisdiction by Western countries in particular. If you propose a major intervention in their jurisdiction you would not get very far in most UN bodies, for example, but parent-based regulation or requirements are perfectly acceptable under current international law.

Q40 Chairman: Looking at the US Act and the *Shell* case, is that pure extraterritoriality or is there some Shell-based link that brought it within the New York jurisdiction?

Professor Ruggie: There does not need to be in the case of the Alien Torts Claims Act. This was an Act, as I am sure you know, that was adopted by the very first US Congress in 1789, intended to fight piracy on the high seas and to protect ambassadors. It was in the late 1980s that the human rights community discovered that this might be a tool to use against state abuses, and then in the 1990s they had the bright idea that if you can bring a case against a natural person, why not against a legal person, and so it was extended to corporations. The standards that have to be met for an Alien Tort Claims Act are pretty high. It has to violate clearly the laws of nations; it has to be precise; it has to be a universally recognised act like crimes against humanity, torture, slavery, forced labour and the like.

Q41 Chairman: So it is a bit of mission creep over 200 years?

Professor Ruggie: It was not mission creep because no-one knew it existed for 200 years!

Q42 Chairman: We have seen mission creep in our public order laws and mission creep in our counter-terrorism laws and we are now seeing mission creep in piracy to multinationals. Just exploring this a bit

further, we certainly know there has been some concern in the UK over extraterritorial jurisdiction exercised by the US courts over UK activities which have got nothing to do with the US, so I can see that it can create some degree of resentment. Your answer is for limited extraterritoriality where you have got a link of some sort through one arm of the company, usually the parent company but presumably also the subsidiary, in the country in which the extraterritorial jurisdiction is going to be exercised in relation to that company's activities in the broadest sense anywhere in the world within a certain threshold of international norms?

Professor Ruggie: I think, at least in the current situation, that is the most effective and certainly the most permissible form of extraterritoriality, apart from crimes against humanity. Let us put that in a separate category.

Q43 Mr Sharma: In your latest report, you recommend that "governments give more weight to NCP findings against companies". In your view how should states do this? Is there any existing good practice?

Professor Ruggie: Again, there are some fairly obvious steps that governments could take that they really have not. An NCP can deliver a finding against a company currently and that company can come back the next morning to apply for support from an export credit agency and there is nothing to prevent their getting support. It seems to me that at a minimum there ought to be a probationary period before they can come back to the public trough having had the NCP deliver a finding against them. There are so many things that, forgive the colloquialism, are "no brainers" that seem so logical to me, and yet they are not being done, and that would be an example. The export credit agency should say, "We want to see evidence that in fact you have taken the finding into account and you have corrected for whatever the defect was that was found in your system and in your activities."

Q44 Chairman: Have you got a specific example you could give?

Professor Ruggie: It does not exist now but it should exist.

Q45 Mr Sharma: You have ruled out the prospect of a new international adjudicatory body for the purposes of providing remedies when home states fail to do so? Have you ruled this option out as it is unworkable or because it is unlikely that a consensus of states and business organisations will accept this approach?

Professor Ruggie: I think the honest answer is both. I have been hanging around the UN most of my adult life and I find it hard to imagine an effective, neutral, well enough resourced body emerging that would develop trust and confidence. I just do not see that happening very soon. I think the worst outcome would be a body that does not have credibility and is not well enough resourced. I would much rather see us pay attention to, for example, creating a network of mediation services. I find the idea that

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you can somehow adjudicate out of a single location in Geneva what 77,000 multi-nationals and 800,000 subsidiaries do around the world conceptually as well as politically difficult to grasp.

Q46 Chairman: So the answer presumably is a network of extraterritorial jurisdiction?

Professor Ruggie: That might be part of the solution but there are non-traditional remedies as well that we should not ignore. I think, as I said earlier, states need to understand better what their current obligations are and act on them.

Q47 Mr Sharma: A number of witnesses have recommended the creation of a UK commission for business and human rights, which would have an adjudicative but not judicial function. Are there any practical objections to the operation of a domestic adjudicative body considering complaints against a UK company allegedly infringing human rights standards in a host's state? If so, what are they?

Professor Ruggie: I would have to know the exact details of the proposal to answer that, but I do not see a principled objection to a country that decides to adopt institutions to more effectively fulfil its human rights obligations and to ensure that companies pay attention to their human rights impact. I certainly have no principled objection to a country doing that. In fact, I would encourage countries to look into those kinds of possibilities.

Q48 Chairman: Anybody else? We have run out of our questions now. Is there anything else that you want to say to us before we close the formal session?

Professor Ruggie: If I may, one thought, and it goes back to a question that you asked earlier, I believe Chairman that it was you: do we have to wait for everybody to act simultaneously or are there things that we ourselves as individual countries can do? I would certainly discourage the former. The idea that you cannot solve any problem until you have solved all problems is not an appealing one, and it means that nothing will ever happen. Different countries will have different approaches, fitting their own statutory and cultural experience, but I would encourage individual countries to do what they need to do and what they should be doing to advance the cause of helping to reduce human rights harm of companies, especially when they are operating in weak governance zones abroad, and helping to reduce the risks to companies themselves, to avoid \$27 billion lawsuits.

Q49 Chairman: There is one question I have just thought of and it is to do with the imbalance between developing countries and big developed countries in what are often sovereign wealth fund contracts or big multinational contracts, where basically the lawyers setting up the contracts for the iron ore contract for the next 100 years, or whatever, run rings around the domestic companies and set up the whole thing to their benefit. Is that the sort of thing which you are looking at as well as part of this?

Professor Ruggie: I think that is certainly an area worthy of investigation. The whole issue of sovereign wealth funds is something that I think deserves investigation. I think some of the provisions of investment agreements do as well. It is an area that we are pushing in the mandate. We say to developing countries in particular, "Well, look, you have the primary responsibility, it is your job to pass laws and regulations to regulate the businesses within your jurisdiction," and then we push them into or encourage them to sign on to investment treaties or investment contracts with individual companies that freeze the current regulatory system in place, in some instances for decades. We have looked at 90 redacted investment contracts that we had access to between companies and host governments. We came across one with a sub-Saharan African country which is not all that of a high risk country for the sub-Saharan African region. It was an aluminium smelter and the regulatory structure of that country was frozen in place in that contract for 50 years, renewable at the discretion of the investor for another 50 years, so for 100 years the investor had the discretion to sue the government for compensation to be compliant with national law. That just makes no sense to me; it is utterly dysfunctional.

Q50 Chairman: That is exactly the sort of thing I had in mind and having recently been to a sub-Saharan African country which is apparently negotiating with a very large company with a very large sovereign wealth fund for a 99-year ore extraction contract, my real concern is, for example in that case, that the lawyers that are available to the country are probably not going to be as highly skilled as those drafting for the company.

Professor Ruggie: They are not as highly skilled or as highly paid and they are going to be outgunned every time, unless we become more aware of it and begin to provide some forms of assistance.

Q51 Chairman: Okay, thank you very much.

Professor Ruggie: Thank you, I appreciate it.

Chairman: That is the end of our formal session. Thank you very much. The Committee stands adjourned.

Tuesday 9 June 2009

Members present:

Mr Andrew Dismore, in the chair

Bowness, L
Dubs, L
Lester of Herne Hill, L
Morris of Handsworth, L
Onslow, E
Prashar, B

John Austin
Dr Evan Harris
Mr Virendra Sharma
Mr Edward Timpson

Witnesses: **Mr Peter Frankental**, Amnesty International, **Ms Jennifer Zerk**, Consultant on behalf of the Corporate Responsibility Coalition (CORE), **Ms Emily Armistead**, Action Aid, and **Mr Richard Meeran**, Leigh Day Solicitors, gave evidence.

Q52 Chairman: Good afternoon, and welcome to this second evidence session of the Joint Committee on Human Rights inquiry into business and human rights. You are our first witness panel and we are joined by Peter Frankental from Amnesty International, Jennifer Zerk, a consultant on behalf of the Corporate Responsibility Coalition, Emily Armistead from Action Aid and Richard Meeran from Leigh Day Solicitors, so welcome to you all. Does anybody want to make any opening remarks? No, so we shall go straight on to questions. Perhaps I can start with you, Peter. We have heard various arguments about whether the response to the human rights impacts of business must be agreed internationally in order to be effective. What do you think of that argument?

Mr Frankental: It is very difficult to see how governments can embed human rights into national regulatory frameworks without there being the embedding of human rights impacts of business into international frameworks, so, from our point of view, the two are complementary, and neither unilateral nor multilateral measures on their own would address the governance gaps that the UN's Special Representative referred to in holding companies accountable. We would also see that, if multilateral measures are to be put in place, then this requires leadership on the part of individual states; it does require individual states to take a significant initiative within multilateral bodies that they are members of. Similarly, if there is a multilateral framework, that framework would have little effect unless states are willing to give effect to it, so we would see the two as linked. In particular, we do support the idea of some kind of international instrument for corporate accountability within the UN system, but we agree with Professor Ruggie that such an instrument would not exist to monitor the activities of tens of thousands of transnational corporations, that would be unfeasible, but it would exist to reinforce the will of states to hold companies to account within their jurisdiction. In other words, it would be an instrument like other human rights instruments; it would be the willingness and ability of states to hold companies to account that the multilateral instrument would give effect to. The purpose would be to create a level playing field so that states which do not have regulatory systems in

place would not find themselves at a competitive advantage and, therefore, this multilateral instrument would encourage individual states to take unilateral action if you did have a baseline of minimum standards.

Q53 Chairman: Professor Ruggie seemed to be suggesting, when he gave evidence to us last week, that there was little prospect in the foreseeable future of getting international agreement anyway.

Mr Frankental: Yes, I think that, if one is referring to an overarching treaty within the UN system on corporate accountability, then Professor Ruggie is right, such a treaty is unlikely to happen within the next decade, but that is not a reason not to promote it now. The whole of the human rights system is full of treaties which, at a particular point in time, were considered unfeasible and, within a period of ten or 15 years, were enacted, but an international framework does not just relate to an overarching treaty within the UN system, there are also multilateral instruments within the World Bank, and the World Bank's performance standards for companies that it lends money to, these are being reviewed next year. There is also the OECD which houses guidelines for multinational enterprises, and the OECD also develops common standards to harmonise standards for export credit agencies. Then you have the European Union where there is the possibility of embedding human rights into tendering processes and procurement policies, so there are many different international instruments and different institutional processes that could go further to addressing the impacts of business on human rights, and an overarching treaty within the UN system is just one particular instrument.

Q54 Chairman: Perhaps I could ask Emily an associated or linked question, that the CBI have given us evidence and they support the idea of good practice guidance, but they are concerned about that being linked to some form of legal penalty. They also argue again that Professor Ruggie should be looking at a binding global instrument on business and human rights. What do you think the outcome of Professor Ruggie's work should be?

Ms Armistead: Well, I would like to start by saying that Action Aid is incredibly supportive of Professor Ruggie's mandate and especially of the three pillars that he has come up with, the duty to protect, the responsibility to respect and access to remedy. As Peter has talked about, I think that where we do disagree with Professor Ruggie is around an international framework and we really think that the governments should have an ambition to have an international framework on business and human rights implemented, even if that is not possible in the very short term. However, we also very much agree with Professor Ruggie that at the moment national governments are not doing enough in this area and that governments can act unilaterally in order to ensure their duty to protect and in order to ensure that their businesses are taking their responsibility to respect human rights. Now, one area where we really think that there are gaps at the moment is particularly in terms of access to remedy, and in our submission Action Aid have talked a little bit about one case in particular, that of Vedanta in India where we have been working with local communities who have come up against a UK-listed company that has just received permission to mine in an area that is considered sacred land by the people there and where both the mine and an existing smelter plant for aluminium will have a severe impact on their human rights in terms of their rights to livelihood as well as some of their religious and cultural rights. Now, for those communities, they have found it very difficult to find any access to redress at the moment in that, within India, national human rights institutions are very powerless and through the courts there are problems in terms of barriers because of discrimination and societal barriers. Then, more importantly for us and what we are discussing here, those communities are finding it hard to find remedy through the UK system, as this is a UK-listed company that is impacting on them. For example, going through the national contact point, as we know, would not achieve any remedy if they do not have any powers to remedy, and again this is not a case that is suitable to go through UK courts. Therefore, I think what we are looking for, bearing this sort of case in mind, in terms of Ruggie's process is that he absolutely makes the strongest possible recommendations in terms of what national governments can do to remedy these sorts of problems. We are particularly interested in what he has to say about the strengthening or the establishment of national human rights institutions that have the power over corporations and over businesses in order to remedy this sort of problem and, as you know, Action Aid and our colleagues at CORE are advocating that the UK Government establish a commission specifically on business, human rights and the environment.

Q55 Chairman: But, overall, it looks as though the prospects for an international instrument are pretty remote, particularly bearing in mind the failure of the UN draft norms on business and human rights.

Ms Armistead: Well, I think I would agree with Peter, that we have to look at this over the long term, and I think we are all aware that business is often very resistant to regulation. I think that some of the regulation that we have which governs standards in the UK, for example, health and safety and employment laws, business initially is very resistant to that. Now, I think we have come a long way on this debate and I think business has come a long way on this debate in the last 20 years and the fact that the CBI is very supportive of Ruggie's work and of the three-pillar framework, I think, shows the fact that business is willing to shift on this, and I think what we have to do is to illuminate them to the fact that there are possible business advantages in getting a level playing field through an international framework which will help them implement their responsibility to respect human rights.

Q56 Baroness Prashar: My question is for you, Emily, as well. You have said that the Government's strategy is weak because it references voluntary arrangements and corporate social responsibility, so do you disagree with Professor Ruggie when he says that it is too simple to categorise some schemes as voluntary?

Ms Armistead: I think we would agree with Professor Ruggie in saying that really we have got to move away from this voluntary versus regulatory debate. I do not think it is helpful and I think it is preventing civil society, NGOs, business and Government from progressing in this area. As I have just said, I think there are areas where nobody would disagree that it is necessary to have regulation, such as in health and safety and employment laws, and we enjoy those rights here in the UK. I think where we are falling down is ensuring that, where UK business affects people abroad, they are enjoying the same rights as we do here. I think, yes, we are critical of the Government, that, at the moment in terms of UK business and its impact abroad, the UK Government is relying far too heavily on purely voluntary initiatives. In our submission, we used the Ethical Trading Initiative as an example where there are certain companies that have either chosen not to join or have dropped out, such as Morrison's, the supermarket. I think that highlights where purely voluntary initiatives really fail because they allow laggard companies to opt out, and I think the point of human rights is that they are universal, inalienable and you cannot have companies saying that they are only going to respect them some of the time, but not when it does not suit them.

Q57 Baroness Prashar: Would you agree though that we do need a combination of approaches to move the debate forward?

Ms Armistead: Yes, absolutely. Obviously there are baselines that need to be achieved and there needs to be a floor in order that laggard companies do not escape respecting basic human rights and in order that the leaders of the pack may strive forward and go even further than the basic demands of them.

9 June 2009 Mr Peter Frankental, Ms Jennifer Zerk, Ms Emily Armistead and Mr Richard Meeran

Q58 Baroness Prashar: My next question is both for you and Peter really and it is about the regulatory framework. You have both argued for a stronger regulatory framework, but you do not really say what it should be like and what it should look like. Can you tell me what changes you would like to see and any examples you may have from other countries?

Mr Frankental: Yes, certainly. I think that a good strong framework would have a range of policy instruments and that these policy instruments would range from a hard law that is embedded in the criminal and civil liability systems to soft law reflected in essentially self-regulatory mechanisms. The important thing is that the combination of hard law and soft law should be mutually reinforcing, that there would be a national and an international dimension to these instruments, that they would address not just impacts in the UK, but, under certain particular defined circumstances, extraterritorial impacts. The regulatory framework would have to offer incentives to companies to operate to acceptable standards and also disincentives to companies that abuse human rights, and one of the outcomes that we would like to see from such a framework is that companies view human rights as a risk and liability issue so that they integrate human rights into their management systems, whereas corporate social responsibility tends to be peripheral. Another outcome that we would like to see is a requirement that companies undertake human rights impact assessments and we would like to see the UK ensure that its investment support agencies, particularly the UK Export Credit Guarantee Department, require companies to screen the human rights impacts of their projects and transactions. Likewise, we would like to see human rights embodied in UK Stock Exchange listing requirements, which is not the case at the moment. There are a number of positive developments within other jurisdictions that do point the way forward. For example, the US's civil liability system includes the Alien Tort Claims Act. Australia, Canada, Denmark, Sweden, Norway, Germany and France all appear to have stronger non-financial reporting and listing requirements than does the UK. The Dutch Government has adopted a national action plan for sustainable public procurement which provides that, from 2010, environmental and social criteria will apply to all public procurements, something which is not the case in the UK. The Norwegian Government has recently adopted a White Paper on corporate social responsibility which frames the responsibilities and dilemmas of companies, and it gives special attention to the challenges of operating in conflict zones and to business impacts on indigenous peoples. A draft law was introduced in the last session of the US Congress, though not yet adopted, called the 'Global Online Freedom Act', which mandates that US Internet companies take certain actions to combat censorship and protect personal information or, otherwise, be subject to criminal prosecution or civil law suits brought by private litigants, and that was the result of the furor

following the impacts of Internet companies on repression in China. In Canada, there is an Act currently receiving its second reading in Parliament, called the 'Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act', and the purpose of the Act is to ensure that corporations engaged in mining, oil or gas activities and receiving support from the Government of Canada act in a manner consistent with environmental best practices and with Canada's commitments to international human rights standards. I feel that there are a number of significant developments and I think the UK would be well-guided to look very closely at these as an example.

Q59 Baroness Prashar: If I can ask a supplementary to that, I know that some of these are in gestation and others have been in operation, so how effective have they been in practice? Has anybody evaluated the impact of these initiatives?

Mr Frankental: That is very difficult to say because I am not aware of any evaluation of other countries' initiatives, and I think that is one of the reasons why we would like to see a UK commission on business, human rights and the environment at arm's length from the Government which can actually evaluate the effectiveness of the range of government policy instruments and initiatives, including self-regulatory initiatives, because, in that way, all stakeholders, including business, can be reassured that the initiatives that the UK Government puts considerable resources into are actually having effect.

Q60 Lord Lester of Herne Hill: It is very helpful to have a recitation of foreign laws, but I wonder whether Amnesty, as a global NGO, could provide us not only with the list of the names of countries with laws, but their own evaluation of the effectiveness of them. May I, therefore, take as just one example the reference to the US Alien Tort Claims Act. What is your evaluation, as an organisation, of the effectiveness of that Act in the context of our inquiry?

Mr Frankental: As an organisation, we have not done a proper evaluation of the Alien Tort Claims Act, but we do have some views about this Act. It is significant because it gives foreign plaintiffs an avenue of redress which they would not otherwise have in their own countries. Its limitation is that it only refers to universal crimes, in other words, the most egregious of violations of human rights and, as a whole, companies tend not to be involved in these kinds of abuses, so 95 per cent of corporate impacts on human rights and most of the rights that companies do have impacts on are not reflected in the Alien Tort Claims Act, but nevertheless, it is a significant instrument. Whether the solution is for lots of states to develop their own Alien Tort Claims Act within their civil liability systems or whether it is actually a much better solution to have an overarching international framework, I think, is something which does need to be evaluated, and Professor Ruggie has taken an interest in that issue.

Chairman: We had quite a lot of evidence from him about that last week, and we will come on to the extraterritorial issue after Lord Onslow's short supplementary.

Q61 Earl of Onslow: I am looking into the Bribery Bill at the moment and we are having this problem of how you control UK companies when bribing foreign governments, whoever it may be, and the Americans have got an Act, the name of which I cannot remember, but it does make it a very serious criminal offence for American companies to indulge in that sort of skulduggery. Where we come up with immense difficulties is with subsidiaries, agencies, all these sorts of people and the point you were making earlier on about this UK company, which was presumably producing aluminium smelter or something like that, digging up sacred graves. What happens if we have an Act along the Alien Tort Claims Act line which says, "You must observe human rights", the indigenous Government then says, "We don't care about the sacred ground" and, if those people then produce a claim against the company in an English court for abuse of human rights, how do you get round that problem? I am looking at problems the whole time because I am not saying they should not be got round, but the sooner we recognise what the problems are, the easier possibly it will be to establish what problems we have to face and how to get round the difficulties.

Mr Frankental: Perhaps we can refer this question to CORE's legal adviser.

Ms Zerk: As regards public law requirements, and you mentioned the example of the Foreign Corrupt Practices Act in the US, yes, there are real difficulties with applying laws to subsidiaries of local companies. There are international law restrictions under international law relating to extraterritoriality which say that you cannot apply directly your own law to foreign subsidiaries. However, there is a great deal that you can do in relation to the parent company, and this is the basis of most extraterritorial regulation in the bribery area, that you apply your primary obligations to your parent company and then you make it their responsibility to ensure that those under their control do not breach UK law, which was the approach, and there is a very neat device in the Corruption Bill which deals with that exact problem, but, as far as the civil liability issues go, Richard?

Mr Meeran: Yes, my area of work is bringing claims on behalf of people affected by the overseas operations of multinationals, so these are civil claims, and an example would be the South African asbestos miners' claim a few years ago against Cape plc, the South African asbestos miners against a British asbestos company. The common feature of all these cases is that they involve operations of subsidiaries of UK multinationals, so you have the typical set-up of a parent company based in the UK, a subsidiary operating locally, and the problem for the local victims is that they are invariably unable to bring claims in the local courts because of problems of access to justice, so they sought to bring claims in

England against the parent company, and it is against the parent company because the English courts would not have jurisdiction over the overseas subsidiary. That gives rise to a problem of the so-called 'corporate veil', the principle which is well-established in English law and the laws of most countries that the parent company, as a shareholder, would not be liable for the conduct of companies in which it invests, so the approach that we have taken in all of our cases is to focus on wrongdoing by the parent company itself, the decisions that it made and actions that it took which directly impacted on people overseas and gave rise to whatever the harm is that we are dealing with. You would look at things like the case we brought against a company, Thor Chemicals, which was a company which made mercury compounds in England and which then was subject to investigation by the Health & Safety Executive here, was on the verge of being shut down, but shipped all its operations, lock, stock and barrel, to South Africa where it carried on operating in the same way and people died and lots of people were injured. There, we were able to bring a claim against the parent company because it had been involved in the design of the defective technology, it had taken the decision to ship everything over to South Africa and it had been supervising, so the focus was on things that the parent company did. That is an approach which has been described by academics here as 'foreign direct liability', so it is a way of getting round the problem of subsidiary and parent companies.

Q62 Lord Dubs: But the difficulty with that is that you have to be quite lucky that you establish the link between the head office and the company where the incident happened and you may not always be able to do that.

Mr Meeran: Exactly. It makes a case enormously complicated and it would be much easier if it were possible to bring a case against the local subsidiary employer or the local subsidiary that had been responsible for the missions. To have to investigate the precise relationship between the parent and the subsidiary company and who was taking what decisions is the real challenge in these types of cases and makes it very complicated.

Q63 Lord Dubs: Which brings me clearly to my question, and it is this: if there is no clear international legal obligation on the UK to deal with the human rights impacts of UK companies' activities outside the UK, what incentive is there for the Government to act? Where do we stand?

Ms Zerk: There are differing views about whether there is an international law obligation on states to regulate human rights abuses by companies in other countries. My own view is yes, I would agree with Professor Ruggie's assessment of that, that there is not enough state practice at the moment to support the idea that states are obliged to regulate companies' human rights impacts overseas, so I would agree with that assessment, but, insofar as the incentives for doing so are concerned in the absence of a legal obligation, I would say that there are three

main reasons for doing this. The first is because it is the morally right thing to do because we, as citizens in the UK, shareholders and consumers of products in the UK, benefit enormously from the activities of companies abroad and the activities of their subsidiaries and suppliers, but there are costs in other countries. Other people in other countries bear substantial costs in relation to the benefits that we enjoy, so there is, therefore, a moral case to do something about it. A second incentive would be because it could actually enhance the competitiveness of UK companies, and I say that because there is a pretty clear correlation between corporate social responsibility performance, which includes human rights performance, and financial performance. John Ruggie has repeatedly made the comment that the failure of governments to provide leadership on issues as to what corporate human rights obligations are and the failure of governments to provide guidance on this is actually not really in companies' best interests. I am told by businesspeople that deciding what is and is not an appropriate use of management resources in relation to the human rights problems that they encounter every day takes up a lot of management time and resources. There is also the lack of clarity about companies' responsibilities for human rights which also creates significant litigation and reputational risk, especially in developing countries and conflict zones, so there is a possible competitiveness case that needs to be looked at. Finally, it would show leadership by the UK Government. The human rights performance of companies is an enormously important political issue at the moment and, given that the UK is a significant home state for multinationals, it is right that they should show some leadership on this. I would also suggest that, if there is good human rights performance of companies, it reflects well on their home states and, if it is poor, it reflects badly, so there are political issues there as well.

Q64 Lord Morris of Handsworth: Could I pick up the point about the division of responsibility, and my question is directed primarily to you, Jennifer and to Emily. You have all said that the current division of responsibility across the UK Government is incoherent and unworkable. What changes would you make?

Mr Frankental: A good starting point would be for the UK to have an overarching strategy on business and human rights which does not exist at the moment. If it is left to individual government departments to try to address these issues, the human rights impacts of business will always be subsumed within other departmental goals, so you have the situation at the moment where the Foreign Office leads on certain initiatives, such as the Human Rights Council, Ruggie's mandate, the voluntary principles of security, human rights and, I think, on the global impact as well, DFID leads on the Ethical Trading Initiative and BERR leads on the OECD guidelines, so you have a fragmentation of strategies and approaches and you do not have an overarching business and human rights strategy for the UK, so I

think that would be a good starting point to increase coherence. I think another important step that would need to be taken is that at the moment the UK conflates human rights with corporate social responsibility. Initiatives that advance corporate social responsibility are deemed by the Government to have positive impacts on human rights and, in our view, corporate social responsibility is a very nebulous concept whereas human rights entitlements are very clear, embedded in international law and, therefore, frameworks to improve business impacts on human rights should relate to international standards. There is nothing wrong with the UK promoting corporate social responsibility, providing that it takes steps to ascertain whether the voluntary initiatives and codes of conduct that it promotes have the effect of protecting human rights on the ground and, if not, why not, so we feel that the UK should initiate an independent review of all its mechanisms across government departments with regard to assessing their effectiveness in preventing and ending abuses by UK companies and particularly abroad. There are several other aspects of coherence, particularly coherence with regard to investment support agencies. Does the UK Export Credit Guarantee Department embody the UK's human rights obligations? Should it screen companies and transactions for impacts on human rights overseas? We believe it should, and likewise with the Stock Exchange listing requirements. We know, for example, that a number of small and speculative mining and exploration companies are listed on the alternative investment market and some of these companies are known to have a poor track record on human rights. One of them was the subject of a recent action by Amnesty International for their activities in Peru, yet there is no screening of such companies as a listing requirement, and we believe that such screening should be considered. Coherence of government policy should also be reflected in the activities of UK missions abroad. UK missions abroad have as a key objective to promote UK business interests, but do they also have as an objective to address business impacts on human rights. We believe that business impacts on human rights should be integrated not just into training of UK missions, but also into their objectives with regard to promoting business interests. There are also other aspects of governmental coherence, for example, with regard to company law. The recently enacted Company Law Reform Bill enhanced the duties of directors and reporting requirements, but without any specific requirements regarding human rights, except insofar as the particular issue to be addressed has consequences that are material to shareholders. Essentially, coherence is about taking all governmental instruments that relate to business impacts on human rights and integrating them into one overarching strategy with clear objectives that are independently assessed and evaluated.

Q65 Lord Morris of Handsworth: You obviously make a very strong linkage between leadership and responsibility, but, when we saw Professor Ruggie a

few days ago, he told us that it did not really matter who leads, whether it is human rights experts or indeed business experts, but what mattered for him was a coherent and indeed a consistent policy. Do you agree with that?

Mr Frankental: Yes, I agree that coherence and consistency should be the two primary benchmarks for developing effective business and human rights policies and that it does not matter who is leading these, but I think there does need to be a body at arm's length from Government that can assess their effectiveness and that can provide policy guidance to Government that is removed from the immediate interests of individual government departments, so that is why we believe that a UK commission, which would reflect inputs from business, from non-governmental organisations and expert advice, would be in a position to assess the performance of different instruments with regard to improving business impacts on human rights and to providing some policy guidance to Government. That would reassure all stakeholders, whether it is Parliament, consumers, international NGOs or business, that the considerable resources that the Government are putting into its corporate social responsibility initiatives actually have the effect of improving impacts on the ground.

Q66 Mr Sharma: Emily, Action Aid appears to agree with John Ruggie, that there is a difference between actions which companies are required to take in order to respect human rights and worthy endeavours that may contribute to the enjoyment of human rights, but which do not go very far. How should a business identify what steps are required rather than merely desirable?

Ms Armistead: Where I think we do absolutely agree with John Ruggie is where we have had some experience of that in some of the fieldwork that we have been doing, for example, in India where the company that I mentioned earlier, Vedanta, is funding community programmes which it puts at the heart of its corporate social responsibility strategy and meanwhile, at the same time, is involved in activities which appear to be violating the human rights of those same communities. What Action Aid would say is that certainly we need to have, on the one hand, those baseline standards that companies can refer to to ensure that they are not infringing on human rights and also that companies are ensuring that they are, if they are going into activities, in proper consultation with local communities and taking into account the wishes of those communities, that there are transparent and open processes that allow that kind of engagement and that their wishes are being followed. I think the case of Vedanta in the Niyamgiri Hills is an absolute case in point where the wishes of the local communities are absolutely being overlooked.

Q67 Mr Timpson: Richard, you told us earlier a little about the more imaginative ways that you have had to go about trying to bring a case against a UK parent company for an overseas litigant. In your written evidence, you have told us about some of the

barriers, both procedural and substantive, in UK civil law which prevent these cases coming to court and being successful, and you talk about cost, lack of protection for group actions, complexity of the facts of the case and so on. In some of the cases that you have been involved with, would it, or could it, have been better for that action if it had taken place as overseas litigation as opposed to in the UK?

Mr Meeran: If it were possible, in short yes, and in fact at the moment we are involved in a case which is being litigated in South Africa against Anglo American on behalf of gold-miners who contracted silicosis, and we are working on that case in conjunction with local public interest lawyers and local counsel. That case has been partially funded by the South African Legal Aid Board, but that is quite an unusual case, quite an unusual situation. It is invariably impossible in practical terms to bring these cases locally, which is why we have been asked to try and pursue them here, but, as has previously been noted, there are very difficult problems that we have to deal with in bringing a case against the parent, in investigating the relationship between the parent and subsidiary companies to identify the manner in which the parent company was involved. That is an expensive exercise and we are usually faced on the other side with well-resourced lawyers and multinationals who drag us up and down the legal system. In previous times, we had the benefit of legal aid which made seeing those cases financially less risky for the law firms involved and nowadays you have to run these cases on a 'no win, no fee' basis and, as far as I can tell, we are probably the only firm that has shown any enthusiasm for doing these types of cases because of the financial risk involved, not because there are not other lawyers who would be interested in doing these cases if they were able to do so, but the 'no win, no fee' system is one which enables these cases to be pursued, but with great difficulty. The kind of burden that a law firm has to carry can often be prohibitive and you have then got problems with 'after the event' insurance which you need to get to protect claimants against the risk of having to pay the other side's costs and also to pay for your expenses as you go along. Those can be prohibitively expensive and the insurers are often unwilling to back cases where the value of the cases is not sufficiently high, and that means quite often that, where you have got very significant human rights cases, but on behalf of people who are very poor, the value may be too low for insurers to want to back the case. The other problem is again a cost problem which is that, unlike in the US and Australia, for instance, it is not possible to bring class actions in this country. You can bring group actions, but there is no class action legislation. If there were class action legislation, it would be possible to bring one representative case and it would be possible, because of the legislation provided for it, to ensure that the limitation period of the rest of the members of the class was protected. Often in cases, people are worried about their safety if they bring claims and in a class action only one person needs to be identified, the rest are not named, so that would be an important advantage as well.

Q68 Mr Timpson: You have mentioned a number of countries, South Africa, the States and Australia, where there seems to be better protection or the system is less complex for these types of actions. Are there any countries that you have come across where the barriers that exist in the UK do not exist or do not exist to the same degree?

Mr Meeran: Yes, South Africa is not one of them. The case that I mentioned is just a unique case that we have been able to pursue, but I would not say that it was easy to bring cases there at all. Australia has a class action procedure which is an opt-out class, which means that everyone is in the class, unless they opt out of it. That enables lawyers to focus on the generic issues in a case which will apply to all members of the class rather than having to take instructions from vast numbers of people and investigate their individual cases. In the US, obviously they have class actions, but, more importantly, they do not have a rule that costs follow the event. In other words, a claimant who brings a case does not have to worry about having to bear the risk of paying the defendant's costs if they lose, but both sides bear their own costs in the US, so that is another important advantage.

Q69 Chairman: Have you got some examples of cases where you have been asked to take it up, but you have declined because of funding issues, where you thought there might be merit in the case, but the funding issues were just prohibitive?

Mr Meeran: Yes, there are certainly examples of that. Those would be cases where perhaps we did not have sufficient evidence of the role that might have been played by the parent company. I can think of a case, though perhaps I should not discuss specific cases, but certainly there have been cases where we did not have sufficient evidence and it would have been very expensive to try and accumulate that evidence.

Q70 Lord Lester of Herne Hill: A couple of the issues that you have raised are of course under scrutiny by the Ministry of Justice at the moment. The issue about class actions or representative proceedings is, I think, being looked at as a topic by the MoJ at the moment across the whole civil justice system. The issue of conditional fee agreements and their abuse has been tackled by the Justice Secretary and his Department where lawyers have been abusing conditional fee agreements, and I am thinking particularly of, for example, equal pay cases in this country where I have some experience. In other words, those issues are difficult and controversial, quite apart from the subject matter of this inquiry. You have not talked about protective costs orders in what you have just said, that is to say, going to the judge before you litigate and saying, "We are an NGO in a public interest case seeking to bring the case. Will you please make an order before we go any further that, even if we lose, we will not have to pay the other side's costs?" I should declare an interest because I did the *Corner House* case originally. Now, am I not right in saying that, since the *Corner House* case, the courts have been much more liberal in their

approach to protective costs orders for the reasons you have been giving already and that we are moving towards a South African position of no costs order in public interest cases fashioned by the courts if governments cannot produce a similar solution? In other words, although I understand what you are saying and share many of your concerns about access to justice, the protective costs order, if it is rationalised, either procedural or otherwise, offers some way, does it not, of taking away the great risk that, if you bring litigation, you are going to have to pay the other side's costs, even if you can find public-spirited lawyers, like yourself, willing to take the case *pro bono* or on a conditional fee agreement basis?

Mr Meeran: I think that is absolutely right. As far as I know, the vast majority of cases in which protective costs orders have been made are public law cases. There has only been one example that I know of where a protective costs order has been made in private civil litigation, but, in principle, there does not seem any reason why, if it were extended to cases generally which raise human rights issues, whether those are public or private cases, that would not be an important benefit, I agree.

Q71 Lord Lester of Herne Hill: I guess what is implicit in my question is that on the other two aspects, class actions in particular, there need to be safeguards against abuse of the system, as also with conditional fee agreements, where a greedy or unscrupulous hypothetical lawyer might, in a conditional fee agreement, if you take the libel area at the moment which is well-known, a claimant's lawyer, knowing that there is no defence, clocks up £200,000 worth of legal costs and the newspaper then has to pay £10,000 damages, but £200,000 or £300,000 legal costs completely unnecessarily because of the unscrupulous conduct of the claimant's lawyer using a CFA. That is one example and I could give others. That is why, is it not, that the MoJ is so concerned about abuses of the CFAs?

Mr Meeran: Well, I agree, these are valid concerns. The idea of a protective costs order—

Q72 Lord Lester of Herne Hill: I did not mean a protective costs order, but a CFA.

Mr Meeran: I understand that, but the protective costs order only solves one of the dilemmas that I mentioned and that is the adverse costs risk faced by the claimant. What it does not assist with is the enormous financial burden that lawyers will have to take on when running these cases on a conditional fee basis, cases which may utilise a vast amount of the law firm's resources for a period which was uncertain, and it is in relation to that aspect that a class action mechanism would assist.

Q73 Chairman: How would that solve your CFA problem? The whole point about a CFA is that you get an uplift on your costs, there is an excess premium, and that, in order to offset the cases where you lose, you do not get anything paid at all because

effectively the law firm runs the risk of losing the case and not getting paid, so how would the class action resolve that issue?

Mr Meeran: Well, it would mean that you did not have to spend so much money pursuing a case because you could run one case on behalf of a whole class and you could focus your resources then on the generic aspects of the case and not on having to take instructions from vast numbers of people to particularise their cases in order to protect their limitation position.

Q74 Mr Sharma: John Ruggie has suggested that states consider ways of strengthening the national contact point mechanism through possible linkage to government support, for example, through export credit guarantees. What do you think of this suggestion? Does this go far enough?

Mr Meeran: First of all, I think the national contact point system and the OECD guidelines are an important tool because there are only so many cases you can litigate, for a start. The problem with the system is that it involves voluntary, non-legally binding guidelines, there is no guidance given to companies about the standards that they are expected to meet in order to comply with the guidelines, the contact point is viewed sometimes as not as impartial because it is part of the UK Government and, finally, the contact point does not have any power to impose sanctions. Now, being able to report non-compliant companies to export credit guarantee departments would be one important additional tool, and also perhaps reporting non-compliant companies to banks, funders, would be another, so, in answer to your question, I do not think that that would be sufficient.

Q75 John Austin: Can I follow on from that and go on to the Corporate Responsibility Coalition's proposal for a Commission for Business and Human Rights. CORE has proposed that this would not only be a policy guidance, advisory and educational body, but it should also have the power to adjudicate on complaints and impose penalties on UK companies. Have any other states introduced this kind of extraterritorial power, or would the UK be breaking new ground if they went down this road?

Ms Zerk: As far as the extraterritorial aspects of the Commission's proposal are concerned, this would be a case of the UK trailblazing and providing a less formal means of resolving disputes between people affected in other countries by the operations of UK companies abroad and UK companies. Many of the elements of the CORE proposal are already in place as regulatory devices in the UK. For example, the informal dispute resolution services are already provided within the powers of the Equality and Human Rights Commission, they are provided by the Financial Services Ombudsman. The power to investigate complaints, the power to make financial awards up to a specified limit, the promulgation of certain standards, these are all regulatory devices that are already in use. It would not be the first time either that a state had attempted to control corporate activity abroad, and we were already

discussing earlier on the example of what states currently do in relation to bribery and corruption, but it would be the first time that a state were to pull all of this together into one package and create a regulatory body with specific responsibility for the human rights performance of companies abroad.

Q76 John Austin: Mr Frankental, do you have anything to add?

Mr Frankental: I can perhaps describe a little bit some of the more potential functions, but that was not really your question.

Q77 John Austin: I know that Mr Meeran is somewhat sceptical about an enhanced role for the national contact points system, but there are those who argue that a strengthened system could provide a non-judicial solution. If we pursue the CORE proposal, is that going to detract from the possibility of a strengthened NCP?

Mr Frankental: Not at all; the two could exist side by side. The problem at the moment is that the NCP is part of a mechanism that has been established by the OECD and that mechanism does not allow for remedies, so either the UK would have to develop this mechanism in an entirely different way or the UK and other governments would have to press the OECD to change not just the guidelines to give them more specificity on human rights because, as my colleague said, they do not actually specify what activities are acceptable and what are not, but they would actually have to offer a remedy. Governments would have to be committed, as part of the mechanism, not just to cite the company, but to actually offer a remedy to the victims. The Commission would have an ombudsman role and would receive complaints, investigate complaints and offer a remedy and, at some point in the future, there is no reason why that function should not subsume the national contact point, but at the moment it is a completely different kind of animal with no enforcement, no remedies, no specificity on human rights, whereas what we are proposing with the Commission would be an ombudsman which would be able, under particular circumstances, to receive complaints and offer a remedy and have some limited enforcement powers, and that could include requiring the company to give an undertaking not to repeat the behaviour that led to the abuses in the first place. Those kinds of requirements of companies to give undertakings are not part of the remit of the existing national contact points.

Q78 John Austin: In her answer to me earlier, Jennifer Zerk mentioned the role of national human rights institutions. We have not yet taken evidence from the HRC, but can you tell us what you think the Human Rights Commission in the UK could add to the process?

Ms Zerk: Well, they clearly have a very important role to play in relation to business and human rights issues, particularly in relation to equality and discrimination issues where they have a specific mandate to enforce specific pieces of legislation, and

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they have a number of very useful powers at their disposal to do this, including commissioning research, carrying out inquiries and promulgating codes of conduct as well. It will be interesting to hear what their evidence to you is, but, as yet, they do not seem to be playing a very significant role in relation to business and human rights, although, it has to be said, there has been a very interesting submission from the Scottish institution which clearly advocates a greater role for these kinds of institutions in relation to business and human rights issues, particularly in relation to foreign, extraterritorial issues. It may just be that they are very new institutions, and they may have other priorities, but it would be good to find out what their plans are, of course. As regards business and human rights issues in other countries they are restricted by legislative mandate and resources, although, yes, it would be interesting to hear some more about that.

Q79 John Austin: That is true here with the EHRC terms of its powers of investigation and enforcement, is it not, which are limited to discrimination and the Act?

Ms Zerk: That is right.

Q80 John Austin: Do you think those powers could be extended or are you referring to their wider powers on promoting good practice and awareness?

Ms Zerk: Those powers could be extended by primary legislation to turn the Equality and Human Rights Commission into the kind of institution that CORE is seeking, that would be possible. We

actually think that because the issues relating to human rights and business are so complex and specific and there are so many different kinds of business impacts and corporate sectors where these issues can arise that a specialist institution is necessary.

Q81 John Austin: So you would need a specialist commission?

Ms Zerk: Yes.

Q82 Lord Lester of Herne Hill: It would not be realistic, would it, to give the Equality and Human Rights Commission a transnational remit? It has already got to deal with all the strands of discrimination plus the entire UK human rights remit as well. It has got the greatest problems in trying to deal with that mandate. If you saddled it with dealing with discrimination abroad or other human rights of nations you would probably risk blunting whatever remains of its cutting edge?

Ms Zerk: Yes, I would agree with that and given the extraterritorial aspects and the special considerations that are raised by lawyers and also the fact that we are talking about a Commission that will focus in particular on the business of human rights issues not human rights issues in general, we really believe that a specialised Commission is necessary.

Chairman: I think that is all our questions. Is there anything any of you want to add before we close your part of the evidence session? Okay, great, thank you very much. We will just adjourn for a couple of minutes while we swap our panel over.

Witnesses: **Mr Owen Tudor**, Head of EU and International Relations, and **Ms Janet Williamson**, Senior Policy Officer, Economic and Social Affairs, Trades Unions Congress; and **Professor Keith Ewing**, President, and **Mr John Hendy QC**, Chair, Institute for Employment Rights, gave evidence.

Q83 Chairman: We are now joined by our second panel of witnesses for the Business and Human Rights Inquiry: Owen Tudor, who is Head of EU and International Relations at the TUC; Janet Williamson, who is a Senior Policy Officer, Economic and Social Affairs at the TUC; Professor Keith Ewing, President of the Institute for Employment Rights; and John Hendy QC, Chair of the Institute for Employment Rights. Welcome to you all. Does anybody want to make any opening remarks or shall we get straight into questions?

Mr Tudor: I just wanted to apologise, especially to the clerks if not to the rest of the Committee, for the lateness of the submission of our evidence.

Q84 Chairman: Thank you very much. Perhaps I will start with Keith and my question has to be this: I suspect in society as a whole that there is very little perception that employment rights/labour rights are human rights. How would you react to that?

Professor Ewing: I would be very surprised to encounter that perception nowadays. If we are guided by the terms of international human rights laws and by international human rights treaties, I think it is now clear beyond doubt that labour rights

and trade union rights are part and parcel of the great human rights instruments whatever terms of reference we choose to adopt. I will just run off a few of them. We have the ILO Conventions 87 and 98, we have the Social Charter of 1961 and the revised Social Charter of 1996, both of which have trade union rights at their core. We have trade union rights now in the EU Charter of Fundamental Rights of 2000. We find all of these provisions now seeping into Article 11 of the European Convention on Human Rights and the great expansion of the rights of freedom of association in recent decisions of the European Court. Two cases in particular, one the case of *Demir v Turkey* in November of last year which recognises the right to collective bargaining as part and parcel of the right to freedom of association, and more recently an application from Turkey decided in April of this year which now recognises that the right to strike is part and parcel of Article 11, so this is an evolving jurisprudence which together brings to this important document something which has long been recognised as part and parcel of the human rights movement.

Q85 Chairman: In your evidence I think you accept that not all international labour treaties are human rights instruments. Am I right about that?

Professor Ewing: Did we say that? There are a number of core instruments. We can divide them into two, if you like, firstly international treaties. There are those treaties which deal specifically with labour rights. Here I am thinking about the ILO Conventions. If you go to the ILO, which is a UN agency, the ILO itself will say that there are four or five instruments which we regard as fundamental human rights instruments and at the top of that list is the Conventions 87 and 98 which deal with freedom of association and which deal with the right to organise, the right to bargain and the right to strike, so there are, if you like, international human rights treaties that are dedicated to labour rights. In addition to that, there are a number of general human rights treaties in which you will find at the core of the treaty a commitment to labour rights. As I have said before, I think the most prominent of these would be the Social Charters of the Council of Europe and there are also UN instruments as well with which people will be familiar, so far as we are concerned I think the three core trade union rights sit at the heart of the international human rights treaties.

Q86 Chairman: So you would say there is universal agreement on the requirements imposed on the UK by those international human rights obligations in the labour context?

Professor Ewing: We have ratified these treaties for the most part so we have undertaken to be bound by them. I cannot see why we are not and why we do not comply with them.

Mr Hendy: Can I just add to that, trade union rights derive from freedom of association, and freedom of association is embedded in the United Nations Declaration of Human Rights and in the ILO Conventions 87 and 98 and in the European Convention and in the European Social Charter and indeed in EU law as well. If you look at the leading cases on, for example, the right to collective bargaining in the European Court of Human Rights, it is dependent on ILO and European Social Charter jurisprudence which has guided the European Court to declare that the right to collective bargaining is an essential aspect of Article 11 on freedom of association and the right to join a trade union for the protection of workers' interests. If you look at the leading case on the right to strike in European Union law, which is *Viking v Finnish Seafarers' Union*, which is a controversial case from a trade union aspect, it begins with an assertion that the right to strike is part of the core human rights recognised by European Community law, so I do not think there can be any doubt about the fundamental nature of trade union rights. Just one last word, what we describe as trade union rights of course is a distinction from employment rights and the rights of the individual worker, but trade union rights are enjoyed not just by trade unions but also by individual workers as well, and the cases in the European Court of Human Rights like *Wilson & Palmer v United Kingdom* and *ASLEF v United Kingdom* are cases where the European Court of

Human Rights have held that these are both individual rights and rights enforceable by trade unions as well.

Q87 Chairman: Perhaps I can put this to you: some of the witnesses to the Committee have suggested that we should be much more concerned by activities in conflict zones or in high-risk industries where particularly high standards of due diligence should be undertaken by UK companies. Is there some sort of hierarchy of rights where companies should consider their due diligence obligations and, if so, where do these rights fit in that hierarchy?

Mr Tudor: It is difficult actually identifying a hierarchy of rights obviously, but our view, building on what Keith and John have said, is that certainly the ILO's eight core Conventions which are fundamental human rights and which I think have a different locus than the rest of the Conventions of the ILO because it is a requirement of all members of the ILO to uphold those Conventions regardless of whether they have ratified them themselves as a condition of membership are clearly more important than some of the other ILO Conventions. I think however the key issue is not about whether there is a hierarchy of rights; it is where you apply most of your activity and where do you think it is most important. I would be willing to accept for these cases that pursuing the human rights of people in places like Iran or Zimbabwe or Colombia might well be worth putting more effort into than the British Government for instance protecting the rights of workers in Sweden, but that is just a matter of priorities rather than a matter of hierarchies of rights.

Q88 Chairman: Can I come back to you, Keith, in the evidence from the Institute you have highlighted a number of areas of concern in relation to UK domestic law in this area. Where do you think changes are needed? Are changes needed in the substantive law or because the existing laws are not respected in practice? Or John?

Mr Hendy: It is the substantive law, particularly if one looks at the right to strike, for example, where the breaches of international treaties ratified by the UK come because of the existing legislation, so the legislation would have to be changed in order to comply. That has been made clear by the supervisory bodies of the ILO, the European Social Charter, the International Convention on Economic, Social and Cultural Rights, and of course in the past by the European Court of Human Rights, although their legislation was amended in the light of *Wilson and Palmer* and in the light of *ASLEF*, but it is plain from the decisions of the ILO and the European Social Charter mechanisms that there are still areas of the law in relation to trade union rights which are not in compliance.

Q89 Chairman: We have had very few ECHR cases, you have mentioned two, and those are very much at the periphery of some of the things that we have been talking about in terms of right to strike and so on. Why do you think we have not had more cases?

Mr Hendy: Why do we not have more cases?

Q90 Chairman: Yes.

Mr Hendy: You are going to get some more cases! I think lots of reasons. For an individual trade union faced with whether it should support a strike or organise a strike which its lawyers are telling it is in breach of domestic legislation, and yet maybe other lawyers are saying, "Well, it may be in breach of domestic legislation but if you take this all the way to the European Court of Human Rights you may be vindicated," that puts the union in a very difficult position because the union is not going to get there for another year or two by which time the dispute is over and the strike is settled and the whole thing has become completely academic.

Q91 Chairman: So if we ever see a case it will be like the *ASLEF* one which concerns a long-term principle for union membership and so on rather than the immediate problems of industrial disputes and strikes being challenged in that way?

Mr Hendy: Yes, I think there are situations even in relation to industrial action where it is conceivable that there would be litigation that could go all the way to the European Court of Human Rights but the immediacy of the problem is one of the principal reasons why there has not been more litigation at European Court level in relation to that.

Professor Ewing: Could I add one footnote. The other point I think which is important is that since the mid-1970s there is a line of jurisprudence in the European Human Court of Human Rights on Article 11 which made litigation at that level very unattractive and unlikely to succeed. It says that the Court took a very narrow view of what freedom of association means for these purposes. Since the *Wilson* case in 2002 and then *ASLEF* in 2004, and now the most extraordinary decision in 2008 in the *Demir* case, followed subsequently by the other case I referred to from Turkey, the jurisprudence is now opening up and this is much more hospitable terrain for unions to take complaints. You asked me is the problem one of substantive law or one of enforcement. What I would say is that in the emerging context of the expansion of the jurisprudence it seems to me there are three areas of substantive law where it would not be suitable for trade unions to be looking with a view to litigation because of the difficulty of getting legislation to address the concerns that arise. The first would be on the right to organise around the blacklisting issue. The second would be on the issue of the right to bargain collectively and the very restrictive nature of our collective bargaining legislation that was introduced in 1999. The third would be the right to engage in collective action around which we have been criticised for a number of years by a number of international human rights agencies. At the same time as these decisions are evolving in Strasbourg, we have this problem which John referred to of the restrictive jurisprudence from the Luxembourg Court. We have got courts effectively moving apart

and the question is how are we going to reconcile these different approaches on these human rights issues.

Q92 Chairman: Could we not just sign up to the charter?

Professor Ewing: It does not matter because this issue is not a charter issue, it is an issue which arises under the fundamental freedoms within the existing treaty. Signing the charter would help but it does not look likely.

Mr Tudor: John has mentioned the immediacy issue. I recognise the dangers of going down this road but trade unions are not natural litigators. They have other means of resolving disputes and they have other means of establishing effectively fundamental rights. One of the issues I think about whether trade union rights are fundamental human rights is that it is not simply whether it is embodied in law that makes it a fundamental human right, it is also what the general opinion is. Our work with Amnesty International, for instance, demonstrates quite clearly that there is a broad public approach that assumes that trade union rights are human rights, and it is not unknown to have had to explain to some of our members that things which they assume to be their rights actually are not written down anywhere and they are embodied in practice rather than in law. One of the reasons why there are not more cases is simply we find other ways of resolving disputes and we litigate, generally speaking, as a last resort in that circumstance. This is why a number of trade union lawyers have had to take up teaching and being Members of Parliament and things like that, there is not enough work!

Lord Lester: I am interested because I was counsel who lost the GCHQ case in the bad old days.

Q93 Earl of Onslow: I would not advertise that, Lord Lester!

Lord Lester: I agree with Professor Ewing that the jurisprudence at that time bears no real relationship to what has happened since. What I am a bit puzzled about is the notion that I think John Hendy was focusing on that somehow it is difficult for trade unions to get focused litigation off the ground. Are you now not much better off? You have got the Human Rights Act so you have got the possibility of declarations of incompatibility here and you have got a much more sympathetic new single Court in Strasbourg. Using Article 11 to open up these issues seems to me to be a way forward. I do not understand what inhibition there would be. I understand Mr Tudor's remarks about trade unions not liking to sue but I have not noticed they are particularly shy at doing so in key cases. Is it not more sensible to start at least one or two cases that are real test cases to see where the Strasbourg Court now is and the British courts?

Mr Hendy: The answer is absolutely yes and that work is going to happen. I have a case in the Court of Appeal at the end of this month where the issue of Article 11 in relation to the current restrictions on industrial action in the shape of ballots and notices and so on and so forth is precisely raised. I think it

is really, as Professor Ewing has said, that the *Demir and Baykara v Turkey* case only last November has really opened the door for the use of Article 11 in circumstances where you really would not have thought of doing it in domestic law. I have run Article 11 cases over the last couple of years but without a great deal of success in domestic law, for understandable reasons, but I think you are absolutely right.

Q94 Chairman: Probably a question for the IER, can changes to the law actually change some of these anti-union practices which you have identified that businesses sometimes get involved in or will new and more imaginative forms of anti-union activity arise as the legislation changes?

Mr Tudor: This probably sounds like a rather glib and superficial response but I think law has several different consequences. One is the practical implications of exactly what the law says and people, generally speaking in this country, tend to abide by laws rather than not. Secondly, there is the issue of creating a culture and changing attitudes about what needs to be done. It is commonplace to record that there were more recognition agreements signed before the introduction of the current legislation on recognition than afterwards because, by and large, business, like trade unions, prefers to do things through informal agreement rather than necessarily have it tested in the courts, which could be uncertain and costly. It is entirely possible that people will attempt to evade whatever legal positions are elaborated but (a) there is always going to be a large number of people who will not go down that route on a point of principle and (b) there are going to be people who assume that is a rather risky course of action to take and then (c) there will be people who will indeed do exactly as you say. To be honest, I think that really applies to any legislation. As I say, those are not in many cases particularly relevant to human rights law.

Q95 Chairman: If we look at the mismatch between international standards and domestic law, in fact that is something that this Committee in the last Parliament raised in 2004, and obviously we have been trying to lobby the Government for change, and collectively across the table at the end. What has been the Government's response and business organisations' response to this issue?

Mr Hendy: The Government say they are not in breach of ILO Conventions 87 and 98. No matter that the supervisory bodies, the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations tells the British Government that it is in non-compliance every year. It seems extraordinary to me that the Government can deny what the supervisory bodies have said but they do.

Professor Ewing: At the last meeting, you will remember that we had a meeting on the Bill of Rights report over the road, and I raised the question there about why there was no discussion about trade union rights in the proposed Bill of Rights, and I wrote privately to a Minister, who shall remain

unnamed, about why is this and why is the Government not engaging with this issue and he wrote back a very satisfactory explanation, but he also said that the Government believed that it fully complied with international obligations under the Social Charter and ILO Conventions. However, if you look at the reports from the Council of Europe, the Committee on Social Rights, it says every time for the United Kingdom that there are the following areas of non-compatibility and every time they identify Article 5 and Article 6, the right to organise and the right to take collective action. Every time it is identified as an issue of non-compliance and every time it is identified not for one reason but for several reasons. I cannot understand how the Government can possibly take the view that it is fully in compliance with these international conventions.

Mr Tudor: I have to say our experience of writing ILO Conventions is that the British Government's position is that they are in compliance with everything that the ILO embodies in its Conventions, and it therefore surprises us enormously when they refuse to ratify them on the grounds that they are not yet in compliance with the Conventions that they themselves have helped to write. I do not think these are acts of juridical decisions being made, more logically it is political choices being made. You asked in particular about business interests. John Cridland, the Deputy Director General of the CBI, spoke at the Government's ILO 90th anniversary celebrations recently and his argument on that point was not particularly that the UK was actually in compliance with international law on these matters but, as I alluded to earlier, he said it was a question of priorities and it was more important to concentrate on the more difficult areas of the world than Europe where, by and large, an accommodation had been reached, I think what he meant was a political accommodation rather than a social partner accommodation. There are cases obviously where employers and unions can come to agreements which step alongside the law. As I say, I think what the current position is is a conjunction of political forces that makes the British Government and British employers satisfied with where they currently are.

Q96 Chairman: Collective agreements are not really enforceable?

Mr Tudor: No.

Q97 Lord Morris of Handsworth: My first question is directed primarily to Owen from a TUC point of view. Perhaps we ought to start by looking at the Social Charter because there have been a number of references so far in the evidence. The predecessor to this Committee recommended ratification of the revised European Social Charter and the adoption of the collective complaints mechanism which would allow employer organisations or trade unions to bring complaints to the Council of Europe Economic and Social Rights Committee. Could you tell us please how would ratification make a difference to human rights protection in the UK?

Mr Tudor: Thank you for asking me but actually I think some of our legal friends would be better able to deal with the detail of that. The only point I would make in particular is, to a certain extent, you answer your own question in terms of the fact that it would give us another avenue to make the case for certain things to happen, which I think would have, as I suggested earlier, a political and attitudinal effect.

Q98 Lord Morris of Handsworth: Can you give us a specific example?

Mr Tudor: It is actually not so much a specific example but it would change the culture of how we see relationships between employers and unions in workplaces, and that is rather difficult to pin down to specific circumstances. As I said, in terms of the actual legal implications of it, I think there may well be specific examples, but I am more interested in creating a culture whereby employers and unions would not have the same balance as now. This is not exactly therefore an actual example of what you are talking about but it is worth noting that, for instance, in the recent Lindsey oil refinery disputes there were a number of associated disputes alongside that where clearly employers could, had they wished, have used certain legal arrangements to challenge what was being done. The fact that they did not was not because they did not think they had the legal power to do so; it is that they thought they would just make matters worse by doing so. It is that sort of balance of what is it sensible to push and what it is not sensible to push that I think would be one of the impacts of adopting the Social Charter. I suspect in terms of the actual legal implications then it is probably better if Keith or John respond.

Professor Ewing: I think it would make quite a big difference in this sense: that there is already a right to complain to the Freedom of Association Committee of the ILO specifically on freedom of association issues, but if trade unions had the right to complain under this mechanism as well it would be an additional way of ventilating particular concerns and particular alleged abuses around the areas where the Social Rights Committee has already identified there is a breach by the United Kingdom. Why that would be important is not in the sense that it would necessarily provide a remedy, and not necessarily because it would lead immediately to change in the law by the British Government (because the British Government might not change the law following a decision of the Social Rights Committee on a collective complaint) but because this jurisprudence now feeds in very importantly to the jurisprudence of the Strasbourg Court on Article 11 cases. Suddenly the social rights jurisprudence and ILO jurisprudence have become very, very important, and it is important that trade unions and others who would be able to use this mechanism have the opportunity to ventilate grievances in a way which is inexpensive but has indirect legal effect, so the direct legal effects may not be massive but the indirect legal effects are very important and significant. For that reason we think that trade unions in this country, as they have in Ireland and as they have in other countries of the Council of Europe should have the

same opportunity to ventilate and give publicity to particular grievances, perhaps even including the issue which arose in East Lindsey. It seems to me that what is happening in East Lindsey and did happen there represented a breach by the British Government of its obligation to promote collective bargaining and to promote respect for collective agreements. We have in place a mechanism which now allows these agreements to be undermined in breach of our international duties.

Q99 Lord Morris of Handsworth: I know from the history of the Institute that the issue around so-called blacklisting has been one of the areas of concern in terms of Institute policy. In the light of the recent discovery by the Information Commissioner of the operation of an unlawful database for construction workers, you have called for the Government to use powers under section 3 of the Employment Relations Act to make regulations to do with blacklisting which affect trade union members. Do you know why the Government has not used these powers before now?

Professor Ewing: We are probably the same as you; we have no idea. I can only presume that the Government thought there was no need to use them (a) because there was a belief that this had ceased to be a problem and (b) because if there was a problem there was existing protection in the Data Protection Act of 1998, but that seems self-evidently, in the light of what we now know, not to be the case.

Q100 Lord Morris of Handsworth: Have you made representations since the Information Commission report was made public? Have the Institute made representations?

Professor Ewing: We have been approached by a number of trade unions who are planning to make representations, so we will be supporting and advising the unions who have approached us on this issue.

Mr Tudor: Our understanding from the Government was that their view when they obtained powers to act in this was that they took the view that there was not a problem that then needed addressing. That does now indeed seem not to be the case and we will be calling for effective and robust laws prohibiting blacklisting on which we can provide you details if you wish. We have had informal discussions obviously with government over that issue and we look forward to something positive on this subject. I do not know whether I have to declare an interest as a former person on the Economic League blacklist. It has not actually affected my career.

Q101 Lord Morris of Handsworth: It did you a favour, I think. Just to take the debate a step further, because it has been suggested that the Government should create a specific compensation scheme to remedy the hardship potentially suffered by those included on the unlawful database that I mentioned earlier. Do you have any examples of the type of hardship concerned? Would these individuals have no other civil remedies to correct their losses?

Professor Ewing: I have evidence here of people who have written to us which I am quite happy to put on the record. There are people whose stories have appeared in public. There is a guy, Steve Acheson, from Manchester, a case which has been reported on the BBC and in local newspapers, who says after he had taken an unfair dismissal claim he appeared on a blacklist. He was out of work for a long time. It affected his health and family. His life was devastated. He could not understand why anyone would not employ him. There was no recession then. He was a highly qualified and experienced electrician who worked hard but nobody would take him on because he was on this blacklist. We have another case of a man who must remain anonymous but he has given me permission to refer to his case. This is his file. This is the file which was retrieved from the blacklisting company in question. He invites me to read it and he says, "As you will, see some of it is funny, some of it is malicious smear, some of it is straight victimisation. He goes on to name the companies involved. He says, "I was a qualified engineer responsible for major contracts in control of many staff. Once the blacklisting and victimisation started in earnest I could not get a job anywhere as an engineer and ended up working as a carpenter. After a while even this dried up and during the building boom my children were on milk tokens." Since then he has had to leave the industry and is now happily employed elsewhere. If you speak to the union which has principally been involved in this they will be able to provide you with more details of what I think constitutes hardship. The question you ask is is there an existing remedy. There is a provision in the Data Protection Act of 1998, section 13 I think, which makes provision for compensation for people who are caught up in the unlawful processing of their data, but it seems to me there are a number of problems with this provision. The first of course is that it is not retrospective and a lot of this blacklisting activity took place before the Data Protection Act came into force. The second problem is that you do not get compensation because you are being blacklisted as such; you only get compensation if you can show that you have suffered damage. How you begin to get a case up and to prove that you have suffered damage as a result of having been on a blacklist I would have to defer to people more experienced in these matters than I am, but I imagine it would not be easy. The third problem is even if damages are recoverable you can only get damages for loss; you cannot get damages for injury to feelings or for the other harm that you may suffer. In addition to which there is a problem in that you have to go through normal judicial channels to recover, so it is not an easy process for people to contemplate. What we had in mind was when we had the reverse situation in 1980 when Mrs Thatcher came into government, she was faced with the problem of people who had been dismissed between 1974 and 1980 because they were members of a trade union where closed shops operated. After the *Young James & Webster* case, in order to prevent a succession of cases to Strasbourg, what the Government at the time did was to introduce a retroactive

compensation scheme, paid for from public funds, for people who were "victims" of closed shop arrangements. What we are saying is that it would be appropriate to have the mirror image, if you like, and introduce a similar scheme for people who are victims of this practice and who may have difficulty in using existing procedures to recover any losses which they have suffered.

Q102 Chairman: Do you have anything on the practicalities of the claim?

Mr Hendy: The problem, as you know Chairman, is the problem of causation. It would be very, very difficult to show that you did not get the job because you were blacklisted ten years ago, very difficult, and that is the essential difficulty.

Q103 Chairman: Keith, earlier on you mentioned some correspondence with the Minister; am I permitted to ask you whether we could see the correspondence?

Professor Ewing: Yes.

Q104 Lord Lester of Herne Hill: Just a thought—if someone is blacklisted and lacks an effective domestic remedy, could you not then go to Strasbourg and say that under Article 13 the UK have got to introduce an effective remedy for that victim class?

Mr Hendy: That is under contemplation!

Q105 Mr Sharma: To the TUC: you have said that a combination of approaches is necessary to address the human rights impacts of businesses. What is more important: promoting human rights and capacity building in host states or pressing the UK Government to take action in respect of the activities of UK companies overseas?

Ms Williamson: I think you need both and that those two avenues are not mutually exclusive but in fact are mutually reinforcing. Capacity building can achieve a great deal in terms of making sure that business knows what standards it should be applying and is aware of best practice and how to go about implementing that and is able to assess barriers to human rights compliance in its activities. All of that would best be done in a situation where there is a clear legal framework of rights which can, if necessary, be legally enforced. I think you do very much need both. There is evidence that backs up the need for that dual approach. There was a study of trade agreements which found that the most improved firms had both negative and positive inducements to improve their actions. There was a study of the Ethical Trading Initiative that found that while there had been quite a lot of improvements among member companies and their supply chain firms in several areas, quite a few other problem areas remained, notably freedom of association, harassment and discrimination. One of the core conclusions of that assessment study was that there needs to be a stronger institutional and legal framework for collective bargaining and freedom of association in order to uphold other labour rights.

Q106 Mr Sharma: Should it make a difference if the host state has not ratified the relevant international standards which bind the UK?

Ms Williamson: I think we would argue no it should not because we are talking about fundamental human and labour rights here. Whether legally it makes a difference one of my other colleagues will have to address, but from our perspective we believe that all states and all companies should uphold in their different roles the fundamental human and labour rights which we have been talking about.

Mr Tudor: Our general approach, to be honest, is that companies operating in other countries ought to look for whatever the highest standard is, whether it is the British standard or the local standard. You can have problems with that, for instance in terms of where higher standards might even be illegal in another country, for instance freedom of association in China, which we know provides problems although there are lots of ways round that, and lots of things that you can do. I would also draw attention, or redrew attention, to the fact that for instance the ILO core Conventions apply regardless of whether countries have ratified those Conventions or not, unless you are not a member of the ILO, which applies to only a very small number of very small states. Thus in many cases under things like freedom of association it does not actually make any difference whether the country has ratified that or not; they are bound by it.

Q107 Baroness Prashar: You support the suggestion of CORE for establishing a new Commission on Business, Human Rights and the Environment. What would the UK Commission add to the ability of individuals who suffered poor employment conditions overseas to remedy their position?

Ms Williamson: I think it would do several things. One of the key things it would do is provide a route for redress and for remedy for overseas victims, as you were hearing in the earlier session, and that would provide both the avenue of redress but also be a deterrent to companies and an incentive for them to improve their behaviour overseas where they are operating in their supply chain. I think alongside that it would also provide a focus for work on developing and particularly perhaps co-ordinating all the different best practice standards that exist at the moment. The Commission could also have a key role in trying to promote those standards and disseminate them more widely. To go back to the earlier question about legal enforcement versus capacity building, the Commission could have an important role doing both, both on the capacity building, dissemination and promotion side in trying to draw attention to the importance of human rights and, on the other hand, also providing an avenue for redress and for remedy for victims where abuses do occur.

Q108 Baroness Prashar: Could you give us an example?

Ms Williamson: An example is Unilever. Unilever states in its CSR report that it upholds high standards with regard to its employees and yet in

practice throughout India and Pakistan workers have been punished severely when they have tried to form a union with lockouts, beatings, cuts in working hours, and severe abuses of their human and labour rights. There have been five challenges to these practices under the OECD Guidelines to the National Contact Point and yet so far there has been no action and no remedy for those people whose rights have been abused, so perhaps in an example like that the Commission would be able to provide additional means through which redress could be obtained.

Mr Tudor: Some of what this and any formal process would do is it is not just telling people this is what you must do and they therefore do it; partly it is changing internal company priorities, what has most weight when a company is deciding what to do about something. In some cases it just strengthens the hand of some people inside a corporate body who want to do a certain thing compared with other people inside who do not. I used to sit on the Health and Safety Commission for instance and we regularly found, and I have walked round workplaces, a factory inspector occasionally misses something only to have the health and safety manager tap him on the arm and say, "If you could possibly serve something on me for that, I could get it sorted where I have not been able to get it sorted before." Then there is also the issue of external competition. We know that companies in many cases are facing stiff competition from other people in the sector. Something which actually made it a requirement to act in a certain way would strengthen the hand of those companies which do not want to go for the lowest possible route by driving cowboys (that is the phrase) out of that industry or require them to not undercut what an ethical company would want to do.

Q109 Chairman: This does come back to the point you made about say China. Supposing you have a UK Commission dealing with human rights and so on, Chinese law forbids trade unions and freedom of association and yet the standards applied by the UK Commission says if you operate overseas must allow trade union membership. How do you square the circle?

Mr Tudor: Strictly speaking in terms of China obviously trade union membership is not prohibited at all; in fact in many cases it is mandated, but you are not free to choose your own union to join. The underlying principle of freedom of association is that workers should be able to operate collectively to do roughly whatever they want but, in particular, to enforce their legal rights and so on. That can be achieved even within the context of operating in China. The smart way that companies are adopting at the moment is to work partly with the established trade union movement in China—the All-China Federation of Trade Unions—but also simply to encourage the development of collective forms of organisation within their workplace and among their employees which can operate almost regardless of the requirement that they should only be part of the ACFTU. As I say, there are ways round that.

Q110 Chairman: So you do not envisage some sort of conflict arising between the high standards imposed by a UK Commission and others? There is a difference between standards which are just low where you can do best practice and standards which are effectively capped and you are not allowed to go above those standards.

Mr Tudor: Yes, well, the final analysis obviously is that if you are operating in a country such as, for instance, Burma where freedom of association is comprehensively breached by the regime all the time, then the answer may simply be that if it is absolutely impossible to operate according to those standards then you have to not operate in those countries, which is indeed the position that we hold in terms of Burma at the moment.

Q111 Mr Sharma: You—and others—have suggested a new system of monitoring and penalties for companies found to breach the OECD Guidelines by the UK National Contact Point, perhaps through removal of government subsidies or export levies. The CBI have told us that penalties might change the nature of the Guidelines. Would this create a system of binding standards through the back door?

Mr Tudor: To be honest, I am not particularly worried about what door you use if you are raising standards. I would not describe it as through the back door. I would simply say that it would undoubtedly change the ways in which companies address potential breaches of the OECD multinational enterprise guidelines and if they are discouraged from breaching those guidelines then, outside flagrant illegality, I think we should embrace those approaches, and that is indeed one of the reasons why we argue it should be done. I should say in terms of the national contact points, our view is that the Government has done quite a lot to improve the functioning of the national contact point. I do not know whether you see this as a positive thing or a negative thing but the UK National Contact Point is held up around world as one of the most effective contact points (it is a comparative issue) of national contact points around the world, partly because of some of the things that have been introduced in its operation. However, we would say that we need to go further, especially in terms of ways of ensuring enforcement of the decisions that the national contact points reach to make sure that companies take more notice of what they are required to do under the OECD Guidelines. I assume we have cited the case in our evidence of the fact that the NCP can actually get things done. It did play a major part in the agreement between G4S and UNI of an international framework agreement recently, so it can achieve things even with the limited powers that it has got at the moment, but we think it could be much more effective if it could actually enforce the remedies that it proposes. One extra thing I think is worth noting is that one of the more imaginative ways of using those sorts of remedies is actually to get companies for instance—and this goes beyond what we have said in our evidence—to use the fines that have been applied to boost the collective

bargaining arrangements in their companies worldwide. We have advocated this in particular for instance in terms of the general system of preferences that the EU runs under trade, which is rather than just having fines on the countries for breaching things, that money should actually be used to remedy the situation, and the same could apply under the national contact points in terms of individual companies. That would actually, we would argue, be of benefit to the company and that is all to the good. Our view is not that we simply want punishment for the sake of it or a deterrent; we actually want to improve the situation.

Q112 Lord Lester of Herne Hill: Oscar Hahn, the Birmingham employer and philanthropist when trying to persuade trade unions and employers to support a race discrimination law used to quote Archbishop William Temple who famously said, “Whenever I travel on the underground I intend to buy a ticket but the fact there is a ticket collector at the other end just clinches it.” As I understand your argument, what you are saying is, as with all social legislation, you need the legislation to be there so that instead of conforming to bad practices employers, commercial firms and so on can say we are simply conforming to the code and the system, and that makes it easier for all of us who are weak to follow the line of least resistance which is to comply with the law. Is that really part of the message that you are putting across?

Mr Tudor: A large part of it, yes.

Q113 Lord Bowness: Really to all our witnesses if I may—in your evidence and this afternoon you have indicated a number of steps that the Government could take to increase the effectiveness of existing voluntary measures, including guidance and awareness raising, and other witnesses have told us the Government does not currently have a coherent approach to any of these issues. Which part of government do you think should take it forward and how should they do it?

Mr Tudor: We do not have a fixed position on that. We do not have a view that this would be the ideal way to do it. Our overriding concern is that someone should do it and it is the principle of coherence and co-ordination that is the most important thing. I can think immediately of some areas of government that I am not entirely certain we would be that keen on having the lead role in this area, and there are competing claims for who would be best at doing it. I simply think at the moment that the important case is arguing that some mechanism should be found for making this more coherent. I would say however that in terms of producing coherence and leadership within government, we should not be looking at that as removing responsibility from every element of government to pursue these approaches. There is always the danger that if you pick one body to co-ordinate this work then everyone else will say, “Thank the Lord for that, we do not have to do it, we can simply allocate it to that.” That certainly must not be a side effect of bringing coherence and co-ordination.

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Q114 Earl of Onslow: The counter-argument of that surely is that if you do not know which minister to go and see you will not get to see anybody at all.

Mr Tudor: To be honest, actually my experience over the years is that the worst outcome is that you end up seeing a succession of different ministers.

Q115 Earl of Onslow: From different departments?

Mr Tudor: In different departments yes, and being passed from one to the other, but you are right the fundamental issue and our overriding interest is that we believe that there should be co-ordination and there should be a central part of government that has overriding responsibility for co-ordination and coherence, precisely because of the various different problems of not having that.

Q116 Earl of Onslow: That is asking quite a lot of this present Government, is it not?

Mr Tudor: It was said by the previous Prime Minister that it was our job to ask for things.

Q117 Chairman: I think we have finished. Is there anything you would like to add to anything you have said to us?

Professor Ewing: Can I add one thing about the Commission which is being discussed and which we heard a bit about in the last session. I do not want to be unpopular for the sake of it, but I think you need to be careful about any kind of displacement in the sense that it is a good idea perhaps to have a Commission but there is not much point having a Business and Human Rights Commission unless the Commission has something to do, and the problem is we talk about all these human rights obligations, and human rights obligations are obligations of government, not obligations of companies, with the possible exception of the provisions of the OECD Guidelines, so I would strongly urge you that if you are going to have a Commission there have got to be certain obligations as well on companies, and the creation of a Commission should not deflect our attention from having certain legal obligations on British-based companies in terms of their commitment to human rights. I would say there are three things which are important in that respect. Firstly is a duty on companies to audit their commitment to human rights, secondly, a duty on companies to respect certain prescribed human rights obligations so they become duties of the company as well as duties of the state; and, thirdly, what we should be trying to do, apart from using the state, is trying to create countervailing sources of power in the voluntary sector to deal with these companies. In our society the only feasible countervailing source of power in most countries is a trade union. We should be looking at ways by which we can encourage companies to enter into global framework agreements with trade unions of the kind that we saw in the Group 4 situation which are dealt with in the ICTUR submission to this Committee.

Mr Hendy: Chairman, can I just come back to a question which you posed earlier which is whether the solution to these criticisms of UK trade union

rights is by legislation or are there policy measures. I just wanted to say this in relation to two of the fundamental aspects of trade union rights, collective bargaining and the right to strike: so far as the right to strike is concerned, it seems to me the only way forward is changes to our legislation so that the restrictions on the right to strike in the UK are in compliance with permissible limitations under the international treaties that we have signed up to. That is simple. Collective bargaining is more subtle because the right to collective bargaining is not a right to compel an employer to enter an agreement with a trade union. None of the jurisprudence that we have talked about has ever held that. The principle obligation is on states to promote machinery for collective bargaining and that is to be found explicitly in Article 6 of the European Social Charter or ILO Convention 98. Of course there is also an obligation on states not to impede trade union access to collective bargaining which is what the *Demir and Baykara* case is all about, but there are steps in relation to the promotion of collective bargaining which are not dependent on direct legislation to permit it. There may be indirect changes. If one looks back 100 years to see how collective bargaining developed in this country, it was because collective bargaining was a policy pursued by all governments of all shades from 1896 right through until 1979, and they fostered collective bargaining not simply by legal mechanisms such as the right to extend collective bargaining to people who are not party to it, or by requirements of public compliance by making public contractors comply with minimum standards of recognition and so forth, they also did it by policy steps. It seems to me that there is a range of policy measures that could be adopted by government which would help to restore the freedom of collective bargaining which this country is obliged to maintain because of this range of international treaties which it has ratified.

Q118 Chairman: Would those policy steps be compliant with international conventions?

Mr Hendy: They would not be enough by themselves but they would go a way to doing that.

Q119 Chairman: On the right to strike, perhaps I ought to put this to you: is one of the problems with the right to strike that we do not actually have a right to strike and it is a series of exemptions from tort law with exemptions to the exemptions and nobody is prepared to sweep all that away and do it the other way round and get a positive right?

Mr Hendy: Absolutely. We are unique in the world in having a backwards, stand-on-your-head sort of freedom to organise industrial action. Yes, we ought to do what South Africa did in 1996 and declare a right to strike as part of a bill of rights, and that would bring us in line with our international obligations. I would just make it clear—and I know all the members of this Committee are well aware—the right to strike is not without limitations in international law. Everywhere the right to strike is limited. The question is the permissible limits under

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the international instruments and the demarcation lines are very, very clear and, unfortunately, our restrictions go beyond them.

Q120 Chairman: Owen, do you want to add anything, or Janet?

Ms Williamson: Just a couple of quick points. Building on the comments that Keith was making about the Commission and the need for there to be obligations on business specifically in relation to human rights, we support the Ruggie framework which does set out distinct roles for states and for business and then looks at the issue of redress. In terms of the obligation of business, he talks about policies and impact assessments integration and tracking performance as all being necessary in order for business to carry out what he calls due diligence, in other words taking proactive steps to ensure that they are not abrogating human rights. Clearly it could be built into the mandate of a Commission to ensure that there were some clear obligations that they were monitoring and upholding. Secondly, to very much support and build on the points made about collective bargaining. If the UK Government wants to really prevent human rights and labour rights abuses overseas, one of the best things it could do would be to promote collective bargaining among UK companies that are operating overseas and ensure that they are promoting collective bargaining in their supply chains. It is the best way of raising labour standards and really the only reliable form of verification.

Q121 Chairman: So the supply chains are the key, going all the way to the Far East or wherever it happens to be, in terms of raising labour standards through collective bargaining?

Ms Williamson: I think collective bargaining is the starting point for raising labour standards. Companies spend thousands of pounds on audits

and so on to try to monitor labour standards with the best of intentions but really the only reliable verification is through collective bargaining and allowing workers to organise themselves and to speak with their own voices about what is happening and their own experiences, there is really no substitute for that.

Q122 Chairman: We come to the point that Owen was debating earlier on about difficulties in some of the rather more oppressive countries around the world where it is very difficult to organise.

Mr Tudor: Yes but it is possible, as I indicated, to find solutions on that. John mentioned the right to strike in South Africa. One of the most effective uses of that power was when South African dock workers refused recently to unload Chinese arms aimed for the Zimbabwe regime, an action which I should say—and maybe I am using the term perhaps in a slightly old-fashioned way—both main parties in Britain indicated was absolutely supportable and exactly the right thing to do but which would of course have been illegal under the laws of the United Kingdom, so in terms of the discussion of why governments of either party have not moved on this issue, I think that throws into sharp relief some of the inconsistencies involved.

Q123 Chairman: Illegal contemplation of furtherance of a trade dispute.

Professor Ewing: Can I make one footnote to finish. Britain is now the only country of the original 15 Member States where less than half the workforce is covered by collective agreements. It is now down to 33 per cent and falling. This is an urgent problem at a time when the right to bargain collectively is now recognised by the European Court of Human rights as a fundamental human right.

Chairman: Thank you all very much. The Committee stands adjourned.

Tuesday 30 June 2009

Members present:

Mr Andrew Dismore, in the Chair

Dubs, L
Onslow, E
Prashar, B

John Austin
Dr Evan Harris
Mr Virendra Sharma
Mr Edward Timpson

Witness: **Gary Campkin**, Head of International Group, CBI, gave evidence.

Q124 Chairman: Good afternoon everybody. This is the third evidence session of the Joint Committee on Human Rights in our inquiry into *Business and Human Rights*. We have two witness sessions this afternoon: the first being with the Confederation of British Industry, with Gary Campkin who is the Head of the International Group. Welcome Gary. Do you want to make any opening remarks?

Mr Campkin: No, Chairman. I will try to respond as best I can to your questions. You have had our written evidence, which I hope was helpful.

Q125 Chairman: Perhaps I could start off with the international nature of the problem and whether there is an international solution. Clearly both NGOs and Professor Ruggie have told us that an international solution—a treaty on Human Rights and Business—is pretty unlikely. NGOs say that it should still be an aspiration we are able to achieve. I think you have a difference of view. How do you think this debate can be resolved without a set of clearly binding international standards for business?

Mr Campkin: We need to roll back the film a little bit and look at how we got to where we are now because that is instructive as to how we need to proceed. Without going into all the detail, the train wreck that was apparent in the business and human rights debate before the first Ruggie mandate had led us to a place where it was impossible to make any progress at all at a time when there were serious issues to address. That was something the business community recognised and it is why we supported both the first mandate and the appointment of Professor Ruggie. What Professor Ruggie has managed to do very, very professionally, very ably, is to get all stakeholders—governments, business, NGOs, unions—to a place where they have agreed now on a framework to move forward. The important thing in looking at Professor Ruggie's framework, the oft cited state duty, the corporate responsibility and access-to-remedies framework, is that it is a very powerful way of taking us forward in a way which can address some of the issues. Professor Ruggie has said, and we would agree, that it is going to be particularly difficult, certainly in the short term, to have an internationally agreed, negotiated treaty of any description. Professor Ruggie's work gives us collectively the best opportunity to move forward to deal with the issues we need to deal with in a way which is workable. In a sense, we have to take guidance from Professor

Ruggie and we have to do all that we can to support what he is seeking to achieve and from our side we will certainly do that.

Q126 Baroness Prashar: I want to talk about respect for human rights. Professor Ruggie has said that the moral or social responsibility of business to respect the human rights of others is near universally accepted. Most of the businesses operating in the UK are small and medium sized and a lot of them will do business locally. Do you think that they accept that they have any responsibility to respect the human rights of others?

Mr Campkin: We need to look at two dynamics to that question, if I may. The first is the responsibility to respect, which obviously involves compliance with the law. That is the fundamental part of responsible business behaviour and it is something which is obviously very important to the CBI and its members. The other part of responsible business behaviour is what has become known as corporate social responsibility, the voluntary bit above and beyond compliance which exists for a range of reasons related to the nature of the company, the markets in which it works, the agenda it seeks to pursue and so on. That is the first part. The second part is related to size of company. While absolutely all companies should comply with the law, there is no question about that, the way in which smaller companies can have an impact is obviously different from the way in which some of the larger multinationals can have an impact. Therefore I think there would be a degree of difference, depending on impact, about how that responsibility is undertaken in that voluntary part of responsible business conduct. I have to say one of the things we have found at the CBI increasingly over recent years is the number of inquiries we have from companies of all sizes about that responsibility dynamic, about where to go to look for advice, for guidance and help to ensure that what they are doing is right for their companies. This includes putting together things like codes of conduct, codes of practice and so on. There is a whole range of materials which are out there. These range obviously from things like the OECD Guidelines, the Global Compact, to the slightly oddly named risk assessment tool, or RAT. It includes issues we have put together in the business community, together with the International Organisation of Employers, the International Chamber of Commerce and the Business and Industry Advisory Committee to OECD. We put

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together a booklet at the beginning of John Ruggie's first mandate which is designed to highlight a number of areas which companies can look at, regardless of size, in terms of trying to determine how they discharge their responsibilities. If I may make just one other comment at this point, we hear quite a lot of debate about best practice. My own view is that it is quite often an issue of good practice but what determines a company's ability to deal in circumstances where quite often factors outside its control can lead to difficulty is what it does when it has bad experience. It is the response that a company undertakes when it finds itself in difficulty. Even if it has the best and most forward-looking code of conduct or code of practice in the world, sometimes things can go wrong and it is important to have strategies in place which respond to those issues when things go wrong.

Q127 Baroness Prashar: Do you think that the Ruggie framework is only relevant to the big multinationals? You have described what you have done, but what do you think? Is the Ruggie framework only relevant to large multinationals?

Mr Campkin: No. There is a universality of Professor Ruggie's framework but there is a degree of difference between what can be expected of a very large company with a very large corporate footprint and a smaller company with a much smaller footprint. Certainly if you are looking at the Ruggie framework, state duty has to be there at its heart; that is where the human rights duties are vested, states are the primary duty holders. The responsibility and access-to-remedies dynamics are part and parcel of what all businesses should think about in terms of their own particular circumstances.

Q128 Baroness Prashar: Where do you think the line falls between the social responsibility to respect human rights and other voluntary activities that you referred to earlier?

Mr Campkin: In one sense they are not absolutely independent of one another; they are quite often linked. What is quite clear however, if what you are asking is whether philanthropy is enough, the answer is no. It is very important that all companies do due diligence to be sure that they comply with relevant laws and increasingly it is important for companies to look at things like the impact that they have through their businesses, ways in which they will pursue their voluntary initiatives, which is not really philanthropy, it is quite often community or environmentally based, designed to ensure that their linkages with the communities in which they operate are right and that there are channels of communication to deal with issues when they do arise. In a sense it is not quite as simple as being able to split the two.

Q129 Baroness Prashar: Do you have examples of companies which may be doing something which is desirable, but not doing what is required; voluntary activity which may be desirable that they are doing?

Mr Campkin: I cannot give you an example immediately. All I can talk about is in general terms where I do think it is important that companies ensure that they do enough due diligence to make sure that they comply with the relevant law. We have also said in the international sphere—and the CBI was instrumental in contributing to the document I referred to earlier from the three major international business organisations—we found it very important to ensure that where laws were either absent or poorly enforced companies did their best to follow internationally recognised standards or guidelines. We do think that is an important element of CSR in one sense, because obviously if you cannot comply with the law, you need to find another way of dealing with that. Looking to international standards, looking to guidance, looking to codes are some of the ways you can do that.

Q130 Mr Sharma: Business in the Community have told us that business would benefit from greater legal clarity on when the Human Rights Act 1998 duty to comply with ECHR rights will apply to businesses performing public functions. We have also said the scope of that must be clarified. Does the CBI have a view on this?

Mr Campkin: May I just ask you whether by that question you mean particularly related to public authorities, public functions and private companies? Is that the direction of the question?

Q131 Mr Sharma: Yes.

Mr Campkin: Our view would probably echo the view that Professor Ruggie described in his evidence before the Committee and it goes back to his framework in a sense, which is that it is states which have the duties and obligations. You cannot transfer those duties elsewhere, you cannot transfer those to private actors. What you can do, in looking at areas where there is a public function, is to ensure that the contractual arrangements and delivery mechanisms reflect those state obligations. That is the way we would look at it.

Q132 Mr Sharma: The Ministry of Justice is currently consulting with businesses in the UK about whether guidance on human rights is needed—including on the effects of the HRA 1998. Do you think that guidance for business on human rights in the UK would be valuable for business?

Mr Campkin: Our analysis of it at the current moment is that most, indeed probably all, of the elements of the Human Rights Act which overlap with business relate to workplace issues: health and safety in the workplace, employment legislation, discrimination and so on. In that sense our view is that the issues are already covered. We have been consulted by the Ministry of Justice on the questionnaire that they put out to business and we will see what response that questionnaire gets. Our view on guidance would relate to what I have just said in terms of the overlap issues because the CBI itself does provide guidance to its members on things like discrimination, employment legislation, health and

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safety issues, as do other sectoral bodies. We think there is quite a lot of industry-based guidance out there. Whether there would be the need for the Government to provide guidance, we are unclear. As a general principle, the more guidance that is out there, the more sources that are authoritative that businesses can go to to make sure that they can put in place the right sort of procedures, the more it would make sense.

Q133 Mr Sharma: Do you have any view on the Ministry of Justice Private Sector and Human Rights Project?

Mr Campkin: We encourage anything which shines light on and adds to the common knowledge of, that nexus between business and human rights. It is an emerging area; it is one where things have moved on quite significantly over the past ten years. The important thing with the Ministry of Justice project however is to recognise that it is domestically focused and there are other parts of Government that deal with some of the overseas dynamics. Equally important is to make sure that there is policy coherence within Government and make sure there is a joined-up approach across Government when the various parts of Government which are looking at elements of it come together.

Q134 Chairman: You have already said that your view is that labour standards, employment rights, health and safety are human rights issues. Do you think it is generally accepted amongst UK businesses that these are human rights issues or that there are some other rights which are not in that category?

Mr Campkin: I think the answer is yes and no. Part of the interesting response when we get to look at the Ministry of Justice questionnaire analysis is whether businesses themselves recognise all the things they are doing in the human rights arena. A lot of them do it because it is workplace discrimination for example you and they do that because that is what they think is right. If you ask them whether they comply with human rights obligations, you might get a slightly different answer. What I am grappling towards in terms of perhaps the most effective response is that there is a knowledge or education gap. This reflects some of the way which we have come over the past ten years in bringing these things together.

Q135 Lord Dubs: In giving evidence to us Professor Ruggie referred frequently to the concept of due diligence. He highlighted the difficulty in assessing company statements on respect for human rights without effective due diligence. How does the CBI approach the concept of due diligence?

Mr Campkin: The best way to look at due diligence is to look at it in the language of business which is about risk management. The sorts of questions we would ask our members if we have a dialogue with them about this is whether they have a human rights policy, whether they have considered what a human rights policy would mean, whether they have identified the sort of relevant issues that they might need to cover in any such policy, whether they have

looked at drawing down on tools or impact studies and so on to make sure that there is a connection between what they want to do and how it impacts in reality. It is also important that human rights are championed at the highest level within the business, so it needs to be part and parcel of the overall ethos of the business. Lastly, there is an element related to tracking measurement and performance because these things are not static: they do change over time. That seems to us to be something approaching a due diligence package and the other element which it is important to recognise is that the background to a lot of this work is the relationship to company reputation, corporate reputation, social licence to operate and indeed continuing to run sustainable business. Sustainability is very much a watchword these days but it is equally applicable to business as it is to other areas.

Q136 Lord Dubs: Do you give advice and guidance to this effect to all your members as a matter of course or only if they ask you?

Mr Campkin: No, we try as a business organisation not only to respond to members' questions but also to put out issues in front of the members where we believe it would be helpful or to keep them up to date with the most recent developments. They will have seen all of our submissions to parliamentary committees, including this one. They will have seen the submissions we have made to Professor Ruggie's work and so on. We try to keep them updated in terms of what is going on and the sorts of issues they need to think about and then we are available for follow-up.

Q137 Lord Dubs: So none of your members could plead ignorance as an excuse if they did not practise due diligence.

Mr Campkin: I would be quite frankly surprised if too many of my members were not aware of the need to undertake due diligence because it is part of the language of business, it is part of risk management and we will do our best to help ensure that they can do the sort of job they want to do.

Q138 Lord Dubs: There may be some companies which do not, despite your best efforts. How do you think all companies can be encouraged to undertake effective due diligence? Do we need to have some form of regulation either by the national government or internationally to compel companies to take such action?

Mr Campkin: In some senses this is perhaps verging on mixing state duty and corporate responsibility. One needs to be particularly careful about going down that route. Professor Ruggie said that companies cannot be expected to be responsible for the human rights' impacts of all the entities with which they have some sort of interaction or influence. If I look at some of the work he has put out, sphere of influence, for example. If I might use that one to illustrate the point, for some time sphere of influence was seen as the way forward in dealing with some of these issues. What Professor Ruggie says, and it is extremely valid, is that it is probably

better to look at it in terms of sphere of impact because there are some circumstances in which a company obviously does not have that sort of influence or cannot exert the influence in the way that seems apparent from the outset. In answer to your question, it is a difficult one and one needs to be quite careful about how one goes down that route.

Q139 Earl of Onslow: Amnesty and some others have commented that there is no overall policy for human rights and business where it crosses government boundaries and there is no joined-up strategy on business and human rights. Do you agree? If you do agree, what should an effective UK Government strategy be in your view?

Mr Campkin: As I indicated earlier, we are all in favour of a joined-up strategy. However, it is important that each government department looks at the areas for which it is responsible. In a sense, at the moment, it is particularly important to ensure that what they do reflects and enhances the sort of things that Professor Ruggie has put out in his framework. One thing which I do think is important and which quite often does not get enough attention is that there is a lot of focus on complaints about business and we ourselves have said that governance gaps are important. One of the things which is often missed out in this joined-upness is linking significant amounts of aid money which comes from both the United Kingdom and indeed through the EU to build up institutions in developing and emerging economies, to strengthen them related to the rule of law, good governance and so on. If you can get that right, help governments to meet their obligations, then a lot of the criticisms related to business may indeed not be valid any more because we have stronger legal systems in some of these jurisdictions.

Q140 Earl of Onslow: The Chairman asked you just slightly earlier on whether you felt that health and safety was a human right and you said that you did. Obviously in some of these overseas countries things like that are distinctly ropery compared with what we would regard as even the basic minimum here. How should a policy be joined up between government departments and the CBI on that particular part of lack of cover for human rights?

Mr Campkin: The point of departure has to be that a business will comply with the laws of the jurisdiction within which it operates. That has to be the point of departure. Above and beyond that what companies will want to do is to make sure that as far as possible they have codes of conduct, codes of operation put in place, in this case health and safety rules and regulations which relate to the sort of standards that they would wish to pursue based on the internationally accepted standards that I was talking about in answer to a previous question. If you are looking, for example, at aid money, it is not inconceivable that some of the aid money can be directed towards helping to raise those sorts of standards in country; indeed I know some DFID programmes are directed towards doing that. We would like to see more of the EU aid budget directed towards those sorts of issues as well.

Q141 John Austin: I think the CBI have agreed with Ruggie not only that the principal duty lies with states but that businesses also have a responsibility, but the CBI have been somewhat critical of the suggestions that Member States should really change their policies in relation to protecting human rights in their overseas operations. Would you like to comment on that?

Mr Campkin: If you are looking at state duty, the state as the primary duty bearer has within its own jurisdictions to undertake the obligations which are placed upon it. When you begin to look at the home host country dynamic, one of the areas that you get into which does cause business some concern is extraterritoriality and the extraterritorial jurisdiction perspective. As we said in our written evidence, business does not feel comfortable with the extraterritorial application of legislation for the reasons we explained but it is important to look at ways to explore the home host state nexus: indeed I am aware that he is undertaking some more work on that as part of this part of his mandate. We will contribute to that but we do have some reservations about going too far down that route, as indeed I think he has too.

Q142 John Austin: Do you think businesses would benefit from clear home state guidance on what is expected of businesses who operate in countries where their operations impact on human rights?

Mr Campkin: There is a strong case for good effective guidance. If what you were moving towards was some new sort of legislation with extraterritorial extent, then we would have a problem.

Q143 John Austin: Does the UK currently provide the guidance that you think would be acceptable?

Mr Campkin: It is there. A number of departments do so. If you go to the Foreign Office you can get some basic guidance and indeed if you go to some of the posts and talk to the ambassadors you can get help and guidance in post. The Department for Business obviously provides guidance, not just as the Department for Business but through the OECD National Contact Point. There is a range of places where you can go to get guidance but things can always be done better and that is an area which probably merits a little more attention.

Q144 John Austin: Would you be totally opposed to extraterritorial jurisdiction?

Mr Campkin: Yes, in this context.

Q145 Lord Dubs: May I just turn to the Companies Act? When Parliament debated the 2006 Companies Act some amendments were proposed and the Government undertook to review these provisions. I think you will be familiar with that. What does the CBI think about the prospect of enhancing the reporting requirements in the Companies Act to include requirements to provide more specific information on human rights impacts and policies in annual reports? Would you not agree this would increase transparency for investors?

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Mr Campkin: The Companies Act 2006, which the CBI supported, did include language that related to materiality. It is perfectly possible to argue that some of the issues that this Committee is contemplating on human rights would constitute material information in terms of that business review statement. Our assessment at the moment is probably that the Companies Act, in terms of the materiality dynamic, does cover the issue that you are looking at.

Q146 Lord Dubs: Is that understood by all the companies we are talking about?

Mr Campkin: In terms of compliance with the Act as it is written, yes, it probably is.

Q147 Lord Dubs: Can we just turn to the Stock Exchange? Do you think the Stock Exchange listing rules could and should be used to regulate human rights conduct by firms, for example requiring firms which have committed or are complicit in human rights abuses to be de-listed?

Mr Campkin: This is a question where, with your permission Chairman, I would prefer to come back to you in writing. We do not have a particular view at this time. If you would like us to respond in writing, we are happy to do that, but at this moment we do not have a particular answer.

Chairman: We will have a memo from you on that.

Q148 Earl of Onslow: What role should public procurement play, if any, in the business and human rights debate? Should companies which are found to be acting incompatibly with any public commitment to human rights, for example through the UN OECD guidelines, be excluded from government contracts?

Mr Campkin: It is an issue which needs further consideration. As you will know, in the other committee in which we have met, there are some concerns about the EU Procurement Directive and being debarred. There is concern from business, not about the debarment per se but the fact that it is in effect for ever and ever. What that does is not to allow a company—to go back to the good practice/bad experience—that has changed that has altered its practices and procedures to then continue to bid for EU procurement. There are issues surrounding this subject but some of them are quite complicated. Just to say a company should be barred because it has done X at a moment in time is not the whole story.

Q149 Earl of Onslow: What the other committee, on which you and I have met, has shown beyond peradventure is the more people cooperate, in that case in making bribery illegal, the less room there is for others to wiggle through. The more people sign up to behaving decently and making sure that human rights are maintained, the less room there is to wiggle through, but that in turn needs state backing, does it not?

Mr Campkin: There are certainly issues which need to be looked at there. There are some difficult areas, depending for example on whose human rights are recognised, what the human rights are. We hear a lot from some of our counterpart organisations in the

developing world that this is just protectionism through the back door and that we are trying to limit their development by imposing these sorts of standards and so on.

Q150 Chairman: Let us take a hypothetical example. Let us suppose one of the councils in London was to put out a contract for new uniforms for its refuse collectors or its street sweepers and it turns out that one of the contractors bidding for it had been found—and it had put its hands up for it—to be employing child labour in the third world to make clothing of a sort that the contract is for. Is it not appropriate for the Council to say they do not want anything to do with that, that they should not be having clothing made by child labour on the backs of their street sweepers?

Mr Campkin: My own personal view is that yes, it is, although, as you will know again, there are issues surrounding child labour which are particularly difficult in terms of the alternatives of not providing some sort of household income in certain circumstances. The reality is that in the example, in the way you have just given it, my own personal view would be as you have indicated.

Q151 Chairman: Why should the council not be able to exclude them from the bidding process?

Mr Campkin: If they set the rules of the bidding in those terms, I do not see a particular problem.

Q152 Chairman: So it would be all right by you if the council were to say they would expect any company bidding for one of their contracts to satisfy them that they had a decent human rights record as far as their operations in the Far East were concerned.

Mr Campkin: You specifically used the example of child labour. If the contract specified there would be no child labour in the delivery of the uniforms, personally I would not have a problem with that.

Q153 Chairman: What happens if it has a reputation based on child labour for making uniforms for a different local authority and now it is bidding for this one?

Mr Campkin: You said “has a reputation”. This is again where these issues begin to get quite difficult.

Q154 Chairman: There are examples where newspapers have gone out to the Far East, they have done an inquiry, they have found a particular company has child labour in its factory, the company has said “Yes, we’ll try to sort it out” and they have done it more than once.

Mr Campkin: “Try to sort it out”?

Q155 Chairman: Yes; and they have done it more than once.

Mr Campkin: Hypothetically one would hope that the company would have the sorts of controls in place to avoid that happening but supply chain dynamics can often get quite difficult.

Q156 Earl of Onslow: May I interrupt you on that? You said the company should have controls to make sure that was not happening. Can you elaborate on that? That is saying they should have controls for people further down the supply chain, in other words not necessarily for company A but company A who might subcontract to company B. So the person whom the Chairman quite rightly draws attention to, who is supplying clothes derived from child labour, the company with whom he has a contract may have a sub-contractor down the road. How do we deal with that problem?

Mr Campkin: To be frank, I do not have an answer to that. The reality is that in doing business today supply chain dynamics can get extremely complicated.

Q157 Chairman: Is this not just a question of due diligence, of trying to shorten the supply chain and to narrow the numbers of ultimate suppliers?

Mr Campkin: That is what some companies have chosen to do. There may well be implications for some domestic companies in some of these countries if companies do that because they are concentrating work in very narrow areas. The other issue is to what extent you can be expected to have control in certain circumstances, you can put in place contracts with suppliers, you can expect your suppliers to have certain requirements of the people they subcontract to, but if it then goes right the way down the supply chain to the individuals working from home, that is often quite difficult to verify and keep track of.

Q158 John Austin: We have talked about the public procurement side but what about other public support for private trade. John Ruggie has suggested that the UN OECD Guidelines might be enhanced by linking them to public support or access to export credit guarantees. What do you feel about that kind of stick as opposed to other pressure?

Mr Campkin: My understanding is that ECGD already takes the OECD Guidelines into account so in a sense in the UK they are already there. If you go into the ECGD website you will find a reference and a link to the OECD Guidelines so to some extent it is already being done in this country.

Q159 John Austin: So you would agree with that.

Mr Campkin: My members do not feel uncomfortable with that.

Q160 John Austin: What about other forms of public support, maybe consular services or UK missions overseas, UK Trade International? Should they withhold their services from a company which appears to be trampling on human rights?

Mr Campkin: Again, if I may respond in terms of “appears to be trampling on human rights”, that is quite an imprecise set of circumstances, if I may say so. Anybody can throw an allegation at a company and if you took that sort of dynamic, then all sorts of government support should be withheld.

Q161 John Austin: Would you accept that there are less extreme examples than the child labour one to which the Chairman referred? There are various other degrees of abuse of human rights?

Mr Campkin: What tends to happen in my experience with UKTI staff and indeed Foreign Office staff serving abroad is that they have been sensitised to the issues. The Foreign Office is working on new guidance to posts on how to deal with companies in these circumstances. Quite clearly what one would expect is for officials to take account of that advice in their dealings with business

Q162 John Austin: May I go back to the public procurement again? We were talking about contract compliance and putting restrictions or conditions in contracts. I think you said “If it was in the contract”. So the CBI would not be crying foul about restrictions on trade and competition if public bodies sought to enforce human rights through contract compliance?

Mr Campkin: Personally I do not have an issue with that, but if you would like a formal response to that question, we can provide that in writing.

Q163 Mr Sharma: If the UK were to take action, do you think that this is something that could be done domestically or should the Government lobby for minimum standards across the EU?

Mr Campkin: One of the things one always needs to be careful about is the relationship to UK companies’ competitiveness. That is not to say that we downgrade human rights or we downgrade anti-bribery or what have you, but it has to be done in a way which is principled but also not put British companies at a disadvantage. We are aware of renewed focus and attention at the EU level and we have made some representations at the EU level about how they can best support the Ruggie process. I come back to that as an important theme. We are at a place where there is significant momentum behind the business and human rights debate focused on John Ruggie’s work. I would not want to see the UK or indeed the EU do anything which makes that process more difficult. If it enhances John Ruggie’s work, if it adds to that process, then it makes sense and certainly in terms of the competitiveness point, if there is some coherence at EU level, that would also make sense within the nature of the new treaties and competence.

Q164 Earl of Onslow: Some witnesses have criticised the NCP and OECD mechanism in the UK. They call for independence from Government, greater investigatory powers and the power to impose penalties. What does the CBI think about these criticisms and proposals? What would their effect on OECD guidelines be?

Mr Campkin: I ought to declare a double interest here, if I may Chairman. One is that I am the business external member on the UK NCP Steering Board; I am also chairman of the Business and Industry Advisory Committee to the OECD’s Investment Committee under whose remit—

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Q165 Chairman: You are qualified to answer then.

Mr Campkin: There is a very active debate about a potential review or update of the Guidelines. Indeed, the OECD ministerial council at its meeting on 24 and 25 June said in its conclusions “We will continue to promote corporate social responsibility and welcome further consultation on the updating of the Guidelines to increase their relevance and clarify private sector responsibilities”. What that means in my view is that we will now see an intergovernmental process which will lead to a first stab at thinking what a review or update might encompass in the autumn and I would expect that intergovernmental process to come to some sort of decision round about this time next year for a fairly rapid review or update process. That is right. Since the last revision of the Guidelines the world has moved on significantly and it is right that the Guidelines be updated to respond to the way that the world has moved on. I do not have a mandate from my members at the moment in terms of what we would expect to see, but if I might proffer a personal opinion, obviously the Guidelines would need to react to and reflect John Ruggie’s work. The environment is another chapter where things have moved on significantly and I would also acknowledge that there have been some concerns about the way in which some NCPs have operated, even given the OECD principle of functional equivalence. There is quite a lot there which could be done within a potential review.

Q166 Earl of Onslow: From all the answers that you have given, I rather gather the impression that you recognise that there is possibly a problem. However, I do not get the impression that you regard it as ultra urgent or that it needs a big boot behind it. Would I be right in that?

Mr Campkin: I am not sure what you are getting at. What we have done is to say quite clearly—and I hope I have done so today—that there are issues which need to be addressed, that we have come a long way, particularly over the time of the Ruggie mandate. The Ruggie mandate has another two years to go: the OECD Guidelines and the NCP process are intergovernmental and you will know as well as I do that these things do not happen in a matter of weeks. What I can do is tell you that business is absolutely supportive of the Ruggie process and I am pretty certain we will support a good review of the Guidelines.

Earl of Onslow: I hope I am not being unfair, but I am afraid that I definitely have got that impression.

Q167 Mr Timpson: A number of witnesses to this inquiry have given some enthusiasm and support to the idea of the establishment of a UK commission for business, the environment and human rights which would on the face of it seem to have two primary roles and powers. One is an area we have already touched on which is in terms of the power of coordination and policy guidance and I know we have dealt with some issues around that; more crucially, around dispute resolution, that

commission would be able to adjudicate on complaints against the conduct of UK companies abroad. What is your view about that suggestion?

Mr Campkin: This is primarily the CORE suggestion you are referring to.

Q168 Mr Timpson: The LSE as well.

Mr Campkin: We were not consulted on the suggestion, so all I have seen is what is actually in the evidence which was presented to this Committee. I think it needs a lot more thought. I think it needs a lot more thinking through exactly how it might operate. One issue, for example, the extraterritorial dimension, would give us some concern, in the way that I have read the document. One would need to make sure that anything which is done in this country is in lockstep with the Ruggie process and make sure that it reflects and does not undermine, or take away from what John Ruggie is trying to achieve. We are certainly able and willing to dialogue with CORE and others, but we do need to get a lot more detail on precisely what they have in mind and indeed how it might work.

Q169 Mr Timpson: You have already articulated, both in your written submission and also in your evidence today, your opposition to the exercise of extraterritorial jurisdiction by the UK over allegations of human rights by UK companies overseas. I wonder now, in the spirit of hopefully open dialogue which you are now going to have with these NGOs who have put forward the suggestion I have given to you, whether you will be able to put forward your own suggestions as to how we can improve the access to remedies for victims of human rights violations in which UK companies are alleged to be complicit. Perhaps I could ask you what your suggestion would be to them and how that could be improved.

Mr Campkin: I should just perhaps, if I may, correct one thing you have said and that is that we do have quite an active dialogue with NGOs and with trades unions on a range of issues. We see that as quite a rich dialogue. We do not always agree but we do have that dialogue and it is important that we do. Our suggestion, in terms of this area, is to go back to John Ruggie’s work because there is an active stream under the access-to-remedies part of the framework which is designed to do precisely that. What Professor Ruggie’s view is in essence, which is one with which business would agree, is that the access to remedies should best take place in the locations where allegations of abuse happen. There is a number of ways that can be strengthened and helped along.

Q170 Chairman: That is not realistic in a lot of places we are talking about, is it? If you look at the case which has just been settled in New York between Shell and the Wiwa family over the Nigeria allegations, there is no way that case was ever going to be heard in Nigeria given the nature of the Nigerian Government, the allegations of complicity between Shell and the Nigerian Government, the lack of independence of the Nigerian courts. In the

end what brought that case to a conclusion was the Alien Tort Claims Act in America. It is not realistic to look at some of the countries particularly where extractive industries are working, developing world countries which do not have established democracies, do not have independence of the courts, do not have very strong standards, and expect them to have a remedy there. It is bizarre that Shell ends up in a Federal Court in New York. Would it not be better for Shell, if it is going to have to face those charges, to face them in the UK? We have seen the argument over the right jurisdiction for the asbestos claims from South Africa which eventually ended up in the UK courts after a huge battle. Is it not better that these allegations involving UK companies are tried in the UK rather than the US's extraterritorial jurisdiction where they can haul anybody in?

Mr Campkin: The Supreme Court has quite severely restricted the application of the Alien Tort Claims Act.

Q171 Chairman: We are only talking about severe abuses of human rights. There is no argument about minor problems. In the Shell case we are talking about some very serious allegations indeed, about complicity with people getting executed. The case was settled without an admission but that is a pretty serious abuse of human rights, is it not?

Mr Campkin: I am not going to comment on that particular case other than to say that Shell, in their public statements, made it quite clear that they had made a settlement without any admission of the charges. So we need to be clear. We also need to be clear that under the Alien Tort Claims Act no case involving business has yet gone to trial. All we have seen to date is the Supreme Court narrowly constricting the ability of the Act to be applied. It goes back to something I was saying earlier on about governance and rule of law. Yes, I see the validity of your point, but surely what we all need to be doing is to be looking at ways of enhancing good governance, enhancing the rule of law in these countries. That is the most effective way of dealing with some of those issues.

Q172 Chairman: Of course. No-one would argue that the important thing is to try to raise standards across the world. I am sure you would agree that UK companies ought to be setting a good example in their operations overseas, in particular in developing countries, but things do go wrong. What remedy is there for people who are on the receiving end of severe human rights abuses? I am not talking about little things but major human rights abuses like the sorts of things we have seen in some of the Alien Tort Claims Act cases in America? What remedy is available to them other than to sue in America? That is the point. The domestic remedies do not work, the courts are not independent, the Government there will be complicit in what is going on anyway. What is the problem about having a remedy in the UK against UK companies? After all British flagship

companies are effectively seen in the outside world as part of Britain; they are part of our international reputation.

Mr Campkin: That is right and I am pleased to say that most British companies have a good human rights record, have a good reputation and add to the reputation of the United Kingdom.

Q173 Chairman: That is not the point, is it? The point is that things do go wrong. We have seen this in other spheres of interest. Things do go wrong and the test is not whether something goes wrong or not, the test is whether you have mechanisms in place to make things right so far as you can through acting on the complaint.

Mr Campkin: Which is exactly what John Ruggie is trying to do with his framework and exactly why we are so supportive of it.

Q174 Earl of Onslow: If you have your Shell case it makes it much, much harder for a UK company not to look after and behave properly if it knows that my learned friends back in the Strand are going to come and jump on it. They cannot just use the excuse that it is the Nigerian Government or it is this government or that government which made them do it. They know that their back is very unprotected and properly on a policy point of view make sure they do not behave like that.

Mr Campkin: I would again go back to the state duty and the fact that the international community, working with NGOs, working with business, needs to find ways of filling those governance gaps.

Q175 Lord Dubs: May I say yes, in an ideal world? When you get governments like Burma, no amount of outside pressure is going to make Burma behave. We were told of at least one major international company which chose not to have any operations in the United States because they feared they would be charged under the Alien Tort Claims Act for being complicit in using slave labour for their operations in Burma. Without some legislation, there is nothing that can be done about that. The fact that the company mentioned to us does not have an operation in the United States is a sign that at least the sanction of the Alien Tort Claims Act is working. It is not bringing them to justice, but at least they do not have operations in North America.

Mr Campkin: If one is looking at sanctions against regimes like Burma, there are two important things to bear in mind.

Q176 Lord Dubs: It is not sanctions against regimes; it is sanctions against companies which are complicit in those regimes.

Mr Campkin: Yes, I take your point but I was trying to grapple towards a point which is that if the international community feels that the situation in Burma is so bad that sanctions ought to be applied, then it ought to move through accepted international routes to apply sanctions which ensure that companies cannot do business in a jurisdiction.

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Q177 Chairman: Suppose we are not in that position. It could be any country; it does not have to be Burma. Let us suppose that there is a country which has an appallingly bad human rights record, a British company wants to invest in that country, but that does not mean to say that it itself will have a bad human rights record because it could apply decent standards, but what happens if it does not? That is the question. What is the remedy for the people in Burma, or wherever it happens to be, if that company does employ slave labour? It cannot sue in Burma, can it?

Mr Campkin: I am not an expert on Burmese law but I think it would be very difficult. I go back to John Ruggie's framework and the access-to-remedies issues there. A lot of work is being done there; a lot of work is being done in terms of home host dynamics. There have been recent discussions to explore some of those issues.

Q178 Chairman: What is the CBI's submission to Ruggie on this issue of remedies? If that is the point he is consulting on now, what are you saying the remedies should be?

Mr Campkin: We have said that access to remedies is an important part of this issue and access to remedies can take a number of avenues—

Q179 Chairman: What is the meat?

Mr Campkin:—some of which are judicial, some of which are non-judicial. We would have concerns about extraterritoriality for reasons which I think are self-evident and which we explain in our submission. There are, over and above that, some areas which can be explored and we think the Ruggie work is going to be providing the framework to be taken forward.

Q180 Chairman: You are saying what you do not like, which is extraterritoriality. You have said that in your view the remedy has to be in the host country. What happens if the host country does not have a realistic remedy, as in the examples we have described. What do you want if you do not want extraterritoriality?

Mr Campkin: If you are talking about the most egregious violations of human rights—

Q181 Chairman: We are talking about the serious one.

Mr Campkin: If you are talking about the most egregious violations of human rights we would again agree with Professor Ruggie that the current international dynamics would allow for those issues to be brought up.

Q182 Chairman: Where?

Mr Campkin: He has said that there is a dynamic which relates to the way in which companies, if there is a control dynamic . . . but again it goes back to issues related to control and what you can expect a company to do in relation to that control. You need to have a nexus back in to enable the legal remedies to work.

Q183 Chairman: Where is the remedy? Where is the remedy?

Mr Campkin: If you want a more considered answer, then I had better suggest that we try to provide a written response.

Q184 Earl of Onslow: May I help on this? Let us take the case of company A which sets up a business in Burabia—we will call the country that—and the people are paid extraordinarily badly, they are abused. The factory is extremely unsafe and burns down and a lot of people get killed. I am quite deliberately taking a seriously bad example. Are you saying that when a UK company had indulged in that practice overseas those people should have no recourse in the English courts, they should not be able to get some redress? That seems to me to be what you are saying and I do not like it.

Mr Campkin: A UK company?

Q185 Earl of Onslow: Yes.

Mr Campkin: If there is some sort of nexus, if there is a linkage back to a UK parent, then my understanding—please correct me if I am wrong—is that there would be a possibility of pursuing them in the English courts.

Q186 Chairman: So that is a form of extraterritoriality that you would agree with.

Mr Campkin: It is a dynamic related to extraterritoriality, as we said in our evidence, where there is a substantive link between the example that Lord Onslow gave and the company.

Q187 Chairman: This is the problem, is it not? This is the problem that the Alien Tort Claims Act got over, which is how to establish the link between the parent company and the subsidiary and the subsidiary of a subsidiary when everybody knows that realistically it is all the same company but they are hiding behind a corporate veil. How do we lift the corporate veil to achieve that objective which is the just and fair objective for the victims of that company's misdemeanours?

Mr Campkin: The Alien Tort Claims Act of course goes back to the carriage of ambassadors and piracy, not necessarily corporates.

Q188 Chairman: Corporate pirates.

Mr Campkin: If the Committee would like us to put something in writing, we will try to do so.

Q189 Chairman: That would be very helpful. We have finished our questions. Is there anything else you would like to add to what you have had to say to us?

Mr Campkin: No Chairman, other than to reinforce the fact that the CBI and British business continues to be supportive of examinations of the business and human rights issue and particularly we will be

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looking to Professor Ruggie and his work to take that debate forward and hopefully, within the next two years, have some good answers for us.

Chairman: Thank you very much. We will adjourn for a couple of minutes while we switch our interview panel over.

Witnesses: **Sir Brian Fall**, Senior Government and Corporate Relations Consultant, Rio Tinto, **Paul Lister**, Director of Legal Services and Company Secretary, Associated British Foods plc, **Lucy Neville-Rolfe CMG**, Executive Director, Corporate and Legal Affairs, Tesco plc and **Steve Westwell**, Group Chief of Staff, BP plc, gave evidence.

Q190 Chairman: We will resume our hearing. Welcome to our four witnesses. We have Sir Brian Fall, who is Senior Government and Corporate Relations Consultant for Rio Tinto. We have Paul Lister who is Director of Legal Services and Company Secretary for Associated British Foods who are the parent company of Primark. We have Lucy Neville-Rolfe, Executive Director, Corporate and Legal Affairs of Tesco and Steve Westwell who is Group Chief of Staff for BP. Welcome to all four of you. Does anybody want to make any opening remarks before we get going? Okay. Perhaps we can make a start with a question to all of you. We will start with Paul and then work along from left to right. Professor Ruggie said that the moral or social responsibility of business to respect the human rights of others is near universally accepted. I hope you will all agree with that. He also said that there is a distinction between what is required by that duty to respect human rights and corporate philanthropy over and above what is necessary to respect those fundamental human rights. Can you tell us what you understand the responsibility on business to respect human rights requires you to do?

Mr Lister: As a starting point, I have been hearing the CBI presentation as well and we would agree that compliance with local law which deals with human rights has to be the initial starting point. On top of that, where those laws are not adequately enforced or are not clear, then we would put an overlay of good practice relating to those issues which we believe are important on those laws to ensure that back in the UK there is a general understanding of the basics which are enforceable in those countries.

Mr Westwell: We acknowledge Professor Ruggie's point that in the conduct of our business we must always have regard to the human rights impacts of activities. We also recognise that our operations do bring about major change to the societies and communities in which we operate. Particularly in developing countries some of these are positive, that is we provide employment and opportunity, and some could be negative. We may have to relocate people who are located where we want to put our plants. A lot of these impacts therefore are directly related to human rights in their widest context, so we have put human rights and respect for human rights, adherence to the principles of human rights, into the heart of our risk management of the group; not separate to but in the heart of our corporate risk management. We categorise them under three: we have employees where we are committed to creating a safe work environment based on mutual trust. Everyone who works for BP is fairly treated without

discrimination. We seek to work in good faith with trade unions and other bodies. In communities we need to understand the social and economic impact of operations, including human rights, through proactive risk management and obviously security, the security of our facilities, the security of our assets and people. In the provision of that security we need to be very careful that we do not infringe the human rights of the communities in which we operate. We recognise John Ruggie's statement. We put human rights at the heart of our risk management process.

Ms Neville-Rolfe: I agree with a lot of what others have said. I suppose that in our people and the way we operate our supply chains at Tesco we reflect our commitment to maintaining human rights and our support for the ILO core conventions. We do that in two ways really. One is through our core values: we have a values statement for the business, which is about treating people with respect and in the right way. We arrange our strategy now so that we have a section of our strategy and targets around the community plan and another section which deals with people, so it is core to the business. In our supply chain, we work with the principles which are actually embraced in the ETI, the Ethical Trading Initiative, which I am sure others will have talked to you about, so that labour standards and human rights are part of the supply chain because we are conscious that we are buying in lots of countries of the world in addition to those in which we operate. A final point is that we try to use features like staff surveys and supplier surveys so that we are getting feedback into the business, so that we can understand how what we do is impacting in the wider world and how people feel about that. Like others we have normal risk assessment processes, audit committees which look at things like the results of whistle-blowing provisions and so on. The way things get absorbed into a company like ours is quite complicated but the thing I want to emphasise is that there are several strands to the work.

Sir Brian Fall: I would agree in general with what colleagues have said and with the CBI presentation. We find that the Ruggie framework has been extremely helpful in reinforcing what people generally have accepted, that the primary duty is the duty of governments but there was a tendency perhaps to regard the other side of that coin as being that it was nothing to do with business. Nobody argues that any more, certainly not the companies you have here or the members of the CBI. The responsibility of the company is not to replace government, to act as a government and Ruggie again, we think, has the protect-and-respect

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framework which illustrates the different responsibilities rather well. In the case of Rio Tinto, we start off with the “do no harm” due diligence in order to make sure you are not undermining the human rights of others, which is broadly the Ruggie definition. We translate that into guidance on human rights for all our operations around the world and our internal control questionnaire, which is the basic mechanism for making sure that operations are doing what they should, includes human rights questions just as much as paying tax questions and the old-fashioned core responsibilities of a company. It is not human rights as a sort of coffee table add-on to our basic accounting, internal control mechanisms. They are all part of the same set of questions. We had a consultant look at them the other day. He came up with the fact that there were 35 different questions in the annual questionnaire which were human rights related and should that not prove enough, we have a confidential whistle-blowing system which we think would alert us to any human rights problems which had not been fed through in the normal channel. That is the way we try to keep an eye on it.

Q191 Chairman: One of the problems with this is that there are no internationally agreed norms and standards. How do you decide in business what standards you have to meet when there is no clear set of international guidelines, whether set by Ruggie, or the UN or anybody else? There are no clear standards, so how do you decide what are the requirements, the minimum requirements, that extra philanthropic point I mentioned earlier on. Where has the benchmarking come from?

Sir Brian Fall: The benchmarks vary a bit from area to area.

Q192 Chairman: “Area” in the sense of industry or geography?

Sir Brian Fall: Labour law. The core standards there would be the crucial conventions of the International Labour Organisation, so there is quite a degree of clarity. For non-bribery you would look for the codes and the OECD convention. For crimes against humanity and war crimes, that is very well documented as well.

Q193 Chairman: Environmental impact from the extractive industries on communities.

Sir Brian Fall: As Gary Campkin was saying, let us talk about good practice rather than best practice. In the mining industry everybody knows what good practice is and the International Council on Mining and Metals, ICMM, is there precisely in order to make sure that good practice is widely circulated. Any major company which said they did not know what the rules were or what they were meant to be doing, should be taken with a pinch of salt. Questions you were asking earlier about SMEs are quite active because there is a huge bureaucratic business which helps feed examples of good practice around the major companies and it is not always easy to translate that one level down. Transparency International, for instance, have very recently

produced a version of the business principles for countering bribery specifically tailored to SMEs. The trick is to do that in a way which helps and does not sound terribly condescending. I think they have managed that, but it is something which needs to be watched.

Q194 Chairman: A question now for Lucy on behalf of Tesco and Steve on behalf of BP. You have said you support a voluntary approach to business managing human rights impact and you told us that in your experience such measures are necessary. Can you give us an example of any changes, triggers, which have come out of your work on the voluntary side to implement change?

Mr Westwell: I will give a specific example of a voluntary process we are actually involved in, which is the EITI, the extractive industries’ voluntary process. Where does the issue of lack of transparency in flows of funds associated with the extractive industry cross over into corruption and how could you get sufficient transparency of all the exchanges of funds, where they were going, where they had been utilised? After many years of a logjam, this debate was going nowhere as to how we could get more transparency into our business. We had a particular experience in Angola where we voluntarily and openly disclosed payments to the Angolan Government and it had an unintended consequence of shutting down the Angolan Government’s desire to engage in this debate. We have found that in the voluntary process, the EITI process, we are now making significant headway and getting all the interested parties, government, business, NGOs, to participate in a process which is increasing the transparency involved in business. It takes time, it is not easy, but we are definitely seeing good progress in the EITI through a voluntary process.

Ms Neville-Rolfe: May I mention three things? The first I will mention but will not go into it because you hinted at it, is the work we have done on climate change, where we have measured our carbon footprint as a company, set ourselves challenging targets over a long timeframe and then taken steps in the business to get the carbon down. It is a very good example of voluntary practice. Now, if I may, I will talk about ethical trading. In the retail sector we are fortunate to have a quite good voluntary system called the ETI and the base code there is based on the ILO convention, so it covers things like not having child labour, living wages, freedom of association and so on. That brings together not only retailers like ourselves and others in the supply chain but the trade unions and NGOs like Oxfam. We work together to make sure that the supply base is ethical. If there are problems in the supply base then action is taken. Supporting that is something called the Supply Ethical Database Exchange where those of us who inspect a factory log that on a database which other companies can then have a look at. That is the potential, bringing in small companies which you were talking about as well as big companies. To pick up your international point, we are also involved in the Global Social Compliance

Programme which brings together not only UK retailers but also international retailers like Carrefour, Walmart and people like Hewlett Packard, to take forward voluntary standards together. If you get a problem in the supply chain in one retailer, that actually affects customer perceptions of other retailers as well. In a sense we all have an interest in having a really good and ethical system. That is a voluntary system. Within that voluntary system you have to take steps and you have to audit and have a proper system of audit and as a company we have a three-tier approach: risk assessment, check everybody before we take goods from them; audits in agreement, semi-announced audits, which are just within a month and then unannounced audits as well. So there is a high degree of compliance but the culture is just as important as the checking and the compliance, which is why things like the ETI are important.

Q195 Chairman: So you do not see the ETI as a PR exercise. You actually think it achieves something.

Ms Neville-Rolfe: It certainly achieves something and it has helped us. It has problems, but over the last 15 years in which we have been involved—we were founder members—the standards both in Tesco and in other retailers who have been involved in that have gone up. They do a certain amount of checking with independent auditors as well. The framework is a good one and it encourages a good degree of challenge and debate between those involved, including DFID, because they are the backdrop to the ETI. I will not talk about my third example but it is Uzbek cotton where we have stopped taking cotton or cotton products because the Government have sadly organised enforced child labour. In September every year they take the children out of the schools for two months so that they can help in the agricultural production method. We do not think this is right so we have taken steps not to take cotton from that area and that is again voluntary action.

Q196 Chairman: Just on that particular point of Uzbek cotton, is that something you have done voluntarily?

Ms Neville-Rolfe: Yes.

Q197 Chairman: Or is it something you have done because the US have imposed an embargo on Uzbek cotton under their customs rules because of the child labour? You could not export to the US anything that contained Uzbek cotton.

Ms Neville-Rolfe: It is nothing to do with that. We have a few stores in the US, but they are grocery stores; we do not import cotton into the US. I am not briefed on what the US have done, but as far as Tesco are concerned, we did it because we felt the situation was very wrong and we wanted to keep the Uzbek cotton out of our supply chain. Instead, we source it from Bangladesh and India where you can get equally good cotton to sell in our stores.

Q198 Lord Dubs: On the Uzbek cotton question, did you stop buying cotton from Uzbekistan before or after the television programme which exposed all this?

Ms Neville-Rolfe: Having not seen the television programme, I will have to come back to you on that.

Q199 Lord Dubs: But you must have known about the television programme because it was pretty widely publicised.

Ms Neville-Rolfe: I do not know when the television programme was.

Q200 Chairman: If you can check and let us know when you made the decision.

Ms Neville-Rolfe: Of course.

Q201 Chairman: It would also be quite interesting if you could let us have a memorandum on the decision-making process which led to that decision, how that process was followed through your company. That would be very interesting. While we are on the Ethical Trading Initiative perhaps I could ask Paul Lister about this on behalf of Primark. When you joined the ETI in 2006 this was just after the ethical consumer magazine graded your company as the least ethical clothing company in its annual survey for 2005. What changes have joining the ETI made to your working practices? Can you give us an example of how things have been changed for the better as a result of your ETI membership or is it a PR exercise for you?

Mr Lister: No it is not; to answer the last point first, no it is not a PR exercise. Primark had already adopted the base code; the base code represented the values Primark was already following prior to membership of the ETI. We were the first pure value fashion retailer to become members of the ETI. We felt that we had gone as far as we were going to go on our own, therefore membership of the ETI, learning from others—joining ETI was a learning process—would be valuable for taking things forward. Have we learned? Yes, we have learned a lot: sharing with other members, learning their experiences on some of the ETI committees, home workers, et cetera.

Q202 Chairman: What have you changed as a consequence of your membership of ETI compared with where you were in 2005 when you got slated?

Mr Lister: Firstly, let me deal with the specific of getting slated. That did not relate to Primark. It related to a bigger organisation, looking into environmental aspects which were not quite right and they put a retraction in at a later date. Since joining the ETI, what have we done? Clearly last year we put in place far more audits, we have appointed a new ethical trade director, we have started to audit supplies, all based on some learning and some just progress through the issue. We have appointed internal auditors; we found them to be of use in the various regions and we have looked closely at home working and the living wage and the other things the ETI looks at in determining quite what our policies could be and should be in relation to those issues.

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Q203 Chairman: How do you explain what happened more recently with the revelations about breaches of UK labour laws, including on working hours and minimum wage in your supply chain early this year?

Mr Lister: This is the TNS factory in Manchester which we are talking about. We had audited that factory with an unannounced audit in April last year. We had a corrective action plan in place, which is the correct way of doing things after the audit has taken place. We were again auditing that factory in December at the time the BBC investigative journalist was in that factory. We were taking steps in accordance with good practice to put right the issues which were in that factory, indeed the BBC investigative journalist subsequently said that she was coached on how to lie to the auditor, which just so happened to be our auditor present on that day. We were doing the right things in relation to that factory. We had identified the issues. The factory had not at that stage put right those issues and we were working with the factory to put those issues right. The programme came. Clearly the factory has moved on more quickly since the programme.

Q204 Chairman: Are you still using that supplier?

Mr Lister: Absolutely we are using the supplier. Again, we have not simply dropped the supplier. The day following the programme the Fire Brigade came to the factory, the Border Agency came to the factory, the Health and Safety Executive came to the factory and the Inland Revenue were looking at the factory. That factory has probably had more examination, external and internal, than any factory in the UK, all in a very short period of time. The factory now and looking forward, as a result of that is ironically a very good factory.

Q205 Chairman: How can your customers, if it is important to them, have any confidence that you are properly monitoring the supply chain in the Far East, say, where it is a long way from home, when you have these problems on your back door?

Mr Lister: It is a matter of the amount of work we are doing in the Far East and at home in the UK. It is a matter of the amount of work we are doing. We are planning to do 1,000 audits this year. We have taken steps in terms of appointments in the field in India, in Bangladesh, in China, we are looking at Vietnam, we have taken lots of steps in relation to that. We have done supply training and buyer training of our own buyers. We have had appointments in Primark head office. We have taken lots of actions, we are looking and then if they find something they put right those issues they find within the factories. They are third-party factories which are contracted to us who give us the rights to look at them and audit them unannounced, announced, announced over a period.

Q206 Earl of Onslow: If you had these problems, which we have all seen that you have, how was it that you missed them all? Have there been problems which you have not found which were found and put

right? In other words, have you been putting things right? It seems odd that you have had a lot of things and we do not hear the good side of it.

Mr Lister: The factory in Manchester was not representative of what goes on in Primark's supply chain; that is the first thing to say. What we had found in the factory in Manchester, and we made it public, we were transparent in what we found, was a whole host of issues, we also put in what we call our corrective action plan, which is "These are the actions that are wrong. These are the things you need to put right". We also made that public, we found the actions and we gave them a timescale to put them right. Sometimes it takes more than one supplementary audit. It can take one; it can take two. The easy thing would just be to say "Fine, we've found these issues. Let's not work with this factory any more". That is not the way we are. We work with the factory responsibly to ensure that the workers' rights, which we are trying to protect here as well, are looked at and it takes time. Sometimes it takes time, some of these issues are quite easy to put right. When we go into the developing world, we do the same thing. We have our audits; those audits will sometimes throw up major issues, sometimes throw up minor issues; it depends on the issue as to how quickly you can put those issues right. We will then look at those issues, we will set a timeframe; sometimes it is immediate, sometimes it is over a period of months. It could be a structural alteration, it could be a fire escape which is not there and we need to put it in. That takes time to put right. It depends really on the issue as to how long it takes, but when we do find issues we work with the factory and we look at the factories again. If we are appointing a supplier, we will carry that out first of all, we will look at the issues in the factory and before we place the order we will ensure that those things which need to be put right are put right. That is the commercial advantage you have before you place the order.

Q207 Chairman: Can we talk about commercial advantage here in the wider sense? First of all it is a question for the two retailers here. Do you think your customers are concerned about your human rights record? Your profits have gone up in the recession; one of the few companies that see that. What does that say? Do you think your customers are bothered?

Mr Lister: I do think our customers are bothered. We face questions from our customers and we need to be able to talk to our customers. We need our customers to shop at Primark knowing that they can rely on us doing the right thing, despite all the difficulties doing the right thing at the right time so they can come to buy their clothes ethically sourced.

Q208 Chairman: Did your customers, when the revelations came out about the factory in Manchester or the previous reports about your bad record, write to you or phone you up and say this was appalling and they were not shopping with you any more? Was there an avalanche of correspondence from the public or not very much?

Mr Lister: The first thing to say is that the customers generally recognise that Primark is doing the right thing in relation to these issues. They can see from the website, they can see externally, they can see what we are doing and they understand what we are doing. We did get some customers who questioned us long and hard about it. Primark continued to trade well during the time and continue to trade well.

Ms Neville-Rolfe: I would make a slightly different point on the customer and then perhaps say something about what we find in our business. If you look at what we call store choice determinants, actually price, value and range come out first. Pleasing the environment is quite high up. Ethical is there but I think it would be fair to say that it is probably a minority of consumers for whom this features as a really strong store price determinant. Obviously we do know that it is right and if we do the wrong thing on this, customers may change their mind and may actually be more worried about it.

Q209 Chairman: So it is a negative not a positive at the moment.

Ms Neville-Rolfe: You could put it that way, but we are obviously always looking at store choice. We want to put the customer first and do the right thing but to some extent we have to help them to make sure that we do not end up having a problem; and there has been a problem round the world with ethical standards historically over a lot of years and it is right to have taken steps in the industry to improve that. We still have some problems. In our Corporate Responsibility Report we said that in our supply chain we have 1.8 million workers this year, so a lot of workers, and we had three reported incidents of child labour and one of forced labour in the year 2008. All reports were obviously followed up immediately and steps taken. Where sadly you do get something like an instance of child labour, what the ETI encourages you to do is for the supplier to arrange for education of the child. They are offered a job when they turn 16 or whatever the working age is in the country in question. Actually using the force of that voluntarism moves things forward and changes them for the better. The other thing is cultural. The key thing is to work with suppliers and say "If you cannot do the order, tell us. Don't subcontract it to someone else. Tell us you are not going to be able to do it and then we can plan to go somewhere else". A lot of the work needed in this sort of thing around the world—there may be parallels in some of the other areas you are looking at—is to make sure people in the supply chain understand what is going to improve things.

Q210 Chairman: Ethical is going to be the new green is it?

Ms Neville-Rolfe: I do not know. Probably not yet on the store choice determinants but over time you do get a change in what consumers' perceptions are.

Q211 Chairman: Going back to the question of voluntarism versus regulation, is not one of the problems with voluntarism that you are doing due diligence and all the rest of it but if you are signed up

to these voluntary agreements—not necessarily the extractive industries because they have wider coverage—your competitors may not sign up to them and can they not undercut you as a result? Do you have anything to fear from trading conditions by you signing up to decent standards as opposed to your competitors not doing so?

Ms Neville-Rolfe: Certainly we would like to see our competitors observe minimum standards. To some extent if a company has better standards, consumers will trust them more in terms of safety and ethical standards. I was in the Government for a long time and worked on regulation. What I found was that the difficulty was, if you tried to look at what you might do to regulate, that you often had a very good intention but actually finding the right thing to do to bring about a better outcome was extremely difficult. Therefore, we tend to feel that if you work with voluntary standards they do not have the same sort of compliance costs. You can get a sort of trickle-down, which is when you do a good thing that then gets copied elsewhere, particularly in competitive markets. You can actually get more improvements. You can have people in the business spending time trying to improve things rather than having to spend all your resources on having lawyers to fight cases.

Q212 Chairman: As I understand it, you are all opposed to home state regulation for your activities overseas. Am I right in that? Does anybody support home state regulation? No; I thought I was right about that. This is the position we heard from BP. Why do you find the prospect of home state regulation objectionable when the alternative might be ending up in the courts in New York under the Alien Torts Claims Act? What is the problem for BP being held accountable in the UK court for your extracting operations in the developing world where there may not be a remedy in the courts because of the nature of the courts there, because of the nature of a rather dodgy regime? Why should you not be held accountable for serious abuses, not minor abuses, if any were alleged?

Mr Westwell: Consistent with the CBI and its speaker previously, starting with the principle that national governments are ultimately the only body accountable for local law, it is a very, very difficult issue to overcome. What we would be concerned about in this case is if we were seen to be an arm, in this case let us say, of the British Government trying to impose British law into a third party.

Q213 Chairman: Do you not think you are seen as part of Britain anyway? British Petroleum, big international company. You are one of our flagship operations.

Mr Westwell: A correction: we are no longer British Petroleum, we are BP. That is the first issue. It puts us into a difficult position: are we acting as a business entity called BP or are we acting as an entity of a government called Britain? We do recognise the tension you have been probing the whole time. Through our own code of conduct we must recognise that there are plenty of checks and balances in place at the moment which, for a

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company like BP, we have to be very conscious of. There is the NGO community, very active, which scrutinises very closely. We have our own code of conduct and our assessment processes where any transgression gets through to our board ultimately. Our board and shareholders are very, very worried about transgressions of human rights. There are checks and balances in place at the moment which for a company like BP we have to consider. Our proposal on this would be that we do believe Professor Ruggie is doing a great piece of work but he has some time to go. Let us not pre-empt his conclusion and at the end of his piece of work, let us see what he suggests might work to solve the issue you are probing on at the moment.

Sir Brian Fall: I would agree with that. A gloss on Rio Tinto as a British company. We are a British company: we are also an Australian company. The annual general meeting happens in two countries and no decision of importance is taken until it has been taken in both. We are an American company for Sarbanes-Oxley reasons, quite apart from the FCPA, because we have a major listing on the US Stock Exchange. Now that we have taken over Alcan we are, to a very important extent, a Canadian company. So the idea of having to face four competent advanced sensible legislatures, each producing a slightly different draft of what the law is on a particular list of heinous, is not an appealing prospect. It may be that there is more that can be done by bringing key countries together and if it can be done that way, I think we would favour that.

Q214 Chairman: Is that an argument for international regulation?

Sir Brian Fall: No, I am talking more about an updated version of the OECD guidelines which Gary Campkin, speaking personally as he said, thought that he would regard as a good idea. I think we are one of his member companies who would agree with that. They have been criticised. The national contact point system is getting better but there is nothing to say that it could not get better still. We should like to feel that, if there are major developments in the way that the home-country constituency watches over and takes responsibility for what companies are doing abroad, we would move as far as possible in company with other major trading companies. I am not saying a convoy, because I wanted to move at the speed of the slowest, but let us try to reach out and see whether other countries can be persuaded to do whatever it is that we think it most urgent to do next.

Q215 Lord Dubs: My question is to you, Sir Brian. I think you will have seen from the evidence that there have been quite some criticisms of your company. One of the allegations is that you talk very convincingly about human rights, but that voluntary commitments are impossible to hold companies to. Would you care to comment on that?

Sir Brian Fall: We have not replied individually to comments made by others who have given evidence, partly because our understanding of the primary focus of this Committee is that it is doing the general

points and the Ruggie follow-up and it is not interested in examining individual cases. The individual cases which I have seen mentioned are ones where we, or the operating company, have already answered the people concerned, or have offered dialogue or have been in dialogue. The most aggressive—if I may use the word in the American sense—set of complaints that I have noticed in the evidence concerns the Murindo deposit in Colombia and there we have a problem of an NGO saying that the consultation process was inadequate, not up to the legal standard required and that the concession was invalid. As I understand it, the Supreme Court of Colombia has very recently heard the case and decided that the consultation process was up to the mark and the concession is valid. It is very easy for the NGOs to throw stones into the pool. It is difficult to answer each time. What we are trying to do at the moment, with respect to Colombia, and we have hired a local consultant with a reputation for dealing with sensitivity with this company/NGO interface and have asked him to take a second look. As you will have seen from the evidence, we have an option, which we have not exercised, to buy in to work which would have been being done by an American company had the drilling programme not been blocked by a popular demonstration. Nothing is happening there at the moment. We want to see whether there is some sensible way through which will get all the stakeholders happy, if we can. We know that there is a lot of local support for the exploration that is being planned and we will be in a better position in a few months' time in the light of this investigation to come to our own conclusions about whether there is such a major problem there that it would be simply better not to press on. We are not at the moment doing any exploration in Colombia.

Q216 Lord Dubs: Thank you for that. You will be aware from the evidence that there have been criticisms of your company not just in one country but about your activities in other countries. Are you saying that all those criticisms have been investigated by you and that you are satisfied there is nothing in them or that you have dealt with them?

Sir Brian Fall: We have certainly investigated all the criticisms of Rio Tinto. The other two I noticed were one about Ecuador, where my understanding is that nothing is happening at all because the concession in question has been withdrawn by the Ecuadorean Government. We again had an option which we have not exercised and we are not working in Ecuador. The third which came up concerns a project in the Upper Peninsula of Michigan where four legal challenges were put forward on behalf of local organisations and one of the First Nation tribes involved. Two of those have been settled in favour of the company. Numbers three and four have been combined into one case and that is before the court at the moment. We do not know the result. There of course we are dealing with a legislature which ought to be able to look after the interests of its citizens pretty well.

Q217 Lord Dubs: My next question is about BP to Steve Westwell. You have told us something about your policies and practices in due diligence and human rights assessments. Given that there may be no legal obligation on BP to take these steps, what benefits, if any, does your business see in conducting such scrutinies? Is it worth your while doing it?

Mr Westwell: The benefits we see have evolved with the evolution of the company. Until 15 or 20 years ago we were predominantly and overwhelmingly a company with assets in Europe and the United States, but over the last 15 to 20 years our business has migrated towards developing countries, new democracies, difficult countries. I always say successful businesses are businesses which can correctly anticipate risk and mitigate that risk. As our business has evolved, with the need to include with an equal weighting what we call non-technical risks, which are issues around human rights, around the communities, around the environment in which we operate, we have had to up our game to make sure that we have correctly assessed and done all we can to mitigate non-technical risk. A pure execution of non-technical risk can shut down a project just as much as if your technical assessment of the reservoir was not correct. The benefit we see in this is that by correctly mitigating and anticipating issues around human rights, it is ultimately good business and allows us to do what we do, which is produce energy.

Q218 Mr Sharma: You both use auditing of factories in your supply chain as part of your due diligence. Some NGOs have said that audits are only a smokescreen because any audit is only as good as the company which has ordered it. How do you make sure that your audits make a difference on the ground?

Mr Lister: Clearly we know there have been criticisms of audits and we know there has been NGO criticism of audits. Audits on their own are rightly criticised. It is not the audit which is the issue; it is the follow-up which gives it the benefit. The audit is informative. It tells you the issues which have taken place within the supplier and then the follow-up, either by us or again by the auditors, is absolutely imperative. We then have buyer training. The buyers also look at the audit results and they talk to the supplier. We also look at supplier training, which is also important, not just in the UK, as we learnt in Manchester, but also in the developing world. Some of the laws that the suppliers have to meet are quite complicated and they are not as easy to understand. We train the suppliers in the understanding of their local legislation and also show them holistically—horrible word—how, if they improve, they can actually gain commercially by that improvement. Recognising that the audits are not the perfect tool, there is a lot of work that goes around the audit; the audit is the information-gathering tool which is necessary. Looking at the auditors, you have to pick your own auditors and obviously do due diligence in relation to those as you would with any other employee. For the third-party auditors we use a variety of extremely reputable third-party auditors.

Q219 Earl of Onslow: You contract to buy a shirt from company A in country B, wherever it is. That shirt manufacturer presumably buys the cloth from somebody else and the buttons from somebody else and the man who makes the cloth buys the cotton or silk or whatever it is. How do you actually follow? It seems to me that in some ways you are going to be damned if you do and damned if you do not. It is an incredibly complicated process, as you perfectly reasonably want to produce goods at the right price which people can buy and make yourselves a profit. Help me, is what I am saying with that question.

Mr Lister: It is not always the case that the supplier buys the cotton, buys the fastenings or buys whatever else is used in the business. We spend quite a lot of time sourcing those to make sure they are up to our standards. We would buy the cotton and supply it.

Q220 Earl of Onslow: You would say “This is the cloth, we want you to stitch it into a shirt and we will buy it from Mr So-and-So in Knightsbridge”.

Mr Lister: Yes. Your shirt, for instance, we would buy the cloth in X, we would give the cloth to the supplier whom we had contracted to make the shirt and the same with the buttons and all the rest of it. So we are doing the contracting to make sure the standard of the cloth is up to our standards as opposed to getting the supplier to source that. In the case where the supplier does do it, we look very carefully at what the supplier is doing and how it is doing because, again, it goes to the very fabric of the garment.

Ms Neville-Rolfe: May I just add that I agree with a lot of those things? You ought to check before you start the business and we have a code of practice which we give to new suppliers so they know what our expectations are. We have the buyer training, we have the audits, we have the supplier training and then we have the independent element. We have 726 independent auditors as well as our own technical people in our supply chain and then we try to change the culture of the supply chain, which helps you with the buttons and the cotton. We try to work with the suppliers so they understand that ethical is important, so that they in turn are going to trade ethically. The NGOs can also play a part. In Costa Rica we worked with Banana Link and the unions to try to make sure they understood about ethics. In South Africa we have a special group to help us with both the women who work on fruit farms and the issues of ethical trading there. It is not just the audit, it has to be a joined-up process and in a sense you are going to get problems because you will have a weak link somewhere with so many transactions. Then you have to put it right and I agree very much with Paul that the improvement plan is the important thing.

Q221 Chairman: Can we go back to something Paul said earlier on in response to a question from me? You said that somebody—I think it was the reporter—had been coached to lie to the auditors. Presumably if the reporter had been, then other people in the factory had been as well; that would

probably follow. So how can you be sure that the information you are getting is accurate? How can you rely on it?

Mr Lister: If for a minute you just ignore the Manchester example, the idea behind the audit and what we instruct the auditor to do is to take out a sample of the employees, take them outside the factory and talk to them independently outside of management hearing, outside of management influence. In that way you try to understand what is really going on within the factory. There is a decent sample of employees within any factory who are spoken to and you would expect at some stage that you would begin to see whether there had been coaching. To go back to your specific example of coaching in Manchester, the programme came very quickly after the audit so that gap was too close to understand whether there was coaching going on or not. It was just the timing.

Q222 Chairman: The sequence was the audit before the TV programme, was it not?

Mr Lister: Yes.

Q223 Chairman: Did the audit give them a clean bill of health?

Mr Lister: No, it did not. The first audit in April did not give them a clean bill of health and there were issues to work on. The second audit in December did not give them a clean bill of health; again there were issues to work on. It is fair to say that the audit did not pick up all of the issues that the programme picked up and have subsequently been picked up with everybody looking at this Manchester factory. Would it have picked them up over time? I think it may have taken two or three more audits of that factory, which is extremely frustrating, but you keep going back going for continuous improvement within the factory to ensure that actually the issues you are auditing against are ultimately met and they then get a clean bill of health.

Q224 Lord Dubs: My question is about Tesco. A few weeks ago we had a session with trade unions where we focused on the importance of right to freedom of association for the purposes of securing human rights. In your Corporate Social Responsibility Report for 2009 you say that “Employees across our business are free to join unions, and we have an industry leading partnership agreement with Solidarity in Poland and Usdaw in the UK”. What do you think are the benefits of having a unionised workforce?

Ms Neville-Rolfe: If we talk about the UK example, we have had a business for nearly 80 years in the UK and we have been unionised for about half of that. We work with the unions in the stores, when we put our induction packs out they recruit and they work with us on training, they work with us on health and safety, have consultation machinery which they are involved with and they wanted Tesco to grow, helped us with that whole growth piece over a long period. Similarly in some of the other countries in which we operate: You highlighted the Solidarity arrangement

in Poland, which obviously is much less longstanding as our international business is 15 years’ old.

Q225 Lord Dubs: That being the case, I wonder whether you can comment on the following. You have set up a chain of stores in California and Nevada, have you not?

Ms Neville-Rolfe: Yes.

Q226 Lord Dubs: Why is it that your approach to trade union membership there is not as enlightened—if I may put it that way—as you have just described it is in the UK and indeed in Poland?

Ms Neville-Rolfe: I would emphasise that staff are free to join a trade union and to freedom of association. What we found in the Fresh n’ Easy business is that staff do not want to join a trade union; trade-unionism is not quite the same in the States. Some of our competitors, Trader Joe’s, Whole Foods, Walmart, are not unionised as it happens. We have a very good pay and benefit package. It is a convenience business, so they are small stores not big box stores in the United States. There is a very supportive culture. We have our best figures on staff motivation and satisfaction in that business of all our businesses; 90 per cent figures. They have not wanted to become union members. Obviously there have been some steps by groups which I know have given evidence to you who are looking for support to extend trade unionism in that context, but it is early. We have been there a couple of years and the staff do not want to join the trade unions. They like the consultation mechanisms we set up within the business.

Q227 Lord Dubs: Our difficulty of course is that we hear one side from you and we hear another side from them and we did meet the United Food and Commercial Workers Union in the United States. I do not think they would agree with you. They even said that some of the people who worked for you were frightened to talk to us. We are getting two different views. I just wonder how we can arrive at what your company’s policy really is.

Ms Neville-Rolfe: Our policy is to support free association. The trade unions in the United States have not come along in a collaborative and constructive way in quite the way I described for Usdaw. They have followed our staff home to try to get them to join the union in circumstances where they do not want to join. It is a different circumstance out there to be honest.

Q228 Lord Dubs: In that case, would you be willing to look into this just to see. It is very difficult for us to get totally diametrically opposed views. I am not saying we have any evidence to support one way or the other. We have heard what you have to say and we heard what they had to say. Would you be prepared to look into that for us?

Ms Neville-Rolfe: I am grateful to you for listening and certainly we will give you a further note.

Q229 Chairman: May I pursue this a little further because we did not just meet the union, we met some of your employees there? You have described the union following people home; well that may or may not be the case. However, is it not a fact that the union is not allowed to do anything at all inside your shops, they are not allowed to talk about the union, if they are they will be subject to disciplinary action? There is no question of any form of recruitment anywhere in the shops at all. People have been subjected to what I can only describe as union-busting activities where assistant managers are bussed into a shop with only one or two employees in it. We heard stories of four or five assistant managers being bussed in to this particular shop to keep an eye on what was going on. Generally a very intimidatory atmosphere. We also heard complaints of your staff attempting to use the open-door policy to come in and make a particular complaint about their pay being underweight for the particular period concerned and it not being resolved. They go to the union and the union tries to resolve it for them. The fact is that I understand Mr Obama actually wrote to Sir Terry Leahy asking whether he would actually meet the United Food and Commercial Workers Union to discuss these issues yet there has been no reply, there has been no effort by the management to meet the union at all. That is completely contrary to what Tesco's union representation is in the UK. Why are you adopting this much more aggressive anti-union approach in the US compared to the UK, particularly bearing in mind that some 70 per cent of retail workers in California, Arizona, Nevada are unionised?

Ms Neville-Rolfe: A series of these points has been raised with us and obviously I will look at the transcript and at the points you have raised to check those are the ones we have previously checked. When we have looked into them, they have not been true. Sir Terry did reply to President Obama and obviously I can ask him whether he would be happy to share the reply to that letter with you and explain the circumstances that we find ourselves in and the way that our staff have reacted. Individuals are entirely entitled to join unions; that is part of the protocols we have been discussing here today and I want to emphasise that.

Q230 Chairman: They certainly did not give that impression to us. That may be your formal policy, but it is quite clear they were being frightened off as the only way to describe it. I met personally and spoke to two young women who were working for you. I have no reason to doubt their truthfulness. They tell their stories very clearly, very cogently, answered our questions. I have no reason to believe they were making it up. I think they were being entirely truthful. You can argue about what the union officials may or may not have said and put their gloss on it, but these were two ordinary shopfloor workers, the sort of people you see in the supermarkets in the UK, who wanted to join the union to be represented, to make sure they get a fair crack of the whip and they were being subjected to what I can only describe as union-busting practices.

Ms Neville-Rolfe: I can assure you that they are entitled to join the union. I can say that clearly. Also, when individual things have been stated and the union concerned has actually put out some material in the UK as well, they have a lobbying company here, some of the material in that is not accurate. They say it is only 60 hours paid part time off, for both sickness and holiday and it is actually 160 hours or more which is actually very competitive.

Q231 Chairman: Was the union allowed to recruit in your stores?

Ms Neville-Rolfe: They are outside our stores some of the time.

Q232 Chairman: Are they allowed to recruit in your stores like they would be in the UK?

Ms Neville-Rolfe: The staff are allowed to join a union and it is entirely up to them.

Q233 Chairman: Can one member say to another member of staff "I'm a member of a trade union. Here's a membership card" inside your stores like they could in the UK?

Ms Neville-Rolfe: I do not think the card system works in quite the same way in the US.

Q234 Earl of Onslow: With the greatest respect, you were asked a very, very, very simple question. Are they allowed to recruit inside your stores or not? I have noticed that you have been dodging. You may think it slightly odd for an hereditary peer on the right of the Conservative Party to suddenly be taking a pro-trade unions attitude but this is because I would quite like an answer.

Ms Neville-Rolfe: Individuals are allowed to join the union.

Earl of Onslow: That was not the question.

Q235 Chairman: You made a criticism earlier on about unions following people home to recruit. It is probably not surprising that the union tries to follow people home to recruit new staff, if that is what they are doing, if they are not allowed to recruit on the shopfloor like they can in the UK. Are they or are they not allowed to recruit inside the shops in the US or not? A simple question.

Ms Neville-Rolfe: I would prefer to come back to you on that detailed issue to make absolutely sure I am not misleading the Committee in any way. What I can state absolutely clearly and we have said again and again is that there is a right of association but that the approach the unions have taken has been different in the United States to the one we have been used to in other places, including the UK. They seem to be trying to use discussions outside the US to push forward the trade-unionism in the US.

Q236 Chairman: It is perhaps not surprising, if your management in the US will not meet with the union, that they come and raise issues with us and other people in the UK to raise with you if you will not talk to them. Here you are talking to us about it. Will

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your company meet the union, will the American management meet the American union, to discuss these issues with them?

Ms Neville-Rolfe: We are very happy to meet our staff.

Q237 Chairman: Will you meet the union?

Ms Neville-Rolfe: I think my colleagues in Fresh n' Easy have not had a collective meeting with the union. There has not been evidence of individual staff—

Q238 Chairman: That is a given. We know they have not met the union because you have said so and they told us so. That is agreed. The question I am asking you now is whether you will—not you personally, your management in the United States—meet the union to discuss your mutual concerns about each other and try to reach an accommodation which is to everybody's benefit, in particular your staff's benefit?

Ms Neville-Rolfe: I think our staff have made quite clear what they think is to their benefit. I am in touch regularly with the management in the United States. I will talk to them about the exchanges we have had. I can assure you that we are trying to do our best for our staff there but they so far have not chosen to join the union.

Q239 Chairman: The ones we met had and they were not being given an easy time as a result.

Ms Neville-Rolfe: Obviously if you can give me any details in relation to them in an appropriately confidential manner—

Q240 Lord Dubs: We cannot give you details because they were actually frightened; they were actually frightened they would lose their jobs because they were talking to us.

Ms Neville-Rolfe: I can assure you that they would not.

Chairman: I can assure you that they were very frightened. We are not going to get any further now.

Q241 Mr Sharma: Who checks company practices against codes of practice? Should this burden all be on NGOs, journalists and individuals?

Mr Lister: There is a variety of checks. Part of the audit is to check. The audit is based on the ETI base code and that is the practice that we have in effect with third-party suppliers. They are third-party suppliers, they are based on contracts and that contract incorporates this base code. The auditors go in and check against the base code that it is being complied with. We then look at the audits and make sure there is a corrective action plan in place and we take responsibility for ensuring that actually the corrective action plan is followed up and the suppliers improve and put the changes into practice.

Mr Westwell: Similar. We have a formal audit programme of our activities on a regular basis but in respect of our code of conduct we have a confidential employee line on which anyone who feels we have not acted according to our code of conduct is encouraged and free to lay a formal complaint or

issue. All those issues are confidentially investigated; all investigations are then collated in a report which is reviewed on an annual basis by one of our board committees, CAC, composed of our independent directors, to see whether there are any trends or any specific issues. Major violations of our code of conduct are obviously automatically escalated through the system. In certain major high risk projects such as Tangguh we put into place an additional mechanism whereby we have independent monitors who, with the community in Tangguh, are free to approach an independent monitor outside BP, if they feel we are not living up to our commitments.

Ms Neville-Rolfe: For clarity I would want to ask you whether this is codes of practice in general or whether there was a specific code of practice you were asking us about.

Q242 Mr Sharma: A company must have a code of practice and the companies also have general practices.

Ms Neville-Rolfe: Clearly there are some government codes of practice which are quasi regulations and you deal with those often in the normal way that you deal with the regulatory compliance in a company. We have codes of practice. I mentioned expectations for ethical practice in suppliers and then we have a number of statements in our corporate responsibility report and we arrange for those to be looked at by an external forum for the future. They look through those to see what we are doing about that. Then, like the others, we have an audit system with auditors, internal auditors, external auditors and a report into the audit committee and to the compliance committee. If there is a new code brought in by Government, you would set up a compliance system appropriate to that particular area. I am conscious that I am not answering your question because I do not quite understand what you are trying to get at.

Sir Brian Fall: We have auditors and part of our code of practice comes under their review because it is dealing with financial aspects. When we come to individual company policies and to bribery, human rights, environment, working practices, the head of the compliance department is in charge of checking that operations are doing what the good book says they should do.

Q243 Earl of Onslow: You used the words “good book” which struck me as particularly appropriate. Do you know where the good book is, what the good book is? I think that is what Mr Sharma was trying to get at.

Sir Brian Fall: Yes. Every Rio Tinto business would know that there is a series of policy and guideline documents.

Q244 Earl of Onslow: So you have a good book. How do you know your good book links in with whichever the good book is?

Sir Brian Fall: I have a number of booklets on my desk which affect the bits of the business with which I am concerned. Other people will have the booklet

called *The way we buy* which provides the instructions for supply chain and related questions that we have been talking about. The compliance department is responsible for compliance across the board. It operates in addition to keeping in touch with operational management of the various businesses, through the annual internal control questionnaire which asks a range of questions which have to be replied to by each of the Rio Tinto businesses and which are so drafted as to ensure that, if you answer honestly and yes to the questions put to you, you are in compliance across the board with our codes of practice. If somebody is going to take the very, very big risk of lying in their response to the ICQ, that is a major offence and well understood to be one. We would rate the chances of our spotting it through the confidential whistleblower system as very, very high. We regard that as an important safety net for senior management to make sure that these various codes of practice are not coffee table things, they are the working instructions. We talked about voluntary and mandatory. It is voluntary for Rio Tinto to sign up to, let us say, the voluntary principles on human rights and security. It is compulsory for Rio Tinto businesses to follow the security instructions in our human rights policy document. In addition, we have introduced an assurance department which is going around being very busy asking questions of people, but it is so new that I am not able to tell you exactly what it is going to produce.

Q245 Mr Sharma: My question is to BP. Certain companies are clearly identifiable as British companies. Given the impact on the reputation of the UK in relation to allegations against you, should the home countries not bear some responsibility?

Mr Westwell: Three things on that. First, we put into place to the maximum extent possible measures to mitigate risk to the reputation of BP to a very high standard. On the back of that, recognising the association with the Government of the UK, you could say by implication we are doing all we can to protect the reputation of the UK as well. Our prime responsibility is the reputation of BP. We do keep coming back to this issue of whether we are comfortable with cross-jurisdictional regulation. I did place my concerns in the room. We are very nervous about attempts for cross-jurisdictional legislation. We would ask that we wait for Professor Ruggie to conclude his work. Somewhere in his work there will be remedies and then we can have an informed discussion about the appropriate mechanism for remedies in this debate.

Q246 Mr Sharma: In a recent speech to the Drapers Association, the chair of a major retailer called for the Government to offer incentives to business for good ethical practice. What do you think of this suggestion and what do you think any incentive scheme could add?

Mr Lister: I am not sure that I agree incentives need to be offered; I am not sure what incentives he is talking about and I am not sure we need incentives for good ethical practice. Good ethical practices

should be ingrained in any business. It goes back to reputation, it goes back to risk. We do not need to be incentivised to do the right thing.

Q247 Chairman: May I come back to one or two points which Mr Sharma has been raising with you. Basically you have your internal rules and regulations and codes of practices and systems. Are you still ultimately reliant on the NGOs and the media to say when things have gone wrong? To what extent do you actually find things out yourself? BP has had a real battering over the years over the activities on the Baku-Tbilisi pipeline and activities in Indonesia; Rio Tinto in lots of places all over the world. These are usually brought to light by the NGOs or journalists. Are what the NGOs and journalists find the tip of the iceberg or have you found things yourselves and dealt with them? What is it?

Mr Westwell: The internal processes are obviously continuously improved and we learn and we adapt. I would like to say that we continuously get better both about mitigating risk or, when there has been a failure in our risk mitigation, identifying it quite early on internally. There will always unfortunately be gaps which we have just not covered, so I could not sit here and say we will 100 per cent identify where we are not living up to our own code. There will always be a slip somewhere. It is a continuous cycle of improvement and more and more we put into place a system to eliminate the previous transgression.

Q248 Chairman: With the best systems in the world things will still go wrong.

Mr Westwell: With the best systems in the world what goes wrong will have less of an impact; with poor systems there could be a major impact.

Sir Brian Fall: That incremental explanation fits us very well. We are constantly developing extra ways of finding out; the internal control questionnaire gets longer and longer every year and is more specific on human rights certainly than it was when I started off some years back. *Speak Out* is extremely important and all businesses know that they have to make communities as well as employees aware of its existence. The NGO and other members of the community have an important function there. One of the reasons why, although it is not human rights to do philanthropy, having a primary school or a mother and baby clinic conveniently situated near the plant is a good way of making sure that if there is a problem in the local community it may come to management notice through that chain rather than more formally. So all these currents go by. One of the questions we ask of businesses all the time is whether they are aware of any allegations which have been made in the course of the last year accusing Rio Tinto or its suppliers or its security consultants of human rights violations. So these are deliberately asking for people to do a bit of trawling. As Steve has said, it is not perfect but we have a lot of different antennae out there.

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Chairman: So if we work on the assumption that even with the best systems things will still go wrong, that brings us to the question of a remedy for that particular problem, does it not?

Q249 Earl of Onslow: What is your attitude then to whistleblowers? Some have been known to ruthlessly sack whistleblowers. I would like to ask all of you, whether you are all so keen on making sure.

Sir Brian Fall: It varies a lot in different cultures. We tried to produce a whistleblowing programme in the ICC and the first draft was written by a Frenchman who thought that whistleblowing was shopping your neighbours to the Gestapo. It was just a wholly different attitude to what we thought was normal business practice. It should be clear to Rio Tinto employees in many different languages that the system is confidential and that there will be no repercussions unfavourable to them because they have put in a *bona fide* complaint or are warning about something going wrong.

Q250 Earl of Onslow: You are all aware of the extraterritorial jurisdiction exercised by the US courts under the Alien Torts Claims Act. We know that as members of the CBI you object to the notion of the UK or any other state exercising jurisdiction for allegations against companies in respect to their activities overseas. How do you think Professor John Ruggie should approach his work on remedies, if not through the involvement of home states? I think you heard me put my mythical country “Burabia”, or whatever it was, to the previous witness which encapsulated my view of this. How do you get round those problems?

Sir Brian Fall: On extraterritoriality John Ruggie may suggest that there is good extraterritoriality and bad. It is one thing for a British company to have UK legislation which is affecting its conduct abroad. This is precisely what the new bill on bribery is proposing. There has been no objection from business that I know of on that and indeed it is already the case because there was that tack-on paragraph to the counter terrorism bill a few years back in order precisely to defend the British Government and the business community from the accusation that they were not taking steps to fulfil their OECD convention commitments. We know already that we have British legislation which applies to us when we are working abroad. Having American legislation which affects New Zealanders when they are working in Australia is perhaps an example of extraterritoriality going too far.

Q251 Earl of Onslow: Do I gather from what you are saying, which I think is slightly different from what Sir Stephen Young was saying, that, if the bribery bill principles were applied to human rights, you would have no great objection to it?

Sir Brian Fall: What I would say there, to come back to something I said earlier, is that businesses—and Rio Tinto would probably be among those—are saying that it is highly desirable that major home countries, those with a lot of companies operating abroad, should move together on something like

that. In the case of anti-bribery, we are there already because we have the OECD convention and we are all committed to functional equivalence. If we had upgraded OECD guidelines for multinationals and a requirement to legislate and to provide functional equivalence, that would be a very different decision for an individual company than feeling that Britain was doing one thing and lots of other countries were doing nothing.

Q252 Chairman: At the moment, supposing you did something horrible in Indonesia, you could end up in the court in New York being sued by somebody from Papua or wherever it happens to be and the next thing you know you are facing the Alien Torts Claims Act. Would you not be happier if it were in UK jurisdiction?

Sir Brian Fall: We have a little Papua problem in California, as you probably know, at the moment. If one were trying to legislate in the United Kingdom in a way to make the United Kingdom courts more attractive to plaintiffs than the combination of ATCA and the California plaintiffs’ bar, I do not know what sort of bill would emerge.

Q253 Chairman: We would start off by having extraterritorial jurisdiction like the Alien Torts Claims Act, which we do not have at the moment.

Sir Brian Fall: Yes but we were talking about Nigeria and Shell and then saying it was silly that it was happening in New York and why could it not happen in the Strand. You would have to persuade the plaintiff that they would get a better deal by coming to London.

Q254 Chairman: Not necessarily. The starting point is that we do not have jurisdiction. If we have jurisdiction, you are going to end up with the argument about *forum non conveniens* in international law, which is a *forum conveniens* for a particular case, which is eventually how the asbestos in South Africa claims ended up in the UK after many, many years of argument about where the case should be tried. If you do not have jurisdiction in the first place, the only place you can go is the United States then inevitably those cases will go to the US. You may well be right that under the US jurisdiction it would be more favourable to claimants; it inevitably would be but you have no argument to say you are suing in the wrong place other than to say sue in Nigeria, which is laughable.

Sir Brian Fall: If you look back at some of the ATCA hearings in the US, thinking of ones dealing with South Africa where the Government of South Africa were particularly keen to handle it at home because it had implications for truth and reconciliation, the American courts were very reluctant to say, because it could be handled effectively in South Africa, that it should not be heard in whatever district of the federal system it was. Competition with the American plaintiffs’ bar is not going to be easy, is all I am saying.

Q255 Chairman: But at the moment there is no competition because we do not have any jurisdiction.

Sir Brian Fall: We would say that we had jurisdiction and the Nigerian plaintiff would say “To hell with the stuffy Brits; we’re going to get a very expensive and not very helpful hearing there, too many lawyers. Let’s go to California; no fee if you don’t win and a much more attractive deal for the plaintiff”. I do not think that can be changed by British legislation. This is not a company position by the way.

Q256 Chairman: There is no point debating it now because it is a point for lawyers.

Mr Westwell: Picking up the example of a company from the previous session, I do start with the fact that given the code of conduct, the first thing we have to do in the factory we built in wherever the country was is to have an equivalent standard for HSE, for equipment, for process safety.

Q257 Earl of Onslow: Of course that is the ideal but as you all know we are all human and we all make mistakes from time to time. It is when the mistakes are made, not when you have all been very good boys.

Mr Westwell: I did not want to leave the impression that the first recourse should be a legal recourse. The first recourse has to be that we adhere to our standards wherever we operate. In the cases where that does not happen, I do want to say again that this extraterritorial legislation has some real issues of practical implementation. Will it be a better solution at the end, given the complexity? We do not know. I recognise that the voluntary principles do not help the case we have been talking about in Nigeria. However, a voluntary principle of adhering to human rights will get traction and will get more participation. It will stop people’s hackles going up about colonialism and interfering in the interest of states. I do come back to saying let us just wait and see where the Ruggie work gets to on what or how is a practical way for remedy. It is a valid point about remedy; I just worry that a remedy is a desire for extraterritorial legislation. It is going to be very difficult.

Q258 Chairman: Has BP made any representations as to what the solution should be?

Mr Westwell: We are actively participating with Ruggie.

Q259 Chairman: What have you said to him about what the remedy should be?

Mr Westwell: Similar to what we are saying here. We find the concept of extraterritorial legislation very difficult. We need to be very careful how practical it is going to be.

Q260 Chairman: What instead of?

Mr Westwell: The voluntary principles.

Q261 Chairman: That does not give you a remedy. That gives you a standard and system. I go back to the point made earlier on. BP could be the best company in the world but things could go wrong. What is your answer to what you should do in terms of things going wrong?

Mr Westwell: One of the issues is access, using Ruggie’s term, access to a legal system. Is there access to law? You then get into a secondary debate about the quality of the legal system.

Q262 Chairman: Let us assume it is a country which has no independent judiciary; it is in the pocket of the government.

Mr Westwell: Within our high risk projects around the world we do put in place independent monitors, independent authorities, whereby local communities can access—

Q263 Chairman: That all goes to making sure standards are met. Let us assume something has gone wrong and all those systems have failed. What is the remedy for the indigenous people whose land has been destroyed, or whatever, as a consequence of your actions?

Mr Westwell: The fact that we are having this discussion for so long shows that there is no simple answer to this question. I do not have the magic answer for a solution. I just place on record our concerns about extraterritorial legislation.

Q264 Chairman: Fine. I have got what you do not want. If you accept that the indigenous people should have a remedy for their land being destroyed—this is hypothetical, I am not saying you have done it—because of something that BP have done despite all your due diligence and all the checks you make—and I accept you have systems in place but things do go wrong at times—let us suppose there has been a horrible oil spill, indigenous people’s land has been destroyed, you do not want them to sue you in the UK, what is the remedy for them, if they cannot sue in their own country because their own country does not have an independent judicial system?

Mr Westwell: Given the genuine complexity of the issue, what I would like to propose is that we write to you with our position on this in more detail.

Q265 Chairman: It is not complex at all. You have people whose livelihoods have been destroyed, whose way of life has been destroyed—this is hypothetical—they have to have a remedy, do they not?

Mr Westwell: National governments are ultimately responsible for the law in their country.

Q266 Earl of Onslow: I would suggest that you have had more experience with governments of a dodgy background, whose human rights attitude is not that of a Liberal Democrat parish councillor. You must know and you must have experience of this so how do you get the remedy?

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Mr Westwell: How do we get remedy? We have had experience of working in many, many countries around the world and we had experience that in most cases we can operate to our own standards.

Q267 Chairman: That is not the issue. I accept, for the sake of argument, that BP is the best company in the world, has all the best standards, best monitoring system and all the rest of it, but something has nevertheless gone wrong. How do you deal with the victims of your company in those circumstances, if they cannot sue in their own courts because their own courts are not independent of an evil dictatorship?

Mr Westwell: This is too big an issue to try to focus in on specifics. It is not correct to say that even under the current structure there is no recourse.

Q268 Chairman: They would only have a recourse if it was the BP parent company that was responsible. You will have a chain of subsidiary companies behind whose corporate veils the parent company would hide surely.

Mr Westwell: I would like to give you a far fuller response than I am able to do in the room today.

Sir Brian Fall: I would like to add that the more major OECD, EU countries—choose your group—can move together the more we will get some precise recommendations from John Ruggie. It is clear that this is work in progress; the report he has just produced is saying in effect that this is what he is going to be concentrating on in the next year.

Q269 Chairman: Have you made representations to Ruggie about what the answer to the remedy issue is?

Sir Brian Fall: No, we are looking forward to seeing what he has to say. The International Council on Mining and Metals, ICMM, will produce a paper shortly which we think will be helpful concentrating in the first place on how to prevent a complaint developing into a grievance which then develops into a dispute. I agree this is when things go right. When they go wrong, the idea that there ought to be some sort of procedure is running strongly. It will work best if home countries, or as many of them as possible, are seen to be working together to provide a recourse which is available to all.

Q270 Chairman: I do not think anybody would argue with that as a principle, but let us suppose that for Rio Tinto, great international company, high standards around the world, whatever, something goes wrong and you pollute a river and a load of people get poisoned in Indonesia tomorrow, what is their remedy?

Sir Brian Fall: I cannot answer to you now what would happen in Indonesia. One of the problems companies always have is that the assumption that the local courts are corrupt and useless is often wrong and never popular, so that one has to tailor one's answer to your question "What are we going to do? This has gone pie-eyed" to the local circumstances, including the ability or otherwise of the local court systems to provide a remedy. We have had a case on Rio Tinto which came out of Namibia,

which moved to London for claims of not being able to be equitably handled in Namibia. The argument of *forum non conveniens* is being accepted upon a little bit less in this country as well as in others. The fact that Ruggie has illustrated this area as one of the three main planks of his next two years of mandate surely illustrates absolutely that there is a serious problem there and it needs a lot of thought and a lot of research which he will be doing and which companies individually and collectively will be playing their part in. As Steve was saying, if we had an answer ready, we could give it to you, but it is going to emerge out of a lot of hard work in an area which has had the spotlight put on it, I personally would think probably absolutely rightly, by John Ruggie.

Q271 Earl of Onslow: Sir Brian, what you are saying is that you recognise the problem. I rather got the impression from Mr Westwell that he either did not want to or did not recognise it. The consequence is, as you do recognise the problem, Rio Tinto ought to have a view on how to solve it; so I would suggest should BP and everybody else. You are very big companies, you are vitally important to the economy, you are very serious, what my children call, grownups and you therefore know that there is a problem so you should surely have a view on how to address it.

Sir Brian Fall: Our way of addressing it at the moment, which does not cover 100 per cent of the problem is to do our utmost to make sure problems of this kind do not arise in the first place.

Q272 Chairman: That is a given. You have all accepted that with the best will in the world bad things happen from time to time. The question is: when bad things happen what do you do to put it right?

Sir Brian Fall: This is the one per cent. The answer to that is that at the moment, for lack of any generally agreed framework, we would have to look at the situation in the individual country where the problem arose, all the facts of the case and try to find the best way of stopping it.

Q273 Earl of Onslow: We are getting at it generically. You acknowledge the problem as a possibility, therefore it must be within your collective brains to say "We see this is a problem, it may happen in spite of all our best efforts. What do we think is the fairest way even for Rio Tinto to deal with it, let alone for the person concerned to deal with it?". Do you see what I am getting at?

Sir Brian Fall: I do see what you are getting at. It is a little bit like saying to me as an individual that somebody over the next month may sue me, what am I going to do about it? I will say that I do not know. Is it going to be my driving which is pretty bad or is something going to fall off the roof of the house?

Q274 Chairman: That is not the same at all. In those circumstances there is a very clear remedy. That is not the issue. The problem we have here is that

without extraterritorial jurisdiction there is no remedy for half the world in which your company operates, if you are realistic.

Sir Brian Fall: If you could point to a series of things which have gone wrong and which have not found a solution—

Q275 Chairman: I gave you one. Let us suppose in the Far East somewhere you had a mining operation, the mining operation uses poisonous chemicals, uranium or whatever, some of that is washed into the river, a village gets poisoned, half the people die, the other people are ill, like the Bopal scenario, in a country where there is no rule of law, in a country where there is a dictatorship, in a country where the judiciary is not independent. Suppose it happens tomorrow, what is the remedy for the people who have been affected? How do they achieve that remedy?

Sir Brian Fall: You try to get an impartial assessment of the extent of the problem, who has suffered, whose fault it is, which complaints are justified, which may be less justified and then you look into the possibilities of compensation.

Q276 Chairman: Who does that assessment?

Sir Brian Fall: It would start with the company but they might well feel in something as important and as difficult as the example you are giving us, that some outside help ought to be brought in.

Q277 Chairman: Who appoints the outside help?

Sir Brian Fall: The outside help is one of the things which I imagine will be recommended when we get Ruggie around to there. At the moment one would talk to other companies, one would talk to arbitrators. One would talk to international lawyers and see how these things have been handled when they have arisen in other parts of the world with other companies affected, particularly what are the lessons not to follow because attempts to solve had turned out to be worse than the problem itself? What are the examples which are worth following? That is what companies would have to do. It is not specific to Rio Tinto and I do not see that anybody is in a better position to answer the question.

Q278 Chairman: Let me give you a scenario Lucy. Let us suppose that somewhere in your supply chain in the Far East somebody has subcontracted to a sweat shop full of child labourers and the sweat shop burns down. What happens? Despite all your wonderful systems of checking and processes something horrible has happened. What is the remedy?

Ms Neville-Rolfe: I certainly hope that would not happen because of the systems we have. If that were to happen it would immediately become a major issue for our board.

Q279 Chairman: It would. It would be on TV.

Ms Neville-Rolfe: We would work with the government locally to see what the right thing is because our businesses are local, like others, and probably half the people on our boards and some of

our CEOs locally are natives of the country in which they operate. We do believe in corporate responsibility and that would be relevant in those circumstances. What I want to add is in relation to Professor Ruggie, who does have a good framework. I think he has given evidence to you and has come up with some good thoughts. One of the things we are about to do with him is to see whether we could work on a case study with him—and I think he is thinking of doing case studies in some other areas—on this very question of scenarios and remedies to see what is the right thing you could do going forward to minimise the difficulties we have identified of extraterritoriality. The trouble is that, if you bring in law in certain jurisdictions with extraterritorial effect, you can actually end up penalising companies in that jurisdiction. There can be perverse effects.

Q280 Chairman: How would that penalise companies in that jurisdiction? I do not get the argument.

Ms Neville-Rolfe: Therefore companies will not have their head offices in the UK or the US or wherever because they may become liable.

Q281 Chairman: I have not seen a flight of companies out of New York or California as a result of the Alien Torts Claims Act.

Ms Neville-Rolfe: I do actually think there has been a shift from the US to the UK over the last five or six years.

Q282 Chairman: I think it has been a very marginal change. I do not think the Alien Tort Claims Act is the motivating factor for most of them.

Ms Neville-Rolfe: What you want to try to do, it seems to me, is to come up with a proposal which does not have those kinds of perverse effects and therefore working with somebody like the Harvard team that Ruggie has.

Q283 Earl of Onslow: Nobody is saying that it is not anything other than fiendishly complicated. I must say that I am on the Bribery Bill and we hear in the evidence how complicated it is. Nobody is suggesting that these things are not complicated. It just seems to me that people who have things done wrong to them ought to have a method of remedy. It is basically as simple as that and Henry II understood that.

Ms Neville-Rolfe: The best remedy of course is if you can make the regulatory regimes in those countries improve. This is why international relations and all those sorts of things, which I am sure you have looked at and tried to improve in some of these countries, are very important. Having British companies like those which are seated before you in some of these countries can actually be a force for better regulation, standards and democracy. That is what we would hope. We have not pulled out of Bangladesh, despite the difficulties in the supply chain there. We worked to improve them because we felt that was the right thing to do some years ago.

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Mr Lister: I tend to agree with Lucy on that, the idea that government could really help the local governments—I am not sure what the terminology is but the Government of Bangladesh, for instance—in trying to deal with their legislation and trying to enforce their legislation as they go along. Legislation tends to be on the statute book, it is just that the governments are not capable, sometimes not willing, to enforce it. That is a real key as an initial step.

Sir Brian Fall: Just to agree on that capacity-building point; it is hugely important. It can go in parallel with some of the ideas that you are toying with. We have also a very real problem of dealing with the host country. If the plaintiff says “My courts are no good, I’m going to London” and London agrees jurisdiction, we are building in something which the British Government will have to think about very seriously if legislation is coming. In a way it is quite easy for the Americans because they say “Terribly sorry. Separation of powers. We can’t do anything about what these judicial guys are doing”. The State Department will say “We are very

sympathetic Ambassador, we’ve done everything we can but they ignore everything we write to them” which is very nearly true. I think as the British Government we would find ourselves in real trouble with the Government of X, if we seemed to be ignoring the possibilities for judicial settlement in the country in question. That does not answer the problem of what you do if they are completely useless and there is a real human problem which has not been solved. That again is what we hope we will be in a better position to answer when we get some Ruggie proposals. He has put far more work into this and perhaps it is to the shame of a lot of OECD governments that they have not. He has brought the issue up, put it in the spotlight and is working on it. The chances of getting some sensible ideas coming out are very much higher than they otherwise would have been. That is one of the great things that we owe him.

Chairman: I think we have exhausted our questions. Does anybody want to add anything before we close the formal session? Thank you very much for your evidence. The Committee stands adjourned.

Tuesday 7 July 2009

Members present:

Bowness, L
Dubs, L
Lester of Herne Hill, L
Onslow, E
Prashar B (Chairman)

John Austin
Dr Evan Harris
Mr Virendra Sharma

Witnesses: **Mr Alan Christie**, Director of Policy, Equality and Human Rights Commission, **Mr Peter Reading**, Senior Lawyer, Equality and Human Rights Commission, and **Ms Kavita Chetty**, Legal Officer, Scottish Human Rights Commission, examined.

Q284 Chairman: Thank you very much indeed for attending this afternoon. I would like to welcome Alan Christie, Peter Reading and Kavita Chetty. Before we start on the questions, is there anything you would like to say by way of introduction?

Mr Christie: I do not think so. You have seen our submission. You know essentially what our views are. We would be more than happy to at least try to answer the questions that you have for us.

Q285 Chairman: Is there anything you want to say?

Ms Chetty: No, thank you. You have seen our submission. I have a bit of background about the Scottish Human Rights Commission and how business and human rights fit within our mandate, but I am sure I will be able to do that during the course of questioning.

Q286 Chairman: We have read your submissions with interest. It seems to me that you have a slightly different approach to this inquiry. The Scottish Human Rights Commission is involved at an international level working on how national human rights institutions can contribute to the debate, but the Equality and Human Rights Commission considers that its mandate and resources limit the role it can play in looking at the work of UK companies outside the UK. What can you do and have you done with your existing mandates?

Mr Christie: In general, we can certainly intervene in cases where we believe that to be appropriate. We will offer advice when it is asked for and sometimes when it is not asked for. We are not able to take individual cases in human rights issues, as I am sure you know, nor do we have the power to mediate in human rights issues. We do need to consider that a mandate is GB specific. That is not to say we are not involved in working internationally. We just recently, as indeed did our colleagues in Scotland, gave evidence to the UN Economic and Social Committee in Geneva, so we do engage and we certainly seek to be informed by international experiences, but, given the limitations of our resources and the breadth and the scope of our mandate, our priority is certainly very much focused internally in GB.

Q287 Chairman: Is there anything you want to add?

Mr Reading: I was going to give you a few practical examples of work we have done in this area. Our approach has really been multi-faceted. It is partly

litigation strategy, partly policy work. The Human Rights inquiry has been important in this process. On our work around procurement and reporting of companies in relation to equalities issues and also enforcement action, just very briefly, to summarise, in terms of litigation in the aftermath of the *YL* decision, we undertook substantial work with the Government to secure an amendment to the Health and Social Care Bill which proved to be successful and we were very happy with. We have also recently intervened in the *Weaver* Court of Appeal decision which relates to housing associations and their coverage under the HRA. We understand that is likely to be appealed to the House of Lords and we would also seek to intervene. In that decision, we were very happy with the outcome, which was 2:1, in relation to the allocation, distribution and termination of social housing. That particular housing authority was covered by the HRA in terms of obligations. In terms of the HR inquiry there are a couple of very important outcomes, the most important of which I think links to this particular inquiry, and it is the need for guidance in terms of businesses being able to understand the circumstances in which they may be subject to the HRA in particular, but also, generally, why they should abide by the HRA in their work. There have been a number of recommendations which we have made which link to that. The need for a human rights duty. We have recommended that the Government consult on that, something similar to the equality duty. The need for the Commission, as Alan said, to have the power to represent individuals on human rights claims. And, also, the need for us to have the power to mediate in relation to human rights issues. Alan is going to talk more about procurement and equality issues and so on as we go through, because I am sure there will be questions. I have one final point on enforcement which is not in our written submission and is very important in relation to this inquiry. We are conducting a formal investigation into the poultry and meat processing industry. It is looking at the conditions of employment for migrant workers in that industry because we have indications that there are serious concerns in relation to employment conditions which also relate directly to issues of exploitation and potential human rights abuses. We are currently in the process of undertaking that inquiry.

Q288 Chairman: And from your perspective?

Ms Chetty: I will set out for you briefly how we

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would see business and human rights fitting within our mandate as the National Human Rights Institution for Scotland. By way of background, we were set up by statute in 2006 and we have been operational since December of last year. We have a duty to promote awareness, understanding and respect for human rights and, in particular, to encourage best practice. We fulfil this duty through education, training, awareness raising and research, as well as recommending changes to Scottish law policy practice as our work demands. Between December of last year and April of this year, the Commission held a national consultation on its strategic plan which is scheduled to go before the Scottish Parliament later this week. During that consultation we had feedback from business representatives and from Government who were keen for our support to implement the human rights based approach to the issue of business and human rights, and we identified a few key areas of focus within our strategic plan and operational plan which relate to the role of business in the field of human rights. I will run through those now. Firstly, we intend to look carefully at the issue of procurement. We have outlined in our operational plan our proposal to hold human rights interaction on the possibility that we may hold an inquiry into the issue of procurement. This means really that we intend to bring together all those with a stake in the issue of the procurement of public services, from the individuals affected to practitioners, policymakers, independent experts and others, to develop a shared understanding of the problem, the solution and responsibilities of each of those actors in this area. In this round table discussion we hope to explore the possibility and need for a future inquiry into this issue. Another area which touches upon the private sector is our dignity in care project. This is a key project area for the Commission in the coming months which looks to increase the ability and accountability of duty bearers in this area to fulfil rights. Part of this project will entail working directly with care providers, both in the public sector and in the private sector, to pilot a rights-based approach to the delivery of services I believe a preliminary meeting has already been had with the Scottish Care Association, which is an umbrella organisation for private care providers. We also intend to work directly with the private sector where appropriate. The chair of our Commission has already had discussions with representatives of both the Scottish Development International and the Scottish Enterprise to explore ways in which we might reach out to business and promote a rights-based approach. Finally at an international level we hope to work closely with other NHRIs around the world to develop a common international strategy in this area. In particular we represent the European group of national human rights institutions on two of the international co-ordinating committee steering groups, both of which are related to this area in human rights and business and human rights and climate change. The first meeting of the European NHRIs on this issue will be hosted by the Danish Institute, I believe next month. It is anticipated that

a strategy and programme of work will be discussed there and we hope that this group will be an important platform for us ensuring our learning and our experiences.

Q289 Chairman: This is a question for both organisations. Do you think your mandates are broad enough for you to engage with these issues?

Mr Christie: The temptation is always to say of course we want an even broader mandate, but I think the truth of the matter is we are only somewhat less than two years old and still finding our way around the mandate that we have. We have found that we have a reasonable degree of flexibility and capacity, but as I tried to indicate earlier, we have specific areas where we come up short, where in order to deliver the breadth of service that we think needs to be delivered in, for example, our ability to support individual cases or to mediate, that we are sure and that that would be a valuable extension of the existing mandate.

Ms Chetty: Yes, we do. While our powers specifically apply to Scottish public authorities, our general duty we believe provides us with a basis to work with Scottish companies operating at home and abroad in host states, as well as with the Scottish Government, to support them to comply with their duty to protect rights. We believe we play a crucial role as an NHRI in the promotion and monitoring in this area, and our mandate is broad enough to fully engage with these issues.

Q290 Lord Bowness: We are told that the Danish Institute works with the Scottish Human Rights Commission on the International Co-ordinating Committee Working Group on Business and Human Rights and that they are very advanced in this area of work, both working directly with businesses on their human rights impacts, providing tools and consultancy services and advice for a fee. Perhaps I could ask both organisations for their view about that approach.

Ms Chetty: The Danish Institute is in a fairly unique position of being an NHRI with a business human rights consultancy arm and they have contributed, as you say, greatly to the development of tools for large multinational business in particular. Where the Scottish Human Rights Commission sits differs, but we do believe that we are likely to engage directly with business where it fits within our broader work of the promotional rights-based approach or in relation to our identifying strategic priorities. Early indications are that there is a positive opportunity to integrate human rights into the business environment in Scotland, as it is seen to attract inward investment, the retention of a dedicated and skilled workforce, and it fits as well with the expansion of Scottish businesses into new markets. The core industries in Scotland of oil and gas, as well as the financial services sector, have a particular international focus and impact to be considered. We have already had, as I have said, some discussions with SDI and Scottish Enterprise to explore how we might work with them in promoting a human rights based approach. As I say, we also work with business

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where it fits within our other strategic priorities; for example, through our dignity in care project, and working directly with private care providers. While our approach varies from that with the Danish Institute, we hope to be working in close collaboration with them and to learn from them, for example, through the ICC working group.

Mr Reading: I think their approach is admirable, having read their submission. Our approach I think has been two-fold, which links to their approach. First, we have been looking at how we can use equalities frameworks to apply human rights principles to businesses, whether it is through procurement, whether it is through the requirement on large companies to have indications of gender pay gaps, kite marks for businesses in relation to equality which could be expanded to human rights, but one aspect which I think we are doing which is similar to what they are doing is the development of equality and human rights indicators, which we are required to do under the Equality Act. As part of the *State of the Nation* report that we are going to be producing next year, that will include reference to an assessment of where public and private bodies are at in relation to those equality and human rights indicators.

Q291 Lord Bowness: Do you think that your mandate extends to working as the Danes do, particularly providing consultancy services in return for a fee? Even if they do not, would it be appropriate in the UK?

Mr Christie: I would be very surprised if we ever were allowed to go in that direction, never mind if we wanted to go in that direction. Clearly we have an advisory role but we also are very conscious of our regulatory role, and I think if we were to find ourselves as a commercial organisation the credibility of that regulatory role would be seriously undermined. I do not really think that is the direction we would aspire to go in.

Q292 Lord Bowness: Is that the Scottish view as well?

Ms Chetty: I would echo that. I think it is something that we have yet to consider and address.

Q293 Lord Lester of Herne Hill: I should declare an interest, because I have appeared before the HRC in third party interventions but not in anything to do with this case. I should just say in relation to the last question—and Mr Christie may not know this—that I have advised in the past that it would be unlawful for the old Equality Commission to start accepting fees and putting themselves in a conflict situation with their law enforcement function. Both organisations today have given very clear written evidence about the *YL* problem being a problem of the extent to which the Human Rights Act applies to bodies performing functions of a public nature. Both organisations have said that they fully agree with this Committee about the need to have a proper solution to that problem and the Ministry of Justice has suggested that the problem can be exaggerated. Could I ask you whether you think that this is a minor problem or a more serious problem?

Mr Reading: From our perspective I think we consider this to be a very serious problem. The case law has demonstrated that it is a very complex area and that case law is not going to solve this issue. We were very surprised by the Government's written evidence on this point because the Government has agreed with us in the past that there was a need to consider the wider issue of the definition and that it would be done so by public consultation. In fact, when the amendment to the Health and Social Care Bill was being considered, they agreed that the wider issue would be considered by consultation. We have not received any such notification that there will be a consultation. There was going to be, they said, in the context of the Bill of Rights Green Paper, but there was nothing on it in there and so we are concerned that the Government has not fulfilled its commitment to consult on the wider issue.

Q294 Lord Lester of Herne Hill: They have in answer to one of my questions said that they do still intend to consult but they do not say when. There is a commitment still to that.

Mr Reading: Yes.

Q295 Lord Lester of Herne Hill: Can you give some examples of why it is not just a trivial problem, other than, say, housing or detention? Do you have any further material you can give us?

Mr Reading: In relation to work on the Human Rights Inquiry we interviewed the voluntary sector in terms of its understanding of human rights issues and we had clear evidence from the POPPY Project, for example, that they are not sure of situations in which they may have human rights obligations in terms of their housing and care of trafficked persons, for example. There is a reference to it in our final report. I think one big area that remains uncertain is the voluntary sector.

Ms Chetty: I believe that the anecdotal evidence during consultation suggests that this is an area of concern where there is uncertainty in practice, if not legally, about this question of whether this is settled in a legal sense or that it is an area of marginal uncertainty. The key areas that we have picked up on would be other vulnerable groups, such as detainees in the broadest sense and those detained under the mental health legislation. We are currently commencing our mapping projects to identify gaps as well as good practice in Scotland, to then provide the evidence base for a national action plan for human rights in Scotland, and I believe that may assist us in identifying the gaps and loopholes of protection in this area.

Q296 Lord Lester of Herne Hill: When Andrew Dismore introduced his private Member's bill on this last week, Bridget Prentice, the Justice Minister, was hostile to it in her reply, and of course it did not get anywhere. It was the bill essentially from this Committee. The Government have suggested that legislative change is unlikely to help. I myself do not understand that answer but perhaps you can give your own views about it, because the original intention was made clear by Lord Bingham and

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Baroness Hale in their judgments in *YL*. I do not understand, but maybe you can help me, why putting the situation back to where we thought it was in 1998 by means of a legislative amendment would not be a good idea. Could you try to explain what you think of the Government's notion that legislative change is not likely to help?

Mr Reading: We think that legislative change would help in a number of ways. It would help in terms of clarifying the factors that are relevant to take into account. We do not see it as a silver bullet because obviously those factors must be applied to the particular facts of the case. We saw the proposal of the JCHR in relation to the Bill of Rights on this issue, that you could, for example, have a piece of legislation which provided guidance in terms of interpreting section 6(3) of the Human Rights Act. Our view, as we have said in our evidence, is that that would be a preferable approach, as to any amendment to the HRA, given concerns with constitutional issues and not wanting to make changes to the HRA unless they are absolutely necessary. We think that would help, but there would be further work that would be needed to be done in particular guidance, and I think that that would need to supplement any further legislation.

Q297 Lord Lester of Herne Hill: What would be wrong with a simple amendment to the Human Rights Act to put it back to where we thought it was originally when it was passed? What is the problem about doing that?

Mr Reading: From our perspective it is a concern at amending the HRA in general. That is something that we are thinking about in the context of the work on the Bill of Rights as well. We are concerned with indications from the Conservative party that if they came into power they would, for example, repeal the HRA. That is where our concerns are coming from with an amendment directly to the HRA. For example, the Health and Social Care Bill, it being a deeming provision on the effect of the HRA, we thought was helpful, as opposed to a direct amendment.

Q298 Mr Sharma: You are thinking about producing guidance on the 1998 Act for the private sector, particularly focusing on private bodies who might be covered by the Act. Have you liaised with the Government on whether this is your job or theirs?

Mr Christie: I think it is everybody's job. I can certainly see a role for the Commission in providing guidance. That is clearly one of the functions that we were established to fulfil, and a function that we are very happy to undertake. Equally, though, I think there is a role and responsibility of the Government to be engaged in that process. This should be something that all parties are involved in. I think it would be a mistake simply to say, "That is your responsibility and push it off to one side." We much prefer an engaging process that would demonstrate also to those who were subject to the advice and

guidance that it is fully understood across the spectrum, as it were, because this was something that was important.

Q299 Mr Sharma: I am sure you are aware that the Government is conducting a survey to consider whether business want this kind of guidance. Do you have any evidence that this guidance is wanted by the business community?

Mr Christie: No. It is a short, one-word answer, in effect. We talk to business and business representative organisations regularly and constantly, and I have to say that there is no evidence that we have seen of a particular demand to focus in on specific human rights issues from within the business community. There are human rights issues that are important to the business community but they do not categorise them in that way, so the idea that there was an expectation for a suite of guidance and guidelines characterised as human rights and business or human rights issues for business I think would be a stretch from where we are, where the business community is thinking about these issues.

Q300 Lord Dubs: This is where we turn to Kavita Chetty and the Scottish Human Rights Commission. You have told us that over and beyond the legal obligations under the Human Rights Act and other instruments on business, business should be encouraged to take a human rights approach in a wider sense to its activities. What would this involve? Can you or the Government do anything positive to support business to follow your guidance and recommendations?

Ms Chetty: We believe in what we call a rights-based approach to business, and that approach would go beyond the due diligence recommendations that Professor Ruggie made in his last Protect, Respect and Remedy Framework to look at how business can more deeply embed a human rights approach. This can give concrete expression to the notion of accountability of business. It means that business must see human rights not just as an end but also as a means of doing things, as part of business processes. It means they need to take an approach which first recognises the rights or rights-holders as the starting point. They need to take an approach which then identifies where the responsibility lies for the protection of certain rights and an approach which looks to further the protection and realisation of those rights through certain actions, all of this being underpinned by some of the core rights-based principles of participation, accountability, non-discrimination empowerment and the legal framework of rights protection. We think that that approach has resonance beyond the business sector. It is an approach where there are many synergies and lessons to be learned from the public sector experience. We are currently evaluating a project which saw the integration of this rights-based approach into The State Hospital of Carstairs in Scotland, to learn lessons about how this approach can be applied and works in practice. We will also be working with business to promote this rights-based approach. There are many tools and guidance

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documents already in the public domain which allow business to begin to engage with what a rights-based approach might mean in practice. For example, the Danish Institute compliance toolkit, the work of the Business Leaders Initiative on Human Rights or the International Business Leaders Forum *Guide to Human Rights Impact Assessment*. We believe that ourselves, other actors and government can contribute to this promotion of human rights in business, so we are encouraged to see action being taken by the Foreign and Commonwealth Office and Department for Business Enterprise and Regulatory Reform to produce a toolkit on business and human rights, and government can play a role in supporting these initiatives. We think that a multi-stakeholder approach to developing the role of business and establishing guidance for business can be the most appropriate way forward in building a shared understanding of what a business's approach to human rights should be.

Q301 Lord Dubs: At one point early on in the answer you referred to a hospital example. I wonder if you could elaborate on that example, please.

Ms Chetty: The State Hospital of Carstairs in Scotland many years ago looked to change their culture and the way that they approached human rights from being a defensive approach and an approach which saw detainees come in and relinquish their rights to then become one based on a human rights based approach. Our Chair, Professor Alan Miller, assisted in that process of integrating human rights into the culture at the hospital. Now, many years down the line, the Commission wants to go back and assess that project and learn lessons from that project, both good and bad, and hope to use that as an example to promote human rights based approach throughout the public sector in Scotland.

Q302 John Austin: This is a question for the EHRC. Government developments have differing objectives, different priorities. In your experience does the Government have a joined-up strategy in relation to its work with business on human rights issue?

Mr Christie: A tricky question.

Q303 John Austin: The question is easy. It is the answer that is tricky.

Mr Christie: Yes, the answer is the tricky one. I need to be careful, I am being recorded! I think we should all be modest enough to admit that we can do better, that often there are inconsistencies or even divergences in approach. I have to say I think in our experience there is increasingly an effort of will to try to find comprehensive joined-up approaches to these issues. It is a work in progress. I am sure we could find lots of examples where the commonality of thinking has not been good enough but I would want to give credit to colleagues across government. I think there is evidence that they have taken these issues much more seriously than was the case in the

past and that there is an effort being made to try to find synergies and commonalities in working together effectively.

Q304 John Austin: Do you think it would be unfair to suggest that the Government might drop its positive measures at the first sign of resistance from the CBI?

Mr Christie: Let me give you the example of the Equalities Bill which is very large in our world at the moment. I think it is fair to say that there were a number of ideas that we wanted to see explored in that bill that many others wanted to see explored in that bill that have not seen the light of day in the face of concerns being expressed by a variety of lobbies, including business lobbies. I do not think it is for us to judge how resistant the Government was to lobbying from any particular quarter, but there is certainly a hesitation and a reluctance to take on strong opinion on this issue.

Q305 John Austin: We have heard from Ms Chetty earlier. Would you say from the Scottish experience that the Scottish Government has taken a more joined-up approach?

Ms Chetty: Any strategy in this area is clearly in the early stages, but our experience in Scotland has been that there is an openness by government to engage in this area. As I said, it fits with priorities in Scotland of attracting inward investment and the expansion of Scottish business. I believe the Chair of our Commission has had at least one meeting with a senior Scottish minister to discuss issues around the importance of human rights around trade and investment.

Q306 Earl of Onslow: First of all, I must apologise for being late. I got very badly held up in traffic. We have seen on this issue that people are saying there is this lack of joined-up thinking. You said you thought possibly there was. It is really examples which one would like to know. Both these bits of paper are riddled with allegations but I would really like an example—

Mr Christie: Of where we are joined up?

Q307 Earl of Onslow: Of what is joined up, yes. It is much easier to deal with if you know what you are talking about and I certainly do not at this stage.

Mr Christie: Let me give an example of public procurement which for many years has been seen as an area in which the use of public resources could be used to leverage significant improvements in the delivery of social priorities, reducing employment gaps, improving working conditions and so on and so forth by setting standards of behaviour and performance for private companies hoping to gain public sector contracts. There has been a feeling that there was a lot of unrealised potential there, that somehow the application of the idea was not rigorous enough, that we were not really nailing the steps that we could take to make a difference. I think there is visible change in that area. I think the quality and the focus of the guidance coming from, for example, the Office of Government Commerce has

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taken much more on board those social policy concerns and clearly issues that deal with equality of human rights. That is not to say there still is not a long way to go, and one of the commitment and one of the things that I think is emerging through the debate on this issue within the context of the Equality Bill is an expectation, indeed a requirement, that ourselves, the Government Equalities Office and the Office of Government Commerce are joined at the hip and coming up with clear guidance that will help everybody on both sides of the equation to better understand not only what it is that we are trying to achieve but how the Government expects and will support the achievement of those objectives.

Chairman: One brief question and then we need to move on.

Q308 Earl of Onslow: You say that you think government procurement policy should be used to improve employment conditions, is that right?

Mr Christie: Yes.

Earl of Onslow: Thank you.

Q309 John Austin: If the Equalities Bill goes through, there is going to be a specific requirement in this field. This Committee in its earlier reports criticised the ODPM for the confusing nature of the public procurement policy. Clearly there is an agreement between us and you that there needs to be clear guidance, but should this guidance be coming from the Government or is the EHRC in a position to provide this?

Mr Christie: I think there is a role for both. There is provision on the face of the bill that is before Parliament at the moment that there will be a procurement requirement and an equalities requirement in the public duty. The specific duty that will flow from that and the regulations that would flow from that from ministers of course has yet to be specified. We will be working with others, I am sure, to make sure that that would meet the need. Whatever is agreed in the bill, we have a statutory responsibility to provide guidance and we will do that. We also acknowledge that if you are a procurement officer working for a public authority, of which there are 44, 000, the Equality and Human Rights Commission is not going necessarily the first number you call if you are faced with a problem. You are much more likely to go to the Office of Government and Commerce or some other central government department than to us. We certainly have a role to play and we will play that role. We will make sure that we consult extensively and we construct guidance that is appropriate and, to use that horrible phrase, fit for purpose and delivers on the expectations, but to make that truly successful, we need to do that work in very close co-operation with those central government departments, in this case particularly OGC, because that would add enormously to the weight and to the efficacy of whatever guidance we were going to publish.

Q310 Lord Dubs: This is for the Scottish Human Rights Commission again. You have suggested that some changes in company law might be made to minimise the harmful impact of businesses on human rights, including by changing enlightened shareholder value. Could you expand on that, please?

Ms Chetty: We mentioned in our written evidence that the Companies Act takes an enlightened shareholder value approach, placing an obligation on directors to have regard to social and environmental factors. It is clear that the duty there is owed to the company itself rather than to society at large and there is also nothing regarding the duties of employees. It is understood that there is a potential for a more progressive approach to be taken in the future where the company owes broader obligations to society. As a Commission it is not one of our focus areas and we are probably not at the stage of giving any further consideration to how those changes could be implemented.

Q311 Lord Dubs: Nonetheless, you have raised it as an issue and we all know the Government was resistant to amendments to expand the provision for social and community impacts in the Companies Act 2006. Do you think there is any political will to make changes to company law so soon after the previous Act was passed?

Ms Chetty: Probably not, but as a Commission we would hope that you would push for that progressive change.

Q312 Chairman: Can we really recommend that businesses should be required to conduct human rights impact assessments when public bodies do not? Can we have two approaches for businesses and public bodies?

Mr Christie: We think impact assessments are useful tools that ought to be used much more extensively than they are. There is a certain cynicism almost, because our experience tell us that the use of impact assessments tends to be less than consistent, less than universal, and often there is what one would describe as a tick-box approach to the exercise. What we need, what we would advocate very strongly, are very effective comprehensive impact assessments used much more extensively than they are currently. We would support and we would argue for that. How we get to from where we are to where we want to be and whether the inclusion of specific human rights impact assessment should settle alongside an equality impact assessment or whether we find a way of broadening what currently exists to be more all-encompassing I think are questions open for discussion. Effective impact assessments we are absolutely in favour of. How we make them effective is the challenge, I believe.

Q313 Lord Dubs: There is an onus on businesses, in your view, to do that, but public bodies do not have to do it. The general argument for impact assessments is clear, but should there be a distinction between businesses and public bodies?

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Mr Christie: I think it would be our view that it is not realistic to expect the private sector to do something in this area that the public sector is not required to do.

Q314 Lord Dubs: Following on from that, can you tell us why a general duty to conduct a human rights impact assessment would not place an onerous burden on either a business or a public authority? Are there any lessons to be learned from the equality duty?

Mr Reading: We have had a look at some of the work that is being done by other organisations and I think a good example is the pilot project by the Department of Health in the VIHR which has looked at how you can embed human rights considerations into the processes of public authorities, including issues such as impact assessments. We do not see it as something that is going to be particularly onerous because you would undergo the same processes that would be required in relation to the equality duties. We think that it would be good practice for such organisations, including where private bodies are carrying out public functions, for them to do so. We do not suggest that all private bodies would be required to conduct such assessments; it would be private bodies carrying out public functions. Just on that point, we have said that the Government should consult on introducing a human rights duty. We believe that that is important because we do think it is important to take on board the views of businesses and other sectors to consider these issues in more detail, because it would be an important step.

Q315 Chairman: Would you like to say anything from the Scottish perspective?

Ms Chetty: Yes. We would promote a joined-up approach to both equality and human rights impact assessments in both the public and the private sector. We are exploring this issue further with public authorities who are already taking a joined-up approach to equality and human rights in piloting their impact assessments. We are contributing to the consultation of the Scottish Government on the implementation of the specific duties under the Equality Bill and there we would also hope to promote an approach which looks at equality and human rights impact assessments in a joined-up coherent, comprehensive framework. We would also support Professor Ruggie's recommendation that all businesses in all sectors can carry out human rights impact assessments.

Q316 Lord Bowness: A question for the EHRC, if I may: your remit allows you to support strategic equality cases. In your evidence you have said that you think the remit should be broadened to allow you to support more individuals to take cases under the Human Rights Act and that you should be able to support conciliation and mediation services. How do you see those extended powers helping individuals who wish to allege that practices in the private sector are having a negative impact on their human rights?

Mr Reading: The first point is that we have recommended that the Government should consult on extending our powers in those respects.

Q317 Lord Bowness: Forgive me interrupting you, but you may have recommended that the Government consult but presumably you are in favour of it.

Mr Reading: I think we are in favour of the need for these issues to be discussed. The evidence that we had was that most organisations that considered this issue in our evidence were supportive of it and I think our view is that we would be supportive of it, but we do think it is important that we have an opportunity to discuss these issues in more detail. In terms of why we think it would be important, the problem at the moment in relation to interventions is that often we do not know about these cases until we hear about them through various sources, so we do not have the same opportunity to be as strategic as we would like to be. We would have that opportunity if we could support individuals in terms of human rights cases. A good example may be this detention case that we became aware about. If the individuals had had an opportunity to come to us, then it may have been a different result in this case. Strategic litigation is the key benefit. Interventions do not provide the same focus.

Q318 Lord Lester of Herne Hill: Could I challenge you on this. The Commission is overwhelmed with various powers, functions, duties and has a limited budget. When the Equality Bill was going through, I successfully persuaded the Government, as you probably know, that you should be allowed to bring judicial review proceedings in human rights cases against public bodies. That enables you to deal with any case where individuals or groups or anyone else comes and says in relation to detention or any other aspect, "Here is a practice rule or procedure which is contrary to the European Human Rights Convention" and you can then seek judicial review. If you start to suggest that we must be able also to deal with all individual complaints of human rights violations, that is the very thing which the Government, with my support, ruled out because they were worried that you would be completely overwhelmed. You have to deal with all the quality cases, which of course are cases where you assist individual proceedings. If you then had to deal with the whole mandate of the human rights catalogue of rights, you would be completely overwhelmed and your cutting edge would be seriously blunted. I know you say you asked the Government to consult, but your own view is what really counts and it seems to me that working within the Commission you would be well advised not to pursue the idea that you would have the power to pursue every individual case, if that is what you are saying, whether against a government body, a public body or a private body. I really think that is not a sensible thing to be putting forward.

Mr Reading: Perhaps I could explain in a bit more detail. We would not be considering a proposal that we support all human rights actions in terms of

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individuals. We would very much take the same approach as we have on equalities issues, which is to consider what are the strategic issues and whether or not we should provide support to the individual. We do think there potentially is an issue about access to justice here, because the sources for which persons can obtain justice in relation to human rights cases is in our view diminishing.

Q319 Lord Lester of Herne Hill: I am talking about legal aid.

Mr Reading: Yes.

Q320 Lord Lester of Herne Hill: Can I stop you. I am sorry. If you have the power to give assistance in any human rights case against public or private bodies, apart from anything else you will be deluged with people coming to say, "Please give assistance." You will then have to have your staff looking at all those cases. You cannot do everything. It does seem to me to be a mistake, especially when the next government is going to review quangos, for you in any way to be accused of overreaching. That is why I urge you to reconsider.

Mr Reading: I can understand your point, Lord Lester. I would just say that the number of cases that are going through the courts on human rights, from what we understand from recent surveys has not been increasing. We do think we would be able to act strategically in terms of how we use our resources. We certainly do not in relation to equality cases represent even a tenth of those that come to us. I take your point, though, and it is something we will consider.

Q321 Earl of Onslow: I am, as yet, rather unconvinced of the scale of problem but I am totally convinced, listening to you, that you all have your imperial sola topees on and you want to advance the boundary of your empire to the far reaches of the Hindu Kush. I hear the sounds of empire building with a problem which does not seem to me as large as perhaps you are making it out to be. Am I being unfair?

Mr Christie: Ever so slightly.

Chairman: I think we will stop there.

Q322 Mr Sharma: A question for the Scottish Human Rights Commission. You have recommended that we consider whether the barriers to our courts exercising extraterritorial jurisdiction over the activities of the UK companies and their subsidiaries overseas. Is a network of developed countries all exercising extraterritorial jurisdiction over allegations of human rights abuse in the developing world a realistic or attractive option?

Ms Chetty: Extraterritorial application of human rights in this area is clearly an area of development at international level and it is undoubtedly an area that will be expanded and clarified in years to come and HRIs may play a role in doing that. We are not yet in a position as a Commission to comment on the feasibility of extraterritorial liability legislative provision, but we do recognise that the behaviour of and impacts of Scottish and UK companies acting

abroad warrant scrutiny. We will, as I say, be looking to engage directly with the private sector on human rights issues that they face when operating overseas and also sharing our experiences in promoting a rights-based approach to business through the network of NHRIs globally.

Q323 John Austin: A number of NGOs have given evidence to us, particularly on the issue of improving the performance of UK companies abroad, and have suggested the need for a UK commission for business, the environment and human rights. Do either of you have any views as to whether this is desirable? Or would it be just another commission and an example of too many cooks?

Mr Reading: We are aware of that suggestion. Although in principle, in some ways, we can see why it would be important, particularly because there may be a gap in jurisdiction in terms of gaining access to justice for those UK companies operating overseas, that is on the one hand. On the other hand we do see some potential problems with that proposal. For example, if in principle the country in which the business is operated has jurisdiction, then how would the British body be able to take action in those circumstances, or should it be able to take such action? We see potential conflicts there. But I would also say that, given the fact that there is a concern with the creation of new organisations, particularly when our organisation and the Scottish Commission have just been created, it perhaps may be a little bit early to make such a suggestion.

Ms Chetty: We do not have a definitive position on this. We recognise that non judicial grievance mechanisms can play an important role in increasing accountability where they are in accordance with rights-based principles and supported by a robust legal framework. We would welcome perhaps further discussion on any proposal for a UK Commission which on the one hand could be helpful in having a strength in the complaints handling process, but there may also be scope for an overlap with regard to any promotional or capacity-building work. Although the Scottish Commission does not have a complaint handling function, we believe that our mandate does allow us to explore other means of increasing non-judicial accountability. By that I mean that we intend to take an approach where we hold, as I have described earlier, what we call human rights interactions: essentially a multi-stakeholder dialogue with key actors to determine what rights are at stake and the responsibilities of individual actors. We believe that that approach will be helpful in allowing a common framework of understanding in what the business responsibility to respect rights looks like and what the state duty to protect looks like. As I have said before, we will be engaging directly with business, and further to that we believe that this proposal is looking at business human rights and the environment, and the Scottish Commission is looking at the interface between all three in its work with the ICC Working Groups.

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Q324 John Austin: Mr Reading, you talked about a conflict of jurisdiction but we were concerned about those areas where British companies may be operating in areas where there is scant regard for human rights and little protection or recourse in those countries. Both of your bodies have educational and awareness raising powers, but it is suggested that this Commission might have dispute resolution powers as well. I think that is something that Ms Chetty was alluding to. Since the EHRC at the moment does not have adjudicatory or dispute resolution powers, do you think it would be feasible for a human rights commission in the UK to be able to exercise those powers, as I think the Scottish representative has suggested, in respect of extraterritorial disputes involving allegations against UK and British companies?

Mr Reading: Legally I do not think there would be any barrier to that if the claim was brought under the Human Rights Act. Obviously our jurisdiction extends to England, Wales and Scotland to the extent of reserved matters. I think that if we did have such mediation powers that could be a useful tool. We have been informed about the case that Leigh Day are involved with in relation to the activities of companies overseas. We could, for example, consider talking to them about those issues and how we may be able to resolve them.

Mr Christie: Perhaps I could offer a non legal response to that. At the end of the day we are talking about how we can best influence the behaviours and policies of businesses and companies. To do that, we need first of all to demonstrate an understanding of their business, what it is they are trying to do and the challenges that they face in trying to do that, and, having demonstrated that understanding, to explain and demonstrate to them the best interests that they have in respecting human rights in pursuit of their business. If there is a belief that that can best be done by creating a new body with new powers, fine. I think we would take the view that given we are less than two years old and at the very least we have the ability, hopefully, to persuade, to engage, to advocate, give us the chance to try and do that. I do not think there would be a great demand from the business community certainly for a new Commission. We have to build our own credibility in order to be effective with them. That would be a challenge faced by any organisation, so I think we can play a part, we can play a role, but it would be for you.

Q325 John Austin: I am sure you are right in saying that there would not be any great enthusiasm from the business community but in some senses you have been rather generous to the business community because the evidence that we have seen suggests that many companies behave quite differently in the UK to the way in which they behave in their overseas operations.

Mr Christie: That is a long-established pattern of behaviour in not just UK companies but companies worldwide. In fairness, many companies quite voluntarily are trying to address that through their own policies and corporate responsibility stances, but there is clearly a role for the public sector to play in reinforcing and cajoling and regulating perhaps even in that area, but the question you are asking is how can that best be done. All I am suggesting to you is that there are organisations and institutions in place that could certainly make a significant contribution to improving or to bringing about the behavioural improvements that you are looking for.

Q326 John Austin: Is not the CSR thing sometimes a little cosmetic? I can recall many years ago a certain British bank running very good training schemes to get young black people in this country into employment and training whilst being one of the major planks supporting the apartheid regime in South Africa.

Mr Christie: I cannot imagine who you are referring to! This is slightly off our remit but it does seem to me that, particularly for big companies who adopt socially responsible business practices, even the cynics would say that at the very least they would do that as a risk management exercise in order to protect themselves and protect their reputation. The problem about claiming to do something and then not actually doing it is that you tend to get found out and the damage to their reputation would then be enhanced, so it is in the best interests of companies to say that they are behaving appropriately and to behave appropriately if they want to protect their reputation at home from consumers who, as we all know, are these days fairly interested in these matters and they can indeed have a commercial impact.

Chairman: Thank you very much indeed for your time this afternoon.

Witnesses: **Mr Gavin Hayman**, Director of Campaigns, and **Ms Seema Joshi**, Legal Advisor for Ending Impunity, Global Witness, examined.

Q327 Chairman: I would like to welcome both of you this afternoon and say thank you for your time. We need to finish by about 20 past three and it would be very helpful if we could start. I want to look at the question of the relevance of the Ruggie Framework in conflict zones. Why do you think the UK should take unilateral steps in respect of UK companies operating in conflict zones before Professor Ruggie comes up with his proposals for a global response?

Ms Joshi: We think the Ruggie Framework is quite relevant. We support the three pillars that have been

developed in Professor Ruggie's Framework. In the section in his report specific to conflict zones we support his finding that these were the places where the worst human rights violations are occurring and therefore companies are at highest risk of being complicit in these violations. We support the finding that conflict zones are unique places with unique circumstances where there is violence, absence of law and an absence of governance and that in this context the human rights regime cannot function as it is intended to function when looking at

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international human rights. We support Professor Ruggie's findings specifically that states should take more assertive policy action, we would actually go even a step further and like to see Professor Ruggie suggest that in these contexts voluntary mechanisms are not enough and that in conflict zones there should be hard law that is used and there should also be direction given by the home state, in this situation the UK Government, that compels UK companies to comply with human rights standards, and if they do not these companies should be sanctioned.

Mr Hayman: As for why the UK Government should go further, I would say there are a number of cases where UK companies have been found to be guilty of violations of the OECD Guidelines on multinational enterprises, which is a source of considerable national embarrassment for the UK, where the UK has done nothing about addressing that effectively. One of the examples we cited in our paper is that of Afrimex which is a company trading in coltan and cassiterite, which is tin ore coming out of the East of the Democratic Republic of Congo. It was found in violation of two main elements of the Guidelines: one was paying rebel groups and the other one was failing to exercise due diligence over the supply chain to weed out the use of child forced labour. The UK National Contact Point has ruled that there is a UK company actively in violation of the Guidelines and yet nothing has happened as a result of that. That is a source of embarrassment. I think if the UK wants to be a credible international actor—and we have DFID publishing the White Paper talking about trying to do this more in conflict zones—the UK faces a number of particular challenges. It will not be a credible intercessor in the DRC unless they address the human rights impacts of those companies operating in that particular conflict zone. So, I would say it is a particularly poignant challenge for the UK at the moment and the UK should develop and advance its thinking on this topic.

Q328 Mr Sharma: A number of witnesses have told us that the Government lacks a joined-up strategy on human rights and business. Do you agree?

Mr Hayman: I can answer that really simply: yes, I would agree with that completely.

Q329 Mr Sharma: If so, can you give us any examples of the implications of this lack of coherence in respect of businesses operating in conflict zones?

Mr Hayman: A perfect example being the one I have just cited of course, that of Afrimex and the whole issue of its being found in violation of OECD Guidelines. Another example might be a UK company AMC, Amalgamated Metals Corporation, a subsidiary of which has been named in UN Expert Panel reports looking at the Eastern DRC and arms violations in the region. It was found to be working with a particular *comptoir*, (which is the Congolese word for a trading company) which was prefinancing intermediaries who are called *négociants*, who are the people buying the minerals on the ground, and who were buying from particular

rebels. The UK Government has not done anything about that. It was invited through a Security Council resolution to actually propose what it was going to do about tackling companies' roles in funding conflict in the DRC. We had a recent meeting with the Minister for Africa, Lord Malloch-Brown, and he could not give us a straight answer. He said, "I cannot get a straight answer from my people." So perfect—there you go—an absolutely *prima facie* case of lack of joined-upness. I could carry on if you like to also incorporate the UK Department for International Development's role in all this. It has a whole programme called Trading for Peace which is meant to be working with companies trading minerals from the Eastern DRC and trying to get them to use their powers for good but which in fact that has turned out to be a big block on dealing with rogue companies that only seem to want to operate in a predatory manner because DFID are saying that they cannot frighten the companies, they cannot get out in front, 'let us talk to them first'. There has been a real problem of actually addressing the hardcore of malfesants who are not actually interested in doing good work; they are simply there to make money and they want to make money as fast as possible and get out.

Q330 John Austin: You said quite clearly that Afrimex and the AMC should have been reported by the UK Government to the UN Sanctions Committee for their activities in the DRC. Can you give any examples of other companies that have been reported to the UN Sanctions Committee by their home governments?

Mr Hayman: It is a good question. The standardised practice is normally a UN expert panel will go away, investigate and recommend that companies are sanctioned and that is the way it has normally happened. I know of discussions between governments behind closed doors about who goes on sanctions lists. The example would be Victor Bout, the person who was named by Peter Hain as the "merchant of death" involved in arms sanctions violations from Liberia, Sierra Leone and elsewhere. He was taken off a recent sanctions list. There was considerable embarrassment and a suggestion that the UK and US were stopping him going back on the sanctions list. He was put back on shortly after the exposé in the press so that was pressure on the UK/US governments to put him back on. It was not necessarily a UK company but certainly it is a subject of much negotiation at the Security Council which companies get sanctioned.

Earl of Onslow: Can you tell me what is this stuff we are talking about, cassiterite and something else? Does anybody else know round the table?

Q331 Chairman: Let him explain.

Mr Hayman: Cassiterite is effectively tin ore so it is a kind of rock that is dug out of the earth and it is turned into tin in smelters mostly in the Far East, although one of these smelters is owned by a subsidiary of a major British company called AMC. Tin ore is used in a huge number of products. It is a solder in the electronics industry so it is used for

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things like mobile phones and iPods. Coltan is a particular commodity that is used to make chips and everything else in mobile telephone devices.

Q332 Earl of Onslow: And that is the only place it comes from, is it?

Mr Hayman: It comes from other places but a lot of its production is tied into long-term mining contracts elsewhere. The DRC production effectively is sold on the spot market—the open market—and as these smelters have excess capacity so they tend to Hoover up what is available internationally and melt down as much as possible. There is a problem tracing it back to sources as a lot of it can get mixed together from different sources but there is also an issue of there are only a few choke points in the global supply chain, only a few major international smelters where the stuff goes to, so there is a way of looking at the trade there and seeing where they are buying it from.

Earl of Onslow: That is very helpful.

Q333 John Austin: On the Afrimex and AMC issues, both of these companies have been publicly named by the UN Panel of Experts in relation to their activities in the DRC. Afrimex has also been found in breach of the OECD Guidelines by the UK National Contact Point, as I think you told us. What practical difference would it make if a report were to be made to the UN Sanctions Committee? They have already been named and shamed.

Ms Joshi: I think it would make quite a big practical difference because, first of all, as we have seen with the final statement from the UK NCP, nothing has actually happened with that final statement. We were quite happy with the decision made and the final statement itself and the text is quite good. The disappointment is that no other department in government or in no other way has the Government picked it up within its policy in terms of its relationship with Afrimex, so the practical significance is that it would give a signal to companies that do not comply with final statements that the UK Government takes these instances very seriously.

Q334 Lord Dubs: You recommend that the UK should take steps to develop sanctions for UK companies which fall below a certain standard in respect of the human rights impact of their business. Do you think the UK can determine that standard without some internationally agreed benchmarks?

Mr Hayman: I would give an example perhaps of the Anti-Bribery Convention, if I may, in terms of extraterritoriality and bribery by UK companies and everything else. Looking at the history of anti-bribery legislation in the US, the US discovered that there was a major problem with American corporations bribing. There was a particularly big scandal around Boeing in the 1970s. They unilaterally passed legislation that outlawed US companies doing it and they used that as a platform then to launch an international programme which led to the OECD Anti-Bribery Convention, so I would say there is a role for unilateral action leading

in due course to a multilateral convention on understanding these things. That is a good model for extraterritoriality about human rights abuses. There is room for national governments to act still with their own particular companies and there is a role for international co-ordination and a level playing field. I think it is a two-step process. I do not think you have to necessarily go straight towards international and multilateral action.

Q335 Lord Dubs: Before we get to international and multinational action do you think that unilateral action by the UK would really improve human rights in conflict zones? In other words, is this not just a policy for enabling UK companies to keep their noses clean?

Mr Hayman: In terms of the DRC I think it would make a major difference. You have two major companies there who have been involved effectively in funding rebel groups. I will give you an anecdote, if I may, from looking at the issue of conflict diamonds, which is one of the things our organisation has done in the past and we were nominated for a Nobel Peace Prize for our work on that. It is not like it stops the whole problem overnight but it can help address and diminish the intensity of the abuses that take place and it sends a clear signal to other international actors that perhaps the game is up. I think there is a need for a strategy of headhunting perhaps the worst malfeasants in these kinds of areas to show everybody else that the rules have changed. There is a standardised rule that there are always 15 per cent of people who obey the rules, 15 per cent who always break them, and there are 70 per cent who wait and see what is going to happen in the middle. I would say in this case what you are helping to do—and perhaps the UK, Norway and others who seem already to be putting some practices in place, and you heard about Denmark earlier on—is signalling that there is a general sort of change in business ethics in conflict zones.

Lord Dubs: Let me put an argument to you. I do not know whether you would call Burma a conflict zone but let us say there is enough going on there for it to be within the terms of what you are saying. What about the argument that if Western companies (not necessarily British) pull out of Burma it will make not the slightest difference in Burma because they will immediately be replaced by Chinese companies who do not care about human rights in Burma?

Q336 John Austin: Or Indian?

Mr Hayman: It is an omnipresent challenge, I would say. What is interesting is that we have actually done some work on Chinese companies in Burma. We looked at them and we showed how they were effectively engaged in illegal logging. It was sufficiently embarrassing to the Chinese pre the Olympics that they actually shut the border and pulled their companies out of Burma. They were illegally logging in the Karen areas where there is a series of minor civil wars along Burma's borders. We are not advocating that only the UK does this. I think there has to be a role for governments to

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provide guidance to their companies. I would also say there is a role beyond just pure legislation to actually providing guidance to prevent companies getting into trouble in the first place. That is where, to my mind, there is a huge fertile area of what the UK should be doing, particularly the FCO, and it simply is not at the moment. For example, there should be clear guidance about what the UK Government would like you to do if you are operating in Eastern DRC, or how you should be considering the risks of operating in a conflict zone. Why can't that be done?

Q337 Lord Dubs: One tool, as it were, and I think in this you agree with Professor Ruggie, is to use export credit guarantees. I think John Ruggie said they could perform a useful tool to improve the human rights impacts of companies operating overseas. What standards do you think the ECGD Department should apply when judging whether the risk associated with a project is too high?

Ms Joshi: To me the standard that should be applied is the UK Government's obligations to international human rights standards, so when you are looking at the ECGD when they are providing credits or insurance for companies they should be ensuring that the companies that they are supporting comply with those international human rights standards. The risk would be too high if the company could not show that it could comply with those standards and, as we have heard in other sessions before, there should be a due diligence requirement that the company must be required to put forward in order to show that they can comply with those standards.

Q338 Lord Dubs: Have you raised the issue with the Government or the CBI that export credit guarantees should be used in this way?

Mr Hayman: We have had some very early preliminary discussions but I have to say dialogue with the ECGD has never been easy at the best of times. I know from engaging with them on anti-bribery provisions that there is a clear box in there that says "thou shalt not bribe and if you do you will not be covered by an export credit guarantee". That has been problematic in practice, as perhaps many people in the Committee know, and the ECGD has not always done particularly well in taking soundings from people. We have spoken to them a little bit about this but I would not say it has any traction at the moment.

Q339 Lord Dubs: And with the CBI?

Mr Hayman: Not with the CBI.

Q340 Lord Dubs: Do the export credit guarantee people pay any attention to human rights at all?

Mr Hayman: Not that I am really aware of, no.

Q341 Lord Lester of Herne Hill: I ought to declare two interests. One is I am on the board of the Open Society Institute Justice Initiative which has similar aims about corruption and human rights to your own. Secondly, I did the *Corner House* case about the Export Credit Guarantee Department and the

watering down of the anti-bribery standards that you just mentioned, Mr Hayman. In the light of what happened in that case, which indicates strong lobbying by the CBI, by British Aerospace, and by a number of other powerful bodies, to the Secretary of State for Trade and Industry to weaken the anti-bribery standards operated by the Export Credit Guarantee Department, is it really realistic given that that was the view of the Government and these large commercial organisations, to seek to use that Department to go wider than anti-bribery when even the anti-bribery strategy does not seem to be very strongly executed? If one extends it to human rights generally, is that really realistic in the unpleasant real world that we live in?

Mr Hayman: That is an excellent question. If it did its job properly and enforced those standards then it would have a clear signalling effect to business and that would be something positive about this. I guess it would also provide some sort of affirmative defence for business to say I have attempted to do the best I possibly can, I have done my due diligence, and thus encouraging best practice. In many cases, such as for example Afrimex, it is not an ECGD recipient and it is not the only thing that drives business for the UK, so it is only going to have an impact where there are large mega-projects that need credits and guarantees. They tend to shop around for them anyway. I agree with you that its overall impact would be limited. It does have a small positive signalling effect. I have seen that in action a little bit from the World Bank and some of its work, particularly through the IFC, about standards in relation to disclosure and transparency of revenues from projects where they actually put a standard in that to receive funding from the IFC you had to be transparent about where you are paying the money and to whom it goes, effectively so the companies had to publish what they had paid to governments to enable them to track that money into the exchequers rather than into offshore bank accounts. It has some positive effects if you can engineer business processes to back up good practice and good governance. Ultimately I would say it would make those businesses more sustainable which may not necessarily be a bad thing.

Q342 Lord Lester of Herne Hill: Can we look at the experience since the *Corner House* case. In your experience, has the Export Credit Guarantee Department now become more effective in operating the anti-bribery standards so that we have got that as a piece of evidence to show that what you are saying could be extended to human rights?

Mr Hayman: No, I could not say there is any proof that it has become more effective, sorry.

Q343 Lord Bowness: You called for better training and guidance for FCO and UKTI staff currently providing support to UK businesses including in conflict zones. Coming back to what is feasible, if you are going to ask the UK Government to conduct an assessment of the companies' human rights performance before it gives assistance, is it really feasible in a conflict zone for somebody in post with

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the FCO to conduct an effective assessment of the human rights compliance of a company before they give consular or other assistance? If they came to the wrong answer and decided they would not give assistance, is there not a grave danger that you might possibly be infringing the human rights of the individual employees of the company?

Ms Joshi: I would suggest that this actually builds on the question about the government needing to have a joined-up approach. If we take the example of Norway, they have a Council of Ethics. Everyone is nodding their head so I think everyone is aware of the Council of Ethics. There is an assessment that that Council makes with respect to human rights and if money is given to certain companies, whether or not the Norwegian government would be complicit in supporting those companies. An investigation is carried out by the Council of Ethics, a decision is made, and I would suggest with the UK Government a similar type of approach could be useful where there is an investigation and assessment made and that feeds into the other departments such as the FCO. That could centralise where the actual investigation is occurring, how the assessment is being made, the expertise that is being used in coming to those conclusions, and then ensuring that the finding then feeds into the FCO as well as DFID as well as ECGD.

Q344 Lord Bowness: I am very sympathetic to what you are trying to achieve but if you take a real situation of a company that is operating in a foreign jurisdiction in a conflict zone where it has not had the approval and ticked all the boxes down the line, and consular assistance is then needed for British citizens working for that company in that country in that conflict zone, are you actually saying that consular assistance should not be rendered to those individuals because we do not actually approve of the policies or have not approved of their employer's policies? Is that what we are saying: get out of jail yourself, in other words?

Ms Joshi: No, we are not saying that.

Q345 Lord Bowness: Good.

Ms Joshi: We are not saying that consular assistance should be denied to UK citizens, but what we are saying is that the embassies can play a key role in terms of providing information and adviser support to companies operating in those conflict areas.

Mr Hayman: Perhaps I could give an example of where the FCO could improve and smarten up its act as a helpful real world case study. A certain country in South East Asia (which will remain nameless so that I do not want to embarrass the UK ambassador concerned) was taking a British biofuels company to a plantation to encourage them to invest with inward investment, but effectively that plantation was completely illegal under the laws of the land. It was effectively expropriated by a member of the ruling elite because it is an entirely kleptocratic government run for its own business interests. It is a UK company which is being encouraged by them to invest and take that plantation over. That is deeply concerning and that is a real world case. That is the

kind of thing where a sensitivity to, not simply promoting business but helping business to manage risks could be a very sensible approach. If you go to the FCO website you can get this great travel advice for private individuals. Can one conceive of something similar providing some form of sensible, practicable, implementable guidance for companies about where to invest and how to begin to manage those risks? Certainly we are saying in conflict zones like the DRC that would be a very simple thing to do and to take some measurable steps to saying hold on, this is a conflict zone, you need to be extremely careful about who you are dealing with given that practically the entire mineral extraction from this region is militarised.

Q346 Earl of Onslow: You have joined the criticism of the operation of the current OECD Guidelines. What do you think is going wrong and what needs to change?

Ms Joshi: With respect to the OECD Guidelines, since the revisions to the Guidelines were made in 2006 and based on our experience in filing the Afrimex complaint, we were actually very pleased with the process when the complaint went to the UK NCP. What we have seen of the problem is what has happened after the final statement. There has been no monitoring of whether or not the company actually complied with or responded to any of the recommendations made by the UK NCP. After the decision was made by the UK NCP in September 2008, Global Witness contacted the company in February of 2009 to ask whether or not the company had taken the recommendations into account and we also asked that the company to respond to information that we had that Afrimex was continuing to purchase from *comptoirs* associated with rebel groups. To make the long story short, up until that point there had been no follow-up activity done by the UK Government. We see that as a shortfall. In March 2009 Afrimex responded to the UK NCP, not to us, stating that they had stopped trading in minerals from Eastern DRC. To this date we have asked that the UK Government verify whether or not that is actually the case and there has been no verification that we are aware of.

Q347 Earl of Onslow: Right. The CBI told us last week that they thought that review of the OECD Guidelines might be a positive thing, in other words more or less what you are saying. Do you think that you could keep the CBI on board if the UK Government accept your recommendation for increased powers of enforcement?

Mr Hayman: It is an excellent question.

Q348 Earl of Onslow: Flattery will get you everywhere!

Mr Hayman: One of the interesting things that has emerged is that it is not always helpful to businesses to operate in a legal void. This is one of the things that particularly pertains to conflict zones because companies can very easily get into trouble and end up having for example, an Alien Tort Claims Act case filed against them in the US, so perhaps clearer

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guidance in those sort of circumstance might actually be helpful. I know of some large international mining companies who have said, mostly off the record when you talk to them, that clearer guidance could be helpful. Going back to the issue about the rise of China, those mining companies see their ability perhaps to compete and win in future being based upon reputational excellence and providing a whole development package, so not just simply digging the stuff out of the ground and running away with it but providing and building roads and everything else, which is something that China does quite well at the moment. They see clearer guidance and the ability to show themselves to be accountable and good partners for development as potentially a part of that. This is an interesting area where actually there may be a more progressive coalition of change coming out of some of the more forward-thinking companies on this topic as well.

Q349 Earl of Onslow: I seem to remember seeing some *Panorama* or *Dispatches* programme on a Chinese company's investment. I think it was in the cutely named Democratic Republic of the Congo where basically they put in everything themselves, everything was provided by the Chinese, from the laundryman upwards, and there seemed to be very little benefit to the local people, although there may have been some benefit to the government. Does that fit with your experience?

Mr Hayman: Yes, that is a common image and in some cases that is the case and Chinese projects do very much come with an army of labourers who will then simply build everything themselves. That said, Chinese companies do build infrastructure very well, so in some countries you can point to clear infrastructural developments that China has been able to bring about as part of a package deal for natural resources, so I would not completely dismiss the entire model of not just digging mines but building infrastructure as well, but there is probably a better and more transparent way of doing this, and I think that is where international companies might be able to compete in future.

Earl of Onslow: Finally, almost as an afterthought you have told us that you agree with CORE's call for a UK Commission for Business, the Environment and Human Rights. If the UK Government were to make the policy changes which you think are necessary what practical difference would the

Commission make? I think it is reasonable to say that it is most unlikely to happen because (a) I suspect there is no room in this legislative session and (b) we are going to have a general election and I do not think anybody will be into building new quangos after the next election.

Chairman: We would still like to hear what difference it might make.

Q350 Earl of Onslow: That is completely fair.

Ms Joshi: Answering your question and linking it to your question about the OECD, we do support revisions to the OECD but the OECD does have its limitations. It does not provide a remedy and also sanctioning powers do not rest with the UK NCP. We support the early stages and the principle of the CORE submission and we support further development and the ideas being fleshed out more.

Mr Hayman: Just to say there are nonetheless short-term practical steps while we discuss the exact parameters of how that could go forward that can be taken now and which would have a measurable impact.

Q351 Earl of Onslow: It does seem to me from reading this paper that there is a real and genuine problem. It is not just people empire building but seems to be a real problem.

Mr Hayman: There is an absolute vacuum. If you look at the statistics of how many people have died in the civil war in the Congo, it is absolutely mind-bending. It is over three million people and you can see child slave labour directly: you can go there and witness children as young as eight digging almost with their bare hands out of the ground, and that stuff being bought and eventually traded by UK companies. That is a real fundamental problem.

Q352 Earl of Onslow: And some of the UN forces have been shown to have not been behaving in a very pleasant manner.

Mr Hayman: There has been a problem with the accountability of UN peacekeepers too, that is absolutely right.

Earl of Onslow: Rape and getting involved in things. Right, okay.

Q353 Chairman: Thank you very much indeed for your time. I think you have answered the questions comprehensively.

Mr Hayman: Thank you very much.

Tuesday 14 July 2009

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L
Dubs, L
Morris of Handsworth, L
Onslow, E
Prashar, B

John Austin
Dr Evan Harris

Witnesses: **Mr Michael Wills MP**, Minister of State, Ministry of Justice, **Ian Lucas MP**, Minister for Business and Regulatory Reform, Department for Business, Innovation and Skills, **Lord Malloch-Brown**, a Member of the House of Lords, Minister for Africa, Asia and the UN, Foreign and Commonwealth Office, and **Ms Carmel Power**, Deputy Head of Human Rights Democracy and Good Governance Group, Foreign and Commonwealth Office, gave evidence.

Q354 Chairman: Good afternoon everybody; this is the last of our evidence sessions in the Joint Select Committee on Human Rights inquiry into business and human rights. We are joined by an array of talent in front of us, comprising Michael Wills, Minister of State, Ministry of Justice and Minister for Human Rights; Ian Lucas, Minister for Business and Regulatory Reform from the Department for Business, Innovation and skills; Lord Malloch-Brown, Minister for Africa, Asia and the UN, of the FCO; and the Deputy Head of Human Rights, Democracy and Good Governance at the Foreign and Commonwealth Office, Carmel Power. Welcome to you all. Does anybody want to make any opening statements?

Mr Wills: We were all planning to say just a few sentences, if we may, Chairman. Can I say first of all how pleased I am to be here and I am sure I speak for my colleagues in that.

Q355 Chairman: I hope you feel the same way when we have finished!

Mr Wills: We will still be pleased to be here. I just want to say that this is an important area of work; it is an area of work upon which the Ministry of Justice had already embarked. Clearly this is an important area for the promotion of the human rights culture. Strictly speaking, human rights are rights enjoyed by individuals against the state but, nevertheless, we think that there is an important role for businesses to play in promoting a human rights culture; and particularly if we look at concepts such as dignity and respect, which underpin all human rights instruments, we think that business has an important role to play. Our preliminary work in the exercise that we have embarked upon with the Department of Health suggests that businesses are already actively engaged in this process, although they do not always articulate it in human rights terms. Nevertheless, they are actively engaged with these issues. There are, of course, a lot of questions to be asked about the role of business. Some businesses are very much more conscious of these issues than others, particularly those that have global operations and deal with human rights issues overseas, about which I think both of my colleagues

will be talking shortly. In short, we think this is an active area for investigation; we are glad you are doing it and we want to play our part in taking this forward.

Ian Lucas: I just want to say that I am very pleased to be here for my first appearance. In the Department of Business, Innovation and Skills we believe very strongly in the positive effect that businesses can have on human rights across the globe and we want to be supporting businesses to improve the culture in business and the respect of human rights within those. We are very keen that all UK businesses take account of economic, social and environmental impacts in the way that they conduct business, and that is regardless of the complexities of globalisation and the complex supply chains nowadays. There is one particular example I want to mention from the Department, which is the Companies Act 2006, which will improve the quality of company reporting by introducing an expanded business review to report on environmental/employee/social community issues as well as other appropriate measures. So that is an indication of the importance that the Department does give to business and human rights and I am very pleased to be here.

Lord Malloch-Brown: If I may, to lay out right away—and thank you for allowing me to join you today—just one dividing line in terms of approach to these issues, which I suspect will run through all of our evidence today. That is who is responsible for enforcing human rights law. I just want to make the point that the FCO, which is engaged extensively internationally in terms of capacity building with states to make them implement human rights law better, is engaged with a whole range of actors on different corporate social responsibility issues. With the US we established the voluntary principles on security and human rights; with Professor Ruggie we have been doing a lot; we have the Kimberley Process on diamonds. But behind all of them lies the assumption that what you are trying to do is to strengthen a states-based system of human rights enforcement. Obviously there are those voices which would argue that with corporations operating now multinationally across borders that somehow, either through pressure on those corporates directly or

14 July 2009 Mr Michael Wills MP, Ian Lucas MP, Lord Malloch-Brown and Ms Carmel Power

through the evolution of law, the right way of addressing this is to hold corporations directly responsible to the international community for human rights enforcement. That has not been our approach and I just wanted to lay that out straightaway because it is, as I say, in a sense the conceptual dividing line with which the human rights community has to struggle in dealing with these issues.

Q356 Chairman: We would like to start off with the work of the Special Representative and Professor Ruggie, which you have just introduced. Perhaps we can start with Michael on this one as the Human Rights Minister. Has the new Ruggie policy framework had any practical impact on UK Government policy so far?

Mr Wills: On UK policy?

Q357 Chairman: Yes.

Mr Wills: Not so far. We are actively engaged with it and the FCO, as you know, are in the lead on this and I will let Lord Malloch-Brown say a few more words about it. Obviously we are aware of this; it is informing our thinking and we are taking forward, as you know, this joint project with the Department of Health, which is still continuing; and obviously his work, his thinking on this, will inform that process.

Q358 Chairman: What practical steps are we taking to try and respond to what he is doing?

Lord Malloch-Brown: We are supporting all three pillars of his work: the state duty to protect human rights; the corporate responsibility to be respectful and respect human rights; and the issue of access to effective remedies. He is midway in his work and we have seconded a Foreign Office official to his team to work with him and he is now involved in developing a set of guiding principles on the corporate responsibility to respect human rights in a corporation's activities. We are supporting him in developing that through the secondment of an individual, through engaging with him in various task force and seminar ways. As I say, I hope he would think that we were one of the principal supporting countries of his initiative but, as I say, he is halfway through and, as Michael said, it is too soon to start incorporating his work domestically in the UK.

Ian Lucas: I am very supportive and the Department is very supportive of Professor Ruggie's approach and we want to see the development of guiding principles for business taken forward very strongly. We are very anxious and keen to support Professor Ruggie in any of the work that he carries out.

Q359 Chairman: Lord Malloch-Brown, one of the issues that are arising in this debate is whether it is the international community that needs to take regulatory measures or whether individual states should be taking action. Is the work of Professor Ruggie obscuring this distinction and particularly to deal with businesses that are operating in countries with very weak governance arrangements?

Lord Malloch-Brown: I do not think he is obscuring it; I think he is wrestling it. As I said in the opening, I think it is the central dilemma of his work. I do not want to predict or prejudge where he is going to come down, but so far all his work has indicated that he believes, like us, that it is strengthening state capacity rather than trying to introduce some international dimension to this, which is the best way of securing national level compliance by corporations.

Q360 Chairman: There is also the suggestion let your thousand flowers bloom, which is also talked about. Bearing in mind that he is not going to finish his final recommendations until 2011—another two years yet, and no doubt there will be lots of arguments afterwards—is there not a case for saying that the UK should take earlier action, if only in those areas where state action has been pretty weak so far?

Lord Malloch-Brown: Across a lot of areas of activity, which are essentially touched on this, the Kimberley Process on Diamonds, the different Transparency Initiatives and security in human rights in conflict areas, the UK is already a real leader and I think what Ruggie is trying to do is to find a conceptual framework which ties all of this together. But it is not as though we are standing still and waiting; we are doing a lot in these different areas.

Q361 Chairman: The next question is for Ian. Supposing Professor Ruggie comes up with ideas, suggestions, proposals, recommendations that British businesses do not like, are you going to fight for Ruggie or are you going to fight for British business if they resist what he comes up with?

Ian Lucas: We have strong principles in this area as a country, as a government and as a Department in terms of the commitment to human rights, which we are trying to take forward with business already through improving corporate responsibility and improved work with business, and we certainly see the benefits as an individual government working with UK businesses to improve their practices generally right across the globe. It seems to me that Professor Ruggie's course at the moment appears to be sitting squarely in accordance with UK Government policy. So I think the work that we are doing as an individual country will help the Ruggie process and take it forward. I cannot predict what he is going to say at the end of the conclusions, but I would be surprised if it is at complete variance with the way that we are approaching matters.

Mr Wills: I would not necessarily agree with your verb, Chairman. Fight is not necessarily what is going to happen here. We believe that it is very strongly in business interests to engage with this agenda. The evidence is that many of the companies that we are looking at in the Private Sector and Human Rights Project are actively engaged already, as Ian said. They may call it other things like corporate social responsibility and so on, but we would hope and to a large degree expect this to be a cooperative venture where we can work together in promoting this agenda.

Q362 Chairman: Can I come back to you, Michael, because a lot of Ruggie's work has been viewed in a national context. Do you think what is coming out of this new policy framework has relevance to businesses working within the country?

Mr Wills: I think there will be almost certainly implications for what we do domestically and we would want to look at that, and that is why we have set up the Private Sector and Human Rights Project in the first place. It is an across departmental initiative and a very wide range of departments are already involved in it, and I am sure it will feed into this.

Q363 Earl of Onslow: Mr Lucas, you may find this a slightly odd question coming from a Conservative hereditary peer who is in the process of about to defend American trade unions but we have had evidence, certainly from Tesco—they were all fine words and buttering parsnips to start with—that they were really being anti-human rights in resisting the unionisation of their shops in the United States, and the same I was told outside—not on the floor of the House but other people have written about it—resisting unions in South Korea. I slightly got the impression that they were making all the nice noises to us, but when it was convenient actually not to be quite as good as they were pretending to be they did not come up to scratch the whole time. Am I being unfair from your experience and if I am I am quite happy, but if I am not what will you do about it?

Ian Lucas: I do not know the detail of the particular circumstances of each individual case that you are talking about, but I would say that with a company like Tesco's, which has a reputation to maintain, that a Committee of this nature raising an issue of the type that you have just described is a very serious matter indeed, and a very compelling actor upon its behaviour in the future will be the fact that you have raised it in Committee on the basis of what you have said, that they did not raise satisfactory explanations and their approach to the issues has not satisfied the Committee. I think that will be something that would and should be of concern to companies generally when that conclusion is reached and I think we should not underestimate the impact that can have upon the behaviour of a multinational company like Tesco.

Chairman: They promised us a supplementary memorandum to deal with the points that were raised.

Q364 Lord Dubs: This is for Michael, please, if I may. Some time ago, Michael, you agreed with us that the meaning of a public function in the Human Rights Act 1998 needed to be clarified—and I am sure you expected this question to come sooner or later and it is coming sooner—to reinstate the intention of Parliament that private providers providing public services would be covered by the Act. This was so important, you argued, that it must be included in the wider constitutional debate about a Bill of Rights for the UK. That consultation has been and gone and your submission to this inquiry treat the issue as one creating only "marginal uncertainty",

which is a bit at variance with what you were saying to us earlier. The question is, is the Government backtracking on the scope of the Human Rights Act now that the voter-friendly issue of care homes has been dealt with?

Mr Wills: No, no we are not. Just as a point of fact, the consultation on the Green Paper on rights and responsibilities has not come and gone, it is about to begin in earnest. However, having said that—I do not want to create more uncertainty—we have decided that because of the way in the end the Green Paper turned out, and I think I have already said this to your Committee in closed session, it was not appropriate to bring the two things together; that because we did not want the Green Paper really to be a discussion about the Human Rights Act—we are proud of the Human Rights Act, we do not resile from it but we do not think it should be an issue for debate any more, we think it has proved its worth—therefore bringing a question about the scope of the Human Rights Act into the context of the Green Paper we thought was to mix chalk and cheese. So we have committed to launching a separate consultation. The immediate mischief from *YL* we dealt with, as you have alluded to. It does not mean that we think that there is not a strong case, because we think there is a strong case for dealing with the wider question about scope. It is obviously very important. We are ready to launch a consultation. However, as the Committee will be aware, the case of *Weaver* is going through the courts at the moment and until we see that is definitely concluded and we do not know—we are digesting the most recent court judgment of *Weaver*—how this is finally going to conclude and until then I am afraid we just have to hold fire. I am sorry that this creates even marginal uncertainty but it is an important issue which is not going to go away and we are committed to exploring it and I think that any government is going to have no choice but to engage with it.

Q365 Lord Dubs: That is very helpful, thank you. In the meantime, are you aware how many government departments have had similar issues come before them, possibly leading to litigation, about the scope of Section 6(3)(b) since the *YL* case was decided?

Mr Wills: I cannot answer that off the top of my head but let me try and find out for you and I will write to you.

Q366 Chairman: I think also the number of times they have faced amendments from the floor of either House to try and clarify it as well would be helpful.

Mr Wills: I am sure that someone somewhere is making a very careful note of these requests.

Q367 Chairman: When I raised this in the Westminster Hall debate the answer was "soon" and when I raised it on my Bill last Friday or whenever it was—the Friday before—the answer was "soon". Nobody is being very clear about "soon". If you are saying you are waiting for the outcome of *Weaver*, which looks almost certain to go to the House of Lords, that means another year.

Mr Wills: It may well mean that, we do not know.

Q368 Chairman: A year is not “soon”, is it?

Mr Wills: I think it depends on your timescale, with respect. When you look at how long these great constitutional matters can take and how long it took to pass the Human Rights Act, I think we are moving with proper dispatch. It is completely open to us to say that we do not think there is an issue here, but we have not said that. We are not opening ourselves up heedlessly to this debate. I could have come to you right from the beginning and said, “Look, we will deal with this in this way and actually we do not think it is an issue; we accept the House of Lords’ judgment in *YL* and that is an end to it.” But we have not said that. All the way through, when I said in evidence to your Committee—again I think it was in closed session—you will recall that I said if we could find a way of dealing rapidly with the mischief caused by *YL* we would do so, and we did so. And in exactly the same way we will embark on an investigation, a proper consultation on the scope because we do recognise that these are important issues, but we will do it as soon as we properly can do so, and while *Weaver* is still not concluded we have no idea of what the courts are going to decide on *Weaver*. This could have been concluded by now in which case “soon” would have fallen more within your definition rather than a geological definition.

Q369 Chairman: Is it intended to intervene in the *Weaver* case? If it goes to the Lords will you intervene in the *Weaver* case?

Mr Wills: I think we have to digest the judgment. It is very recent and we are still looking at it; and it is not a matter for this Department, as you will understand.

Q370 Chairman: The overall point about it is this: the initial response to this inquiry was that the law is very clear and it is all very peripheral, but I think we have demonstrated that is not the case. The *Weaver* case goes to the heart of public housing in the sense that housing associations are becoming increasingly the main providers of social housing now and that is a very fundamental issue that affects the lives of millions of people potentially, so it is an important issue. The point about the G4S case, the transport of immigration detainees, very fundamental human rights issues there. So they are very, very profound issues and whilst we agree with you with the approach of sorting out the *YL* case straight away, that was on the understanding, which I think we all had at the time that the rest would be looked at relatively quickly, and now we are a year on and not much progress.

Mr Wills: Of course we want to do this as quickly as we possibly can but there are all these issues—and integrally tied up with the Green Paper—that bring into play every single Whitehall department, for the reason you say, that they are fundamentally important and affect the way that every department does business—all these issues do. Sadly, Whitehall does not make these decisions in three weeks. You may wish that they did so and others may wish they

did so but they do not and often there are very good reasons for taking time and having a proper cross-government deliberation—not just discussion but deliberation—on these profoundly important issues. We need to get it right and there are different views on this issue about what getting it right actually means. There are valid differences of opinion on these matters and they need to be serviced, discussed, deliberated upon and agreed upon within government. All governments operate like this and generally it is prudent for them to do so.

Q371 Chairman: But three years to make your mind up is an awful long time.

Mr Wills: With great respect, it is not three years to make our mind up.

Q372 Chairman: It is since *YL*.

Mr Wills: It is since *YL*, but we have dealt very swiftly with the immediate issues raised by *YL*. The wider issues, which we have always accepted needed to be dealt with, are complicated. I have just explained in answer to Lord Dubs that originally our plan was that we should incorporate the investigation into the scope of the Human Rights Act into the Green Paper, which is now published; however, in discussions on that we made a judgment that we did not want to put the Human Rights Act into play because we thought that would be destructive to the Human Rights culture in this country and we thought that it would raise unnecessary and unwelcome question marks about the future of the Human Rights Act, which is something we are proud of and we think should be a fixed part of our constitutional arrangements. We do not want that brought into question; that was a judgment we made. When we made that judgment then of course we had to look again at the question of how we best consult on the scope and we have to take into account the interaction with *Weaver*. The world is not a tidy place, I am afraid, and we have to take account of it and it would be a mistake to get this wrong.

Q373 Earl of Onslow: Just arising out of that question, Mr Wills, I thought that when the Human Rights Act was passed it was assumed that *YL* meant not what the courts found it to be, so why do you have to go discuss, discuss, discuss, discuss on something which I thought had been agreed and you thought had been agreed in 1999 when the Human Rights Act was passed?

Mr Wills: When you go back ten years and ask people what they thought they had agreed sometimes you get different answers. I am certainly quite clear about what I thought I was agreeing to when I voted.

Q374 Earl of Onslow: So 1999 you did not think—

Mr Wills: Sorry. People have different views about this and, as I say, there are different views about what the scope of the Human Rights should be—valid views but they just happen to be different. That is the world and we have to try to bring people to common understanding and we need to know exactly the

terms on which we are consulting and then we need to consult. But at the moment, as I have explained to you, there have been these two issues that we have had to deal with: one was the scope of the Green Paper, and I have just explained why that was an issue. You may say that we should have drafted the Green Paper more appropriately right from the beginning and that all my colleagues should have agreed with that initial draft. I hold my hand up; I am sorry that we did not, but there it was. Once we had that we then had *Weaver* and we have to see what the courts say about this. We have to digest the judgment and I think probably you would expect us to reflect on the judgment and then make a decision rather than making a decision without reflection. I hope you would think that.

Q375 Earl of Onslow: Let us move on. In your submission to this inquiry you say, “Where necessary government departments, after consultation with small businesses and their representatives, should also provide information and guidance on best practice.” What guidance and support are departments currently providing and can you give us some examples?

Ian Lucas: We have a broad policy of supporting small businesses, indeed all businesses, through the corporate responsibility agenda that we have. We want businesses to adhere to the wide guidelines that we see applying not just in the UK but beyond that. So we have, for example, adherence to the OECD guidelines for multinational enterprises and voluntary principles on human rights and security. We have support mechanisms within government to assist business in developing their human rights consciousness, if I can put it that way, so that they perhaps take into consideration matters of dignity, respect and human rights that they might not previously had considered as being within their remit, and we think that that is an important part of their role.

Q376 Earl of Onslow: How much uptake by small businesses is there of this advice and how actively is it promoted?

Ian Lucas: I mentioned the 2006 Companies Act earlier on, which is a statutory mechanism for making companies address these issues within the approaches that they have. I think that increasingly businesses are aware that they have corporate responsibilities. Even in the short time that I have been in post I have become aware of the commitment of businesses in discussions with me to their corporate role, and also the perception of their corporate role and responsibilities. It is important that they are seen to do the right thing. As someone who ran a small business myself, I think that one of the most important aspects of any business is reputation within the community in which you operate, and that is true whether it is a town or whether it is a country or whether it is a global reputation. One of the best ways that you can improve your reputation is to show yourself as a company that has consciousness of the environment in which you operate; that does things beyond its

normal commercial remit to assist the local community and to be seen to be behaving in that way. I think that brings a commercial benefit as well as doing the right thing, and that is a perfect solution as far as I am concerned.

Mr Wills: Can I just add a couple of points to that? I think that the CBI also provide guidance in various forms, but part of the scoping research that we are doing as part of the Private Sector and Human Rights Project will actually investigate whether there is a need for further guidance to businesses to better integrate human rights into their businesses. So we are actively looking at this as part of this project.

Q377 Earl of Onslow: You say, “The government believes that it is good practice for companies to use the Human Rights Act as a framework in their business policies and practices”. Could you explain how and any examples of good practice that you might want to give us?

Ian Lucas: The Human Rights Act sets out fundamental principles that within the UK we would have hoped for a number of years to have been adopted by business. I think it is a useful reference document in terms of identifying the rights that are central to our democratic culture within the UK. It is a useful benchmark, if you like, from which to move forward. We also need to look at ensuring that business takes those rights much further forward and commits to the local area in which they operate. I have very often encountered good practice by business in their local communities working local communities and taking forward individual projects for which they secure great benefit.

Earl of Onslow: Do you intend to publish the responses to your survey in full in order to allow for more effective scrutiny of its results?

Q378 Chairman: This is the Ministry of Justice survey.

Mr Wills: We are still not halfway through this project and I am sure we will publish, but I cannot tell you now until we have finished the project. We will certainly be publishing something and will want it to be as open and as transparent as possible.

Q379 Earl of Onslow: Has your scoping exercise told you anything new on this so far?

Mr Wills: Yes. As I say, the conclusions are still emerging but what is clear is that there is the desire and ready engagement with the businesses taking part in this to participate within human rights and, as I said earlier, they do not always articulate it in human rights terms. But what is becoming clear is that this is potentially fertile ground.

Q380 Chairman: When do you expect the study to finish? Do not say soon!

Mr Wills: No, no, I was wrestling with the temptation! I do not know but I would hope by the end of this year.

Q381 Chairman: At the end of this calendar year?

Mr Wills: Yes.

Q382 Chairman: This calendar year?

Mr Wills: Yes, the end of this calendar year.

Q383 Chairman: When do you anticipate being in a position to publish something?

Mr Wills: Shortly afterwards.

Chairman: Shortly afterwards! Soon! Soon after!

Q384 Earl of Onslow: To all of you: in your supplementary memorandum you make clear that the survey results show that UK businesses more closely associate human rights with their activities overseas and in developing countries, and I must admit that that is also the impression I have had from businesses who have given us evidence. I think it is perhaps because they think it is normal here but may not be normal overseas, but that is perhaps just my impression. Did you work together on this or was there rivalry between you?

Mr Wills: Between us?

Q385 Earl of Onslow: Lord Malloch-Brown is giving the impression of innocence sublime! Which may be why he is rather a good diplomat and it may be while he is moving elsewhere later., but that is another story.

Lord Malloch-Brown: It is a very easy mutual inter-departmental interest. As Ian said earlier, I think British companies understand that the environment in which they are operating in developing countries is getting steadily trickier, whether you are in a mining business or any kind of natural resource business, but equally whether you are in consumer goods or financial services, the issue of corporate behaviour is rising up the agenda everywhere. It is often not just limited to human rights issues; it is limited to whether or not corporations are putting back into the communities where they are operating in terms of social and other developmental services, a lot more is expected of the company than before. For British companies which have traditionally been long time investors in the countries where they operate this has just become an intrinsic bit of their business model—a respect for human rights, a respect for investment in the communities where they operate—because if they do not they will suffer political costs over the medium term. There will be a change of government, at worst an election campaign will even focus on why the last government protected corporations which were behaving in a way which was not consistent with good human rights practice. So a combination of philosophical commitment by the management of many companies and a pragmatic understanding for the political context in which they now operate means that our efforts as departments—and again I mention the Kimberley Process as a very good example of this, which deals with dirty diamonds—you get hit in the countries where you are digging those diamonds, you get hit in the countries where you are selling them and you get hit globally in terms of your reputation if you do not respect these codes.

So I think we are living in a very new environment where any international company realises that some breach of human rights or other standards in the furthest corners of its far-flung global operations can come back and bite it in terms of its share price or its annual shareholders meeting.

Q386 Chairman: I think it has all become pretty clear that that UK business is beginning to get it in terms of overseas operations and I think that has come out in your supplementary memorandum. So I think the real question about the survey work that the Ministry of Justice is doing is join the dots between domestic and international because the survey does not actually raise questions about overseas activities, although the answer has come back that way. Why was the FCO not involved—or was it—in designing the survey and indeed as the answers have come through?

Mr Wills: They are not part of the steering group but they have been copied into all the papers, as indeed have DFID and of course we will work closely with them. But one of the things emerging from this is actually that there is a need to join up the dots and we would agree with that. That will be one of the valuable outcomes of this; we do need to do that and we do need to try and encourage companies to take a much more seamless approach to what they are doing because it is clear that in terms of their overseas operations they do often conceptualise things in human rights terms and in terms of their domestic operations often although they are pursuing human rights policies they do not always see them as such and personal I believe that they would derive value from articulating some of these domestic operations in human rights terms.

Q387 Chairman: I would agree with that last point and this is really I suppose the thrust of the issue.

Mr Wills: So we actually both agree with each other.

Q388 Chairman: That makes a change, does it not! However, as far as the first point you raised—this is what I am concerned about—if British businesses are starting to get it in relation to the overseas operation but we still have some way to go in conceptualising it, as you say, in the UK, I am very surprised that the FCO was not more involved in the process of devising this survey and much more involved actively than simply being copied in on what is going on. If what we are trying to do is to translate international good practice into the domestic agenda and it seems to me that the FCO has an important role to play there and simply being copied in does not really do justice to being involved in the process.

Mr Wills: Our responsibility is for human rights in the United Kingdom and what we are trying to do is to look at the scope for promoting a human rights culture within the operations of business. Part of that is to do with cope of the Human Rights Act, which we have already discussed, in a very particular sector of the business community, but, as I have said, we think that there is value in promoting a human rights culture more widely and that is primarily a

domestic matter. That is why all the other departments that have been involved—Ian’s department, DWP, DCRG, the Home Office, Department for Transport, the Office of Government Commerce, the GEO, the Audit Commission, the Equality and Human Rights Commission, the Scotland Office, Wales Office and Northern Ireland Office, there is a broad swathe of the domestic departments that are involved on the steering group not copied in but on the steering group precisely because this is primarily a domestic issue. That is not to say that we do not have a lot to learn from the FCO and that input has been very valuable and will continue to be so; but it is primarily a domestic matter.

Lord Malloch-Brown: Just in defence of Michael, I gather that actually the Foreign Office was invited to participate in the steering group and therefore the responsibility for not participating is more ours than the Ministry of Justice, but I think the reason we did not was that we at that time felt that it was going to have a strong domestic focus and therefore we asked to be copied in and follow it. With the benefit of hindsight, Chairman, I agree with you that it has exposed this international link. And just going forward we need to engage more in this work.

Q389 Baroness Prashar: Can I pursue this a little further because a number of witnesses to the inquiry have expressed concern that the current division of responsibilities across the government is inherent and it actually undermines the government’s approach. If you look around there are about six departments across with this responsibility for business human rights and, of course, on the social responsibility it has changed hands a number of times in the lifetime of this Government. I would like to hear a bit more about how do you ensure that there is a coherent strategy for approaching the question of human rights and business?

Mr Wills: I think that does fall to me primarily. What we have identified independently and what you are identifying is the need for further work in this area, there is no question about that. The history of human rights in the last ten years, 15 years has been difficult and complex. We had the Human Rights Act brought in and we then had to deal with a whole range of issues that came up after 9/11 and a very concerted media campaign in certain parts of the media and a political campaign against the Human Rights Act; so we have had to deal with a whole host of different issues and the government cannot always operate on every front at once. What has become clear and I am personally very committed to and the Department is very committed to is you have to look at how you promote a human rights culture, and this is not about more regulation in business, it is important to say that, it is about the promotion of a human rights culture. How we do that is complex and we do not have the answers, we are learning together and that is why we have set up this project and that is why I started by welcoming what you are doing and I have no doubt that the

report you produce will be invaluable in helping us learn the lessons that we clearly need to learn, and our businesses are giving you that.

Q390 Baroness Prashar: Is this something about the machinery of government and how you ensure a joined-up approach?

Mr Wills: Of course. First of all you have to find out what the policy objective should be and that is what we are involved in. We have already discovered that we need to coordinate better into the domestic and international areas of operation. But when we have gone through this process we will have to see what machinery of government will be needed in this. So let us conclude the research first, get the evidence and then make a decision. Let me just say that we accept the case for looking at this and we also accept that there may well need to be changes to the machinery of government to ensure better coordination and better certainty for business.

Q391 Baroness Prashar: I do not find that very convincing because to me it is a question that you need to get the machinery of government right to achieve an objective and not set up the machinery after you have begun to do the research.

Mr Wills: With respect, I was saying that I think it is a good idea to get the evidence before we decide on what the proper objectives are and then we can work out how to achieve them. I would suggest that is the best way forward.

Ian Lucas: If I could just give one example of an area in which my department has a lead, which is on the OECD guidelines for multinational enterprises which is dealt with by a steering board across government with various departments, including the Foreign Office, the Department of Work and Pensions, DFID and the Export Credits Guarantee Department. That steering board is chaired by a BIS official at a high level and we see corporate responsibility as an issue that should operate and be considered right across government, and we try to ensure that this is done through official machinery including that steering board.

Q392 Baroness Prashar: My next question is really for you, Mark, which is about the main point of contact on the work of Professor Ruggie which is the FCO “Conflict Group”, as I understand. Does the Government only see the business and human rights debate as a means to avoiding conflict? Or could we send much more of a positive message about integrating human rights in foreign policy?

Lord Malloch-Brown: I think it is much broader. It happens to be that Professor Ruggie has made conflict one of his priorities and, therefore, we have picked that up and are running with it and are in a taskforce with him, but that does not mean that we think this is something limited just to that, quite the contrary, we see that it needs to be integrated into foreign policy across all sets of countries, all sets of company actors, et cetera.

Q393 John Austin: A question to Ian Lucas. Lord Malloch-Brown was earlier saying that British companies by and large are increasingly, whether through altruism or pragmatism, taking on board human rights issues. Amnesty, however, in its evidence to us suggests that the government's failure to recognise responsibility to respect human rights is quite distinct from general corporate responsibility measures. Do you agree with Amnesty on that?

Ian Lucas: I do not think of them as entirely separate. I think that corporate responsibility is clearly a grouping of itself, but for me human rights are fundamental and a sensible and appropriate corporate responsibility policy would flow from the foundations that human rights give us. So I certainly do not see them as separate. I think that sometimes businesses may initially not see a corporate responsibility policy as being something that derives from human rights. I think people, and perhaps businesses, have a tendency to compartmentalise issues and corporate responsibility might be something that business thinks it should do, whereas some businesses may think that human rights are something that are to do with government and nothing to do with them. An important role for us within Government and within my Department is to break down these compartments and I like to think of the words dignity and respect for others as being an extremely important part of both human rights and corporate responsibility, and I think that bringing those together and ensuring that your business sees them together is an important role for government to play.

Q394 John Austin: In your Corporate Responsibility Report you publicise the benefits of corporate responsibility, but have you issued specific guidance to business on what the Government might expect of them in order to meet the responsibility to respect human rights as identified by Professor Ruggie in his report?

Ian Lucas: I think that we have various methods of engaging with business through offering advice on an individual basis to businesses when they are looking at corporate responsibility in issues to having a broad policy as far as the Department and, indeed, Government is concerned. What we are very keen on, and I think the Foreign Office in particular provides very detailed advice on human rights for businesses that are looking to improve their practice in different parts of the world—

Q395 John Austin: Giving specific advice to specific companies in their operations?

Ian Lucas: That is right. I think for the UK missions in parts of the world it is very high on their list of priorities in terms of engaging with British business abroad; that we want this to be at the front of the minds of businesses when they are conducting business in different parts of the world, rather than at the back.

Q396 Lord Morris of Handsworth: As I understand it both departments are currently working together to develop a toolkit for FCO posts on business and human rights. Could you share with us the purpose of this toolkit?

Ian Lucas: I think this leads on from what I have just said to John Austin. We want to create a more straightforward and presentable way of putting these matters to business and getting them to consider them as easily as they can, but to ensure that they do consider them. We see the missions across the world being able to use the toolkit working with UK business as it operates in different parts of the world, and this is a tool for them to do that.

Lord Malloch-Brown: Can I just add to that just to put it in context. The Foreign Office has produced a series of these guides or toolkits. We have done one on children's rights, one on LGBT rights and another one on democracy, religion and rule of law, and now with BIS we are doing this one that has been referred to about business operations, and it includes the OECD guidelines and the other baseline material that business needs to understand in terms of international standards. Let me just also add that the Foreign Office, before our people go abroad, one of the training modules they have to do is on human rights and that is also available to people from other departments who go out, so we hope that there is a high consciousness of these issues across our overseas missions.

Q397 Lord Morris of Handsworth: Just to explore this a little bit further, will the toolkit help to clarify the expected standards of UK business before promoting those UK businesses abroad?

Lord Malloch-Brown: By its reference to the OECD guidelines, yes, which are the accepted standards across a lot of business.

Q398 Lord Morris of Handsworth: Which will obviously include human rights issues?

Lord Malloch-Brown: Yes.

Q399 Lord Morris of Handsworth: What about the resource implications? Does the Government intend to make any additional resources available for the purposes of providing training on human rights issues appertaining to cases?

Lord Malloch-Brown: We are already training our staff and these toolkits are already budgeted for and being prepared. In terms of additional outreach to business, I do not think we do have plans for additional things at the moment.

Ian Lucas: We like to think that is an intrinsic part of the service that we are offering to business, both abroad and in the UK. In the UK people tend to think of it more as corporate responsibility than human rights and I think that is an interesting issue that we touched on earlier; but as far as abroad is concerned then we see human rights as part of the advice that we would offer to businesses trading abroad.

Q400 Lord Morris of Handsworth: So where would you see greater adherence to human rights issues, here at home or abroad where the same business operates?

Ian Lucas: We want to see greater adherence both domestically and abroad.

Q401 Lord Morris of Handsworth: I know we do, but the question was your judgment as to where the greater adherence takes place?

Ian Lucas: I think that international businesses tend to think of human rights as a foreign issue in their own minds and what we need to do is to get them to think about the domestic aspect of the business in human rights terms as well.

Q402 John Austin: Can I just follow that up? This is a joint BIS/FCO initiative, and this goes back to Lady Prashar's comment earlier. There is a perception outside that whilst the FCO may be beavering away at ethical foreign policy the emphasis of UK Trade International is business, business, business. Have you identified any tensions or differences within this working party on the degree of commitment between the FCO and BIS?

Ian Lucas: I think that Mark and I have been getting on very well! I think there is a perception of difference, for example, in the UKTI and perhaps the Foreign Office, from outside; but what we are working hard to try to do is to ensure that for UKTI human rights are just as much on their agenda as they are for the Foreign Office. That is an important part of my role, to emphasise that.

Q403 Chairman: Can I come to some points for Mark. You have said quite a lot about the Kimberley Process and all those sector-based programmes, but one of the criticisms we have had of the UK is that it is less effective at integrating human rights into its more general work in the EU, the OECD and the World Bank, so what are you doing to try and promote responsibility of business to protect human rights in these wider inter-governmental activities, particularly in the EU?

Lord Malloch-Brown: Although you say particularly the EU I will start, if I may, with the World Bank for a moment and then come back to the EU. Things like the whole issue of transparency in contracting has been very, very driven and heavily driven by the World Bank but very much at the instigation of British pressure. Similarly, the World Bank's development of social and environmental standards, which on the social side have a number of human rights components to them, is again an area where there has traditionally been strong British leadership. So I would argue rather the opposite, that within these foras we have actually worked to try and mainstream human rights into their decision-making. With economic institutions there are always limits. The World Bank is itself insistent that its conditions for lending have to be primarily based on economic impact and return and not on human rights issues.

Q404 Chairman: That is the whole point, is it not? The criticism from Amnesty is that we should be exercising more leadership in trying to get higher standards into all these agreements with international organisations to try and entrench, embody better standards of corporate behaviour and we are not doing that. That is their criticism, we are not showing the leadership that they think we should, like we showed leadership as you mentioned in the Extractive Industries Agreement, in Kimberley and all the rest of it, but not international bodies.

Lord Malloch-Brown: Those international bodies are intrinsic to the operation of most of these initiatives. It would be impossible to do what we are doing on natural resources without the collaboration of particularly the World Bank. I think that more broadly there are limits, and I have to be frank about it. The World Bank particularly is also subject to a lot of push back, not by companies but by countries arguing that its lending conditions to them cannot be primarily human rights driven, they must be economics driven, and over many years the Bank has tried to push back on that, increase building conditions which in a sense are there because of their link to development, you cannot have development unless you have a degree of political freedom as well as economic freedom. But they are not human rights institutions and, therefore, getting this mainstreamed is not a straightforward process; there are many countries which are development successes but disappointing on human rights and democracy criteria. That is just a fundamental dilemma at the heart of all of these international development institutions. The only one I would say which actually says that you cannot have development without human rights is UNDP, for which that is a very strong philosophical premise; but it is not the case in the economic institutions. Just on the EU, which you have mentioned as well and drew particular attention to, again I would argue that within the EU's work in this area, which again I have to stress, is country-based, it is not taking the international business sector at the abstract global level—

Q405 Chairman: What about the Procurement Directive; that says how you should go around buying things?

Lord Malloch-Brown: If you take that Procurement Directive—and officials are welcome to kick me in the pants if I get this wrong—there are real issues there about ensuring that the procurement process is fully competitive. We have been frustrated in trying to build in that kind of conditionality because it often breaches procurement requirements.

Q406 Chairman: This is the whole point: are we actively showing the leadership within the EU to advocate that when we set out rules relating to procurement we build into those procurement rules human rights principles? After all, the EU is the European Union, it is no longer the Common Market or the EC, it is much broader than it was, and membership of the EU is predicated on

compliance with the European Convention and all the rest of it. You cannot be in the EU without being compliant with the European Convention. So why are we not thumping the table and saying, “We have to go beyond straightforward mere commercial interests when we are looking at procurement”?

Lord Malloch-Brown: We are, but we are pushing on a closed door which is not closed because other countries want to keep procurement as something where human rights abusing companies can benefit from it, but because Europe has developed a procurement system where there is a real wariness about introducing these actors for fear that they will be used in ways which actually prevent the European taxpayer getting best value for money.

Q407 Chairman: Best value at the expense of human rights in the developing world.

Lord Malloch-Brown: That is the argument.

Q408 Chairman: Human right within our own countries.

Lord Malloch-Brown: That is the argument. There is no doubt which side of the argument we take. My only point is, and maybe at this point I should defer to Ian because it is as much a BIS issue as it is an FCO issue, because of issues in the past about non-transparent procurement there is within these Procurement Directives a prejudice towards the best price at the expense of some of these other considerations. Equally, I can tell you that while that is a tension it does not lead to conditions of abusive labour, etcetera, in terms of the contracting that goes on. There is a balance that may not be drawn where we think it should ideally be.

Q409 Chairman: We will come back to procurement in more detail later on. Can I come at this from a slightly different angle now and that is bilateral trade agreements. One of the things that Ruggie identified was the fact that bilateral trade agreements can have the effect of suppressing human rights developments in the host country, and he referred to Sub-Saharan Africa at paragraph 32 of his report: “Provisions were found in seven of the 11 host government agreements specified exemptions from or compensation for the effect of all new laws for the duration of the project, irrespective of their relevance to protecting human rights or any other public interest.” When Norway got involved in these things this made sure that these agreements with which they get involved do not do that; that they do have proper respect for human rights, but ours do not. Why?

Lord Malloch-Brown: The FCO is not the lead on these issues.

Q410 Chairman: Ian then.

Ian Lucas: I am not sure if your characterisation is entirely correct.

Q411 Chairman: This is Ruggie’s characterisation: “seven of the 11 host government agreements specified exemptions from or compensation for the

effect of all new laws for the duration of the project” and many of those new laws would be, for example, to protect labour standards.

Ian Lucas: That is your description relating to the quotation; that was not within Ruggie’s quotation. That is your observation.

Q412 Chairman: That is based on other evidence that we have had in this inquiry.

Ian Lucas: Within BIS, and I refer you to the OECD guidelines to which I referred to earlier on this, that is an extremely important device as far as we are concerned, both to indicate the general approach that we want to be taking as a government and for business to be taking in the way that they conduct business. Those are the guidelines that we want them to adhere to. In circumstances where the guidelines are for any reason broken or if we find that there is not the adherence to the principles relating to human rights that we would like to see and if that is established then that is clearly something that will be considered in the future when dealing with that individual organisation or company.

Q413 Chairman: Why do we not do as Norway does?

Mr Wills: Can I clarify one point? Article 45(2)(d) of the Procurement Directive enables contractors to exclude suppliers if they have been found guilty of human rights breaches. So it is not the case that this cannot be taken into consideration—it can be. Also, it is perfectly open for public sector procurers to stipulate compliance for basic human rights principles as well, particularly when we are talking provision of care services or things which directly engage human rights provisions as well. So it is not that we do not think that these things are important, but there are opportunities to bring this into play and we need to make sure that they are done across the public sector—it is a very wide ranging sphere of business and what we are all engaged in doing is seeing as far as possible that these principles are brought into play in procurement.

Ian Lucas: I need to find out precisely what you are advocating and consider it and I will come back to you.

Q414 Lord Dubs: This again is to you, Ian, and it is about Export Credit Guarantees. We have heard suggestions that the Export Credit Guarantee Department does not have adequate procedures to ensure that the projects that are guaranteed by the UK will not contribute to human rights abuses overseas. How, if at all, does the ECGD prevent British taxpayers’ money being used in projects that might contribute to human rights abuses?

Ian Lucas: The approach with relation to the Export Credit Guarantee Department is the same and adheres to the principles that we have indicated already in the evidence session to date, so that if there are individual instances or allegations relating to particular contracts or credits then we would want to know about them and to look at them in the context of the principles that I have outlined.

Q415 Lord Dubs: But where does the onus lie? How do you react to the suggestion that human rights assessments should be conducted on any project seeking export credit guarantees? They have to look at it and see whether any project meets the human rights standards.

Ian Lucas: The ECGD is primarily a commercial department and that is the way in which it approaches the guarantees that it is talking about. The whole focus of the work of the Department will have to change if a capacity was created to, for example, investigate the human rights' position in another part of the world relating to the credit guarantees. What we need to do is ensure that embedded in the work of the Department is an understanding of the importance of human rights and the way in which the work of the Department is conducted. It is very difficult for the ECGD to carry out the type of assessment you are describing.

Q416 Lord Dubs: It could do if they were geared up to doing that sort of assessment.

Ian Lucas: It would entirely change the work that it does because at the present time the work that it does is primarily to assist UK business in commercial operations. We want UK business to conduct business with respect to human rights and that is the overarching framework that we want to see but it is not specifically the role of the ECGD to link in or use as a basis of their decision-making the issues which you are raising.

Q417 Lord Dubs: Obviously implicit in my question is the suggestion that they should be, but do you accept that limiting measures designed to protect human rights in order to meet business interests of UK companies might be inconsistent with the framework proposed by Professor Ruggie?

Ian Lucas: I do not think they were limiting in the way that you describe it. I think that there is a fundamental assumption which underpins the work of the Department as a whole, that we have respect for human rights and the way that we approach matters; but it is not a question of allocating individual tasks or investigations relating to human rights to individual departments. We need to have an overarching approach and the work of the Department needs to be conducted with respect to that overarching approach and not specifically directing itself to individual investigations relating to human rights in each individual case.

Q418 Lord Dubs: I understand what you are saying but if the ECGD are aware of human rights, unless they look at individual projects they are not going to know whether these projects are liable to breach human rights. In other words, it is all right saying, "Yes, of course we are aware of this," but unless it is their responsibility to look at it they may miss out.

Ian Lucas: I think it is their responsibility to consider the human rights position because it is part of their existing impact analysis, but what they cannot do is assess the human rights' position for each individual application in the way that they commercially assess each individual application. But they have to have

regard to human rights both in the context of each of the applications that they are considering but also in the context of the overall approach of the Department.

Q419 Lord Dubs: My last question is this: but could not the ECGD ask an individual business that is seeking support to do human rights assessment and to provide that to the Department?

Ian Lucas: I think that the present position is that human rights are considered as part of the process. I think that that is the correct approach, rather than requesting a business to make a human rights assessment and to present it to the Department; I do not think that that is the correct burden to impose on that individual business.

Q420 Chairman: We have been told that the Business Principles Unit, which advises the Export Credit Guarantee Department, states that it does not consider it is associated with conflict—which is probably the very sharpest end of human rights—when assessing projects proposed for export credit guarantees; is that right? I find that rather surprising if it is correct?

Ian Lucas: Where is that evidence from? I find that surprising as well.

Q421 Chairman: I will quote it to you. There was a hearing last week, the Information Commissioner, where Corner House were seeking publication of information relating to the Baku pipeline project and the question to the witness from the Information Commissioner: "Does that include assessment of political security on conflict related risk?—No."

Ian Lucas: I would expect conflict risk to be taken into consideration by the underwriting team as part of the process.

Q422 Chairman: That is a pretty clear answer, is it not—not qualified but just "No.?"

Ian Lucas: I hope I gave you a pretty clear answer.

Q423 Chairman: It is pretty important at the very least. We will move on to the recommendation that they came out with but my own view at the very least is that if you have an area which is potentially subject to conflict, civil war and some of the horrible things we see in Sub-Saharan atmosphere and we are not taking that into account when we are considering whether a company gets an export credit guarantee then I find that extremely surprising, not just from the human rights' perspective but the very fact that we are gambling with taxpayers' money as well, which we might get back, using a much more hard headed approach.

Ian Lucas: As I have indicated, my understanding is that conflict risks are assessed by the underwriting team; that is my understanding of the position.

Chairman: Perhaps you might like to go back and check it as against the evidence that was given to the Information Commission and give us a memorandum on that.

14 July 2009 Mr Michael Wills MP, Ian Lucas MP, Lord Malloch-Brown and Ms Carmel Power

Q424 Lord Bowness: Gentlemen, I apologise that I was late for the beginning of the session. Can I just go back to what you were saying, Mr Lucas? I did not really understand it. You say that an assessment of human rights was not a fair burden to impose on individual businesses when they are submitting their project and that the ECGD only has to consider human rights. What does that actually really mean in terms of a project which is there before the Export Guarantee Department in considering it? We all know cases, do we not, that have gone to court on Judicial Review where perhaps the government—any government, not this particular one—has lost because the court said that due consideration has not been given to certain factors, so the appropriate Department reconsiders it and comes to the same conclusion and said, “I have considered it.” Who is looking at the human rights aspect of these projects if it is an unfair burden on the applicant and the Department only considers it? And really as a follow-up, if it is not the ECGD’s business to do it who decides what is their business? Cannot your Department tell them what is their business and what they ought to be doing?

Ian Lucas: Yes, I can. The suggestion as I understand it—and perhaps I misunderstood the suggestion—was that in the case of each individual application an individual human rights assessment should be undertaken by each individual company and then lodged with the ECGD before any decision was made on the application, and that was what I was describing as being something that I thought would be unfair to impose on an individual business. What I want to be clear about is that there are responsibilities on the Export Guarantee Department to take into consideration the issues of human rights in determining their applications and specifically that there are obligations to consider issues such as—and I have a least here of land resettlement, labour, indigenous people, lost of culture and culture heritage. So those are issues that are there for the consideration of the application, but it would not in my view be reasonable to expect individual companies to make assessments relating to those individual matters when lodging an application.

Lord Bowness: Are they not the people who will know the answer to these questions?

Q425 Chairman: If you take what Mark was saying earlier on about how business is now starting to get human rights in the overseas developing countries in which we are investing—and we have had a plethora evidence from business both formal and informal that now this is part of the due diligence process to check out what is going to happen in the developing world and they are producing these reports for their own board before they actually decide to invest. They then come to you and say, “Can we have an export credit guarantee for this?” and have already done that work, so why are you not asking them to produce that work which nine times out of ten they have already done and on the tenth occasion they ought to have done? If we are going to be gambling with taxpayers’ money because effectively what you

are asking the taxpayer to do is to underwrite these businesses—that is what the Credit Guarantee Department is all about—and they are prepared to gamble with taxpayers’ money on businesses investing overseas that have not done the appropriate due diligence if they do not produce these reports.

Ian Lucas: What we are expecting business to do is to adopt principles in the work that they are carrying out in a particular part of the world. We are not expecting business in every individual case to carry out a detailed assessment of the type that you seem to be suggesting every time they make an application to the Department. I am surprised that you are suggesting that, frankly.

Q426 Chairman: I am suggesting it because it is actually happening. As Lord Malloch-Brown said earlier on—and that chimes exactly with the evidence we have had throughout this inquiry—businesses are doing this anyway; they are producing these reports for their boards. We have had a huge amount of information from BP and on behalf of BP about the work that they are doing to clean up their act when they do this sort of work and whether they decide to invest or they do not. We have heard of companies that have done this work, done the due diligence and decided not to invest on the basis of what they have found, or indeed to dis-invest when circumstances have changed. So they do this work anyway on these big contracts. Of course if you are investing in somewhere that is 100 per cent it is not an issue but if we are talking about investing in large parts of Africa or parts of Asia or indeed in parts of Central America it is a big issue, and I would have thought that if we are going to gamble with taxpayers’ money to the tunes of tens of millions of pounds in some of these cases and we are not expecting the proper due diligence to be done to protect that investment at the very least because the human rights considerations are part of protecting that investment. I am amazed.

Ian Lucas: These are issues that the Export Credit Guarantee Department does take into consideration.

Q427 Chairman: Did they take them into consideration when they exported Hawk jets to Indonesia; the BP-Baku pipeline; the Lesotho Wala Dam the power plant in Dabhol in India. I do not think so.

Ian Lucas: You do not think so?

Q428 Chairman: If it did it did not weigh very much, did it?

Ian Lucas: In each of those individual cases—

Q429 Chairman: Arms exports to Saudi Arabia—not the most benign regimes?

Ian Lucas: The principles that the Department adhere to are the principles I have outlined. They are taken into consideration by the Export Credit Guarantee Department when the applications are made and they underpin the work of the Department.

Q430 Lord Dubs: Could I just pursue one further aspect of this, if I may? What about instances where a company has been the subject of a negative final statement by the UK National Contact Point? Should the ECGD decline to support projects proposed by such companies?

Ian Lucas: It is clearly a serious matter when that occurs and there have been examples of that occurring. We think that each individual application would need to take into account such a finding when it was considering whether a further application should be granted. I think it would be appropriate for such a company to find out what steps that company has taken to change its behaviour before determining whether any future application by the same company could be successful. So it will be something that will need to be looked at extremely closely. I do not think that you could operate a blanket system of absolute refusal whenever such a decision has been made in the past because it may be that a company has good display evidence of changing its behaviour. I think that a decision simply to have a blanket rule that they could not secure any support at any time in the future may be difficult in terms of a Judicial Review. But it would be a very serious matter.

Q431 Lord Dubs: So am I right in saying that your argument is that the general conduct of an individual company seeking support would not be an issue for the ECGD or should not be an issue for at the ECGD?

Ian Lucas: The ECGD has to take into account all the relevant factors relating to an individual company, so general conduct is a very vague description. But if a specific finding of the UK contact point has been made then that would be something that would be considered within the context of the application. But also what the Department would need to do would be to investigate what had happened so far as the work that we would expect that company to take forward following such a finding.

Q432 John Austin: To Michael Wills, in your formal evidence you have said that public authorities are free to withhold public contracts from companies with poor human rights records, and when asked an earlier question you reminded us that public authorities are able to include human rights issues as specifications in the contracts. Is this now standard practice across government departments?

Mr Wills: I will have to write to you about that; I cannot answer for the whole of government. I can try and get you a comprehensive answer but I should warn you that these things take time to compile.

Q433 John Austin: Does your department lead on this issue?

Mr Wills: I am not sure that we lead on government procurement; that is a matter for the Office of Government Commerce, but what we can do is to coordinate a response.

Q434 John Austin: Does your department lead by example in terms of good practice?

Mr Wills: I would certainly hope so but let me find out what the practice is elsewhere before I give a definitive answer to that. We certainly intend to do so.

Q435 John Austin: And if you have any examples of good practice.

Mr Wills: I will give you some examples as well. But before I say we are leading we may find that some other department has actually excelled itself in this area. But I will write as comprehensive an answer as I can to both questions.

Q436 John Austin: The Equality Bill which is currently before the House does have provision in it for a requirement of statutory duty on public authorities to include equality issues in public procurement contracts. Would you consider extending that to include human rights?

Mr Wills: Not immediately, clearly, but I certainly think that there is a case to be explored there certainly and I think we have to be careful, in the end law is important, regulations are important and duties are important but crucially in relation to business what we are trying to do is promote a human rights culture. That is the most important thing. We do not want people always looking to the courts to enforce this; what we want to generate is that there is an understanding of what human rights mean. Some public sector bodies are getting very good at this and the police, for example, are genuinely engaged with this process and we see it in examples such as the Health Service, and the Equality and Human Rights Commission have produced a very good report on this recently. We have done a report which we published a year or so ago showing how applying human rights principles to the delivery of public services can categorically improve the delivery of public services. But the best way is to find different ways to promote a human rights culture. We are trying to do it at the Whitehall end by every department having a human rights champion; we are trying to drive this through the front end of public service delivery. But certainly we would never rule out considering this because we have to do better—we know that. We know the advantages that can come from the creation of the human rights culture. We do have to be careful about putting extra burdens on business at the moment and that is clearly particularly sensitive at the moment. We do not think that regulation is necessarily the best way of doing it, but that is one of the things that we are exploring in the Private Sector and Human Rights Project in which we are currently engaged, and it is certainly something that we will be exploring.

Q437 Chairman: Can I come back on this point about procurement because we had evidence from business two or three weeks ago—and this also again chimes with the informal evidence we had from business before—which is that bigger businesses are driving the human rights agenda by their own

procurement processes through their supply chain, and this is how it is starting to trickle down into SMEs. Big businesses are saying, “You want to sell us stuff, you have to comply with basic human rights principles, whether it be both in the UK or overseas”—and that was from Primark, for example. The Primark guy, who sat where Carla is now, was absolutely surprised that whilst they were doing this the public sector was not and they were saying, “What we are effectively doing is when we are contracting for public services we are expecting our contractors to comply even though we are not required to by the procurement contractor.” What they were effectively saying was, “We are ahead of the game than the public sector” and I find it amazing that the private sector is now developing procurement work to ensure that it complies with human right principles down the food chain and yet we are not. I certainly accept the point about the human rights culture, that approach, as you know from the other reports we have done on this stuff, but why are we not doing it in this way?

Mr Wills: I have not had the advantage of hearing the evidence from Primark. Perhaps you could just help me a little and tell me what are they actually doing? What are the human rights principles that they are adopting in their domestic procurement?

Q438 Chairman: For example in relation to labour standards is one of the examples that they gave, but also when sourcing materials.

Mr Wills: I am not quite sure why they think that government does not procure in accordance with these standards anyway, domestically. We have to be careful how we badge these things. Of course the government procures in accordance with basic standards—labour standards and all the rest of it. I have not, as I say, had the benefit of seeing the evidence from Primark but in terms of their domestic procurement I would be interested to see what exactly they are badging as human rights principals in their procurement policies. Without having seen it I cannot say definitively, but I doubt whether government procurement processes are any less compliant with, as it were, something as fundamental as human rights.

Q439 Chairman: Could the government sign up to the Ethical Trading Initiative? Public procurement done in accordance with the principles of that initiative? Because Primark and Tesco, despite all their faults, are working within the Ethical Trading Initiative and why cannot government?

Mr Wills: As I say, I think we have to be very careful about our definitions here. What I am very happy to do again is once I have seen the evidence from Primark or any other of the businesses that have given evidence to you I am happy to go to the Office of Government Commerce and indeed every relevant department and find out how our procurement processes match up to theirs and are therefore compliant with what they have obviously described to you as human rights principles. That I

am happy to do. And I am certainly happy to accept that government has an important role to play in leading by example in this area.

Q440 Chairman: I am informed that DFID is a member of the Ethical Trading Initiative, which is good; but I am not sure about the other government departments, so perhaps we could have a checklist of which government departments subscribe to ETI.

Mr Wills: As I have said, I have given an undertaking and once I have seen the evidence we will match up government procurement standards to private sector procurement standards and I have given a commitment that it is right that we should lead by example in this area.

Chairman: That is very good. ETI is the standards we are talking about.

Q441 John Austin: Going from procurement to investment we have had evidence that the Norwegian Government has withdrawn pension fund investments from projects with high human rights risks or ones where there is a suspicion of failure of human rights impacts. Is this an example of good practice and, if so, is it one that you would be prepared to take up with the Treasury?

Ian Lucas: We have already talked about the OECD guidelines and the importance of those in underpinning the work that BIS is doing and the approach of the UK Government. Clearly the conduct of any particular individual investment organisation is something that we would need to consider closely if there were shown to be a breach of those guidelines. So it is something again that we would be very, very serious about.

Q442 John Austin: Do you think that the Norwegian Government is on the right track?

Ian Lucas: I could certainly look at the individual case and circumstance and, as I say, those guidelines are extremely important to the Department.

Lord Malloch-Brown: If I may? You had given us notice that you would raise this issue and I understand that it was the Holy Hill Trust and London Mining Network that raised the actions of the Norwegian Government. So we did go to Treasury because they are the lead and they are the ones responsible for British state companies making investments. What we got back from Treasury was that the government’s primary concern at having invested in private companies is to protect the value of taxpayers’ shareholding while paying due regard to financial stability and competition. However, seeking to protect the value of taxpayers’ shareholding may include pursuing responsible policies with regards to human rights where that is considered necessary to enhance the value of the company. It goes on to say that the institutional shareholders’ committee statement of principles explains that many issues could give rise to concerns about shareholder value and that among them are the companies’ approach to corporate social responsibility. So I think that means that we do take

account of it but I suspect with less, if you like, of proselytisation on this than the Norwegian Government does.

Q443 Lord Dubs: Can I move to company law and the Companies Act. Ian, may I turn to you on this one? We have had a number of submissions suggesting that the Companies Act 2006 reforms do not go far enough. What do you think about suggestions that the business review could be strengthened by providing for more detailed reporting on human rights impacts?

Ian Lucas: I think as I mentioned in my opening statement, the 2006 Act does go further than government has done before in recognition of the importance of corporate responsibility and indeed human rights. That was quite a step that was taken forward and, as always, there is pressure to go further forward in a particular direction and clearly you have heard evidence to that effect. I think that the 2006 Act was a major step and is relatively recent and I think we need to see the impacts that that has, both in terms of encouraging good practice, how effective it has been and then look at the situation again.

Q444 Lord Dubs: Are you intending to review these provisions? I think you are, are you not?

Ian Lucas: I think it is always very important always, in my view—one of the things I am very keen on to do as a Minister—to review the impact of individual pieces of legislation and certainly as far as this particular item is concerned it is something that we will be reviewing as a department and considering.

Q445 Lord Dubs: Have you not carried out some reviews, the 2009 business reviews? Have you not learnt any lessons already from those?

Ian Lucas: I am afraid I am going to have to let you have a note on that particular investigation; but I am pleased to hear that it has been carried out.

Q446 Lord Bowness: Can I turn to investment and listing arrangements? Some witnesses have given examples of how domestic rules for listing mechanisms can support or undermine human rights in the countries where those companies operate and they also say that governments miss the role that listing rules could play with an increase in transparency, protecting human rights and developing countries including conflict zones. Are you concerned that the Alternative Investment Market allows companies to seek investment from UK investors without adequate transparency about previous involvement in alleged human rights abuses? And is it something that you think the government could or should take action on? I guess that is for you, Mr Lucas.

Ian Lucas: I am concerned that the suggestions are being made. I am not aware of the specific evidence to which you are referring or the individual cases that are involved but I would like to see individual cases and the suggestions because I think transparency is very important. I think it is an important driver of policy and we need transparency

and if clouded investment is causing the difficulty that you are describing then I would be very anxious to hear about it.

Q447 Lord Bowness: We have had evidence— and Lord Malloch-Brown has already referred to Holly Hill Trust in answer to a previous question, and they gave us some evidence. In your Corporate Responsibility Report you point out the benefits to business being responsible, including the potential to attract socially responsible investment. Have you taken any steps to encourage socially responsible investment?

Ian Lucas: We engage with business on an extremely regular basis. We have set up the type of structures that we referred to earlier, both within the UK and in our missions abroad to stress to business the importance of a corporate responsibility and a responsible approach. That does bring benefits both in perception domestically in the conduct of UK companies and also it brings benefits in terms of the positive impacts that good practice within companies can have in countries that have need of improving their governance abroad.

Q448 Baroness Prashar: I just want to pursue a couple of points on the practicalities of unilateral action by the UK. This is really for Ian and Mark. The CBI told us that they would be cautious about any of the reforms and they were particularly concerned about the ease of identifying the standard that business should meet. Is this an argument in favour of agreeing an international minimum standard or standards for individual industries or circumstances?

Lord Malloch-Brown: What it is an argument for is the difficulty of any of us, even the Foreign Office, monitoring corporate behaviours abroad. It is not that we have legal procedures which allow us to prove indisputably that a company has breached some standard, and therefore we are at one level reduced to those cases where a company has been found guilty of something in another jurisdiction that provides it, but I think provides one way. I think it does mean that international standards of a voluntary character are a critical tool and I think it is increasingly the case that if you are in the diamond business and you are not part of the Kimberley Process and not signed up for those standards your business would be contracted and would be narrow. So I think this patchwork of standards that are being developed is absolutely critical and must be combined with strong national actions in different jurisdictions. That is the way we are going in our own minds, rather than some international human rights treaty on business.

Q449 Baroness Prashar: Do you have anything to add?

Ian Lucas: I think that there are real problems in broadening the role of individual governments in extraterritorial activity, both in terms of capacity to actually enforce the rules and standards or laws that we individually create as a nation state, but also the enforcement of those rules or laws. So the approach

that we are taking is very much based upon, as Lord Malloch-Brown said right at the beginning, the individual state and enhancing their capacity to deal with the problems and enhancing their capacity to deal with the problems and the pressures that exist within their own country. That is the operation that we prefer.

Q450 Baroness Prashar: Do you think that in principle the UK could take any of these steps without joint action across the EU?

Ian Lucas: Across the EU? We proceed on the basis of consensus—that really underpins the whole of our approach in international relations and we want to be working with other countries to ensure that the standards that you want to see are embedded in the cultures and the principles of other nation states. That is something that we can do only by consent and we are working towards that end and trying to improve the standards for individuals in other countries through what may be a longer process, but it is essentially what we regard as the more effective process.

Q451 Chairman: Can I ask Mark some questions about the National Contact Point and in particular what happens when it issues a final statement. I am going to take the case of Afrimex because it was one that you referred to in the government memorandum about the UK National Contact Point. I remind you that in March 2009 Afrimex finally advised the UK National Contact Point that it had stopped trading in minerals from eastern Democratic Republic of Congo in September 2008, after the final statement was issued. So far so good. But Global Witness last week was critical in that there has been no attempt to verify that Afrimex has, as promised, stopped trading in tin from eastern DRC. So what steps have you taken to scrutinise Afrimex's response? Have you actually verified the Afrimex statement that they are no longer trading in DRC minerals?

Lord Malloch-Brown: Let me, if I may, Chairman, in a moment refer to the general point of National Contact. But if I may just take the Afrimex case and let me first say that I am somewhat constrained because inquiries are still ongoing. We have spoken with Global Witness; I have spoken with Global Witness a number of times about this case but at a more formal level officials have also followed up. We are also working closely with a group of experts who the UN Security Council had mandated to look at the natural resource and conflict issues of the DRC, and it is their report which is the most recent report which is driving a lot of this. Obviously we feel a real obligation to make sure that UN sanctions are observed but our difficulty is again we have to make sure that we have sufficient evidence to act and that is what we are trying to establish before we move against Afrimex.

Q452 Chairman: So have they been verified or not?

Lord Malloch-Brown: That is my point about inquiries being underway. We are in the process of verifying it but I am reluctant, given the sensitive nature of it, to really confirm or deny that. It is actively being investigated.

Q453 Chairman: Is that typical of the government's response to an NCP finding?

Lord Malloch-Brown: This particular one of the DRC is actually far from being typical. We have been aggressive leaders on this issue of natural resource exploitation in the Congo and we consider it one of the main drivers of conflict in the area. Part of British Government strategy for dealing with the DRC is to crack down on companies that are party to this and are fuelling the insurgencies there. So far from this in our eyes being dilatory we are working on it very aggressively because it is for us embarrassing that there is a British company involved or a British registered company. But, again, we come up against this real issue of when we are trying to operate in a country which is not our jurisdiction, in trying to determine hard evidence which is usable against Afrimex.

Q454 Chairman: I understand that Michael has to go. We have not very many questions left and if you have to go right now, fine.

Mr Wills: Probably in about five minutes, I am afraid. I understood it was going to finish at half past.

Q455 Chairman: We are not far short. We will just finish this question and then there is one question I will interpose that Usha is going to ask at the end, on which I think we need to hear your views, and then we will come back to the other questions which are mainly for BIS and FCO. So a question to Ian, while we are on the National Contact Point: we understand that you are looking into what could be done after an NCP finding against a UK company. Can you tell us what the government is thinking about on this?

Ian Lucas: What we are looking for is to see what process the UN can take forward as a result of the finding of the National Contact Point and really we regard it as an issue that, given, again, the territorial difficulties in terms of jurisdiction to which we have referred, it is best dealt with if at all possible by international institutions. So the way that we see action being taken is through the international institution, the UN, and issues such as sanctions.

Q456 Chairman: But in the end it is for the UK Government to take action on the National Contact Point findings, is it not?

Ian Lucas: It is.

Q457 Chairman: It is not for the UN, it is for the British Government in one way or another. The NCPs have been around for nine years now so there is nothing particularly new about it, even if you take Michael's assessment of the glacial "soon"—something might have made some progress?

Ian Lucas: The action that would be taken would be that when a finding is made clearly that informs all of the dealings that the UK Government has with the individual organisation or company that the finding is made against, in the way that I described earlier. That it would be something that would cause real concern; that we would want to know what action if any the individual company had taken before further dealings were undertaken with that company. But in addition to that we would want to consider whether it would be appropriate for action to be taken at a national level. So I am not talking about there being no effect following on from the NCP finding; I am talking about there certainly being an effect because it would inform the dealings that the government had with that organisation, and it would also mean that we would be looking to try to take forward international effective action against that individual company, if that was appropriate.

Q458 Chairman: In your memo you said that the government explains that it is “currently considering what follow-up there should be after the UK NCP has closed an investigation under the guidelines”. So either you are or you are not.

Ian Lucas: We are considering it.

Q459 Chairman: So what are you considering doing?

Ian Lucas: I have described the type of action as far as the UN is concerned.

Q460 Baroness Prashar: My question is about creation of yet another quango. CORE and others have recommended that they should establish a new UK Commission on the Environment, Business and Human Rights? I would just like to hear your views, whether you think that would be a good thing or not?

Mr Wills: I think probably the answer is no, I do not. You have rightly said that we have a lot of organisations and there is very clear framework. We will look at it in the context of the work that we are doing already but my initial response is no, it is not a good idea. There are lots of avenues for doing this already. We are making good progress; this Committee is playing a valuable role in scrutinising these issues and we are going to take it forward. We never say never, but not right now and probably not soon.

Q461 Baroness Prashar: That is what I expected. Any other views?

Lord Malloch-Brown: I agree with Michael!

Chairman: Michael, if you would like to go, please do.

Q462 Lord Morris of Handsworth: My question is primarily to you, Ian. A key theme running through the evidence we have received almost in a word has been “reform”. Some witnesses have called for further reform of the UK NCP, including to increase independence from government and to extend its powers of enforcement to include penalties and sanctions for misconduct. What do you think of these recommendations for reform?

Ian Lucas: I think the difficulty with sanctions and penalties is the issue to which we referred earlier, about the principle that we want to deal with these issues within an enforceable jurisdiction that we have. If we are talking about conduct that took place in a different jurisdiction in order to take effective action it really is necessary to pursue the line of taking steps within the jurisdiction where that occurred. If we get assisted in developing the capacity of the country in which the incident occurred then that is the role that we play. So I think that there is in a sense a kind of superficial appeal to the idea of the extraterritorial sanctions—I think it is impractical.

Q463 Lord Morris of Handsworth: International provisions are not standard so there is a variation; it varies country to country and jurisdiction to jurisdiction. What we are talking about here is not what some other jurisdiction might be doing but what is the UK Government’s response.

Ian Lucas: But we have a general principle that we will apply within our own jurisdiction the laws of our own jurisdiction. We cannot apply our own laws in respect of another jurisdiction.

Q464 Chairman: We do in relation to various international law offences, do we not?

Ian Lucas: We do but within those particular areas that you are describing there is a much broader consensus in terms of international opinion than there is in the area of human rights, where the perceptions are different in different countries.

Q465 Chairman: The problem really is the complete lack of a remedy for people who are on the receiving end of some of the worst human rights abuses. You say that the remedy has to be in their own country but in practice you have a corrupt judiciary, an ineffective, weak government; you have a powerful multinational; and you have people who are peasants or worse right at the bottom of the pile who have no prospect of getting remedy in their own country. That must be self evident to most people.

Ian Lucas: There is implicit in your question, if I may say so, a suggestion that it would be somehow easier within this jurisdiction to secure a remedy. My point is that in terms of evidence, in terms of enforcement that would be extremely difficult to secure within the UK as well as contradicting the general principle that we apply in terms of extraterritorial means.

Q466 Chairman: The Americans manage it with the Alien Tort Claims Act.

Ian Lucas: With respect, that is a two-hundred year old Act that actually has not secured a judgment.

Q467 Chairman: It has proved very effective in concentrating the mind of businesses from the UK and elsewhere and the fact remains that it has proved quite an effective tool—going back to the point that Mark was making—about getting companies to do proper due diligence before they start investing in some of these operations, to make sure that they have a defence.

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Lord Malloch-Brown: May I just add to Ian? It is not that one is just relying on action in the national jurisdiction. Ian has made the case about how tough it is for us to act through our courts on these kinds of things abroad. The OECD guidelines are perhaps the primary example of the network of these arrangements which are starting to govern corporate behaviour. The Aquila G8 Summit just again referred to them as what they expected of their Member State companies in situations of weak governance operating in those countries. I think if shareholders hold companies to account and are forced to report on them you are going to get the levelling of compliance and improvement that we want, but I think over time we are going to have to keep this under continuous review because the fact is that extraterritoriality is a terribly difficult thing to do. We only like to see it happen in extremis but as companies become more global—whether it is on issues of taxation or financial regulation—we are starting to see moves towards more global answers; so I do not think one can rule out that there will not be a move towards more global answers here too. But we must not run before we can walk and set up systems which will not secure convictions.

Q468 Chairman: We are already now looking at the Draft Bribery Bill, which is looking at the activities, I suppose, of UK companies overseas as much as anything else. And we are following here the US Foreign Corrupt Practices Act, I suppose, which in some ways we have modelled it on, to deal with the problem of corruption in the developing world, to make sure that if UK businesses are involved in that we can deal with it in the UK, and that is quite right that we should do that. So it is not much of a step to say that we should also be doing the same in relation to some of these human rights issues. The fact remains that if you have very poor people in the developing world who have their land appropriated or poisoned by chemicals emitting from a British company's plant, or at the receiving end of a regime's security forces that have been contracted to a UK company to defend their premises, or indeed in the case of certain countries in West Africa perhaps even involved in executions—allegedly—is it not about time that we provided a remedy for those people when they clearly patently cannot get a remedy anywhere else? Or are you happy to see British companies dragged through the US courts because we do not have the balls to do it ourselves?

Ian Lucas: I am not happy for the picture that you have described to take place. What I am pointing out to you is that there is a much broader consensus, for example on bribery, within the international community than there is upon what the human rights that we would be compelled to take action on actually are. There is a much broader range of agreement on those rights than there is on the fact that bribery is wrong. So it is a much more difficult step to take. What Mark has said about the future is correct; it may be that in the longer term these are issues that we may need to look at, but we have to

recognise that we are also making progress through operating the policy that we are at the moment, and that that is bringing about improvement too.

Q469 Chairman: So what would you advise the poor innocent person whose parents have been poisoned by the emissions of a UK company in the developing world, where there is a corrupt judiciary and a weak government hand in hand with a major multinational? What would you advise him to do?

Ian Lucas: As you have described it that individual does not have a remedy.

Q470 Chairman: So it is tough luck, is it?

Ian Lucas: I certainly would not describe it in that way and I do not think it helps for you to present it in that way because clearly that individual does not have a remedy within the UK at the present time. You are suggesting that somehow that person would have a remedy if we introduced the Alien Torts Act—

Q471 Chairman: They would.

Ian Lucas: That is not necessarily the case and for you to suggest that is not a helpful way of trying to assist that person.

Q472 Chairman: It has worked in the United States—

Ian Lucas: I am not sure that it has.

Q473 Chairman: These scenarios have actually happened involving multinational companies—some not US companies have been on the receiving end of Alien Torts Act claims in precisely those circumstances.

Ian Lucas: I am not sure that it is quite that simple and quite that pat. I think it is for us to try to work to improve the governance of countries where the reprehensible behaviour that you are describing is actually happening.

Q474 Chairman: I have no argument with you that we need to do what we can to improve good governance around the world—that is a given. But we have a long way to go in doing that, before that is achieved.

Lord Malloch-Brown: Mr Chairman, is it not the case that what you have yourself heard in testimony to this Committee is that corporations are improving their performance. I have to say I think there is a big difference between publicly listed corporations and small privately owned mining companies, but, nevertheless, the trend is the right way. But we are all also agreeing that the kind of example you have described is definitely still prevalent out there, so improvement prize but we are nowhere near where we need to be. So the debate is how do you go that next step? It is not about standing on the status quo and saying that that is okay; it is about saying that we are doing better than we used to do on this.

Q475 Chairman: That is the point, is it not? I put this to BP and we have heard a lot from BP and about BP and how they have really cleaned up their act, but

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things still do go wrong—even in the best run companies mistakes, problems and disasters will happen. The question is when they do happen what do you do about it to put it right?

Lord Malloch-Brown: Equally in the case of BP you can take two extreme cases: one was their use of security companies in Columbia, something that was hugely damaging to their reputation and was one of those events which made this company really accept the importance of changing its corporate behaviour. The second hit, if you like, on that scale that happened to BP was in a market which is the most regulated, where there is most legal redress and that is the pipeline and refinery problems they had in the US, where it is said—and I believe it has been affirmed in court judgments—that there was under investment in certain parts of that operation. So it is a bit more complicated than just saying that these things only happen in situations of weak governance. Where they do I think there has been—

Q476 Chairman: I agree with that, but the difference is that when things go wrong in the US there is a remedy in the US courts; when things go wrong in Colombia there is not. We have heard about how BP cleaned up their act in relation to their security on the Baku pipeline and all the rest of it and all very positive stuff, but things still go wrong. So how do the people on the receiving end of these things go wrong get around it?

Lord Malloch-Brown: Again, our argument is that the combination of national improvements—because after all the Bhopal people finally did get a remedy very late and all the rest—plus this issue of getting these companies signed up to these different standards and getting them to promise their shareholders and board of directors compliance with them, and having transparency in the reporting is for now a more effective way of raising the standard than getting involved in an extraterritoriality which is hard to sustain. That is, if you like, the root of our argument. It is not to disagree with you on the fact that there are a lot of problems out there; it is what is the best way of addressing them.

Q477 Chairman: I think we have finished. Do either of you want to add anything to what you have said to us? We have one or two memos to come.

Ian Lucas: No thanks.

Lord Malloch-Brown: If I may, the only thing I would say is that I think we owe you a comprehensive memo on procurement, both national and European because obviously I felt rather under-prepared on that issue but recognise that it is a very major way of pushing this forward; so perhaps we could come back with something suitable on that point.

Chairman: Thank you very much; the Committee is adjourned.

Written evidence

Memorandum submitted by the Ministry of Justice

1. *How do the activities of UK businesses affect human rights both positively and negatively?*

It is now often recognised that businesses can affect the human rights of individuals, and there is an increasing public expectation for businesses to respect human rights. Therefore, in addition to the traditional areas of corporate social responsibility (the environment and sustainability) some UK companies are taking steps to incorporate human rights into their business practices and policies. This can take a variety of forms, however a trend has emerged of a company-wide constitution or code of best practice.

Preliminary desk research taken forward by my department has revealed that companies are taking proactive steps to produce their own human rights policies, statements of values, codes of conduct and pledges. However, policies and statements tend to be aspirational and overarching, with a blurring of corporate social responsibility and human rights.

It should be noted that UK businesses have the potential to impact positively upon human rights. By promoting and respecting human rights in their activities, businesses can play a vital role in mainstreaming human rights and rebutting popular myths.

2. *How do these activities engage the human rights obligations of the UK?*

Under its international human rights obligations, the UK is required to secure certain rights to people within its jurisdiction. For this purpose, these rights may be split into three types.

A “negative obligation” is an obligation not to interfere with a certain right or freedom. A right may be absolute or may be limited or qualified in some manner, which in turn affects the extent of the corresponding obligation. In general, the state’s responsibility for negative obligations extends only to state functions. The European Court of Human Rights has developed extensive jurisprudence as to the scope of state responsibility under the European Convention on Human Rights (ECHR). The doctrine of state responsibility also applies under international human rights law, but is less widely used given the absence of as developed a system of enforcement in individual cases as under the ECHR.

A “positive obligation”, by contrast, obliges the state to take certain reasonable steps to secure the enjoyment of a certain right to people within its jurisdiction. In the case of absolute or limited rights, this may involve taking steps through the law to prevent one person from engaging in behaviour that may breach the right of another, an example of this is the law on offences against the person in respect of the right to life. In respect of certain qualified rights, such as the rights to respect for private and family life and to freedom of expression, the action required of the state may be more nuanced to reflect the balances that need to be struck, and may engage both law and policy.

The third type of right is that requiring progressive realisation, for example economic and social rights arising from the UK’s obligations under the International Covenant on Economic, Social and Cultural Rights. These too may require positive steps to be taken by the state. This will generally involve the disbursement of state resources and the administration of state policy so as to secure a minimum enjoyment of the right to all people within the jurisdiction and then a progressively greater enjoyment of the right by those people to the limit of available resources.

The doctrine of state responsibility means that the activities of businesses do not generally fall directly within the scope of the state’s negative responsibilities. However, where a state has delegated or relied upon a private body to fulfil its own obligations under the ECHR or has delegated a function which is clearly a function of the state to a private body, Strasbourg and UK jurisprudence provide that the state will remain liable for the acts of that entity which violate Convention rights. It remains, however, that this occasional private engagement of state responsibility is a limited exception to the general principle that a business trading as a private entity will not engage the state’s negative obligations.

So long as a business does not engage the State’s negative obligations, it can for the purposes of a State’s positive obligations be considered in theory indistinguishable from any other private person; in this respect, a business would be obliged in the same manner as any other private person to respect the laws promulgated by the State that fulfil positive obligations, and is subject like any other private person to the actions taken as part of State policy to secure a balanced enjoyment of qualified rights to all people. However, it is inevitably the case that the power of certain private corporations is such that their potential impact on the fulfilment of positive obligations is greater than that of a single private person; in this respect, it is therefore particularly important that the laws take account of this greater power, and that the corporation both respect the law and engage in the formulation and delivery of State policy. However, it is important to note that the obligation remains with the State, and it is therefore for the State to formulate its laws and policies in a suitable manner that achieves the required outcome.

3. *Are there any gaps in the current legal and regulatory framework for UK business which need to be addressed, and if so, how?*

As discussed above, there is no requirement for a business to comply with the obligation under section 6 of the Human Rights Act 1998, save where it is exercising a function of a public nature within the meaning of section 6(3). However, the Government believes that it is good practice for companies to use the Act as a framework in their business policies and practices.

4. *Does the UK Government give adequate guidance to UK businesses to allow them to understand and support the human rights obligations of the UK? If not, who should provide this guidance?*

The Ministry of Justice is currently undertaking a project, in partnership with the Department of Health, to establish an understanding of how UK businesses engage with human rights, and whether there is a need for further guidance on how companies can embed human rights within their business practices. Phase 1 of the project consists of a scoping study, conducted via questionnaire and in-depth interview with companies from a range of sectors. Once the scoping study has been completed the need for any further guidance will be considered, based on the study's findings.

5. *What role, if any, should be played by individual Government departments or the National Human Rights Institutions of the UK?*

Individual Government departments and National Human Rights institutions should take steps to ensure and promote human rights in business where appropriate. Government Departments and other public sector bodies can take steps to exclude firms with a poor human rights record from tendering and, where relevant, ensure appropriate human rights issues are covered in the contract. Where necessary, Government departments, after consultation with small businesses and their representatives, should also produce information and guidance on best practice.

The Foreign and Commonwealth Office and the Department for Business, Enterprise and Regulatory Reform are currently producing a toolkit on business and human rights for FCO and UK Trade and Investment posts, in order to create awareness of and promote, amongst other tools, the Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises (a set of corporate responsibility standards for companies which include a provision on human rights) among UK posts overseas. The toolkit gives guidance on how the activities of multinational enterprises may infringe human rights, how to promote the OECD guidelines and how to deal with complaints using the OECD National Contact Points.

Since 2003, the Department for Business, Enterprise and Regulatory Reform has introduced legislation that makes it unlawful for employers to discriminate against employees on the grounds of their religion or belief, sexual orientation or age. Any employee who feels discriminated against on one of these grounds may make a claim for redress to an Employment Tribunal.

Several Government Departments are playing an active role in the Private Sector and Human Rights Project outlined in the previous question. Representatives from some private sector organisations are also engaged, including the CBI and the Federation of Small Businesses. Race for Opportunity, a third sector organisation that works with public and private sector employers on equality issues, is also actively engaged with the project. Once the scoping study has been completed, its findings will inform the consideration of the potential roles of individual Government Departments, the Equality and Human Rights Commission and private sector organisations in taking this work forward.

6. *How should UK businesses take into account the human rights impact of their activities (and are there any examples of good or bad practice which the Committee should consider)? How can a culture of respect for human rights in business be encouraged?*

UK businesses can adopt various tools to take into account the human rights impact of their activities, including human rights risk assessments, codes for suppliers and contractors and policy analysis. The Private Sector and Human Rights Project will consider the current awareness of UK businesses of human rights and how a culture of respect for human rights in business can best be encouraged.

A good practice example of such a voluntary tool is the OECD Guidelines for Multinational Enterprises. The Guidelines are a set of recommendations for responsible business conduct addressed by the OECD members (and 11 additional adhering countries) to multinational enterprises. The Guidelines (Chapter 11(2)) clearly encourage enterprises to "respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments": A unique feature of the Guidelines is the establishment of National Contact Points by the adhering countries. The UK National Contact Point (UK NCP) has been very active in raising awareness of the Guidelines amongst UK businesses and civil society and also in implementing the Guidelines' complaint procedure. The outcome of the complaint process is a final statement which is published on the UK NCP's website (www.berr.gov.uk/nationalcontactpoint) and, since May 2007, also deposited in the Libraries of Parliament. The final statement may either state whether a UK company (or its subsidiary overseas) has breached the Guidelines (and, in this case, will make recommendations to rectify the situation), or reflect the successful outcome of the mediation offered by the UK NCP. An example of the former is the final statement on Afrimex (August

2008), and an example of the latter is the final statement on G4S (December 2008), both published on the UK NCP's website. The Government is currently considering what follow-up there should be after the UK NCP has closed an investigation under the Guidelines.

The UK NCP is also responsible for promoting the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, which aims to help companies that invest in countries where governments are unwilling or unable to assume their responsibilities. It addresses risks and ethical dilemmas that companies are likely to face in such weak governance zones.

The UK has also been a driving force behind a number of other initiatives designed to promote business responsibility for human rights. These include:

Voluntary Principles on Security and Human Rights (VPs)—Set up in 2000 by the Foreign and Commonwealth Office and the US State Department, the VPs aim to provide guidance to companies in the extractive industry, on ensuring the safety of their personnel and security of installations in insecure environments, while at the same time promoting standards of corporate responsibility with regard to human rights.

Professor John Ruggie (United Nations Special Representative on Human Rights and Transnational Corporations) is looking at reducing the risks of negative human rights consequences of international business activity in conflict zones as part of his overall human rights mandate. The Foreign and Commonwealth Office's Conflict Group act as the main point of contact on this particular piece of his work, with support from the Department for International Development and the Department for Business, Enterprise and Regulatory Reform.

The Kimberley Process (KP) was designed to combat the trade in conflict/rough diamonds. The UK played a leading role in setting it up in 2003. The Government Diamond Office (GDO), run by the Foreign and Commonwealth Office, works closely with participants, industry and civil society to ensure that it remains effective and credible.

The UK Government has also supported businesses' own efforts to improve global understanding of the relationship between business and international human rights standards. For example, the Department for International Development provided seed funding to the Business Leaders Initiative on Human Rights to support the development of an international Institute for Human Rights and Business. The Institute is supported by a wide range of international stakeholders, including governments, businesses, the UN Global Compact and non-governmental organisations (NGOs). The purpose of the Institute is to provide a source of global expertise in the area of business and human rights. The institute will build a body of knowledge to help define the responsibilities of different duty bearers, and provide services to help build the capacity of business and others to uphold human rights in practice. The Institute was launched in early 2009 and its Executive Board is chaired by Mary Robinson, former UN High Commissioner for Human Rights.

The Private Sector and Human Rights project being taken forward by the Ministry of Justice and the Department of Health aims to establish an understanding of the engagement of UK businesses with human rights within their domestic operations, and will consider whether a need for further guidance for businesses exists on how to embed human rights within their UK practices.

Should UK businesses' responsibility to respect human rights vary according to:

- whether or not they are performing public functions or providing services which have been contracted out by public authorities; is it clear when the Human Rights Act 1998 does and does not apply directly to businesses?

In terms of legal responsibility, as noted in the response to question 2 in the discussion of negative obligations, State responsibility under international law can extend to

certain functions of non-state actors where those functions are considered state functions. At the international level, businesses have no direct obligation to respect human rights when they are not operating within the scope of state responsibility.

The Human Rights Act 1998 defines the scope of the duty under section 6 not to act incompatibly with the Convention rights by reference to "public authority", a concept analogous but not identical to state responsibility. Section 6 provides that "public authority" includes a person exercising public functions and the Committee will be well aware of the jurisprudence in this area. In the majority of cases, it is clear whether a certain function is or is not of a public nature. While the issues considered by the House of Lords in *YL v Birmingham City Council* and others have been the subject of much attention, it should not be overlooked that, for the most part, it is clear both in law and in practice when a function should be considered a function of a public nature. It is only at the very margins of the concept that certainty may not exist; however, such marginal uncertainty would be an inevitable consequence of the duty having been defined in any manner other than by reference to a list of those subject thereto. In the Government's view this does not obviate the overall success of the duty under section 6 in developing an effective general domestic mechanism for the provision of remedies for breaches of human rights.

Further to such general human rights provisions, however, it should be recalled from the earlier discussion (question 2) of positive obligations and rights of progressive realisation that a substantial part of the framework of our law and of Government policy exists indirectly so as to protect or promote the enjoyment

of such rights. Businesses that operate under the law of the UK will inevitably indirectly participate in the protection or promotion of such rights by respecting laws and regulations, and on occasions by participating in the general framework of the delivery of essential services and functions to the public. Doing so may well amount to no more than the performance of their ordinary business functions, but it should nevertheless be recalled that human rights as a broad field of Government activity is not limited only to those laws and policies that bear the title, especially where economic and social rights are concerned.

- whether they are operating inside or outside the UK;

The responsibility of UK companies to respect human rights should not vary according to whether they are operating inside or outside the UK. However, in practice this may be the case, as UK companies operating overseas are required to respect local laws, which may vary according to the international human and labour rights instruments that host countries may have ratified.

- the size, type or nature of their business?

UK businesses should have an equal responsibility to respect human rights. The amount of resources that are available to address human rights issues may vary from business to business and sector to sector, however all UK businesses should be encouraged to engage and address human rights in their policies and practices regardless of their size, type or nature of business.

- How, if at all, should the current economic climate affect the relationship between business and human rights?

The current economic climate has put pressure on UK businesses to make cutbacks. However, although this may mean that businesses are concerned about investing resources in developing new human rights policies, there remains a strong business case for companies embedding human rights within their practices. In addition to potentially improving their corporate image, companies may enjoy potential benefits of protecting the human rights of their employees in terms of their staff turnover and retention, sickness rates and motivation.

7. *Does the existing legal, regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?*

8. *If changes are necessary, should these include:*

- *Judicial remedies (If so, are legislative changes necessary to create a cause of action, or to clarify that a cause of action exists, or to enable claims to proceed efficiently and in a manner that is fair to claimants and respondents);*
- *Non-judicial remedies (for example, through the operation of ombudsmen, complaints mechanisms, mediation or other non-judicial means). If non-judicial means are appropriate, are there any examples of good or bad practice which the Committee should consider?*
- Government initiatives, whether by legislation, statutory or other guidance or changes in policy;
- initiatives by business or other non-Government actors.

Recalling the discussion in question 6 about the legal framework put in place by the Government to fulfil its positive obligations to secure the protection of certain human rights, the Government is confident that adequate opportunity exists through these means for activities of businesses that have breached these laws, and hence may have led to a breach of an individual's human rights, to be challenged in court. The same would be true of regulatory frameworks where appropriate. It is not always necessary for there to be a remedy for the individual: indeed, where the breach is not one that falls within State responsibility for negative obligations, there will be no direct relationship under human rights law between the alleged originator of the breach and the person who is claiming that their rights have been breached. This is a proper consequence of the predication of human rights law upon the responsibility of the State, and of the proper role of the State in acting to ensure that all people within its jurisdiction are able to enjoy their rights. If a remedy should exist, therefore, that remedy will often be a remedy against or supplied by the State.

The Government therefore considers that, taking in combination the human rights protections for matters within the scope of State responsibility, such as under the Human Rights Act, and the protections developed as a direct or indirect consequence of the positive human rights obligations of the State, including obligations to fulfil rights of progressive realisation, there exists in the UK the correct legal framework to protect the rights of individuals.

However, as previously discussed, the Government encourages all organisations, whether public or private, to consider whether and how they could adopt a rights-based approach to their interface with the public, and believes that the Human Rights Act can provide a useful framework for businesses to embed human rights within their practices.

Supplementary memorandum submitted by the Ministry of Justice

The purpose of this supplementary memorandum of evidence is to provide the Joint Committee on Human Rights with additional information for its inquiry into business and human rights. This is in light of the preliminary findings of the Private Sector and Human Rights Project, which is currently being taken forward by my Department in partnership with the Department of Health.

The initial phase of this project consists of a scoping study via questionnaire and in-depth interviews to establish an understanding of how UK businesses are currently engaging with human rights and whether they see a need for any further guidance on how to integrate human rights into their business practices.

As part of this scoping study, questionnaires have been distributed to a range of companies across the UK private sector, and in-depth interviews have been conducted with selected companies. The emerging findings from the scoping research have enabled the Government to provide the Committee with additional information for some of the questions outlined in your call for evidence.

1. *How do the activities of UK businesses affect human rights both positively and negatively?*

The scoping research conducted as part of the Private Sector and Human Rights Project has found to date that human rights issues are clearly understood by the majority of respondents as applying to the individual, with everyone having human rights. When asked in the survey what the term “human rights” means to their organisation, themes that emerged were those of respect for the individual, fairness, equality, integrity and non-discrimination in the workplace.

Although companies do not often use the term “human rights” beyond the enclave of corporate responsibility, human rights issues are incorporated within other policies and referred to under broad, overarching terms such as equality and diversity, work-life balance and flexible work patterns to cover aspects of human rights. Therefore, although the term “human rights” is seen by companies as mainly applicable to overseas operations, companies recognise that their activities within the UK do affect human rights issues and these are addressed within a range of policies. The scoping research also found that companies place particular emphasis on human rights in employment issues.

2. *How do these activities engage the human rights obligations of the UK?*

As discussed above, the scoping study has found that businesses typically see the term “human rights” as mainly applicable to their wider operations only when they operate overseas, particularly in the least developed countries. Therefore, most companies do not conduct the same type of human rights risk assessments to their UK operations as they do for their overseas operations, but have integrated human rights issues into other relevant domestic policies.

A notable exception to this is in relation to the farming, food processing and shell-fish sectors. The Morecambe Bay disaster and the on-going work of the Gangmasters Licensing Authority has established an awareness of the risks faced by migrant labourers in the UK amongst the industries concerned and the retailers they supply. In terms of addressing specific human rights issues, the survey carried out as part of the scoping research asked companies whether they had developed policies to address a range of human rights issues. The responses reveal that companies are most likely to have comprehensive management systems in place for the issues of occupational health and safety, harassment and most forms of discrimination.

4. *Does the UK Government give adequate guidance to UK businesses to allow them to understand and support the human rights obligations of the UK?*

The scoping research conducted as part of the Private Sector and Human Rights Project has indicated that human rights are clearly understood by the majority of companies, although it is perceived that they are largely limited to employment issues. Both questionnaire and interview responses referred to a broad range of rights and principles including treating everyone with dignity and respect and without discrimination, equality, a safe working environment, fair pay, recognising trade unions and complying with employment legislation. Rights are viewed by many as a means of empowering individuals and realising their potential, for example through access to training and development, listening to marginalised voices and tailoring services to meet individual needs.

The scoping research has also shown to date that UK businesses do have a significant desire for practical guidance on how to integrate human rights within their policies. Approximately half of respondents to the survey to date have indicated that they are working regularly with other organisations on human rights issues. Of these, Business in the Community is the organisation most commonly worked with, followed by the Employers Forum on Disability, International Business Leaders Forum and the United Nations Global Compact.

There appears from the scoping research to be few obstacles to companies taking further steps to address human rights issues. Significantly, companies did not believe that cost or a lack of senior management commitment or stakeholder support present barriers to taking further action on human rights issues.

6. *How should UK businesses take into account the human rights impact of their activities (and are there any examples of good or bad practice which the Committee should consider)? How can a culture of respect for human rights in business be encouraged?*

The scoping study has found that most companies seek to meet the expectations of their stakeholders regarding human rights, rather than seeking to lead on these issues. The survey so far has revealed that in terms of the influence of stakeholders, the strongest is the personal commitment of business leaders.

As mentioned in the response to Question 1, the scoping research so far has found that human rights are more often integrated into other policies, not handled through a stand alone policy. However, a minority of questionnaire respondents to date (17%) did not have a human rights policy or position statement and had not integrated human rights into other policies.

In terms of addressing specific human rights issues, questionnaire respondents are most likely to have comprehensive management systems in place for occupational health and safety (OHS), harassment and most forms of discrimination. However, around 10% of respondents to date have taken no specific action on any human rights issues, including occupational health and safety. Privacy, sexual orientation, cultural and religious expression and bribery and corruption are issues where a proportion of companies have yet to make any progress.

The most popular measures for integrating human rights into existing policies and practices are codes of conduct and reactive grievance and discipline processes. A significant proportion of respondents also use employee training, a dedicated corporate responsibility or ethics committee, and procurement policies and practices. Some companies also use an ombudsman, customers evaluation, a public performance report, individual performance incentives, business unit performance reviews, and third party assessment.

Some examples of good practice emerged from the scoping research. Some participants mentioned taking human rights issues into account as a matter of due diligence in the development of new services and the bidding process, which in one case revealed an untapped market opportunity. One respondent also included human rights as part of an ongoing risk training exercise.

A number of interview participants emphasised the importance of working with supply chain partners who shared their human rights values, with one reporting that they had severed relations with a UK supplier who would not allow them to visit their factory in China. Other participants explained that they would turn away business or terminate a tender process if it became clear that their values and standards might be compromised. Approximately half of the survey respondents require their suppliers and contractors to have a human rights policy.

The scoping research has revealed that the UK private sector does display a strong alignment with human rights values. When asked how influential human rights principles are in guiding the conduct of companies, questionnaire respondents stated that common human rights principles or values such as fairness, respect, equality and accountability were important, with integrity and trustworthiness rated most highly. While allowing for social bias in these responses (it is to be expected that respondents would naturally select the more positive outcomes) this nonetheless indicates a strong alignment between the desired values or culture of the business responding and principles underlying human rights.

Furthermore, the interviews found numerous companies where there is strong integration of ethics into business governance and decision making. This included, in some cases, being prepared to stand up to their clients on questions of ethics for example around how staff restructuring and lay-offs were to be achieved. Then questioned it was hard to discern a clear business case for such commitment to ethics. It was often described as simply “the way we do business”. It was seen as a differentiator in the market, but not having a clearly established financial business case. The ethical culture was usually attributed to one or more key leaders in the business.

30 June 2009

**Letter from the Chair of the Committee to the Rt Hon Michael Wills MP, Minister of State,
Ministry of Justice**

I would like to extend my thanks to you and your colleagues, Lord Malloch-Brown and Ian Lucas MP for your attendance before the Joint Committee on Human Rights on 14 July 2009.

During that session, you each promised to provide the Committee with additional information in a supplementary written memorandum or memoranda. The transcript of this session is now available and has been forwarded to your officials for correction (Question references below are to the uncorrected transcript, HC 559-v).

In addition, there are a few additional questions arising from the evidence we have received to which we would welcome a Government response.

ORAL EVIDENCE FOLLOW-UP

The following supplementary evidence was promised in oral evidence on 14 July 2009:

1. A list of which Government departments, if any, which have had problems in relation to Section 6(3)(b) HRA, including through disputes, litigation or proposed Bill amendments, since the decision of the HL in *YL*. We would be grateful if you could list the Government's position in any litigation, or its response to any amendments, if possible. (See Q365; Michael Wills MP)

2. What role do human rights and, in particular, conflict risk, play in the assessment of Export Credit Guarantee applications? (See Q420—423; Ian Lucas MP. See *ECGD -v- ICO and Hildyard (EA/2008/0071)* Transcript, 6 July 2009, pages 83—86)

3. You promised to provide a supplementary memorandum on the Government's position in respect of public procurement and human rights. It would be helpful to know what guidance is currently provided to public authorities by central Government on public procurement and human rights. Please provide examples—if there are any—of good practice on public procurement and human rights in the UK. (Q 432, Michael Wills MP) The JCHR last commented on the role of public procurement, and the adequacy of public guidance on human rights in its last report on the meaning of public authority for the purposes of the Human Rights Act 1998 (Ninth Report of Session 2006-07, paragraphs 33—61; 118—123).

4. We asked the Ministers to consider the approach of the Norwegian Government to ethical public investment. Ian Lucas MP promised to consider the Norwegian position and come back to the Committee (Q442).

Further information about the Norwegian approach can be found in the submission of the Holly House Trust to our inquiry (their submission is available online) and in the recent submission of the Norwegian Government to Professor Ruggie on their corporate social responsibility policies.¹ The administration of the Norwegian public pension fund is overseen by a Council of Ethics which is responsible for ensuring that all investments comply with certain ethical principles. These include that no investment may contribute to unethical acts or omissions, such as violations of fundamental humanitarian principles, serious violations of human rights, gross corruption or severe environmental damages.²

ADDITIONAL QUESTIONS

(a) *Government responsibilities*

We understand that at least six Government departments have responsibility for Government policy which may be relevant to this inquiry: Justice; the Foreign and Commonwealth Office; Business, Innovation and Skills; International Development; Work and Pensions and Treasury.

5. Please confirm how responsibility for human rights and the private sector, including responsibility for corporate responsibility, is currently arranged across Government. We would be grateful if you could explain which Ministers, departments and agencies have responsibility for each area of Government policy; and set out any recent relevant joint-working programmes or initiatives undertaken, specifying the departments involved. (See Q389—391)

In evidence, Ian Lucas MP, referred to a “steering board across government” with responsibility for corporate responsibility. This steering board included a number of Government departments and agencies. (Q 391)

6. Please provide further information on the cross-Government steering board on corporate responsibility. In particular please tell us about its:

- History;
- purpose and goals;
- membership and structure;
- working methods and objectives; and
- responsibilities and achievements.

Lord Malloch-Brown explained that although the Conflict Group at the Foreign and Commonwealth Office was responsible for liaison with Professor Ruggie, the priorities for the Government were not limited to conflict issues. The FCO was working specifically with Professor Ruggie on conflict issues. The FCO also sees that the human rights debate “needs to be integrated into foreign policy across all sets of countries, all sets of company actors, etc”. (Q392).

7. Please explain how responsibility for human rights issues is organised across the FCO.

¹ Available online through the Business and Human Rights Resource Centre: <http://www.business-humanrights.org/Links/Repository/643435>

² http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277

(b) Current guidance for business

In evidence, Ian Lucas MP, helpfully explained that Government has “support mechanisms within Government to assist business in developing their human rights consciousness”. (Q375; see also Q394)

8. Please provide further details of the “support mechanisms” which currently exist within Government for the purposes of assisting businesses to develop their awareness of human rights, both in relation to their activities within the UK and overseas. We would be grateful if you could provide examples of how these mechanisms work in practice.

The Minister went on to explain that, in his view, the Foreign Office provides very detailed guidance for businesses seeking to improve their practices overseas and that this role was “very high” on the list of priorities for UK missions engaging with British businesses abroad. (QQ394—395)

9. We would be grateful for examples of the circumstances in which guidance is provided by the Foreign Office to businesses on the human rights impacts of their activities.

The Minister added that there was a “perception of difference” between the work of the FCO and the work of UKTI. He was “working hard to try . . . to ensure for UKTI human rights are just as much of their agenda as they are for the Foreign Office” (Q402). UKTI states that one of its key purposes is to work with UK businesses “to ensure their success in international markets”. One of UKTI’s strategic objectives is to “deliver a measurable improvement in the reputation of the UK in leading overseas markets as the international business partner of choice.”³

10. What steps, if any, has the Government taken to integrate human rights into the objectives of UKTI?

(c) Private Sector and Human Rights Project

11. Please provide further details of the scope and purpose of the Private Sector and Human Rights Project, including the working methods employed, its aims and the departments and agencies involved in the steering group for the project. In respect of each department or agency, please explain their role in the project. (Q388)

(d) Bilateral investment treaties

We asked about the conclusions of Professor John Ruggie on the impact of stabilisation clauses in bilateral investment treaties (Report of the UN Special Representative, April 2009, paragraph 31—33). Lord Malloch Brown explained that the conclusion of these treaties were not the responsibility of the FCO (Q409). Ian Lucas MP was concerned that we had not reflected the observations of Professor Ruggie accurately (Q412).

12. How does the Government respond to the concerns of Professor Ruggie that stabilisation clauses in bilateral investment treaties impact adversely on human rights in developing countries? What is the Government’s position on stabilisation clauses? How, if at all, does the Government consider their potential human rights implications?

(e) Companies Act 2006

13. During the passage of the Companies Act 2006, the Government committed to review the operation of the social and environmental requirements of the business review within two years (by 2010). We would be grateful if you could confirm the arrangements for that review, including the proposed timetable. (See QQ 443—445)

14. In the Government’s view, are there any lessons to be drawn from the already completed business reviews for 2009?

(f) UK Commission for Human Rights, the Environment and Business

15. In evidence, you told us that you did not see the need for a dedicated Commission for Human Rights, the Environment and Business. I would be grateful if you could provide us with more detail on the Government’s position. (Q460)

16. Do you see any place for the existing UK human rights commissions in raising awareness among businesses of the human rights impacts of their activities or having an educative role in disseminating good practice? In the Government’s view, would this role be open to any of the EHRC, the SHRC or the NIHR within their existing mandates and resources?

SUPPLEMENTARY CALL FOR EVIDENCE

On 9 June 2009, the Committee issued a supplementary call for evidence, focusing on a number of recent Government activities or initiatives. These included:

— HM Government, Corporate Responsibility Report, February 2009;

³ https://www.uktradeinvest.gov.uk/ukti/appmanager/ukti/aboutus?_nfpb=true&_pageLabel=aims_objectives&_nfls=false

- Foreign and Commonwealth Office, Consultation on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) internationally, April 2009;
- Industry and Exports (Financial Support) Bill 2009; and
- Draft Bribery Bill, May 2009.

17. If the Government would like to submit supplementary evidence on the human rights implications of any of these proposals—or other recent Government initiatives affecting the private sector and human rights—this would be welcome.

UK GOVERNMENT SUBMISSIONS

18. We would be grateful if your officials could provide us with copies of all submissions on behalf the UK to Professor Ruggie and with any submissions made by the United Kingdom intervening in any proceedings in the United States against UK companies under the Alien Torts Claims Act (Alien Torts Statute).

I have copied this letter to Lord Malloch-Brown at the FCO and Ian Lucas MP at the Department for Business, Innovation and Skills, with whom you may wish to coordinate a Government response.

21 July 2009

Further supplementary memorandum submitted by the Ministry of Justice

1. *A list of which Government departments, if any, which have had problems in relation to Section 6(3)(b) HRA, including through disputes, litigation or proposed Bill amendments, since the decision of the HL in YL. We would be grateful if you could list the Government's position in any litigation, or its response to any amendments, if possible.*

The way in which section 6 of the Human Rights Act (HRA) is drafted means that the question of whether or not any given function is a “function of a public nature” is something that must be addressed on a case-by-case basis. As such, we would not necessarily agree with the Committee’s suggestion that disputes, litigation or probing amendments relating to section 6(3)(b) necessarily constitute “problems” in respect of this issue. Indeed, we consider that probing amendments in particular represent a normal part of the examination of legislation, and note that litigation on this point has been rare.

The involvement of Government Departments in each area is set out in more detail below.

DISPUTES AND LITIGATION

As noted above, it is rare for the point to be contested in litigation. This is illustrated by the length of time it took the Government to find a suitable case in which to intervene to argue about the status of privately-provided social care, as recommended by the Committee. In terms of disputes and litigation, the majority of the cases in which this point has arisen and in which central Government has been involved are set out in the Committee’s own reports on the subject.

To the best of our knowledge *Weaver v London and Quadrant Housing Trust* represents the only significant contested post-YL proceedings on the subject, although we understand that the point has also been raised in a number of minor judicial review proceedings that have, for the most part, failed to receive permission as presenting no arguable case. *Weaver* is not a case at this time in which the Government is involved, and as such it has taken no position in the litigation.

PROPOSED BILL AMENDMENTS

To the best of our knowledge, three Government Departments have encountered proposed Bill amendments relating to section 6(3)(b) of the Human Rights Act since the judgment in YL. They are: the Department for Children, Schools and Families, the Department of Health and the Department of Work and Pensions. The Bills in question and the nature of the amendments tabled are set out below.

Children and Young Persons Bill

The amendment tabled to the Children and Young Persons Bill concerned the status of social work providers under section 6, and was tabled by Baroness Walmsley at Committee stage in the House of Lords.

Health Bill

An amendment was tabled in each House during the passage of the current Health Bill, seeking to clarify that the provision of healthcare services under direct payment provisions is a public function for the purposes of the HRA.

Welfare Reform Bill

Two separate amendments were tabled in the House of Lords to the Welfare Reform Bill relating to the status of independent bodies providing services under right to control provisions, and contractors carrying out public functions on behalf of the Secretary of State.

In each case the Government has clearly set out its view as to whether it considers the functions or bodies in question to be public for the purposes of the HRA, which is recorded in *Hansard*.

1. What role do human rights and, in particular, conflict risk, play in the assessment of Export Credit Guarantee applications?

Consideration of Human Rights is incorporated into the Export Credit Guarantee Department (ECGD)'s Business Principles, which guide its practices. One objective of these is that:

“ECGD will, when considering support, look not only at the payment risks but also at the underlying quality of the project, including its environmental, social and human rights impacts.”

The Business Principles go on to state that ECGD:

“...will promote a responsible approach to business and will ensure our activities take into account the Government's international policies, including those on sustainable development, environment, human rights, good governance and trade.”

In carrying out its role ECGD also has to comply with various international agreements, including the Organisation for Economic Co-operation and Development (OECD) Recommendation on Common Approaches on the Environment and Officially Supported Export Credits (the Common Approaches). This requires Export Credit Agencies to ensure that the projects that they support meet international environmental and social standards. These are normally the standards of the World Bank Group, which include standards on human rights issues.

It is ECGD policy that the projects it supports should normally comply in all material respects with the relevant international standards. ECGD has published a Case Impact Analysis Process (CIAP), which sets out how it determines whether the projects it is asked to support satisfy that policy.

Where projects are considered to have a high potential environmental and social impact, the Common Approaches require that an Environmental Impact Assessment (EIA) is produced and made publicly available with human rights issues being identified and included in any EIA. It is the responsibility of the project sponsor/developer/owner to produce an EIA or equivalent, not the UK supplier. Typically, the human rights issues which are considered against international standards include:

- (i) involuntary resettlement;
- (ii) compulsory land acquisition;
- (iii) Impact of imported workforces;
- (iv) job losses among local people;
- (v) damage to sites of cultural, historic or scientific interest;
- (vi) impact on minority or vulnerable groups;
- (vii) child or bonded labour; and
- (viii) use of armed security guards.

If a project has been classified as having high potential environmental and social impacts, ECGD would normally require monitoring arrangements to be put in place during the construction and operational phases of the project to ensure compliance with international standards by the project owner.

During oral hearings, the Committee referred to the evidence given by ECGD at a recent Information Tribunal in regards to conflict risks on the Baku-Tbilisi-Ceyhan (BTC) pipeline project that was supported by ECGD. I understand that at the Tribunal, ECGD explained that conflict risks are in fact assessed by ECGD's Country Risk Analysts. This was certainly the case with ECGD's consideration of support for the BTC project. Such risks could impact upon the viability of projects that ECGD is asked to support and, therefore, are always assessed so that ECGD can satisfy itself that the repayment risks are acceptable. That assessment is informed by advice from the Foreign and Commonwealth Office, including overseas posts, as it has particular expertise within the Government on conflict risk issues.

2. *You promised to provide a supplementary memorandum on the Government's position in respect of public procurement and human rights. It would be helpful to know what guidance is currently provided to public authorities by central Government on public procurement and human rights. Please provide examples, if there are any, of good practice on public procurement and human rights in the UK.*

All public procurement spend must comply with the EC Treaty principles of transparency, non-discrimination and the free movement of goods, services and persons across the European Union single market. In addition, procurements over certain value thresholds must comply with specific measures contained in the EU Procurement Directives, which are transposed into UK regulations (The Public Contracts Regulations 2006).

Public procurement decisions aim to achieve value for money and take various factors into consideration, including cost, quality and reliability. Human rights issues are taken into account where they are relevant to the subject matter of the procurement or where they relate to the performance of the contract. When human rights issues have been assessed as relevant, departments take that into account in their procurement activities.

For example, public sector bodies consider the human rights record of companies performing services on their behalf as one important factor in the procurement process. This is particularly the case when the protection of human rights is inherent in the performance of the service being procured, such as care services, when the contract will specify standards for its performance that ensure that the human rights of service recipients are protected.

Because there are multiple factors involved in the procurement process and the decisions taken are often the result of several different considerations, it is not possible to select examples of companies being excluded solely on the basis of their human rights record. At selection stage, Article 45(2)(D) of the Procurement Directive allows contracting authorities to exclude a supplier from the procurement process if guilty of grave professional misconduct, which could include breaching human rights legislation. In considering whether to exclude a supplier for breaches of human rights legislation, the contracting authority would need to ensure that exclusion would be relevant and proportionate. In reaching its decision, it should consider the nature of the breach, and the remedial action taken in the meantime by the supplier.

The Regulations also list specific offences, where convictions must result in the mandatory exclusion of contractors from tendering. These cover matters such as fraud, bribery and corruption, which can be linked to abuses of human rights and are an important consideration in helping to protect vulnerable groups of people.

Similar provisions to those contained in the EU Procurement rules apply to states outside the European Economic Area (EEA) that have signed the government Procurement Agreement. The Office of Government Commerce (OGC) is also working with the United Nations Commission on International Trade Law to extend model procurement laws to third countries. Suppliers from countries outside the EEA or from countries that are not signatories to the Government Procurement Agreement can be automatically excluded for human rights breaches, and breaches by suppliers of human rights in EEA countries will be in breach of local law and should be dealt with accordingly.

Domestically, OGC has taken action to help contracting authorities to address issues that impact on human rights beyond minimum legal requirements in public procurement. In 2008, OGC published a guide which demonstrates, with practical examples, how social issues can be reflected at each stage of the procurement process in a manner consistent with the Procurement Directive and UK Regulations. This complements OGC's existing, more detailed guidance published in 2006 on addressing social issues through public procurement.

As the Committee is aware, in 2005 the Department for Communities and Local Government, then the Office of the Deputy Prime Minister, produced a guide for public authorities entitled *Guidance on Contracting for Services in the light of the Human Rights Act 1998*. The MoJ, in partnership with the Department for Communities and Local Government, now intends to review the content, communication and distribution of this guidance, and will be working with the Improvement and Development Agency for Local Government to take this forward.

OGC is also developing a procurement charter between Government and private sector suppliers, aimed at promoting wider policy agendas through procurement by placing voluntary commitments on its signatories. While the formal procurement process affords contracting authorities opportunities to address human rights issues, much can also be achieved on a voluntary basis through ongoing supplier relationship management that could not be included in a formal procurement.

3. *We asked the Ministers to consider the approach of the Norwegian Government to ethical public investment. Ian Lucas MP promised to consider the Norwegian position and come back to the Committee.*

The majority of UK public pension schemes, including those for the Civil Service, the NHS, teachers, police, fire-fighters and the Armed Forces are unfunded pay-as-you-go schemes. They are not therefore backed by a specific fund of monies which are then invested. This is in contrast to Norway's, "Norwegian Government Pension Fund- Global" to which Ian Lucas was being referred by the Committee.

The Local Government Pension Scheme is a funded scheme comprising of 89 separate local authority controlled pension funds in England and Wales, plus 11 in Scotland and 1 in Northern Ireland which operate on a similar basis. These funds have powers to make investments in the ordinary sense but there are prudential limits as set out by their investment framework which is broadly similar to that set out in “The Local Government Pension Scheme (Management and Investment of Funds) Regulations 1998” and its subsequent amendments. The regulations require local authorities with responsibilities for pension funds to act prudently, seek proper advice, ensure the suitability and diversification of investments and are required to publish their policy regarding ethical investments as part of their Statement of Investment Principles.

The Norwegian Government Pension Fund-Global is one of the largest pension funds in the world and derives its financial backing from oil profits rather than pension contributions. As of August 2008, 50% of the fund was invested in the international stock market. The fund referred to is subject to an ethical investment policy which includes measures to exercise ownership rights in order to promote long-term financial rewards, based on the UN Global Compact and the OECD Guidelines for Corporate Governance and for Multinational Enterprises. As Ian Lucas stated in his evidence, the principles of the OECD Guidelines underpins the work of the UK Government. Therefore any action by the Norwegian Government to support them is welcomed by the UK.

4. Please confirm how responsibility for human rights and the private sector, including responsibility for corporate responsibility, is currently arranged across Government. We would be grateful if you could explain which Ministers, departments and agencies have responsibility for each area of Government policy; and set out any recent relevant joint working programmes or initiatives undertaken, specifying the departments involved.

The subject of human rights is shared between the Ministry of Justice (MoJ), the Foreign and Commonwealth Office (FCO), and the Department for International Development (DFID) depending on whether the issues are mainly domestic, international or related to other countries’ international human rights obligations. The Department for Business, Innovation and Skills (BIS) is fully engaged in initiatives taken forward by these departments which have an impact on UK businesses, consumers and employees.

BIS’s role in coordinating corporate responsibility across Whitehall effectively draws together work going on within other government departments into a coherent and cohesive agenda with a specific remit to help develop the business case for organisations to adopt and embed corporate responsibility within their operations. Other Government Departments with policy responsibilities for corporate responsibility include: the Department for Environment, Food and Rural Affairs (DEFRA) with environmental reporting, skills for corporate responsibility and liaison with trade unions in the workplace; DFID with ethical trading, the extractives industry and natural resource conflict issues; the Department for Work and Pensions (DWP) on ethical pension fund management, UK relations with the International Labour Organisation and socially responsible investment; the Department for Communities and Local Government for business brokerage and neighbourhood renewal; the Cabinet Office with the Prime Minister’s Social Action Agenda, City Leader’s Challenge and the Prime Minister’s award for Social Technology; and the Office of the Third Sector with youth volunteering, community endowments, support for charities and faith-based organisations.

BIS is also responsible for the reporting provisions of the Companies Act 2006; and is the home of the National Contact Point which leads on the OECD Guidelines on Multi-national Enterprises and Anti-corruption issues. Business Group’s Central Team provides the BIS interface with the Office of the Third Sector. As the Committee is aware, Ian Lucas, Minister for Business and Regulatory Reform, is the Minister responsible for corporate responsibility.

5. Please provide further information on the cross-Government steering board on corporate responsibility. In particular please tell us about its:

- history;
- purpose and goals;
- membership and structure;
- working methods and objectives; and
- responsibilities and achievements.

In his evidence to the Committee, Ian Lucas referred to a “steering board across government” with responsibility for the OECD Guidelines for Multinationals; an international corporate responsibility standard. This steering board includes a number of Government departments and agencies.

The OECD Guidelines are recommendations on responsible business conduct addressed by Governments to multinational enterprises operating in or from their territories. Each signatory Government to the Guidelines, (all 30 OECD member states, as well as 11 non-OECD countries have signed up), must establish their own national Contact Point (NCP). The role of the NCPs is to promulgate the Guidelines to the business community, employee organisations and other stakeholders, and to implement the Guidelines Specific Instance, often referred to as the complaint, procedure to examine allegations that multinational enterprises have breached the Guidelines.

The OECD does not prescribe how an NCP must be organised or run, consequently there are a number of different models in existence across different signatory countries. Following criticism of the effectiveness of the UK NCP, the Government undertook a consultation with UK NCP stakeholders. This consultation resulted in a revamp of the UK NCP, including the establishment of a Steering Board.

The purpose of the Steering Board is to oversee the work of the UK NCP and to provide it with strategic guidance.

The constitution of the Board is currently nine Members, five representing Government departments (BIS, who also Chairs the Board, DFID, FCO, DWP and ECGD) and four representing external stakeholders (the Trades Union Congress, civil society, the business sector, and the All-Party Parliamentary Group on the Great Lakes Region). However, because the Guidelines cover a range of issues the Steering Board, with the agreement of the Chair, can call upon persons having a knowledge, experience or understanding of particular topics. These individuals can be either from external organisations or other Departments not currently represented on the Board.

The responsibilities of the Steering Board are as follows:

- to oversee and monitor the effectiveness of the operation of the National Contact Point, ensuring correct and fair procedures are followed in line with the established and published NCP procedures for dealing with complaints;
- to agree any changes in procedures, and develop further procedures, where this is necessary in the light of experience;
- to consider issues of general and specific application of the Guidelines when they arise. The Steering Board will consider requests from the NCP for guidance on the procedure to be followed, for example where there are new or contentious issues to consider. However, the Steering Board will not make decisions on the substance of Specific Instances;
- to consider requests for review in relation to Specific Instances examinations in respect of procedural issues only;
- to assist and advise the NCP in relation to the promotion and awareness raising of the Guidelines; and
- to consider issues where clarifications or improvements to the Guidelines are proposed for bringing to the attention of the OECD Investment Committee. The Steering Board may make recommendations to Ministers as appropriate in this respect.

The main achievements of the Steering Board since its conception are:

- Review of the UK NCP's procedural handling of the Baku-Tbilisi-Ceyhan (BTC) pipeline Specific Instance, at the request of one of the complainants. The Board found that there had been procedural failings in the UK NCP's handling of this case and made various recommendations including: the withdrawal of the previously issued Final Statement; and the preparation and issuing of a new Final Statement.
- Provided advice on how the UK NCP should handle Specific Instances which are or have been subject to legal proceedings and where there is a risk of prejudice occurring.
- Promoted the Guidelines in various ways, including participating in events and discussions.

6. *Please explain how responsibility for human rights issues is organised across the FCO.*

The subject of human rights is mainstreamed across all of the FCO's departmental strategic objectives. This means that geographical and thematic departments and posts are responsible for ensuring that human rights are factored into their work. The FCO's Human Rights and Democracy Group (HRDG) exists to drive, guide and support this effort, while leading on work to protect and strengthen the international human rights system and develop policy on key international human rights and democracy challenges.

Lead responsibility for the UN human rights machinery, international human rights law, and overarching human rights themes therefore rests with HRDG, but thematic and country specific issues rest with the responsible geographical or functional FCO departments. In practice departments work together to ensure coherence between different policy priorities. Likewise HRDG works closely with other government departments where they have the overall policy lead, for example on the following subjects: climate change; international development; UK compliance with international human rights obligations; and corporate responsibility.

In line with HRDG's lead responsibility for UN special procedures we strive for credible, expert individuals such as Ruggie to be appointed as mandate holders. HRDG supports Professor Ruggie's work and has a keen interest in seeing it operationalised in a manner compatible with the international human rights framework to improve respect for human rights on the ground. In addition, the FCO's Conflict Group is seeking to improve private sector compliance with best practice frameworks in order to reduce the links between the exploitation of natural resources and conflict. As a result, Conflict Group acts as the focal point

across Whitehall on business and conflict issues, but not corporate social responsibility or sustainable development. Conflict Group sits on Professor Ruggie's core steering group, which is seeking to develop a code of conduct for businesses operating in conflict zones.

7. Please provide further details of the "support mechanisms" which currently exist within Government for the purposes of assisting businesses to develop their awareness of human rights, both in relation to their activities within the UK and overseas. We would be grateful if you could provide examples of how these mechanisms work in practice.

The Human Rights Division within the MoJ produces a range of guidance on the subject of human rights. As well as a toolkit for public authorities, this includes both a guide and a short introduction to the Human Rights Act, which are available to the general public. The Private Sector and Human Rights Project currently being taken forward by MoJ, in partnership with the Department of Health, will consider a range of options including whether any further guidance should be provided for UK businesses on how to integrate human rights approach within their domestic policies and practices. This work will be taken forward in partnership with the Equality and Human Rights Commission (EHRC) and Race for Opportunity, a third sector organisation that works with both public and private sector employers on equality issues. The Government believes that as the protection and promotion of human rights and the Human Rights Act is a core duty of the EHRC, the Commission should actively provide leadership in promoting and raising awareness of human rights.

Furthermore, the Private Sector and Human Rights Project has served to initiate dialogue between the Government and the UK private sector on the subject of human rights. Businesses from across the UK private sector have participated in the scoping study via questionnaire and interview, and will be kept updated on the project's findings and any next steps. Representatives of the sector, including the Confederation of British Industry (CBI) and the Federation of Small Businesses (FSB), have also been fully engaged; they have participated in the project's Steering Group and have made valuable contributions to the development and distribution of the questionnaire, and identifying participants for in-depth interviews. The Government will continue to work closely with these organisations to develop any next steps for the Private Sector and Human Rights Project, based on the findings of the scoping study.

The Government supports the development of a human rights consciousness in UK companies operating overseas through a programme of Corporate Responsibility awareness-raising and the systematic promotion of international good practice guides. For example, the OECD Guidelines for Multinational Enterprises is brought to companies' attention through mainstream trade promotion services such as the UKTI and ECGD websites.

The Government has also developed a toolkit for our overseas posts to raise awareness of how business operations may affect the enjoyment of human rights and how to promote good corporate conduct, including through the OECD Guidelines. As Lord Malloch Brown told the Committee during the oral evidence session, this is one in a series of working-level human rights guides provided to officials working overseas. In addition, the Government issues an annual telegram to overseas Posts reminding them that the OECD Guidelines constitute a useful tool when dealing with complaints brought by NGOs about the behaviour of UK companies overseas including in relation to human rights.

The Government has also sponsored a number of multilateral initiatives to help equip UK companies with practical tools to assess and manage the impact of their international activities. For example, the UK NCP has sponsored the development of a dedicated web portal to promote the OECD Risk Awareness Tool for Weak Governance Zones.

8. We would be grateful for examples of the circumstances in which guidance is provided by the Foreign Office to businesses on the human rights impacts of their activities.

It is standard practice for FCO posts overseas to brief visiting business missions on the security and internal political situation in a country. Posts make every effort to ensure that UK businesses understand how local conditions might affect their activities and vice versa when conducting business in a country.

Through posts FCO supports the work of the UK NCP, encouraging British companies to meet their obligations to their workers under these guidelines. Posts are also encouraged to promote the guidelines locally with civil society and others and to consider providing a link to the guidelines from their websites. Annual guidance is issued to posts reminding them how the guidelines can be used, and posts judge the situation on the ground to determine when an intervention might be appropriate. Training on human rights is provided for officers going to post and the Government has recently compiled a toolkit on human rights and business.

All FCO posts are expected to monitor and report on the human rights situation in a country. They have played a key role too in promoting ethical business practice initiatives including the UN Global Compact, the Voluntary Principles on Security and Human Rights and British Government initiatives such as the Medicines Transparency Alliance and the Extractive Industries Transparency Initiative.

FCO has on a number of occasions provided further advice to businesses, for example on the reputational risks of their activities or on appropriate local business partners. Such guidance is often provided at the business' request, and the circumstances under which the guidance is provided vary greatly from case to case.

9. *What steps, if any, has the Government taken to integrate human rights into the objectives of UKTI?*

There are no specific references to human rights principles in the objectives of UKTI. However, through the commitments of its parent departments BIS and FCO, UKTI is bound to consider human rights principles in its efforts to achieve its objectives; the FCO provides introductory and advanced level human rights training courses to officers going overseas.

Further, UKTI is always mindful of the UK's responsibilities regarding Corporate Social Responsibility; this forms part of the thinking behind their general operational guidelines, much the same as their eligibility guidelines, the FCO tobacco guidelines, and the bribery and corruption guidance. Through overseas posts the Government actively encourages countries to establish the necessary governance/ business regulatory framework to protect human rights.

10. *Please provide further details of the scope and purpose of the Private Sector and Human Rights Project, including the working methods employed, its aims and the departments and agencies involved in the steering group for the project. In respect of each department or agency, please explain their role in the project.*

The Private Sector and Human Rights Project is currently being taken forward by MoJ, in partnership with the Department of Health. The initial phase of this project consists of a scoping study to establish an understanding of how UK businesses are currently engaging with human rights and whether they see a need for any further guidance on how to integrate human rights into their businesses practices.

As part of the scoping study, questionnaires have been distributed to a range of companies across the UK private sector, and in-depth interviews have been conducted with selected companies. The questionnaire was distributed to companies across the sectors identified by the Office of National Statistics, in order to ensure that it engages the breadth of the UK private sector. It was also distributed to a number of companies from Scotland, Wales and Northern Ireland to ensure that the study includes all parts of the UK.

The questionnaire has been distributed both directly to companies, and via online announcements, through:

- the Business and Human Rights Resource Centre website and newsletter;
- the Federation of Small Businesses newsletter;
- the Race for Opportunity online newsletter; and
- the CBI announcing to their members and encouraging them to respond.

In-depth interviews have been conducted with companies across a range of sectors, and from across the UK. These interviews provided an opportunity to look below the surface and find out exactly how companies perceive human rights and how they affect their domestic operations, and whether there is a need for any further guidance on how to integrate human rights within their practices.

The emerging findings from the scoping study were outlined in the Government's supplementary memorandum of evidence submitted to the Committee as part of this inquiry. Their key messages emerging from the scoping study to date are:

- UK companies understand human rights issues although they do not use explicitly human rights language within their practices. They instead use a variety of overarching terms including ethics, social responsibility and specific terms such as equality and diversity. Therefore, most do not have stand-alone policies or position statements on human rights, but have integrated human rights into their existing relevant policies.
- Companies usually view human rights as risk factor only in their overseas operations, and for their UK operations see human rights as an issue only in terms of employment. Within the UK, companies are most likely to have comprehensive policies in place for occupational health and safety, harassment and most forms of discrimination. The most common ways in which these issues are integrated into policies are through codes of conduct and grievance and discipline processes.
- The supplementary memorandum also explains that there is a significant demand for practical guidance on how UK businesses can integrate human rights into their business practices.

A Steering Group has been established for the Private Sector and Human Rights Project, which is comprised of the relevant Government Departments, private sector organisations and Race for Opportunity, a third sector organisation that works with employers on equality issues. The Group has contributed to the scoping study through the development of the questionnaire, identifying participants, distributing the questionnaire through contacts and networks, and analysing the findings of the study. The Group will be fully engaged in considering any potential next steps of the project.

The project's Steering Group is comprised of the following Government Departments: the Department of Health (who are jointly sponsoring the project), the Home Office, the Department for Work and Pensions, the Department for Transport, the Government Equalities Office, the Office of Government Commerce, the Foreign and Commonwealth Office, the Department for International Development, the Audit Commission, the Tenant Services Authority, the Wales Office, Scotland Office and the Northern Ireland Office. The Equality and Human Rights Commission is also a member of the Group.

The Welsh Assembly Government, Northern Ireland Executive and Scottish Executive have been informed of the project and have asked to be kept updated regarding its progress. Officials from each are therefore copied into papers for the Steering Group.

Although this project has a domestic focus, at the evidence session held by the Committee on 14 July we discussed the need to ensure that the Foreign and Commonwealth Office is fully engaged with the work and that the international and domestic dimensions of business engagement with human rights are fully joined up. FCO has since attended a meeting of the Private Sector and Human Rights Project's Steering Group, to discuss the findings of the project's scoping study. FCO and DFID will remain fully engaged with the project and we will continue to seek opportunities to integrate the work that both are taking forward in the area of business and human rights with that being taken forward by MoJ.

In addition to Government Departments, the Steering Group of the Private Sector and Human Rights Project is also comprised of private sector organisations, including the Confederation of British Industry (CBI) and Federation of Small Businesses (FSB). The CBI in particular has been closely involved with this project, both through the Steering Group and through additional collaboration with the Ministry of Justice. The CBI has made a valuable contribution to the design and distribution of the questionnaire, and has participated considerably in the discussion of the study's findings. Both the CBI and FSB will continue to be fully engaged in this project, including any next steps.

As well as public and private sector bodies, Race for Opportunity has also made a significant contribution to the scoping study, both through and beyond the project's Steering Group. Race for Opportunity is a third sector organisation that works with employers on equality issues. This organisation has a strong commitment to taking this work on the UK private sector and human rights forward, following a survey that they conducted amongst public and private sector employers last year, which showed that many participants were interested in learning more about how human rights impact on their practices. Like the CBI, Race for Opportunity has made a valuable contribution towards developing the questionnaire, identifying participants, and analysing the findings of the scoping study.

The findings of the scoping study are currently being collated and analysed. They will be detailed in a report later in the year, which the Government intends to publish. The findings of the scoping study will inform the potential next steps of the project and thus determine its overall scope. Any potential next steps will be taken forward in partnership with the key stakeholders, including the EHRC and Race for Opportunity.

11. *How does the Government respond to the concerns of Professor Ruggie that stabilisation clauses in bilateral investment treaties impact adversely on human rights in developing countries? What is the Government's position on stabilisation clauses? How, if at all, does the Government consider their potential human rights implications?*

The UK's Bilateral Investment Treaties (known as Investment Promotion and Protection Agreements, IPPAs) do not contain stabilisation clauses. The purpose of the protections in our IPPAs is to ensure that regulation is non-discriminatory and is introduced in a fair and equitable manner, not to prevent host States from regulating in the interest of such issues such as the environment or human rights.

We understand Professor Ruggie's concern was in fact with clauses in agreements between host governments and private sector investors, in which the UK Government cannot directly intervene. We are, however, looking at ways in which developing countries' own capacity to address the issues raised can be improved.

12. *During the passage of the Companies Act 2006, the Government committed to review the operation of the social and environmental requirements of the business review within two years (by 2010). We would be grateful if you could confirm the arrangements for that review, including the proposed timetable.*

The Government committed to conduct an assessment of the business review provisions under Section 417 of the Companies Act 2006 two years after implementation. These provisions came into force on 1 October 2007 for financial years beginning on or after that date. The first business reviews to be completed under these provisions have therefore been published this year and we expect to review how the provisions have worked in 2010, after two reporting cycles. A detailed timetable has not yet been set for this project.

13. *In the Government's view, are there any lessons to be drawn from the already completed business reviews for 2009?*

The Government plans to evaluate how the new provisions are working after two reporting years and we have not undertaken an analysis in advance of starting that project.

14. *In evidence, you told us that you did not see the need for a dedicated Commission for Human Rights, the Environment and Business. I would be grateful if you could provide us with more detail on the Government's position.*

The Government is confident that there exists in the UK the correct framework to protect the human rights of individuals, and therefore does not consider that the creation of any additional bodies is necessary. The Government established the Equality and Human Rights Commission (EHRC) under the Equality Act 2006 with wide range of statutory responsibilities. Section 9 of the Equality Act, states that the Commission has duties to:

- “promote understanding of the importance of human rights”,
- to “encourage good practice in relation to human rights”, and
- to “promote awareness, understanding and protection of human rights”.

Jack Straw and I have noted on 15 June the publication of the Commission's Human Rights Inquiry, which made a number of important recommendations for the way in which it should in future carry out its responsibilities under the Equality Act 2006, which sets out the Commission's duty in relation to human rights. We think Dame Nuala O'Loan's team has produced a realistic and workable scheme for the way in which the Commission can assume a leadership role in promoting human rights, and building capacity across the public sector. We look forward to seeing how these recommendations will be translated into specific projects and outputs in their business plans and grants programmes for this and future years.

We are pleased to note that the Commission in its Human Rights Strategy for 2009–12 has set out how it plans to take forward the recommended actions from the Inquiry. The Government believe that as part of this strategy, the Commission should become more active in the promotion and protection of human rights within the UK private sector. Therefore, the Government does not believe that it is necessary to create a new Commission which relates specifically to the private sector and human rights.

15. *Do you see any place for the existing UK human rights commissions in raising awareness among businesses of the human rights impacts of their activities or having an educative role in disseminating good practice? In the Government's view, would this role be open to any of the EHRC, the SHRC or the NIHRC within their existing mandates and resources?*

The Government believes that the Equality and Human Rights Commission (EHRC), the Scottish Human Rights Commission (SHRC) and the Northern Ireland Human Rights Commission (NIHRC) can play a valuable role in raising awareness of human rights among businesses and having an educative role in disseminating good practice.

As a National Human Rights Institution, the EHRC has a vital role to play in raising awareness of human rights. The Commission also has statutory duties to promote and protect human rights, and encourage compliance with the Human Rights Act. One of the EHRC's key functions is to provide authoritative advice and guidance across their remit, including to business, and their recent Human Rights Inquiry found that there is a need for new guidance on human rights. The Commission is currently considering how they could best provide practical and relevant advice and guidance on human rights to private bodies, particularly those such as private detention and deportation facilities and private care homes.

As outlined in the responses to Questions 8 and 11, the EHRC is working closely with MoJ on the Private Sector and Human Rights Project to consider a range of options including the development of any guidance for UK businesses. The Commission was created under the provisions of the Equality Act 2006 with new powers to enforce legislation and to encourage and promote equality for all, including compliance with the Human Rights Act.

The SHRC believes that it can play a valuable role in promoting best practice to businesses, both directly and through the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). Indeed, the SHRC has been elected as representative of the European group of NHRIs on two ICC steering committees, one of which is on human rights and the business sector. As outlined in their written evidence to the Committee, the SHRC promotes a human rights based approach to business, which seeks to integrate human rights into all business decisions and practices.

The NIHRC engages in a regular dialogue with the Institute of Directors, CBI, FSB and local Chambers of Commerce. To date this dialogue has focused on consulting on the NIHRC's advice on a Bill of Rights for Northern Ireland, but the Commission has expressed an interest in considering options for pursuing work on the private sector and human rights with the Ministry of Justice and other relevant stakeholders.

The SHRC and the NIHRC are being kept informed of the progress of the Private Sector and Human Rights Project and will consider how they can engage with any next steps.

On 9 June 2009, the Committee issued a supplementary call for evidence, focusing on a number of recent Government activities or initiatives. These included:

- HM Government, Corporate Responsibility Report, February 2009;
- Foreign and Commonwealth Office, Consultation on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) internationally, April 2009;

- Industry and Exports (Financial Support) Bill 2009; and
- Draft Bribery Bill, May 2009.

16. If the Government would like to submit supplementary evidence on the human rights implications of any of these proposals, or other recent Government initiatives affecting the private sector and human rights this would be welcome.

CORPORATE RESPONSIBILITY REPORT, FEBRUARY 2009

Our vision, as outlined in the Government's Corporate Responsibility Report of February 2009, is to see UK businesses take account of their economic, social and environmental impacts. In particular it outlines ways in which Government is working with businesses to reduce poverty and promote human rights overseas. A copy of the report is enclosed.

FOREIGN AND COMMONWEALTH OFFICE, CONSULTATION ON PROMOTING HIGH STANDARDS OF CONDUCT BY PRIVATE MILITARY AND SECURITY COMPANIES (PMSCS) INTERNATIONALLY, APRIL 2009

On the conduct of Private Military and Security Companies, the Government has seen James Cockayne's submission to the Committee and is pleased to enclose its formal response to the recommendations made, which is attached at Annex 1. The Foreign and Commonwealth Office would be happy to answer any further questions the Committee might have.

DRAFT BRIBERY BILL

We do not propose to submit supplementary evidence on the draft Bribery Bill. We are carefully considering the views of the Committee on the issues referred for its consideration by the Joint Committee on the Draft Bribery Bill as part of our preparation of both the Government's response to the Report of that Committee and the Bill referred to in the Government's draft legislative programme for the next session of Parliament. The Explanatory Notes accompanying that Bill will include a section dealing with human rights issues.

INDUSTRY AND EXPORTS (FINANCIAL SUPPORT) BILL 2009

The Industry and Exports (Financial Support) Bill 2009 made amendments to the Export and Investments Guarantees Act 1991, these in no way affected the operation of ECGD's Business Principles including in relation to human rights.

THE LETTER OF CREDIT GUARANTEE SCHEME

Since the Committee met with Ministers, ECGD has decided to launch a new product, the Letter of Credit Guarantee Scheme. This was the subject of a recent public consultation which among other things considered the application of ECGD's Business Principles to the exports that would be covered under the scheme. Following that public consultation, the Government decided that it would not be appropriate to undertake such assessments. This is consistent with OECD Common Approaches on the Environment and Officially Supported Export Credits which applies only to exports involving repayment terms of two years or more. A copy of the consultation document and the Government's response can be found at www.ecgd.gov.uk.

17. *We would be grateful if your officials could provide us with copies of all submissions on behalf the UK to Professor Ruggie and with any submissions made by the United Kingdom intervening in any proceedings in the United States against UK companies under the Alien Torts Claims Act (Alien Torts Statute).*

Submissions to Professor Ruggie

The UK played a leading role in setting up Professor Ruggie's mandate. The Government has been impressed by the work he has done in bringing understanding and coherence to the subject area. We continue to support his mandate and co-sponsored the resolution in 2008 to renew it. Through EU and national statements we have registered broad support for his approach and proposed tripartite framework.

Beyond Council statements, we maintain a policy of not seeking to influence the views of UN special procedure mandate holders in order to show respect for their independence. We have therefore not submitted UK views to Professor Ruggie, except for a recent letter from the FCO Legal Adviser on a technical legal question. We are pleased to enclose this letter and Professor Ruggie's response, attached at Annexes 2 and 3 [not printed with this volume].

Separately we have recently accepted an invitation from Professor Ruggie to join his core steering group seeking to develop a code of conduct for businesses operating in conflict zones (which will hopefully be available by the end of 2010).

The UK has a standing invitation for UN special procedures to visit. Professor Ruggie has not visited the UK in his formal capacity as the mandate holder, but did meet with Lord Malloch Brown during an informal visit in May 2008. We are pleased to attach at Annex 4 the record of this meeting.

 SUBMISSIONS TO THE US ALIEN TORTS CLAIMS ACT

The Government has submitted to intervene in ATS proceedings on three occasions:

- In 2007 the ATS came before the 9th Circuit Court of Appeals on a case involving Rio Tinto. The UK and Australia together submitted an amicus brief;
- In 2007 the UK submitted a letter to the US Secretary of State at the petition-for-certiorari stage in the Khulumani case which was then attached to the amicus brief by the US Solicitor General along with two joint UK-German Note Verbales to the US State Department;
- In 2004 the UK filed a joint amicus brief with Australia and Switzerland in the case of *Sosa v Alvarez-Machain* before the US Supreme Court.

I am pleased to enclose these documents, attached at Annexes 5, 6 and 7 [not printed with this volume].

Annex

PRIVATE MILITARY AND SECURITY COMPANIES (PMSCs): RESPONSE TO JOINT COMMITTEE ON HUMAN RIGHTS

The Foreign and Commonwealth Office launched a Public Consultation on our proposals to promote high standards of the Private Military and Security Company (PMSC) industry internationally on 24 April 2009. The objective of the policy is to promote high standards of conduct by PMSCs internationally, and to reduce the risk that the activities of PMSCs might give rise to human rights or humanitarian law concerns, assist internal repression, or provoke or prolong internal or regional tension.

The FCO ran a public consultation, which closed on 17 July, on our preferred option, which consists of a three-part package of:

- working with the UK industry to promote high standards through a code of conduct agreed with and monitored by the Government;
- using our status as a buyer to contract only those companies that demonstrate that they operate to high standards; and
- an international approach to promote higher global standards based on key elements of the UK's approach.

We are now considering the received responses and will publish a summary of those responses within three months of the close of the consultation.

We welcomed and considered the specific recommendations made by James Cockayne to the JCHR:

Recommendation 1: The Joint Committee on Human Rights should invite the Foreign and Commonwealth Office to share its views on the compatibility of Her Majesty's Government's proposed policy on the regulation of private military and security companies with the 'Protect, Respect, Remedy' policy framework.

Recommendation 2: The Joint Committee on Human Rights should encourage the Foreign and Commonwealth Office to explore how the 'Protect, Respect, Remedy' policy framework could be integrated into its work on private military and security companies from now on.

Recommendation 4: The Joint Committee on Human Rights should encourage Her Majesty's Government to incorporate the Ruggie policy framework into its efforts to promote an international regulatory framework for private military and security companies.

The UN Human Rights Council was unanimous in welcoming the policy framework for business and human rights proposed by Professor John Ruggie in his final report under the 2005 mandate. The Human Rights Council extended Prof. Ruggie's mandate in 2008 asking him to "operationalise" the framework in order to provide concrete guidance to States and businesses. We welcome Professor John Ruggie's framework and consider that it is broadly compatible with our own approach on PMSCs. We are considering how far the "Protect, Respect and Remedy" framework is compatible with the preferred option to improve standards in the PMSC industry in detail. Though we believe that the state does not have a general duty to protect against abuse by non-state actors, as they do not have human rights obligations, we consider that the Respect tenet of Prof. Ruggie's framework may help to encourage responsible corporate citizenship. We are also considering how possible grievance mechanisms, incorporated into a Code of Conduct/International Standard, may contribute to the Remedy tenet of Prof. Ruggie's framework.

We are currently taking forward an international initiative, in conjunction with other key partners such as the Swiss, the US, Norway and the Extractive Industry, to uphold high standards of the industry through a code of conduct, building on the Montreux process, together with an accountability mechanism/grievance mechanism. Once an international code of conduct is agreed we will encourage a wide range of PMSC exporting and contracting states and the main industries employing PMSCs to sign up to it. We will look at whether Prof. John Ruggie's framework might be introduced into discussions on creating and enforcing these international standards.

Recommendation 3: The Joint Committee on Human Rights should encourage Her Majesty's Government to clarify how any system for the regulation of UK-based PMSCs will allow for effective investigation and prosecution of apparent criminal conduct, either in the UK or elsewhere.

There is already legislation penalising grave breaches of the Geneva Conventions, as well as torture, genocide, war crimes and crimes against humanity. This applies to acts committed by United Kingdom nationals overseas, ensuring that they can be prosecuted for these acts even if they take place overseas. We are also able to prosecute British citizens for murder with extra territorial jurisdiction.

Recommendation 5: The Joint Committee on Human Rights should seek clarification by Her Majesty's Government of how any 'Code of Conduct' for UK-based private military and security companies will ensure they discharge their responsibility to respect human rights, in particular by requiring a process of ongoing human rights due diligence.

We will work with the relevant Trade Association to agree a code of conduct to which all members must adhere. Our aim is for the framework to cover ongoing compliance in accepting contracts, incidents and accountability, resource management and responsible behaviour and promote respect for International Humanitarian Law (IHL) and Human Rights Law (HRL).

Recommendation 6: The Joint Committee should invite the Foreign and Commonwealth Office to clarify how an industry-run Grievance Mechanism for the private military and security industry will ensure respect for the principles of legitimacy, accessibility, predictability, equity, rights-compatibility, transparency and independence outlined in the Ruggie policy framework.

The Government is currently consulting on its preferred option to uphold high standards of the PMSC industry globally. We are engaged in an initiative to write an international code of conduct and are considering how an effective accountability mechanism will enforce those standards. As part of that process, we are also considering how a grievance process will improve that accountability mechanism. We will look to frame a detailed policy proposal after the close of the consultation and will then be able to provide a comprehensive answer. When we consider the details of this mechanism, we will explore how Professor John Ruggie's principles—as outlined—can be incorporated.

21 August 2009

Memorandum submitted by Paul Harpur, Associate Lecturer, Queensland University of Technology

I would like to thank the Joint Committee for inviting submissions and commend them for engaging in this extremely important topic. My submission will respond to the question:

How do activities of UK businesses engage the human rights obligations of the UK?

INTRODUCTION

Human rights documents require States to take steps to ensure human rights are protected by laws and policies. This means if UK corporations breach human rights then the UK has an obligation to ensure there are sufficient regulatory vehicles to prohibit this conduct and provide a remedy. A very good example of such a law is the *Disability Discrimination Act 1995* (UK). Where the corporation is engaging in human rights violations outside the UK's geographical jurisdiction then the extent of the human rights duties imposed the UK to regulate such conduct is unclear. This submission seeks to focus upon the responsibility upon the UK to regulate corporations' extraterritorial conduct.

DUTIES UPON CORPORATIONS

The imposition of human rights obligations upon corporations has been developing for a considerable period of time. One of the most substantial statements of corporation's human rights obligations can be found in the United Nations Global Compact (UNGC).

The UN General Assembly has accepted the complicity principle and provided direction where a person will be complicit. The *UNGC Principles* state in Principles 1 and 2:

1. Corporations should support and respect the protection of internationally proclaimed human rights ... within their sphere of influence
2. Corporations should make sure that they are not complicit in human rights' abuses.

Clapham and Jerbi explain that these first two principles impose duties upon corporations firstly to ensure corporations do not abuse human rights in their operations and secondly, take reasonably practicable steps to ensure corporations are not complicit in others' human rights' violations.⁴ When introducing the *UNGC* to business leaders, Kofi Annan explained:

⁴ Andrew Clapham and Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses" (2001) 24 *Hastings International and Comparative Law Review* 339, 341.

You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business ... You can at least make sure your own employees, and those of your subcontractors, enjoy those rights.⁵

On the basis the *UNGC* principles are based on the *UDHR*, the principles which are reflected in the *UNGC*, in effect, re-state existing international law obligations. As a result, Principles 1 and 2 effectively re-state corporations' existing obligations under the horizontal conceptualisation of international human rights law.

What obligations does the UK have to ensure corporations subject to their jurisdiction satisfy the complicity principle?

Arguably corporations have a moral obligation to take reasonably practicable steps to ensure they are not directly, indirectly or silently complicit in human rights' abuse within their domestic and international spheres of influence. Does the imposition of duties upon corporations create any additional obligations upon States? Paust has observed that one of the issues surrounding corporations' obligations under international human rights law is how the extension of obligations over corporations will impact on "public responsibility".⁶ The imposition of human rights' obligations over corporations to ensure they are not complicit in human rights' abuses means corporations have human rights' obligations which were previously exclusively the province of States. The fact that human rights' obligations have been imposed over corporations does not mean States' human rights' obligations have decreased because corporations also have obligations to ensure the same rights. Clapham and Jerbi explain:

The boundaries of what is expected from business, and what a State is obliged to do under international law, cannot be neatly drawn. It must be stressed, however, that governments do still possess wide powers over—and primary responsibility for—the well-being of their citizens and for the protection of human rights.⁷

The fact States horizontally impose obligations upon corporations under international law arguably does not mean States have their obligations under vertical international law reduced. States impose obligations on corporations to enable States to discharge their human rights' obligations. Where the operation of horizontal rights ensures the protection of human rights, then States have discharged their obligations. Conversely, if the imposition of horizontal rights fails to ensure rights, then States will be liable to find alternative means to ensure those human rights are protected. Ruggie concludes:

[T]he State duty to protect against non—State abuses is part of the international human rights regime's very foundation. The duty requires States to play a key role in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.⁸

As a result it is argued that the operation of horizontal rights assists States to discharge their human rights' obligations, but it does not enable States to avoid their human rights' obligations.⁹

It is submitted that as States remain the paramount actors under international law and thus all corporations' rights and obligations flow through States. Rather than reducing States' obligations, the operation of imposing horizontal obligations upon corporations may actually increase States' obligations. Generally, States' human rights' obligations are limited to territory the State controls. For example, article 2 of the *ICCPR* provides that through ratification, all States undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".¹⁰ Article 2(2) requires Australia to introduce laws to ensure the rights contained in the *ICCPR* are protected and article 2(3) requires Australia to ensure there is a judicial remedy if such a right is breached. These obligations upon States have been read widely to include some extraterritorial obligations. The International Court of Justice has read article 2 widely. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (*Advisory Opinion*) the court advised:

⁵ Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in address to World Economic Forum in Davos" (1999) UN Press Release SG/SM/6881.

⁶ Jordan Paust, "The Significance and Determination of Customary International Human Rights Law: the Complex Nature, Sources and Evidences of Customary Human Rights" (1995) 25 Georgia Journal of International and Comparative Law, 147, 162; See a further discussion in: Jordan Paust, "The Other Side of Right: Private Duties Under Human Rights Law" (1992) 5 Harvard Human Rights Journal 51.

⁷ Andrew Clapham and Scott Jerbi, "Categories of Corporate Complicity in Human Rights Abuses" (2001) 24 Hastings International and Comparative Law Review 339.

⁸ John Ruggie, Interim Report (The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97, 2006); John Ruggie, "Business and Human Rights: the evolving international Agenda" (2007) 101 American Journal of International Law 819; John Ruggie, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (Report of the Special Representative of the United Nations Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 2007); John Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights (Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises to the Human Rights Council Eighth session, 7 April 2008) 27–50.

⁹ Peter Newell and Jędrzej George Frynas, "Beyond CSR? Business, Poverty and Social Justice: an Introduction" (2007) 28 Third World Quarterly 4, 669.

¹⁰ See for general discussion: Sarah Joseph, Jenny Schultz and Melissa Castan, International Covenant on Civil and Political Rights: Cases, Materials and Commentary (2004) 679 and 752.

This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction.¹¹

The UN Committee has supported the concept that States have extraterritorial human rights' obligations.¹² Kamchibekova has concluded that "[i]t seems that human rights bodies have accepted the possibility of extraterritorial state responsibility". The extraterritorial obligations of States under international law can be further evinced by the "effects doctrine". The "effects doctrine" extends a State's extraterritorial obligation to any conduct which is performed outside the State which is intended to have an impact within the State.¹³ Further evidence of the extraterritorial obligations of States can be demonstrated by the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.¹⁴ The *Draft Articles on Responsibility of States for Internationally Wrongful Acts* do not impose any territorial limitation upon States' obligations.¹⁵ It is clear States' legal obligations under international human rights law are not restricted to the State's own geographical territories.

One manifestation of States' extraterritorial duties concerns the conduct of corporations. It could be argued that States have a moral obligation to ensure corporations operating within their jurisdiction are not directly, indirectly or silently complicit in human rights' abuse. The extension of corporations' human rights duties has resulted in an increase in States' moral obligations. States have increasingly imposed human rights' obligations over how corporations manage their international supply chains.¹⁶ While corporations cannot impact upon the vertical conceptualisation of human rights and bind States, States, through extending corporations' obligations, may in turn extend States' obligations. The horizontal imposition of human rights' obligations upon corporations effectively extends the obligations of States, to all the international and national activities of corporations operating in their jurisdiction.¹⁷ Through imposing non-binding extraterritorial human rights' obligations over corporations, it could be argued that States have effectively extended their own obligations.

A number of jurisdictions have acted to regulate the extraterritorial affairs of corporations within their jurisdictions. Examples of this can be found in Europe and in the USA. The European Parliament has recognised that European States have a responsibility to regulate for European-based corporations dealing in developing States. In 1999, the European Parliament passed a resolution calling for a legally-binding framework for regulating European transnational corporations operating in developing countries. While the European Commission has not adopted this mandatory model,¹⁸ the European Commission has adopted a voluntary code and individual European nations have developed voluntary regulatory frameworks to encourage corporations to engage in ethical conduct.¹⁹

The USA has recognised it has an obligation to attempt to prevent its corporations from using sweatshops.²⁰ In 1997, the Clinton administration reached an agreement with the Apparel Industry Partnership for an industry-wide code, aimed at preventing child labour and sweatshop conditions generally in supply chains.²¹ The most recent USA government involvement in international supply chain regulation has occurred through the Sweatfree Procurement movement. This movement was started by the City of Maine, and requires all corporations which supply products to the public bodies associated with the City of Maine, not to have acquired those products from domestic or international sweatshops.²² Similar laws have now been introduced in other states, including California,²³ Pennsylvania,²⁴ Portland,²⁵ New Jersey²⁶ and San Francisco.²⁷

¹¹ [2004] ICJ 136, 178–79.

¹² Damira Kamchibekova, "State Responsibility for Extraterritorial Human Rights Violations" (2007) 13 *Buffalo Human Rights Law Review* 87, 145.

¹³ Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed, 1992) 459–460.

¹⁴ *Statute of the International Law Commission*, G.A. Res. 174 (II).

¹⁵ Rick Lawson, "Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century?" in M. Castermans-Holleman (ed.), *The Role of the Nation-State in the 21st Century* (1998) 96.

¹⁶ Pall A. Davidsson, "Legal Enforcement of Corporate Social Responsibility within the EU" (2002) 8 *Columbia Journal of European Law* 529, 531, 534.

¹⁷ Magdalena Bexell, *Exploring Responsibility: Public and Private in Human Rights Protection* (PhD Thesis, Lunds University (Sweden), 2005).

¹⁸ Yaroslau Kryvoi, "Enforcing Labor Rights against Multinational Corporate Groups in Europe" (2007) 46 *Industrial Relations* 2, 366; Pall Davidsson, "Legal Enforcement of Corporate Social Responsibility within the EU" (2002) 8 *Columbia Journal of European Law* 529.

¹⁹ European Commission, *Communication From The Commission Concerning Corporate Social Responsibility: a Business Contribution To Sustainable Development* (2002); For a summary of the United Kingdom's regulatory framework see Commonwealth Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (Report, 2006) 6.17.4 and 6.17.5.

²⁰ For a discussion of various regulatory vehicles proposed and implemented in the USA see: Mark B. Baker, "Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?" (2007) 23 *Connecticut Journal of International Law* 123, 150-62.

²¹ Heidi S. Bloomfield, " "Sweating' the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System" (1999) 22 *Hastings International and Comparative Law Review* 567, 576-577.

²² *Administrative Procedures and Services Regulation* (City of Maine), Part 4, Subchapter I-B, *State Purchasing Code of Conduct for Suppliers*.

²³ *An Act to amend S 6108 of the Public Contract Code, Relating to Public Contracts 2003* (California, SB 578).

²⁴ *Executive Order for Sweat-free Apparel Procurement 2004* (Pennsylvania).

²⁵ *Sweat-free Procurement Ordinance for the City of Portland*.

²⁶ *Sweat-free Procurement Rules 2006* (New Jersey).

²⁷ *The Sweatfree Contracting Ordinance of the City and County of San Francisco, 2005*.

 CONCLUSION

This submission has argued that the operation of the imposition of human rights obligations upon States, such as through the United Nations Global Compact, have increased the human rights of the UK to ensure corporations are respecting human rights within those corporations' spheres of influence. Due to the 2500 word length I was unfortunately unable to discuss possible regulatory vehicles which could assist the UK to discharge this extended human rights obligation.

If the Committee would be interested in further submissions or comments I would be honoured to oblige them.

Paul Harpur

BBus (HRM), LLB (Hons), LLM, PhD (under examination), Attorney of Law, Associate Lecturer with the Queensland University of Technology

March 2009

 Memorandum submitted by Sir Geoffrey Chandler

This enquiry relates to the potential for action within the United Kingdom. Since, however, corporate activity today is predominantly international and the incidence of abuse occurs chiefly in supply chains or extractive operations in the developing world, I hope that it may be helpful to the Committee to provide an overview of the international situation within which the UK is placed. The challenge cannot be met at a national level alone.

The fundamental challenge we face is how to influence the behaviour of companies not only so that they should do no harm, but also that they should give positive support to human rights through the manner in which they conduct the totality of their operations.

1) The globalisation of the world economy has made the corporate sector a more important influence on human rights for good or ill than almost any other constituency. Through its spreading supply chains it touches directly the lives of millions. Its operations affect the social and physical environment wherever it works. Directly or indirectly it influences the political scene. Human rights abuses by companies have been well documented, though redress remains inadequate; far less has been done to engage companies' positive support on behalf of human rights. Without the latter we have no hope of reaching our objectives for human rights or indeed of attaining the Millennium Development Goals.

2) In the past 12 years human rights have become part of the corporate agenda. A growing number of companies include the Universal Declaration of Human Rights or an explicit commitment to human rights in their business principles (see www.business-humanrights.org). Many initiatives, most notably the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the Voluntary Principles on Security and Human Rights, call for the observance of human rights by companies.

3) However, the companies which accept responsibility for their human rights impact, although growing in number and including some of the largest in the world, remain a small proportion of the whole and are those whose reputation and brand name are susceptible to the pressure of public opinion.

4) The various initiatives cited in 2) above are voluntary, are limited in their reach into the corporate world, and fail to touch a large number of companies, such as major state-owned companies and the small and medium-sized companies which are the biggest employers of labour and therefore of crucial importance to labour conditions. Most importantly, none of these initiatives influence the market by providing authoritative non-financial criteria by which all stakeholders can judge comparative non-financial performance and so ultimately influence share price. So long as the market—the most significant driver of corporate behaviour—measures comparative performance solely on financial criteria we will not win; and responsible companies, with reputational exposure enforcing greater care for human rights, will find themselves undercut by the less scrupulous on an uneven playing field. (The oil industry in Sudan provides an example of this).

5) For too long the debate has been dominated by conflict between the proponents of voluntarism (the companies) and the proponents of the law (the non-governmental organisations (NGOs)). But history tells us, from the abolition of the slave trade onwards, that voluntarism has never worked. And the law can never encompass the protean diversity of corporate activity and its international mobility. There are moreover weak or failed states where the law may not exist or its writ not run.

6) That we need law is incontrovertible. International human rights law needs to be interpreted into national legislation and made applicable to companies. We require legislation which makes parent companies responsible for abuses committed by their subsidiaries where these are not adequately dealt with in the countries where they happen. The United States 18th century Alien Tort Claims Act serves such a purpose, though with difficulty, and to deal with international business requires international treaties which inevitably lie well in the future. Closer to our grasp is legislation at national level to ensure reporting of companies' non-financial impacts on a comparable basis, something that the recent reform of UK company law failed to do.

7) “Complicity”—corporate involvement in the violation of human rights by others, for example governments—presents a more complex picture. Direct complicity, for example with genocide or slavery which transgress international human rights law, should be legally actionable. This is likely to be rare. More common is moral complicity—the silent and apparently acquiescent presence of a company in a country where human rights are flagrantly abused and to whose government that company provides economic support. This can only be dealt with by a company’s adopting principles in accord with the UDHR which empower its managers to speak out in defence of international human rights which transcend domestic law.

8) The most significant gap today is the absence of such clear human rights principles, based on the International Bill of Rights, made applicable to and operationable by companies. It is this that the failed Norms initiative attempted to tackle and which is now the most important part of the renewed mandate of the Special Representative of the UN Secretary General for business and human rights (SRSG), Professor John Ruggie. Authoritative principles, backed by the UN, would provide criteria available to all stakeholders, including the market, by which the full spectrum of corporate behaviour could be judged. Such principles would not be enforceable, but they would be more than voluntary: they would be normative in that they reflected the views of international society. We know from the experience of the initiatives cited in 2) above that “soft law”, as the lawyers describe such principles, can be effective. If they are to make an impact, we need principles set out in language applicable to the managers who will ultimately have to act on them and intelligible to all stakeholders—for example, the right to a living wage and the right to organise, not a generalised call for respect of human rights.

9) At the end of the day a framework of law alone will not make for a responsible corporate world any more than it can make a moral individual. And so long as there is financial advantage in ignoring the human rights of individuals and societies, the irresponsible may find it cheaper to pay the cost, for example of environmental pollution, rather than invest in its avoidance. It is only when principles become the point of departure for corporate activity that we will have won, when companies do what is right because it is right.

10) There is no magic bullet, as the SRSG pointed out in his first mandate’s final report. But the promulgation of authoritative normative principles is a next step whose necessity has long been evident and which constitute the essential under-pinning for an ultimately better regulated framework. This is within our grasp through the implementation of the SRSG’s mandate, but this requires better support than it has had up to now to reach its completion. I hope that the UK Government, which was the main instrument in keeping the process going after the fiasco of the Norms, will play its part in seeing it through to conclusion. It is an international challenge which can only be met internationally.

Sir Geoffrey Chandler

Memorandum submitted by the Institute of Directors

INTRODUCTION

1. The Committee has identified an important area of concern, and the Institute of Directors is very happy to contribute to the debate. This evidence is submitted in response to the call for evidence that the Committee issued on 6 March 2009.

2. Questions of the observation of human rights by businesses can arise in two very different contexts. The first context is where a national legislature legislates for the observation of human rights within that country. In such cases, the questions are those of the proper extent of such law and of the extent to which the legislation of human rights is the best way to achieve policy objectives. The second context is where the relevant legislature, judiciary and business activities are not all in the same country. Then there are important questions as to the legitimacy of extra-national legislation and judicial process. We tackle each of these two contexts separately in what follows.

HUMAN RIGHTS AND BUSINESSES WITHIN ONE COUNTRY

3. The call for evidence specifically refers to business operations within the UK. We here discuss the usefulness of human rights legislation in this purely national context.

4. There is a serious danger of extending the language and the legislation of human rights to areas where they do not belong, and in consequence imposing new burdens on business that will ultimately harm everyone except those who make a living out of enforcing or litigating regulations.

5. The main legal point of reference is the June 2007 House of Lords decision in *YL (by her litigation friend the Official Solicitor) (FC) v Birmingham City Council and others*. This case did however turn on the narrow question of whether a private care home was performing functions of a public nature, and there was a 3:2 majority view that it was not. There was no decision on whether YL’s human rights were in fact violated or at risk of violation, although there were obiter dicta on the potential for violation of the rights of care home residents, notably in Baroness Hale’s speech (paragraph 58). Baroness Hale mentioned the risk of inhuman or degrading treatment, of loss of liberty and of loss of privacy and of family contact. She noted that it would be possible for rights to be violated without the crimes of ill-treatment or of neglect being committed.

6. Two main questions arise.

7. *Should private contractors providing services on behalf of the state be brought within the scope of human rights law as it applies to the state when it provides services directly?*

8. An argument in favour is that if this were not so, the state could evade human rights obligations simply by contracting out services. An argument against is that one would lose the opportunity to save money by contracting out on the basis that the required services were well-defined but the private contractor was allowed to provide those services in the most efficient way possible, without being burdened by a civil service mentality. Another argument against is that subjection to human rights law could be taken to excuse the state from defining standards of service properly. That is, it would encourage lazy contracting by the state.

9. *When an action or a failure to act might be regarded as a violation of a human right, but might also be regarded as a failure to provide a high enough level of service, to what extent should human rights law apply?*

10. The point here is that a violation of human rights is naturally taken very seriously, whereas a failure to provide a high enough level of service would normally merit an apology, improved service and some modest compensation. The question is, is there a line to be drawn so that some acts or omissions, while they could be construed as violating human rights, should be regarded as not sufficiently grave for human rights legislation to apply? This is a serious issue because the European Convention defines rights in such broad terms that minor failings with modest consequences could be construed as violating human rights.

11. It is our view that there is a strong case for drawing such a line. Litigation is unnecessarily encouraged, and costs are driven up, by the invocation of human rights law. Human rights law can be a valuable weapon against ministers and officials who misbehave. But it should not be invoked in disputes that should be settled by informal compromise.

12. If a line is to be drawn, one must ask where. One guideline might be that one should identify the sorts of conduct that a reasonable person might expect to count as criminal offences, even if they do not actually count as offences and even though the *Human Rights Act 1998* itself explicitly does not create criminal offences (section 7(8)). Another guideline might be that one should identify the sorts of conduct that a reasonable person who was unaware of the narrow criteria that were laid down in *Rookes v Barnard* 1964 (discussed in *Kuddus (AP) v Chief Constable of Leicestershire Constabulary*, [2001] UKHL 29) would think merited the award of exemplary damages.

THE INTERNATIONAL CONTEXT

13. If it is proposed that there should be some requirements on business activities in a country that are imposed from elsewhere, that raises wider issues. It is necessary to go back to first principles.

14. Liberal democracy has developed on the basis of a clear division between civil society, government and business (Habermas, 2001). The specific role of business is to contribute to the wellbeing of society by generating wealth, creating jobs and paying taxes. In addition, firms gain legitimacy by operating within the framework of applicable law and prevailing moral values (ie hard law and soft law). However, it is not the role of firms to enforce law or to impose their moral preferences or norms on the rest of society. The latter are the responsibility of government and civil society respectively.

15. Considerations of human rights affect corporate behaviour to the extent that they impose a binding legal requirement on companies, or provoke a response due to the demands of widely accepted societal values and moral principles.

16. This model may function in a straightforward manner in a national context. But beyond the nation state, there are not yet sufficiently strong global governance institutions that can define and impose laws and enforcement mechanisms.

17. For example, the existing corpus of international law has been developed as a legal framework for the interactions of nation states (Kingsbury 2003). Its direct application to non-state actors such as corporations is still underdeveloped. As a result, no specific regulations exist that can be used to hold corporations responsible for human rights violations or the support of repressive regimes (Taylor 2004). International conventions—such as the UN Convention on Human Rights—may represent a universal normative standard for corporations, but they cannot be enforced on them.

18. One response to this legal vacuum is for individual nation states to impose legal restraints in foreign jurisdictions. For example, in recent years, the US government and US courts have begun to develop laws or apply existing laws beyond their own national borders. They have punished US and non-US companies for corruption via the Foreign Corrupt Practices Act, for human rights violations via the Alien Tort Claim Act, and for financial fraud via the Sarbanes-Oxley Act.

19. However, this is not an approach with which we agree. Such a transnational application of US law serves to weaken the sovereignty of other national governments. In addition, it lacks legitimacy in the eyes of non-US citizens. If enforced by one country (or a few countries), human rights could easily become seen as an appendage of the foreign policy of that country, or an attempt to achieve cultural hegemony. There are arguments that would undermine the objection that is based on cultural hegemony. One can argue that it is legitimate, from your own standpoint, to claim that your approach to human rights issues is objectively superior to the approaches of others, but the validity of such arguments is debatable except in the most egregious cases of human rights abuses by, or with the connivance of, foreign regimes.

20. Some global corporations have responded by entering political domains that have traditionally belonged to state actors (Walsh, Weber, and Margolis 2003). For example, corporations have started human rights initiatives, such as the Business Leaders Initiative on Human Rights of British Petroleum, ABB and other companies. Furthermore, they have proposed initiatives of self-regulation in order to fill the described vacuum of global governance (Scherer, Palazzo, and Baumann 2006).

21. However, the entry of corporations into the political domain is an equally unsatisfactory solution. Companies lack the political legitimacy to act in this area. Furthermore, the firm's primary duty is to promote the success of the company. Although this will involve incorporating ethical and social responsibility considerations into the decision-making process, firms should not seek to become quasi-governmental bodies. Government is the primary institution concerned with the welfare of society as a whole. It should also seek to hold a monopoly on the enforcement of law (as argued by Max Weber), and not rely on companies to fulfil that function.

22. Consequently, the legitimate enforcement of human rights at a transnational level is the proper function of appropriate international governmental bodies that command a high level of support amongst the community of nations. If these do not exist, they should be created. Human rights are universal values that exist independently of nation states. Consequently, an appropriate global governance framework should be designed to enforce them. However, it is not the role of companies to undertake this task, or to act as a trans-national police force for human rights in the interim.

23. There are also more specific arguments why enforcement should be a matter for international bodies. International documents that set out rights do so in general terms, so that the rights are open to interpretation. It would be fruitless to seek universal agreement on interpretations, but one should at least seek interpretations that are widely agreed. Only an international body would have the authority to say that a right should be interpreted in such a way that a given course of conduct should be regarded as a violation of that right. It is particularly clear that interpretations can differ between countries, and legitimately so, in relation to environmental rights and labour rights. The international interpretive body might well be the court that heard specific cases, because the consensus that could be obtained in the text of interpretations that were not prepared for specific cases is probably to a large extent reflected in the documents that have already been published. Moreover, if one were to say that it was appropriate for a court of one jurisdiction, rather than an international court, to interpret human rights, one would have to accept that it was appropriate for the courts of any jurisdiction to do so, or produce a further argument why not. Absent such a further argument, the decisions of courts of oppressive regimes would then come to be accepted as respectable.

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Signed for and on behalf of the Institute of Directors

April 2009

Memorandum submitted by Holly Hill Trust

The following submissions relate to experiences and circumstances of the impacts of UK businesses *outside of the UK*. My personal experiences relate primarily to the mining and extractives industries.

1.

As other submissions to the Committee will no doubt confirm, many human rights abuses are committed by, or flow from, UK extractives multinationals working overseas. As many of these occur in States where governance is weak and enforcement of local law is poor, many have gone by with little sanction or criticism except by a few small NGOs or church groups, and the local communities blighted by these activities.

UK companies operate overseas in ways they would never dream of doing in the UK. There is after all gold in Snowdonia, yet no attempt is made by UK companies to forcibly clear hill farmers from the area with para-military groups and dogs, threaten and oppress any local opposition to the project, and operate an open cast mine in a protected area, heavily polluting local rivers and lakes.

Impacts linked to the extractive industries need to be addressed as a priority. Many of the easy mineral deposits around the world have been mined already, so now increasingly projects are being considered where people live, in areas of political and social volatility, or in protected areas (whether national parks, other nature reserves, and/or watersheds important for nearby farms and towns). Such projects will be more difficult to manage responsibly and require much higher standards of practice than those exercised in the past in order to avoid social conflicts and human rights abuses, and severe environmental destruction.

The fact that the Norwegian state government pension fund felt it necessary to publicly divest its £500 million holdings in Rio Tinto due to human rights abuses and massive environmental destruction in West Papua, and that it felt its attempts to engage in meaningful dialogue with management to improve this had been a waste of time should be an indication of the scale of the problem.

There is a significant problem, and the UK government must have a role in trying to solve it.

PERSONAL EXPERIENCES OF THE NEGATIVE HUMAN RIGHTS IMPACTS OF UK BUSINESS

My main experiences of the human rights impacts of UK business are of the negative impacts of mining companies operating in Ecuador, where I have been working for several years for a small UK charity sponsoring wildlife conservation and rural sustainable development projects.

I have been told of threats, intimidation, and violence against local residents who opposed a mining project. They opposed peacefully, yet were demonised as terrorists. Many were threatened with violence and some physically attacked. Spurious legal cases were filed against them using false witnesses, which subsequently fell apart. However, the cases needed to be defended.

Local residents were not consulted properly, nor presented with the true picture including relevant information from the Environmental Impact Assessment (EIA).

People should be entitled to express their views without threats, and to live in a clean environment without pollution of their water and lands.

Many serious negative human rights impacts also flow from the activities of UK businesses as a result of contractual relationships and their subsidiaries. This issue is discussed in further detail below under point 3.

2.

As far as I am aware the activities outlined in this submission (impacts of UK companies outside of UK territory) do not engage “hard” human rights obligations of the UK government as the law currently stands.

BEYOND OBLIGATIONS

Notwithstanding the above, it is clear that the UK (and indeed all States with strong governance and legal systems) should develop mechanisms to help prevent human rights abuses abroad caused by companies based within their territory. There is a need to reduce the governance gaps created by globalisation. The UK, if dedicated to the process of ensuring that human rights proliferate and are ensured worldwide, should seek to go *beyond* its strict obligations to find *opportunities* to provide mechanisms that protect human rights worldwide.

As the UN Special Representative identifies,²⁸ there is growing encouragement at international level for home States to step forward and take regulatory action to prevent abuse by their companies overseas.²⁹

3.

As already noted, there is a broad gap at the international level, when businesses operate in countries with weak governance or corruption.

CONTRACTUAL ARRANGEMENTS, JOINT VENTURES & SUBSIDIARY ACTIVITY

There is also a more specific but no less significant gap in the legal framework for human rights protection, stemming from the legal doctrine of separate legal personality, and restrictive conceptions of responsibility in commercial arrangements.

Typically major UK mining companies don’t carry out human rights abuses themselves, but rely on small exploration companies and para-military subcontractors to do the dirty work for them. In the Ecuador case outlined above, Rio Tinto was working with a small Canadian exploration company called Ascendant Copper (now trading as Copper Mesa).

Rio Tinto’s head office in the UK was repeatedly warned of problems with the way their partner in Ecuador was operating, but persisted in dealing with Ascendant Copper regardless. Rio Tinto provided Ascendant Copper with its historical drilling data, and had an option agreement to buy into the project as

²⁸ Ruggie J, “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Protect, Respect and Remedy: a Framework for Business and Human Rights” (A/HRC/8/5, 7 April 2008), p. 7.

²⁹ E.g. the Committee on the Elimination of Racial Discrimination (CERD/C/CAN/CO/18)

it was developed. Essentially this arrangement allowed Rio Tinto to stand on the sidelines disclaiming responsibility for the negative human rights impacts, but with a foot in the door ready to buy into the project once the dirty work had been done.

Rio Tinto and other UK mining companies which operate in these ways are playing key facilitating roles in projects with significant human rights impacts, and are standing to profit considerably from these negative impacts. In this context it is important to note that the UN Special Representative's report of April 2008, which provides the framework to the Committee's call for evidence,³⁰ recognised the legal and non-legal concepts of complicity, sphere of influence and due diligence as key elements of the corporate responsibility to respect human rights. These are key issues which *must* be examined.

There is also the issue of contractual relationships with military or para-military organisations (or "militarised commerce"). Rio Tinto has been implicated in several cases of human rights abuses flowing from military contractors working for its joint venture partners. When questioned, Rio Tinto blames its local partners or subcontractors, claiming that the project is just an investment, while providing finance and sometimes management data or expertise for it. But where your local partner is a military dictator, how would you expect him to behave? Or where you choose a military or paramilitary organisation to manage your "community projects", is it surprising that social conflicts and human rights abuses arise? There are numerous examples beyond Ecuador where such problems arise (Colombia, Philippines, Burma, West Papua, Nigeria and more).

UK companies should be forced to disclose in their accounts when projects they are invested in or manage involve militarised commerce. They should not be allowed to present such projects as normal commerce. They should be obliged to disclose which military or paramilitary forces are employed, how much these contractors are paid, and if there have been reports of killings.

The legal framework for UK business fails to account for these corporate roles in abuses, and these types of relationship, and has very few ways of driving UK companies to engage more fully with their responsibilities. This needs to change if we are to reduce the incidence of these conflicts and UK business' role in them.

POTENTIAL WAYS FORWARD: CORPORATE TRANSPARENCY

Transparency obligations can be an effective driver of higher standards of corporate practice with respect to human rights. An effective regulatory system that ensures balanced and thorough transparency on social impacts could help to fill the "accountability gap", and better align company performance with societal expectations.

The Holly Hill Charitable Trust and the Staples Trust (one of the Sainsbury Family Charitable Trusts) have sponsored work by ClientEarth (an organisation of public interest lawyers) to examine the regulatory framework for social and environmental reporting by UK companies, and how key aspects of Companies Act 2006 could be better implemented. I recommend you read a copy of their report and talk to them about how it fits within the broader question of business and human rights.

In addition to the disclosures suggested in ClientEarth's report, examples of straightforward but key disclosures that should be required of UK mining companies, that could drive higher standards of human rights practice include:

- Contractual or other arrangements with military groups (including when done through a local partner).
- Royalty or other payments made to overseas governments.
- All Environmental Impact Assessments carried out relating to their projects.
- Full minutes of their AGMs to be made publicly available on the company website in a timely manner.

POTENTIAL WAYS FORWARD: PERFORMANCE BONDS AND INSURANCE

In the context of mining, a lot could be achieved if companies were forced to provide performance bonds and insurance to ensure that projects are managed in a responsible way, and to compensate or restore any damage done.

- 4.
- 5.
- 6.

³⁰ Ruggie J, op cit.

CORPORATE TRANSPARENCY AS A DRIVER OF CORPORATE CULTURE

An improved corporate transparency framework, with appropriate regulatory scrutiny, has great potential to encourage a culture of respect for human rights in UK business, whether domestically or overseas. Furthermore, as ClientEarth's forthcoming publication identifies, greater transparency can be good for both the protection of human rights and for businesses' interests.

However, proper transparency requires external scrutiny and regulation. The senior management of UK mining companies like Rio Tinto are very smooth at presenting themselves as responsible companies, and expert at telling half truths and making omissions to mislead investors and others. In my personal opinion I believe that Rio Tinto knowingly, deliberately and repeatedly misleads its shareholders and others about the reality of its activities in developing countries. There appears to be a culture of double standards and impunity within UK companies like Rio Tinto, who rely on a culture of "greenwash". There is a need for regulatory intervention to ensure that transparency acts as an effective driver of corporate culture, and that company *reports* are "true and fair", and not just the financial statements.

THE ROLE OF THE INVESTMENT COMMUNITY

There is a role for the investment and fund management community to play in driving a corporate culture of respect for human rights.

The UK fund management sector, including pension fund managers, have unfortunately not been effective in improving current management practices. Human rights and environmental impacts can significantly damage the long-term value of a company, and so there is considerable scope for better aligning investment interests with human rights protection.

The UK government could have a role in raising awareness and encouraging proactive engagement by the investment community with UK business.

THE CURRENT ECONOMIC CLIMATE

The UK's change in economic fortunes should serve as a reminder that business and finance do not operate in a vacuum—that their activities are tied intrinsically to the welfare of all. It should also be a point for reflection that unregulated generation of short-term value will not necessarily lead to the greater public good. We have seen clearly the impact that shorttermism can have on UK shareholders *as well as* stakeholders and communities around the world.

Returning to the potential role of transparency obligations, in this context unreported human rights issues can constitute intangible risks that investors should be aware of. In this sense a more effective regulatory regime for social and environmental transparency has a role to play in constructing a robust financial system which can also help to provide investor confidence and greater financial stability.

DEREGULATED FINANCE AND HUMAN RIGHTS

Gordon Brown changed the listing requirements for AIM companies—since the change in listing requirement, you can float a start-up company on AIM. While this resulted in a boom on AIM, one of the unintended consequences has been that the majority of the value of the AIM market now consists of small exploration companies operating in the developing world, against which there are numerous human rights complaints.

UK-based asset managers also have a key role in human rights problems. RAB Capital was Ascendant Copper's largest independent investor when it listed on Toronto Stock Exchange TSX. RAB is an important investor in small aggressive exploration companies in developing countries. Hedge funds are able to invest in and benefit from projects involving social conflict and human rights abuses, without providing transparency or accountability.

There is insubstantial examination of the role that UK investment has in financing human rights abuses. The London Stock Markets (both the main market and AIM) provide a lot of the global finance for extractives activities in developing countries, which flows to many human rights abuses.

In the context of the current economic situation, there is an opportunity to re-assess the value and impact of the UK's deregulated financial system, in the context of the human rights abuses it may facilitate. Self regulation or so-called "principles based" regulation is not working.

7.

People who have been badly treated by UK companies in other countries should be able to make legal claims against the company and/or its directors in the UK under UK law. In practice and principle this is very difficult at the moment.

The rare cases which reach British courts have ended up with out of court settlements with confidentiality agreements so the UK company concerned avoids further bad publicity and most UK residents including investors may never hear the real story. This is not an acceptable situation.

In brief, it is clear that the existing framework does not provide adequate or effective access to remedies for individuals overseas whose human rights are breached, or allegedly breached by UK companies. There is a host of reasons that this is the case, a proper examination of which would go way beyond the allowed limit of this short submission.

In brief overview, factors which obstruct access to remedies in the multinational context: the doctrines of separate legal personality and limited liability in the context of subsidiaries; underdeveloped liability for complicity and inaction within sphere of influence in the context of joint ventures and contractual arrangements; broad domestic legal frameworks that were not designed with the modern globalised context in mind; high cost barriers; lack of awareness of and information on available remedies for affected persons.

It may be of interest that recently the community in Ecuador affected by the Canadian exploration company working with Rio Tinto have issued legal claims in Canada against the Toronto Stock Exchange for over \$1 billion, and against the exploration company and two of its directors for combined claims of \$90 million for human rights abuses.

8.

Inevitably, to create a robust framework that provides appropriate and accessible remedies to potential claimants in a rapidly changing world, reform attention will be required at each of these levels. However, in my view, initiatives flowing from public or judicial authority will be of particular importance.

Holly Hill Trust

May 2009

Memorandum submitted by the UFCW

INTRODUCTION

The United Food and Commercial Workers' International Union (UFCW) is the largest private-sector trades union in the USA, representing 1.3 million employees in grocery retailing, food processing and meatpacking. More than half of our members are women and a significant proportion are from ethnic minorities. We seek to protect the rights of some of the lowest-paid employees in America.

The UFCW is pleased to offer a submission to the Joint Committee on Human Rights on the subject of business and human rights. Our submission focuses on the responsibility of businesses to respect human rights abroad, and on the need for effective access to remedies for breaches to these rights. We limit our evidence to issues concerning fundamental employment rights, notably freedom of association and the right to collective bargaining.

Our submission has been prompted by our experience of Tesco's operation in the USA, which in our opinion is in breach both of key conventions on human rights and of Tesco's own stated policies on human rights.

HUMAN RIGHTS AND EMPLOYMENT

Employees are protected by two crucial human rights conventions of the International Labour Organisation: ILO Convention 87, Freedom of Association and Protection of the Right to Organise (1948); and ILO Convention 98, Right to Organise and Collective Bargaining (1949).

These two conventions allow individuals to form and join a trades union, in order collectively to represent their interests on matters related to their employment. Crucially, Article 1 of ILO Convention 98 states:

“Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.”

These conventions enshrine in international law, among the signatories to these conventions, rights for which workers have campaigned for over two centuries.

In addition, in 1998, the ILO issued a landmark Declaration on Fundamental Principles and Rights at Work,³¹ which states:

“...all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation to respect, promote and realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions...”³²

The 1998 Declaration goes on to refer to these fundamental rights as freedom of association and the effective recognition of the right to collective bargaining, among others. The Declaration ensures that states which are members of the ILO, but which have not formally ratified the conventions, also have a legal obligation to respect the rights set out in the conventions.

³¹ ILO Declaration on Fundamental Principles and Rights at Work, issued 86th Session, Geneva, 19 June 1998

³² 1998 Declaration, Preamble, paragraph 2

BUSINESS AND EMPLOYMENT RIGHTS

The UK, as a signatory to these ILO conventions, strongly upholds the rights of employees to freedom of association, to organise and to collective bargaining. Businesses operating within UK jurisdiction must comply with the employment laws which enshrine these rights, and there is legal redress for employees and trades unions when employers breach these laws.

The USA has never ratified these two conventions, but has signed the 1998 Declaration. In theory, under US federal employment law, employees have the right to freedom of association, to organise or to collective bargaining and can claim redress or protection against anti-union discrimination. However, the practice is very different and even the United States itself acknowledged in a 1999 report that “there are aspects of this [US labor law] system that fail to fully protect the rights to organize and bargain collectively of all employees in all circumstances”.³³ In fact: “Some provisions of US law openly conflict with international norms and create formidable legal obstacles to the exercise of freedom of association.”³⁴ The system that is supposed to protect workers’ rights to freedom of association and collective bargaining is in reality too lengthy to be effective, with minimal sanctions for employers which breach the rules. So businesses operating within the USA are able to deny employees these fundamental employment rights with impunity.

It is therefore critical that, in the absence of the worthwhile protection of federal law, employees enjoy protection for these rights through other means. Firstly, in the USA, strong trades unions, like the UFCW, have successfully campaigned to recruit employees into the union. We use our size and resources to persuade businesses to recognise the union for the purposes of collective bargaining.

Collective bargaining is vitally important to employees in the USA, principally because, under federal law, there is no right to an employment contract (in the UK all employees must have a contract after 13 weeks) and there is therefore no protection against dismissal (save for specific, narrow exceptions). Therefore, employees with many years’ service can be terminated without notice or compensation under the so-called “employment-at-will” doctrine. For almost all employees, only a negotiated collective agreement can guarantee legally-binding employment contracts, setting out pay and conditions of employment, with agreed notice and procedures for dismissal.

Secondly, many responsible businesses themselves recognise the rights of employees contained within the ILO conventions and voluntarily act as if these rights are in force in the USA. Trades unions, politicians, NGOs and community groups work hard to encourage businesses in the USA to operate within the framework of ILO Conventions 87 and 98. It is especially expected that international businesses based in countries which have ratified these conventions, and which operate in their home markets under these principles, will operate in the USA in the same responsible manner.

TESCO AND EMPLOYMENT RIGHTS ABROAD

Tesco’s Human Rights Policy states:

“Tesco is committed to upholding basic Human Rights and supports in full the United Nations Universal Declaration of Human Rights and the International Labour Organisation Core Conventions.”³⁵

On employment rights, Tesco further states:

“We will treat all employees fairly and honestly regardless of where they work. All staff will have a written contract of employment, with agreed terms and conditions, including notice periods on both sides.”

“Employees have the right to freedom of association and collective bargaining. We recognise the right of our staff anywhere in Tesco around the world to join a recognised trade union and bargain collectively where this is allowed within national law.”

In the UK, Tesco has been unionised since 1969. In 1998 Tesco and the retail union Usdaw signed a ground-breaking partnership agreement, the largest private-sector collective bargaining agreement in the UK.

In 2006, Tesco announced that it was entering the US grocery retail market and in 2007 it opened a chain of small neighbourhood supermarkets, called Fresh and Easy. There are now 119 stores throughout California, Arizona and Nevada, as well as a major food preparation and distribution centre.

As a company with a very public commitment to corporate responsibility and clearly-stated policies on human and employment rights, the UFCW expected Tesco to operate in the US along the same partnership lines as it does in the UK and to respect the ILO Conventions to which it is publicly committed. However, Tesco’s approach in the USA is quite the opposite, and we believe that Tesco is in breach both of the ILO Conventions and of its own stated policies on freedom of association and collective bargaining.

³³ US Report for the period ending 31 December 1997 under Article 19 of the ILO Constitution on the position of national law and practice in regard to matters dealt with in Conventions 87 and 98, US Department of Labor

³⁴ Compa, Lance, “Unfair Advantage: Workers” Freedom of Association in the United States under International Human Rights Standards’, *Industrial & Labor Relations Review*, Vol. 59, Issue 2, 2006, Berkeley Press, p14

³⁵ http://www.tescocorporate.com/plc/corporate_responsibility/good_jobs/human_rights/

In 2008, the UFCW published a report, *The Two Faces of Tesco*,³⁶ which exposed the stark differences between Tesco's stated policies and its behaviour in practice. Among the breaches that we highlighted in the report was the refusal by Tesco even to meet the UFCW to discuss allowing the union to organise among employees. This prevents the UFCW from talking to employees in their workplace, effectively hampering our ability openly and freely to organise within Tesco's stores.

Tesco also advertised for an employee relations director in the following terms:

"The incumbent has primary responsibility for management of employee relations; maintaining non-union status and union avoidance activities."³⁷

And in clear contravention of its own policy, Tesco provides no written contract of employment and no written notice period for employees.

In the year since we published our report, we believe that a number of other breaches have occurred. In response to Tesco's repeated assurances that employees are free to join a trades union if a majority of them want to, in September 2008 we successfully recruited the majority of employees in one Tesco Fresh and Easy store in Huntington Beach, California. They submitted a written request for recognition to Tesco's US chief executive, Mr Tim Mason, who is also a member of Tesco's corporate board in the UK. Tesco denied that request. In so doing, the company referred to US labour laws, a tactic that a *Financial Times* article described as one that "has been successfully used to block union organising efforts by Wal-Mart and other anti-union US companies".³⁸

In recent weeks, union representatives have been making house calls to Tesco employees to talk about the benefits of membership, since Tesco will not allow the UFCW access to employees at work. House calls are a common recruiting procedure when companies deny unions access to the workplace. During the first day of such calls, employees responded positively to the approach. But on subsequent days our union representatives were warned by employees to leave their property immediately, and threatened that the police would be called if they did not comply.

Following the house calls our Las Vegas union office also received a number of letters from Tesco's Las Vegas employees, requesting the union not to contact them again. All the letters but one share the same postmark and return address: El Segundo, California—the home of Tesco's US head office. Las Vegas is 300 miles from El Segundo.

Based upon this and other corroborating information, we believe that employees have been actively encouraged by Tesco management to write these letters, that Tesco collected them together and posted them from the same location. Moreover, we also hold the view that Tesco management had a hand in coordinating the responses of workers as the house calls progressed. In our view, this is evidence of coercion and that Tesco is actively influencing employees against involvement with our union.

Moreover, in a recent staff meeting with representatives from all Tesco's Fresh and Easy stores in Nevada, senior Tesco managers spoke against the UFCW. The references included a statement that Tesco does not need a "third party" interfering in its business, and the firm opinion that, while the UFCW is not permitted on Tesco property, it was "despicable" that the union would attempt to contact people at home.

The UFCW has also received reports that Tesco is establishing "employee advocates" in its stores, which, in our view, is not an uncommon union avoidance technique. In a recent employer survey published by the London School of Economics, the most common reason given for establishing such employee consultation was precisely to avoid unionisation.³⁹

Furthermore, in a Notice to Interested Parties in relation to the establishment of a pension plan for US employees, Tesco seems to exclude union workers in its stores from pension benefits.⁴⁰ The effect of the inclusion of this language serves as a deterrent to workers who may wish to join the union and is, in the view of UFCW, a breach of US labour law.⁴¹

These are just a few examples of Tesco's anti-union activities in the USA, which we believe are in breach of the ILO Conventions to which Tesco is publicly committed. We have more examples, and we also know of many other examples in other countries where Tesco operates.

³⁶ <http://www.ufcw.org/twofaces/index.cfm>

³⁷ "Tesco job ads follow non-union line" *Financial Times* 26.5.06

³⁸ "Tesco faces US union challenge", *Financial Times*, 18 September 2008, http://www.ft.com/cms/s/0/7bc7d2a4-85ae-11dd-a1ac-0000779fd18c.html?nclink_check=1

³⁹ "... the most significant reason to implement [non-union employee representation] arrangements was the desire by employers to avoid active trade union presence in their workplaces—six of the nine companies in the study suggested that this was the main reason for their establishment", Gollan, Paul J., "Faces of non-union representation in the UK: management strategies, processes and practice", LSE Reseach Online, 2008.

⁴⁰ Clause 8 of Tesco Fresh and Easy's Notice to Interested Parties regarding the Fresh and Easy 401 (k) pension plan states: "The employees eligible to participate under this plan are all employees who have completed 90 days of service except union employees, leased employees, non-resident aliens with no US income, and Ex-patriot Employees".

⁴¹ In the case *Dallas Morning News*, 285 NLRB 807,808 (1987), it was held that "clauses in benefit plans that automatically exclude employees in a collective-bargaining unit violate the [National Labor Relations] Act where they suggest that employees will necessarily lose existing benefits if they join a union and that coverage under such plans could not be gained through collective bargaining."

We believe that Tesco's anti-union activities not only undermine the employment rights of employees, but also undermine the reputation of one of Britain's largest companies. For nearly three years, the UFCW has sought constructive engagement with Tesco, within the terms of Tesco's own stated policies of engagement. We are drawing the Joint Committee's attention to Tesco's behaviour to expose how a major company can, in its home market, garner plaudits for its corporate responsibility approach, and yet away from its home environment ride roughshod over the very policies it publicly espouses without being held to account.

ACCESS TO REMEDIES

In the UK, employees may take a case to an employment tribunal if an employer infringes their employment rights, and tribunals have considerable power to award compensation to employees and issue notices of other remedies to offending companies. In the USA, the National Labor Relations Board and its regional offices fulfil a similar function, although their remit is much more tightly drawn. Extending and protecting employment rights from employer abuse in the USA is a matter for US democratic and legal processes and not for the Joint Committee on Human Rights, and we do not wish to draw a British Parliamentary Committee into US domestic politics. In this submission, we therefore focus on some potential remedies in the UK, which we hope could extend employment rights under the ILO Conventions to employees of UK-based companies wherever they are.

We would welcome the establishment of a Human Rights Ombudsman in the UK, to which complaints could be made about breaches of human rights by UK-based companies, including when they operate abroad. Such an ombudsman could hear a complaint and require a company to account publicly for its actions. While we would prefer that an ombudsman would be equipped with the power to direct a company to remedy its actions, we also believe that the public exposure and negative publicity surrounding such cases would itself encourage companies to desist from acting irresponsibly in breaching human rights abroad.

We would also like to see the Government encourage the corporate practice of appointing independent, non-executive directors to corporate responsibility boards, which set policy and monitor performance against corporate responsibility objectives, including on human rights, whether in the UK or abroad. Tesco's corporate responsibility committee currently comprises 16 Tesco employees and it is chaired by the company's executive director of corporate and legal affairs. There are no independent board members and therefore no external monitoring of policy and practice. In comparison, six out of the FTSE's 10 largest UK firms have corporate responsibility committees comprised largely or entirely of independent non-executive directors. Shell's committee, for instance, comprises three independent non-executive board members, one of whom is a former chairman of the Confederation of Dutch Trades Unions.

CONCLUSION

We believe that UK-based companies which are bound in the UK by ILO Conventions on employment rights should uphold these rights when they operate abroad, even where the local employment law does not require this. Tesco, which publicly states its commitment to the ILO Conventions, is in our view in breach of these conventions in the USA, at least in spirit, if not also in the letter. Multinational companies have an important role to play in spreading good practice internationally, to improve the employment conditions of employees where the local law does not provide these protections. We would like to see greater scrutiny of UK-based companies in the UK on how they operate abroad, and we would welcome the establishment of a Human Rights Ombudsman, and the appointment of independent, non-executive directors to company corporate responsibility committees.

United Food and Commercial Workers' International Union

April 2009

Supplementary memorandum submitted by the UFCW

Following the meeting that the Chairman and members of the Joint Committee held with the UFCW in Washington DC in June, and the oral evidence session on 30 June involving Tesco, I wish to submit a short, supplementary note and formally to enclose as supplementary evidence the three reports published on 30 June 2009 by UN[Global Union on Tesco's employment practices in Thailand, South Korea and the USA.

We were very grateful for the opportunity to meet the Chairman and members of the Joint Committee to explain the background to the issue that we have with Tesco's approach to labour relations in the USA. We felt that the Committee understood our position and listened carefully to our explanations of the efforts that we have made to engage constructively with Tesco over its Fresh and Easy subsidiary in the United States.

In this note, I would like to put on record our disagreement with some of the statements made by the Director of Legal and Corporate Affairs, Ms Lucy Neville-Rolfe in the oral hearing. Ms Neville-Rolfe stated several times that the complaints made in the UNI reports were untrue, but provided no evidence to support her allegation. She also said:

"The trade unions in the United States haven't come along in a collaborative and constructive way in quite the way that I described for Usdaw."

This is also completely untrue. As we told the Joint Committee members when we met in Washington DC, we made repeated attempts to meet with Tesco to discuss partnership, as the following chronology of our early attempts will demonstrate.

UFCW'S ATTEMPTS TO ENGAGE WITH TESCO

Early 2006	Via UNI Global Union, UFCW President Joe Hansen expressed the desire to meet Sir Terry Leahy, CEO of Tesco, to discuss labour relations in the proposed US subsidiary. We received no response.
20.9.2006	In a meeting with UNI's General Secretary (Philip Jennings) Tesco's Catherine Glickman (Personnel Services Director) said that the company would not be willing to meet the UFCW prior to the opening of stores. She agreed to raise with US management the possibility of meeting Mr Hansen of the UFCW.
2.11.2006	UFCW vice president, Rick Icaza, wrote to Sir Terry Leahy proposing a partnership with Tesco. Tesco referred the letter to Tim Mason, Chief Executive of Tesco USA.
21.11.2006	Philip Jennings (UNI) told Catherine Glickman (Tesco) that the company needs to reply within two weeks and that refusing to meet would be a mistake. She reportedly urged "patience".
4.12. 2006	Rick Icaza wrote to Tim Mason (Tesco) seeking "partnership". At a Tesco event, UFCW Local 1442 President, Mike Straeter, asked Tim Mason for a meeting. Mr Mason referred Mr Straeter to the Chief Human Resources Officer, Hugh Cousins. Mr Mason reportedly indicated that a meeting in 2007 would be fine, but not sooner, since stores would not open until June or July 2007.
19.12.2006	UFCW President, Joe Hansen, wrote to Sir Terry Leahy proposing to meet him.
20.12.2006	Hugh Cousins, on behalf of Tim Mason, replied to Rick Icaza's letter: "We do not believe a meeting with you would be appropriate. We must respectfully decline your offer."
20.12.2006	Catherine Glickman (Tesco) told Philip Jennings (UNI) that a meeting with the UFCW would be premature. Hugh Cousins is cited as believing there is "not yet an agenda for talks". Mr Jennings again advised that meeting the UFCW is very important.
11.1.2007	Sir Terry Leahy replied to Mr Hansen but only to refer his letter to Lucy Neville-Rolfe. Nothing further was heard.
9.2.2007	Philip Jennings proposed a follow-up teleconference with Catherine Glickman. Ms Glickman responded on 20.2.2007 that she saw no reason for a follow up.
21.3.2007	Philip Jennings e-mailed Hugh Cousins requesting dialogue. Mr Cousins replied that he would like to learn more about the discussions between UNI and Tesco and then "touch base". There has been no further communication on this request.

Moreover, our experience is mirrored by that of UNI Global Union, as a recent exchange of letters between Philip Jennings, UNI General Secretary, and Ms Neville-

Rolfe, which we have attached to this supplementary evidence [not printed], clearly illustrates.

We entered into this process of dialogue with genuinely positive intent, believing that the partnership approach that Tesco has with Usdaw in the UK would be successfully transplanted to the USA. We still want Tesco to make a success of Fresh & Easy and we remain ready to be partners in that endeavour. It was only after our friendly overtures were rejected that we realised that Tesco had no intention of meeting us as potential partners, and that it was hostile to union representation in Fresh & Easy. Only then, having tried both direct and indirect friendly approaches, did we finally take the decision to raise public awareness of Tesco's approach in the USA, working with community groups and local politicians to raise our concerns. Moreover, we only took the further step of raising awareness in the UK once the stores had opened and evidence emerged of Tesco's union-busting activities.

Contrary to what Ms Neville-Rolfe told the Joint Committee, we believe that we acted constructively and collaboratively in our approaches to the company, and that our subsequent actions of awareness-raising are a reasonable, though regrettable, response to a company that has demonstrated its opposition to freedom of association.

I also wish to address the two items upon which Ms Neville-Rolfe has committed to revert to the Committee in writing. I can confirm that UFCW is not permitted to recruit union members in Tesco stores in the USA. Not only has the company forbid us to do so, but it has scripted staff in what they should say in the event that they meet a union representative in the store, telling them to instruct the union representative to leave the premises and then report the matter immediately to their manager.

On the other point, the issue of whether the company will agree to meet with UFCW, I can assert that the UFCW stands ready to meet Tesco at any moment. All we have ever wanted is a constructive partnership with Tesco, and for the company to abide by its own public policies on employee rights.

In considering its report and recommendations, we therefore ask the Joint Committee to consider our own modest requests:

- that Tesco investigates and publicly reports on the complaints made by the UFCW in our evidence to the Joint Committee and on the allegations contained in the UNI reports on Thailand, South Korea and the USA; and
- and that Tesco ensures that it abides strictly by its public policies on freedom of association in all countries where it operates.

27 July 2009

Memorandum submitted by Dr Mika Peck, University of Sussex

THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

1. How do the activities of UK businesses affect human rights both positively and negatively?

The specific example I use is the negative impacts of the mining industry to communities in NW Ecuador that resulted in human rights abuses, threatened over a decade of investments in sustainable alternative livelihoods and threatened the objectives of a UK government funded Darwin Initiative wildlife conservation project. This report also outlines simple, cost effective measures that could be taken to strengthen the Companies Act 2006 to promote a respect for human rights in UK business.

Between June 2005 and May 2008, based at the University of Sussex, I was the principal investigator of the DEFRA-funded Darwin Initiative project (the PRIMENET project) whose aim was to develop a sustainable network for the conservation of the critically endangered brown-headed spider monkey (*Ateles fusciceps*) and other primates in NW Ecuador. The project incorporated research, education and identification of sustainable livelihoods in trying to develop and implement a strategy to conserve habitat and wildlife in the biodiversity hotspot of NW Ecuador.

A key to conservation of the forests of NW Ecuador lies in the development of sustainable livelihoods that minimise deforestation and degradation of its forests, and one aim of the project was to identify and disseminate successful working models of sustainable livelihoods. As a result I was introduced to an impressive number of sustainable livelihood initiatives established by the communities of the Intag region (NW Ecuador) over the last 15 years, supported by local and international NGOs. These initiatives were developed to generate alternative livelihoods to unsustainable activities such as logging and mining.

The need to develop alternative livelihoods was triggered following the withdrawal of a proposed copper mining operation by Bishi Metals (part of Mitsubishi Group) in the 90's as a result of local resistance to the mine and the results of the Japanese government agency JICA's Environmental Impact Assessment that highlighted the negative impacts to wildlife, forest, and local communities of the region should the mine proceed. A number of new initiatives were established including ecotourism, a successful shade grown organic coffee cooperative and a network ensuring trading of local produce within Intag communities.

The fact that successful alternative livelihoods had been established in the region meant that many of the communities opposed a new threat to mine the copper deposits in the area. A junior Canadian exploration company, Ascendant Copper Corporation, had bought the exploration concessions, and there were claims this was done illegally. Behind Ascendant Copper Corporation (now renamed Mesa Metals) was Rio Tinto Zinc a UK mining company with the option to buy out the concessions once initial exploration was completed. In my opinion, and the facts bear me out, the role of the junior mining company also included an operation to remove local opposition to mining activity—effectively what took place was the outsourcing of human rights abuses by a UK based multinational company waiting in the wings for Ascendant Copper Corporation (or its paramilitary contractors) to “do its dirty work”.

The conflict resulted in an Amnesty international alert as local community representatives dealt with intimidation and death threats and a great deal of media coverage in Ecuador following a confrontation between a paramilitary force (funded by the community liaison organisation established by the mining company) and local community members in which a member of the local community received a gunshot wound. All the detail of the conflict can be seen on the DECOIN website (www.decoin.org).

My role in the PRIMENET project, in addition to project management was to develop a map, using satellite imagery, of remaining forest in NW Ecuador. In the Environmental impact Assessment submitted by Ascendant Copper it claimed that most of the forest within the concession had already been deforested. This came as a great surprise to me as the satellite images show remaining primary forest covering a large proportion of the region—and anyone who actually visits the area knows that it is still renowned for intact forest. The EIA also failed to mention the existence of many endangered species including the spider monkey, which was the subject of the DEFRA sponsored conservation project. I submitted a rebuttal to the Ecuadorian government regarding the statement that the region was largely deforested. Thankfully the Ecuadorian government rejected the EIA and following further investigations the concessions have been annulled. This is a rare good news story for local communities faced by the greater powers wielded by well funded multinational companies.

Effectively the dynamics of international business allow organisations to partner “invisibly” with other business entities that appear to escape any obligations to adhere to human rights. In this case Rio Tinto Zinc were informed, throughout, of the activities of the company they “supported” in Ecuador but still never made the situation clear to their shareholders or took action to disengage themselves from the future investment in this copper mine. Clear presentation of the social and environmental risks to the shareholders in its reports and at its AGM could have resulted in RTZ pulling out of any support for Ascendant Copper Corporation at an earlier date preventing much of the conflict that occurred. As it stands the concessions were annulled by the Ecuadorian government proving this to be a very poor speculative investment! As quoted by John Browne, former Director of Reputation Assurance (Pricewaterhouse Coopers):

“[In the next 50 years] successful companies will be those who embed social, environmental, and ethical risk management into their core business processes and performance measures”

It is the obligation of UK government to provide the guidance and legal framework to ensure companies adhere to human rights directly and indirectly, worldwide.

2. *How do these activities engage the human rights obligations of the UK?*

The company, Ascendant Copper Corporation, was funded, through the Canadian Stock Exchange in part via a UK based hedge fund—effectively UK money was being transferred across borders to commit human rights abuses, and behind this stood a major UK based mining company RTZ ready to “buy in” once exploration and social opposition had been dealt with—outsourcing human rights abuses.

This process of “outsourcing” activities complicates the legal framework within which UK companies can be held responsible to their covert support of such activities but there are mechanisms as part of the Companies Act 2006 that could be reformed that would increase transparency of such activities without resulting in excessive costs to companies and maintaining the governments “light touch” approach to industry.

3. *Are there any gaps in the current legal and regulatory framework for UK business which need to be addressed, and if so, how?*

The Companies Act of 2006 established the legal framework for companies to present accounts and reports that comply with relevant requirements but in their current form there are major weaknesses—reform is urgently needed to provide adequate scrutiny to the reporting process. In a review commissioned by “Client Earth” it is clear that greater clarity is needed in what companies are legally required to report.

4. *Does the UK Government give adequate guidance to UK businesses to allow them to understand and support the human rights obligations of the UK? If not, who should provide this guidance?*

Currently the answer to the first question is “No”, however four key proposals are recommended to enhance the legal framework established by the Companies Act 2006 and are outlined below (Please find detail in the full report presented by Client Earth).

- 1) Regarding social and environmental aspects, existing reporting obligations (Companies Act 2006 sections 416 (4), 468(1)) need to be clearer by clearly identifying business factors impacted by social and environmental issues, providing explicit provisions to outline the types of environmental or social issue that can be particularly relevant to companies with a structure as to how they must be reported and, provisions ensuring correct narrative reporting using balanced, reliable and comparable information.
- 2) Reformation of the Financial Reporting Review Panel to provide greater capacity and diversity (ie employment of independent experts) to ensure engagement with companies regarding environmental and social reporting.
- 3) Enhancing the role of the Annual General Meeting (AGM) as a forum for company scrutiny by legally requiring; i) time for scrutiny of company accounts and reports, ii) access to AGMs to persons negatively impacted by company activities.
- 4) Broader transparency in publication generated by companies—especially with respect to internet and meetings with the media.

For a full review of the Companies Act 2006 and suggested reforms please read the report “Environmental and Social Transparency under the Companies Act 2006: DiggingDeeper” March 2009 prepared by Client Earth (Contact <http://www.clientearth.org/>)

5. *What role, if any, should be played by individual Government departments or the National Human Rights Institutions of the UK?*

See 3 and 4 above—reform of the Companies Act 2006.

6. *How should UK businesses take into account the human rights impact of their activities (and are there any examples of good or bad practice which the Committee should consider)? How can a culture of respect for human rights in business be encouraged?*

The case presented here is a clear example of bad practise that the committee should address and the fact that the company operates outside the UK should play no role in mitigating their obligations to adhere strictly to human rights.

“There’s a simple fundamental legal point that you shouldn’t harm somebody and that you shouldn’t use your money to hire someone who you know is likely to do harm.”

Within the existing legal framework established by the Companies Act 2006 simple and effective improvements and cost effective reforms (outlines above) would promote a culture of respect for human rights in business.

7. *Does the existing legal, regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?*

People whose human rights have been abused by UK companies in other countries should be able to undertake a legal claim against the company and/or its directors in the UK under UK law. The few cases to reach British courts resulted with out of court settlements with confidentiality agreements so that the UK Company avoided adverse publicity and most UK investors never hear about the problem. The major underlying pattern is that shareholders do not hear of these cases. There needs to be legal obligations to publish environmental and social reports (on the internet for example) including details out of court settlements to claimants, which would play a clearer role in prevention of many current abuses.

8. If changes are necessary, should these include:

See suggestions for enforcement and reform of the Companies Act 2006 above (detailed in the report “Environmental and Social Transparency under the Companies Act 2006: Digging Deeper” published March 2009).

Dr Mika Peck

Memorandum submitted by the Columbia Solidarity Campaign

Rio Tinto and the impact of the Mandé Norte/Murindó mining exploration project on indigenous Embera and Afrocolombian communities in the provinces of Choco and Antioquia, Colombia

INTRODUCTION

Rio Tinto is one of the world’s largest diversified mining companies, jointly listed on the London and Australian Stock Exchanges. London-listed Rio Tinto plc and Australian-listed Rio Tinto Limited have a joint Board and function as a single company.

Rio Tinto is currently associated with a highly controversial mining exploration project in Colombia: La Muriel Mining Corporation’s Mandé Norte/Murindó project on the borders of the provinces of Choco and Antioquia in the north west of the country. Colombia Solidarity Campaign has been informed about the impacts of this project by the Comision Intereclesial de Justicia y Paz (Interchurch Justice and Peace Commission) in Colombia, which provides support and accompaniment to the communities affected by the project. The Comision Intereclesial de Justicia y Paz enjoys a close relationship with British development agency Christian Aid and with British-based human rights defence organisation Peace Brigades International. The Comision Intereclesial de Justicia y Paz is also well known to the British Embassy in Bogota.

On the strength of the testimony of the Comision Intereclesial de Justicia y Paz, the Colombia Solidarity Campaign believes that the Mandé Norte/Murindó project is having a serious, negative impact on human rights.

The Mandé Norte/Murindó project is being pursued on collectively-owned Indigenous and Afrocolombian land against the express wishes of the communities involved. It is alleged that it has been accompanied by intimidation, deceit, manipulation and falsification of community consultation procedures, militarisation, terrorisation and forced displacement of families. According to a written communication from Rio Tinto on 27 February 2009, the company retains “an option to joint venture with Muriel” though it currently has “no active engagement in the Murindo project”.⁴² At the company’s London Annual General Meeting on 15 April 2009, the company’s CEO Tom Albanese was happy to confirm the company’s involvement but was unable to describe the exact nature of the joint venture and recommended contacting a company official in Chile to clarify the matter. In an informal conversation after the AGM, Mr Albanese suggested that the project’s critics should be relieved that Rio Tinto is involved, as it is in his view exercising an improving influence on La Muriel Mining Corporation.

⁴² Email from Julie Dennis, Rio Tinto, to Digby Knight, 27 February 2009, 09.25

The headquarters of La Muriel Mining Corporation is in Denver, Colorado, USA, and it has offices in Medellin and Bogota in Colombia. The company's Director is Georges Juilland. The Juilland family own a number of mining companies in different countries—among them Panama-based Goldplata Mining International, which owns La Muriel Mining Corporation and Toronto-based Goldplata Resources, also active in Colombia.⁴³ In 2005, according to mining journalist John Chadwick, La Muriel Mining Corporation entered into an agreement for a 30%–70% joint venture with Rio Tinto.⁴⁴ Chadwick notes in an October 2008 article that “Muriel Mining ... negotiated an agreement with a major mining company [*presumably Rio Tinto*], which is earning a 70% interest in the property through work expenditures and a series of payments.”⁴⁵ The Colombian Church organisation Comision Intereclesial de Justicia y Paz describes this as a “shared risk agreement.”

2. CERRO CARA DE PERRO (DOG-FACE HILL)

The mining project is in an area declared a Forest Reserve by the Colombian Government in 1959. In 1970, Indigenous People obtained legal recognition of their territory, and in 2000 Afrocolombian people achieved recognition of their ancestral rights in the area. The land therefore legally belongs to these communities. The Murindó Indigenous “Resguardo” (Reservation) is one of the largest in Colombia. “La Rica” is considered a sacred place by the communities because it is there that the “Jaibanas” send spirits to provide protection to the community.

3. MINERAL POTENTIAL AND THE MINING PROJECT

Ingeominas, the Colombian Government's geological surveying office, investigated the mineral potential of the area in 1975 as part of a project financed by the United Nations. It found a large quantity of copper, molybdenum and, in places, gold. The survey was completed in the 1990s. The deposits are on the eastern slopes of a small mountain range north of the town of Murindó and about 165 kilometres north east of Medellin. The Phelps Dodge company, which owned the concession, sold it to La Muriel Mining Corporation in 2001. But only in 2005 did communities in the area learn that a number of companies wanted to exploit the area known as Cerro Cara de Perro (Dog-Face Hill). Exploration began against the wishes of local people and has caused a number of impacts on local people and the environment (see section 5 below). No environmental impact study apparently exists.

4. LACK OF CONSULTATION

Among other irregularities, the communities report that the people consulted by the mining company to obtain their consent to the project were bribed, threatened or do not live in the affected area. They allege that there has never been a proper consultation with the people who will actually be affected by the project. Members of low-income communities, they say, were pressured by company representatives to sign documents. Despite community demands, no discussions are taking place aimed at halting the project. Both the company and the Colombian Government claim that the consultation process was carried out according to the law. In January 2009, a delegation of Indigenous people met with the Human Rights Ombudsman to tell him that the consultation process was illegitimate. The disagreement about whether or not there has been legitimate consultation is central to the dispute and warrants independent investigation.

Colombian law requires “consulta previa” (prior consultation) with Indigenous communities before major projects are carried out on their collectively owned lands. Colombia has not yet signed the United Nations Declaration on the Rights of Indigenous Peoples (see <http://www.un.org/esa/socdev/unpfi/en/drip.html>), which states (Article 8.1) that “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture”, which violation of Cerro Cara de Perro undoubtedly represents. Article 32.1 states that “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.” Article 32.2 declares that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” The United Kingdom is a signatory to this Declaration and, we would assert, therefore has a duty to ensure that companies listed on the London Stock Exchange respect the requirements of that Declaration. This should extend to their involvement as minority partners in joint ventures.

5. IMPACTS TO DATE ON LAND AND LOCAL COMMUNITIES

Local communities allege that there have been multiple violations of human rights and Indigenous rights, including:

- Failure to recognise Indigenous and Afrocolombian territorial rights.

⁴³ *Goldplata, Big Plans*, John Chadwick, October 2008, in <http://www.infomine.com/publications/docs/InternationalMining/Chadwick2008ff.pdf>

⁴⁴ *Going for Gold in Guyane*, John Chadwick, in *International Mining*, December 2006

⁴⁵ *Goldplata, Big Plans*, John Chadwick, October 2008, in <http://www.infomine.com/publications/docs/InternationalMining/Chadwick2008ff.pdf>

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- Militarisation of the zone to protect the interests of the mining companies, with illegal raids and use of hoods to hide the identity of agents, which has generated panic during military operations .
 - Use of apparatus which inhibits movement around the area and presents a threat to life and safety.
 - Continuous brutal intimidation of communities.
 - Forced displacements.
 - Local people have repeatedly had to suspend their daily work, with consequent economic losses.
 - Severe health impacts, including the deaths of four babies, which local people believe to have been caused by disruption to people's means of livelihood and ability to travel within the zone of exploration and the stress caused by fear of soldiers and the consequences of violation of sacred sites.
 - Loss of primary forest (in which the mining camp has been set up and where soldiers are based).
 - Profanation of the sacred hill, causing massive stress and uncertainty among the communities, for whom the hill restrains the spirits of evil.
 - The situation has led to suicides and suicide attempts because of the fear that what is sacred is being destroyed.

Despite repeated requests by local people, neither the company's owners nor the national government, who are responsible for what is going on, have yet visited the area to engage in dialogue.

6. LEGAL SITUATION

A number of separate legal actions have been taken in Colombia with the aims of protecting the lives and livelihood of the local people, ensuring a legal consultation process is carried out, stopping deforestation, demilitarising the area and getting the company to leave. A case may also be made before the Interamerican Commission. In response, the company has attempted to discredit local communities, the Comision Interclesial de Justicia y Paz and the international organisation Peace Brigades International, through paid advertisements in the press and communication with the President of Colombia. The company does not recognise the legitimacy of the locally-organised "popular consultation" in February (see below) and intends to continue its exploration work.

7. CONSULTATION IN FEBRUARY IN THE COMMUNITIES AFFECTED BY THE PROJECT

The "popular consultation" was the first of its kind to be carried out in Colombia. Such consultations have been used elsewhere in Latin America to gauge support for and opposition to mining projects. They are based on the principles of community custom and local autonomy. This consultation was also based on Indigenous rights to territory established by the Colombian constitution of 1991 and the principles of International Labour Organisation (ILO) Convention 169. Article 7 of ILO Convention 169 says: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly." The purpose of the consultation was to ensure that the Colombian authorities, Muriel Mining Corporation and Rio Tinto would know and accept the communities' decision about the mining project in their territories.

The consultation, an initiative of the Indigenous communities themselves, produced a resounding "No" to mining in their territories. The intention is that with the help of the legal actions being taken, the consultation will be legally recognised by the State. Voting took place over three days in four places, with the participation of 17 communities from three Indigenous Resguardos—all Emberas—and a community council from the Afrocolombian communities.

Communities have also been carrying out frequent rituals seeking forgiveness from the spirits for the violation of their most sacred place. These are an expression of their objection to mineral exploration. They are demanding that the company cease its activities in their territory and that their sacred place be demilitarised.

8. DUTIES OF THE STATE, RESPONSIBILITIES OF BUSINESSES AND ACCESS TO REMEDIES

The Colombia Solidarity Campaign believes that the UK Government is bound to uphold the UN Declaration on the Rights of Indigenous Peoples and other human rights instruments, and that companies are bound to observe them. Rio Tinto is clearly associated with a company against which serious allegations have been made. Colombia Solidarity Campaign does not have confidence that the Colombian authorities are effectively imposing on companies operating in its territory even the minimal obligations to which they are bound by Colombian law, let alone the stricter obligations imposed by such international instruments as the UN Declaration on the Rights of Indigenous Peoples. UK law needs to be changed in order that London-listed companies can be held to account for their own actions and those of subsidiaries, associates or joint venture partners in other jurisdictions around the world. People from directly and negatively affected

communities need to have an easy and effective avenue for investigation and redress of their grievances, and this should not be frustrated by the so-called “corporate veil” which so often precludes the initiation of legal proceedings in British courts.

We urge the Joint Committee on Human Rights to hear oral evidence from representatives of the communities affected by the Mandé Norte/Murindó mining exploration project in Colombia. At a minimum, we believe that the JCHR should have the opportunity to hear from Father Henry Ramirez Soler of the Comisión Intereclesial de Justicia y Paz, currently in Europe for some months, whose attendance in London could be arranged with minimal cost and delay.

Richard Solly
Chair, Colombia Solidarity Campaign

May 2009

Much of the information in this submission was collated by Guadalupe Rodríguez of Salva la Selva/Rettet den Regenwald, Berlin, to whom the Colombia Solidarity Campaign is very grateful. It is based on information provided by the Comisión Intereclesial de Justicia y Paz, the Organización Indígena de Antioquia OIA (Indigenous Organisation of Antioquia) and others. Photos are from the OIA.

Memorandum submitted by Vigeo

The Joint Committee on Human Rights has decided to inquire into Business and Human rights and the way in which businesses can affect human rights both positively and negatively. Vigeo, a Corporate Social Responsibility Rating Agency, would like to contribute to this inquiry by sharing some of its findings on the human rights performances of UK companies. This paper focuses on the question: *How should UK businesses take into account the human rights impact of their activities? How can a culture of respect for human rights be encouraged?*

VIGEO’S RESEARCH RESULTS ON UK COMPANIES AND HUMAN RIGHTS

Vigeo’s reference model is based on criteria drawing together international objectives for social responsibility. These criteria are divided into six fields: Human Rights, Human Resources, Environment, Business Behaviour, Corporate Governance and Community Involvement. In this paper we only consider findings analysed under the Human Rights Domain, focusing in particular on two criteria: *Fundamental Human Rights*, and *Freedom of Association and the Right to Collective Bargaining* (Labour Rights).

1. *Respect for Human Rights Standards and the Prevention of Violations (fundamental human rights in society)*

Over the past three years, Vigeo has analysed 414 European companies on the issue of fundamental human rights. 104 of these are British. Compared to the average performance of its European peers, more British companies have established formalised policies on Human Rights and 50% of them have implemented concrete measures to ensure the respect of these rights (such as risks assessments, training and awareness raising, etc...). However, 25% of the UK companies do not address human rights issues at all. Moreover, between January 2007 and April 2009 Vigeo has identified human rights allegations involving 18 British companies—which is a rather high number compared to companies from other European countries.

The British companies included in Vigeo’s panel that were involved in violations of fundamental human rights, were: Group 4 Securicor, Serco GRP, GlaxoSmithKline, BHP Billiton, Unilever, Vedanta Resources, Mondi, BAE Systems, AstraZeneca, Anglo American, Royal Bank of Scotland, HSBC Holdings, BP, Royal Dutch Shell, Xstrata, Rio Tinto, Barclays and Standard Chartered.

In general, these companies belong to “sensitive” sectors in terms of human rights, which means that, due to the specific activity or the region in which these companies operate, there is an increased risk of exposure to human rights violations.

The sectors that were most exposed to fundamental human rights risks and involved in controversies were Mining & Metals, Business Support Services (security), Forest Products and Paper, Energy (oil & gas), Banks (related to investment projects) and Pharmaceuticals.

EMPIRICAL EXAMPLES OF UK COMPANIES INVOLVED IN FUNDAMENTAL HUMAN RIGHTS CONTROVERSIES:

Anglo American

In September 2006, Amnesty International reported that a leader of the Association of Miners of the Bolívar Department (linked to the Agro-mining Federation of the south of Bolívar Department in Colombia) had been killed. According to Amnesty, he was “reportedly killed by members of the Colombian army’s Nueva Granada Anti-Aircraft Battalion”. The reports states that “Soldiers have also reportedly told local residents that their operations aim to guarantee the

presence of international corporate mining interests in the area". This is an area in which the gold-mining company AngloGold Ashanti has interests (Kedahda S.A. in which Anglo American has 17.5 holding). Local miners had opposed the arrival of this company in the area.

Rio Tinto

In April 2007, the U.S. Ninth Circuit Court of Appeals upheld the right of Bougainville Island residents in Papua New Guinea to pursue class-action litigation against Rio Tinto. The plaintiffs claim that they or their families were victims of numerous violations of international law as a result of Rio Tinto's Bougainville copper mining operations, and the decade-long uprising generated by the controversy over the mine. Rio Tinto has argued that the plaintiffs need to exhaust all PNG court remedies prior to seeking U.S. court intervention. In November 2007, War on Want released a report, "Fanning the Flames: The role of British mining companies in conflict and the violation of human rights". Rio Tinto responded to the report by explaining its policies and management systems in safeguarding human rights, and proposed a meeting with War on Want, which has been accepted.

BP

According to the Independent, in 2006, BP paid multi-million dollar compensation to Colombian farmers, who accused the company of benefiting from a harassment and intimidation from Colombian paramilitaries hired by the government to protect BP's pipeline. However, BP's direct involvement with the paramilitaries was not established.

However, there are also examples of good practices among British corporations. Quite many companies adhere to the Global Compactⁱ and/or to the UK Voluntary Principles on Security and Human Rights.ⁱⁱ Although it remains rare, some companies also cooperate with independent stakeholders.

Companies should not only issue commitments to Human Rights. It also lies within their responsibility to ensure the respect of these rights within their operations. Some of the British companies in Vigeo's panel have implemented relevant measures such as risk assessments, consultations with local populations, grievance procedures (such as confidential hotlines), human rights training and awareness raising for relevant employees and contractors. Best in class companies also conduct external human rights audits.

EMPIRICAL EXAMPLES OF GOOD PRACTICES AMONG UK COMPANIES:

Old Mutual

Old Mutual is a signatory of the Global Compact. Nedbank, the major unit of the company's banking activities, is also a signatory of the Equator Principles. Nedbank has a structured approach to prevent human rights violations in project finance. Procedures are in place to ensure that appropriate social assessment studies are carried out by the borrowers. The bank verifies that the borrowers implement and monitor environmental and social risk management programmes and borrowers must submit periodic reports. Nedbank discloses the number of project finance transactions subjected to environmental/social assessment. In 2007, the company completed a second two-day training session for its key support staff. Credit Committee awareness sessions were also included.

Meggitt

As a defence company, Meggitt's business activities in it selves are highly controversial from a Human Rights point of view. Indeed, the defence industry's responsibilities in this area are important. As other companies in the sector, Meggitt is subject to statutory export controls.

While Meggitt's Corporate Responsibility Policy only vaguely refers to human rights, the company states that it seeks to become an "industry champion" on export compliance, and hence non-proliferation, based on the recommendations of the Nunn-Wolfowitz Taskforce Report on best practice in export compliance. Meggitt's commitment to arms export compliance is sponsored by senior management and compliance officers at all business units. The company's export compliance programme includes awareness-raising and training programmes for employees, internal audits and screening of potential counterparties against government lists of restricted parties. In addition, the programme is externally audited by trade consultancy JPMorgan Chase Vastera. The company has set up such systems throughout the group, including subsidiaries and sites located in countries where regulations on arms exports are not stringent.

A review of stakeholder sources did not reveal any allegations against the company on this issue.

2. *Respect for freedom of association and the right to collective bargaining*

A majority of the European companies in Vigeo's panel commit to respect basic labour rights. Some companies go further in their commitment and sign an International Framework Agreement (IFA) with global trade unions. In the end of 2008, 78 IFA's had been signed world wide. As regards to UK companies, only five have concluded an IFA (Ability, Barclays Africa, Brunel, G4S, NAG) which is a rather low number compared to countries like Germany, Sweden or France.

Although many European companies commit to respect basic labour rights, very few (UK companies included) have implemented measures for ensuring the respect of basic labour rights within their operations. Hence, this is an area of improvement for international corporations. Even basic measures, such as providing and spreading information on freedom of association to employees (eg access to the Code of Conduct in all relevant languages), are rarely in place. There are several means available for companies that wish to ensure the respect of labour rights within their operations. Best in class companies have for example conducted risk assessments, internal and external audits, and collaborate actively with international and local trade unions.

EMPIRICAL EXAMPLES OF GOOD PRACTICES AMONG UK COMPANIES:

Reckitt Benckiser PLCR

Reckitt set up internal standards that including a part relating to the right of employees to freedom of association and collective bargaining. All Reckitt's entities are audited on their compliance to these standards.

BAE Systems

BAE Systems has developed a set of guidelines, through consultations with trade unions, on the recruitment of new union members. In order to make an informed choice, trade unions are said to be provided with an opportunity to talk to new employees during their induction, and "check-off facilities" for union dues are provided at a number of sites. Paid time off is usually granted for shop stewards to be trained in membership recruitment activities. BAE Systems does not operate a collective bargaining policy in Saudi Arabia, where the situation is naturally more complex. There, employees are said to be encouraged to represent their views through formal consultative forums, opinion surveys, local briefing and discussion forums.

In a recent studyⁱⁱⁱ on European companies and their respect of basic labour rights, Vigeo demonstrates that British companies are more often involved in labour rights controversies than companies from other European countries.^{iv} Most of these allegations occurred outside Europe, in so called "sensitive" countries. The controversies relate to cases of union busting, non recognition of trade unions, the refusal of collective bargaining, the denial of the right to strike, and discrimination of trade union members or representatives. The sectors most involved in allegations were the Mining & Metals, Technology Hardware, Building Materials and Automobiles sectors.

EMPIRICAL EXAMPLES OF UK COMPANIES INVOLVED IN LABOUR RIGHTS CONTROVERSIES:

Group 4 Securitor

In October 2007 workers and trade union members brought demands to their employer, Group 4 Securitor Marocco (Business Support Services), on the payment for overtime work and proper health and safety protection. According to UNI, following this demand G4S dismissed 20 trade union members. In protest, 500 union members took 24-hour strike action on 11 October 2007. The following day, almost 200 of the strikers, including the union leaders, were dismissed from their employment. During the three months that followed, G4S offered severance packages to the dismissed workers but refused to re-employ any of them. In January 2008, the last of the remaining strikers accepted severance pay. G4S Morocco reported on 23 January 2008 that it had recognised another union.

Tesco

Tesco faces major and recurrent allegations of labour rights abuses. According to UNI, the British retail giant did not accept a newly created trade union at its subsidiary Tesco Lotus in Thailand and resorted to repression instead of dialogue. In Turkey, the company refused to accept a government decision that recognised UNI Commerce affiliate Tez-Koop-IS as a negotiating partner. In South Korea, Tesco Homeplus is considered as an anti-union employer. And in the United States, Tesco has consistently refused to meet with the large UNI Commerce affiliate UFCW (USA), prior to its recent entry to the United States market. Instead, UNI believes that the retail giant is tempted to build up a non-union convenience store chain, thus avoiding entering into a collective agreement relationship.

How should UK businesses take into account the human rights impact of their activities? How can a culture of respect for human rights be encouraged?

International law firmly establishes that States have a duty to protect against non-State human rights abuses within their jurisdiction, and that this duty extends to protection against abuses by business entities.^v Of concern are the HRT violations reported by Amnesty International in 2008 and 2007. These allegations are particularly severe considering the pioneering role the UK could fulfil in the promotion of human rights.^{vi}

Companies have clear legal responsibilities to respect human rights standards according to both international and UK law.^{vii} There is also an overwhelming consensus that corporations have a clear moral obligation to respect Human Rights.

This paper provides several examples on how businesses can, and should, take into account the human rights impacts of their activities. A first step for companies is to issue formal commitments towards the respect and the promotion of human rights. However, such commitments must be followed by measures that monitor and ensure that the company's policies are respected.

In Vigeo's opinion, active and transparent support of human rights can induce a motivating working environment as well as company cohesion. Indeed, addressing human rights issues may enhance a company's effectiveness in managing its human capital risks. The competition for high qualified employees is a challenge in today's business world. Responsible business practices, including transparency and appropriate policies on human rights, are persuasive means for encouraging employees and potential employees to choose a company over its rivals. Indeed, graduates take into account social responsibility issues when choosing which jobs to apply for—even when the employment market is depressed. Adopting and implementing explicit human rights policies therefore reinforces a company's value proposition and sends a strong and tangible signal internally and externally about what the company stands for. Moreover, violations of human rights can have severe consequences for the company's reputation as well as its market acceptability. Vigeo's examples demonstrate that companies that do not comprehensively address human rights issues also run important legal risks (litigations, trials, legal proceedings, fines etc).

When looking at the results of Vigeo's analysis of the 104 British companies in the panel, it is striking that barely 50% of the UK companies have monitoring/audit systems in place to ensure the implementation of their declared policies and commitments. The lack of such measures increases the risk that fundamental human rights and labour rights will not be effectively monitored, and in case of conflicts, corrective measures might not be taken. Additionally, a company's policy may be considered by external stakeholders as a mere marketing instrument or pure "window-dressing" if not concretely supported by strong implementation mechanisms.

Finally, it has become more and more common for companies to externalise and delocalise their core businesses from their home and host country of operations, to suppliers or subcontractors in more "sensitive" countries or regions. Under the pressure of stakeholders (in particular international trade union movements and human rights NGOs) companies increasingly need to prove that they handle human rights risks in an effective and responsible way throughout their entire supply chain. Indeed, in Vigeo's opinion, a responsible management of the supply chain by international companies will be the next "front line" for promoting human rights and for fighting against the violations of these rights. This is why companies should, starting from today, address human rights issues within their own operations as well as within their supply chain.

Annex

PRESENTATION OF VIGEO'S RESEARCH FRAMEWORK ON HUMAN RIGHTS^{viii}

Vigeo Group is a European leading supplier of extra-financial analysis. The Group measures the degree to which the companies take into account—in the definition and deployment of their strategies—corporate social responsibility objectives. Vigeo's reference model is based on criteria drawing together international objectives for social responsibility. These criteria are divided into six fields: Human Rights, Human Resources, Environment, Business Behaviour, Corporate Governance and Community Involvement. In this paper we only consider findings analysed under the Human Rights Domain, focusing in particular on two criteria: *Fundamental Human Rights*, and *Freedom of Association and the Right to Collective Bargaining* (Labour Rights). Each criterion is correlated to international texts of reference.^{ix}

Like all other Vigeo criteria, the human rights criteria are analysed through the Leadership, Implementation and Results (LIR) approach:

- Leadership (L) relates to the formalisation of commitments towards the promotion of human rights in terms of visibility, relevance and ownership.
- Implementation (I) focuses on the relevance of the implementation measures used to achieve or respect the company's commitment: monitoring of the respect of human rights, risk assessments, and the promotion and coverage of the implementation tools.
- Results (R) are linked to the efficiency of the system which is measured by the occurrence and management of allegations and/or controversies.

For Vigeo, a company's CSR performance is also an indication of the way it manages its legal, human capital, operational and reputational risks. The weight Vigeo gives to each risk class to assess a company depends on the nature of stakeholders' rights, interests and expectations and the stakeholders' exposure. For the domain of human rights, the *reputational risks* (brand recognition; allegations; controversies; social acceptability; attracting new skills; licence to operate) and *legal risks* (litigations; trials; legal proceedings; fines) are of utter importance.

REFERENCES

- ⁱ <http://www.unglobalcompact.org/>
- ⁱⁱ <http://www.voluntaryprinciples.org/>
- ⁱⁱⁱ “Freedom of Association and the Right to Collective Bargaining: Analysis of Vigeo’s Universe of European companies”, Vigeo, February 2009
- ^{iv} German, Swedish, Finnish, Italian, French, Belgian, Swiss and Spanish companies have also faced labour rights controversies during the last three years. Controversies that occurred in the “Western” world mostly concerned Anglo-Saxon countries such as the USA, the UK and Australia.
- ^v <http://daccessdds.un.org/doc/UNDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement>
- ^{vi} Amnesty International Report 2008:
The UK continued to attempt to return individuals to states where they would face a real risk of grave human rights violations on the strength of unenforceable “diplomatic assurances”. Secrecy in the implementation of counter-terrorism measures led to unfair judicial proceedings. There were continued failures of accountability for past violations, including in relation to alleged state collusion in killings in Northern Ireland. The government sought to limit the extraterritorial application of human rights protection, in particular in relation to the acts of its armed forces in Iraq. Women who were subject to immigration control and had experienced violence in the UK, including domestic violence and trafficking, were unable to access the support they needed. Rejected asylum-seekers continued to be forced into destitution.
- Amnesty International Report 2007:
The government continued to erode fundamental human rights, the rule of law and the independence of the judiciary, including by persisting with attempts to undermine the ban on torture at home and abroad, and by seeking to enact legislation inconsistent with fundamental human rights. Measures taken by the authorities with the stated aim of countering terrorism led to serious human rights violations, and concern was widespread about the impact of these measures on Muslims and other minority communities. Public judicial inquiries into cases of alleged state collusion in past killings in Northern Ireland were ongoing, but the government continued to fail to establish an inquiry into the killing of Patrick Finucane.
- ^{vii} See for example John Ruggie’s report “on the issue of human rights and transnational corporations and other business enterprises” according to which corporations have legal responsibilities to prevent human rights abuses <http://daccessdds.un.org/doc/UNDOC/GEN/G07/108/85/PDF/G0710885.pdf?OpenElement>
- ^{viii} www.vigeo.com
- ^{ix} — The International Bill of Human Rights,
— United Nations: International covenant on civil and political rights, 1966
— United Nations: International Covenant on Economic, Social and Cultural Rights, 1966
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— United Nations: Code of Conduct for Law Enforcement Officials
— United Nations: Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
— United Nations: Project of Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 2002
— ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 2000
— ILO: C169 Indigenous and Tribal Peoples Convention, 1989
— OECD guidelines for multinational enterprises, revision 2000
— fundamental ILO conventions: 29, 87, 98, 100, 105, 111, 138 and 182

Memorandum submitted by Imperial Tobacco

Imperial Tobacco welcomes the opportunity to contribute to the Joint Committee on Human Rights’ inquiry into business and human rights. This includes examination of the way in which businesses can affect human rights both positively and negatively; how business activities engage the relative responsibilities of the UK Government and individual businesses; and whether the existing UK regulatory, legal and voluntary framework provides adequate guidance and clarity to business as well as adequate protection to individual rights.

In response to the call for evidence, Imperial Tobacco would like to offer insight into the approach that it takes as a British-based company operating internationally. Hence, this submission covers:

1. An introduction to Imperial Tobacco
2. Business and human rights
3. Human rights policy and management approach
4. Employment practices and labour rights

5. Working with business partners
6. Working with the community
7. Conclusions

1. INTRODUCTION

The Imperial Tobacco Group PLC (“Imperial Tobacco” or “the Company”) is a leading international tobacco company which manufactures, markets, distributes and sells a comprehensive range of cigarettes, tobaccos, cigars, rolling papers and tubes. The Company has sales in over 160 countries and employs around 40,000 people in 50 countries world-wide. Imperial Tobacco Group has its headquarters in Bristol in the UK.

Imperial Tobacco is committed to high standards of corporate governance and business conduct and to operating responsibly in line with its Business Principles, Code of Conduct, policies and standards. This includes complying with all relevant laws, regulations and voluntary agreements; managing social, environmental and economic risks and opportunities; and responding to stakeholder issues and external developments.

Further information is available at www.imperial-tobacco.com and in the Company’s Annual Report & Accounts and Corporate Responsibility Reviews. These are available both online and in printed copy.

2. BUSINESS AND HUMAN RIGHTS

Imperial Tobacco agrees with the proposition that the state has a duty to protect human rights, and welcomes the recommendations of the UN Special Representative on Business and Human Rights, Professor John Ruggie, that set out the three core principles:

- The state’s duty to protect against human rights abuses by third parties including business;
- The corporate responsibility to respect and promote the human rights of its employees, of the communities in which it operates, and of its business partners; and
- The need for individuals to have access to remedies for breaches of their human rights.

Imperial Tobacco aims to establish and maintain effective risk assessment and management mechanisms based on the universal Declaration of Human Rights.

As a UK PLC, the Company uses the guidance to UK businesses on their human rights obligations as encompassed by company and employment legislation. The Company supports the International Labour Organization’s (ILO) conventions that cover freedom from discrimination, freedom from forced labour, freedom of children from child labour, freedom of association and the right to collective bargaining. It also uses recognised standards and guidelines, such as those published by the Organisation for Economic Co-operation and Development (OECD), the United Nations’ Global Compact and the Global Reporting Initiative, to help shape its human rights-related policies.

3. HUMAN RIGHTS POLICY

Imperial Tobacco is a British-based company with employees in over 50 countries worldwide. Whilst the governance of these countries varies, Imperial Tobacco’s policy is to respect and advance the fundamental human rights of individuals across all the Group’s operations and to influence its business partners to do the same.

The consideration and management of aspects of human rights are covered by various corporate policies, systems and processes. These include employment policies and practices, occupational health, safety and environmental management systems, procurement processes and community investment activities. The Company also has processes that consider human rights issues in its product supply processes, market assessments and for potential new investments or joint ventures.

A range of governance procedures is used to monitor the effective application of internal controls across Imperial Tobacco’s business. These include independent reviews by the Group Compliance Function together with self-assessment of risks and relevant controls. Senior operational managers of each business and function annually certify that effective systems of internal control, in accordance with the Group’s policies and covering all business activities, have been maintained within their area of responsibility.

Specialist audits and assessments support these governance procedures. These include third-party audits of the Company’s performance against ISO 14001 for environmental management and OHSAS 18001 for health and safety management. Trained social auditors use the principles of SA 8000 as a basis of evaluation for performance improvement purposes in newly acquired operations in countries considered by the UK Foreign and Commonwealth Office (FCO), US Office of Foreign Assets Control (OFAC), or the FTSE4Good Policy Committee to be medium- to high- risk in terms of human rights.

Periodic self-assessment questionnaires, submitted via an internet-based non-financial reporting system, capture information and performance measures from the Company’s factories, offices and markets. This assessment enables a better understanding at corporate-level of local practices and helps managers to identify improvements needed to align with corporate policies.

This management approach and performance is reported in the Company's annual Corporate Responsibility Review, and summarised in the Annual Report & Accounts. Independent assurers verify the data and statements made, and benchmark activities against the Global Reporting Initiative's guidelines.

4. EMPLOYMENT PRACTICES AND LABOUR RIGHTS

Imperial Tobacco's Business Principles and employment policies set out a framework of practices to ensure employees are treated with fairness, dignity and respect, as depicted in universally accepted standards for human rights.

4.1 Employee engagement

Effective working relationships with employees and their representative organisations are an important element of the way in which the Company conducts its business. Individuals' rights to representation are respected and the Company uses a range of engagement mechanisms in different locations. These include formal trade unions and works councils, the European Employee Forum, joint bargaining arrangements and collective agreements. For example, in West Africa during the 2006 financial year, the Company created a Common Collective Agreement concerning main terms and conditions of employment for its subsidiaries in Senegal, Ivory Coast, Burkina Faso and Mali.

4.2 Contracts of employment

Imperial Tobacco's policy is to provide all employees with a written contract of employment in accordance with relevant statutory requirements. The aim is to comply with the appropriate employment legislation in each jurisdiction by providing a contract that details the agreed employment terms and conditions, with the rights and responsibilities of both parties made clear and understandable. Grievance mechanisms are provided to ensure that employees have access to established, formal procedures through which they may have their complaint considered and addressed consistently, fairly and within an appropriate time frame. Where employees do not meet the standards of behaviour and job performance expected of them, formally documented disciplinary procedures are used to ensure that individuals are treated appropriately and consistently.

4.3 Responsible restructuring

Working in a highly competitive environment, the Company continues its drive to improve efficiency. This has led to restructuring of various parts of the business and to some factory closures. The aim is to manage these situations in a fair and responsible manner and to support employees through any restructuring programmes. The focus is on active consultation with employees and their representatives and the incorporation within social plans of measures and approaches to support early retirement, voluntary severance, internal and external redeployment.

4.4 Equal opportunity and non-discrimination

Equal opportunity and non-discrimination are important aspects of the Company's employment practices. The aim is to ensure that no employee or job applicant receives less favourable treatment than any other on the grounds of gender, race, disability, marital status, nationality, ethnic or national origin, sexual orientation, age or religious beliefs, or any basis which is not related to their performance or their ability to carry out a job. Human resource managers review local procedures to ensure that direct or indirect discrimination does not take place. Areas reviewed include recruitment and selection, remuneration, opportunities for training and development, security of employment and conditions of work. Employment agencies and other organisations involved in the supply of employees to the Company are advised of the corporate policy and local standards on equal opportunities. Grievance procedures are in place to allow employees to challenge actions believed to be discriminatory without threat of victimisation and retaliation.

4.5 Remuneration

The policy of Imperial Tobacco is to ensure its employees are rewarded effectively in line with their contribution, the Group's performance and the market. To comply with this policy, local operations ensure remuneration is equitable with reference to comparable roles within the relevant area of the Company, taking into account the level of responsibility held and individual performance. They also ensure remuneration is competitive in relation to the appropriate external labour market.

4.6 Occupational health, safety and wellbeing

The occupational health, safety (OHS) and wellbeing of employees and those working with the Company remain a high priority. The aim is to reduce work-related injury and ill health through risk management, employee training and co-operation, performance reporting, audit and improvement planning. Central to OHS management systems is a risk assessment philosophy that allows the Company to identify risks, create improvement plans and implement management controls to reduce or eliminate significant risks. A number of risk management training tools and techniques are used, including in those countries where the legal requirement for risk assessment is less developed.

A range of performance measures and self-assessment questionnaires are collated through the non-financial reporting system. This information can be accessed and used at Group, function, market and site level to monitor and improve performance. Key accident categories are analysed and a training programme has been developed to improve the quality of accident investigations so that underlying causes can be identified. The aim is to stimulate good-quality reporting, investigation and corrective action so that such incidents provide a valuable learning opportunity.

The overall objective with regard to employee wellbeing is to increase the awareness, identification and reporting of occupational illness, so that incidents of work-related ill-health and days lost through sickness can be reduced. The Company also has more specific objectives in some countries where state health and hygiene provisions are weak. Through a detailed audit and review process health management systems, medical infrastructures and surveillance systems in each of the countries of operation are kept under review and local initiatives undertaken to make lasting improvements to the quality of life of employees, their families and their communities. These include provision of clean water and sanitation facilities for farming communities close to the Company's operations in Madagascar, and supporting malaria prevention projects in Central and West Africa.

4.7 Elimination of child labour

As a responsible company Imperial Tobacco does not condone the use of child labour, whether in its own operations or in its supply chain. The Company is committed to working with suppliers and appropriate bodies to support the progressive elimination of any exploitation of children in the tobacco sector. Imperial Tobacco is a Board member of the Elimination of Child Labour in Tobacco (ECLT) Foundation. The ECLT was established in 2000 by organisations representing tobacco workers, growers and manufacturers, with support from the International Labour Organization. Through the Foundation the Company aims to ensure that children are provided with an upbringing that gives them the best chance in all aspects of life. ECLT partnership projects are ongoing in Malawi, Tanzania, Mozambique, Uganda, Zambia, Philippines and Kyrgyzstan. More information, including progress updates on each of the projects, can be found at www.eclt.org

4.8 Elimination of forced labour

Imperial Tobacco continues to support the ILO core conventions on freedom from forced labour. The social assessments described above use the principles of SA 8000 which include the right to freedom from forced labour. The self-assessment questionnaire on the Company's non-financial reporting system captures information relating to employment practice policies and the local practices in place.

5. WORKING WITH BUSINESS PARTNERS

Imperial Tobacco is committed to working with suppliers and appropriate organisations to encourage their compliance with international labour standards. The majority of raw tobacco used by Imperial Tobacco is purchased from third-party suppliers, mainly through the leading international leaf supplying companies. A small amount is purchased directly from the farmers, principally in Madagascar, Morocco and Laos. The issues that need to be managed within the tobacco supply chain are similar to those of other agricultural industries, and include health and safety, child or forced labour, lack of schooling, farmers' incomes, appropriate use of plant protection products and environmental protection.

To assess standards in the tobacco supply chain the Company operates the Social Responsibility in Tobacco Production (SRiTP) programme. SRiTP consists of self-assessments, guidance, audits and improvement plans that allow the evaluation and, where necessary, improvement of performance. SRiTP places an emphasis on continuous improvement and the ability of all parties to work together to find solutions to social, environmental and economic issues in the supply chain.

The Company's ISO 9001 supplier qualification process includes social and environmental aspects. First-tier suppliers complete an initial survey which asks questions about their policies and procedures, their standards of business conduct and their labour practices in line with the ILO core conventions. They are also asked if they have procedures in place to evaluate and select their suppliers or subcontractors, in an attempt to encourage better standards further down the supply chain. The supplier qualification process involves a phased cycle of on-site audits to check against the supplier's self-assessment.

6. WORKING WITH THE COMMUNITY

Imperial Tobacco has made significant progress in advancing a strategic community investment portfolio that takes account of international issues. This includes the use of the UN Human Development Index and Millennium Development Goals to identify issues of global importance and the geographic regions where these are particularly relevant to the Company. For new investments, fewer but more substantial initiatives are undertaken that generally involve three to five-year pledges. A portion of the Company's community investment budget is dispersed through regional investment committees for the funding of local projects favoured by employees that meet the UN goals.

The Company is increasingly involved in partnership programmes with suppliers and non-governmental organisations in tobacco growing communities to seek solutions to issues such as child labour, poverty alleviation, climate change, environmental protection and sustainable development. For example, projects are in place in Malawi, Mozambique and Madagascar that protect ancient forests from deforestation and develop practical solutions for the use of wood for tobacco curing. Established initiatives include the planting of woodlots and bamboo, the provision of fuel-efficient ovens and curing barns, and model tobacco plantations to demonstrate to farmers the benefits of good agricultural practice.

Other continuing and new projects involve working with local authorities and NGOs to introduce new sources of rural income through microfinance and investing in community-led developments to improve quality of life in communities which are involved in tobacco growing.

7. CONCLUSIONS

Imperial Tobacco believes that companies which operate globally have a responsibility to maintain high standards of respect for the promotion of human rights. These standards should be consistent in every market, but must take into account the social and cultural aspects that prevail locally.

April 2009

Memorandum submitted by “Drive Up Standards”

INTRODUCTION AND SUMMARY

1.1 “Drive Up Standards” is a joint cooperation between the Transport and General Workers Union section of Unite the Union and the International Brotherhood of Teamsters, based in the United States of America and Canada. “Drive Up Standards” mission is to ensure that employees of multinational transport companies are treated with respect and dignity in regard to their human rights in order to provide both quality jobs and safe, reliable transportation services to the communities that they serve.

1.2 Unite the Union represents over two million workers in the United Kingdom, including over 90,000 workers employed in public transport provision. The International Brotherhood of Teamsters represent 1.4 million private and public sector employees, many performing transport services throughout North America, including 75,000 bus transportation workers, and many working for UK based multinational transport companies.

1.3 We are grateful for the opportunity to submit evidence to the Joint Committee on Human Rights and hope our commentary assists the Committee in its inquiry. For the purposes of this submission we focus, given the limitations of length, on the overseas activities of UK-based transport multinational National Express Group.

1.4 National Express Group, and its subsidiaries, employ 45,000 workers in its global operations; in the UK it operates local bus services in London, the West Midlands and Dundee, a national network of coach services and rail franchises for the Department for Transport; its North American subsidiary National Express Corporation in turn operates Durham School Services in the United States and Stock Transportation in Canada which combined comprise the second largest private school bus operator and serve 350 school districts in 29 states and two Canadian provinces; and in Spain the company’s subsidiary is a major provider of coach and urban bus services.

1.5 Our experience of this company, especially in North America, provides a picture of a business that continually practices union avoidance and consistently violates the human rights of its employees by every means possible.

1.6 Public transportation companies are dependent on front line staff to project a positive image of the company and to deliver high quality and reliable services to passengers. This requires multinational companies to attract and retain high quality, professional employees. Failure to meet these challenges exposes companies to reputational and financial risk, especially in the case of National Express where the bulk of revenues are derived from contracts with national and local public authorities.

1.7 Professor Lance Compa, a Cornell University Professor specializing in labour and human rights law, characterizes the situation “*Community consensus is critically important to secure adequate funding for school transport services—including funding for pay and benefits to attract and maintain good employees. A company with a reputation for going to war against its own employees cannot sustain community consensus. A company with a reputation for working well with its employees’ representatives is in a more advantageous position.*”⁴⁶

⁴⁶ Compa: Freedom of Association and Workers’ Rights Violations at First Student, Inc. 2006

RESPONSE TO CALL FOR EVIDENCE—BUSINESS AND HUMAN RIGHTS

The duty of the State to protect human rights

2.1 The Special Representative of the Secretary-General of the United Nations, John Ruggie, identified in his report to the Human Rights Council (7 April 2008) various means by which business impacts human rights. For labour rights this includes Freedom of Association, the Right to organize and participate in collective bargaining and the Right to a safe work environment. Ruggie also noted many non-labour rights including the Right to hold opinions, freedom of information and expression and the Right to political life.

2.2 Many States, including the United Kingdom, are signatories to the International Labour Organization core principles that include:

- ILO Convention 87 —Freedom of Association and Protection of the Right to Organise Convention, 1948. Article 2 “*Workers and employers, without distinction whatsoever, shall have the right to establish and... to join organisations of their own choosing without previous authorisation.*”
- ILO Convention 98 —Right to Organise and Collective Bargaining Convention, 1949. Article 1 1. “*Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. 2. Such protection shall apply more particularly in respect of acts calculated to—(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.*”

Although the United States of America is not a signatory to these conventions, it has embraced the Universal Declaration of Human Rights (1948) and the 1998 ILO Declaration on Fundamental Principles and Rights at Work “*All members, even if they have not ratified the Conventions in question, have an obligation...to respect, to promote and to realize, in good faith...freedom of association and the effective recognition of the right to collective bargaining.*”

2.3 Ruggie states “*Indeed, there is increasing encouragement at the international level.... for home States to take regulatory action to prevent abuse by their companies overseas.*”⁴⁷

How do companies like National Express Group impact human rights of workers in North America?

3.1 After entering the United States school bus and transit market in 1998 it had become clear from 2001 reports gathered from Racine, Milwaukee, Hayward, Livermore and St. Louis that National Express Corporation’s subsidiary Durham School Services was blocking workers’ rights to unionize. Workers’ progress toward workplace representation was hampered by anti-union tactics during organizing drives. When workers voted to join a union, the company retaliated by protracting first contract bargaining, encouraging workers to decertify the union and insisting on contract language that diminished union administration.

3.2 Anti-union companies in North America, like National Express Corporation, employ tactics designed to “chill” workers rights, when they seek to form a union using a structured and legalistic system that often fails to protect workers basic human rights and lacks protection to deter anti-union behaviour in a timely manner. Workers at National Express subsidiaries face a “triple-jeopardy” involving signing authorization cards to apply for a secret ballot election; the election campaign itself and finally bargaining a first contract that grants collective representation in the workplace. At every stage National Express management is afforded ample opportunity to delay the process and to run anti-union campaigns to harass and frighten workers, frustrating workers rights to form a union.

3.3 Anti-union tactics used by National Express Corporation subsidiaries involve holding mandatory “captive audience” meetings where workers are forced to watch corporate anti-union DVD’s and carefully scripted speeches, often orchestrated by professional “union busters”. The constant recurring themes include joining a union and entering into collective bargaining is futile, strikes are inevitable and strikers can be permanently replaced, unions are corrupt, lie and are only interested in collecting dues and locations might be closed if a union is voted in.

3.4 This climate of fear is reinforced through “one-on-one” conversations between supervisors and workers and in company produced literature circulated before the election. Fear remains a constant norm — fear of retaliation for supporting the union, fear of losing jobs if a union is voted in, fear of losing existing pay and benefits as a result of collective bargaining, fear of union strikes, corruption and coercion, fear of conflict in the workplace and fear of change. As an ultimate deterrent to other workers, union supporters are sometimes fired to derail support for the union.

3.5 Professor John Logan from the London School of Economics states “*Under the American system of union recognition, fear is the number one deterrent that employers....exploit in their aggressive efforts to undermine employee support for unionization.*”⁴⁸

⁴⁷ Ruggie: Human Rights Council, Eighth session, Agenda item 3. 2008

⁴⁸ Compa, Logan & Feinstein: FirstGroup’s Neutrality Policy: Failed Implementation. 2007

3.6 “Drive Up Standards” experience is that National Express Corporation subsidiaries uses these tactics during the election process which is often a prolonged, stressful experience for workers. Durham workers in Racine voted 2001 to not form a union following a vicious antiunion campaign waged by management. Driver Debbie Christensen, admitted that she was “*worried for her job during the union organizing campaign and had been told that her contract did not allow her to join a union.*”⁴⁹ The Teamsters filed objections to the NLRB and not until two years later did Durham agree to a settlement setting the election result aside and arranging a new ballot. The company settled eleven NLRB charges concerning harassment, intimidation, surveillance and coercion of workers during the election and agreed to pay \$25,000 to five workers who had been fired and disciplined for their union support.⁵⁰

3.7 If workers are strong enough to overcome the violation of their rights to form a union then National Express Corporation often stalls the next step by failing to bargain in good faith and in a timely manner for the first contract.

3.8 For example, in St. Louis, Durham drivers voted to join the Teamsters union in 2001. The company stalled contract negotiations⁵¹ and later unilaterally imposed a contract⁵² and supported efforts to try and get rid of the union through a decertification petition and firing a worker for protected union activities.⁵³ Finally, in June 2004, after more than three years without reaching a contract agreement, the school district awarded the work to another provider.⁵⁴

3.9 National Express Corporation subsidiaries flout worker human rights even where a public authority attempts to promote labour harmony. Durham gained a contract in Seattle and in a 2005 effort to promote labour peace, Seattle School District introduced a requirement for bus contractors to recognize a union if 75% of workers signed a card authorizing the union to act as their representative. Rather than positively react to this initiative, Durham refused to agree and chose to walk away from a contract valued at more than \$5 million per year.⁵⁵

3.10 National Express Corporation continues to violate workers human rights today. Carpentersville workers filed an unfair labour practice complaint with the NLRB in 2007, which was upheld. The company was instructed to bargain with the union but refused to, according to the NLRB Regional Director. In May 2008 the company was ordered to negotiate and a date was set for an election.⁵⁶ As in earlier campaigns, Durham management subjected the workers to their usual tactics, holding captive audience meetings where a corporate DVD warned of the “risks” involved with collective bargaining, that the union was “a big business that only wanted their dues” and ended “*Now that you know the essentials about the Teamsters vote NO.*”⁵⁷

3.11 UK Government guidance relies in part on former DTI guidelines concentrating on Corporate Social Responsibility (CSR) seeking to promote awareness and best practice by improving existing processes. When National Express and others, however, refuse to consider partnerships with “employees and their representatives” as suggested, then government guidance is destined to fail. OECD guidelines on human rights issues lack specificity and lag behind many current voluntary standards already in place. As Ruggie notes in his report, “*On the contrary, the less governments do, the more they increase reputational and other risks to business.*”⁵⁸

The responsibility of businesses to respect human rights

4.1 The Committee’s Call for Evidence notes some services previously provided by public bodies are now provided by private companies, and though bus services in Britain, outside London, are deregulated, National Express still receives public subsidy for socially provided services and those operated for Transport for London. Further taxpayer monies are provided for pensioners’ free travel and the Bus Service Operators Grant totalling £413 million in 2008, part of the government’s subsidy to the bus industry of £2.485 billion. In North America in 2008 National Express earned £372.5 million from school bus contracts funded by tax dollars from local, state and federal subsidies.

4.2 Such reliance on public monies (and by providing former public services) places a greater responsibility on companies like National Express to comply with “national laws” and to reduce the risk of human rights harm with a view to eliminating it completely, without regard to whether they are operating outside of their home State or the size of the company.

⁴⁹ Media story, “Drivers ask for fair union election” by Brent Killackey, 4 November 2003

⁵⁰ National Labor Relations Board: Settlement Agreement cases 30-CA—1SS46.1, 30-CA15687-1, 30-CA-15690-1,30-CA-15701-1,30-CA.15857-1,30.CA-15863-1,30.CA-15864-1,30-CA.15891-1,30.CA-15948-1,30-CA.16450-1,30-A16595,30.RC-6310

⁵¹ Durham School Services document: “The Michigan Avenue Story”

⁵² Constangy, Brooks & Smith LLC: Letter to Mr. Rich Piglowski, Teamsters Local 610, dated 31 July 2002

⁵³ National Labor Relations Board: Case #14-CA-26801

⁵⁴ Durham School Services document: “The Michigan Avenue Story”

⁵⁵ Durham School Services President & CEO John Elliott: Memo to all Durham School Services Employees at Seattle CSC

⁵⁶ Daily Herald: “District 300 bus drivers to vote on union” by Jameel Naqvi, 13 May 2008.

⁵⁷ Durham School Services, Hampshire Yard, Elgin IL.: Captive audience meeting held January 2009

⁵⁸ Ruggie: Human Rights Council, Eighth session, Agenda item 3. 2008

4.3 Ruggie suggests “due diligence” as an example of good practice and which exists, as a starting point, in North America at the largest school bus operator, UK-based FirstGroup plc. After raising human rights issues with FirstGroup, the company introduced, albeit unilaterally, a Compliance Monitoring Programme for its North American subsidiaries in January 2008. This comprises a Freedom of Association Policy and an Independent Monitoring system. The Policy states FirstGroup supports human rights including the employee’s rights to associate with a union without influence and interference from management, who will not act in any way that could reasonably be perceived as anti-union. Workers and unions can report violations of the policy to the Independent Monitor, who if necessary suggests remedies to redress the situation.

4.4 The introduction of this policy has witnessed a sizeable reduction in human rights violations and a surge in the number of FirstGroup workers voting to join a union. As Ruggie states “Companies should identify and address grievances early, before they escalate. An effective grievance mechanism is part of the corporate responsibility to respect.”⁵⁹

4.5 As to whether the current economic climate should affect the relationship between business and human rights, Compa makes this point “For a human rights analysis, it makes no difference whether a corporate violator’s conduct helps or hurts its ‘bottom line.’ Human rights violations are unacceptable in and of themselves, without regard to profit or loss. Still, a recurring pattern of worker’s rights violations can have significant collateral effects on a firm’s business interests.”⁶⁰

Effective access to remedies

5.1 “Drive Up Standards” recommends that States play a greater role in protecting the human rights of multinational companies’ employees, wherever those workers reside and regardless of whether that is in the world’s strongest economies or underdeveloped nations. Government judicial and business grievance mechanisms will have little impact on human right abuses unless there is the ability to investigate, punish and redress abuses inflicted by bad corporate actors.

5.2 Perhaps one such remedy for companies like National Express, which provide services previously carried out by public entities and receive considerable amounts of revenue from the public purse, would be to have their human rights records taken into account when awarding rail franchises, bus quality contracts, school bus contracts or procurement agreements by central or local government or their agencies. Companies that refuse to submit to this test and that continue to allow anti-union behaviour to be waged against their employees should be debarred from the bidding process.

5.3 One of the greatest forces in upholding human rights and exposing abuses is the international trade union movement and that interaction would not be possible without enforcing the basic rights of workers to freely associate and form unions to collectively bargain without undue interference from employers.

5.4 “Drive Up Standards” is grateful for the opportunity to make this submission and is willing to attend any oral evidence sessions should it be necessary.

Memorandum submitted by the World Development Movement

1. INTRODUCTION

1. The World Development Movement (WDM) campaigns to tackle the root causes of poverty. With our partners around the world, we win positive change for the world’s poorest people. We believe that charity is not enough. We lobby governments and companies to change policies that keep people poor. WDM is a democratic membership organisation of 15,000 individuals and 70 local groups.

2. We welcome the Joint Committee on Human Rights decision to hold an inquiry business and human rights. The terms of reference for the inquiry raise many issues of importance. This consultation response focuses on the specific case of the proposed Phulbari open-cast coal mine project in Bangladesh, by UK company Global Coal Management Resources (GCM). We believe that this case highlights the need for an independent body to be established on a permanent basis to review and adjudicate on the human rights impacts of British corporations overseas.

2. THE PHULBARI OPEN-CAST COAL MINE IN BANGLADESH

3. The following example of the Phulbari open-cast coal mine in Bangladesh acts as an example of how the actions of a UK company can negatively impact upon the human rights of individuals within a host country. It also shows that there needs to be greater regulation of corporate activity by the UK government, rather than the government acting purely on behalf of UK business.

4. UK company Global Coal Management Resources (GCM) is seeking to develop an open-cast coal mine in Phulbari, north-west Bangladesh. If built the mine would take away the land of more than 40,000 people.¹ GCM’s resettlement plan says cash compensation would be given to the legal holders of land and houses, and other agricultural land users and sharecroppers would receive livelihood restoration grants

⁵⁹ Ibid.

⁶⁰ Compa: Freedom of Association and Workers Rights Violations at First Student, Inc. 2006

for just two years.² It is not clear how resettling affected families on land of equivalent size and quality can be achieved without adversely impacting on other agricultural communities. GCM's resettlement plan states; *"the project will not directly acquire replacement cultivation land for displaced households, because this will simply transfer the impacts associated with the loss of land to households in host communities"*.³

5. Bangladesh is already one of the most densely populated countries in the world,⁴ with huge pressures on land. Rising sea-levels and increased flooding from climate change are and will make good quality land even scarcer. Atiq Rahman from the Bangladesh Centre for Advanced Studies, a lead author from the Intergovernmental Panel on Climate Change, has said that 35 million people could be displaced from Bangladesh coastal areas by 2050.⁵ In the face of climate change, it would be disastrous for local people to be displaced from the good quality land in Phulbari.

6. The Phulbari mine will be dewatered to its base. The Expert Committee report on the proposed mine, commissioned by the Bangladesh Government, estimates that the dewatering and relocation means the mine would affect a total of 220,000 people.⁶ The Expert Committee report also raises the likelihood that the mine would lead to acid mine drainage affecting water supplies and agriculture for large surrounding areas, and there are fears that the mine could lead to arsenic and other toxins being released into water supplies.

7. In August 2006, tens of thousands of people protested in the area against the mine and Asia Energy. Five people were killed after Bangladesh government troops opened-fire on the protest. The Expert Committee says there is a *"high risk of social unrest and conflict"* if the relocation of thousands of people is attempted, and: *"The majority of the local community with whom the Committee exchanged views was against the Phulbari coal project."*⁷ Forty-two community leaders from the Phulbari area have said: *"we believe that this project will increase the poverty of the local population as well as cause environmental disaster."*⁸

8. Under the Emergency Power Rules, declared by the military backed interim government on 11 January 2007, all major civil rights were suspended. Movement into and out of Phulbari has been restricted and there are regular reports about the inability of people within the project area to congregate or voice their opinions freely without repression.

9. The World Organisation against Torture (OMCT) is concerned that police and security forces may again employ violence to deal with public opposition to the Phulbari project.⁹ Over the past two years instances of public torture and death threats against project critics have been reported.¹⁰

10. Since the start of 2008, the Asian Development Bank, Barclays and RBS have all withdrawn from investing in the project. However, in a parliamentary answer in April 2008, Gareth Thomas, UK Minister for International Development and Minister for Business stated:

11. *"We have provided support to Global Coal Management Resources PLC, through the British high commission in Dhaka. They have lobbied to ensure that the Government of Bangladesh take the company's interests into consideration and do not prohibit opencast mining. The British high commission will continue to remain in touch with the company and will represent their interests as appropriate. The Bangladeshi Caretaker Government's new draft coal policy leaves the way open for opencast mining in Bangladesh in the future."*¹¹

12. In a further parliamentary answer Gareth Thomas stated: *"BERR officials have held regular discussions with officials from the Department for International Development on this subject, both in the UK and the British high commission in Dhaka."*¹²

13. However, in an email to WDM, Bo Sundstrom, Head of Corporate Business for DfID in Bangladesh said: *"DfID has not looked into the proposed Phulbari coal mine issues in detail, since other development partners such as the ADB and the World Bank lead on energy issues in supporting the Government of Bangladesh."*¹³ It is worth noting that the Asian Development Bank cancelled its proposed project to fund GCM and the Phulbari mine in April 2008; the World Bank does not appear to have shown interest in funding the project.

14. Furthermore, in response to a freedom of information request from the World Development Movement, DfID said that it: *"does not hold any information about the discussions"*¹⁴ between BERR and DfID officials about the Phulbari mine, whether in the UK or Bangladesh. BERR have also told us that *"No formal meetings have taken place between DfID and BERR on this subject."*¹⁵

15. The Phulbari case raises two key issues:

- A British company is pursuing a project overseas with large human rights implications and no scrutiny by authorities in the UK.
- Moreover, the UK government has been lobbying in Bangladesh for the mine to go ahead, even though it has not investigated the implications of the mine for local people.

16. We believe that this case highlights the need for an independent body to be established on a permanent basis to review and adjudicate on the human rights impacts of British corporations overseas.

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- ⁴ The average population density is 1,042 people per square km, compared to 246 people per square km in the UK. Around Phulbari, an agricultural area, the population density is still 711 people per square km.
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Memorandum submitted by ActionAid UK

INTRODUCTION

1. This document represents ActionAid's views on the role of the UK government in relation to business and human rights. It has been produced as a submission to the Joint Committee on Human Rights' inquiry into business and human rights.

2. ActionAid is an international development agency whose aim is to fight poverty worldwide. Formed in 1972, we work with local partners to fight poverty and injustice in 42 countries worldwide. We help the most vulnerable people fight for and gain their rights to food, shelter, work, education, healthcare and a voice in the decisions that affect their lives.

3. ActionAid has significant experience in the field of business and human rights. We have researched and presented evidence of numerous examples of violations of poor people's rights overseas by UK based companies or their subsidiaries.

4. As a member of the Corporate Responsibility Coalition (CORE), ActionAid played a key role in campaigning for a strengthening of reporting requirements and changes in directors' duties as part of amendments to the Companies Act, which now oblige company directors to report on social and environmental concerns. ActionAid has also worked alongside other NGOs to make submissions to the UN Special Representative on human rights and transnational corporations and other business enterprises' mandate.

5. ActionAid welcomes the Joint Committee on Human Rights' inquiry into business and human rights and supports its use of Professor Ruggie's framework of protect, respect and remedy to structure its discussion. We will submit evidence under these three headings to address some of the questions posed by the committee, drawing significantly on an ActionAid case study of UK business involvement in human rights abuse overseas.

6. ActionAid has recently documented that a subsidiary of UK-listed mining company Vedanta Resources plc's (thereafter Vedanta) has violated or been complicit in the violation of various rights of local people through the establishment of a bauxite processing plant and proposed bauxite mine in Orissa, India. Rights violations include the right to life and personal liberty and religious rights codified under various national and international agreements.

7. The key points of this paper will be that:

- the UK government is lagging behind the debate on business and human rights. It continues to place too much emphasis on voluntary approaches which makes its overall approach to business and human rights incoherent and weak;
- corporate social responsibility (CSR) is no substitute for business's responsibility to respect human rights. Indeed, CSR often masks businesses' involvement in human rights violations;
- current remedies, both in home and host states, are inadequate and those seeking redress often face significant barriers in accessing them; and
- the UK Government should establish a Commission on Business, Human Rights and Environment as an important step to tackling some of these issues.

STATE DUTY TO PROTECT

8. In his 2008 report to the United Nations Human Rights Council (UNHRC), Professor John Ruggie outlined the importance of the State duty to protect human rights, including preventing abuses by third parties such as business. He highlighted that this duty can and should extend beyond a state's own borders to prevent human rights abuses abroad, particularly those perpetrated by companies based in its own territory⁶¹.

9. ActionAid strongly supports this idea. UK business is spread across every continent and affects the lives of millions through its operations, investments and trade. Much of this takes place in host countries whose state mechanisms are inadequate to protect their own citizens for a variety of reasons including conflict, weak judicial systems, corruption and discrimination. ActionAid has observed many instances of this. For example, in Orissa, India, discrimination against indigenous peoples and a pro-business bias within state apparatus has prevented local communities from seeking adequate redress for human rights abuses committed by mining company Vedanta. More detail will be given of this under the heading Access to remedies later in the discussion.

10. Professor Ruggie's report highlights the current failure of states to fulfil their duty to protect with respect to business and human rights including, "how to foster a corporate culture respectful of human rights at home and abroad"⁶². He states that introducing policies to remedy this "should be viewed as an urgent policy priority for governments"⁶³. ActionAid believes that this is particularly true of the UK.

11. The UK government's strategy for ensuring that businesses respect human rights is currently incoherent and weak. Its emphasis lies in minimum standards and voluntary codes and responsibility even for these measures is split amongst different departments causing confusion and a lack of concerted effort. It fails to recognise that CSR can only work if underpinned by a strong regulatory framework.

12. In a recent report the government highlights the importance of 'corporate responsibility' but defines this as "the voluntary actions that business can take, over and above minimum legal requirements..."⁶⁴, and goes on to outline its strategy for achieving corporate responsibility as being "to create a policy framework with minimum levels of performance in the fields of health, environmental impact and employment practices..." [author's emphasis].⁶⁵ It uses soft language with regards to its relationship to business, saying it wants to "encourage" business to recognise the value of corporate responsibility and "to reach out" to those that don't.⁶⁶

13. This reliance on minimum standards and voluntarism is of deep concern to ActionAid. Voluntary initiatives have a limited scope in terms of the rights they include and the sectors they cover and many "laggard" companies choose not to join any voluntary initiative. For example, the leading supermarket chain Morrisons has not joined the Ethical Trading Initiative,⁶⁷ a multi-stakeholder scheme championed by the government.⁶⁸ Due to their voluntary nature such initiatives typically fail to ensure that the principles which they advocate are upheld in practice; even the more robust multi-stakeholder initiatives fall short of what is needed to ensure compliance. Standards are inconsistent across initiatives and do not require all companies to respect all human rights but allow companies to "opt in" to standards which are convenient and allow them to "opt-out" of those that aren't. This contradicts the concept of human rights as being inalienable, leaving it up to business to decide which human rights to uphold and when.

14. ActionAid is also concerned that the government's current approach for progressing the corporate responsibility agenda lies between different departments. The minister responsible for corporate responsibility (amongst other briefs) straddles BERR and the Treasury, whilst many of the governments' relationships with numerous voluntary initiatives are managed by an array of other government

⁶¹ UNHRC "Protect, respect and Remedy: a Framework for Business and Human Rights" 2008 p7

⁶² *ibid.* p9

⁶³ *ibid.* p9

⁶⁴ HM Government "Corporate Responsibility Report" 2009 p5

⁶⁵ *ibid.* p5

⁶⁶ *Ibid.* p5

⁶⁷ The Independent *Global brands learn to mind gap in public mood on ethical trade* 20th May 2005

⁶⁸ HM Government *op. cit.* p14

departments.⁶⁹ Responsibility for the National Contact Point (NCP) for the OECD's guidelines on Multinational Enterprises is split between BERR, DFID and the FCO. These splits demonstrate a lack of coherence in the government's approach to business and human rights and fail to task a single institution with responsibility for the issue.

15. Given the progression of the business and human rights agenda at the UN, which now goes beyond the limiting dichotomy of voluntary vs regulatory, the UK government's continued reliance on voluntary measures shows it to be lagging behind the debate. In looking to promote only minimum standards the government's strategy lacks ambition and its emphasis on "encouraging" voluntary corporate responsibility fails to meet its State duty to protect. The UK government should remedy this by introducing a regulatory framework which ensures social and environmental best practice and enforces businesses' responsibility to respect human rights.

THE CORPORATE RESPONSIBILITY TO RESPECT

16. Whilst not being successful in ensuring that business respects human rights, the widespread existence of voluntary business initiatives and company CSR schemes demonstrates that the principle that business should respect human rights is universally accepted. However, time and again a commitment to human rights by companies does not translate to human rights being respected in practice.

17. ActionAid has been monitoring the activities of one UK registered company, Vedanta, particularly its operations in the state of Orissa in India. On paper Vedanta clearly recognises the importance of corporate responsibility and accepts that it should respect human rights. It is a member of the UN Global Compact and the company's website has a large section devoted to 'sustainable development'.⁷⁰ Its eighty page Sustainable Development Report states that "All of our companies have a policy of adhering to applicable local human rights legislation."⁷¹

18. However ActionAid has found that, contrary to these stated policies, Vedanta's operations in Orissa have significantly breached the human rights of local communities, illustrating the shortcomings of self regulation as means of policing corporate behaviour. Indeed Vedanta's construction of an integrated aluminium complex in the region has led to accusations of several human rights violations including:

- the razing and displacement of indigenous villages in violation of internationally recognised rights to property and livelihood;
- the proposed construction of a mine on Niyamgiri mountain which is protected and considered sacred by the Kondh tribal people thereby violating communal, cultural and religious rights;
- environmental pollution in the form of caustic soda emissions from the Lanjigarh refinery. People locally have complained of breathing difficulties and skin complaints as well as damage to crops and livestock, again impacting on their rights to livelihood as well as health; and
- that the company has been complicit with local hired security in forcibly removing those who resisted evictions.⁷²

19. Vedanta denies these allegations and instead highlights the 'sustainable development programmes' it has brought to the area, including new housing, health and medical facilities. However, the rehabilitation package for displaced villagers is ill suited to the sustainable livelihood of local communities. There is no provision made, for example, for animal grazing or agriculture—the Kondh people's primary means of sustaining their livelihood.⁷³

20. This highlights a common problem with the CSR model within business: the notion that community development initiatives can be seen as alternatives to corporate accountability and respecting legally-enshrined human rights. Human rights are inalienable, indivisible and non-exchangeable and the violation of them cannot be excused by the donation of an alternative and often unsolicited benefit.

ACCESS TO REMEDIES

21. The case of Vedanta's operations in India also highlights current significant problems faced by victims of human rights abuses by UK companies, in terms of accessing effective remedies and redress. The CORE Coalition, of which ActionAid is a member, recently worked with the London School of Economics to look at the issue of redress. The report *The Reality of Rights*⁷⁴ found that in terms of seeking redress from Vedanta, the indigenous peoples of Orissa have found all existing judicial and non-judicial channels inadequate. All despite the fact that the human rights which have been breached are codified in either Indian law or international treaty ratified by India.

⁶⁹ E.g. The UK's involvement with the ILO is managed by DWP, DFID provides support for the Ethical Trading Initiative and the FCO has helped established initiatives such as the Voluntary Principles on Security and Human Rights in the Extractive Industries.

⁷⁰ <http://www.vedantaresources.com/sustainable-development.aspx>

⁷¹ Vedanta "Sustainable Development Report 2008: Enduring Value Through Values" 2008 p38

⁷² ActionAid *Vedanta Cares?: Busting the myths about Vedanta's operation in Lanjigarh, India* 2007 p9

⁷³ Central Empowered Committee (CEC) 2005: Report in IA no. 1324 regarding the alumina refinery plant being set up by m/s Vedanta Alumina Limited at Lanjigarh in Kalahandi district, Orissa, 21.09.05, section 7 (iii)

⁷⁴ LSE and CORE *The Reality of Rights: Barriers to accessing remedies when business operates beyond borders* 2009

22. Within India, indigenous families affected by the refinery have attempted to use political channels of redress including public protest and lobbying of local politicians only to find local officials and police to be predominantly aligned to the company. Petitions to the Indian Prime Minister and Orissa state government have similarly failed due to State support for mining and the potential financial benefits to the State from the mine.

23. Other non-judicial avenues within India have also failed or would not have led to effective redress. The country does have a National Human Rights Commission, for example, but it has very weak legal powers and is not able to enforce any recommendations.⁷⁵

24. Despite the existence of a human rights framework in India in the form of the Indian Constitution and a Supreme Court, attempts at judicial redress by affected communities have also proved unsuccessful thus far. As is often true in cases of marginalised communities attempting to seek judicial redress, complainants faced financial and educational barriers to a costly and complicated process. Nonetheless three complaints were made to the Supreme Court on behalf of affected communities by Indian human rights and environmental organisations. However, the process is lengthy, making it hard for claimants to resource the claims and the court has failed to make decisive recommendations which would prevent further human rights abuses, namely by ordering a cessation of Vedanta's activities in Niyamgiri.

25. One case was brought before the Supreme Court in 2005, accusing Vedanta of violating environmental guidelines for both the refinery and the proposed mine and for deliberately and consciously concealing the inclusion of forest land in the project. In 2007 the court made an interim ruling refusing Vedanta permission to mine bauxite, however Vedanta was allowed to reapply for permission to mine through another of its subsidiaries, Sterlite. In August 2008, despite its previous ruling, the Supreme Court granted permission for the building of the mine by Sterlite in a joint venture with the Orissa State government (Orissa Mining Corporation) and for the refinery to continue to operate.

26. The case of Vedanta in Orissa strongly demonstrates common failures in host states' duty to protect their citizens' human rights and the barriers that exist within host states for adequate redress for victims of human rights abuses. Further examples can be found in CORE's report *The Reality of Rights*.

27. This Vedanta example also shows the inadequacy of existing international and home state mechanisms for redress. Many business organisations and governments point to the OECD Guidelines on Multinational Enterprises as holding the potential to fill the 'governance gaps' which Professor Ruggie has highlighted. However the guidelines are excessively vague and National Contact Points (NCP) only have partial investigative powers and no power to remedy. Although a complaint has now been filed to the UK NCP, it is not expected that it will lead to a satisfactory remedy of human rights violations, in this case, through the cessation of mining and refining activities in the area.

28. In the case of Vedanta there are also currently significant barriers to seeking redress through the UK courts:

- any claim would most likely be unsuccessful because of technical difficulties in proving the UK parent company's legal responsibility for its subsidiary's activities;
- the process would be prohibitively costly and complicated for claimants; and
- a UK court would only be able to order the company to pay damages to the victims, a resolution which, in the case of the Orissan communities affected by Vedanta, is not the desired outcome.

A COMMISSION FOR BUSINESS HUMAN RIGHTS AND THE ENVIRONMENT

29. As John Ruggie has stated, there is "no single silver bullet"⁷⁶ to solve the current institutional problems relating to business and human rights. However this does not mean that ambitious solutions should not be sought. Whilst some of these might be found at an international level, state governments, especially those of economically powerful home states have a duty to put in place the best possible mechanisms to ensure the protection of human rights by business, whether operating at home or abroad.

30. ActionAid, along with partners in the CORE Coalition, favours the establishment of a Commission for Business and Human Rights and Environment within the UK. Such a Commission, if established with a strong mandate and effective powers, could help remedy many of the gaps in the current business and human rights framework highlighted in this submission. The Commission could act as a centre for business and human rights to promote best practice and investigate claims of corporate abuse. Unlike current investigative bodies, it could also settle disputes between companies and alleged victims of human rights abuse and most importantly offer remedies, including financial settlements and the power to order companies to alter their behaviour. A well-functioning Commission would:

- provide a unified body to devise and implement business and human rights policy to ensure coherence and focus;
- provide regulatory standards that companies must universally meet, avoiding the short-comings of voluntarism;

⁷⁵ LSE and CORE op. cit. p28

⁷⁶ UNHRC op. cit. p4

- have powers and budget to thoroughly investigate claims of corporate abuse, including having the power to access company documents and witness statements;
- ensure parent companies' responsibility for the activities of subsidiaries and third parties over which the company has significant control or leverage;
- provide an affordable and accessible non-judicial mechanism for victims of corporate abuse to seek effective redress; and
- Make UK companies world leaders in doing business ethically.

30 April 2009

Supplementary memorandum submitted by Action Aid UK

THE COMPETITION COMMISSION'S GROCERIES OMBUDSMAN PROPOSAL: HOW UK LEGAL STANDARDS CAN PROTECT THE RIGHTS OF OVERSEAS FARM PRODUCERS AND WORKERS

Background

This note describes how the Competition Commission's proposal for a Groceries Ombudsman will allow overseas agricultural suppliers to enforce their rights under the Ombudsman scheme and resolve disputes in the UK.

It should be noted that the Ombudsman proposal offers only a partial solution to a specific problem—namely anti-competitive procurement practices—in a specific industry. It does not offer a comprehensive remedy for victims of human rights violations linked to the activities of UK companies operating in the agri-food industry or in other industries, and as such it does not detract from the need for a UK Commission for Business, Human Rights and the Environment, as advocated by the CORE Coalition.⁷⁷

However, the Ombudsman is a credible proposal that indicates how a body that allows people in developing countries to enforce their rights quickly, easily and inexpensively in the UK, without having to resort to court action, could work.

The Competition Commission groceries market inquiry

The Competition Commission (CC) completed a two-year investigation into the UK grocery market in April 2008. It found that UK grocery retailers consistently misuse their buying power by engaging in procurement practices that transfer “unexpected costs and excessive risks” to suppliers.⁷⁸

Some of the procurement practices found by the CC that are commonly used by retailers include:

- Reducing agreed prices after orders are delivered, even when suppliers have fulfilled their contractual obligations.
- Requiring payments from suppliers when the retailer's profits on a product were less than expected.
- Requiring payments from suppliers for product wastage that occurs in-store.
- Delaying payments to suppliers substantially beyond the agreed time (which can cause severe financial distress for suppliers).
- Refusing to give written terms to suppliers (allowing retailers to renege on contracts).⁷⁹

These practices were found to be widespread despite the existence of a voluntary code of practice, introduced in 2002, which was designed specifically to prevent the major grocery retailers from carrying out these harmful procurement practices.⁸⁰

The CC's inquiry also recognised that food processors who trade directly with retailers pass on these cost and risk pressures to indirect suppliers further up the supply chain, such as farmers.⁸¹

Furthermore, it is widely accepted by businesses, academics and civil society organisations that excessive cost and risk pressures are passed on to suppliers' employees in the form of low wages, excessive hours, insecure employment and inadequate health and safety standards.⁸²

⁷⁷ MacDonald, K (2009) *The reality of rights: barriers to accessing remedies when business operates beyond borders*, London: CORE Coalition.

⁷⁸ Competition Commission (2008), Final Report, Groceries Market Investigation, para 3.

⁷⁹ Competition Commission (2008), Final Report, Groceries Market Investigation, Appendix 9.8.

⁸⁰ The Supermarkets Code of Practice.

⁸¹ Competition Commission (2008), Provisional Findings Report, para 44.

⁸² Ethical Trading Initiative (2007) *Purchasing practices: case studies to address impacts of purchasing practices on working conditions*, London: ETI; Insight Investment (2004) *Buying your way into trouble: the challenge of responsible supply chain management*, London: Insight Investment; Casey, R (2006) *Meaningful change: raising the bar in supply chain workplace standards*, Cambridge, MA: John F Kennedy School of Government.

Recognising that the voluntary approach to addressing the problem had failed, the CC will introduce a new, legally binding Groceries Supply Code of Practice (GSCOP) that bans or regulates a set of specific procurement practices. It also includes an overarching provision that requires “fair dealing” at all times, in order to prevent retailers from engaging in other damaging procurement practices that are not covered by the GSCOP.

The Groceries Ombudsman proposal

The CC believes that the GSCOP will not be effective without proactive monitoring and enforcement. This is because suppliers are extremely reluctant to bring forward complaints against retailers, for fear of damaging their commercial relationships with them.

In recognition of this, the CC recommended the creation of a Groceries Ombudsman to monitor and enforce the GSCOP. The CC proposes that the Ombudsman will:

- Receive complaints relating to alleged breaches of the GSCOP from suppliers, including indirect suppliers such as farmers, and other third parties such as trade associations.
- Investigate *bona fide* complaints regarding alleged breaches of the GSCOP.
- If necessary, withhold from retailers the identity of suppliers who submit complaints.
- If an investigation finds breaches of the GSCOP, issue directions to retailers to comply, which are ultimately enforceable in the courts under the Competition Act.
- Require retailers to provide information needed to monitor compliance with the GSCOP.
- Arbitrate formal dispute cases relating to alleged breaches of the GSCOP brought by direct suppliers who are willing to be identified.
- Require retailers to pay compensation to direct suppliers who win formal dispute cases.

How the Ombudsman would protect overseas suppliers and workers

UK grocery retailers procure huge volumes of goods from overseas, and research shows excessive cost and risk pressures are transferred to suppliers and their employees in developing countries.⁸³

Because the Ombudsman would enforce a set of standards that only UK companies (rather than overseas suppliers) are obliged to comply with, it does not infringe the principle of territorial sovereignty.⁸⁴

If an overseas supplier, including an indirect supplier such as a farmer, believes they have suffered a breach of the GSCOP, they would be able to submit a complaint to the Ombudsman. If the complaint had merit, the Ombudsman could initiate an investigation and if a breach of the GSCOP was found, it could issue directions to retailers to discontinue or change the practice that harmed the overseas complainant.

The Ombudsman could also award compensation to direct suppliers based outside the UK who win formal dispute cases, although there are relatively few overseas suppliers that trade with UK retailers directly.

The Ombudsman is not designed to protect agricultural workers, and the benefits for them would be indirect. However they would also be significant, as the GSCOP covers procurement practices such as:

- Last minute changes to orders, which can result in employees being forced to work excessively long hours or laid off without notice.
- Delayed payments, retrospective reductions in price and other unexpected cost pressures that can cause financial distress for suppliers and lead to lower health and safety standards, pay cuts and job losses.

Establishing the Ombudsman

The CC has the power to introduce the GSCOP, but not the Ombudsman. As a result, the CC sought to obtain undertakings from retailers that would give it permission to establish an Ombudsman. However, the “Big Four” retailers—Tesco, Asda, Sainsbury’s and Morrisons—as well as the Co-op, have refused to sign undertakings.

This means the CC will recommend to the Department for Business, Innovation and Skills that it takes the necessary steps—including the creation of primary legislation—to establish the Ombudsman scheme.

July 2009

⁸³ Ethical Trading Initiative (2007); Insight Investment (2004); Casey, R (2006) *op cit.*

⁸⁴ Legal advice provided to ActionAid by Jon Turner QC, Monckton Chambers.

Memorandum submitted by Richard Hermer QC and Rachel Chambers

INTRODUCTION

These submissions are premised upon the following simple but fundamental principles:

- Those who commit, or are complicit in, human rights abuses must be held accountable.
- The victims of such abuses should be afforded practical and effective means of redress.
- The above principles should not be dependent upon the status or the legal personality of the Defendant. It should be irrelevant whether those who commit, or are complicit in, human rights abuses are individuals, governments or corporations.
- It should be the responsibility of government to ensure that practical effect is given to the realisation of these principles.

These submissions are also based upon the following facts:

- That human rights law and its concomitant enforcement mechanisms are at present primarily addressed to the responsibility of nation-states, an understandable fact in light of the events of history from which they were borne, but one that fails to reflect the complexity of the modern world.
- That Multi-National Corporations (“MNCs”) have been identified in many cases as committing or being complicit in human rights abuses across the globe.
- That existing international human rights law is currently ill-equipped to deal with this phenomena.
- That the various voluntary agreements brokered by the UN and the OECD, amongst others, do not provide adequate enforceable mechanisms for accountability and redress.

As will be seen from the short biographies attached, the authors are able to assist the Committee with analysis as to the effectiveness of “regulatory” mechanisms, in particular experience of the OECD Guidelines in both the United Kingdom and Australia. This submission focuses in the main however upon the availability of remedies in tort law. In the absence of either national legislation providing enforceable mechanisms for justice, or international frameworks that meet the same aims, domestic tort law presently provides the most suitable and effective framework for accountability and redress against MNCs with links to the UK.

Accordingly, this submission will address questions seven and eight from the Committee’s Call for Evidence. In respect of number seven it will focus on the existing legal and regulatory framework and identify obstacles to seeking and obtaining an appropriate remedy within this framework. The obstacles will be divided into two categories: legal and practical. The particular problems faced by individuals from other jurisdictions who have no local options for seeking remedy and therefore must turn to the UK Courts will be highlighted within both categories. The submission will go on to address question 8 using the same sub-headings as those under question 7.

Question 7: Does the existing legal, regulatory and voluntary framework provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?

Tort law is an imperfect vehicle for ensuring accountability and redress for victims of human rights abuses. As set out below, our common law system has yet to develop a clear body of jurisprudence that addresses many of the major issues that are capable of arising in litigation of this nature. A series of cases brought over the past few years has demonstrated that it can provide, in certain circumstances, effective remedies for victims. Further law reform is however required.

LEGAL OBSTACLES*Cause of action*

The causes of action used in human rights cases are generally torts relating to trespass to the person such as battery, assault, false imprisonment and torture; the tort of intimidation; the tort of negligence; or breach of contract. These torts are well established in the common law. A difficulty arises however if an associate of the UK business such as a supplier or partner commits the trespass rather than the business itself. In this scenario the UK business may be found to be negligent, if for example it has failed to observe health and safety precautions, or it might be found to have acted deliberately by procuring the tort; conspiring to injure the individual or through agency or vicarious liability. These are developing areas of law and the exact requirements to prove the necessary connection between the business and its associate have yet to be established by the Courts.

Another obstacle arises when the associate that commits the trespass is a subsidiary. The difficulty in holding a parent company liable in this (common) scenario is that corporations are legally distinct from their shareholders. Thus a “corporate veil” exists which establishes a separate juridical personality for each corporation and protects shareholders (including corporate shareholders such as the parent company) from liability for corporate activities beyond the extent of their investment. The Courts have shown themselves unwilling to lift the corporate veil in order to prevent parent companies taking advantage of limited liability

in relation to tort liability, although some exceptions to the principle have been established. In practice thus far the most common means of establishing liability of the parent company is through direct liability. This involves showing that the parent is so directly involved in the acts leading to the legal claim as a contracting party or a joint tortfeasor, that it is directly liable for them. This approach shares the legal uncertainties described in the paragraph above. The position is even more complicated in circumstances in which the UK business is merely a shareholder in a relevant company.

The Courts have yet to assess whether Article 6 of the European Convention on Human Rights will materially impact upon the ability of the “corporate veil” to protect parent companies against actions premised on the acts of their subsidiaries. Much will depend in this respect on whether the concept is deemed to be a procedural or a substantive bar to access to the Court (only the former is capable of engaging Article 6).

Choice of laws—substantive law and damages

On 11 January 2009 EU regulation no. 864/2007 on the law applicable to non-contractual obligations (Rome II) became law in the UK. Article 15(c) provides that the assessment of compensation will be governed by the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred. This is significant given that the damages awarded on the UK scale will often be substantially more than those awarded under local scales, particularly those in developing nations. With respect to the law governing the substantive issues, the Private International Law (Miscellaneous Provisions) Act 1995 provides that the applicable law is that of the country in which the tort was committed. This can present individuals with difficulty if for example tort law is not well developed in that country or if an amnesty has been passed exempting violators from liability. Section 12 of the Act does however provide the UK Courts with a discretion to displace the general rule where they see fit and section 14 provides an exemption to the application of foreign laws when they would conflict with principles of public policy.

Limitation

The Foreign Limitation Periods Act 1984 provides that the law governing the substantive issues applies to the limitation period. There is an exception to this principle, based on public policy, where its application would result in undue hardship for a person who is or might be made a party to the proceedings. Assuming that UK law does apply, the limitation period for claims in negligence, nuisance or breach of duty where the damages claimed include personal injuries is three years. For simple breach of contract and tort claims the limitation period is six years (Limitation Act 1980). A discretion is conferred on the Courts to exclude the time limit in actions for personal injury or death where they consider it would be equitable to do so. Victims of human rights violations must first discover they may have legal recourse through the UK courts, and then face such difficulties as identifying lawyers and finding funds to cover costs. In these circumstances issuing proceedings within the limitation period is often a problem.

The presumption that the limitation period of the foreign jurisdiction applies has also been entrenched in Rome II in a manner which might well make it more difficult to apply the exception clauses.

Group/class action

Provision for such litigation allows a large number of individual Claimants to bring, before a single Court, similar claims against a Defendant company. This is relevant given that there are frequently multiple victims of human rights violations by MNCs. In ordinary proceedings where representative parties, as Claimants or Defendants, represent numerous persons having the same interest in the matter a Court may make a group litigation order (“GLO”).⁸⁵ This provides for the case management of claims which give rise to common or related issues of fact or law. Any judgment or order given on a GLO issue is binding upon other parties on the group register. The GLO is an “opt-in” system (Claimants must issue proceedings and then apply to join the group register in order to participate in a GLO), which contrasts with the “opt-out” systems of Australia, Canada and the United States (where all potential Claimants are presumed to participate). The GLO schema does not address various important issues associated with the conduct of group litigation, such as judicial approval of settlement agreements and limitation periods (these issues are covered in the “opt-out” system in Australia).

PRACTICAL OBSTACLES

Funding

Most cases of the type under consideration are excluded from public funding and must therefore be funded through a conditional fee agreement (“CFA”). There is an expectation that a prospective litigant entering into a CFA will, if they do not already have some form of insurance cover, take out after-the-event insurance to cover their potential liability for their opponent’s costs. There are several companies which offer this type of insurance; however it is a hurdle for any victim of a human rights violation by a UK business to find a willing insurer and the funds to pay the insurance premium. Individuals seeking to enter into a CFA must have sufficient prospects of success in the proposed litigation to make such an agreement financially

⁸⁵ Part 19 of the Civil Procedure Rules 1998.

viable for the legal representative. The prospects of success will inevitably be lower when there are jurisdictional difficulties in bringing the claim; when the cause of action is relatively new or untested; or when it is unclear who the Defendant is (local subsidiary or parent company). Such factors might all be present in a claim against UK businesses.

Lawyers willing to take on the cases

This is linked in a large part to the section above. Since cases are generally funded through CFAs, law firms must be in a position to take on the risk of losing and to afford the up-front costs of investigating the claim, commencing the litigation etc. In these circumstances such costs may well be substantial due to the fact that the individual Claimants live overseas and the law of the relevant jurisdiction must be investigated. At present claims against corporations have invariably been conducted on behalf of Claimants by Leigh Day & Co—few others have had the resources or commitment to undertake such work.

Action by UK businesses

There is usually an enormous disparity in resources available to the parties to litigation. Defendants are often able to deploy considerable funds to the litigation and utilise the services of libel lawyers and public relations firms to seek to control media coverage of the claims.

Question 8: *If changes are necessary, should these include: Judicial remedies (If so, are legislative changes necessary to create a cause of action, or to clarify that a cause of action exists; or to enable claims to proceed efficiently and in a manner that is fair to both Claimants and respondents).*

As stated above, the authors of this submission are in a position to assist the Committee in respect of the need for regulatory change both at the domestic and international levels. At this stage however the submissions are confined to tort law.

LEGAL OBSTACLES

Cause of action

In an area as important as this, there should be no room for uncertainty. Companies need to know what they are permitted to do and what is prohibited. They need to understand clearly what their obligations are in respect of subsidiaries and companies in which they are significant shareholders. Uncertainty prejudices business as well as victims.

There is a need to ensure that there is clarity as to the legal basis upon which a company can be liable in damages for its role in the “supply chain” and for the acts of its subsidiaries (and the basis of that liability) including the circumstances in which the corporate veil can be pierced. This cannot be left to the Courts to develop but should be addressed by Parliament. By way of example only, there could be a reversal of the burden of proof in certain cases so that the parent company with a controlling interest in a subsidiary would automatically be liable for negligence along with that subsidiary unless the parent can demonstrate it took all reasonable steps to prevent the damage or injury occurring.⁸⁶

Choice of laws—substantive law and damages

Legislative change would be difficult to effect given that this area of law derives from European Law. However the Courts need to be open to exercising the discretion afforded by the Private Law (Miscellaneous Provisions) Act 1995 in favour of individuals bringing human rights claims against UK businesses. As noted above, this discretion enables the judiciary to displace the general rule (that the applicable law is that of the country where the tort was committed) when it is clear that the law of the state in which the violation has occurred will not provide an appropriate remedy. One possible legislative change is that the “public policy” exception could be specified as being applicable where to apply a foreign law (instead of English law) would allow a Defendant to escape liability for serious human rights abuses.

The powers to displace the general rule on choice of law are also contained in Rome II and may therefore be used to determine the question of the applicable law on the assessment of damages. The same degree of clarity is required in respect of ensuring that Rome II does not apply foreign limitation periods in a manner that will unjustly “shut out” victims of human rights abuses.

Group/Class Actions

It is not suggested that the US model of “opt out” class actions would necessarily increase access to justice for victims nor be capable of being successfully transplanted into this jurisdiction. There are however elements of the US system that do offer some advantages. A more expansive approach to “representative actions”, flexibility in locus standi in private law claims and the use of anonymity for victims in carefully defined circumstances may well facilitate claims from countries in which victims are too remote or simply too frightened to fully participate in litigation.

⁸⁶ This option was proposed in the CORE Paper “Corporate Abuse in 2007: A discussion paper on what changes in the law need to happen” (written by Jennifer Zerk).

PRACTICAL OBSTACLES

Funding & Lawyers willing to take on the cases

Legislative change is required to expand the provision of public funding to cases against UK businesses brought by individuals from overseas, particularly less developed nations, for whom costs will be a prohibitive factor in their pursuit of remedy. This is to ensure not only that they may have access to justice through the UK Courts, but also that they will be able to find lawyers to represent them. Furthermore in cases in which after-the-event insurance is unavailable, consideration should be given to widening the Courts' jurisdiction to impose "Protective Costs Orders" so that they are available in suitable cases in which a Claimant has a private interest in the litigation.

Action by UK businesses

There is perhaps little that Parliament can do directly to curtail the ability of large corporations to seek to "defend their reputation" by deployment of often limitless funds. The excesses of such companies in the course of litigation should however be a matter of concern to the Courts and might for example be a basis for extending the availability of exemplary damages and/or a punitive element in costs awards when such methods have been used in an oppressive manner.

Richard Hermer QC is a specialist in international and human rights law. He has been instructed in many of the claims brought against MNCs in the domestic courts in recent years, including the Colombian case against BP and the pending case against Trafigura concerning the alleged dumping of toxic waste in the Ivory Coast. He is an external member of the Advisory Board to the UK's National Contact Point (OECD Guidelines). In 2000 he was appointed the first "Human Rights Practitioner in Residence" at Columbia University New York, where his research field was international human rights and corporate responsibility.

Rachel Chambers is a practicing barrister. In 2004 she was appointed Research Fellow at Monash University, Melbourne where she specialised in the accountability of corporations for human rights violations. Her publications include "*The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*" 13 No. 1 Hum. Rts. Brief 14 (2005); "*The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*" co-authored with Professor David Kinley Vol. 6 No. 3 Human Rights Law Review 447 (2006) and "*Human Rights Translated: A Business Reference Guide*" (2008) co-authored with Professor Sarah Joseph. Working with local NGOs she has issued a complaint under the OECD Guidelines in Australia.

Richard Hermer QC

Rachel Chambers

Memorandum submitted by Professor David Kinley, Chair in Human Rights Law, University of Sydney

MAKING POWER RESPONSIBLE: REGULATING THE RELATIONSHIP BETWEEN CORPORATIONS AND HUMAN RIGHTS⁸⁷

NOTE: This submission draws from Chapter 4 of a forthcoming book:

David Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (June 2009).

See www.cambridge.org/kinley for details.

As the key drivers of today's global economy, corporations have enormous capacity to create wealth, jobs and income; the taxes they pay finance public goods; the competition they generate accelerates innovation; they propagate the transfer of technological and intellectual know-how; and by way of the interdependency of their commercial operations they can contribute to the establishment and maintenance of domestic social and economic order, as well as international peace and stability.

Thus, there is no question that business and its evident attributes and outputs benefit human rights, but, not only can and should business do more, its abuses of human rights—inadvertent, by neglect or design—must be curtailed. As a matter of principle, these are non-negotiable precepts; as a matter of practice, much more needs to be done.

The problem of regulating the relationship between corporations and human rights has two facets: first, how to address corporate abuses of human rights, and secondly, how best to encourage corporate support for human rights. This submission addresses the relative merits of the legal and non-legal aspects of corporate regulation on human rights matters, and how the two aspects interrelate.

NON-LEGAL: CORPORATE SOCIAL RESPONSIBILITY (CSR)

CSR has increasingly gained purchase in the minds and actions of critics, commentators and corporate leaders alike. It has formed part of a "new governance", whereby large corporations now dedicate sizeable resources and executive effort towards building CSR into their business values or principles. There now exists a vast array of codes, principles, guidelines and standards to which corporations can sign up or have

⁸⁷ Odette Murray of the *Sydney Centre for International Law, Sydney University*, greatly assisted in the compilation of this submission.

their performance measured against.⁸⁸ These codes range across six main categories:⁸⁹ (i) model codes, developed by intergovernmental bodies (eg the UN Global Compact); (ii) intergovernmental codes, concluded between governments (eg the OECD's Guidelines for Multinational Enterprises); (iii) multi-stakeholder codes, which are negotiated agreements often involving corporations, labour representatives, NGOs and governments (eg the UK Government's Ethical Trading Initiative Base Code); (iv) industry codes, (nearly all major industries have such codes—for example, the Equator Principles for the banking sector); (v) company codes, which many companies (and certainly all major ones), now possess, reflecting not only the standards set by whichever of the above types of code they subscribe to, but also their own particular CSR values, and may cover strategic direction, employee and community relations, investment protocols, complaint handling, compliance monitoring, and supply-chain management; and finally, (vi) compliance and verification codes, which are tools developed to assist corporations in assessing their CSR performances (eg, Social Accountability 8000,⁹⁰ the Global Reporting Initiative Guidelines,⁹¹ and the forthcoming (in 2010) ISO 26000 guidelines for Social Responsibility⁹²).

Many of these codes incorporate some human rights values, usually embedded within avowedly social and environmental standards, but few are explicitly and centrally concerned with corporate abuses, and/or promotion, of human rights. Those that are include: the Voluntary Principles on Security and Human Rights, drawn up between a number of large mining and exploration corporations, a number of prominent human rights NGOs, and the governments of the Netherlands, Norway, the UK and US, and intended “to guide companies in balancing the needs for safety while respecting human rights and fundamental freedoms”;⁹³ Amnesty International's Human Rights Guidelines for Companies; and the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (henceforth, the “UN Norms”).

In terms of process, CSR has been about trying to take issues that have been traditionally seen as outside the purview of business and move them into the sphere of what business is, or ought to be, concerned with. There has been mixed success in this endeavour. On the one hand, corporations are, generally, disinclined to take on board such a varied array of interests, actors and objects that are seen as, at best, on the periphery of their core business. CSR critics claim that such distractions from a corporation's core concerns (centrally, to make a profit in whatever they do), is neither good for business, nor legitimate.⁹⁴ On the other hand, capitalism and corporations are nothing if not enterprising and opportunistic. It did not take long for many corporations to appreciate that if this is what stakeholders really want (and they are, after all, potential consumers, financiers, regulators, opinion-makers), then that is what they should deliver, provided, crucially, that in the process they continue to make profits—a kind of “enlightened self-interest”, as some have put it.⁹⁵

There is also tension between the voluntarism of CSR, and the role of the state in mandating its precepts.⁹⁶ Some in the corporate world see the whole CSR enterprise to be something largely outside (and typically trying to ward off) state regulation. According to this view, CSR entails no more than a voluntary adherence to principles that are seen as reflections of community expectations, whatever the law might actually demand. Examples of this include the setting of social and/or environmental targets that are “beyond compliance”; investing in local communities (it is now not uncommon for extractive industry corporations working in developing states to assist in providing health care, school education, transport or communication facilities), and institutionalised philanthropy in the tradition of Rockefeller and Ford and now advanced by Buffett and Gates.

Important though it is, focusing too intently on the business case for CSR undermines its rationale (it is concerned with business “responsibility” not “opportunity”), and it leaves the enterprise open to abuse. For such a “limited form of CSR,” as Tom Campbell points out, “amounts to little more than intelligent business practice that enhances long-term profitability, to the virtual exclusion of responsibilities that are not just justifiable in terms of the economic interests of the corporations in question”.⁹⁷ Campbell argues that “the real crunch questions in CSR concern what to do when the business case does not hold because it is not

⁸⁸ Phillip Rudolph reports that there are at least 1,000 codes of conduct in existence. See: Phillip Rudolph, “The History, Variations, Impact and Future of Self-Regulation” in Ramon Mullerat (ed.) *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Hague, Netherlands: Kluwer Law International, 2005), pp.367–84.

⁸⁹ Drawing directly on Rudolph's typology for the first five listed categories; *ibid*.

⁹⁰ www.sa-intl.org

⁹¹ www.globalreporting.org

⁹² www.iso.org/sr

⁹³ www.voluntaryprinciples.org

⁹⁴ Martin Wolf, “Sleep-walking with the Enemy”, *Financial Times*, 16 May 2001, p.21

⁹⁵ See the report of the Australian Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (Canberra: Parliamentary Joint Committee on Corporations and Financial Services, 2006), at para. 4.76.

⁹⁶ See the recent comments on this tension by Professor John Ruggie, the Special Representative of the UN Secretary-General on Business & Human Rights: “Prepared Remarks by SRSG John G. Ruggie”, Public Hearings on Business and Human Rights, Sub-Committee on Human Rights, European Parliament, Brussels, 16 April 2009, at <http://www.reports-and-materials.org/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf>

⁹⁷ Tom Campbell, “The Normative Grounding of the Corporate Social Responsibility: A Human Rights Approach” in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007), p.530.

economically wise for a particular economic unit or business sector to ‘do the right thing’.⁹⁸ Campbell’s observation effectively marks the boundary between that which can reasonably be expected of voluntary CSR, and that which has to be mandated by law.

The voluntarism of CSR has its critics as well as its supporters, but the debate and practice has now reached a stage of maturity such that CSR can no longer (if ever it could) be seen as a law-free domain. For in so far as CSR initiatives can, broadly, be seen as beneficial, their multiplication and their kaleidoscopic coverage and format, have provided fertile grounds for confusion, and evasion. This is the salutary message that John Conley and Cynthia Williams draw from their empirical study of the implications (including for human rights) of CSR practices in mainly UK and US corporations, noting that many corporations were able to exploit this circumstance with significant skill and stealth.⁹⁹ The prospect of direction, or at least hierarchy, being established through legal regulation (whether of the hard or soft law variety), is therefore not only appealing, but necessary.

HARD LAW AND SOFT LAW APPROACHES

There is, in fact, already a significant body of law regarding the human rights obligations of corporations. As I have argued elsewhere,¹⁰⁰ domestic laws governing occupational health and safety, labour and workplace relations, anti-discrimination, privacy, environmental protection, property rights, freedom of expression, fair trial (complaints handling and disciplinary procedures), criminal prohibitions (such as against physical abuse, fraud and corruption, and property offences), are typically found in the statute books of developed countries. Further, they are also, increasingly, to be found in developing countries, as the twin forces of global economic order and the rule of law propagate them, and the demands of regulatory certainty and fairness become evermore insistent.¹⁰¹ Across and within nations, these laws are, of course, incomplete and imperfect, but the records of the state courts and tribunals that enforce them, such as they are, against corporations on a daily basis, are testimony to the prevalence and importance of existing community expectations about corporate observance of human rights standards.

In all the debates about whether, or which, or how human rights obligations apply to corporations, it is important to remember that this array of legal regulation already exists. The regulatory questions that are to be addressed in this field are, therefore, concerned with how much *further* corporations should be made to engage with human rights, rather than deliberations about whether they should in the first place.

Domestic legislation, policies and practices regarding the requirements made of corporations to protect and promote human rights and the consequences of their breach must continue to be the most significant and effective vehicles to enunciate and enforce such responsibilities. While, evidently, not all states utilise their regulatory frameworks sufficiently and effectively in this regard, such limitations are due to variations in political will, administrative capacity and economic imperatives, *not* a lack of jurisdictional competence. What has been of vital importance to much of the debate about corporations and human rights in the past decade or so, is when the human rights actions of the corporations in question are *transnational*. That is to say, when the corporation is legally incorporated in one (home) state, while it conducts its operations in another or other (host) states. The crux of this matter is when the human rights laws that apply to corporations differ significantly, in form and/or substance, between the home and host states. For such legal gaps in human rights protections lead, almost inevitably, to their neglect and abuse in practice. Though such gaps can appear between any two states, they are most obvious and potentially most damaging when the corporation’s home state is a rich, liberal state in the West, and the host state is a poor, weakly governed state in the developing world.

Adopting the perspective of the victims (or potential victims) of abuse in these circumstances, there exist four possibilities by which legal regulation might possibly address corporate infractions and provide redress for the abused.

First, most directly, international and domestic pressure (from other states, international organisations, civil society and even corporations themselves) might be put on the states to plug the gaps in their own laws regarding corporate behaviour within their jurisdiction, by enactment of legislation where there is none or it is inadequate, or enforcing that which exists but is ignored or easily evaded. In situations of states with weak governance, however, this is to invest in hope more than expectation. By definition, weakly governed states lack capacity and probably political will, and many egregious breaches involving corporations are perpetrated jointly with (and often principally by) state organs themselves. In such cases this may be a pointless exercise, and points of legal leverage will have to be sought elsewhere.

⁹⁸ Ibid, p.531.

⁹⁹ John Conley and Cynthia Williams, “Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement” (2005–06) 31 *Journal of Corporation Law* 1, at 34.

¹⁰⁰ David Kinley, “Human Rights as Legally Binding or Merely Relevant?”, in David Kinley and Stephen Bottomley (eds.) *Commercial Law and Human Rights* (Aldershot: Ashgate Dartmouth, 2002), pp.25–45.

¹⁰¹ See David Trubek, “The ‘Rule of Law’ in Development Assistance: Past, Present and Future” in David Trubek and Alvaro Santos (eds) *The New Law and Economic Development: A Critical Appraisal*, (New York: Cambridge University Press, 2006), pp.84–6.

The second possibility is the extension of the extra-territorial reach of strong-state laws, effectively to make corporations liable at home (under home-state law) for their actions overseas (despite host-state laws). Extra-territoriality has many legal guises,¹⁰² including, most directly, the criminalisation of acts taken by individuals or other legal persons, including corporations, offshore—relatively common examples of which include sex tourism, drug trafficking, terrorism activities and war crimes.¹⁰³ Tort liability is another example, in respect of offences against persons, negligence resulting in egregious harm (such as severe environmental damage), or, most notoriously, for breaches of fundamental international legal norms, as with the US's revived *Alien Torts Claims Act* (ATCA), provided that such norms are “specific, obligatory and universal”.¹⁰⁴ In addition, other laws or legal techniques may have a facilitative extra-territorial capacity in this regard. Corporations laws, for example, regulate the nature and extent of legal liability of corporations for the actions of their overseas subsidiaries,¹⁰⁵ which can include actions that violate human rights, and there have been a series of attempts (so far unsuccessful) in Australia, the UK, and the US to enact “corporate code of conduct” legislation that would bind corporations, and/or their directors, in respect of their conduct overseas.¹⁰⁶ Use by corporations of *forum non conveniens* to deflect litigation from home state courts (which are normally far more rigorous, less tolerant and more punitively-minded of corporate indiscretions than host-state courts) has also been watered down in the certain common law courts in which it is applicable. As a result, this peculiar, but important, determinant of the jurisdictional competence (determining, that is, whether a home-state court has the power to hear a case regarding action taken in another state's jurisdiction, and if so, whether it should), has effectively extended the extra-territorial reach of home-state courts in cases where they are *not* “seen as a clearly inappropriate forum”.¹⁰⁷ Finally, the international legal facility of “universal jurisdiction”—whereby states “have jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern”¹⁰⁸—has also been used by states to arrogate extra-territorial powers to their courts, which power might conceivably extend to corporations.¹⁰⁹

All that said, such extra-territoriality in the specific respect of corporate behaviour that affects human rights is relatively rare, certainly as compared to normal, intra-territorial, law. It is a potentially highly charged, political issue. Extra-territorial laws emanate almost exclusively from Western states and are therefore seen by many developing states as, at best, presumptuous and somewhat patronising, and, at worst, imperialist challenges to their sovereignty. In the home states themselves, the device can also be subject to intense political pressure—from those activists in favour, and, more significantly in terms of lobbying power, from the business community against such extended jurisdictional reach in respect of corporate activity. Indeed, the failures of the corporate code of conduct bills mentioned above bear testimony to business's lobbying power.¹¹⁰

The benefit of extra-territorial legislation in this area for those whose human rights are abused, is that it provides a potential alternative forum in which to pursue their claims against corporations. But closing the gap in respect of the human rights obligations of corporations across jurisdictions, however, has not, and will not, be achieved on the back of extra-territorial laws alone. Even their most celebrated manifestation, the now much litigated ATCA has so far yielded just one concluded trial (and then in favour of the

¹⁰² Surya Deva, “Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should ‘Bell the Cat?’” (2004) 5 Melbourne Journal of International Law 37

¹⁰³ See Eric Engle, “Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?” (2006) 20 St. John's Journal of Legal Commentary 287, at 291.

¹⁰⁴ As stipulated in the US Supreme Court's landmark decision in *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004), at 732; see further, Lucien Dhooge, “Lohengrin Revealed: The Implications of *Sosa v. Alvarez-Machain* for Human Rights Litigation Pursuant to the Alien Tort Claims Act”, (2006) 28 Loyola of Los Angeles International and Comparative Law Review, 393. Also see Joanna Kyriakakis, “Freeport in West Papua: Bringing Corporations to Account for the International Human Rights Abuses under Australian Criminal and Tort Law”, (2005) 31 Monash University Law Review 95

¹⁰⁵ See *Lubbe and Others v Cape Plc* [2000] 1 WLR 1545, in which the House of Lords, rejecting the defendant's argument of *forum non conveniens*, demolished attempts of a parent company to distance itself from the damage done by its asbestos mining subsidiary in South Africa.

¹⁰⁶ Adam McBeth, “A Look at Corporate Code of Conduct Legislation” (2004) 33 Common Law World Review 222

¹⁰⁷ This is the formulation that prevails in Australian courts as enunciated in *Oceanic Sun Line Special Shipping Company Inc v Fay* [1988] HCA 32, per Deane J, at para.18. In the UK, *forum non conveniens* was also similarly removed as an effective defence against removal of cases to home-state courts in *Connelly v RTZ Corporation Plc and Others* [1998] AC 854. For a discussion of the much more limited inroads into the defensive use of *forum non conveniens* in the US, see Malcolm Rogge, “Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine on *Forum Non Conveniens* in *In re: Union Carbide, Alfaro, Sequihua, and Aguinda*” (2001) 36 Texas International Law Journal 299.

¹⁰⁸ These are the defining words used in the Restatement (Third), The Foreign Relations Law of the United States (1987), section 404.

¹⁰⁹ For an overview of the various forms of implementation of universal jurisdiction in the common law and civil law jurisdictions of Europe, see Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art* (June 2006) Vol.18, No.5(D). It should also be noted here that officers of corporations, as individuals, may be subject to the jurisdiction of the International Criminal Court for grave breaches of international law, including genocide, war crimes, crimes against humanity and the crime of aggression; Rome Statute of the International Criminal Court 2000, Articles 6–9.

¹¹⁰ Though, in Australia, it seems that this issue might be put to the test once again, following the Rudd Government's decision in June 2008 to support a Parliamentary motion to consider “the development of measures to prevent the involvement or complicity of Australian companies in activities that may result in the abuse of human rights, including by fostering a corporate culture that is respectful of human rights in Australia and overseas”, see Oxfam Australia media release, 23 June 2008, at www.reports-and-materials.org/Oxfam-Australia-on-parliament-motion-23-Jun-2008.doc.

corporation),¹¹¹ and one notable out of court settlement.¹¹² That is, despite dozens of high profile cases having been brought against some of the world's largest companies,¹¹³ alleging human rights abuses including complicity in murder, forced and child labour, assault, rape, forced relocation and expropriation, and aiding and abetting apartheid. There is no doubt the ACTA is useful publicity tool, but it is a less effective and efficient tool of legal regulation. Harold Koh recognises the statute for what it really is: an extremely limited, highly conditional, litigable instrument of last resort.¹¹⁴ To be sure, it is an important, indeed, vital backstop, but does not and cannot serve as central plank in any regulatory program to address corporate abuses of human rights standards.

The third and fourth regulatory possibilities are both situated in the same transnational sphere, and though very different and controversial in their own ways, together offer the prospect of bolstering a more globalised perspective of the legal regulation of corporations in regard to human rights protections.

The third possible avenue relates to the already noted burgeoning instances of transnational codes of conduct, developed by industry peak bodies, governments, NGOs, or by transnational corporations themselves, in so far as they contain human rights standards. Though soft-law and, in the main, entirely voluntary initiatives, they nonetheless constitute the foundations for harder legal regulation, being not only the policy firmament from which future domestic and international laws are likely to develop, but also in their desire to stipulate standards and to proclaim their adherence to them, corporations are in effect engaging in commercial speech—or, to put it more directly, in marketing.¹¹⁵ All developed states, and many strictly so, have trade practices rules governing false advertising, and misleading or deceptive conduct such that a company is prevented from making any false or misleading claims in an effort to entreat you to purchase their products. In a landmark case brought against Nike in California, anti-corporate activist, Marc Kasky claimed that he had been so entreated to buy a pair of Nike shoes on the basis of the company's self-declared good human rights business practice of not engaging sweat-shop labour in the manufacture of its products, only for him later to discover, he alleged, that the claims were false. The veracity of Kasky's allegation was never tested in court as the case was settled,¹¹⁶ but the point was made that specific claims as to one's human rights practices can be just as strictly regulated as are those made in respect of the quality of one's stitching, or the curative effects of one's drugs, or the longevity of one's battery life. Rather curiously, there have been few repetitions of such litigation under similar trade practices and competition laws in other developed states, but the prospect of such litigation appears to have had the salutary effect of making corporations think more carefully about the justifications for their public pronouncements about their respect for or compliance with human rights standards.

The fourth possibility is perhaps the most ambitious as it entails proposals for the regulation of corporate entities regarding human rights under international law. There are in fact two dimensions to this possibility. One is actively to encourage such international human rights bodies as the committees that oversee the implementation of the main UN human rights treaties, to make more use of their existing authority to press signatory states to do more within their respective jurisdictions to protect and promote human rights, *including* in respect of relevant acts of commission or omission by corporations. Some of these committees through their consideration of periodic reports, hearings of individual communications, and publication of General Comments, do already inquire of states what they are doing in this regard, make specific suggestions as to how they might do it better, and indicate more broadly how corporations might assist, or be required to assist, in the domestic protection of human rights. A survey by the Special Representative of the UN Secretary-General (SRSG) of the position in respect of the UN's core human rights treaties concludes that "an examination of the treaties and treaty bodies' commentary and jurisprudence ... confirms that the duty to protect includes preventing corporations—both national and transnational, publicly or privately owned—from breaching rights and taking steps to punish them and provide reparation to victims when they do so."¹¹⁷ In actual practice, however, moves to extend this duty to cover corporations are still in their

¹¹¹ On 26 July 2007, an Alabama jury found the coal corporation, Drummond, not to be guilty of complicity in the 2001 murder of three union leaders at one of its mines in Colombia; In *Re Juan Aguas Romero v Drummond Company, Inc., et al.*, United States District Court for the Northern District of Alabama, (Case No. 702-CV-00665).

¹¹² Appeals pending in the Unocal litigation were dismissed by the Ninth Circuit Court of Appeals following the settlement of the case: see *John Doe I v Unocal Corp.* 403 F.3d 708 (9th Cir. 2005). For a discussion of the settlement, see Rachel Chambers, "The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses" (2005) 13(1) Human Rights Brief 14.

¹¹³ Including, Coca-Cola, Chevron, Chiquita, Exxon-Mobil, Nestlé, Shell, Texaco, Yahoo!, and Wal-Mart. For an overview, see Beth Stephens, et al, *International Human Rights Litigation in US Courts* (Leiden: Martinus Nijhoff, 2008 (2nd edn)), pp.309–33.

¹¹⁴ Harold Koh, "Separating Myth From Reality About Corporate Responsibility Litigation", (2004) 7 *Journal of International Economic Law*, 263. Koh specifically notes that these conditions (as to forum and personal jurisdiction; compliance with the Statute of Limitations; nature of breaches of international law amounting to complicity in a state crime; and, meeting the substantial burden of proof linking cause to effect) constitute "very high multiple barriers to recovery" under the statute; at 269.

¹¹⁵ Codes might also be framed and adopted in ways that make them contractually binding, such as when comprising part of a contractual agreement between a company and its suppliers.

¹¹⁶ In 2002 the Supreme Court of California found in favour of Kasky (see *Kasky v Nike, Inc.* 27 Cal.4th 939 (2002)). Nike appealed to the US Supreme Court, which initially granted leave to appeal, but later determined not to decide the issue: *Nike, Inc. v Kasky* 539 U.S. 654 (2003). In September 2003 the case settled, with Nike agreeing to pay \$1.5 million to the Fair Labor Association.

¹¹⁷ Special Representative of the UN Secretary-General on Business & Human Rights, "State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties" (12 Feb 2007), para.7, at www.humanrights.ch/home/upload/pdf/070410_ruggie_2.pdf.

infancy. Such moves also rely on the very entities that give us cause for concern about their competence to regulate effectively the errant activities of corporations—namely, states, and especially weakly governed states.

The other dimension is to seek to establish some form of international legal regime under which corporations might also be held *directly* liable for breaches of particular human rights standards, thereby, where needs be, avoiding the intermediary of state action. This second option is more revolutionary—and controversial—because it promotes the as yet nascent idea that international law can apply to (and bind) non-states entities as well states. The focus of much of the debate and controversy on this issue has, at least since their “publication” in 2003, been on the UN Human Rights Norms for Corporations.¹¹⁸ In formulating his “protect, respect and remedy” framework, as outlined in his third report to the Human Rights Council in June 2008, the SRSG has steered away from the treaty approach, on the basis that the prospects of any international initiative to plug the gap (which he acknowledges is there and is serious) left by inadequate or non-existent state-based hard and soft law regulation is impolitic and impractical because it would be “unlikely to get off the ground” (and even if it did, likely be counter-productive).¹¹⁹

In and of itself, the “protect, respect and remedy” framework is unobjectionable—rightly urging states to “protect”, by taking more seriously and implement more thoroughly their obligations under international human rights law regarding corporate activities in their jurisdiction (the first possibility above); corporations to “respect” rights, by which the SRSG means, ultimately, that failure to do so “can subject companies to the courts of public opinion—comprising employees, communities, civil society, as well as investors—and occasionally to charges in actual [domestic] courts”;¹²⁰ and victims to have access to “remedies” that “could include compensation, restitution, guarantees of non-repetition, changes in relevant law, and public apologies”.¹²¹ But this framework with these features does not address the problem of situations in which states are so weak or unwilling to protect human rights, and corporations are so comparatively strong or conveniently transnational to evade human rights responsibilities. This is the gap that an international treaty regime can address. While hesitations might exist about the prudence of engaging with the controversial treaty approach and potentially undermining present levels of positive engagement between corporations, NGOs and states currently manifest under the goodwill of the SRSG, this is not sufficient reason to sideline potential international options. If we were always to back away from the invariably tough challenges of establishing new international human rights regimes merely because “treaty-making can be painfully slow” and “serious questions remain about how [any treaty obligations] would be enforced”, as the SRSG argues,¹²² then few if any of the human rights instruments that populate the post-War international law landscape of today would have made it beyond the stage of high-minded rhetoric. It may be that with, from June 2008, another three years added to the term of his mandate, and the extension of the mandate itself regarding, in particular, the provision of “concrete and practical recommendations on ways to strengthen the fulfillment of the duty of the State to protect all human rights from abuses by or involving transnational corporations”,¹²³ the SRSG will be able to develop a consensus for a bolder foray into the international field.

CONCLUSION

In the business and human rights debate, one must stress the singular importance of the role of states in urging, facilitating and, if necessary, coercing corporations to better protect and promote human rights, starting by demonstrating greater vigilance themselves in these respects. The front line will be in corporate board-rooms and management mindsets. Lawrence Mitchell, an eminent corporate law scholar, has argued that CSR and the human rights guarantees it encompasses, must be “something central to the corporation’s business, not something the corporation does in addition to business”,¹²⁴ and as such, he maintains, “corporate management that looks to the best interests of the business over the long term will largely, if not completely, fulfil many of the goals of CSR”.¹²⁵

Corporate mindsets are changeable in this regard, and there has been evidence to prove this in recent years, from the now significant involvement of transnational corporations in various forms of embracing CSR and human rights principles at the level of business strategy, engagement with CSR and human rights experts and organisations, and implementation of lessons learned in policies and practices. Such outcomes are preferable to all interested parties—corporate, activist, state, and above all those whose human rights might

¹¹⁸ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc.E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003)

¹¹⁹ John Ruggie, “Business and Human Rights: Treaty Road Not Travelled”, Ethical Corporation, 6 May 2008, at www.ethicalcorp.com/content.asp?contentid=5887

¹²⁰ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Protect, Respect and Remedy: a Framework for Business and Human Rights”, UN Doc.A/HRC/8/5 (7 April 2008), para. 54.

¹²¹ *Ibid.*, para. 83.

¹²² Ruggie, “Treaty Road Not Travelled”, *ibid.*

¹²³ Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Resolution 8/7 (18 June 2008), para.4(a).

¹²⁴ Lawrence Mitchell, “The Board as a Path Toward Corporate Social Responsibility” in McBarnet et al (eds.), *The New Corporate Accountability*, p.280.

¹²⁵ *Ibid.*, at p.181.

otherwise suffer. In the end, therefore, underpinning all the initiatives canvassed in this submission, what will serve human rights best in the field will be if corporations “pray not for lighter burdens but for stronger backs.”¹²⁶ And it will be up to states both to insist and assist in the quest.

Professor David Kinley

April 2009

Memorandum submitted by BP

INTRODUCTION

1. National governments and international law provide the ultimate protection of human rights—their definition. Business cannot supplant this role. The duty of national and international companies alike is to comply fully with the legal and constitutional frameworks which governments have established. For international companies, the responsibility is wider, since we operate across jurisdictions and in countries with varying levels of respect for human rights. BP freely acknowledges that, in the conduct of our business, we must always have regard to the human rights impact of our activities. This entails acting in a manner which respects the human rights of those who are involved and affected by our business activities, including those who work for us and the communities and countries in which we operate.

2. In this submission, BP will provide details of how we put this into practice, and especially the way in which, through a variety of mechanisms, we incorporate human rights considerations within our business activities.

PROCESSES

3. It was lessons learnt in Colombia which provided BP with the impetus for a wider consideration of the impact of our business upon human rights. In the mid 1990s, we were criticised for alleged acts of wrongdoing relating to security issues in Colombia. Following our own and independent investigations, it was concluded that there was no basis to the allegations made of inappropriate ties between BP and illegal paramilitary groups. However, spurred by this experience, we took a number of steps to develop internal ‘process’ with the intention of ensuring that considerations of human rights are embedded within our business practice.

4. Thus, BP’s objective is now always to incorporate human rights requirements within processes and policies governing all business activity, including the behavioural expectations of those who work for the company. The main elements of this broad framework include the need for clear policy positions which are articulated and backed-up by supporting developed processes; for ensuring that human rights requirements are enshrined in third party procurement and contracts, particularly in high risk areas; and for the provision of independent monitoring, assurance and reporting techniques.

A. Clear policy positions and processes

5. Some years ago BP communicated, through a Human Rights Guidance note to staff, our clear support for the Universal Declaration on Human Rights and our expectations on how these should be enforced in our operations—specifically in relation to employees, communities and in the provision of security. We have since embedded our commitment to respect human rights through various policies and practices.

6. For example, BP’s code of conduct outlines our commitment to fair employment and equal employment opportunity, and to the provision of a safe and secure work environment; and expresses our commitment to engage in open and transparent dialogue and consultation with communities and other representatives of civil society. We also make a very explicit statement against the use of child labour and forced and compulsory labour. The code establishes principles for business conduct applicable throughout the Group, regardless of location. Where differences exist as the result of local customs, norms, laws or regulations, we apply either the code or local requirements—whichever sets the highest standard of behaviour. This Code is strictly enforced and employees are provided with a mechanism to report confidentially breaches of the Code

7. Additionally, we are in the process of developing a new Group practice applicable to all major new projects with the aim of including social factors (along with environmental, cultural and historical factors) in the screening of major project risks. This new practice includes requirements to consider questions such as the provision of security, the rights of indigenous peoples, involuntary resettlement and worker welfare and items related to natural resource rights or environmental justice, such as water. Several new projects have used these social indicators when screening for environmental and social risks. The findings have helped projects to identify the most important social and environmental risks when performing the impact assessments. By embedding the new screening requirements within our Operating Management System, we are reinforcing our commitment to ensure such issues are considered, along with technical risks, from the very early stages of planning a project. This new practice emphasises that reviewing and mitigating social risks is an important issue for us and our stakeholders.

¹²⁶ Attributed to Theodore Roosevelt.

B. *Third Party Procurement and Contracts, particularly in high risk areas*

8. Considerations of human rights also inform our relationship with third parties (including Government and Security Forces, suppliers and business partners), particularly where we believe such considerations help to reduce a significant business operating risk either to BP's reputation or through potential project delays. Also, our ability to influence such third parties can have a direct and indirect effect of improving the overall human rights situation in these areas. The most relevant third party arrangements relevant to this debate are provisions in certain major projects agreements; the supplier procurement process; and in the provision of security.

9. Several of BP's significant investment agreements include provisions on human rights. For example, the bilateral security protocol for our operations in Azerbaijan ensures that the Universal Declaration of Human Rights, the United Nations Code of Conduct for law enforcement officials, and the United Nations basic principles on the use of force and firearms by law enforcement officials are part of the legal framework for our Azeri-Chirag-Gunashli oil project, the Shah Deniz gas project, the South Caucasus gas pipeline and the Baku-Tbilisi-Ceyhan pipeline.

10. We have also agreed with the Government of Azerbaijan that this bilateral security protocol will extend the application of the Voluntary Principles on Security and Human Rights to all the assets there for future operations. At the Tangguh LNG project in Indonesia, a commitment to follow human rights principles and procedures which are consistent with the Voluntary Principles is included in the Joint Security Guidelines, an agreement signed with the Papuan police. Similar commitments are included in the formal agreements with the Colombian Ministry of Defence in the Exploration and Production Project in Casanare, Colombia.

11. In the supply and procurement area, we are currently working towards the development of more common processes for assessing suppliers and qualifying them to work with us. This is intended to cover issues relating to human rights as well as employment conditions and diversity.

12. This process is informed by our experience in China where we have already begun to screen potential suppliers to examine their human rights practices. Companies under consideration as potential suppliers are sent questionnaires which cover working conditions. In 2008, we audited 25 potential suppliers and rejected five for social compliance or safety issues. The principles and practices learned in China have been incorporated in a global common sourcing process which, starting this year, will be implemented across BP.

13. The provision of security is one of the most challenging and sensitive areas. In 2000, BP joined other leading oil, gas and mining companies, non-governmental organizations and the US and UK Governments in developing the Voluntary Principles on Security and Human Rights. BP was one of the founding members of the Voluntary Principles and we have gained experience in putting these principles into practice in several of our major operations and projects. This includes risk assessment exercises in Algeria, contracting with private security providers in Georgia, supporting human rights training for public security in Azerbaijan and internal audit of Voluntary Principles management practice in Colombia.

14. At the end of 2008, we codified this experience in the BP's Voluntary Principles Implementation Guideline. This aims to make implementation more effective and consistent by providing practical tools for businesses and by integrating guidance as much as possible into BP's management systems. The guideline, which consists of seven elements addressing risk identification, mitigation, performance evaluation and improvement, has been made available on BP's website as dynamic content that will be updated and improved periodically.

C. *Independent monitoring, assurance and reporting.*

15. Often, an external perspective of our performance enhances credibility and demonstrates to external stakeholders the extent to which we are seeking to manage risks such as human rights. In that regard, BP has occasionally sought the help of independent experts to provide scrutiny and advice on projects with complex environmental, economic and social issues.

16. In Indonesia, for example, the Tangguh Independent Advisory Panel (TIAP), chaired by former US Senator George Mitchell, published last year its sixth report on the non-commercial aspects of the Tangguh liquefied natural gas project in West Papua, Indonesia. TIAP's reports have provided advice on the Project's impacts on the local community and environment, including such topics as security, employment, education and health. In the 2008 report, TIAP noted that, in respect of most of those Papuans affected by it, support for the project remained strong. It said that residents of villages who have been resettled in new locations are benefiting from new homes, employment, better health and education. Other directly affected villages have also benefited. However, there was criticism of the Project's programmes as villagers adjusted to changes affecting their traditional fishing economy and in-migration to the villages.

17. A human rights risk or impact assessment may also become necessary when a project occurs in a particularly challenging environment, especially when, for example, there have been allegations of human rights abuses either by state or non state actors; or where the project's impact on the indigenous population is high because of fundamental issues such as involuntary re-settlement or because of increased contact with the outside world. BP considered such an exercise necessary prior to the start of construction in Tangguh. The results of the study conducted in association with leading US human rights experts provided insight into

the human rights related impacts (such as specific indigenous, labour and security issues) which the project needed to address and ameliorate so as to create benefit for the local community. The subsequent BP project development was shaped to take the findings into consideration and the TIAP report mentioned above referred to the positive progress.

CONCLUSION AND FUTURE PRIORITIES

18. First, we acknowledge the work of Professor John Ruggie, UN Special Representative of the Secretary-General for Business & Human Rights. We supported the initial phase of his work by seconding one of our staff to support his research effort. He has helped to bring clarity to this contentious issue which previously had been characterised by sharply divided opinions on the scope, scale and accountability of business in the matter of human rights. We support him in his continuing task, and we re-iterate his assertion that it is the State which has a duty to protect citizens against human rights abuses by third parties, including corporations.

19. There will always be a sensitive line between the role of business in respecting human rights, and the role of home and host governments in defining and enforcing them, particularly for companies like BP which operate in multiple jurisdictions. Consistent with our support for the Universal Declaration on Human Rights, BP insists upon a framework of ethical practice (embracing a respect for human rights) in all our business activities, and including those conducted indirectly on our behalf. However, as a business, we must be cautious of imposing BP's standards upon activities outside our legitimate sphere of control. Our best contribution is to lead by example through rigorous enforcement of our internal code in all our external interactions.

20. We believe firmly that voluntary, multi-stakeholder efforts are the most effective means of promoting positive change in human rights practices at the operating level. While legislation has a role, the engagement of all stakeholders is essential if a genuine improvement in human rights standards is to be achieved.

21. We also believe that further development of the Voluntary Principles is required. This initiative is already having success, both in term of the number of companies engaged and in finalising the rules of governance. Key governmental support and encouragement should also be given to finalising performance and reporting criteria so that companies are held accountable to their obligations under the initiative.

22. A primary requirement for business is to demonstrate a transparent and rigorous internal process embedding the protection and enhancement of human rights, including mechanisms for redress, in all its operations. Such a process will serve in the long term to both protect and enhance the general well-being of the communities in which business operates—including their civil and human rights.

23. BP's goal is to make a positive difference in the societies in which we operate through genuine partnerships that seek to create mutual advantage. Ultimately it is our ability to engage with local stakeholders, including governments, which enable us to create an opportunity for improvement. Such dialogue, supported by our strong internal process, is the most effective way of enabling business to contribute as a progressive force towards a wider and higher acceptance of human rights in all areas applicable to economic development.

30 April 2009

Supplementary memorandum submitted by BP

I undertook to write to you to expand our views on how to approach situations where prospective claimants in foreign jurisdictions perceive they have no effective remedy in their own country for human rights claims against the foreign subsidiary of a UK domiciled company.

This is an issue which we believe to be at the heart of one of BP's core values—namely that in the conduct of our business, we must always have regard to the human rights impact of those who are involved with and affected by our business activities. I hope that through both our written and oral submissions, it is clear that BP has sought to take tangible steps to embed consideration of human rights within our business and risk management process and that there is senior leadership commitment to addressing the issue. Our company is also actively engaged with other extractives companies (along with governments and Human Rights NGOs) in the Voluntary Principles on Security and Human Rights (VPs). We continue to implement the VPs in our major projects and operations specifically to address human rights concerns in the provision of security.

When I appeared before you, I acknowledged that there will always be the risk, despite the best systems a company can devise, that even the best-intentioned companies may fail to live up to their own standards, and that this could result in the infringement of the human rights of nationals in foreign countries. In such cases, we believe the most appropriate response should be the swift, fair and proportionate resolution of such complaints on the ground in the relevant country, including, where appropriate, the provision of reasonable compensation and remedial action, without the need for such complainants to seek redress in their local

courts.¹²⁷ As a company, where we believe complainants have justifiable and meritorious claims, we aim to settle matters promptly and reasonably without the need for recourse to either local or other courts, In Appendix 1, I provide examples of BP's efforts to facilitate timely feedback and resolution of community based issues, including human rights claims.

None of this, however, precludes foreign complainants from accessing the UK courts in appropriate circumstances. In the event that such complainants believe a foreign subsidiary of a UK domiciled company has infringed their human rights, and that they have no real recourse in the courts of their own country, then we believe it is a matter entirely for them if they wish to bring an action in the UK courts. As a general matter BP believes the UK courts provide a just and efficient forum for resolution of disputes.

If foreign complainants choose this route, they can already access the UK courts in certain circumstances. There is an existing legal framework to allow the UK domiciled parent to be sued in the UK in appropriate circumstances. Further, there is legal precedent applicable to certain cases which might be relied upon to sue the foreign subsidiary in the UK courts.

In saying this, BP is not passing judgment on the efficacy or otherwise of the judicial systems of the countries in which we operate—nor would it be appropriate for us to do so.

Additionally there are other mechanisms that allow the complainant to access other, non-local mechanisms for the consideration of redress:

- The VPs, in addition to providing a framework for understanding and managing the issue of human rights as it relates to the provision of security services, includes a detailed reporting requirement and a mechanism by which concerns over company performance can be raised by other VPs members, mediated and resolved.
- There are already existing mechanisms such as the OECD Guidelines for Multinationals, which have country based National Contact Points who in effect have the ability to hear and publish findings (which are albeit non binding).

With regards to company level policies, English law already mandates consideration of issues such as human rights to be factored into decision making. The recently amended UK Companies Act has expanded the fiduciary duties of directors to consider the impact of their company's operations on the community and the environment of which human rights would be one consideration, particularly for a multi-national like BP which operates globally in a range of different socio-economic environments. The Companies Act also requires additional reporting on non-financial risks.

In discussing a way forward on this I believe it imperative that we should not pre-empt the outcome of the work of John Ruggie who has so far developed the framework of “protect, respect, redress” which has gained fairly widespread support. The next stage is to make more explicit the expectations of governments, companies and civil society under this framework. Only after Ruggie builds consensus on the companies' role in respecting human rights, should we move to consider the need for a globally consistent set of rules or standards and the appropriate framework for compliance.

In the absence of such a consensus, there is the risk of a multiplicity of new country based business and human rights related standards and adjudication systems. This should be avoided since it will have the consequence of complicating the business environment and creating potentially inconsistent, country specific guidelines.

Moving forward, BP offers the following thoughts on the debate on national mechanisms for redress, and more broadly on business and human rights:

- BP is broadly supportive of the concept of a non-judicial, independent body which uses the Ruggie output as a framework—but with a mandate to clarify and promote appropriate standards, create greater coherence amongst government agencies and evaluate the effectiveness of existing initiatives. However, we feel strongly that, in the UK, the courts are best placed to fairly and effectively adjudicate human rights claims given their knowledge and experience of interpreting the law and procedure which might apply.
- We need to preserve the momentum created through the VPs. No doubt, there are still issues about governance, the voluntary nature of the VPs and how VP members report performance: but at base, the initiative is trying to guide and support companies in identifying and mitigating the potential human rights impacts of their security arrangements. Additional UK Government support to enhance this effort should be an essential part of the way forward on this debate.
- Ultimately any new standard must be pragmatic—allowing business to be successful while at the same time to be a force for positive change in the countries we operate. Ongoing consultation With business on this issue will be essential to developing such a pragmatic and practical approach.

I hope these additional points are helpful to your Inquiry, before which I was pleased to appear as a witness earlier in the summer.

¹²⁷ In referring to redress, I am agreeing with John Ruggie's conceptualisation of redress to include “compensation, restitution, guarantees of non-repetition, changes in relevant law and public apologies”.

APPENDIX 7

Examples of mechanisms we have used that are close to the point of action and can provide swift resolution are drawn from our Tangguh LNG construction project, Baku-Tbilisi-Ceyhan pipeline construction and our current operations in Colombia:

- The Tangguh Independent Advisory Panel, funded by BP, was headed by the well respected US Senator George Mitchell. The Panel over the last seven years held open public hearings at which community members were free to raise concerns and complaints which were then relayed to BP and a response was expected. The Panel also held sessions in London and Washington to present their report and get feedback.
- Where specifically there is a risk concerning the performance of security forces, we have a very detailed system of receiving and dealing with complaints regarding allegations of security and human rights abuses. The case of Colombia is illustrative where we have well documented procedures.

BP Colombia's procedure for responding to complaints and allegations aims to make sure that community grievances related to actions of the public forces in our operational area, to our own actions or to the potential impact of changes in security arrangements, are recorded, analyzed, addressed and responded to promptly. It also aims to help the business to take preventative action to avoid recurrence of any incident.

The procedure identifies individual responsibilities and actions in response to a complaint. It sets out how complaints are to be recorded and analyzed. It also provides guidance on the types of cases that would require an internal investigation, which would focus on identifying any acts or omissions by BP that contributed to the incident. If a complaint involves a possible breach of the Universal Declaration of Human Rights, the individual concerned would be urged to make their representation to the appropriate authority.

Throughout the procedure there is an emphasis on record keeping as statistics on complaints received and remedied are used on an ongoing base to improve security management performance.

- During the construction of the Baku-Tbilisi-Ceyhan pipeline in Azerbaijan, Georgia and Turkey we put in place a number of measures to try to resolve complaints related to land issues in a fair and transparent manner.

For example BTC Co, the consortium led by BP to build the pipeline, engaged a third party (the BNB Statistics, Economy, Informatics,

Education and Trade Co.) in Turkey to provide independent verification that construction impacts and land acquisition grievances were being closed out, and that ongoing land acquisition activities were complying with Resettlement Action Plan requirements. In Azerbaijan, the Center for Legal and Economic Education (CLEE) provided free legal assistance to any land owner/user not satisfied with the result of the grievance response. Additionally, CLEE, on a monthly basis, selected ten closed complaints at random and contacted the complainants directly to verify that claims had been resolved.

Steve Westwell
Group Chief of Staff

18 September 2009

Memorandum submitted by Scottish Human Rights Commission (SHRC)

INTRODUCTION AND COMMENT ON UNSRSG RUGGIE'S FRAMEWORK OF PROTECT, RESPECT AND REMEDY

Business has become an increasingly powerful social, economic and political actor yielding unprecedented power and influence in an ever more globalised and privatised society. The international, regional and national system of human rights protection, originally conceived as protecting individuals from abuses of state power, has struggled to keep pace with the impacts of business in the protection of human rights.

The United Nations Secretary General's Special Representative (UNSRSG), Professor John Ruggie report of April 2008 "Protect, Respect and Remedy: a Framework for Business and Human Rights" was unanimously welcomed by the Human Rights Council Governments and for the first time provides structure for the protection of human rights from violations of business.

The SHRC would like to submit the following observations which are explored more fully in our responses to the JCHR questions below:

- The UK has an opportunity to demonstrate leadership in developing a framework of action around the "state duty to protect" human rights from the violations of business which feeds into the business "responsibility to respect" and focus on "access to remedies" for victims.
- Beyond the baseline responsibility of business to "do no harm" we promote an approach which harnesses the potential for business to contribute to the realisation of human rights through social and environmental sustainability. In this way business may contribute to the "*social and international order*" (*Article 28 Universal Declaration of Human Rights*) under which human rights can be realised for everybody.

- The regulatory framework for business accountability could be improved upon in many ways. For example, by clarification of the meaning of “public authority” under s6 of the HRA 1998, increased obligations under UK company law, public procurement regulation guidance, the removal of hurdles where possible to extraterritorial liability of parent companies, and the strengthening of non-judicial mechanisms of accountability.
- While companies should be encouraged to conduct the “due diligence” requirements as set out by the UNSRSG this should be viewed as the starting point of embedding a human rights culture in business. The SHRC promotes a “human rights based approach” to business which seeks to instill human rights considerations into all business processes and decisions.
- The SHRC recognises that non judicial mechanisms to address alleged breaches of human rights have an important role to play in increasing corporate accountability for human rights but also is aware of their inherent limitations and does not see them as a substitute for judicial accountability.
- The SHRC can play a role in promoting best practice to government, business and through the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights. (ICC).

RESPONSES TO CALL FOR EVIDENCE QUESTIONS

THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

1. *How do the activities of UK businesses affect human rights both positively and negatively?*

The negative impacts of business on human rights, both in the domestic context and also when UK companies are operating abroad, have been well documented largely through civil society campaigns and a few high profile legal cases. Many of the most egregious and widespread abuses by companies can be identified as being most prevalent in certain sectors and in relation to certain rights (eg in a domestic context in the care sector and the right to physical and psychological integrity under Article 8 ECHR, or when operating abroad the extractive sector and the right to water, an adequate standard of living and the right to health etc; or the information communications technology sector and the right to freedom of expression and privacy etc). It is clear, however, that business can potentially impact on *all* internationally recognised human rights as recognised by the UNSRSG Report of 2008.

The positive impacts of business, however, must not be overlooked in terms of economic growth, sustainable development, technological innovation etc. The SHRC promotes a view of business that recognises the positive role that business can play in the realisation of human rights by adopting business models which put social and environmental sustainability at the core of business strategy.

It is apparent that where business can see the benefits brought by integrating human rights into their management systems and business models that human rights will become less a matter of business risk and more as business opportunity.

We believe that business, while having a baseline “responsibility to respect” as identified by Professor Ruggie, also should be viewed as having increasing responsibilities to evolve their business practices in recognition of their place in a changing world order which calls for increased sustainability and accountability. Article 28 of the Universal Declaration of Human Rights states that “*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.*” The implications of Article 28 must be that business should be held to account for human rights violations and must evolve their practices to take their place in a world order that promotes the realisation of human rights for everybody.

2. *How do these activities engage the human rights obligations of the UK?*

The UK is under various international treaty obligations to respect, protect, fulfill and promote human rights. It also has duties under the European Convention on Human Rights and Fundamental Freedoms (1950) which have been incorporated into domestic law through the Human Rights Act 1998 and the Scotland Act 1998.

The UNSRSG has highlighted the “state duty to protect” against the human rights violations of business. This has legal and policy dimensions and includes taking all necessary steps to prevent, investigate and punish violations of human rights, and to provide redress. This duty is increasingly recognised as applying to both the activities of business operating nationally as well as the activities of transnational business operating abroad.

The SHRC would promote a progressive interpretation of the “state duty to protect” which includes recognition of extraterritorial grounds of jurisdiction where appropriate and also lends support and guidance to Ruggie’s other “pillars” of “the corporate responsibility to respect” human rights and “access to remedy” for victims of human rights violations.

3. *Are there any gaps in the current legal and regulatory framework for UK business which need to be addressed, and if so, how?*

The Meaning of Public Authority under the Human Right Act 1998: The SHRC welcomes the recommendations of the JCHR Ninth Report of Session 2006–07 regarding urgent action and legislative solutions to clarify the meaning of “public authority” under the HRA 1998 in accordance with Parliament’s intention when passing the Act, and in light of the increasing contracting out of public services to private service providers.

We welcomed the amendment to the Health and Social Care Bill which sought to close the legal loophole created by the case in the House of Lords of *YL v Birmingham City Council* which ruled that private and voluntary sector care home providers, including those caring for local authority funded clients, should not be considered as performing public functions under the HRA. It remains of concern, however, that people who arrange and pay for their own residential care remain outside the scope of the HRA. Furthermore other vulnerable groups, such as prisoner detainees or those detained under Mental Health legislation, who are users of contracted out public services are not covered by this amendment and further legislative action is urgently required to clarify the interpretation of “functions of a public nature” in s6(3)(b) HRA.

Public Procurement: The UK’s public sector purchases supplies, services, and works contracts in compliance with the procedural requirements of EU and UK public procurement law. We believe that better use could be made of public procurement law to both prevent the UK’s public sector from purchasing in a way which is detrimental to respect for international human rights and to encourage private sector businesses to satisfy the terms of public contracts in compliance with human rights norms.

Company Law: The introduction of the “enlightened shareholder value” duty in the UK Companies Act 2006 which requires directors to have regard to the longer term factors including the interests of employees, suppliers, consumers and the environment is welcome. However we consider that it may be possible to introduce more progressive and far reaching legislative provision which requires business to minimise any negative aspects of their business activities regardless of shareholder value.

Extraterritorial jurisdiction: Often when human rights violations are committed by multinational companies there may be many barriers to local remedies being sought by victims. There have been attempts by victims to bring claims directly against parent companies in their “home states”.¹²⁸ It appears there may be legal hurdles, however, to establish liability of parent companies for the wrongdoings of their subsidiaries and the doctrine of the “corporate veil” creates problems for claimants. An examination of viable ways to remove hurdles to establishing the liability of parent companies would be helpful in increasing corporate accountability.

Non Judicial Grievance Mechanisms: It is possible to bring complaints under the OECD Guidelines before the UK national Contact Point (“NCP”). It is considered, however, that while the NCP procedure provides a valuable route of recourse for victims the process lacks transparency and legal force and has no mechanism to provide compensation to claimants.

It is noted that an “Initial Review of the Operation of the UK National Point (NCP) for the OECD Guidelines for Multinational Enterprises” was published in January 2009 setting out a review of the effectiveness of changes to the UK NCP. It is hoped that the published procedures, statements of cases, improved capacity and prioritisation of awareness raising of the guidelines will improve the functioning of the UK NCP. It is also hoped that the UK NCP will continue to consult with stakeholders to improve its effectiveness.

The SHRC would be in favour of further discussion and consideration to be given to the establishment of a UK body to deal with issues of human rights violations committed by subsidiaries of UK companies in other countries which is complementary to existing civil and criminal liability processes.

4. *Does the UK Government give adequate guidance to UK businesses to allow them to understand and support the human rights obligations of the UK? If not, who should provide this guidance?*

The SHRC believes that a multi—stakeholder approach to establishing guidance for business on upholding human rights can often be the most effective way of ensuring accountability through building a common framework of understanding of responsibilities.

The role of government is crucial for the success of many of these initiatives in trying to bring about a level playing field of regulation for business internationally and ensuring the most progressive standards are universally applied.

5. *What role, if any, should be played by individual Government departments or the National Human Rights Institutions of the UK?*

There is an important role for government departments to promote best practice in human rights, initiate legislative form and liaise with other governments on the issue of business and human rights to work towards a level playing field of accountability. In particular the Department for Business Enterprise and Regulatory Reform (BERR), the Department for International Development (DFID), the Department for

¹²⁸ eg *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL)

Environmental Food and Rural Affairs (DEFRA) and the Foreign Commonwealth Office (FCO) have key roles to play in this regard. Where Government departments can assist in the capacity building of other jurisdictions to hold business to account through the building of political will and capacity this is welcome.

An example of progressive change could be the promotion by the Office of Government Commerce (in England and Wales) and The Scottish Procurement Directorate (in Scotland) of guidelines that would encourage the public sector to purchase by reference to human rights standards. The current legal framework for public procurement permits the public sector to select tenderers and award contracts to those who can demonstrate compliance with human rights standards where these are linked to the contract being procured. (An example might be the private sector running of public sector care homes) At present there is no appropriate guidance to assist the public sector realise the potential for human rights compliant public procurement.

The Export Credits Guarantee Department could also require companies to comply with the OECD Guidelines and require adequate due diligence of their human rights impacts in order to receive credit.

The National Human Rights Institutions of the UK (NHRIS) can play a role in the promotion of best practice both to government, business and within the global network of NHRI's under their individual mandates.

The SHRC participates in the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). SHRC has been elected as representative of the European group of NHRI's on two ICC steering committees both of which may be of relevance in this context: human rights and climate change, and on human rights and the business sector.

THE RESPONSIBILITY OF BUSINESSES TO RESPECT HUMAN RIGHTS

6. *How should UK businesses take into account the human rights impact of their activities (and are there any examples of good or bad practice which the Committee should consider)? How can a culture of respect for human rights in business be encouraged?*

The UNSRSG recommends that the responsibility to respect human rights requires a scheme of due diligence which includes a human rights policy; impact assessments; integration of policies throughout the company and monitoring and auditing processes to track ongoing developments. While these processes may be seen as core to meeting the baseline responsibility to “do no harm” it could be further explored how these due diligence components can go further than being risk management tools, reaching into the core of the business and becoming an enabler of deeper change in business culture. For example, human rights impact assessments may assess not only social risk but also the creation of business opportunity.

The SHRC believes an underlying human rights based, or rights *aware*, approach, can give concrete expression to the concept of accountability. This means business must be encouraged to take an approach which takes an understanding of the human rights of stakeholders who are “rights holders” as the starting point; identifies where the responsibility for the protection of those rights lies and the legitimate role that business can play in furthering the realisation of rights in the communities and societies in which they operate.

A rights based approach to business must also be underpinned by some of the core rights based principles such as participation and empowerment of local communities, accountability, non—discrimination and transparency. This approach can be embedded in all due diligence processes and business culture.

An example of good practice and a rights based approach being applied by a Scottish business is that of Cairn Energy plc in Rajasthan India in 2005.¹²⁹ Following a discovery of oil in the desert region of Rajasthan, India the company faced a dilemma where it required saline water to support the extraction of oil but did not want to infringe the local communities' right to water. Applying a “rights-aware approach” the Company identified that the primary duty bearer for meeting the right to water lay with the government but that it nevertheless must avoid violating the local communities' rights and allegations of perceived complicity in a violation of the rights to water. The Company therefore accepted its responsibility and engaged with relevant stakeholders to reach an understanding of the shared responsibilities towards the right to water. Cairn then provided support through the application of technical know-how in exploring for further fresh water aquifers, capacity building in improved drilling and completion technology and promoting considerable local knowledge of water conservation. In this way Cairn was able to meet its human rights responsibilities through capacity building with state government and turned a human rights “risk” into a business opportunity.

¹²⁹ Cairn Energy plc Corporate Responsibility Report 2005, p20

Should UK businesses' responsibility to respect human rights vary according to:

(a) *Whether or not they are performing public functions or providing services which have been contracted out by public authorities; Is it clear when the Human Rights Act 1998 does and does not apply directly to businesses?*

As outlined above there is a need for clarification around the application of the HRA, particularly for contracted out public services to private providers.

It is considered that even where the HRA will not apply directly business should be made aware of the horizontal effect of the Act and the responsibility and business case for respecting human rights.

(b) *Whether they are operating inside or outside the UK; the size, type or nature of their business?*

The responsibility to respect rights applies to all business regardless of where they operate, size, type of business etc. It is clear, however, that the way in which business should be encouraged to meet its responsibilities may vary. The opportunities for business to further the realisation of human rights will vary greatly according to the nature of the business activity, but the underlying premise and rights based approach will remain the same.

(c) *How, if at all, should the current economic climate affect the relationship between business and human rights?*

The current global financial crisis could undoubtedly negatively impact the business commitment to human rights and propagate a view of "corporate social responsibility" as voluntary action in times of profitability, rather than central to the core competency of the business and part of a long-term commitment to deliver social change.

It is our view, however, that the current economic climate should serve to reinforce the need to embed human rights in sustainable business practices. There has been an identifiable shift in the international order and a resulting recognition of the need for increased state regulation of business and accountability of all actors in society. The financial crisis should be viewed as opportunity to embed to change and human rights into the culture of business.

EFFECTIVE ACCESS TO REMEDIES

7. *Does the existing legal, regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?*

As outlined above it is considered that the existing legal framework of regulation is piecemeal both for companies operating in the domestic framework and abroad. This serves to increase the need for supporting and complementary non judicial mechanisms.

8. *If changes are necessary, should these include:*

Judicial remedies (If so, are legislative changes necessary to create a cause of action, or to clarify that a cause of action exists; or to enable claims to proceed efficiently and in a manner that is fair to both claimants and respondents);

As outlined above it is considered there may be cause for closer examination of the law around extraterritorial jurisdiction and parent company liability for its subsidiaries when operating abroad.

Non-judicial remedies (for example, through the operation of ombudsmen, complaints mechanisms, mediation or other non-judicial means). If non-judicial remedies are appropriate, are there any examples of good or bad practice which the Committee should consider?

Government initiatives, whether by legislation, statutory or other guidance or changes in policy;

As outlined above it is hoped that the UK NCP will continue to consult with stakeholders and improve its effectiveness.

It must be recognised, however, that non—judicial mechanisms such as the OECD NCP's have inherent limitations which must be clearly articulated (for example they lack the legal powers to carry out investigations or provide remedies to victims.) Non—judicial mechanisms require to be complemented and supported by judicial mechanisms to provide an effective remedy.

As outlined above the SHRC would welcome further discussion around the establishment of a new body to investigate, sanction and provide remedies for abuses committed by UK companies abroad and/or the establishment of a supra-national institutional structure such as an Ombudsman, as mentioned in the UNSRSG's report.

Initiatives by business or other non-Government actors

In accordance with Ruggie's framework we note an increased interest by companies in establishing company level grievance mechanisms. We consider that while these can serve to increase accountability and foster a culture of human rights within an organisation, it must be ensured they operate in accordance with certain rights based principles and are supported by a robust legal framework of accountability. With regard to all non judicial grievance mechanisms in order to secure legitimacy and credibility the rights of victims must be paramount and multi stakeholder scrutiny around their operation must be maintained.

Memorandum submitted by Survival International

BRITISH COMPANIES ON TRIBAL LAND

1. Vedanta Resources plc is a FTSE 100 mining conglomerate, listed on the LSE with its registered office in this country. It is about to construct an open pit mine in Orissa, India which will blast 73 million tonnes of bauxite from Niyam Dongar, the most sacred site of the Dongria Kondh. The streams and cultivated land on which the tribe depends for its livelihood will be polluted by air-borne particulates from the mine, conveyor and access roads. A timber mafia has already begun to use these roads to invade Dongria forests and orchards. For months now, in a last ditch effort to protect their way of life, the Dongria and their supporters have organised road blocks, mass protests and other demonstrations against the mine.¹³⁰ Many believe that the tribe will not survive if Vedanta proceeds with its plans.

2. In December 2008 we filed a complaint against the company for breaches of the OECD Guidelines for Multinational Corporations. We would welcome an opportunity to give oral testimony about the complaint and how it has been handled. In summary we have alleged that Vedanta has persistently failed to respect the rights of the Dongria Kondh under international human rights law—particularly their rights to enjoy their own culture and religion, to equality before the law, and not to be deprived of their means of subsistence. We have also identified repeated violations of the Dongria's right to be consulted about the project under the Convention on Biological Diversity, the Race Convention and the UN Declaration on the Rights of Indigenous Peoples.

3. Notwithstanding claims by Vedanta that the complaint represents a “deeply disturbing interference in the internal affairs of India,” and “shows contempt” for the Indian Supreme Court which has received petitions about the mine, the DBERR has recently decided that the complaint is admissible. An investigation is now under way.¹³¹

4. We have also drawn the attention of Vedanta Directors to their duty under section 172 of the Companies Act 2006 to “have regard to the impact of the company's operations on the community and the environment, [and to] the desirability of the company maintaining a reputation for high standards of business conduct”. We have reminded them that Section 417 requires the company to inform shareholders in its 2009 Business Review that an adverse finding under the OECD procedures might harm its reputation; and of the significant costs that the company can expect to incur to protect its property and personnel against the protests to which we have referred.

5. Another group with which we are closely involved are the Kalahari Bushmen, whom we helped win a landmark case in the Botswana High Court against their eviction from the Kalahari Desert. In December 2006 the Court ordered that they should be allowed to return to their settlements. As and when world markets recover, however, a diamond mine will almost certainly be built on their territory and will bring new threats for the Bushmen. Unless Gem Diamonds Ltd—another LSE listed FTSE 100 company in which the mining rights are vested—can be persuaded to enter an impact and benefits agreement with the affected communities, they may be forced from their homes again.

6. In other sectors the problems are of a different order but are no less acute. Most recently we have crossed swords with a television production company, also British, which trespassed on tribal lands in South America to make a reality TV programme. The film crew unwittingly brought disease with them, and are said to have left several Indians dead in their wake.¹³²

NO EFFECTIVE CONTROL

7. There is no doubt that British companies frequently exert an enormous impact on indigenous peoples in developing countries, and that their activities escape effective regulation in both the host country and the United Kingdom.¹³³

8. In the host country, governments often fail to enact the domestic legislation required to give effect to the human rights covenants they have ratified. Even if the legislation is in place there may be no independent judiciary to enforce it, and indigenous communities almost always lack the financial or human resources to litigate.

¹³⁰ For details see <http://www.survival-international.org/news/4152> In a recent altercation, Dongria tribesmen apparently resorted to violence to repel Vedanta personnel from Niyam Dongar. Local tensions continue to increase.

¹³¹ The complaint can be accessed at www.oecdwatch.org/cases/Case_165/753/at_download/file . The initial assessment by the DBERR is at <http://www.berr.gov.uk/nationalcontactpoint>. For the background, see www.survival-international.org/tribes/dongria

¹³² See <http://www.survival-international.org/news/3166> for details.

¹³³ By “indigenous peoples” we mean people characterised by a close attachment to ancestral territories, self-identification as members of a distinct indigenous group, and a subsistence-oriented production.

9. In the United Kingdom, many organisations at least make the right noises. New codes of conduct and human rights policies appear almost daily.¹³⁴ The Equator Principles call on companies to “respect and preserve the culture, knowledge and practices of Indigenous Peoples”. The International Council on Mining and Metals has committed its members, many of whom are major British companies, to “respect the rights and interests of indigenous peoples under international human rights laws.” Rio Tinto has agreed not to mine on aboriginal land without the consent of the community, even if this “may sometimes result in our not exploring land or developing operations when legally permitted to do so.” The bank that advised Vedanta on its stock exchange listing, JP Morgan Chase, is one of several which have pledged not to fund projects on tribal lands unless they are preceded by a “free, prior and informed consultation” of the affected groups.

10. These are encouraging developments, but most voluntary codes offer no effective redress if things go wrong; and the companies most likely to violate indigenous rights are the least likely to subscribe to a code in the first place.¹³⁵ Vedanta may incur reputational damage if the OECD finds against it, but the company cannot be compelled to put right the damage it has done, or even to adjust its future conduct. Nor is there any obvious way of bringing to book a company or its directors for breaches of sections 172 or 417 (which may explain why the Vedanta board has not troubled to reply to our letters on the subject).

11. The UK Government also makes the right noises. It voted for the UN Declaration on the Rights of Indigenous Peoples, and accepts that these peoples “have suffered many historic injustices and continue to be amongst the poorest and most marginalised peoples of the world.” It has yet to introduce any practical measures, however, to ensure that British companies do not add to these injustices.

12. One of the Business Principles of the ECGD, for example, is that it “will ensure that our activities take into account the Government’s international policies, including those on sustainable development [and] human rights”; but no sanction is available if the recipient of an export credit guarantee operates on indigenous land without prior consent.

13. In theory an indigenous community might sue an English company here for a negligent act or omission abroad. Negligence in remote areas may be difficult to establish, however, and it can be even more problematic to prove that it is the actions of the English parent that have driven its local subsidiary. Cases could take years to come to trial.

THE WAY FORWARD

14. If real progress is to be made new means must be found to hold British companies liable in this country for the violation of indigenous rights abroad. Professor Ruggie has himself referred with apparent approval to the “increasing encouragement at the international level, including from the treaty bodies, for home States to take regulatory action to prevent abuse by their companies overseas.” Interestingly the example he gives is a request made by the UN Committee on the Elimination of Racial Discrimination to Canada, to “take appropriate legislative or administrative measures to prevent adverse impacts on the rights of indigenous peoples in other countries from the activities of transnational corporations registered there.”

15. What sort of measures might the UK introduce? It could and should follow the lead of the Dutch Parliament which in 2001 approved proposals to enable financial assistance to be withdrawn from companies which fail to comply with the OECD Guidelines. The UK ought also to consider whether to remodel its national contact point along Dutch lines, so as to encourage a more obviously independent investigation of complaints. It should often be possible, and desirable, for the NCP to hold public hearings.

16. In France, listed companies are required by law to report on the compliance of their foreign subsidiaries with “fundamental” ILO conventions. A similar provision could easily be introduced here, especially for ILO Convention 169 on Tribal and Indigenous Populations. Shareholders are entitled to know whether and how their companies respect the rights of the indigenous communities with which they come into contact. They ought especially to be able to satisfy themselves that the company has not undermined indigenous rights to “ownership and possession of the lands which they traditionally occupy” [Article 14(1)], and “to be consulted with a view to ascertaining whether and to what degree their interests would be prejudiced, before any programmes are undertaken for the exploration or exploitation of mineral resources pertaining to their lands” [Article 15(2)].

17. The Environmental Information Regulations 2004 already recognise the public’s right to environmental information, and do not confine the right to information about activities with an environmental impact in the UK. But the Regulations would be more effective if British companies were required to deposit with a public authority in this country impact assessments of projects of which they or their subsidiaries were the proponent and which were likely to affect indigenous peoples.

18. Social and environmental impact assessments are now a standard requirement in some developing countries, if only to appease the IFIs. They vary hugely in quality but can contain valuable material not readily accessible elsewhere. Rarely, however, are they made available to the indigenous peoples whose homes or livelihood may be directly under threat. Even if they are, illiteracy rates in many communities

¹³⁴ See <http://www.business-humanrights.org/Documents/Policies>

¹³⁵ Vedanta, for example, is not a member of the IMCC. Nor is Gem Diamonds.

remain high. If NGOs like Survival were able to obtain these assessments here, they could explain their significance to the communities in a language and a form they could readily understand. (Indigenous people may not be able to read but they can use mobile phones).

19. Without prior access to the impact assessment, any “consultation” of the community about the project is likely to prove an empty charade. With it, community leaders should find it much easier to negotiate with project proponents.

20. These are all modest proposals. We believe that the UK should go further and ratify Convention 169, as the European Parliament has urged all member states to do. The Government has so far declined, ostensibly on the ground that there are no indigenous peoples in this country.

21. This has not stopped Spain and the Netherlands, both of which have recently ratified the Convention to ensure compliance with its provisions by Spanish and Dutch companies working in indigenous areas. Ratification would fully accord with the views of the IFC, which has pointed out that:

“If an IFC client is implementing a project where government’s actions mean that the project does not meet the requirements of the Convention, it can find itself accused of ‘breaching’ its principles or of violating rights that it protects. This has occurred in relation to several IFC-financed projects in Latin America, and such complaints have sometimes contributed to troubled community relations and project delays. The implementation of the Convention in the context of private sector projects (directly by governments or indirectly by private companies) will support a more open and inclusive approach to private investment. In this way, the private sector also benefits from government ratification and adherence to the Convention.”

22. A short enabling Act could require British companies to “respect” the rights of indigenous peoples laid down by the Convention, and give them a cause of action here for a breach of the statutory duty. If necessary the court would assume jurisdiction only if it was first satisfied that the claimants were unable to obtain adequate relief in their own country. With or without this restriction, litigation in the UK would be a rare event. The mere possibility of a claim, however, would again strengthen the hand of community leaders in their attempts to resolve disputes with multinationals.

23. Alternatively an independent commission should be created to investigate allegations of corporate abuse. The statute by which it is formed should require British companies to take reasonable steps to identify and avoid any abuse of indigenous rights within their sphere of responsibility. In most instances this will require a company to commission an indigenous peoples impact assessment before a project is approved. As Professor Ruggie has observed

“Many corporate human rights issues arise because companies fail to consider the potential implications of their activities before they begin. Companies must take proactive steps to understand how existing and proposed activities may affect human rights ... While these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis.”¹³⁶

24. It is essential that the “internationally recognized human rights” which the company is required to respect should specifically include the right of indigenous peoples to their traditional lands, and their right not to be removed from them without their prior informed consent. These rights are unique to indigenous peoples, reflecting the unique relationship that they bear to their land and territories. Unless their consent is obtained at all stages of the project lifecycle, indigenous peoples will be effectively denied their more conventional human rights as individuals.

25. Affected communities can only consent to a project if they are informed about its nature, duration and impact in a culturally appropriate manner. Anthropological or other expert evidence may be required to determine what is appropriate in any particular case, and the commission would need to have the power to call for such evidence where it was required. Provision would also have to be made to meet the costs incurred by indigenous communities in making representations to the commission.

CONCLUSION

26. The particular rights of indigenous peoples are now well established in international law. Over the last few years many companies have come to recognise that it is in their own best interests to recognise and respect those rights. They know that if they fail to do so they risk significant delays, reputational damage and hugely increased security costs, as well as the prospect in some cases of future litigation. These risks can only increase as indigenous groups become better organised (or, depending on your point of view, more militant).

¹³⁶ Protect, Respect and Remedy: A Framework for Business and Human Rights [A/HRC/8/5] §61

27. There remain companies, however, that cling to the view that their investors are concerned solely with profits, and that they can safely rely upon their superiority of arms to defeat any indigenous community that confronts them. They know that local laws will not usually be allowed to stand in their way. They think they know that UK laws cannot deter them either. We hope that the JCHR can take effective steps to disabuse them of this notion.

30 April 2009

Supplementary memorandum submitted by Survival International

Earlier this year we submitted a report to the JCHR regarding the activities of FTSE100 company Vedanta Resources in the Niyamgiri hills of Orissa, India.

This week, the Department for Business, Innovation and Skills (BIS) issued a Final Statement on Survival International's complaint against Vedanta under the OECD Guidelines for multinational enterprises.

The British government's statement condemns Vedanta's treatment of the Dongria Kondh tribal community and upholds Survival's complaint. It concludes that Vedanta "did not respect the rights and freedoms of those affected by its activities consistently with the international instruments of which India is a party", "did not consider the impact of the construction of the mine on the [Dongria's] rights" and failed to consult with the Dongria.

I hope that you will use this information in your current review of business and human rights and that the JCHR will be ensuring that the government follows up on cases like this so that such statements do not remain toothless paper recommendations.

As requested, we shall be reporting back to the National Contact Point at BIS within three months with news of whether Vedanta has abided by its recommendations. If it has not, we will be seeking ways to ensure that sanctions are levied on the company and would be very interested to hear your views on what the government could—or should—do in this regard.

13 October 2009

Memorandum submitted by War on Want

1. THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

War on Want welcomes the opportunity to submit evidence to this inquiry into business and human rights.

War on Want has long maintained a strong focus on exposing the human rights abuses that UK corporations, both directly and indirectly, commit across the world. These abuses range from the shooting of innocent civilians by UK private military and security companies (PMSCs) to labour rights abuses by companies making goods for UK high street supermarkets.

The UN Committee on Economic, Social and Cultural Rights has clarified that the obligation of the state to protect human rights beyond borders includes a duty to prevent third parties (including companies headquartered within their jurisdiction) from abusing economic, social and cultural Rights in other countries.¹

War on Want believes that the government needs to play a much stronger role in enforcing human rights and ensuring human rights abuses committed by UK corporations, anywhere in the world, are addressed promptly and effectively.

We do not accept the government's approach to business and human rights, which is based on the use of voluntary initiatives and the promotion of corporate social responsibility (CSR) rather than effective enforcement and redress for affected individuals.

Research undertaken by War on Want and its partners in the Corporate Responsibility (CORE) coalition reveals that UK companies have committed or contributed to human rights abuses in many countries and contexts.²

War on Want has itself gathered evidence from our partners and through investigations on the ground in developing countries highlighting human rights abuses committed by UK corporations. Below is a list of reports War on Want has produced relating to this issue:

- War on Want has published a report highlighting the gross human rights abuses by PMSCs operating in conflict zones such as Iraq.³ Yet despite the many human rights abuses that PMSCs have committed and promises to regulate this sector, the UK government has now proposed industry "self-regulation" instead.⁴
- War on Want has published reports on UK mining corporations operating in conflict zones overseas and their complicity in human rights abuses.⁵ The abuses highlighted include violence and intimidation of local people by paramilitaries and police, arbitrary arrests, physical violence, extrajudicial killings, destruction of houses and the forced displacement of local communities.

- War on Want has recently published a report on the UK banks' financing of the arms trade, highlighting how many of our high street banks are supporting the arms industry despite their claims to be acting responsibly.⁶ This includes supporting companies making cluster munitions, which have been condemned by the UN as "immoral"⁷ and are estimated to have killed as many as 100,000 people.⁸
- War on Want has also published a report highlighting the complicity of companies in human rights abuses committed against the Palestinian people.⁹ These human rights abuses include the destruction of Palestinian homes, schools, orchards and olive groves and have resulted in the forced displacement of Palestinian families and the loss of human lives.
- War on Want has produced a number of reports highlighting the human rights abuses suffered by workers supplying goods for well-known high street companies. These include reports on garment workers, flower workers and wine workers from overseas supplying UK supermarkets.¹⁰ The abuses concerned include physical and verbal harassment, severe breaches of health and safety standards, intimidation and imprisonment of trade unionists, denial of the right to protest, excessive working hours and unfair wages.

War on Want has also produced a number of alternative company reports to compare and contrast the rhetoric of CSR with the reality of companies' actual practices:

- War on Want's Anglo American report exposes the company's complicity in extrajudicial killings and forced displacement of local communities in Colombia and the Democratic Republic of Congo, as well as other human rights abuses in Ghana, Botswana, Mali, South Africa and the Philippines.¹¹
- War on Want's Coca-Cola report exposes the company's role in denying farmers and local communities in India adequate water due to overextraction from local aquifers. Coca-Cola has been accused of complicity in the intimidation and torture of trade unionists in Turkey, as well as union-busting activities in Pakistan, Guatemala, Nicaragua and Russia.¹²
- War on Want's Asda Wal-Mart report reveals the company's violation of workers' rights and anti-trade union activities in Canada, China, Honduras and the UK.¹³
- War on Want's Caterpillar report highlights the use of Caterpillar bulldozers in Israel's occupation of Palestine.¹⁴ Caterpillar equipment has been used in the destruction of Palestinian homes, schools, orchards and olive groves and the construction of the Separation Wall, which Israel has built on illegally occupied Palestinian land in the West Bank.

These reports clearly illustrate how UK corporations operating across different sectors can commit or be complicit in a broad range of human rights abuses, including abuses of economic, social and cultural rights. We believe that it is essential that the Joint Committee consider the full range of human rights—as was also acknowledged by Professor Ruggie, UN Special Representative on Human Rights and Transnational Corporations, when developing his framework for business and human rights. This reinforces the UN Special Representative's view that the human rights issues confronting companies are wide-ranging and far-reaching.¹⁵

CSR is not an acceptable mechanism for enforcing human rights

War on Want believes that companies must be made accountable for their complicity in human rights abuses if there is to be any possibility of preventing further abuses in future. Rather than calling British companies to account, however, the UK government continues to offer companies support in developing countries, irrespective of the harm which may be caused to local communities as a result of their operations.

This support for UK corporations is complemented by the government's promotion of the voluntary approach of CSR. The British government has consistently championed voluntary codes of conduct for industry, and opposed the introduction of international frameworks of regulation on the grounds that these "may divert attention and energy away from encouraging corporate social responsibility and towards legal processes".¹⁶ War on Want has repeatedly challenged the government's promotion of voluntary codes and other CSR initiatives, seeing as these have been manufactured as a deliberate and open attempt to avoid the introduction of binding rules which would offer genuine corporate accountability.

In a review of the effectiveness of CSR by the Department for International Development (DFID), many of the existing voluntary initiatives were found not to be integrated into the operations of corporations.¹⁷ For example, with respect to the UN Voluntary Principles on Security and Human Rights, DFID found only a few companies had attempted to integrate these principles into their own operations, let alone include them in contracts with their suppliers.

The failings of this approach have been spelled out clearly by Professor John Ruggie in his February 2007 report to the UN Human Rights Council. Having surveyed existing instruments of corporate accountability in national and international law, Ruggie drew attention to the "large protection gap for victims" which exists as a result of the international community's reliance on voluntary initiatives. He concluded: "*This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed.*"¹⁸

Limitations of the UK Equality and Human Rights Commission

The UK Equality and Human Rights Commission (EHRC) is able to investigate suspected breaches of human rights law by UK corporations. For example, the EHRC commissioned an inquiry into the UK meat processing industry within the UK and its potential impact on issues of discrimination and inequality.¹⁹ However, its powers of investigation only extend to suspected breaches of specific UK “*equality and human rights enactments*” and not to the operations of UK companies abroad.²⁰ The ECHR also lacks the legal power to recommend new human rights laws. If the UK were to address the extra-territorial impacts of its companies on human rights, even in very selective circumstances, then this would almost certainly require the enactment of new UK legislation.

2. THE RESPONSIBILITY OF BUSINESS TO RESPECT HUMAN RIGHTS

While governments as signatories to UN Conventions covering human rights are primarily responsible for ensuring they are respected and enforced, corporations themselves are not exempt from ensuring they actively promote and enforce human rights wherever their sphere of influence reaches.

Sphere of influence

Modern corporations are integrated into the global economy through their extensive supply chains, with a varying degree of control over companies and businesses within those chains. It is also well known that corporations often deliberately structure their operations so that their subsidiaries are legally separate entities, in order to protect themselves from future legal and financial liabilities.²¹

War on Want believes UK corporations must be required to ensure that human rights of individuals and local communities are respected wherever they operate or have influence over a business within their supply chain.

Corporate complicity

War on Want’s experience of working with partner organisations in conflict zones reveals that corporations may not always be directly involved in human rights abuses but can still be complicit in these abuses. Human rights lawyers have distinguished between three types of corporate complicity in such abuses.

“Silent complicity” is held to exist where companies fail to speak out against clear patterns of human rights violation in their areas where they are operating. “Beneficial complicity” pertains when companies are the beneficiaries of human rights abuses committed by state forces—as in many of the cases described in our two reports *Fanning the Flames* and *Fuelling Fear*.²² “Direct complicity” occurs when a company provides assistance to a body which then commits a human rights violation, even if the company itself did not wish the violation to happen: “it is enough if the corporation or its agents knew of the likely effects of their assistance”.²³

Supply chains

War on Want believes that corporations must be required to take responsibility for human rights within their supply chains. Companies routinely use their contractual relationships with suppliers to ensure that products and services purchased meet certain technical and quality standards. Failure to comply with these standards can lead to penalties and ultimately the cancellation of contracts.

War on Want’s experience is that voluntary initiatives which are put forward to ensure “socially responsible” behaviour are typically ignored or downplayed, while other factors such as purchasing practices and profits are afforded more importance. One well documented example is that of high street retailers that have signed up to a voluntary initiative to ensure ethical labour practices in their supply chain when sourcing garments from overseas.²⁴

The failure of this approach was highlighted by a shareholder resolution put forward at Tesco’s Annual General Meeting in 2007. The resolution requested the company appoint independent auditors to ensure that workers in its supplier factories and farms are guaranteed “*decent working conditions, a living wage, job security*” and the right to join a trade union of their choice.²⁵ Tesco opposed the resolution, even though it only called on the company to abide by the ethical labour practices Tesco claimed its suppliers were already signed up to.²⁶

3. EFFECTIVE ACCESS TO REMEDIES

While there are numerous voluntary initiatives and codes of practice promoting “socially responsible” behaviour for corporations there are no administrative bodies or procedures that offer effective redress or remedies for victims of abuse committed by UK companies overseas.²⁷ The best known international mechanism for allowing victims of corporate abuse to challenge poor corporate practice is the OECD Guidelines for Multinational Enterprises.

The limitations of existing mechanisms

Under the Guidelines, National Contact Points (NCPs) were established in OECD countries to investigate potential breaches of the Guidelines brought forward by complainants. Yet the NCP can only provide mediation and adjudication with respect to disputes between parties, and it has limited investigative capacity and no enforcement powers. Case studies conducted by a number of NGOs have illustrated that the structural weaknesses of the NCP mechanism have not been addressed by the review and restructuring implemented by the government in 2006.²⁸ At the heart of these weaknesses is the inability of the NCP to impose penalties on companies or award compensation to victims.

These weaknesses cannot be addressed by procedural changes, so putting additional resources into strengthening this mechanism is unlikely to be a productive avenue for the UK government to pursue.

Barriers to redress in host countries

Clearly, when abuses of rights occur it is the duty of governments to ensure the provision of effective mechanisms of legal redress. Where there are concerns around insufficient capacity within countries hosting foreign companies, the UK can provide support for capacity building to help to promote effective human rights protection.

However, studies and years of experience amassed by War on Want partners in developing countries show that there are systemic barriers to effective redress.²⁹ Often these are not legal barriers but practical and financial barriers to accessing avenues of redress; capacity barriers with respect to regulatory authorities and judicial systems; and motivational barriers arising from governments' subordination of the protection of rights to other private or public goals.

The systemic nature of barriers to redress in developing countries suggests that the strengthening of local systems of redress would be an insufficient approach to protecting the human rights of workers and communities affected by the business activities of UK companies abroad.³⁰

Proposal for a UK Commission on Business, Human Rights and the Environment

On the basis of a detailed review of possible avenues for reforming existing systems, the Corporate Responsibility (CORE) coalition has proposed the creation a new body to address the human rights responsibilities of companies when operating abroad.³¹ It proposes that the government should create a specialised *Commission for Business, Human Rights and the Environment* able to operate as a hub for a broader network of actors working in the UK and abroad. The Commission would have coordinating, capacity building and informational roles, while also operating as a dispute resolution body with a mandate to receive, investigate and settle complaints against UK parent companies relating to abuse in other countries.

War on Want supports such a body, which it believes could make a significant difference to addressing the human rights abuses committed by UK companies operating overseas and, importantly, help victims of such abuse to seek legal redress.

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¹² War on Want, *Coca-Cola: The alternative report*, March 2006.

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- ¹⁹ Equality and Human Rights Commission media release, “Commission announces independent inquiry into the treatment of workers in the meat processing industry”, 17 October 2008.
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- ²¹ H Ward, “Corporate accountability in search of a treaty? Some insights from foreign direct liability”, *Briefing Paper No 4, The Royal Institute of International Affairs Sustainable Development Programme*, May 2002.
- ²² War on Want, *Fanning the Flames: The role of British mining companies in conflict and the violation of human rights*, November 2007; War on Want, *Fuelling Fear: The human cost of biofuels in Colombia*, May 2008.
- ²³ A Clapham and S Jerbi, “Categories of Corporate Complicity in Human Rights Abuses”, in *Hastings International Comparative Law Journal*, vol 24, 2001, pp339–349; this three-fold typology has been adopted by the Office of the UN High Commissioner for Human Rights in its online Human Rights and Business course, which argues that examples of direct rather than simply beneficial complicity could include cases “where a company provides information, funding or equipment to a government that it knows will be used to violate human rights”; see www.unssc.org
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- ²⁸ Rights and Accountability in Development (RAID), *Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises*, 2008.
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- ³⁰ *Ibid.*
- ³¹ *Ibid.*, pp41–43.

Memorandum submitted by Prospect

JOINT COMMISSION ON HUMAN RIGHTS: LABOUR RIGHTS AS HUMAN RIGHTS

As a trade union we are currently engaged in a three year Department for International Development funded project that aims to address poverty reduction via Corporate (Social) Responsibility and supply chains. The approach is grounded in trade union values which we believe impacts all dimensions of the “world at work” be this local and/or global and that labour rights are fundamental to the health and well being of workers in all business activities. We therefore want this submission to be considered as part of the Select Committee’s current inquiry.

Prospect is an independent, thriving and forward-looking trade union with more than 102,000 members in the public and private sectors. Our members are engineers, scientists, managers and specialists in areas as diverse as agriculture, defence, energy, environment, heritage, shipbuilding and transport. We are the largest union in the UK representing professional engineers.

Enclosed for you is our new Negotiator's Guide to Corporate Social Responsibility, which outlines the approach we have to the global world at work encapsulating the core belief of the right to decent safe work as a means to address poverty and to hold organisations to account from within.

This approach, aimed at demonstrating the link between organisational activities, core labour standards and the Millennium Development Goals and that as trade unionists we can bring about change to working practices, not only to the communities in which organisations operate—but the broader accountability in practices relating to the developing world—this to include labour exploitation, national humanitarian campaigns, trade inequalities and corruption that impacts individuals and communities in the developing world.

LABOUR RIGHTS AS HUMAN RIGHTS

(Question 1 & 2)

Derived from the Universal Declaration of Human Rights and ⁱAdopted in 1998, the ILO Declaration on Fundamental Principles and Rights at Work is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values—values that are vital to our social and economic lives. The Declaration covers four areas:

- Freedom of association and the right to collective bargaining.
- The elimination of forced and compulsory labour.
- The abolition of child labour.
- The elimination of discrimination in the workplace.

The Declaration makes it clear that these rights are universal, and that they apply to all people in all States—regardless of the level of economic development. It particularly mentions groups with special needs, including the unemployed and migrant workers. It recognizes that economic growth alone is not enough to ensure equity, social progress and to eradicate poverty.

Workers' rights are human rights, but that these rights are still denied to millions of workers. Abuses range from restrictive legislation to the brutal repression and even murder of union activists—the ultimate breach of their fundamental right to life.

DECENT WORK AS A HUMAN RIGHT

Decent workⁱⁱ is captured in four strategic objectives: fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue. These objectives hold for all workers, women and men, in both formal and informal economies; in wage employment or working on their own account; in the fields, factories and offices; in homes or in the community.

PROSPECT, LABOUR RIGHTS & POVERTY REDUCTION

(Question 6)

Prospect's initiative to link the Millennium Development Goals and trade union values, which in essence are those of basic human dignity, into a force that can affect change from within the organisations we represent (both private and public sectors). This approach is also expected to achieve results: sustained progress towards respect of human rights, development, peace, security, eradication of poverty, and achievement of the Millennium Development Goals.

Prospect's approach will be to raise awareness of the MDGs and human/labour rights and then advocate for organisations to address these issues via:

1. Corporate Social Responsibility

Demonstrating the link between organisational activities, core labour standards and the Millennium Development Goals and that as trade unionists we can bring about change to working practices, not only to the communities in which organisations operate—but the broader accountability in practices relating to the developing world—this to include labour exploitation and corruption that impacts individuals and communities in the developing world.

The objectives of this ongoing work will be to demonstrate:

- How the Millennium Development Goals can help deliver organisational CSR policies.
- That organisations play a role, through their overseas operations and supply chains, in alleviating poverty by providing safe, decent and humane work.
- How organisational humanitarian/charitable work activities can contribute to the Millennium Development Goals.

2. Procurement & supply chains (*Question 8*)

We aim to encourage members to call for ethical procurement to be added to the bargaining agenda with their employers. This will include advocacy to ensure that the working conditions of workers in companies that supply goods to UK consumers (both individual and corporate consumers) meet or exceed international standards and adhere to labour rights.

Prospect

April 2009

ⁱ http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN

ⁱⁱ http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatisDecentWork/lang--en/index.htm

Memorandum submitted by the Corporate Responsibility Coalition (CORE)

ABOUT CORE

The Corporate Responsibility (CORE) Coalition seeks to help achieve our members' goals by improving the environmental and social performance of UK companies abroad.

CORE is a coalition of 130 NGOs, trade unions, academics, responsible businesses and individuals who work on environment, development and human rights issues including groups as diverse as Action Aid, Amnesty International (UK), Christian Aid, Friends of the Earth, Global Witness, The Schumacher College, Traidcraft, War on Want, The Women's Institute, WWF-UK, UNISON and Unity Trust Bank. CORE was founded in 2001 to provide policy leadership and coordinate campaign efforts to improve the environmental and human rights impacts of UK companies.

CORE's members have extensive and diverse experience in identifying and finding solutions to environmental, human rights and poverty related issues. The broad experience of the membership has led them to conclude that all too often UK companies' impacts abroad are detrimental to people and the environment. CORE's work is guided by these experiences and aims to establish an appropriate framework for the corporate sector, specifically to:

1. Improve companies' *transparency* regarding social and environmental impacts;
2. Increase *accountability* of companies for their impacts on stakeholders; and
3. Ensure adequate *access to justice* mechanisms are in place for victims of corporate abuses.

From 2001 to 2006 CORE's campaign focused on securing legislative amendments in relation to *directors' duties* and company reporting in The Companies Act 2006. The campaign resulted in new legal obligations on company directors to have regard to environmental and social impacts in company decision-making and a new obligation on the largest public companies to report annually on their environmental and social impacts.

Since enactment of the Companies Act 2006, CORE has followed the implementation of this new legislation¹³⁷ and undertaken a range of research to update our analysis in this area (producing research on corporate abuse in 2007,¹³⁸ exploring options for reforming tort law,¹³⁹ and carrying out consultations with MPs, government departments and civil society groups). CORE is now campaigning for the UK Government to improve access to justice for victims of UK companies, through the creation of a new UK Commission for Business, Human Rights & The Environment.

OUR ANALYSIS

There are many obstacles to effective corporate governance of international companies. The reluctance of some states to effectively regulate companies' negative impacts, liability limitations, concern about the exercise of extraterritorial jurisdiction and the sheer range and complexity of international business

¹³⁷ CORE's Directors Duties Guidance, by David Chivers QC was sent to the FTSE 100. Available here: http://www.corporate-responsibility.org/module_images/directors_guidance_final.pdf

¹³⁸ Zerk, Jennifer, (2007), *Corporate Abuse 2007: A discussion paper on what changes in the law need to happen*, CORE, London available at http://www.corporate-responsibility.org/module_images/corporateabuse_discussionpaper.pdf

¹³⁹ Watson, Niall "Challenging the Future of Corporate Responsibility", CORE, London available at http://www.corporate-responsibility.org/C2B/document_tree/ViewADocument.asp?ID=146&CatID=9

arrangements all combine to make it difficult to bring companies to account, particularly where the abuse has taken place in a country with a developing or emerging economy.

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relations to human rights is our fundamental challenge.”

John Ruggie
UN Special Representative on Human Rights and Transnational Corporations
(April 2008)

There is a likelihood that trends in business-related international human rights and environmental violations are worsening as the global reach of companies and their supply chains extends and as poor practices go unchecked. This is compounded by the lack of effective penalties and other forms of deterrence that would have the effect of preventing poor practices. Those in business who would like their companies to have a better social and environmental footprint will only be able to justify this if they know they will not be undercut in the market. Currently there is no business case which exists for all companies to be more ethical, only a business case for strong consumer brands selling to socially conscious consumers.

Ideally, unacceptable corporate practices should be dealt with in the country where they occur, the reality is there are often many barriers to redress in developing countries. Although laws may exist on paper, regulatory oversight can be weak, under-resourced and, in some cases, corrupt. CORE and The London School of Economics (LSE) published a report *‘The Reality of Rights: Barriers to accessing remedies when business operates beyond borders’*, provided as an appendix to this submission, illustrating how victims of human rights violations are far too often unable to obtain adequate remedy. Case studies were drawn from a broad spectrum of commercial sectors and activities and although each case study raised its own set of problems a number of common themes emerged:

1. Governments having to decide between the competing priorities of effective redress for victims and attracting international investment for job creation;
2. Victims lacking information about the processes for seeking redress;
3. Victims being politically marginalised based on issues such as race, class and gender;
4. Victims being unable to afford legal advice as well as there being a lack of legal expertise to call on;
5. Victims not trusting the delays, uncertainty, weak remedies, and independence of the legal and self-regulatory system;
6. Governments lacking the capacity to enforce the laws they do have, and
7. Large multinational companies having the money and expertise to exploit and reinforce the barriers.

Some victims’ groups have bypassed their local legal systems altogether and have brought claims directly against parent companies of corporate groups in the “home states” of those companies (eg in the UK and the US). These claims are based upon the idea that parent companies ought to bear some responsibility for the failings of their subsidiaries and suppliers, since it is usually the parent which influences the subsidiary’s decisions and profits. But the logistical, financial, legal and psychological obstacles to pursuing a lawsuit against the parent company in another jurisdiction are huge, meaning that many abuses go un-remediated.

Alternatively, it might be possible to bring a complaint under the Organisation for Economic Cooperation and Development’s (OECD) Guidelines for Multinational Enterprises before the appropriate National Contact Point (NCP). Recent reforms of the UK NCP have resulted in some significant improvements to this process (eg. a steering board with external representation, increased capacity, judgements) though inherent limitations remain. The most significant of limitations are the lack of transparency, inconsistency of application, lack of legal force, and the absence of an enforcement mechanism to compensate those affected or to penalise companies that clearly breach these standards.¹⁴⁰

In the UK, environmental, health and safety, and labour legislation has been vitally important in setting out what is and is not acceptable corporate practice in this country. Crucially, this legislation does not address the impacts of UK companies operating in other countries. Although ILO Conventions have been successful in securing advancement of workers rights internationally, many other international agreements and standards such as the OECD Guidelines for Multinational Enterprises have proven ineffective in ensuring responsible behaviour of corporations in relation to their international activities.

¹⁴⁰ RAID in Association with CORE and The TUC, ‘Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises 2008’ available http://www.corporate-responsibility.org/module_images/NCP_report_2008.pdf

There are, however, several other initiatives relating to business and human rights that the Government is currently involved in. The Foreign and Commonwealth Office (FCO) lead on the United Nations Human Rights Council, the Voluntary Principles on Security and Human Rights for the Extractive Sector, as well as liaising with the United Nations Special Representative for Business and Human Rights. The Department of Works and Pensions lead on ILO conventions, the Department for International Development (DFID) lead on the Ethical Trading Initiative, Extractive Industries Transparency Initiative, The Kimberly Process and The Global Compact.

CORE's members follow all of these initiatives to a varying extent. Although there is significant encouragement by the actors involved in these initiatives for greater civil society involvement, CORE's members do not have the capacity to take part in all of these initiatives in a meaningful way. This makes it difficult for other concerned stakeholders be they business, investors and consumers to ascertain the effectiveness of these initiatives. Furthermore, CORE's members do not feel it is their role, and do not have the mandate, to monitor the compliance of all the companies involved in these initiatives, as is sometimes expected of them.

Additionally, very little coordination exists between government departments involved in these initiatives and no cross-initiative learning or analysis of if, and how, these initiatives may have contributed to preventing human rights abuses or the attainment of the Millennium Development Goals, has been produced. The Department of Business, Enterprise and Regulatory Reform (BERR), FCO¹⁴¹ and DFID all have produced their own corporate social responsibility (CSR) strategies and it is of concern to CORE that it is unclear as to the progress achieved in relation to these strategies to date. It is also of deep regret to CORE that the FCO strategy has not been implemented due to the closure of the Sustainable Development and Business Group within FCO and CORE are concerned that this has led to further polarisation between departments working on these issues.

In summary, the problems with the operations of UK companies in developing and emerging economies are threefold:

1. There is a lack of effective enforcement of human rights by many host countries.
2. There is a lack of effective remedy available to foreign victims of UK companies; and
3. A lack of clarity in the outcomes, benefits and coherence of the various CSR initiatives which the Government is involved in.

RECOMMENDATIONS

The Government must address the lack of accountability of UK companies responsible for human rights abuses abroad. Although many companies do act responsibly, relying on voluntary CSR initiatives to drive companies to act responsibly is insufficient. Such initiatives are far too often undermined in the market place by irresponsible competitors. Since poor practice is not checked, the trend of worsening practices appears to be increasing, particularly for unbranded and low quality goods where there is no driver for change. The lack of drivers to improve the social and environmental performance of the bottom of the market, effectively acts as a brake on all parts of the market to improve.

In many areas of UK law, alternatives to expensive and uncertain court action have already been found. The last few years have seen a proliferation of "quasi-judicial" bodies and public complaints mechanisms whereby people can enforce their rights and resolve disputes informally without having to resort to court action. The UK legislature has introduced numerous such procedures, ranging from court-like institutions (eg employment tribunals) to less formal methods of investigating and settling complaints by members of the public (eg various "ombudsmen" services). A new dispute resolution body with a mandate to receive, investigate and settle complaints against UK parent companies relating to subsidiary or supplier abuse in other countries is a realistic legal possibility provided it:

1. Respects international law restrictions on extraterritorial jurisdiction;
2. Complements existing civil liability processes, rather than seeking to replicate or replace them; and
3. Is underpinned by a clear set of standards which focus, not on the day-to-day operations of subsidiaries and suppliers, but on the role of the parent company as the "primary influencer", "overseer" or "coordinator" of the corporate group.

¹⁴¹ See the Foreign and Commonwealth Office Departmental Strategic Objectives for 2008/09 – 2010/11 at <http://www.fco.gov.uk/resources/en/pdf/pdf1/CSR-07>.

PROPOSAL: A UK COMMISSION FOR BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

- Mandate:** To oversee compliance with codes of best practice relating to the management by UK companies of their global labour, environmental and human rights impacts, and to monitor the impacts of UK companies abroad (either directly or through subsidiaries and suppliers).
- Functions:** To provide an information and advisory service for companies and complainants; to oversee and enforce standards of best management practice; and to investigate complaints and resolve disputes regarding alleged breaches of core labour rights or adverse environmental and human rights impacts outside the UK.
- Powers:** To investigate and report on allegations of breaches of standards; to compel production of documents and witnesses; to enter into “cooperation” agreements with foreign regulatory authorities; to undertake research; to commission expert reports; to hear and resolve disputes involving UK companies in accordance with its dispute resolution procedure, to make hearings and decisions publically available.
- Possible Outcomes:** Financial award (up to a specified limit). Publication of apology and/or explanation. Recommendations. Undertakings (an order to a company in relation to a specific breach, eg. clean up a contaminated area).

CORE

May 2009

Supplementary memorandum submitted by the Corporate Responsibility (CORE) Coalition
THE CORPORATE RESPONSIBILITY (CORE) COALITION’S PROPOSAL FOR A UK
COMMISSION ON BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

THE ESSENTIALS¹⁴²

Q. *WHAT kind of body would the Commission be?*

A. An independent, non-departmental Commission with statutory mandate.

Q. *WHAT would the Commission do?*

A. The Commission would have responsibilities in four main areas:

- (a) Clarifying and promoting appropriate standards for UK companies to help them address and manage their human rights impacts. Maintaining a “Centre of Excellence” for UK companies as regards human rights “best practice”. Providing a hub of business and human rights expertise and resources that can readily be accessed by UK companies.
- (b) Providing a complaints mechanism accessible by those whose human rights have been infringed as a result of the activities of subsidiaries and contractors of UK companies in other countries.
- (c) Evaluating the effectiveness of existing business and human rights measures supported by the UK government.
- (d) Providing authoritative policy advice to government. Bringing about greater coherency in UK government response.

Q. *WHO would it be regulating?*

A. UK companies (ie companies incorporated in the UK with the power to control or direct the activities of foreign companies and contractors in other jurisdictions). *No legal obligations would be imposed on foreign entities directly.*

Q. *WHAT standards would it apply?*

A. UK companies would be placed under a general duty to supervise their foreign subsidiaries and contractors so as to respect the human rights of all those that are, or may be, affected by the operations of those foreign entities.

This general duty could then be amplified by further standards and codes of conduct, *derived from internationally agreed standards* and adopted from time to time by the Commission.

¹⁴² The CORE Coalition supports co-operative efforts within the EU and internationally towards greater accountability of corporations as regards their international human rights impacts. Additionally, national governments, especially the most significant home states for multinationals, should be doing more to support their companies in the development of “best human rights practice”, and to prevent abuse by their companies overseas. This note sets out, in outline, some ideas as to how a UK Commission on Business, Human Rights and the Environment could operate in practice.

The intention is not to apply UK law to the activities of foreign legal entities in other jurisdictions. Instead, such standards and codes of conduct would focus on the role of the UK parent company as ultimate “overseer” of global corporate operations. As such, these standards would be likely to cover matters such as:

- (i) regular human rights auditing;
- (ii) on-going human rights monitoring requirements;
- (iii) consultation with local populations and employees;
- (iv) observance of local legal requirements;
- (v) disclosure of human rights impacts, compliance policies and activities;
- (vi) appropriate remedial action.

Standards could be tailored for different sectors and regions. And facilities could be provided for companies to seek clarification of standards in relation to specific human rights compliance problems and circumstances.

Q. *WHAT powers would it have?*

A. The Commission’s legal powers would include:

- (i) powers to commission and undertake research;
- (ii) powers to promulgate standards and codes of conduct;
- (iii) powers to make recommendations to government;
- (iv) powers to investigate complaints of non-compliance with legal obligations (eg to compel production of documents, and to require attendance at interviews);
- (v) powers to obtain binding undertakings or “action plans” from companies;
- (vi) powers to make binding financial awards (up to a specified limit);
- (vii) appropriate sanctioning powers in the event of non-compliance with the Commission’s decisions;
- (viii) powers to publish details of dispute resolution outcomes; and
- (ix) powers to consult and co-operate with human rights institutions in other countries.

Q. *HOW does the Commission’s role differ from that of other existing bodies?*

A. The Commission would be administering a *UK regulatory initiative* applicable to *UK parent companies* with operations and interests overseas. The NCP, on the other hand, is concerned with a non-binding code of conduct promulgated by the OECD and addressed to multinational groups as a whole. The standards administered by the Commission would be more detailed than those used at present by the NCP. And the Commission’s role would be much wider, engaging with business on an ongoing basis to consolidate and develop our understanding of “best practice”. Finally, and unlike the NCP, the Commission would have powers to make remedial orders at the end of a dispute resolution process.

Unlike the UK’s NHRIs, the Commission would have a clear mandate in relation to human rights impacts of UK business *overseas*. However, liaison between the two institutions will clearly be necessary on UK business and human rights policy generally.

Q. *WHAT international law issues are raised by this proposal?*

A. This proposal is based on the “nationality” jurisdiction that the UK enjoys over companies incorporated within the UK. It is a “parent-based” form of regulation that, provided it is exercised “reasonably”, is permitted under established international law principles relating to the use of extraterritorial jurisdiction.¹⁴³ Regulation that is based on *internationally agreed human rights standards*, provided it is *implemented sensitively and with regard to the legitimate policy interests of other states*, ought to satisfy this “reasonableness” test.

**Memorandum submitted by the Forest Peoples Programme and Middlesex University Business School—
Law Department**

BACKGROUND

It is widely recognised that the expropriation of lands and resources from indigenous peoples directly threatens their survival as peoples and an extant and expanding body of international human rights law exists to protect indigenous peoples from such destructive actions. As recognised by one of the preeminent experts on the rights of indigenous peoples, Ms Erica-Irene Daes:

¹⁴³ See Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other enterprises, A/HRC/8/57 April 2008, para. 19.

Much large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples' rights to lands, territories and resources. Economic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development.¹⁴⁴

One of the key principles that has been developed in international human rights law to protect indigenous peoples from destruction of their lives and cultures is the principle of “free, prior and informed consent”, a principle well established in law as a responsibility of states in their interaction with indigenous peoples in their territories. However this principle is also increasingly being adopted by non-state entities, notable business groups involved in enterprises that impact on indigenous peoples' lands and resources, including the extraction of sub-soil resources and the alteration of land use practices through the creation of plantations or other agricultural changes.¹⁴⁵

SCOPE AND DEFINITION

Free, prior and informed consent (“FPIC”) has been widely discussed and debated among international and national fora. The United Nations Permanent Forum on Indigenous Issues, the preeminent body for addressing issues facing indigenous peoples within the UN system, defines FPIC as a process undertaken free of coercion or manipulation, involving self-selected decision-making processes undertaken with sufficient time for effective choices to be understood and made, with all relevant information provided and in an atmosphere of good faith and trust.¹⁴⁶ Notably FPIC is defined as a *process* which implies and requires an iterative series of discussions, consultations, meetings and agreements.

In the context of transnational business, including business enterprises undertaken with funding or investment by British companies or the British state, a requirement for FPIC means that prior to project being undertaken, or a licence for same being issued, which would impact on the lands and resources of indigenous peoples, that the affected indigenous peoples should be involved in the decision making process at all stages, including design and consideration of alternatives, and that any decision to undertake activities impacting on their lands and resources is only undertaken with their express consent and with any preconditions or requirements they may make being met. Any consent achieved or gained should be formalized in a legally binding document and where consent is withheld the company must withdraw its application. This process of decision-making and possible negotiation must ensure that the affected indigenous peoples have sufficient time and information to make a decision according to decision making practices that they chose, whether through traditional authorities or other frameworks.

LEGAL CONTENT

The principle of FPIC stems from and relates to the right to self-determination, as protected by shared Article 1 of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have found that when a State unilaterally extinguishes indigenous peoples' rights to lands and resources that this act is in contravention of the right to self-determination, thereby acknowledging that indigenous peoples hold this right under international law.¹⁴⁷

The UN Declaration on the Rights of Indigenous Peoples (“UN DRIP”), passed by the General Assembly with the support of the UK Government in 2007, restates this right to self-determination and contextualises it as requiring FPIC highlighting specific instances in which this right must be respected. These include physical relocation (Article 10), use of cultural, intellectual, religious and spiritual property (Article 11), adoption of any legislative measures impacting on them (Article 19), restitution of lands taken (Article 28), storage of hazardous materials (Article 29) and—key in the context of UK transnational corporations operating overseas—the approval of any project impacting on the lands or resources of indigenous peoples (Article 32).¹⁴⁸

The main *binding* international instrument that deals explicitly and directly with the rights of indigenous peoples is ILO Convention 169 on the rights of indigenous and tribal peoples in independent countries. The UK has yet to ratify this treaty and we strongly encourage the government to consider its ratification without delay. This instrument requires under Article 16 that where “the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed

¹⁴⁴ *Indigenous people and their relationship to land*. Final working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur. UN Doc. E/CN.4/Sub.2/2001/21. at paras. 49–50.

¹⁴⁵ For non-state entities or business groupings that accept the need for FPIC or formulations similar to FPIC, see the Roundtable on Sustainable Palm Oil, the World Parks Congress, the World Commission on Dams and the Equator Banks (although the EB requirements are limited to a standard lower than true FPIC)

¹⁴⁶ See Annex One. For an overview of recent developments in relation to the respect for FPIC see Free Prior Informed Consent (FPIC)—a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector. Paper prepared for OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights Moscow, 3–4 December 2008 Cathal Doyle, University of Middlesex available at http://www2.ohchr.org/english/issues/indigenous/resource_companies.htm

¹⁴⁷ Among others, *Concluding observations of the Human Rights Committee: Canada*. 07/04/99, para. 8. UN Doc. CCPR/C/79/Add.105. (*Concluding Observations/Comments*) (1999) and *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*. 10/12/98. E/C.12/1/Add.31, para. 18.

¹⁴⁸ UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, September 2007

consent”. In contexts other than relocation, ILO 169 requires under Article 6(2) that consultation be undertaken “in good faith ... in a form appropriate to the circumstances, with the objective of achieving agreement or consent.” This is then further supported by Article 7(1) which requires that:

[t]he people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

In addition to the legal obligations established by the two International Covenants, the UN DRIP and ILO Convention 169, there is also extensive jurisprudence from the UN treaty bodies and the Inter American Court examining the obligations of States in regards to indigenous peoples and specifically in regards to the requirement for FPIC. To cite one body of jurisprudence, the Committee on the Elimination of Racial Discrimination (“CERD”) has called upon States-Parties to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.”¹⁴⁹ It relates the right to informed consent to the right to participate found in article 5(c) of the Convention and has made repeated reference to the preceding language in its decisions and concluding observations.¹⁵⁰

The Convention on Biological Diversity (CBD), Article 8(j), requires that the traditional knowledge of indigenous and local communities may only be used with their “approval”, which has subsequently been interpreted to mean with their prior informed consent or their FPIC.¹⁵¹ This principle has also found its way into ongoing CBD work on Access and Benefit Sharing,¹⁵² CBD guidelines on environmental and social impact assessment¹⁵³ as well as regional standards on access and benefit sharing adopted by the African Union¹⁵⁴ and the Andean Community.¹⁵⁵ Similar language is also found in the Convention to Combat Desertification.¹⁵⁶

FPIC AND BUSINESS ENTERPRISES

It is recognized that the experience of indigenous peoples with extractive industries has included many examples where the rights of indigenous peoples have been eroded and the standard of living of affected peoples has been diminished.¹⁵⁷ Indeed the UN Special Rapporteur responsible for addressing threats to the rights of indigenous peoples concludes that it is “one of the major human rights problems faced by [indigenous peoples] in recent decades”.¹⁵⁸

The UN Centre for Transnational Corporations has undertaken a series of studies examining the investments and activities of multinational corporations on indigenous territories.¹⁵⁹ The final report concluded that multinational companies’ “performance was chiefly determined by the quantity and quality of indigenous peoples’ participation in decision making” and “the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development...”¹⁶⁰ Further to the conclusions of UN bodies, multi-sectoral processes and industry-led processes have reached similar conclusions. The World Commission on Dams, a multi-sectoral, multi-year study into the impacts of dams

¹⁴⁹ *General Recommendation XXIII (51) concerning Indigenous Peoples. Adopted at the Committee’s 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4*, at para. 4(d).

¹⁵⁰ See, for instance, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana. 23/08/200; Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America. 14/08/2001.*

¹⁵¹ Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity. UNEP/CBD/WG8J/2/6/Add.1, 27 November 2001, at 11.

¹⁵² See *Seventh Conference of Parties to the Convention on Biological Diversity, Decision V/26A*, para. 11

¹⁵³ See *Seventh Conference of Parties to the Convention on Biological Diversity, Decision VII/16F, Annex: The Akwe:kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* note 70.

¹⁵⁴ Organization of African Unity/Scientific, Technical and Research Commission, *Declaration and Draft Legislation on Community Rights and Access to Biological Resources* (Addis Ababa, Ethiopia, 1998).

¹⁵⁵ Andean Community, Decision 391, *Common Regime of Access to Genetic Resources, of the Commission of the Cartagena Agreement*, July 1996.

¹⁵⁶ *Convention to Combat Desertification, particularly in Africa 1994*, Article 16(g).

¹⁵⁷ Among others, T. Downing, *Indigenous Peoples and Mining Encounters: Strategies and Tactics*, Minerals Mining and Sustainable Development Project: International Institute for Environment and Development and World Business Council: London 2002. (concluding that indigenous peoples experiences with the mining industry have largely resulted in a loss of sovereignty for traditional landholders; the creation of new forms of poverty due to a failure to avoid or mitigate impoverishment risks that accompany mining development; a loss of land; short and long-term health risks; loss of access to common resources; homelessness; loss of income; social disarticulation; food insecurity; loss of civil and human rights; and spiritual uncertainty).

¹⁵⁸ *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2001/57.* UN Doc. E/CN.4/2002/97, at para. 56.

¹⁵⁹ The CTC reported to the Working Group four times: proposing methodology, and a draft questionnaire for distribution to Indigenous Peoples (UN Doc. E/CN.4/Sub.2/AC.4/1990/6); a preliminary report (UN Doc. E/CN.4/Sub.2/1991/49); a report focusing on the Americas (UN Doc. E/CN.4/Sub.2/1992/54); a report focusing on Asia and Africa, summarizing the findings of all reports and making recommendations “to mitigate the adverse impacts of TNCs on indigenous peoples’ lands, and increase indigenous peoples’ participation in relevant government and TNC decision-making.” (UN Doc. E/CN.4/Sub.2/1994/40)

¹⁶⁰ *Report of the Commission on Transnational Corporations to the Working Group on Indigenous Populations.* UN Doc. E/CN.4/Sub.2/1994/40, at para. 20.

on development hosted by the World Bank and involving the dam construction industry, highlighted the need for inclusive decision making processes for all dam construction and noted that when dams may impact on indigenous peoples “such processes are guided by their free, prior and informed consent”.¹⁶¹ The Roundtable on Sustainable Palm Oil, an industry fora which establishes best practice principles and criteria for the palm oil industry, includes a requirement for FPIC prior to any new plantations being established, prior to any action which may impact on resource use and prior to any action that may impact on the legal status of the land under use.¹⁶²

The International Finance Corporation, the private sector arm of the World Bank Group, established a series of “performance standards” to guide its investment in the private sector, standards which have since been adopted by the so-called “Equator Banks” as minimum standards for investment. Performance Standard 7 on Indigenous Peoples requires, where the lands and resources of indigenous peoples may be directly impacted, economic or physical displacement may occur or where cultural resources will be commercially developed, that “good faith negotiations” be conducted and that these negotiations be “successfully concluded” prior to investment taking place.¹⁶³

It is also worth noting that the International Bank for Reconstruction and Development (IBRD), more usually known as the World Bank, is undertaking a review of its Operational Policy 4.10 on Indigenous Peoples and numerous public commitments have been made by Bank staff that recommendations will be presented to the Board that the policy reflect the requirements of UN DRIP and the right to FPIC.

THE RESPONSIBILITY OF THE UK GOVERNMENT

Several of the world’s leading companies in the area of extractive industries are headquartered in the UK and many others are listed on the London stock exchange. This includes both small companies (for example those involved in exploration) as well as larger companies involved in resource exploitation. Similarly, the principle of FPIC is also relevant to the work of several British based financial institutions (banks and investment managers) that fund the activities of companies operating in this sector. Likewise, the obligation to respect FPIC is also of relevance to consulting companies and other third parties that do work with or on behalf of these companies.

These companies often find themselves operating in counties where violations of indigenous peoples’ rights, including their right to FPIC, are widespread. This is the case even in those countries where the right to FPIC is enshrined in national legislation.¹⁶⁴ In many cases a climate of impunity and corruption combined with inefficient and discriminatory judicial systems translates into an inability of members of vulnerable groups, such as indigenous peoples, to obtain access to justice. Worst still, the legal systems in many of these countries are being used as a tool to suppress communities and individuals that have raised their concerns in relation to violations of their right to FPIC.

However we recognize that the actions of these companies do not reflect the position of the UK government and that in many cases such violations are unintended consequences of company actions. We believe urgent action is needed to assist companies in recognising the rights of indigenous peoples and in protecting those rights.

We have been pleased to note the UK Government’s support for the inclusion of the principle of FPIC in the safeguard policies of the Asian Development Bank (“ADB”) (still under review) and note that such a safeguard is particularly relevant for the growing private sector portfolio of the ADB.¹⁶⁵

We were further pleased to see the European Bank for Reconstruction and Development (“EBRD”) acknowledge in their updated Environmental and Social Policy that the UN DRIP is relevant guidance for development impacting on indigenous peoples and further recognise and seek to uphold the principle of FPIC in certain categories of projects impacting on indigenous peoples.¹⁶⁶ The UK is among the largest shareholders, in terms of capital subscription, in the EBRD.

¹⁶¹ *Dams and Development: A new Framework for Decision-Making*, A Report of the World Commission on Dams, November 2000, at p. 215

¹⁶² *Roundtable on Sustainable Palm Oil (RSPO) Principles and Criteria for Sustainable Palm Oil Production* Public release version, 17 October 2005

¹⁶³ International Finance Corporation (IFC) Performance Standard 7 at para 9.

¹⁶⁴ FPIC is a requirement under the Indigenous Peoples Rights Act in the Philippines however CERD has engaged its Early Warning Urgent Action procedure in relation to the failure of transnational corporations operating there to obtain the FPIC of indigenous peoples affected by mining operations there. See <http://www2.ohchr.org/English/bodies/cerd/early-warning.htm>

¹⁶⁵ Statement of the Executive Director of Austria Germany, Luxemburg Turkey and the United Kingdom, Asian Development Bank, 23 February 2009 (available on request)

¹⁶⁶ European Bank for Reconstruction and Development (EBRD) Environmental and Social Policy issued May 2008 available at <http://www.ebrd.com/about/policies/enviro/policy/2008policy.pdf>

 RECOMMENDATIONS

While the UK is a party to the main international human rights treaties and declarations which impose a duty to respect FPIC, its national framework is not clear enough on the obligations of its corporations to respect human rights when operating overseas. We invite the government and the parliament to provide clearer guidance to UK businesses on the UK commitment to respect the principle and the right of FPIC in government-funded activities and to provide guidance on international best practice for businesses on the protection and realisation of FPIC in relation to their operations in indigenous peoples' lands.

Furthermore, we see the adoption of legislative or administrative measures that provide for extraterritorial regulation of transnational corporations registered in the UK as key in reducing or preventing acts which negatively impact on the realisation of the rights of indigenous peoples in territories outside the UK. We invite the government to draft such measures and stand ready to provide any assistance that may be required.

Moreover the UK government and parliament should put in place mechanisms to monitor the implementation of the right to FPIC by corporations registered in the UK that operate in indigenous peoples' territories and to ensure that these corporations are held accountable for violations of human rights committed overseas.¹⁶⁷

Finally, it is clear that UK corporations operate in some host countries where there exists inadequate *de jure* and *de facto* respect for indigenous peoples' rights in the context of development operations in their lands. This is compounded by a lack of access to justice for indigenous peoples in these countries. Given this, if the UK is to adhere to its international human rights obligations, it is important for it to provide adequate and effective grievance mechanisms under which UK companies can be held to account for failures to respect the human rights of indigenous peoples, including their right to FPIC, in the countries in which they are operating.

ELEMENTS OF FREE, PRIOR AND INFORMED CONSENT

What?

- *Free* should imply no coercion, intimidation or manipulation;
- *Prior* should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes;
- *Informed*—should imply that information is provided that covers (at least) the following aspects:
 - a. The nature, size, pace, reversibility and scope of any proposed project or activity;
 - b. The reason/s or purpose of the project and/or activity;
 - c. The duration of the above;
 - d. The locality of areas that will be affected;
 - e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
 - f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others); and
 - g. Procedures that the project may entail.

Consent

Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate.

This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

¹⁶⁷ Recently CERD has specifically ruled that states do have an obligation to monitor the action of transnational corporations registered in their own country, see: Concluding observations of the Committee on the Elimination of Racial Discrimination, Canada, CERD/C/CAN/CO/18, 25 May 2007, para. 17

When?

FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

Who?

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, indigenous peoples, UN Agencies and governments should ensure a gender balance and take into account the views of children and youth as relevant.

How?

Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.

Source: Excerpt from the Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the UNPFII at its Fourth Session in 2005.

Memorandum submitted by the Working Group on Mining in the Philippines (WGMP)

THE IMPACT OF UK-BASED MINING COMPANIES ON THE PHILIPPINES, PARTICULARLY FOCUSING ON THE RIGHT TO FOOD

1. INTRODUCTION AND BACKGROUND

This submission focuses on the way existing and proposed mining by global companies in the Philippines poses a threat to human rights, particularly the human right to food of local communities.¹⁶⁸ Its findings build on the WGMP's recent publication *Philippines: Mining or Food?*,¹⁶⁹ focusing on the impact of UK companies, with pertinent recommendations on how to address these.

The Philippines is one of the world's most biodiverse countries, but its natural resource base has declined alarmingly, leading to increasing proneness to fatal disasters. Past wilful ignorance of the connection between natural resources management and food security has meant that the country has lost most of its forests and much of its fisheries. Forest loss has led to a decline in rice production, the Philippines' staple food, by affecting climate and water supply; and, with the destruction of fisheries, has severely undermined long-term sustainable livelihoods for poor people.

There is strong evidence, where mining has taken place, that the extraction process damages rice production, often permanently. Mining is universally acknowledged to be a high-risk activity, especially precarious in areas of high rainfall, seismic activity, steep slopes downstream of deforestation, and dense population—conditions common in the Philippines. Mining is particularly risky in agricultural areas, especially above irrigation and fishpond zones. In comparison to agriculture, fisheries or tourism, mining creates fewer jobs per unit of money invested and contributes least to poverty reduction and sustainable development. On the contrary, it often increases poverty.

Profits of mining are privatised by companies, while costs are externalised to Filipino communities, the legacy remaining long after the mining corporation has left the country. Once costs of environmental and social damage, decommissioning, rehabilitation and restoration are included, the net benefit figure is negative. Mining is also frequently associated with generating or exacerbating conflicts, militarisation human rights abuse and corruption in the Philippines.

This is because mining is occurring in a context where by access to justice is rendered impossible for impacted communities. According to the European Commission corruption is traditionally notorious in the Philippine mining sector and the government has taken no measures to curb it.¹⁷⁰ Those opposing mining operations or seeking redress for violations of their rights face intimidation, harassment, violence or even death. It is estimated that there have been in the region of 1,000 extra-judicial killings and enforced disappearances since 2001. Over 20 of these were involved in opposing mining projects. Another 100 plus were indigenous leaders attempting to uphold their rights to lands and resources. Court cases are regularly

¹⁶⁸ Human right to food: Committee on Economic, Social and Cultural Rights, *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12, The Right to Adequate Food*, UN Economic and Social Council, E/C.12/1999/5. See also <http://www2.ohchr.org/english/issues/food/index.htm>

¹⁶⁹ *Philippines: Mining or Food?*, written by Dr Robert Goodland and Clive Wicks, published by the Working Group on Mining in the Philippines, London, 2009. Available at www.piplinks.org/miningorfood and the previous report, *Mining in the Philippines: Concerns and Conflicts* (London 2007) Available at http://www.iucn.org/about/union/commissions/ceesp/ceesp_alerts/mining_philippines.cfm

¹⁷⁰ <http://www.delph.ec.europa.eu/docs/cep/%20Philippines.pdf>: European Commission, 2005. Philippines country environmental profile. Makati City, Delegation of the European Commission to the Philippines

dismissed or go unheard for years on end. As a result communities have turned to international mechanisms only to realize that these mechanisms do not have enforcement powers over transnational companies necessary to ensure redress for wrongs committed.

2. CASE STUDIES

The brief case studies below are based on visits by members of the WGMP in 2006 and 2008 and illustrate the negative impacts of global mining companies', activities on food security in the Philippines. All have a UK connection,

a. *Midsalip, Zamboanga del Sur, Mindanao*

Company: History of Rio Tinto (UK/Australia) applications in the area

In 1996 the municipality of Midsalip was covered by a number of Rio Tinto applications. Operating under the name Tropical Exploration Philippines Inc., Rio Tinto withdrew from the area in 1999 following strong local and international opposition to the project. In June 2001, US mining company Phelps Dodge, together with a Philippine partner, also applied for an exploration permit in Midsalip, but they too withdraw their application because of community opposition. Despite their withdrawing from the area, the status of these Rio Tinto claims remains unclear. Nine current applications in the municipality will ultimately rely on joint venture partners.

Mining and irrigated rice and fish farming are incompatible in an area that produces valuable agricultural and marine food supplies. The extraction or exploitation of iron ore and other minerals will severely damage the water catchment services of Midsalip, affecting water quality and supply to all three provinces in the peninsula, reduce agricultural production and diminish the ability of future generations to survive.

Mining will also affect the significant investment of the international community in reforestation, pollute and cause erosion and siltation of rivers, and exacerbate geohazard and landslide problems. There will be a risk of flooding and pollution of fresh water supplies and of the main fish farming and fish breeding grounds. There is also likely to be flooding of lowland communities, which the forest and water catchment currently protect, all of which will affect food security. The Indigenous Subanen community will be particularly impacted if mining proceeds.

b. *Tampakan, South Cotabato, Mindanao*

Companies: Xstrata Copper (UK/Switzerland), Indophil Resources (Australia)

This project of Sagittarius Mines has been managed since 2007 by Xstrata, the world's fourth largest producer of copper, whose major shareholder is the private company Glencore (Switzerland).

Mining in this area of important forests and water catchments, including the proposed Tampakan mine, should not be permitted. Mining will impact the lands of the Indigenous B'laan peoples and the downstream agricultural areas of the provinces of South Cotabato, Sultan Kudarat and Davao del Sur. These areas would be at risk from mining pollution, erosion, siltation and continuing devastating flash floods and landslides. Lake Buluan, with its superb sustainable fish production capacity, may be damaged or destroyed by flash floods, toxic pollution and increased siltation, which will gravely affect the largely Muslim population who depend on it for survival. The Liguasan Marsh could also fall victim, and there are fertile rice-growing areas and mangrove forests in the marsh.

The area is geologically unstable with frequent landslides, and fault lines. Water catchment areas need urgent protection, conservation and reforestation, not mining, to help sustain and increase sustainable food production. The area is also a centre of armed conflict because of political, cultural and economic issues. Mining in conflict areas has fuelled, and will most likely continue to fuel, armed conflict, exacerbating human rights abuses and internal displacement of vulnerable communities. On 9th March 2009, a notable anti-mining critic, Eliezer "Boy" Billanes, was shot dead by two unidentified gunmen. Although there is an on-going investigation, it is being widely reported that he was killed for his work opposing this project.

c. *Pujada Bay, Mati, Davao Oriental*

Company: BHP Billiton (Australia/UK)

The joint venture between Asiaticus Management Corporation (AMCOR) and BHP Billiton over the Hallmark Project involved a 60–40% equity split. However, disputes have arisen between AMCOR and BHP Billiton, with AMCOR being granted a restraining order and preliminary injunction against BHP Billiton in May 2008.

Mining claims—mainly nickel and cobalt—in this area cover approximately 17,573 hectares. Mining pollution, erosion and siltation will severely damage biodiversity, water catchments, agricultural and marine resources and erode the area's potential as an ecotourism attraction. The human rights of the Mandaya will be further affected by mining on their ancestral domain. Coastal communities who depend on fisheries are likely to be displaced, and fish stocks, the main protein diet of the coastal communities and nearby cities,

will likely be adversely affected in both the short and long term. Exploration and mining within this fault line, which flanks the watershed on the southwest and southeast, will increase risks and may induce additional seismic activity.

d. *Mindoro nickel project, Mindoro Island*

Company: Intex Resources (Norway)—parent company UK-registered Crew Development Corporation

After a chequered history of company takeovers and name changes, Mindex Resources Development was acquired by UK-registered Crew Development Corporation in 2000, with Crew subsequently in 2007 creating Intex Resources, listed as a separate company with the Mindoro nickel project as its main asset. Over this 10-year period, mining permissions were granted, revoked and reinstated, with claims of deception. The project, currently under the control of Intex, is between pre-feasibility and feasibility stage.

Intex and other mining companies should comply with the Provincial mining moratoria and immediately cease all activities. Mining is likely to damage the island's important food production capacity, its fisheries and its ecotourism potential and is considered inconsistent with the provincial sustainable development plan. In the light of other factors, including seismic and climatic conditions, the proposed Intex nickel project has the potential to cause massive damage to the water catchment area, impacting up to 40,000 hectares of rice producing lands and exacerbating flooding of towns and villages. The Intex nickel project, and the other 91 mining applications being considered for the tropical island, would damage most of the water catchment area and the possibility of sustainable food production in the foreseeable future on Mindoro.

e. *Sibuyan Island, Romblon Province*

Company: BHP Billiton (Australia/UK)

In 2007 Pelican Resources (an Australian company) announced a memorandum of agreement under which BHP Billiton would be the sole financier of the exploration and drilling programme of the Romblon nickel project and have exclusive rights to purchase the laterite nickel.

In October 2008, Armin Marin, a former WWF employee, and local councillor was shot and killed by a mine security guard while leading a peaceful protest against the mining operations. The mine guard has since been arraigned for murder. However, in what is a clear distortion of the justice system the mining company is taking a case against the local schoolteachers for their role in organising the legitimate protest to protect the environment. Similar strategic lawsuits against public participation ("SLAPPs") are common throughout the Philippines as a way to deter opposition to mining operations.

No Strategic Environmental Assessment (SEA) has been carried out to manifest the cumulative impacts of the proposed mines targeting the island, which will be a disaster for this up-to-now remote island. Mining applications cover 42% of the island and overlap 32% of the management area of the National Park, including 14 sq km of the Protected Area, 32% of mangrove, primary lowland and secondary lowland forests, 45% of rice lands, 56% of coconut lands and 43% of the Sibuyan Mangyan Tagabukid ancestral domain. Mining on the island will undermine its ability to feed itself or develop its eco-tourism potential.

3. CONCLUSIONS AND RECOMMENDATIONS

On the issue of the right to food, mining reduces options for future generations. The Philippine population of approximately 90 million is due to rise to 136 million by 2030. Feeding the current population means that the country has to import more than a quarter of the 12 million tonnes of rice needed annually. World market prices have almost tripled in recent years, placing imported rice out of reach of the country's poor—about half the population. The Philippines used to be self-sufficient in rice but is now the world's largest rice importer.

Mining in the scale planned in the Philippines and under current conditions poses a serious threat to indigenous ancestral domains, watersheds and other areas environmentally critical for agricultural and marine food security. The stark choice is between a few years of mining and thousands of years of sustainable irrigated rice and fisheries production. As such the WGMP supports the widespread call from civil society, Indigenous Peoples and the religious leaders that a moratorium on mining should be declared in the Philippines and a credible independent body should be established to review all existing contentious mining operations. A human rights impact assessment methodology is recommended for all projects.¹⁷¹

All of the cases above illustrate issues of where the activities of UK-based mining companies have been detrimental to human rights. Although it has focussed on the right to food, the report also investigates the inextricable link between mining and militarisation, and the intimidation and high number of extra-judicial killings and disappearances among civil society opponents of the Government's mining policies.¹⁷² This would argue that even assuming the best intentions of companies it is not possible to operate to the highest international standards on human rights in remote locations where conflict and impunity for abuse exists.

¹⁷¹ See eg Business & Human Rights Resource Centre, "Human rights impact and compliance assessments", <http://www.business-humanrights.org/Documents/Impactassessment> [accessed 31-Mar-09].

¹⁷² Figures from Kalikasan PNE note there have been 24 killings of environmental activists and leaders since the current President took office in December 2001, along with two enforced disappearances and an attempted assassination.

The report records many instances of where the rights of Indigenous Peoples, particularly the right to Free, Prior, Informed Consent over mining projects which is enshrined in Philippines law, is constantly abused. Companies operating in such a context where national legislation and international obligations are being violated are complicit in this abuse.

A key concern of communities impacted by these violations, is the lack of access to justice in the Philippines. Various community leaders have lodged complaints with UN processes, most notably a submission under the Early Warning Urgent Action mechanism of the Committee on the Elimination of all forms of Racial Discrimination. However these mechanisms are slow and lack the capacity and enforcement power to address the extent of the issues at hand. Community representatives have travelled to the UK, to directly lobby the headquarters of the mining companies, and to seek redress, but have found this to be of little avail. Impacted communities see the complaint mechanism available under the OECD Guidelines for Multinational Enterprises as incapable of addressing their issues. In addition to its administrative limitations, the OECD complaint mechanisms only recourse is to facilitate a dialogue with the companies who have abused the community's rights. This is an inadequate process for most communities, as past dialogues with companies have not resolved abuses committed.

Communities are therefore looking for redress within a legal framework in which companies can be held to account for violations of their rights. To this end the WGMP recommends the establishment of a UK roundtable¹⁷³ process involving government, NGOs, companies, and impacted communities to investigate the role of British mining companies overseas and how they can be held to account for violations of communities and individual rights, leading to:

- 1) The establishment of a UK parliamentary committee (in aid of enacting legislation) to review the actions of British companies overseas and with the power to hear testimony from communities.
- 2) The enactment of extraterritorial legislation to hold British mining companies to account.
- 3) The creation of a UK Ombudsman on mining with powers to examine overseas operations.

4. BASIS OF SUBMISSION

This submission is based on the findings of *Philippines: Mining or Food?*, written by Dr Robert Goodland and Clive Wicks, published by the WGMP, London, 2009¹⁷⁴ and the 2007 report *Mining in Philippines: Concerns and Conflicts*¹⁷⁵

Working Group on Mining in the Philippines

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Memorandum submitted by the London Mining Network

The role of London-based and London-financed mining companies in human rights abuses overseas

The London Mining Network (LMN) is an alliance of 23 human rights, development and environmental groups concerned about the impacts of the activities of mining companies listed on the London Stock Exchange or financed by London-based institutions. Members include ACTSA (Action for Southern Africa), CATAPA (Comite Academico Tecnico de Asesoramiento a Problemas Ambientales), Colombia Solidarity Campaign, The Corner House, Down to Earth (the ecological campaign for Indonesia), Forest Peoples Programme, LAMMP (Latin American Mining Monitoring Programme), Partizans (People Against Rio Tinto and its Subsidiaries), PIPLinks (Philippine Indigenous Peoples Links), TAPOL (the Indonesia human rights campaign) and the Society of St Columban. LMN's twelve observer groups include leading human rights, environmental and development organisations.

LMN wishes to draw to the attention of the Joint Committee on Human Rights the persistence and gravity of the allegations brought against London-connected mining companies in the pursuit of projects which have a negative impact on human rights. LMN understands that the Committee will be receiving detailed submissions about the effects of the activities of Vedanta plc in India, Rio Tinto in Colombia and

¹⁷³ See "An Important Step Forward: The Final Report of the National Roundtables on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries", 2007, www.miningwatch.ca/index.php?92/CNCA_statement

¹⁷⁴ Available at www.piplinks.org/miningorfood

¹⁷⁵ Available at http://www.epolitix.com/fileadmin/epolitix/mpsites/MininginthePhilippines_Report.pdf

Ecuador, Monterrico Metals in Peru, GCM Resources in Bangladesh and a number of mining companies in the Philippines. The current submission is intended simply as an overview which it is hoped may encourage the Committee to take a continuing interest in the matter.

Most of the world's biggest mining companies, and many smaller mining companies, are listed on the London Stock Exchange, and on its Alternative Investment Market (AIM).

The world's most important metals price fixing mechanism, the London Metal Exchange, and the leading precious metals trader, the London Bullion Market Association (LBMA), are based here. Only Toronto rivals London's importance as a centre of world mining finance.

There is a great deal of information publicly available on the negative impacts of mining company activities, including alleged human rights abuses. The leading source of critical information on the world's mining industry is the Mines and Communities website, www.minesandcommunities.org. The more recent London Mining Network website, www.londonminingnetwork.org, carries a more limited amount of information about companies with a London connection. These websites link to many other sources of published information which counter the generally positive picture which the mining industry paints of itself.

The largest mining company in the world is the dual-listed Anglo-Australian company BHP Billiton. The company has, along with its partners Anglo American and Xstrata, both also listed on the London Stock Exchange, come under fire for its involvement in the Cerrejon Coal mine in northern Colombia. The mine has a history of forced relocation of farming communities with inadequate compensation. It took years of campaigning by local people, backed by Cerrejon mine workers and supporters in Britain, Australia, Canada, Switzerland and the United States, and the lodging of complaints to the Organisation for Economic Co-operation and Development in Australia and Switzerland, before the demands of the affected communities began to be taken seriously. Even now, reports from communities facing relocation suggest that the mine's community engagement strategy leaves a lot to be desired. BHP Billiton and Anglo American, together with, at the time, Glencore, were part of a Joint Venture which owned 50% of the Cerrejon mine when, in August 2001, the unarmed inhabitants of the small farming village of Tabaco were evicted by armed force and their houses demolished to make way for mine expansion. In February 2002, that Joint Venture took control of the remaining 50% of the mine, thus inheriting responsibility for the legacy of suffering caused by the forced evictions.

The Cerrejon Coal Company signed an agreement with former residents of Tabaco in December 2008, following recommendations made by an Independent Panel of Inquiry established by the company to respond to persistent criticisms. The agreement is welcome; but the gravity of the abuse suffered by the people of Tabaco, and by other communities before the destruction of that village, should not have occurred. Having occurred, it should have received speedier and fuller redress.

One of the problems worthy of the Committee's consideration is that of the so-called 'corporate veil', whereby British-based companies can avoid legal responsibility for actions for which they bear moral responsibility simply by virtue of their convoluted corporate structure. In the case of the Cerrejon mine, the operating company, Cerrejon Coal, is owned by companies in the Caribbean which are wholly owned subsidiaries of the London-listed multinationals. It is difficult to believe that the three multinational companies, which between them owned 50% of the Cerrejon mine in 2001, were unaware of the planning of the demolition of Tabaco. However, legal advice obtained by the villagers' supporters was that an action in English courts would be unlikely to succeed, not because the case lacked merit but purely because of the company's structure. LMN believes that this is an injustice.

BHP Billiton also faces continuing criticism for its activities in the Philippines, including notable community opposition at its Hallmark Project in Davao Oriental and accusations around an initial off-take agreement on the island of Sibuyan. The dispute in Sibuyan led to the shooting of an unarmed protestor in October 2007.

BHP Billiton is exploring for nickel in Guatemala and is believed to hold a number of leases in the Lake Izabal region, where there has been strong community opposition to any activities which might pollute the lake, on which over 1000 fisher people rely for their livelihood. Baroness Miller of Chilthorne Domer, who visited the area early last year, doubts that the companies proposing mining and mineral processing in the area will be able to carry out adequate Environmental Impact Assessments or valid community consultation. BHP Billiton's subsidiary Mayaniquel S.A., has already been fined \$25,000 for not carrying out a legally required Environmental Impact Study. As in Colombia and the Philippines, there is widespread and violent intimidation of those opposed to mining.

Rio Tinto has a long history of conflict with communities who believe that they have been ill treated by the company. Most notably, the company has financed expansion at, and continues to profit from, the vast and notorious Grasberg mine in West Papua, which has caused extensive environmental damage, violated indigenous land and cultural rights and is associated with atrocities by the Indonesian military. In 2006 the Norwegian Government's sovereign pension fund disinvested from Freeport McMoran Copper & Gold, the US company which controls the mine, and in September 2008 the Norwegian Government also disinvested from Rio Tinto because of the Grasberg connection.

At its recent Annual General Meeting, Rio Tinto was strongly criticised for violating Indigenous treaty and religious rights in the Upper Peninsula of Michigan. The objections of the Keweenaw Bay Indian Community were carried to the meeting by Lutheran Pastor Revd Jon Magnuson, representing leaders of 100 faith communities in the area who believe that the company's Eagle Project would, in addition to being ecologically disastrous, represent an attack on the right of Indigenous People to exercise their spiritual traditions at their sacred site. Similar allegations were made on behalf of Embera Indigenous communities and Afrocolombian communities in north western Colombia, where the company is involved in a Joint Venture with US-based La Muriel Mining Corporation. Here local people also allege militarisation, intimidation and brutality. In December 2008 Rio Tinto announced new Joint Ventures with India's National Aluminium Company Ltd (Nalco) which could see new projects violating the rights of local communities which have already forcibly rejected new mining or expansion.

Anglo American has attracted criticism for its above-mentioned involvement in the Cerrejon Coal mine in Colombia and its exploration activities in the Cordillera region of the Philippines, where it is alleged that it has manipulated community consent processes in order to obtain the legally required certificate of Free Prior Informed Consent. It is in a highly militarised area, where those who express opposition to mining are subject to threats and intimidation. The company's Anglo Platinum division continues to attract heavy criticism from farming communities in South Africa for its handling of community resettlement and for polluting water supplies. Anglo Gold Ashanti, which was until late 2007 41% owned by Anglo American, was accused of profiting from paramilitary intimidation of mining opponents in Colombia. De Beers, in which Anglo American retains a 45% holding, has been criticised for potentially benefiting from forced removal of indigenous Bushmen from their ancestral territory in Botswana. The lease in question was sold last year to London-based Gem Diamonds.

Xstrata has been criticised for its activities in Colombia, as noted above. It has also been criticised for its role in taking forward the Tampakan copper and gold project in the Philippines, in a situation of growing human rights abuses as the project has become the subject of attacks by armed paramilitaries. In May last year an Argentine Federal Appeals Court upheld criminal charges against Xstrata General Manager Julian Rooney for contamination caused by the company's Alumbra copper and gold mine. Aboriginal people around McArthur River in Australia have had to watch their sacred lands violated by expansion of a massive opencast zinc mine and the diversion of the river. They claim the company does not listen to them.

London-listed Vedanta is notorious as a model of poor corporate governance. Anil Agarwal is both its Chairman and CEO, and with his family owns the majority of the company's shares. The company has been criticised for its behaviour in Armenia and Zambia, but it is in India that it has come under heaviest criticism for the cavalier manner in which it has ignored environmental legislation. It is currently trying to bulldoze its way into tribal land in Orissa in the hope of constructing a huge bauxite mine on land sacred to the Donghria Kondh people in order to feed its nearby illegally constructed alumina refinery. Under Indian law, tribal land should not be transferred to a private company. There has been overwhelming opposition to the mine by communities dependent on the mountain for their livelihoods, and there are persistent allegations of intimidation of opponents to the mine. Many of the Majhir Kondhs and other tribal people from villages around the refinery have stated that they gave up their farm land after heavy-handed tactics by the state police, acting on behalf of Vedanta. They were paid meagre compensation, but much of this has run out and the promised jobs at the refinery never materialised. They are now landless and jobless. In November 2007 the Norwegian Government's sovereign pension fund disinvested from Vedanta when its Council on Ethics, after nearly two years' research, found that continuing to invest in the company would present "an unacceptable risk of contributing to grossly unethical activities".

It is not only these larger companies which attract criticism, however. Among the smaller companies listed on the London Stock Exchange, GCM Resources has been widely criticised for its proposed Phulbari project in Bangladesh. According to the Bank Information Center in Washington, the project will acquire almost 6,000 hectares of land and will displace between 50,000 and 220,000 people, destroying a critical agricultural region and threatening the region's water and food supply. Over 80% of the land taken for the project will be fertile agricultural land which will not be fully replaced, leaving farming families with few options for employment. People in the area have made clear on numerous occasions that they oppose the project. In August 2006, the Bangladesh Rifles, a paramilitary force, opened fire on 50,000 local people conducting a peaceful protest around the Phulbari project area. At least three people were killed, including a 14-year old boy, and over 100 people were wounded. Over the succeeding two years of military rule, community leaders, individuals from non-governmental organisations, human rights defenders and others were intimidated, threatened, arrested and tortured.

London-based Monterrico Metals' Rio Blanco project in Peru is also a cause of concern. A huge majority of local people rejected the mining project in a 2007 referendum. In November 2005, two protestors against the project were killed during a demonstration; protestors said at least 28 members from their communities were kidnapped and brutally beaten; the following March, Monterrico was accused by a community representative of orchestrating further violence against opponents of the project. In January of this year, the Peruvian National Coordinating Committee for Human Rights released photographs which showed local people being tortured by police and mine personnel. Journalist Julio César Vásquez Calle, who says that the photographs were taken in the mine camp, was himself allegedly tortured. He claims that, before he was

released, company representatives apologised for his detention. According to Amnesty International he is now receiving death threats for revealing the abuse. Some of the other torture survivors are also being threatened should they co-operate with a Peruvian Government inquiry.

The groups involved in London Mining Network believe that companies need to be held accountable for the impacts of their operations around the world. In our experience of working with numerous mining-affected communities, it is clear that the current systems of accountability and avenues of redress for injustices committed, including the OECD complaints procedure, are wholly inadequate. In response to the Committee's question number 7, "Does the existing legal, regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?" we would answer with an emphatic "No!"

LMN as a network, however, is not making specific proposals to the Committee concerning legal or regulatory reform. Some of the groups involved in LMN are also members of the Corporate Responsibility Coalition (CORE) which proposes a UK Commission for Business and Human Rights. Some LMN groups are also involved with the European Coalition for Corporate Justice, which proposes enhancing direct liability of parent companies, establishing a parental company duty of care and establishing mandatory social and environmental reporting. Another proposal of which LMN is aware is the abolition of limited liability status for corporations as a way of encouraging responsible behaviour by company boards, management and shareholders. Some groups in LMN question the legitimacy of foreign direct investment and believe that countries' mineral resources should always be under the exclusive control of the people who live there. LMN urges the Committee to examine further evidence of human rights abuses by London-connected mining companies in formulating its own proposals for reform.

London Mining Network

May 2009

Memorandum submitted by Amarjit Singh

I am a final-year PhD candidate at the London School of Economics, Law Department where my research concerns the identification of human rights compliance requirements. As part of my thesis I have designed a framework specifying or identifying human rights compliance requirements. In this submission I present that framework, which is helpful in addressing various issues in the business and human rights context but specifically in relation to the following elements notified in the call for evidence:

1. How can the UK Government provide adequate guidance to UK businesses to allow them to understand and support the human rights obligations on the UK?
2. How should UK businesses take into account the human rights impact of their activities?
3. How can a culture of respect for human rights in business be encouraged?

The following presents the framework.

BUSINESS AND HUMAN RIGHTS: A FRAMEWORK FOR IDENTIFYING HUMAN RIGHTS COMPLIANCE REQUIREMENTS

Human rights advocates want businesses to be accountable for the human rights impacts of their operations. Businesses have risen to this challenge for instance, by pledging allegiance to respecting the human rights set out in the Universal Declaration on Human Rights (UDHR) within the framework of the United Nations Global Compact. However, businesses and human rights advocates can find it difficult to reasonably, rationally and clearly identify what a business must do in order to comply with a human rights standard. A framework is proposed in this submission for specifying human rights compliance requirements and is explained in terms of their implications for the operational reality of companies.

While offering specific guidance to businesses improves the efficiency with which human rights compliant conduct can be put into practice, it is important that the guidance is tailored to the operational and strategic realities of companies. In fact, the operational environment of the duty-bearer is a key consideration in international and national human rights frameworks for defining their compliance requirements. The actor's context matters not only so that appropriate interventions can be designed but also for there to be the requisite "buy in" so that such interventions are taken up. Context especially matters with non-state actors like multinational corporations having operations in various jurisdictions involving sometimes vastly different operational realities. Taking the actor's operational environment into account also helps reduce duplicated and potentially competing processes within the organisation. In addition, wedding human rights interventions to the strategic vision of the firm can help with the intra-organisational diffusion of human rights compliant practices. Lastly, relating interventions for human rights compliance to the operational reality of actors helps identify and build upon existing compliant conduct.

The Compliance Assessment Framework¹⁷⁶ (CAF) presented here is both an operational and conceptual tool. It is designed to help the user to think through what his organisation ought to do in order to be human rights compliant within a framework that also allows him to see what the operationalisation of the ideas he has generated may look like. *It is emphasised that the CAF is to be used by being taken up and adapted to needs of the individual actor. The elements of the CAF are derived from international human rights law, encompassing the European Convention on Human Rights and the Human Rights Act 1998, which recognise for instance, through the margin of appreciation doctrine, that there will be variation in implementation and compliance among actors. There are human rights standards to guide the actor but these can be rudimentary. By taking up and using the CAF or like tools, the actor participates in clarifying and developing those standards. The whole process is iterative and feedbacks on itself; the actor takes up and uses the CAF referring to existing standards, thus those standards are developed and an improved understanding of the standards guides the further use of the CAF.*

THE COMPLIANCE ASSESSMENT FRAMEWORK

The CAF has three main components representing structural, process and outcome aspects of the actor’s operational or institutional organisation. The CAF components are inter-related and so can have an effect on one another. Thus, for instance, a problem identified at the process or outcome level may actually have to do with an issue at the structural level, which is where a decision-maker would seek to make an adjustment. Also, lessons learnt at one level may have implications for improving other levels of the CAF.

Figure 1

HUMAN RIGHTS COMPLIANCE ASSESSMENT FRAMEWORK (CAF)

Benchmarks for assessment of the level of realisation of the human rights concerned <i>Set by duty-holders, rights-holders, and other stakeholders, eg monitoring bodies</i>			
Outcome	<i>Effect of the law/policy adopted on the level of realisation of the human rights concerned</i>	<i>Effect of the law/policy adopted on the level of realisation of other human rights</i>	
Process	<i>Law and policy implementation</i>	<i>Rights holders’ practice</i>	<i>Environmental, socio-economic and institutional effects</i>
Structure	<i>Laws/ policies</i> — Level of law/policy — Type of law/policy	<i>Mechanisms</i> — Level of mechanism — Type of mechanism	<i>Institutional environment and human rights capacity</i> — Compliance review — Monitoring and oversight capacity — Human rights training provided — Level of human rights awareness
Context and baseline measures	— Social, political and economic environment — Level of social systems development — Baseline measures of the level of realisation of human rights		
Human rights norms of concern <i>Interpretation of provisions and standards in global rights instruments</i>			

A key observation relating to the use of the CAF concerns the principle of the interdependence of human rights, which holds that the protection of one human right must not be achieved at the expense of the enjoyment of other human rights. This is an important consideration so as to avoid an intervention that on the face of it improves human rights in one area but actually negatively affects other rights. The issue of interdependence recurs throughout the CAF, as does that of ensuring that any strategy for human rights compliance is inclusive and non-discriminatory. The norm of non-discrimination is a fundamental human rights norm whose consideration is demanded of any measure aimed at improving human rights compliance. Decision-makers can ensure the non-discriminatory nature of the measures undertaken for instance by ensuring data tracking the impact of any intervention is disaggregated according to the relevant categories, race and sex being among the most likely.

¹⁷⁶ Amarjit Singh, Draft PhD thesis, London School of Economics and Political Science, 2009. The CAF has also been presented at International Centre for Corporate Social Responsibility, University of Nottingham, November 2008 and at the International Finance Corporation-Novartis, Business and Human Rights workshop, Zurich, July 2006.

Structure

The structural aspects of the framework refer to requirements as to whether or not key structures and systems relating to a particular human right are in place.

Laws and policies—Human rights frameworks requires actors to have measures in place in terms of laws or policies that protect and respect human rights. Most multinationals have human rights policies whereas smaller firms may not. In addition to checking if such policies are present and cover all relevant aspects of the actor’s operations, stakeholders and decision-makers should assess if existing policies in the company unfairly restrict the enjoyment of human rights or are discriminatory.

Mechanisms—In addition to laws and policies, there is also a requirement for mechanisms that facilitate the relevant human rights. It is necessary to assess laws and policies distinctly from their associated mechanisms because lack of human rights compliance may lie with issues relating to the mechanisms employed rather than the law or policy adopted. The mechanism may be contractual in nature as when firms seek a commitment to their human rights policies from suppliers. On-site visits with suppliers would be another example of a mechanism designed to ensure human rights compliance.

Monitoring, capacity building and knowledge—Actors are expected to undertake their human rights commitments effectively and in good faith, implying that some system for monitoring policy implementation and a schedule for assessment should be in place covering all aspects of the CAF. Such a monitoring system should be well-resourced and effective. In order for such review systems to fulfil their objectives, it is necessary for the staffs and officials concerned to have an adequate understanding of the human rights provisions and standards to be complied with. The availability of human rights education is thus a key structural consideration. Human rights awareness is also matter of organisational culture, an area for capacity-building in order to ensure measures aimed at human rights compliance are sustained and enhanced.

Process

Thus the process level of the CAF is key as it provides information regarding the manner in which institutional arrangements for realising human rights are functioning in practice. Many organisations may have the appropriate structures but it is in putting them into practice that human rights policies fail or that mistake or oversights occur. For example, it is important to identify whether a policy for increasing human rights-based participation in the implementation stage of a development project is not effective because it is poorly worded (structural issue) or because decision-makers at the local level are contravening the policy. The process level aspects of the CAF help capture any such failures or oversight. An appropriate response can then be produced in the context of how it might influence the structural and other process aspects of increasing rights-based participation in project implementation as well as the outcomes themselves. There are three requirements for human rights compliance at the process level.

Assessing laws, policies and mechanisms in practice—In assessing how the laws, policies and mechanisms relating to human rights function in practice, such assessment ought to be framed around the rights-holders’ perspective. For firms, in many cases, this involves assessing how their human rights policies and mechanisms are working within branches or subsidiaries. As mentioned earlier, as context varies, so local practices can be expected to be different. By highlighting variations in practice, the CAF offers the opportunity for different parts/units of a company to learn from one another.

Assessing rights-holders’ practice—The CAF requires an assessment of whether rights-holders are making use of measures and mechanisms created by the company as part of its human rights policy. For instance, although the company may have provided the appropriate institutional arrangements for facilitating human rights, the individuals concerned might not be using them. It is necessary to identify such instances and make adjustments if needed. In many cases, the non-adaptation of policies and mechanisms to local culture or circumstances may be the issue. By helping to identify problems here, the CAF helps the user to make necessary adjustments to a company’s human rights system.

Assessing the effect of human rights compliance on the operational environment—The implementation of measures relating to the respect and protection for human rights may result in changes to living, work and physical activity environments. These changes may have an impact on the lives of people that could be an impediment on the enjoyment of other human rights. Thus, the principle of the interdependence of rights requires that human rights measures undertaken by a company be assessed in terms of any negative impact they might have at the implementation stage on the enjoyment of other human rights. By making this assessment, companies can avoid or mitigate a scenario involving unintended, negative human rights consequences.

Outcome

Human rights compliance also requires assessment of the outcome of a company’s human rights policies and measures:

- To assess that the aims of the company’s human rights policy have been met.

-
- To assess how meeting those aims measure against the overall aims of the human rights framework in relation to the human rights concerned (this aspect relates to the issue of benchmarks, which I address below).
 - To assess that in meeting the aims regarding the human rights at issue, there has not been a negative impact on other human rights (required by the principle of the interdependence of human rights).

While the reasons why human rights compliance requires the assessment of the outcomes of human rights interventions are clear, assessing those outcomes involves several complexities. The range of actors and factors that potentially influence human rights and socio-political outcomes make it difficult to determine the extent to which those outcomes are directly attributable to any specific actor, policy or process. Additionally, some outcomes may be evident immediately while others could take much longer to develop. Finding appropriate methods to assess outcomes can be difficult and assessment may involve considerable time and resources. Despite these difficulties and limitations, it is still important that outcome level effects be monitored and assessed. It is important for company officials to understand the effect of their policies, in relation to human rights as much as in relation to any other aspect of the business. Identifying negative outcomes is in fact a key component of the duties to respect human rights and to act with due diligence. Whether the outcomes are found to be negative or positive, important lessons are learnt that otherwise might not have been.

BENCHMARKS

Outcome measures can be used to assess progress over time towards achieving defined human rights targets or benchmarks. It is important that these benchmarks are set with other stakeholders, especially rights-holders' representatives, both so that they are relevant to the rights-holders and to avoid setting them too low. In setting these benchmarks, companies can avail themselves of the wealth of indicators and benchmarks they already use as well as work to produce new ones. It is important to emphasise here that as with developing standards through the use of the CAF, companies can also avail themselves of the CAF as the basis for collaboration with concerned stakeholders to develop benchmarks and best practices not only with regards to the outcome level but also for each individual element of the CAF.

Two requirements for human rights compliance however have to be borne in mind in using these benchmarks. First, is the requirement for disaggregating the measures used to ensure compliance with the human rights norm of non-discrimination. Second, is the recognition that the goal of respecting or protecting human rights is not time-bound but an ongoing effort. As such benchmarks are not targets to be met and set aside or maintained as status quo but instead ought more accurately be understood as milestones in need of recalibration as the actor's and indeed society's capacities, contexts and circumstances evolve.

USES OF THE CAF

Before concluding I wish to highlight some uses for the CAF:

- The CAF can help managers think through how best to map their company's human rights policies and systems onto other aspects of its operations.
- Managers and other interested parties can use the CAF to identify which requirements for human rights compliance already exist within the company.
- The CAF provides a basis on which strategic planning of programs and policies can be conducted, in order to meet the goals of the human rights standards.
- The CAF can be used to identify the methods that are needed to assess or measure the duty-holder's compliance with the various requirements set out in it, and to identify instances where new methods must be developed and tested.
- The CAF can be used to assess how the duty-holder's internal governance and practice is being changed, or not changed, as a result of lessons learnt, thus aiding compliance review in broader terms than with only specific project or case reviews.
- The CAF can be used as part of a company's risk management and risk mitigation strategy.

CONCLUSION

Companies seeking to comply with human rights standards, even if only to manage their human rights risks, need to know what to do in order to comply with those standards. The CAF can help meet that need. In conceptualising its human rights compliance requirements in terms of structure, process and outcomes, while bearing in mind that human rights are interdependent, decision-makers may be helped to identify and plan to meet very concrete human rights compliance requirements. In doing so, a business will likely find that existing policies and procedures already satisfy human rights standards but also identify gaps to be addressed. The CAF also represents a conceptual framework to think through the theoretical and legal aspects of corporate responsibility. To this end, one of the interesting potentials for the CAF is in its service

as a template for discussions among various stakeholders¹⁷⁷ as to the development of future standards, policies or best practices in the business and human rights fields. Such discussions will likely be multidisciplinary in order to address the complexity of issues involved and the framework offers a systematic means of organising inputs from various disciplines.

Memorandum submitted by CAFOD and the Peru Support Group

INTRODUCTION

1. CAFOD, the development agency of the Catholic Church in England and Wales, supports and works with partner organisations in over 45 developing countries. The Peru Support Group (PSG) is a UK-based membership organisation of people concerned about the implications for human rights and human well-being of economic and social changes in Peru. The two organisations have been working together to support the rights and interests of the people of Peru, in particular the poorest, since 1989. We welcome the opportunity to respond to the call for evidence by the Joint Committee on Human Rights. Drawing on our areas of expertise, this memorandum concentrates on the impact of businesses on human rights in the developing world, with an illustrative case study of a British junior mining company in Peru.

2. Today many companies operate in an increasingly global context where business transactions and supplier relationships cross national boundaries and legal jurisdictions. While the focus of this enquiry is on the human rights impacts of UK business, it is important to recognise that many companies based or listed in the UK are operating internationally. The UK remains a global business centre. London is an important hub for extractive industries with many UK and foreign companies listed on the LSE Main Market or the Alternative Investment Market (AIM).

3. CAFOD and the Peru Support Group believe that the enquiry is timely as there are clear actions that the British Government can take now in relation to businesses based in the UK. In addition, it will also be necessary for the UK Government to be proactive at European and international level in order to set high standards for corporate practice globally.

4. The crucial measure required is to ensure that those affected by corporate abuses have access to justice. This should be complemented by preventive actions to reduce the risk of the activities of UK companies having a negative impact on human rights. Our recommendations draw on a specific experience in Peru and research in other countries where CAFOD partners are looking at the impact of the private sector.

THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS: IMPLICATIONS FOR THE HUMAN RIGHTS OBLIGATIONS OF THE UK

5. States have the primary responsibility to promote human rights recognised in international law and ensure they are respected.

6. It is clear that relying solely on host governments to uphold this duty is not sufficient to ensure that rights are promoted and respected. Thousands of UK businesses operate in or have business partners in territories identified by the UK government as ‘major countries of concern in relation to human rights’, for example China, Colombia and the Democratic Republic of Congo.¹⁷⁸ In many instances national or local governments are unwilling or unable to protect the human rights of their citizens.

7. Large-scale projects in the oil, gas and mining sectors are often particularly contentious and high-risk in this respect. In Honduras, the administration identified a lack of technical expertise within government departments to monitor the social and environmental impacts of gold-mining operations effectively.¹⁷⁹ In the Philippines many potential mine sites lie within ancestral lands of indigenous peoples whose rights are recognised in ILO Convention 169. The UN Special Rapporteur on Indigenous Rights found that national legislation, which on paper gives significant legal protection for indigenous communities’ rights, is contradicted by other laws and not always enforced effectively.¹⁸⁰ CAFOD partner organisations in Latin America report an increasing tendency on the part of the state to treat legitimate protest by civil society as crime.¹⁸¹

8. The UK Government has put the private sector at the heart of its strategy for economic growth in the developing world.¹⁸² While sustainable development requires a vibrant private sector creating jobs, tax revenues and investment, in some cases, profitable business models can have detrimental effects on economic, human and environmental rights. Any drive to maximise the positive contribution of UK businesses to development, thus needs to be underpinned by appropriate action to reduce the risk of negative impacts.

¹⁷⁷ The stakeholders concerned could include the company’s board, management and shareholders, home or host governments, individuals whose interests are affected by the operations of the business, the broader community or society, non-governmental and other civic organisations and potential investors in the business who are interested in the human rights conduct of the business either because they are motivated by ethical considerations in their investment decisions or because the company’s positive or negative impact affects its market value.

¹⁷⁸ Foreign and Commonwealth Office (2009) Annual Report on Human Rights 2008.

¹⁷⁹ CAFOD (2006) *Unearth Justice: counting the cost of gold*.

¹⁸⁰ CAFOD (2008) *Kept in the dark: why it’s time for BHP Billiton to let communities in the Philippines have their say*.

¹⁸¹ CIDSE (2009) *Impacts of Extractive Industries in Latin America*.

¹⁸² DFID (2009) *Private Sector Development Strategy. Prosperity for all: making markets work*.

9. Measures are needed to build capacity within developing countries to monitor business activities and ensure that human rights are protected. The UK Government should also introduce mechanisms to ensure that British-based companies operate responsibly abroad.

IN DEPTH CASE STUDY: MONTERRICO METALS, PERU

10. Monterrico Metals was a UK company incorporated in 2001¹⁸³ and listed on AIM in June 2002. It operated wholly inside Peru. Monterrico Metals was 100% owner of Peruvian subsidiary Minera Majaz, which has operated the Majaz copper mining exploration project (also known as the Rio Blanco project) in Piura, northern Peru, since 2002. This project aroused the opposition of local communities for operating on their land without proper consent and for its potential to damage the environment. This opposition led to protests, which climaxed in 2004 and 2005.

11. In 2005, at a mine site owned by Monterrico Metals, 29 people were allegedly detained by the police after a protest march, held inside the mining camp for three days and were allegedly subject to various forms of physical and psychological torture.¹⁸⁴ In October 2007, the North American institution Physicians for Human Rights examined eight of the alleged victims of torture. Their final report corroborated the accusations of abuse suffered during their illegal detention (see Appendix 1).¹⁸⁵

12. In July 2008, Peru's National Coordinator for Human Rights (CNDDHH) and local human rights organisation the Ecumenical Foundation for Development and Peace (Fedepaz) lodged a formal complaint about the allegations of torture before the Public Prosecutor's Office in Piura.¹⁸⁶ The complaint included charges of illegal detention, torture and sexual crimes.¹⁸⁷

13. On 6 January 2009, the CNDDHH made public a set of photographs, anonymously delivered to them, which seemingly corroborate the allegations of torture. The photographs appear to document the claims of abuse that occurred at the Majaz mining camp.¹⁸⁸ Images of the alleged incidents appear to establish the actions of police and/or mine security guards.¹⁸⁹

14. The photographs show the injuries sustained by Melanio García, the campesino protestor who died in August 2005, allegedly after being illegally detained by company security guards and/or police as punishment for taking part in a protest march (Appendix 2). Peruvian human rights groups believe that the circumstances of this death must be seriously investigated as, according to the post mortem examinations, Melanio García died on 2 August 2005 of a haemorrhage caused by the gun shot wound (Appendix 3). On 2 August Melanio García had been in police custody.¹⁹⁰

15. On 18 March 2009, local and international press reported that "Peruvian prosecutors have accused police of torturing protesters at a mining camp in 2005 but cleared a British-Chinese metals company and its security firm of wrongdoing..."¹⁹¹

16. Lawyers for Fedepaz, the rights group that filed the complaint along with the National Coordinator for Human Rights, denounced the findings as incomplete. They also criticised the failure to prosecute those who directed the police operation.¹⁹² According to the CNDDHH, the trial of eight officers, those identified as direct authors in the incident, is underway.

17. Notwithstanding the decision of the Public Prosecutor of Piura not to initiate proceedings against private security firm Forza, Monterrico Metals or its Peruvian subsidiary, Peruvian human rights groups (CNDDHH and Fedepaz) believe it is imperative that the conduct of these companies in relation to the incident should be properly and fully investigated. In particular, investigations should focus on the following: Monterrico's knowledge, at the time, of the human rights violations; possible involvement of mine employees and mine security contractor, Forza, in the violations; assistance given to the perpetrators eg in the form of food, money, transport and information; and communications that occurred between the company, Forza and the police.

¹⁸³ <http://wck2.companieshouse.gov.uk/2db504c87e65c709fb00be5b74982a1b/compdetails>. Company No. 04236974.

¹⁸⁴ <http://blog.dhperu.org/?p=1873>. This is the official blog of Peru's National Human Rights Coordinator (CNDDHH). Established in 1985, the CNDDHH is a group of non governmental organisations involved in the defence and promotion of, and education in, human rights in Peru. The CNDDHH publishes an annual report on the state of human rights in the country, reports regularly to the Inter-American Commission on Human Rights (IACHR) and takes part in the National Council on Human Rights and the National Council for International Humanitarian Rights. It has special consultative status within the UN's Economic and Social Council (ECOSOC).

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ <http://www.flickr.com/photos/34173573@N08/sets/72157612249566195/detail/>

¹⁹⁰ <http://blog.dhperu.org/?p=1873>

¹⁹¹ <http://www.reuters.com/article/rbssIndustryMaterialsUtilitiesNews/idUSN1835190220090319>

¹⁹² Ibid.

 MULTINATIONAL ACCOUNTABILITY

18. When the torture allegedly took place Minera Majaz S.A. (now known as Río Blanco Copper S.A.), was a wholly-owned subsidiary of British junior mining company Monterrico Metals. But by the time the incident was being officially investigated, the parent company Monterrico Metals had been acquired by a Chinese consortium led by Zijin.

19. This case is relevant to the JCHR's call for evidence for various reasons: accusations of torture took place whilst the parent company Monterrico Metals was still a 100% British company, operating in a particularly difficult and conflictive context and was therefore of interest to British citizens and government concerned about the behaviour of UK firms overseas. In August 2006, the former British Ambassador to Peru (2003-2006) was appointed Executive Chairman of Monterrico. According to a company press release, he "...became acquainted with and visited the Rio Blanco project, amongst other mines in Peru, during his term as Ambassador".¹⁹³ The case is also emblematic of broader issues in the relationships between mining, society and development—issues that are also relevant to the operations of other British mining companies in Peru (Britain is a significant source of investment in the Peruvian mining sector and a number of important and junior UK companies have offices in Peru).¹⁹⁴ The long time that has elapsed in trying to bring a legal case against those responsible and the difficulty created by new ownership is also a feature typical of this kind of case.

THE RESPONSIBILITY OF BUSINESSES TO RESPECT HUMAN RIGHTS

20. As UN Special Representative on Business and Human Rights John Ruggie has stated, "there are few if any internationally recognised rights business cannot impact – or be perceived to impact—in some manner."¹⁹⁵ Much of the evidence regarding both positive and negative impacts of business is based on case-study examples. While these can be very useful, there is a lack of more quantitative data on the human rights impacts of UK businesses abroad. More systematic reporting requirements would help to capture these impacts.

21. In addition to the case of the Río Blanco mining project in Peru, instances of violence and even killings are also all too common elsewhere. In October 2007, environmental activist and municipal councillor Armin Marin was shot during a protest against mining on Sibuyan Island in the Philippines following a confrontation with the head of security for Sibuyan Nickel Properties. At the time British-Australian company BHP Billiton had an agreement to purchase 500,000 tonnes of nickel from the company in exchange for a loan of US\$250,000 for exploration activities. CAFOD research noted that BHP Billiton withheld funds under this ore-supply agreement as a result of the incident. The Sibuyan killing and the concerns which CAFOD has documented about the community consent process around the Hallmark project demonstrate that it is important to apply social, environmental and human rights standards to joint venture partners, suppliers and contractors.¹⁹⁶

22. Labour rights violations remain a feature of global supply chains and a concern for many UK consumers. Research has identified that purchasing practices and decisions about contracts and orders within a business can have direct implications for workers' rights.¹⁹⁷ In the first quarter of 2009 China was the UK's third greatest source of imports.¹⁹⁸ UK companies are aware that Chinese factories have a poor record on health and safety; because of the political context, workers are not able to organise in independent trade unions; and instances of child labour are rising. Nevertheless many companies are still sourcing from such high risk suppliers.

23. In our view, the response by government to the issue of business impacts on human rights has been insufficient and piecemeal. The UK government and the European Union have too often framed this issue in terms of Corporate Social Responsibility (CSR) instead of as a human rights issue created by core business practices. Too much weight has been placed on voluntary initiatives.

24. Experience of multi-stakeholder and industry initiatives to date have shown the limitations of relying on a purely 'good-practice' approach. For instance, CAFOD is one of the NGO members of the tripartite Ethical Trading Initiative working to improve labour rights in global supply chains. ETI has generated valuable learning but clearly has limited reach: after ten years, only 56 companies are members.

25. Human rights obligations are not an optional extra. Multi-stakeholder initiatives need to be underpinned by comprehensive measures to ensure that all UK companies respect human rights in their core business activities.

¹⁹³ http://www.monterrico.co.uk/s/PressReleases.asp?ReportID=147212&_Type=Press-Releases&_Title=Former-British-Ambassador-to-Peru-Appointed-as-Executive-Chairman

¹⁹⁴ Mining and Development in Peru, Peru Support Group, March 2007, p 1.

¹⁹⁵ Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, "Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts", UN Doc. A/HRC/4/035, 9 February 2007, p.15.

¹⁹⁶ CAFOD (2008) Kept in the dark: why it's time for BHP Billiton to let communities in the Philippines have their say.

¹⁹⁷ See for example ETI (2005) Bridging the gap between commercial and ethical trade agendas.

¹⁹⁸ HM Revenue and Customs, Overseas Trade Statistics.

 EFFECTIVE ACCESS TO REMEDIES

26. In our view the existing legal, regulatory and voluntary framework in the UK does not provide individuals who allege that their human rights have been breached as a result of the activities of UK businesses with an adequate opportunity to seek an appropriate remedy. We agree with the Special Representative's analysis that globalisation has caused "governance gaps". Companies can use investment treaties, national and international laws to protect their interests but it is much harder for communities suffering from corporate abuses to pursue legal redress.¹⁹⁹

27. Complex transnational corporate structures mean that it is often very difficult for someone who has suffered human rights abuses as a result of business activity to bring a successful case. In the case of the Río Blanco mining project, for example, it is necessary to establish parent company liability. This has not been straightforward. The fact that, while ownership has changed, the issues for the community remain the same highlight the international dimension, particularly in mining.

28. To address the "governance gaps" highlighted above, a range of actions are urgently needed.

RECOMMENDATIONS FOR UK GOVERNMENT ACTION

AT UK LEVEL:

ADDRESS GAPS IN EXISTING ACCOUNTABILITY MECHANISMS

- Consider judicial measures to make it easier for foreign victims of UK corporate abuse to access English courts. For example, admissibility of class actions/multi-party cases.
- Improve accountability and recourse mechanisms by establishing a robust, independent UK Commission on Business, Human Rights & the Environment along the lines of the Corporate Responsibility (CORE) Coalition proposal.²⁰⁰

PREVENTIVE MEASURES TO REDUCE THE RISK OF HUMAN RIGHTS ABUSES

- Require companies listed or headquartered in the UK to undertake and publicly disclose social, environmental and human rights impact assessments for significant overseas projects.
- Strengthen individual responsibility of company directors to minimise, manage and mitigate the companies' human rights and environmental impacts.
- Build human rights measures into the criteria for selecting companies for DFID Public-Private Partnerships, Export Credit Guarantees and Overseas Insurance.

AT INTERNATIONAL LEVEL:

- Support legislation at EU level which would enhance direct liability of parent companies, establish a parental company duty of care and introduce mandatory environmental and social reporting.²⁰¹
- Support the development of the UN Special Representative's framework to include home country legislation requiring companies to respect internationally agreed human rights standards in relation to their overseas operations.

Documents relevant to the in-depth case study:

- Appendix 1—Report by Physicians for Human Rights (PHR).
- Appendix 2—Photographs of Melanio García.
- Appendix 3—CNDDHH letter in English sent to international NGOs summarising the Río Blanco case and the allegations of torture.

CAFOD
May 2009

Peru Support Group
May 2009

¹⁹⁹ The case of Konkola Copper Mines (KCM) in Zambia provides an example of this power imbalance. See for example CIDSE (2008) Recommendations to reduce the risk of human rights violations and improve access to justice. Submission to the UN Special Representative on Business and Human Rights.

²⁰⁰ The Corporate Responsibility (CORE) Coalition was set up in 2001 and represents over 130 charities and campaigning organisations. www.corporate-responsibility.org

²⁰¹ http://www.corporatejustice.org/IMG/pdf/ECCJ_FairLaw.pdf

Memorandum submitted by Harrison Grant

INTRODUCTION

Harrison Grant (*HG*) is a small law firm that specialises in human rights and environmental law. Much of the work we undertake is for individuals, charities and campaigning organisations with limited resources. This submission is based on the firm's experience working for clients that have been affected by extractive industries and other related examples.

THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

1. *How do the activities of UK businesses affect human rights both positively and negatively?*

UK businesses can impact on human rights in a positive way by ensuring an appropriate robust corporate social responsibility (*CSR*) programme is in place and applies throughout the corporate group. However, where there are inadequate monitoring mechanisms in place these *CSR* strategies are likely to prove at best piecemeal and at worst meaningless.²⁰²

Further, businesses can influence the behaviour of local companies operating in other countries by conducting adequate due diligence on those companies and only trading with, or investing in, those that are human rights compliant. Where a business does not investigate, or turns a blind eye to, those directly responsible will be encouraged to continue their abusive practices.²⁰³

2. *How do these activities engage the human rights obligations of the UK?*

The State is responsible for ensuring that the private sector is adequately regulated. It follows that the UK should have adequate and accessible legislation, guidance and reporting systems in place to enable victims and businesses to know what standards are expected of business and what avenues of redress are available where those standards are not met.

3. *Are there any gaps in the current legal and regulatory framework for UK business which need to be addressed, and if so, how?*

a. We note and welcome the OECD Guidelines for Multinational Enterprises and the new duties on UK directors contained in the Companies Act 2006.²⁰⁴ However, the statutory duties themselves are not self executing, and there is therefore a practical issue as to how breaches are monitored, and what remedies can be put in place where a breach occurs.

b. A further issue that we have come across is how multi-national corporations (*MNCs*) and financial institutions are enabling companies operating abroad to profit from activities involving human rights abuses. For example, although companies that commit human rights violations may be located and operate entirely abroad, the businesses that trade with or facilitate the operations of (by providing funding directly or by funding key infrastructure projects) those local companies are often large *MNCs* or financial institutions, which may have parent companies/branches in the UK or trade with the UK.

There is often little incentive for these corporations to conduct thorough due diligence and yet they are a critical link in the chain in ensuring that companies who do carry out the abuses are able to profit and have an incentive to continue operating in this manner.

One example we have come across is in the soya industry. Greenpeace, a client of *HG*, has issued a report tracking various human rights violations and environmental issues that soya farms operating in the Amazon are directly responsible for, including slavery and land grabbing.²⁰⁵

In some cases these farms may be owned directly by one of the large *MNCs* involved in the soya trade. However, more frequently they are indirectly involved by funding illegal roads into the area for soya farms to take advantage of or by buying and exporting soya from the farms involved in abusive practices.²⁰⁶ In addition, public and private funding has been provided to farms directly implicated in human rights abuses.²⁰⁷

Although there are systems in place in Brazil to place farms involved in slavery on a "Dirty List", this only occurs once cases have been discovered and successfully prosecuted. Given the geographical remoteness of the farms, the lack of resources of the State's monitoring agencies and the cumbersome judicial process, only a fraction of farms involved in human rights abuses are placed on this list. Even if farms have been black-listed this does not necessarily prevent *MNCs* from trading with them.²⁰⁸

²⁰² See the extractive industry example set out below, which had the potential to positively impact on—for example—the right to education in Sierra Leone but utterly failed to do so and in fact has made a mockery of the company's *CSR* strategy.

²⁰³ See further the soya industry example set out below.

²⁰⁴ Ss. 172(1)(d) and (e)

²⁰⁵ The Greenpeace report, "Eating up the Amazon", has been attached to this submission. See, in particular, pages 27–33.

²⁰⁶ Three *MNCs* mentioned in the Greenpeace report (ADM, Bunge and Cargill), although not incorporated in the UK, all have significant operations in the UK.

²⁰⁷ It is not clear to us whether this includes any UK banks.

²⁰⁸ See page 31 of the Greenpeace report, which refers to a voluntary pact to prevent companies from trading with black-listed farms. At the time of the report, two of the *MNCs* had refused to sign the pact.

Sufficient obligations and incentives do not exist to ensure that MNCs and financial institutions conduct sufficient due diligence and act on evidence of abusive practices. As a result, this crucial link in the chain will not be broken.

c. Another way in which the market facilitates human rights abuses is through the gap between investors, the company they invest in and the local operations of that company abroad. For example, a UK investor investing in a company listed on the London Stock Exchange or on AIM is not required to investigate the human rights record of that company. They may choose to do so for ethical or financial reasons but there is no obligation to do so. Where a company is listed on AIM it does not need to be incorporated in the UK and only has to state whether or not it complies with its domestic corporate governance rules. The AIM Admission Rules, which companies wanting to list must comply with, are concerned primarily with protecting investors and not in ensuring respect for human rights.²⁰⁹ However, once listed on AIM the company is able to reap financial advantages and gains an aura of respectability.

The issues outlined above are not ones that the UK can tackle alone but the UK can have a powerful impact given the global importance of London's financial and trading markets.

THE RESPONSIBILITY OF THE BUSINESSES TO RESPECT HUMAN RIGHTS

4. *How should UK businesses take into account the human rights impact of their activities (and are there any examples of good or bad practice which the Committee should consider)? How can a culture of respect for human rights in business be encouraged?*

- *Should UK businesses' responsibility to respect human rights vary according to:*
 - *Whether or not they are performing public functions or providing services which have been contracted out by public authorities; Is it clear when the Human Rights Act 1998 does and does not apply directly to businesses?*
 - *Whether they are operating inside or outside the UK;*
 - *The size, type or nature of their business?*
- *How, if at all, should the current economic climate affect the relationship between business and human rights?*

Standards and obligations that might apply to a company or branch located in the UK and CSR strategies publicised on a company's website are unlikely to apply in a uniform way throughout the corporate group. The reasons for this disparity vary. In some cases it may result from wilful blindness on the part of the UK company, in others the geographical remoteness of a subsidiary might create practical difficulties in terms of ensuring standards of business are maintained worldwide.

Our experience has shown that this mismatch may also be due to a lack of adequate monitoring mechanisms for CSR strategies and human rights commitments. Where human rights violations occur outside the UK, it is harder to ensure a UK parent company takes adequate responsibility or appropriate steps to engage and deal with the matter. There are also practical difficulties for individuals who have had their rights violated in countries where the legal system is inadequate, for example because it is weak and/or corrupt, for providing redress and where significant resources might be required in order to take their claim further up the corporate chain. We set out below our experience in this regard.

EXAMPLE: EXTRACTIVE INDUSTRY

HG was instructed in 2008 to assist an independent human rights organisation representing various communities in Sierra Leone (the *Client*) to seek redress from an international corporation involved in diamond mining (the *Company*). The Company has various offices around the globe and is listed on AIM with a registered office in London and a UK subsidiary company.

Factual Background

In 2004–05 the Company was involved in prospecting operations in a specific region in Sierra Leone. The operations resulted in various forms of damage to the local communities including:

- the digging of numerous prospecting pits on the communities' land ranging in size from about four metres square to pits that are about 60 metres long by 50 metres wide. Despite promises to the contrary, these pits were not filled upon completion of the prospecting. They remain open. Many of the larger pits have flooded and pose health and safety issues to local communities: they are mosquito infested and villagers fear that local children, most of whom cannot swim, may drown. The larger pits are of such a size and depth that they can only be filled using heavy earth moving equipment;
- the damming of a river resulting in the flooding of surrounding land, damage to crops and property and cutting off of transportation routes. Although the river was partially unblocked, this was done in an unsatisfactory way and flooding is still an issue;

²⁰⁹ There is specific AIM "Guidance for Mining and Oil & Gas Companies". However, this contains nothing concerning human rights obligations.

- failure to repair/build schools; this had been promised to communities at the outset of the prospecting operations. The Company has denied making any such promise;
- damage to the land and crops of more than 114 farm-owners through flooding and/or the construction of access roads. In some cases the damage to the land has been more permanent, preventing the replanting of crops. Compensation has either not been paid or has been grossly insufficient; and
- damage to a road bridge. This bridge was later repaired, but only after representations from HG to the UK Company. In addition, the Company’s representatives demanded that our Client sign a Memorandum of Understanding confirming the satisfactory completion of the repairs, *prior to the repairs having been carried out*. There are numerous other examples of the Company seeking to bully/force agreement from our Client, individuals and/or the communities concerned.

As a result of the above, our Client has been seeking compensation and reparation from the Company. They have also sought a full and public apology.

The efforts of the Client and the communities to raise these issues with the Company’s local representatives in Sierra Leone were almost completely ignored. Although the actions of the Company are contrary to Sierra Leone law, the legal system in Sierra Leone is under-resourced at best.²¹⁰ In addition, our client has not the financial or other means to litigate against an international company. In these circumstances, litigation before the Sierra Leone courts does not provide an effective way of seeking redress. As one illustration of the difficulties, the Company has not even been willing to provide copies of its prospecting licences.

We were therefore instructed to contact the UK offices of the Company.

The Company’s CSR policy

In its Admission Document for listing on AIM, the Company has a CSR policy, which includes promoting “local empowerment and community development”. The Company’s website also highlights its commitment to “developing the educational sector in remote areas of the country” and to “implement programs that support poor communities in the Company’s areas of operation”.

Correspondence with the Company

HG first wrote to the Company on 7 March 2008. Initially, we received a prompt response, seemingly accepting responsibility for dealing with the majority of the matters outlined above. However, since our initial contact, only the bridge repairs have been carried out. The Company advised us that the local communities had agreed that they would fill the open pits themselves; when we queried this, we were provided with copies of MoUs purportedly signed by community members and representatives. However, our instructions are that some of the signatures were improperly obtained, and others were written on behalf of individuals who had not nominated proxies. The compensation paid was nominal, and payment to the Company’s representative was deducted from it. In the case of the schools, the Company categorically denied it had agreed to repair or rebuild. We followed up these issues with a detailed letter and witness statement, setting out the facts and dealing with issues raised by the Company.

We have received no substantive response.

However, upon informing the Company that we intended to make a submission to the Joint Committee on Human Rights (*JCHR*), we received an immediate response promising action, and the Company’s local representatives immediately contacted the Client to try and resolve some of the issues outlined above. It remains to be seen whether the most recent promises will be followed through and whether the outstanding issues will be dealt with.

Conclusion

The issues outlined above are not examples of the most egregious forms of human rights violations. However, at the same time, given the comparatively small sums involved, it is surprising that it has taken so long—and ultimately awareness of our submission of evidence to the *JCHR*—to galvanise this Company into action.

HG has undertaken this work pro bono. The acute disparity in resources between the client and the type of organisation they are up against poses severe difficulties in these types of cases, especially because the violations concerned are not the sort that attract widespread publicity, and are not likely to be appropriate for conditional fee arrangements given the comparatively small sums involved. It is time consuming work

²¹⁰ The Sierra Leone Mines and Minerals Decree of 1994 requires: the written consent of the land owner before any rights under a licence are exercised (s.23(1)(b)), a company to “backfill or otherwise make safe any bore holes of excavations” (s.55(1)(e)); and “any damage done to the surface of the land” and “any disturbance” to the rights of the owner to be paid for (ss. 25 and 26).

and many of the larger law firms who might have the resources to fund this type of pro bono work, may find themselves unable to do so for conflict of law reasons, where the companies involved are MNCs that are past, present or potential clients of the firm.

We are able to provide more detailed information should the JCHR consider it useful; we will, of course, update the JCHR in due course on any future developments in relation to this matter.

EXAMPLE: SOYA FARMING

See 3(b) above for details of this example.

Extensive resources are required in these types of cases to investigate and document the link between human rights abuses and the various national and international actors involved.

Effective access to remedies

5. *Does the existing legal, regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?*

Judicial remedies for the type of human rights violations outlined in the extractive industry example above are likely to be prohibitively expensive. The compensation sought is comparatively small and the resources required to carry out sufficient on-site investigations and bear the risk of costs being awarded against are potentially huge.

The same is true for cases like that outlined in the soya farm example. In addition, there are potential barriers stemming from the need to prove jurisdiction and to demonstrate corporate responsibility.²¹¹

6. *If changes are necessary, should these include:*

- *Judicial remedies;*
- *Non-judicial remedies. If non-judicial remedies are appropriate, are there any examples of good or bad practice which the Committee should consider?*
- *Government initiatives, whether by legislation, statutory or other guidance or changes in policy;*
- *Initiatives by business or other non-Government actors*

A useful mechanism would be an ombudsman or independent complaints commission authorised to examine complaints regarding violations of human rights by businesses.

A statement from a respected independent human rights body would likely be something that could be used as a tool to galvanise a company into acting, especially where the size of the claim was relatively small. It may also be welcomed by companies which would have a chance to vindicate themselves where claims were unfounded.

In addition, companies should have systems in place to ensure that the statutory duties on directors contained in the Companies Act 2006 become a part of the decision-making process. To enable the duties to be meaningful there must be sufficient transparency and monitoring of the implementation of these duties.

In the soya farm example, a crucial starting point would be a requirement for businesses not to fund or trade with companies that have been placed on the “Dirty List”. This type of mutual recognition mechanism could be adopted for other industries and other countries where available.

The UK is a supporter of the Extractive Industries Transparency Initiative, however that does not appear to involve specific obligations for UK businesses. Something similar to the Canadian system could provide useful guidance for businesses as well as a means of holding UK parent companies to account for violations committed abroad.²¹²

7. *Views on the UN Special Representative framework*

HG welcomes the policy framework proposed by the UN Special Representative as a useful starting point for examining the impact of businesses on human rights. We also endorse the most recent report of 22 April 2009 on the progress achieved in “operationalizing the protect, respect and remedy framework”.

Harrison Grant

May 2009

²¹¹ We note in this regard the recent LSE report, “The Reality of Rights” (May 2009), which builds on this issue, in particular at pages 37–38.

²¹² In the extractive industry sector, Canada has recently published, “Building the Canadian Advantage: A CSR Strategy for the Canadian International Extractive Sector”. This builds on the Canadian Government’s endorsement on the OECD Guidelines for Multinational Enterprises and aims to promote widely-recognized international CSR performance guidelines for Canadian extractive companies operating abroad.

Memorandum submitted by Clifford Chance LLP

INTRODUCTION

This response is made on behalf of Clifford Chance LLP to the call for evidence issued by the Joint Committee on Human Rights as part of its inquiry into business and human rights.

We very much welcome the Committee's decision to examine this issue, and welcome the opportunity to submit our views. We trust that the Committee will find our comments helpful.

Clifford Chance is an international law firm, headquartered in London, with 30 offices in 21 countries throughout Europe, the Americas and Asia (together with a co-operation agreement with Al-Jadaan & Partners Law Firm in Saudi Arabia). We are regulated in this country by the Solicitors Regulation Authority.

We have advised a considerable number of companies and public sector bodies on the application of the Human Rights Act 1998 and other human rights instruments to their activities. We are one of a number of law firms supporting the work of Professor John Ruggie, the UN Secretary-General's Special Representative on Business and Human Rights.

In the comments below we have not sought to address every question posed by the Committee. We deal below with those on which we are able to offer comment based on our experience (and we do so adopting your numbering).

3. Are there any gaps in the current legal and regulatory framework for UK businesses which need to be addressed, and if so, how?

There is a gap in that there remains uncertainty as to whether some businesses are covered by the Human Rights Act 1998 or not. Since the Act came into force, there has been considerable satellite litigation regarding the definition of a "public authority" within the meaning of section 6 of that Act, and not all of the decisions are easy to reconcile with one another. Thus, we currently have a situation in which a privately-run care home is not a public authority²¹³ but a privately-run psychiatric hospital can be.²¹⁴ At the time the Human Rights Bill was being debated, a decision was made not to attempt to describe or list the bodies to which the legislation would apply, on the basis that the Government considered it was "far better to have a principle rather than a list which would be regarded as exhaustive".²¹⁵ However, no such difficulty appears to have been encountered with the Freedom of Information Act 2000 (which appends a schedule listing thousands of bodies required to adhere to the provisions of that statute), and there has been minimal litigation on the point in that context (and then confined to bodies which have some functions covered and some not). This uncertainty can make it difficult for businesses to know exactly where they stand in terms of the precise obligations they are required to fulfil.

4. Does the UK Government give adequate guidance to UK businesses to allow them to understand and support the human rights obligations of the UK? If not, who should provide this guidance?

While the UK Government provides considerable guidance on the Human Rights Act through sites such as www.direct.gov.uk, www.justice.gov.uk and the Equality and Human Rights Commission website at www.equalityhumanrights.com, there appears to be little that is specifically aimed at the business community. This could of course be because the focus of the Human Rights Act is on the activities of public authorities rather than organisations operating in the private sector. Guidance which does extend to private sector companies tends to concentrate on employment law, which is an area in which human rights norms have long been incorporated into domestic legislation. If more guidance was thought appropriate, we consider that the logical place for it to be made available would be via the Department for Business, Enterprise and Regulatory Reform.

Guidance for businesses on the wider issue of human rights outside the Human Rights Act context is also difficult to find. For example, a Google search on "OECD Guidelines for Multinational Enterprises" does not produce a link to the BERR website until the second page of results, and the page is then found under Europe, Trade & Export Control > Trade Policy > OECD Multinational Guidelines & UK NCP. However, that page simply notifies users that the relevant information is to be found elsewhere, and links to a page under Business Sectors > Low Carbon Business Opportunities > Corporate Responsibility, Sustainable Development & Waste Policy > UK NCP—OECD Guidelines. In our view, neither of these is a destination where someone looking for this information on the BERR website would intuitively expect to find it. Even the first search result on BERR's own search engine returns the first page, which no longer contains the relevant information.

5. What role, if any, should be played by individual Government departments or the National Human Rights Institutions of the UK?

Government departments should make available timely and accurate information about the way in which human rights obligations affect individuals, business and public authorities.

²¹³ *YL v Birmingham City Council and others* [2007] UKHL 27.

²¹⁴ *R v Partnerships in Care Limited, ex parte A* [2002] EWHC 529 (Admin).

²¹⁵ 583 HL Official Report (5th series) col 796 (24 November 1997).

6. *How should UK businesses take into account the human rights impact of their activities (and are there any examples of good or bad practice which the Committee should consider)? How can a culture of respect for human rights in business be encouraged?*

- *Should UK businesses' responsibility to respect human rights vary according to:*
 - *Whether or not they are performing public functions or providing services which have been contracted out by public authorities; Is it clear when the Human Rights Act does and does not apply directly to businesses?*
 - *Whether they are operating inside or outside the UK*
 - *The size, type or nature of their business?*
- *How, if at all, should the current economic climate affect the relationship between business and human rights?*

Respect for human rights should be something that all businesses strive to achieve. We do not consider that it should depend on whether a business is performing public functions or providing services which have been contracted out by public authorities.

As we have stated above, it is not currently clear when the Human Rights Act does or does not apply directly to businesses, and, while this should not affect a basic respect for human rights, most businesses will want to ensure that they are complying with the law where there is an obligation to act (or to forbear from acting) in a particular way.

We do not consider that a responsibility to respect human rights should vary according to whether a business is operating inside or outside the UK. Human rights apply to everyone, wherever they are. Businesses operating outside the UK, and particularly in developing countries, may, however, find even less in the way of local laws or guidance than they do here, and may need to be guided by instruments such as the OECD Guidelines for Multinational Enterprises rather than relying on local laws to set out their obligations.

Nor should the size, type or nature of a business affect respect for human rights. Once again, however, businesses operating in countries or industries where human rights abuses have historically been common, or are known to continue today, should take extra care to ensure that their policies and processes do not contribute to further abuses, whether actively or by lack of proper supervision.

The current economic climate should not adversely affect the relationship between business and human rights. Respect for human rights should be a given in any business, and not something that depends on economic conditions.

7. *Does the existing legal, regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?*

The confusion over exactly which bodies are subject to the Human Rights Act presents an obstacle not just for businesses but also for individuals who believe their human rights have been infringed. If satellite litigation on the issue of what is and is not a public authority has to go to the Court of Appeal or the House of Lords before a claimant can even be sure that a claim can proceed, that is a significant barrier to a remedy for that claimant, who may struggle to fund even a straightforward claim.

Human rights are not, of course, confined to those rights set out in the Human Rights Act, or able to be secured only by proceedings under that Act. Many human rights are protected in an employment setting, for example, by employment laws, and there is widespread access to employment tribunals for individuals who believe that their rights have been infringed by their employers.

8. *If changes are necessary, should these include:*

- *Judicial remedies (if so, are legislative changes necessary to create a cause of action, or to clarify that a cause of action exists; or to enable claims to proceed efficiently and in a manner that is fair to both claimants and respondents);*
- *Non-judicial remedies (for example, through the operation of ombudsmen, complaints mechanisms, mediation or other non-judicial means). If non-judicial remedies are appropriate, are there any examples of good or bad practice which the Committee should consider?*
- *Government initiatives, whether by legislation, statutory or other guidance or changes in policy;*
- *Initiatives by business or other non-Government actors.*

We consider that clarification of what is a public authority within the meaning of the Human Rights Act is an important step which should be considered at the earliest opportunity by means of an amendment to the Act.

If the definition of public authority means that more businesses are likely to become subject to the Act, guidance for those businesses would be useful so that they can ensure they comply with the relevant provisions.

Outside of the Human Rights Act context, we welcome the Government's commitment of additional resources to the National Contact Point for the OECD Guidelines and the publication of new procedures to improve the process for handling complaints.

Clifford Chance LLP

Memorandum submitted by Oxfam GB

1. INTRODUCTION

1.1 Oxfam GB welcomes the opportunity to submit evidence for consideration by the Joint Committee on Business and Human Rights' in its Inquiry into Business and Human Rights. Our submission generally reflects the interests and concerns of Oxfam International, to which Oxfam GB is affiliated, and which is also supporting a separate submission to this inquiry prepared by the Human Rights Clinic at the Harvard Law School.

1.2 Oxfam GB's purpose is to work with others to overcome global poverty and suffering. We seek to do so by working on three fronts: responding to humanitarian emergencies; developing programmes and solutions that empower people to work their way out of poverty, and campaigning to achieve lasting change.

1.3 Oxfam believes that everyone has:

- The right to life and security.
- The right to a sustainable livelihood.
- The right to basic social services.
- The right to be heard.
- The right to equity.

We work at all levels from global to local, including national governments, global institutions, as well as with local communities and individuals, with the aim of ensuring that people's rights are fulfilled and protected.

1.4 For more than 20 years, Oxfam GB has been concerned about the interaction between business and human rights, and has been advocating in support of public policy frameworks that regulate business activities to ensure that they do not undermine human rights.

1.5 We have also analysed a number of business sectors and proposed changes in company policies and practices either to address negative impacts on people's rights, and/or to promote the fulfilment of people's rights, for example, through the development of new business models. This work has covered the extractives, retail, pharmaceutical, coffee and fast-moving consumer goods sectors. Most recently, Oxfam has been examining the role and responsibilities of business in tackling climate change.ⁱ

1.6 This submission focuses on a number of issues on which Oxfam is working that are relevant to the topic of this inquiry.

2. CLIMATE CHANGE

2.1 The impacts of climate change are already undermining, and will increasingly undermine, millions of people's rights to life, security, food, water, health, shelter and culture.ⁱⁱ Climate change will affect everyone but the human costs will be borne overwhelmingly by the world's poorest people—precisely those least responsible for causing it. Oxfam believes that creating and implementing progressive public policy on climate change is core but government cannot act without support and action from the private sector, both in reducing emissions and in implementing effective adaptation strategies, particularly in developing countries.

2.2 Oxfam's recent paper—"The right to survive in a changing climate"—estimates that, driven by upward trends in the number of climate-related disasters and human vulnerability to them, by 2015 the average number of people affected each year by climate-related disasters could increase by over 50% to 375 million.ⁱⁱⁱ People's vulnerability is inextricably linked with poverty and their (in)ability to realise their rights. In rich countries, an average of 23 people die in any given disaster, in least-developed countries, the average is 1,052 due, for example, to the reality that poor people live in poorly constructed homes, often on land more exposed to hazards such as floods, droughts, or landslides, and in areas without effective health services or infrastructure.

2.3 Oxfam believes that the primary responsibility for tackling climate change lies with industrialised countries, which must take urgent action to:

- stop harming—by cutting greenhouse gas emissions by at least 40% by 2020; and
- start helping—by accepting their obligations to pay for adaptation in the developing world—at least \$50 billion a year.

So far, industrialised-country action has been nowhere near what is required, with the result that hundreds of millions of lives and livelihoods from now and into the future are at risk. It will be essential for the Copenhagen Climate Change Conference in December 2009 to agree an adequate and fair global deal to replace the Kyoto Protocol which expires in 2012.

2.4 Companies can play a critical role in ensuring that human rights are not undermined by the impacts of climate change by using their considerable political influence to encourage and support governments to create and implement a successful post-2012 deal. In May 2009, the World Business Summit on Climate Change will provide a key opportunity for companies to call for bold action in the international climate change negotiations, and to support the formation and implementation of the progressive policies needed to make this possible.

2.5 In addition, all companies have a responsibility to ensure that they respect people's rights in the context of climate change by:

- setting ambitious targets to cut their own absolute emissions;
- ensuring that their mitigation or adaptation projects do not undermine people's rights, either due to the technologies they use, or due to implementing them without consulting affected communities; and
- refraining from lobbying to block effective regulation or agreements that aim to tackle climate change.

2.6 Companies aiming to promote human rights should:

- call on governments to show leadership in setting adequate emissions targets;
- create and disseminate technologies to reduce greenhouse-gas emissions, such as renewable energy systems and energy-efficient appliances;
- create appropriate, affordable and accessible technologies for adaptation, such as small-scale irrigation, drought-tolerant seeds, medicines, weather-related insurance, as relevant; and
- contribute to building community resilience—companies that source and sell globally should ensure that vulnerable communities integral to their supply chains—such as farmers, workers and consumers—build their resilience to climate-change impacts.

3. ACCESS TO MEDICINES

3.1 While governments have the primary responsibility for ensuring people's right to access to health care services, the role of the pharmaceutical industry in providing a critical element of health care—access to affordable essential medicines—carries its own responsibilities.

3.2 According to the UN Special Rapporteur on the Right to Health: “almost 2 billion people lack access to essential medicines. Improving access to existing medicines could save 10 million lives each year, four million of them in Africa and South-East Asia. Access to medicines is characterised by profound global inequity. 15% of the world's population consumes over 90% of the world's pharmaceuticals, by value”.^{iv}

3.3 In many developing countries, health insurance coverage is virtually non-existent for poor people, making medicines the largest household expense after food. In Brazil, for example, the cost of medicines absorbs up to 82.5% of out-of-pocket expenses for the poorest people.^v In addition global investment in research and development for treatment of diseases that primarily affect developing countries is seriously insufficient.^{vi} A critical reason for the lack of availability of suitable drugs that meet the needs of poor people is the minimal resources that the pharmaceutical research-based industry allocate to research in this area.

3.4 This situation is exacerbated by a global intellectual property regime that grants 20 year patents to reward the results of research and development (R&D) by pharmaceutical companies, effectively giving companies the freedom to set prices. This also delays the entry of generic medicines into markets upon which many governments and households depend.^{vii} Despite agreement at the World Trade Organisation that developing countries have the right to use safeguards in intellectual property rules in order to protect public health, the few attempts to use these safeguards to reduce the prices of medicines have been at the expense of attracting huge pressure from the US and EU governments, and the drug companies themselves.^{viii}

3.5 Companies should implement flexible intellectual property and pricing policies that properly reflect the needs and the purchasing power of the poor. They should also contribute to and collaborate in R&D to address the dearth of dedicated products for diseases that predominantly affect developing countries, and develop drug formulations that are applicable and usable in the developing world. Although there has been some welcome progress on R&D and reducing prices by some companies, most notably GSK who announced in February that it will cut the price of all its medicine to the world's poorest 52 countries, the pharmaceutical industry has generally much further to go to fulfill its responsibilities to ensure people's right to affordable essential medicines.^{ix}

4. ENSURING RIGHTS IN GLOBAL SUPPLY CHAINS

4.1 Oxfam’s “Trading Away Our Rights” campaign^x highlighted that companies often fail to take responsibility for the impact of their activities on the rights of people involved along their supply and distribution/retail chains. Our research with partners in 12 countries, involved interviews with hundreds of women workers and many farm and factory managers, supply chain agents, retail and brand company staff, unions and government officials. It revealed how retailers (supermarkets and department stores) and clothing brands are using their power in supply chains systematically to push many costs and risks of business on to producers, who in turn pass them on to working women.

4.2 For many producers, faced with fluctuating orders and falling prices, the solution is to hire workers on short-term contracts, set excessive targets, and sub-contract to sub-standard, unseen producers. Pressured to meet tight turnaround times, they demand that workers put in long hours to meet shipping deadlines. And to minimise resistance, they hire workers who are less likely to join trade unions (young women, often migrants and immigrants) and they intimidate or sack those who do stand up for their rights.

4.3 Oxfam believes that it is the responsibility of companies—retailers and brands—to make respect for labour rights integral to their supply-chain business strategies, especially by addressing the impacts of their own sourcing and purchasing practices on the way that producers hire and treat their workers. In addition, producers and suppliers worldwide have a responsibility to provide decent jobs for their employees, including respect for workers’ right to join trade unions and bargain collectively, and to eliminate discrimination against women workers.

4.4 There are examples of companies that are taking some steps to improve working conditions in their supply chains. For example, in 2007, fashion retailer New Look began working with one of its biggest suppliers in Bangladesh to investigate ways to improve working conditions, for example by providing better estimates of future orders, to enable the factory to plan more effectively. After 18 months, the take-home pay of the lowest-paid workers in the factory, mainly women, had increased by 24%. As a result, the average value of the lowest paid workers’ monthly package in July was more than 2.17 times the minimum wage, although this still falls significantly short of living wage estimates. Furthermore, workers were working 46% fewer overtime hours than before. Unsurprisingly, workers are keen to continue working at the factory, and labour turnover is far lower than the average in the Bangladesh garment factory. New Look is now working to extend this approach to other suppliers.^{xi}

4.5 Although, this and similar efforts have improved the working conditions of workers in some factories, individual voluntary company initiatives are insufficient to secure workers’ rights across the board. The frequent failure of national governments to fulfill their duty to protect workers’ rights in law and in practice, and to enforce international labour standards, allows irresponsible companies to continually undermine human rights.

4.6 When companies actively seek to source from micro-enterprises and co-operatives in their supply chains, this has the potential to help large numbers of people realise their right to a sustainable livelihood. This potential is most likely to be realised where companies, often working with others, including governments, transfer the necessary skills, expertise and technology, and offer fair prices and other terms that will equitably share the value that is created.

4.7 For example, many hotels in the Caribbean import large quantities of fresh produce from the United States, while local farmers struggle to make a living. With support from Oxfam, a group of co-operatives in St Lucia has become a trusted supplier of fresh produce for hotels and restaurants, including the Sandals’ and Virgin Holidays’ resorts. Sandals’ costs have fallen as a result of the initiative, and it benefits from customer satisfaction with an authentic Caribbean dining experience. Oxfam GB plans to support measures to scale up this model to other islands as a means of promoting the right to a sustainable livelihood.^{xii}

5. PROPOSAL TO ESTABLISH A UK COMMISSION ON BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

5.1 As stated by the UN Special Representative, and as illustrated in the examples above, conflicts between business activities and the realisation of human rights are perpetuated by a series of governance gaps in our globalised world. In considering how best to address these gaps, Oxfam urges the Committee to focus on what steps the UK government can take to ensure the protection and encourage the promotion of human rights by UK companies operating at home and overseas.

5.2 In this regard, the CORE Coalition’s proposal to establish a UK Commission on Business, Human Rights and the Environment is garnering considerable interest and support among civil society groups, think tanks, academics and lawyers. Oxfam commends this proposal to the Committee for serious consideration in its Inquiry.

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ⁱ See www.oxfam.org.uk/resources/policy/private_sector

ⁱⁱ Oxfam (2008) *Climate Wrongs and Human Rights: Putting people at the heart of climate-change policy*, Oxford: Oxfam.

ⁱⁱⁱ Oxfam (2009) *The Right to Survive in a Changing Climate, Background Paper*, Oxford: Oxfam.

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- iv P Hunt (2007) “Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines”. Draft for Consultation Prepared by the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health. See: www.ohchr.org/english/issues/health/right/index
 - v M A Dominguez Uga and I Soares Santos (2007) “An Analysis Of Equity In Brazilian Health System Financing”, *Health Affairs* 26 (4): 1017.
 - vi Only US \$1 out of every US \$100,000 spent worldwide on biomedical research and product development goes into R&D to combat neglected tropical diseases (HIV/AIDS, TB and malaria are not included). Over 1 billion people—one sixth of the world’s population—suffer from one or more neglected tropical diseases.
 - vii Generic medicines are typically between 20 to 90% cheaper than originator drugs. European Generics Medicines Association at www.egagenerics.com/gen-basics.htm
 - viii Oxfam (2006) “Patents versus Patients: Five years after the Doha Declaration”, Oxfam Briefing Paper No. 95, Oxford: Oxfam.
 - ix See Oxfam (2007), *Investing for Life: Meeting Poor People’s Needs for Access to Medicines through Responsible Business Practices*, Oxford: Oxfam.
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 - xii See www.oxfam.org.uk/donate/edp/st_lucia for more information.

Memorandum submitted by Earthrights

UK BUSINESSES AND ACCESS TO JUSTICE FOR HUMAN RIGHTS VIOLATIONS

INTRODUCTION AND SUMMARY

In this submission, EarthRights International (ERI)²¹⁶ addresses Questions 1, 6, 7 and 8 in the Joint Committee on Human Rights’ 6 March 2009 Call for Evidence.

In Part I, we briefly address the universality of human rights obligations under international and domestic law. In Part II, we describe the human rights impacts of the activities of the UK’s Shell Transport and Trading Co. in Nigeria in the 1990s, which have led to litigation in the US. In Part III, we address potential obstacles to the legal accountability of UK business entities for human rights abuses. In preparing this submission, ERI consulted UK human rights and public interest lawyers. In light of their comments, we draw both positive and negative comparisons to our experiences with US litigation. Finally, in Part IV, we suggest ways to enhance the ability of individuals to seek appropriate remedies for human rights claims against corporations in UK courts.

The United Nations Special Representative on Human Rights and Transnational Corporations, John Ruggie, has identified access to remedies as a crucial prong of his mandate. We strongly believe that “host countries”—the jurisdictions in which abuses typically take place—should provide a forum in which people with human rights claims against companies could seek appropriate remedies. Nonetheless, abuses often occur in countries with repressive regimes. The governments of such countries may be involved in the abuses, or their legal systems may be insufficiently independent or otherwise inadequate to provide a fair forum. Thus, “home countries”—the nations in which multinational corporations are headquartered or otherwise subject to the jurisdiction of courts—have a key role in ensuring legal accountability for human rights abuses. We therefore express our support and offer our future assistance to the Committee in its efforts to provide effective access to remedies for individuals and groups with human rights claims against UK businesses.

I. UK businesses’ universal responsibility to respect human rights

Businesses’ human rights obligations do not and should not vary depending on where they operate. This universality principle arises from the facts that fundamental human rights principles are part of international law recognized by the community of nations, and that private actors like businesses are liable for complicity in human rights violations and, in some cases, for their direct commission of such violations.

²¹⁶ EarthRights International (ERI) is a nonprofit, nongovernmental organization working for the defense of human rights and the environment. ERI was counsel in the landmark case *Doe v. Unocal*, charging the California company with complicity in abuses on its pipeline project in Burma, and currently represent victims of environmental and human rights violations in lawsuits against Chevron, Shell, Chiquita, Union Carbide, and Occidental Petroleum.

In the UK, this principle also applies to UK corporations by virtue of statutes like the International Criminal Court Act and the Human Rights Act, which attach criminal liability to UK residents no matter where in the world they commit prohibited acts, and European Community and common law principles of jurisdiction, venue, and choice of law, which may allow UK courts to hear cases against UK corporations for claims arising abroad, under UK domestic law.²¹⁷

II. *The negative impacts of UK corporate activities abroad*

The activities of UK companies can have grave negative effects on populations abroad, and serious implications for the reputation of those companies at home. On 26 May 2009, the UK's Shell Transport and Trading Co. will stand trial, along with its partner Royal Dutch Petroleum, in a US federal court in New York in the case of *Wiwa v. Royal Dutch Petroleum Co.* Shell is facing claims that it partnered with the Nigerian military in violently suppressing community opposition to Shell oil extraction in territory belonging to the Ogoni tribe in the mid-1990s. The abuses for which plaintiffs claim Shell is responsible include the torture, maiming, and violent death of innocent civilians, as well as the arbitrary detention and extrajudicial execution of local leaders, including Ken Saro-Wiwa. ERI is co-counsel for the plaintiffs in this case.

III. *Barriers and opportunities for access to remedies*

a. Civil litigation against corporations under the US Alien Tort Statute (ATS)

In the US, lawyers have invoked the Alien Tort Statute (ATS) as a jurisdictional and substantive basis for holding individuals and corporations civilly liable for violations of internationally recognized human rights. The obstacles to successful litigation should not be underestimated—to date, not a single suit has resulted in a jury verdict against a corporate defendant on human rights claims. Regardless, specific accomplishments include:

- In several cases, settlements have provided compensation to individual victims.
- US courts have asserted the authority to hold corporations liable for their direct participation or complicity in a number of human rights abuses, including torture, forced labor, extrajudicial execution, denationalization, cruel, inhuman, or degrading treatment, non-consensual medical testing, and arbitrary detention.
- Those alleging human rights abuses have told their story, presented evidence in open court, and confronted powerful interests whom they accuse of causing harm.

These developments have already put a financial and reputational cost on abusive behavior by businesses abroad; the possibility of facing ATS lawsuits has led companies to conduct human rights trainings and impact assessments, implement codes of conduct, and devise grievance mechanisms for identifying and remedying potential human rights abuses before they lead to judicial proceedings.²¹⁸

b. Lessons for corporate liability for human rights abuses in the UK

Inadequately defined rules of liability

In many corporate human rights abuses cases, as in *Wiwa*, the corporation is accused of having controlled, requested, or substantially assisted the commission of human rights by military or paramilitary groups. Typically, such corporations attempt to cloak their involvement through the corporate form. Thus, without legal doctrines allowing the attribution of tort liability to one party for the acts of another, businesses and individuals may not be held accountable for abuses for which they properly should be considered responsible.

US courts have announced that principles like aiding and abetting apply in the civil context, and that they may be used for human rights torts arising under customary international law.²¹⁹ They have drawn on international legal instruments and the common law to elaborate the substantive elements and *mens rea* standards for these principles.²²⁰ In cases like *Wiwa*, human rights claims have proceeded on other theories of liability, including conspiracy and agency. Whether a court looks to the common law or to international law for authority, theories like aiding and abetting, conspiracy, and agency are available to attribute liability to third parties who are responsible for the commission of grave human rights abuses.²²¹

²¹⁷ See FAFO, “United Kingdom: Survey Responses and Questions (2004)—A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions”. Available at <http://www.fafo.no/liabilities/UK%20Survey%20standardized%20Nov%202004.pdf>.

²¹⁸ See, eg, Jonathan Drimmer, “Five Tips to Avoid the Human Rights Litigation Trap”, 26 March 2009. Available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202429383515>.

²¹⁹ See, eg, *Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007).

²²⁰ See, eg, *In re South African Apartheid Litigation*, No. 02 MDL 1499 (SAS) at 45–53 (S.D.N.Y. 8 April 2009).

²²¹ See, eg, *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998) (relying on the “general common law” of agency); *Prosecutor v. Blaskic*, No. IT-95-14-A at ¶50 (ICTY Appeals Chamber, July 29, 2004) (citing knowledge standard for aiding and abetting); *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 1220 (1952) (approving theory of constructive knowledge for aiding and abetting).

Because the UK relies on the same common-law principles and references the same international law sources as US courts, these principles may be applicable in UK courts. For example, in *Lubbe v. Cape PLC*, a UK company was held liable for failure to oversee the acts of its South African subsidiaries. Some UK lawyers, however, have suggested that the application of these principles may be uncertain. Articulating principles of corporate and secondary liability is critical to the provision of an effective remedy for human rights abuses in UK courts.

Class action suits

UK lawyers have suggested that limitations on class action suits frustrate the ability of human rights plaintiffs to seek justice against UK companies. In a US class action suit, named plaintiffs who are representative of a group of people whose claims share common elements can sue on behalf of the “class.”²²² While the US class action system is far from perfect, it can be a powerful tool to seek justice for people for whom it would otherwise be too dangerous, expensive, or simply impracticable to pursue redress in foreign courts.

One important aspect of class action suits in the US for human rights litigation is the “opt-out” model, which has also been adopted by the Australian federal courts and the courts of the Canadian Province of Ontario. Neither the named plaintiffs nor their lawyers need receive approval from all members of the class to bring the lawsuit; instead, they must convince a court that class treatment is appropriate and then publicize the fact of the lawsuit through a court-approved notice plan. Any person who falls within the class is included in the action unless he or she expressly declines. For all class members who do not opt out, the disposition of the class action is binding. The victims benefit, as they are automatically included in the proceedings as class members and bear no up-front legal costs or personal risks. And as the number of people who opt out is generally minimal, the system makes it much easier for defendants to settle cases out of court because their liability for the underlying incident is capped once the class action suit is resolved.

In human rights cases in the US, however, the class certification system has sometimes proved an insuperable barrier. To proceed with a class action lawsuit, a court typically must be satisfied that the class members’ common issues predominate over any individualized issues. This showing can be difficult to make in the case of gross human rights abuses, which often involve a pattern of violations over a period of time, featuring important common factors but widely varied claims and experiences between plaintiffs. Thus, class certification has been difficult in ATS litigation, resulting in individual lawsuits that exclude large numbers of potential claimants and that do not resolve the defendant’s overall liability.

In the UK, plaintiffs whose claims represent similar fact patterns may obtain a group litigation order, which allows them to litigate the common aspects of their cases jointly, on an opt-in basis. For human rights plaintiffs, this approach presents some advantages over the US model, as it allows for joint litigation whenever the interests of justice and judicial economy support it. Furthermore, UK group litigations move much more quickly through the judicial system than US class actions. However, we are concerned that the opt-in system can involve prohibitive up-front costs, particularly in the international context. It often entails a low participation rate, most likely excluding disadvantaged and difficult-to-reach individuals. Furthermore, the lack of a system by which class representatives or advocacy groups can litigate private grievances on behalf of large groups discourages litigation on more risky or experimental claims.²²³

Financial barriers

Some UK lawyers have expressed concerns that the strict application of the loser-pays system, prohibition on contingency fee arrangements, and difficulty of obtaining exemplary damages have had a chilling effect on human rights lawsuits. We do not question the general logic of these rules, but there may be good public policy reasons to make exceptions in cases involving egregious human rights abuses in order to provide financial incentives for lawyers to take such cases.

Perhaps the most striking example we can provide to illustrate this point is the case around which ERI was founded, *Doe v. Unocal*. In *Unocal*, which eventually settled out of court, public interest lawyers with few financial resources filed suit on behalf of Burmese refugees who had been subject to torture, forced labor, rape, and other gross violations. It was the first case to use the ATS against a corporation successfully; as such it was completely novel and its prospects for success deeply uncertain. Plaintiffs were protected, however, by the well-established doctrine that courts will exempt claimants bringing non-frivolous suits with a significant public interest—especially those seeking to vindicate civil rights—from paying the costs of their opposing party, and the general American rule against payment of the opposing party’s legal fees. Furthermore, cases like *Unocal* generally could not be brought without the involvement of experienced private attorneys, who are attracted by the ability to enter into contingency fee arrangements with their clients and the possibility of sharing in an award of punitive damages.

It would have been more difficult to bring a case like *Unocal* in the UK because financial incentives are skewed against human rights claimants. In the UK, protective cost orders are available in the public sphere to prevent parties from inflating the costs the losing party may be forced to bear. This benefit is not available

²²² Other models for class action lawsuits exist in Portugal, Italy, and Australia, among others. In a different context, the International Criminal Court allows victims to appear in court on a class representative basis.

²²³ See generally, Rachel Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need*. Civil Justice Council: London (2008).

in private litigation, however. Furthermore, it is difficult for public interest plaintiffs to obtain after-the-event insurance on high-risk claims—a prerequisite for conditional fee arrangements. Thus, to bring a case like *Unocal* in the UK, plaintiffs would have risked liability for the enormous costs and fees of the other side. Nor could they easily have attracted private sector legal assistance; without contingency fees and punitive damages, the potential reward for winning was unlikely to outweigh the financial risk.

IV. Recommendations

The legal and financial issues identified above may obstruct access to civil justice for victims of human rights abuses by UK corporations operating abroad. We therefore recommend that the Government:

- a. Provide explicit guidance to UK courts on the theories of liability by which corporations may be held liable for the acts of subsidiaries and third parties. Amend existing statutes incorporating international crimes into UK domestic law to allow the use of international legal sources as interpretive guides for liability.
- b. Adopt the recommendations of the UK Civil Justice Council on implementing the opt-out model for group litigation in human rights cases, at least where the affected group is large and difficult to reach, and where individual notice is impracticable.
- c. Review the UK's loser-pays rules, restrictions on punitive damages, and prohibition on contingency fee arrangements, with the aim of carving out exceptions or otherwise easing the financial burden on international human rights plaintiffs from whom the danger of abuse of the system is low and the value to the public of permitting litigation is high.

Earthrights International

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Memorandum submitted by Amnesty International UK

Amnesty International is a worldwide movement of people who campaign for internationally recognised human rights to be respected and protected. Our vision is for every person to enjoy all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. Our mission is to conduct research and take action to prevent and end grave abuses of all rights—civil, political, social, cultural and economic. From freedom of expression and association to physical and mental integrity, from discrimination to the right to shelter—these rights are indivisible.

1. INTRODUCTION

Amnesty International UK welcomes the opportunity to submit evidence to this enquiry into business and human rights, whose terms of reference borrow from the framework of Professor Ruggie, the UN Special Representative to the Secretary General on Human Rights and transnational corporations and other business enterprises.

Consistent with Amnesty International's work as a global human rights organisation, this submission focuses on the international impacts of business. In particular, we contend that the UK state could and should play a greater role in the governance of corporations so as to contribute to the protection of human rights from corporate abuse, whether the abuse occurs in the UK or abroad.

2. SUMMARY OF RECOMMENDATIONS

Amnesty International recommends that far-reaching reforms are implemented to the legal and institutional framework in the UK to ensure enhanced governance over the extra-territorial impacts of UK companies.

1. Establish a UK Commission on Business, Human Rights and the Environment
2. Develop an overarching strategy on business and human rights that is coherent across government departments and other state bodies, consistent with the UK's international obligations, including by:
 - (a) promoting stronger international frameworks for governing the human rights impacts of companies through the inter-governmental bodies of which UK is a member.
 - (b) amending the Act of Parliament governing ECGD to include a "Duty of Care" clause with regard to the human rights of those affected by ECGD-supported projects.
 - (c) requiring and empowering UK missions abroad to keep a monitoring brief on the human rights impacts of UK companies.
 - (d) including corporate accountability in UK overseas training programmes for jurists.

3. Initiate an independent review of the CSR mechanisms that the UK promotes with regard to assessing their effectiveness in preventing and ending human rights abuses by UK companies abroad
4. Improve access to judicial remedies in the UK for those claiming abuse by UK companies abroad.

3. THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

3.1 *Extra-territorial obligations under international law*

Under international law, there is absolute clarity that the UK has a duty to protect human rights from corporate abuse within the UK. However, there is much less clarity around the state's duty in respect of activity occurring outside the UK, but over which the UK may exercise jurisdiction. The main point of reference for interpreting the meaning and scope of international conventions to which UK is party comes from United Nations treaty bodies.

UN treaty bodies have made recommendations to states parties in relation to the need to ensure that companies are held accountable for human rights abuses outside the state. For example, in a Concluding Observation on the United States, the UN Committee on the Elimination of Racial Discrimination raised concerns about reports of the adverse effects of activities by transnational corporations registered in the United States on the rights of local communities, especially Indigenous peoples.¹ The Committee recommended that the US "take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable".

There are other statements of international treaty bodies that provide useful guidance on extra-territorial obligations. In its General Comment No 3, the UN Committee on Economic, Social and Cultural Rights (CESCR) drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant.² In elaborating States' duties in relation to the right to health, the CESCR commented that to comply with their international obligations, States parties "must prevent third parties from violating the right in other countries if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law".³

Similarly, in relation to the rights to water and social security, the CESCR has recommended that steps should be taken by States parties to prevent their own citizens and companies from violating these rights in other countries, and that "[w]here States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law".⁴

3.2 *Impacts of UK businesses on human rights*

Given the number and range of transnational companies based in the UK and the capacity of these companies to have significant impacts on human rights globally, the fact that there is at present only sporadic regulation of the extra-territorial impacts of corporate activity contributes to a serious regulatory failure. There are some spheres of activity in which UK companies are already subject to UK regulations that have extra-territorial effect, such as bribery and corruption, financing of terrorism, and anti-competitive activity. Currently, however, the UK has not taken steps to regulate the extra-territorial human rights impact of UK companies. Amnesty International believes that the UK must strengthen its regulation of UK companies to ensure greater protection of human rights globally. Moreover, failure to ensure that UK companies respect human rights in all their operations can leave the poorest and most vulnerable communities exposed to serious and repeated human rights abuses.

Research undertaken by Amnesty International and its partners in the Corporate Responsibility (CORE) coalition reveals that UK companies have committed or contributed to human rights abuses in many countries and contexts.⁵ In some cases the company is the primary agent of the abuse, while in other cases it is the company's relationship with third parties, such as governmental agencies and security forces, that has given rise to the abuse.

Amnesty International has conducted research into the activities of several companies operating in the Niger Delta, including the Anglo-Dutch transnational, Royal Dutch Shell, whose subsidiary is the main oil operator on land. Oil spills, waste dumping, and gas flaring are endemic in the Niger Delta. This pollution, which has affected the region for decades, has damaged the soil, water and air quality. The human rights implications are both serious and under-reported. According to the UN, more than 60% of people in the Niger Delta region depend on the natural environment for their livelihoods. Oil-related pollution, including oil spills and waste dumping, has caused serious environmental damage. This has undermined the right to an adequate standard of living, including food and water, as water is polluted, fish die and agricultural land is rendered less productive, or in some cases unusable. The health implications of oil-related pollution are the subject of serious concern.

Although Shell has operated in the Niger Delta for decades, the company has not taken adequate steps to assess and address the social and human rights impacts of its operations, despite the evidence of harm and repeated calls from communities and civil society to do so. According to the UN in Nigeria: “The oil companies, particularly Shell Petroleum, have operated for over 30 years with no appreciable control or environmental regulation to guide their activities”. The failure of the Nigerian State to adequately regulate companies like Shell is, Amnesty International believes, related to the importance of the oil industry to Nigeria and the relationship between the industry and the government. As a consequence the people of the Niger Delta have been left exposed to human rights harms for which their government cannot or will not hold companies to account. While the government of Nigeria should act, there is also a clear role for home states to require all companies to respect human rights, carry out adequate corporate human rights due diligence and act to address human rights and environmental problems that their operations cause.

4. FILLING THE GOVERNANCE GAPS

Amnesty International supports the view of the UN Special Representative that “*the root cause of the business and human rights predicament today lies in the governance gaps created by globalization*”.⁶ The reality of the current phase of globalisation is that while multinational corporations today operate seamlessly across national boundaries, the framework of laws, regulations and initiatives that govern their activities remains piecemeal, fragmented and unequal to the task of ensuring that such companies respect human rights.

Amnesty International considers that there are at least four key means by which action by the UK would make a substantial contribution to filling these governance gaps. First, Amnesty International refers to the submission by the Corporate Responsibility (CORE) coalition, and supports the call for an independent UK Commission on Business, Human Rights and the Environment. Second, we argue that an overarching cohesive government approach to human rights must be implemented to prevent public agencies from taking conflicting and at times counter-productive approaches to business and human rights. Third, the UK should ensure clarity when discussing human rights and should not conflate human rights with corporate social responsibility (CSR). Fourth, it is argued that more can and should be done to assist those whose human rights have been abused by UK companies to gain access to effective remedies through the UK courts. These initiatives are elaborated below.

4.1 UK Commission on Business, Human Rights and the Environment

The most promising initiative of which Amnesty International is aware is the proposal put forward by the Corporate Responsibility (CORE) Coalition on the basis of a detailed review of possible avenues for reforming existing systems.⁷ It proposes that the Government should create a specialised *Commission for Business, Human Rights and the Environment*, able to operate as a hub in broader networks of actors working in the UK and abroad. The Commission would have coordinating, capacity-building and informational roles, while also operating as a dispute resolution body with a mandate to receive, investigate and settle complaints against UK parent companies relating to abuse in other countries.

OECD Guidelines and NCP mechanism inadequate to safeguard human rights

Amnesty International supports the need for a specialised Commission over proposals to reform the National Contact Point (NCP) for the OECD Guidelines for several reasons. Case studies conducted by a number of NGOs have illustrated that the structural weakness of the NCP mechanism have not been addressed by the review and restructuring implemented by the Government in 2006.⁸ At the heart of these weaknesses are the limited investigatory capacity of the NCP and its inability to impose penalties that would deter future breaches by the same company, while also serving as a deterrent to other companies. Moreover, neither the OECD Guidelines nor the NCP process was established to ensure that a remedy is provided to those whose rights are abused by corporations. These inherent problems are compounded by the lack of independence of the NCP from the UK government, and in particular from the department promoting UK trade and investment, where the NCP is located. These weaknesses cannot be addressed by procedural changes alone, which leads Amnesty International to take the view that the NCP mechanism is too flawed for the purpose of providing a non-judicial remedy that will benefit victims of abuse. Putting additional resources into strengthening this mechanism is therefore unlikely to be a productive avenue for the UK government to pursue.

4.2 State coherence on business and human rights

There is at present no overarching UK strategy on business and human rights. Individual Government departments have their own separate CSR strategies that lack coherence with each other in the sphere of human rights, and with the UK’s international obligations, in so far as these have extra-territorial reach.⁹ Responsibilities are fragmented in a way that hinders effectiveness. Fundamental business and human rights issues that cut across Government departments and other state entities are not addressed at all.¹⁰

Need for greater “due diligence” on human rights by ECGD

The UK Export Credits Guarantee Department (ECGD) provides a prime example of where the UK has failed to promote the need to respect and protect human rights in the context of business activity. The ECGD is a governmental body accountable to the Department for Business, Enterprise and Regulatory Reform (BERR). While it does not operate projects itself, it has facilitated corporate activities that have resulted in human rights abuses abroad through the provision of financial guarantees.¹¹ Currently the ECGD’s consideration of human rights is not sufficient to ensure against such breaches.

Some of the most pervasive abuses of human rights occur in the context of extractive and infrastructure projects such as the construction of dams, roads, pipelines and mines. Such projects are often associated with forced evictions, loss of livelihoods, adverse impacts on health, and abuses by security forces. One way that companies can avoid contributing to human rights abuses in the context of such projects is to ensure they undertake due diligence, including a Human Rights Impact Assessment (HRIA).

Amnesty International concurs with the view of the UN Special Representative that “*Many corporate human rights abuses arise because companies fail to consider the potential implications of their activities before they begin. Companies must take proactive steps to understand how existing and proposed activities may affect human rights.*”¹² At the very least, Amnesty International considers that the ECGD should require all its corporate clients to undertake a comprehensive human rights impact assessment, for the purpose of determining whether or not the proposed activity might interfere with human rights. This requires not just improved screening procedures but also the embodiment of human rights considerations into the mission and governance of ECGD. This would require an amendment to the Act of Parliament that created ECGD.¹³

UK role in strengthening capacity within countries hosting investment

When abuses of rights occur, the duties of governments to protect internationally recognised human rights require the provision of effective and legitimate mechanisms of redress. Strengthened capacity within countries hosting investment remains a necessary condition for effective human rights protection. Greater UK support for capacity building within host countries can help to promote this, including training of the judiciary and administrative bodies. Incorporating training on business and human rights issues into existing capacity building activities undertaken with the support of DFID and other state bodies would be consistent with the obligation to protect human rights through international cooperation.

UK missions abroad also have an important role to play in ensuring that their promotion of UK business interests is contingent on adequate human right safeguards being adopted by the companies concerned. UK missions should be required and empowered to keep a monitoring brief on the human rights impacts of UK businesses.

Existing UK bodies ignore extra-territorial impacts

The UK appears to be lagging behind on an issue that is now being addressed at inter-governmental level on the role of National Human Rights Institutions (NHRIs) in holding corporations accountable for their extra-territorial activities.¹⁴ Amnesty International is concerned about the weaknesses of existing UK institutional mechanisms for addressing the gaps in accountability of UK companies for their extra-territorial impacts on human rights. The UK Equality and Human Rights Commission (EHRC), the Health and Safety Executive, and the Environment Agency are severely restricted in their ability to consider the adverse impacts of UK companies overseas and have rarely done so. The EHRC does not have a mandate to investigate suspected breaches of human rights law in other countries. Its powers of investigation only extend to suspected breaches of specific UK “*equality and human rights enactments*”.¹⁵ The EHRC also lacks the legal power to recommend new human rights laws.¹⁶

Need for UK leadership within inter-governmental bodies

Amnesty International also considers that in its inter-governmental activities, the UK should be promoting stronger frameworks for governing the human rights impacts of companies. As a member of the EU, UN Human Rights Council, OECD, and World Bank, the UK is well placed to influence and encourage greater protection of human rights in the context of business activity. While the UK has a strong track record in promoting multi-stakeholder initiatives such as the Kimberley Process and the Extractive Industries Transparency Initiative, the UK has not exercised leadership in embedding higher standards of corporate behaviour into inter-governmental institutional processes where opportunities lie to improve business impacts on human rights. These range from the EU’s Procurement Directives to the World Bank’s Disclosure Policies and its Performance Standards on Social and Environmental Sustainability for the private sector.

4.3 Regulatory framework that does not conflate human rights with CSR

The UK appears to believe that the promotion of CSR is a sufficient measure to give effect to its international obligations. In its 5th periodic report to the UN Committee on Economic, Social and Cultural Rights, the UK referred to its support for five initiatives—the UN Global Compact, the Voluntary Principles on Security and Human Rights, the OECD Guidelines for Multinational Enterprises, the Extractive Industries Transparency Initiative and The Kimberley Process Certification Scheme.¹⁷

Amnesty International believes that the UK has failed to grasp that a human rights framework is different from a CSR framework. A CSR framework is determined by commitments that companies agree to enter into voluntarily. In contrast, protection of human rights requires the state to institute mandatory standards to ensure that human rights are respected, protected and promoted, that abuses are remedied, that violations are identified through investigation, and that reparations are available to victims.

The test of all voluntary initiatives and codes of conduct should be whether they have the effect of protecting human rights on the ground. The pertinent questions to ask are whether a code imposes clear rules that prevent business and their financial backers from contributing to human rights abuses; whether there are credible mechanisms for testing if these rules are being adhered to; whether there are appropriate levels of transparency and disclosure to satisfy third parties that this is the case; whether there is action against a company for breaches of the code, and whether a remedy is available. The UK should initiate an independent review of the CSR mechanisms that it promotes with regard to assessing their effectiveness in preventing and ending human rights abuses by UK companies abroad.

Amnesty International believes that the UK's overarching emphasis on CSR as the primary means of ensuring that companies operate to acceptable standards abroad, undermines its duty to protect rights. Amnesty International is calling for action by home countries to regulate the human rights impacts of companies, particularly those whose operations are highly invasive and frequently associated with human rights abuses and environmental damage—such as extractive industries—when they operate abroad. Home states such as the UK should set and enforce some minimum standards for protection of human rights, including requiring the assessment and public disclosure of human rights impacts and how these will be mitigated. Such assessment must involve the informed participation of communities.

4.4 Access to effective remedies

Amnesty International concurs with the view of the UN Special Representative that “States should strengthen judicial capacity to hear complaints and enforce remedies against *all corporations operating or based in their territory*” and “address obstacles to access to justice, including for foreign plaintiffs”.¹⁸

The structural nature of barriers to redress in developing countries suggests that while strengthening of local systems of redress is important, it is currently insufficient for ensuring remedies are available to the human rights of workers and communities affected by the business activities of UK companies abroad.¹⁹ This is why Amnesty International believes that home states, as part of their duty to protect rights, should offer access to justice to foreign plaintiffs.

Gaining access to UK judicial mechanisms presents an insurmountable hurdle for the vast majority of those whose human rights have been abused by the activities of UK companies abroad. There are many barriers that they face—financial, jurisdictional, procedural. One of the most significant obstacles is the lack of representation available to them. There are few public interest law firms in the UK prepared to take on such cases. The significant barriers to accessing judicial remedies in the UK further support the need for the proposal to create a Commission on Business, Human Rights and the Environment, with an ombudsman function to investigate and adjudicate on claims of abuse, and to offer some form of non-judicial redress. As stated previously, the NCP mechanism under the OECD Guidelines does not provide a remedial focus.

Even when UK courts are prepared to hear such cases, the scope of parent company liability for the acts of subsidiaries and contractors abroad is unclear under English Tort law. It is not known, for instance, to what extent a parent company owes a “duty of care” to those potentially affected by the activities of its subsidiaries. The existence of a “duty of care” is fundamental to a finding that a company has been negligent, but so far all the UK cases that raise this point have either been settled or dismissed.²⁰ In principle, it would be possible to clarify by legislation the circumstances under which a parent company would, and would not be liable. A further difficulty for claimants is proving the kinds of management and supervisory failures necessary for a finding of negligence. A possible solution to this would be to adopt a “due diligence” approach that would require companies with a significant interest or influence over a related company, as well as the related company itself, to demonstrate that it had taken all reasonable steps to anticipate potential human rights impacts, and prevent the human rights abuse occurring.²¹

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See DFID's *Private Sector Development Strategy Prosperity for all: making markets work*, 2009:
<http://www.dfid.gov.uk/pubs/files/Private-Sector-development-strategy.pdf>
See BERR's Corporate Responsibility Report, 2009:
<http://www.berr.gov.uk/whatwedo/sectors/lowcarbon/cr-sd-wp/page50437.html>
10. For example, the human rights implications of the UK's Bilateral Investment Treaties (BITs) have not been addressed by the UK despite evidence that BIT's may come into conflict with the international human rights law obligations of states. See Rights & Democracy's Report, "*Human Rights and Bilateral Investment Treaties*", Luke Peterson, 2009:
http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf
11. Amnesty International publications featuring projects facilitated by ECGD where human rights abuses have been documented include:
Amnesty International, *India: The "Enron Project" in Maharashtra: protests suppressed in the name of development*; Index ASA 20/031/1997; <http://www.amnesty.org/en/library/info/ASA20/031/1997>
Amnesty International UK, *Human Rights on the Line- the Baku-Tbilisi-Ceylan pipeline project*; 2003, <http://www.amnestyusa.org/business/humanrightsontheline.pdf>
Amnesty International, *Urgent Action 228/96: Excessive use of force/Fear for safety (Lesotho)*, Index: AFR 33/02/96,
<http://www.amnesty.org/fr/library/asset/AFR33/002/1996/en/dom-AFR330021996en.html>
Amnesty International, *UK and EU Arms Used in East Timor as Review of Arms Exports Code Begins in Secret*, Index: IOR 61/01/99,
<http://www.amnesty.org/en/library/asset/IOR61/001/1999/en/1c034d51-e01b-11dd-adf6-a1bae6c1ea26/ior610011999en.html>
Amnesty International, *Nigeria: Ten years on—Injustice and Violence Haunt the Oil Delta*, Index AFR 44/022/2005, <http://www.amnesty.org/en/library/asset/AFR44/022/2005/en/dom-AFR440222005en.html>
12. Report of John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, to Human Rights Council, 7 April 2008, para 61.
13. Export and Investment Guarantees Act, 1991:
http://www.opsi.gov.uk/Acts/acts1991/ukpga_19910067_en_1
14. The NHRI Steering Group on Business and Human Rights have recommended that NHRIs establish a Working Group on Business and Human Rights:
<http://www.reports-and-materials.org/NHRI-Working-Group-Mar-2009.pdf>
15. See the list of enactments in section 33 of the Equality Act 2006.
16. Under section 11 of the Equality Act, the EHRC is charged with "*monitoring the effectiveness of the law*". While it may recommend amendments, repeals, consolidation or replications of existing human rights enactments, the Equality Act says nothing about the EHRC proposing new laws.
17. <http://www.justice.gov.uk/publications/docs/ICESCR-whole-report.pdf>, para 70.
18. *Ibid*, para 91.
19. Corporate Responsibility (CORE) Coalition and LSE, *The reality of rights: Barriers to accessing remedies when business operates beyond borders*, 2009.
20. Corporate Responsibility (CORE) Coalition, *Corporate Abuse in 2007: A discussion paper on what changes in the law need to happen*, Jennifer Zerk, 2007, p16:
<http://jenniferzerkconsulting.com/publications/corporateabuse2007.pdf>
21. *Ibid* p16; as well as *Extraterritorial Jurisdiction as a tool for improving the Human Rights Accountability of Transnational Corporations*, Olivier De Schutter, 2006, p35–45.

Memorandum submitted by Anti-Slavery International

Synopsis

Forced labour and human trafficking for labour exploitation will remain a high-profit, low-risk crime and the UK will continue to be supporting modern day slavery unless robust penal measures are firmly in place and enforced. Also regulation, particularly of labour agencies and providers, must be extended and businesses need to be made aware of legislative measures and have access to guidance. Finally, workers at risk of slavery, exploited or in forced labour need adequate support and protection.

Anti-Slavery International was set up in 1839 and is the oldest international human rights organisation in the world. Today Anti-Slavery International works to eradicate all contemporary forms of slavery, including bonded labour, forced labour, trafficking in human beings, descent based slavery and the unconditional worst forms of child labour.

It is estimated by the International Labour Organization (ILO) that contemporary slavery, as defined in international law, affects a minimum of 12.3 million people in the world today, many of them in emerging economies.

Globally, profits generated from all forms of forced labour amount to US\$ 44.3 billion per year, with the majority of the profits generated in industrialised countries. The estimated annual profits of traffickers from forced economic exploitation are \$3.8 billion, with profits highest in industrialised countries (US\$ 2.2 billion).²²⁴ About 80% of forced labour today is privately imposed²²⁵ and a common feature is that some form of debt bondage²²⁶ or debt slavery is involved.

Anti-Slavery's supply chain programme, which is funded by the Department of International Development, is dedicated to eradicating forced labour from the production of goods sold in the UK. By working together with businesses (for example Anti-Slavery sits on the International Board of Cadbury's Cocoa Partnership, and is a member of the Ethical Trading Initiative) as well as undertaking research and eradication programmes in countries and communities affected by slavery; we are developing an in-depth understanding of how business practices relate to slavery.

This response focuses on Anti-Slavery's experience of the specific human right—prohibition of slavery and forced labour—as set out in Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

How UK businesses affect slavery

Slavery emerges at the conjunction of government inaction, prejudice against minorities, and poverty. The causes of slavery are rooted in social norms that often extend far beyond any factory or purely business environment. However thoughtless or malicious business practices can reinforce the social norms that enable slavery to thrive.

Companies' purchasing practices can encourage the use of forced labour, child labour or debt bondage. In manufacturing, downward pressures on costs and large demands given to suppliers with short lead times increase the likelihood of unregulated subcontracting. For example, in June 2008 BBC's Panorama exposed Primark's subcontractors in India who used child labour to embroider items of clothing.

In November 2008, over 60 workers picking leeks in Lincolnshire destined for our supermarket shelves were rescued from debt bondage; it is alleged that they were trafficked to the UK. The existence of illegal labour providers, who are able to provide legitimate businesses with workers at a reduced price, may be a reflection of the demand created by pressures that supermarkets put on suppliers to reduce costs in their price wars.

Industries supplied by forced labour are wide ranging and include agriculture, food packaging, construction, domestic work, care, and the restaurant and hospitality industry. Ascertaining a business's involvement in trafficking and slavery is important when considering an appropriate response. Involvement can lie between actively aiding and abetting to complete ignorance of the condition of its subcontracted workers (which itself is not an excuse). The reality is that labour exploitation and trafficking for forced labour often go undetected because they are largely hidden crimes.

The forms of coercion in recruiting forced labour are relatively subtle. Actual physical violence is rare. The person may be deceived into a situation of exploitation by accepting an initial promise of work and finding on arrival, that the work or working conditions do not meet that promise but the person has little or no choice but to accept it. Manipulation, psychological pressure and threats or simply the retention of their identification documents, are tactics used to coerce the person to accept inferior (and often exploitative) working conditions than what they had previously agreed. This is often combined with debt bondage, which is exacerbated by the obligation that the worker accepts further services at inflated prices such as

²²⁴ Belser, P., *Forced Labour and Human Trafficking: Estimating the Profits*, ILO, March 2005, p.11.

²²⁵ ILO, *A global alliance against forced labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Geneva, 2005.

²²⁶ Debt bondage is defined by the ILO as a distinct form of forced labour.

accommodation and transport. The Daily Telegraph reported in March 2008 that some workers in a Tesco store in Malaysia had paid up to £1,500 in arrangement fees in Bangladesh but on arrival, found that they were earning only between £20 and £50 a month after deductions.

Exploitation and forced labour mostly occur in industries that depend on casual and temporary labour, offer low wages, are non-unionised, labour intensive, predominantly subcontract, and where it is often hard to track supply chains.²²⁷ Although there are companies that may not have actively participated in this exploitation, as beneficiaries, they should be held responsible for ending, remediating and preventing such abuses where they occur in their supply chains.

Anti-Slavery International believes that UK businesses have a specific and unique competence to contribute to the eradication of slavery both within the UK and around the world through the way in which they do business. Through their supply chain, companies can influence their suppliers to reduce the risk that goods sold in the UK are produced using forced labour. For example, Next Plc., a British clothing retailer, has worked with its supplier in Mauritius to improve its recruitment practices, which has greatly reduced the likelihood that its migrant workers are in debt bondage.

Gaps in the existing legal and regulatory framework that need to be addressed

Anti-Slavery's membership of the Ethical Trading Initiative, a tri-partite learning initiative, has shown that whilst voluntary mechanisms can make some headway in improving labour rights, meeting minimum labour standards (such as not using forced labour) remains an aspiration rather than a reality for many businesses. Although legislation and regulation is not a panacea, they act as stimuli for action and have a deterrent effect.

Currently in the UK prosecutions for forced labour are limited to cases where trafficking is involved. A significant gap is the lack of criminal legislation setting out penalties for the use of forced labour, a requirement set out in Article 25 of the ILO Convention 29²²⁸ to which the UK is a party. The penalties, which should be heavier than those set out in employment law, would have a deterrent effect on employers and would offer protection to those who had not been trafficked.

Legislation and better regulation also levels the playing field between those investing in preventative measures and those free-riding on the benefits. The call for better regulation of labour agencies comes from within the industry itself. The largest labour agency, Manpower, has repeatedly called for more regulation at public forums and is leading a business initiative to address trafficking and forced labour.

The existing Gangmaster Licensing Act (GLA), which regulates the supply of labour by gangmasters in the agriculture and food processing industries, has proven effective at tackling exploitation in the areas it regulates. However to ensure that other industries are not offering "safe havens" for rogue labour providers, the remit of the GLA should be extended to include a broader range of sectors, particularly those which employ large numbers of migrant and low-skilled workers who may be particularly vulnerable to exploitation. These sectors include restaurant work and hospitality, care and nursing, domestic workers, contract cleaning and construction.

A particular challenge is balancing the need to introduce robust regulation to improve business transparency which enables NGOs, trade unions, investors and the public to hold companies to account, whilst ensuring that violations that emerge are addressed responsibly and not pushed underground.

UK government guidance for businesses

Although there is widespread support amongst companies against the use of forced labour the lack of guidance in law and regulation means that many are ignorant as to why or what actions they should be taking to prevent forced labour. The government should work with employers' organisations to raise awareness amongst employers of legislation—the stick, as well as provide support and guidance setting out the practical steps employers should undertake in order to meet their obligations and commitments to ensure no presence of forced labour—the carrot.

Governmental efforts directed at businesses should complement measures directed at providing assistance to workers. The government needs to ensure systematic protection and assistance to people who are in forced labour. For example, current measures directed at migrant workers do not extend to the level required by trafficked people. Comprehensive rehabilitation programmes can prevent people from being re-trafficked,²²⁹ as well as increasing prosecutions.

²²⁷ Skrivankova, K., *Trafficking for Forced Labour: UK Country Report*, Anti-Slavery International 2006 page 15

²²⁸ Article 25 reads: "The illegal exaction of forced or compulsory labour shall be punished as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced."

²²⁹ Skrivankova (2004) *op cit*

Role of individual government departments

All businesses that receive substantial public support from government departments in their operations either in the UK or abroad, should have that support withdrawn where they are found not to have effective measures in place to identify and responsibly eradicate forced labour.

THE RESPONSIBILITY OF BUSINESSES TO RESPECT HUMAN RIGHTS

How UK businesses should take into account their impact on human rights

The establishment of the Cadbury's Cocoa Partnership seems to represent a sincere and sustained attempt by a UK company to address, in a critical part of its supply chain, a range of complex stakeholder issues including child labour, and environmental sustainability as well as broader questions of democratic development. This represents an example of good practice of business partnership with civil society, which Anti-Slavery believes is essential if businesses' policies and practices to address forced labour are effective and sustainable. Such partnerships should be encouraged by government.

The responsibilities of UK businesses to respect human rights should not vary depending on whether or not they are performing public functions or providing public services. Although it appears morally dubious to set varying degrees of responsibility for businesses according to the size, type or nature of the business in question, a reasonable starting point would be to focus efforts on businesses either performing public functions or benefiting from substantial governmental backing or support, as set out above.

Inevitably business decisions will be made in the current economic climate to reduce costs, such as to subcontract work, switch suppliers or put downward pressures on suppliers to reduce prices, which provide an opportunity for exploitative employment practices. However, slavery is not acceptable under any circumstances.

EFFECTIVE ACCESS TO REMEDY

Existing opportunities to access remedies

UK legislation sets forth several legal remedies for victims of criminal acts or violations of labour laws. Nevertheless, these remedies remain an illusory option for those trafficked or in forced labour in the UK.

Although there has been an increase in the number of convictions for human trafficking in the UK, legal remedies and compensation for trafficked persons have remained inaccessible. Undocumented workers, who may constitute a significant number of trafficked persons, are excluded from employment tribunals purely on the basis of their immigration status. Although their work will have generated profit for their employer, undocumented workers have no right to claim unpaid wages, as a consequence of their irregular status. This, together with the low level of penalties, creates an incentive for unscrupulous employers to exploit migrant workers. Furthermore, the lack of available legal aid for pursuit of civil claims or employment claims hinders trafficked or exploited persons from obtaining effective legal representation.²³⁰

Consequently, although UK law provides routes for victims of trafficking to seek compensation through criminal, civil and labour law, only a minority of trafficked persons actually have the opportunity to pursue this right, much less receive compensation, as demonstrated in Anti-Slavery's research.²³¹

In addition, a report prepared by COMPAS in collaboration with the Trades Union Congress noted that in the UK enforcement of criminal law for offences committed in the context of forced labour has been weak. The report goes on to say that "although many serious abuses committed by employers—theft of documents, assault and blackmail—are offences under UK criminal law, competing police priorities and limited resources, combined with evidentiary problems, have meant that few cases are prosecuted."²³²

Changes to improve access to remedies

Effective judicial remedies are missing from the current mix of available remedies. Existing initiatives have demonstrated a number of limitations. For example, following the OECD UK National Contact Point's statement in August 2008 that the UK company Afrimex had failed to respect human rights by buying minerals in the Democratic Republic of Congo produced using forced labour, the lack of follow-up by the UK government to ensure its recommendations are implemented, limits the effect of this remedy.

Whilst complaints mechanisms, business initiatives and multi-stakeholder initiatives perform a worthwhile function, the gravity of forced labour and the reality of the scale of the problem of forced labour, require a judicial remedy that allows a person, wherever they are, to hold a company to account and prevent future violations of their right to freedom from slavery.

²³⁰ Skrivankova, K. and Lam, J., *Opportunities and Obstacles: Ensuring access to compensation for trafficked persons in the UK*, Anti-Slavery International 2009

²³¹ *Ibid*, page 35

²³² Anderson, B., and Rogaly, B., *Forced Labour and Migration to the UK*, 2005 available at <http://www.tuc.org.uk/international/tuc-9317-f0.pdf> accessed on 1 May 2009.

Employment law protections should be extended to enable all workers to enforce core statutory employment rights, regardless of their immigration status. In addition, the protection currently given to victims of trafficking should be extended to victims of forced labour to encourage victims to come forward and prosecute the perpetrators.

Anti-Slavery International

May 2009

Memorandum submitted by the International Business Leaders Forum

We are delighted that the Joint Committee on Human Rights has submitted a call for evidence on business and human rights issues, and seeks to understand in greater depth how UK businesses influence society, both positively and negatively.

The International Business Leaders Forum (IBLF) was founded in 1990 to put business at the heart of sustainable development. Championing and advancing responsible business practices is at the heart of what we do. The business and human rights agenda has been a central plank of IBLF's work for over a decade and we have gained global recognition for our expertise in this area, having collaborated with organizations such as Amnesty International, the Business Leaders Initiative on Human Rights (BLIHR), the International Finance Corporation, the UN Office of the High Commissioner for Human Rights and the UN Global Compact Office to produce ten leading company management guidance publications.

Over the last two decades, IBLF has worked with leading multinational corporations across all continents to promote human rights issues within their business operations. For example, in Vietnam we worked with major retail brands Pentland, Adidas and Nike, together with international NGOs, the Vietnamese Chamber of Commerce and the Vietnamese public sector to raise health and safety standards in the footwear industry. Similarly, in Colombia IBLF worked with international and domestic companies across a range of industries, NGOs and other sectors to raise awareness around the positive role business can play in development, peace-building and human rights and to encourage practical action. From 2005–06, IBLF collaborated with the UN Secretary-General's Special Representative on Human Rights and transnational corporations and other business enterprises (henceforth, the UN Special Representative) to coordinate the 2006 survey of Fortune Global 500 companies' Human Rights Policies and Management Practices.

Given IBLF's long-standing record of thought leadership in the business and human rights field, and that much of our recent work has been motivated by seeking to support and inform the mandate of the UN Special Representative we believe we are well positioned to put forth our views on the effectiveness and viability of the UN Special Representative's "Protect, Respect and Remedy" framework.

In compiling IBLF's views, we have sought the opinions of Lucy Amis and Désirée Abrahams, whom are both Programme Managers on Business and Human Rights issues at IBLF. Désirée attended the mini conference on Business and Human Rights on 25 February 2009 at the House of Commons. Lucy represents the IBLF on the UN Global Compact's expert Human Rights Working Group.

Before we respond to your specific questions, we would first like to respond to your general question on the effectiveness and viability of the "Protect, Respect and Remedy" framework.²³³

From the outset, we would like to state that IBLF fully supports the mandate of the UN Special Representative on Business and Human Rights, Professor John Ruggie.

We are very pleased to note the unanimous endorsement by the United Nations Human Rights Council of the policy framework on business and human rights in June 2008, and the extension of the UN Special Representative's mandate until 2011 to operationalise the framework, and provide practical recommendations and concrete guidance to states, businesses and other social actors on its implementation.

We believe that such full support of the UN Human Rights Council underscores the importance and gravity of human rights issues for businesses in the 21st century.

Crucially, we agree with the approach outlined in the "Protect, Respect and Remedy" framework, which promotes:

1. The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication.
2. The corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others.
3. Improved access for victims to effective remedy, both judicial and non-judicial.

This framework provides clear guidance on the main areas for engagement on business and human rights issues, for states, businesses and other related actors. We wholeheartedly agree with the premise that all social actors need to learn to do things differently (UN 2008: 7).

²³³ Protect, Respect and Remedy: a Framework for Business and Human Rights—Human Rights Council, A/HRC/8/5, 7 April 2008.

While we maintain a watching brief on the first pillar—the state duty to protect, and where appropriate we will seek to understand how this primary duty impacts on the corporate responsibility to respect human rights, our *raison d'être* and *modus operandi* presents us with a specific interest in the second pillar. That said we would wish to draw the Joint Committee's attention to the observation made by the UN Special Representative in paragraph 22 (UN 2008: 22) which we regard as critical and pertinent to this call for evidence: it states:

“Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.”

There is therefore, in IBLF's view, a helpful role for national governments to play in providing domestic companies with guidance on how to manage human rights issues both at home, but more particularly in contexts where the rule of law is weak or poorly enforced.

Under the second pillar—the corporate responsibility to respect, companies are urged to pursue a human rights due diligence process composed of four core elements:

- Adopting a human rights policy.
- Undertaking—and acting upon—a human rights impact assessment.
- Integrating the human rights policy throughout the company.
- Tracking human rights performance.

We believe strongly that this four-pronged approach provides a good, clear steer for companies. By implementing each step, a company could develop comprehensive systems and processes that are sensitive to potential human rights risks.

In particular, by completing a human rights impact assessment, a company would be armed with a better understanding of how their operations impact their employees and consumers and the society in which they operate. Such invaluable intelligence would place the company in a greater position to make informed decisions on their business operations. Should potential negative risks be exposed throughout the human rights impact assessment process, such information would inform a company's mitigation policies and practices.

In the context of the second pillar—the corporate responsibility to respect—IBLF would also like to affirm its support for the position taken by the UN Special Representative in paragraph 52 (UN 2008: 52), namely that there are:

“few if any internationally recognized rights business cannot impact—or be perceived to impact—in some manner [and that] Therefore, companies should consider all such rights.”

This premise underpinned the publication *Human Rights Translated: A Business Reference Guide* that IBLF released in 2008 with the Castan Centre for Human Rights Law, the UN Office of the High Commissioner for Human Rights and the UN Global Compact. The publication, cited by the UN Special Representative in his 2009 submission to the UN Human Rights Council (UN 2009: 57),²³⁴ translates the State-based language of international human rights law into language and examples that make sense in a business context, and may also be of interest to the Joint Committee as it explores the relevance of human rights to business.

The third pillar that focuses on improving access to remedy for victims of abuses is an important aspect within the framework, and in our view, complements both the first and second pillars. Crucially, we believe that there needs to be greater attention and support for company based grievance mechanisms, which can be immensely valuable to companies. They have the potential to provide an early-warning complaints system before complaints are magnified and compounded. By cataloging such important information, this should help the company develop an appropriate mitigation policy or process.

Over recent years, the UN Special Representative on Business and Human Rights has managed to corral a diverse set of stakeholders, including business, government and civil society groups from the North and South around the possibility that there should be a set of differentiated but complementary responsibilities (UN 2008: 9). We believe that the high level of support from all actors is indicative of a relevant, appropriate and practicable way forward. In this regard, we encourage you to base any recommendations for the UK on the recommendation of the UN Special Representative on Business and Human Rights, and in particular the UN Special Representative's ongoing efforts as part of the “new mandate is intended to translate the framework into practical guiding principles” (UN 2009: 3).

Before we respond to your specific questions, we would like to inform you that IBLF is an organisation operating under an international remit. Given our international focus, we are not in a position to provide informed comments to some of your UK focussed questions. That said, we have endeavored to make general comments where possible.

²³⁴ Business and human rights: Towards operationalizing the “protect, respect and remedy” framework, A/HRC/11/13, 22 April 2009.

THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

1. *How do the activities of UK businesses affect human rights both positively and negatively?*

Companies, like any other organisation have the ability to affect the human rights of stakeholders in both a positive and negative way. As an international focused organisation, we do not wish to make a specific comment about UK businesses, however IBLF holds the view that companies of all nationalities have the potential to impact, positively or negatively, on all international human rights standards and that for all companies and all industries this encompasses labour-related rights, including freedom from discrimination, the right to freedom of association and collective bargaining, and freedom from child and forced labour. In addition, companies from different industries also have the potential to impact on non-labour related rights, for example an internet company may impact on the freedom of expression; a pharmaceutical company may impact on the right to health; and a mining company may impact on the freedom of movement.

2. *How do these activities engage the human rights obligations of the UK?*

As an international focused organisation, we do not wish to make a specific comment about UK businesses.

3. *Are there any gaps in the current legal and regulatory framework for UK business which need to be addressed, and if so, how?*

Given our international focus, we are unable to provide an informed comment to this question.

4. *Does the UK Government give adequate guidance to UK businesses to allow them to understand and support the human rights obligations of the UK? If not, who should provide this guidance?*

We would encourage the UK Government and all governments to follow the guidance outlined in the UN Special Representative on Business and Human Rights' "Protect, Respect and Remedy" Framework which provides guidelines for Member States on their state duty to protect. The UK Government, and by extension, the Joint Committee might for example wish to canvass the opinion of business leaders and business associations to more fully understand the nature of guidance companies would find helpful in managing human rights issues at home, and more particularly internationally in contexts where the rule of law is weak or poorly enforced.

5. *What role, if any, should be played by individual Government departments or the National Human Rights Institutions of the UK?*

Given our international focus, we are unable to provide an informed comment to this question.

THE RESPONSIBILITY OF BUSINESSES TO RESPECT HUMAN RIGHTS

6. *How should UK businesses take into account the human rights impact of their activities (and are there any examples of good or bad practice which the Committee should consider)? How can a culture of respect for human rights in business be encouraged?*

All businesses, regardless of their nationality or registered status can take into account their human rights impact of their activities by implementing a human rights impact assessment. The Guide to Human Rights Impact Assessment and Management, which provides a methodology on how to conduct a human rights impact assessment by following a eight-step process is a good example of a practical approach companies can adopt, which will upon completion, provide information and intelligence on a company's human rights impact in society.

It is possible that by undertaking a human rights impact assessment, a company may be presented with information on both positive and negative company impacts. However, while gathering information on one's impact is an important step, it is even more critical for a company to use this information and in light of the information and data presented, change their business operations accordingly. Without this next step, a human rights impact assessment is of little value.

A company's human rights impact assessment, should as outlined by UN Special Representative, ideally sit within a wider process of human rights due diligence, which also encompasses the adoption, and more critically the integration of, a human rights policy.

— *Should UK businesses' responsibility to respect human rights vary according to:*

— *Whether or not they are performing public functions or providing services which have been contracted out by public authorities; Is it clear when the Human Rights Act 1998 does and does not apply directly to businesses?*

This is an issue that the UN Special Representative has earmarked in his 2009 submission to the UN Human Rights Council as meriting further investigation as he continues to operationalise the “Protect, Respect and Remedy” Framework. In particular the UN Special Representative remarks in paragraph 64 (2009: 64):

“More than respect may be required when companies perform certain public functions for example, the rights of prisoners do not diminish when prisons become privatized.”

— *Whether they are operating inside or outside the UK;*

IBLF believes that companies should respect the human rights of their direct and indirect stakeholders, wherever they operate.

— *the size, type or nature of their business?*

All companies, irrespective of the size, type or nature should respect the human rights of their direct and indirect stakeholders, wherever they operate. That said the capacity and resources of companies to carry out full human rights due diligence process may vary by size; size should not however be used as an excuse for inaction.

— *How, if at all, should the current economic climate affect the relationship between business and human rights?*

An economic crisis should not adversely affect a company’s ability to respect the human rights of their direct and indirect stakeholders. Indeed as highlighted by the UN Special Representative in his 2009 report to the UN Human Rights Council (UN 2009: 10), companies will need to:

“acknowledge that business as usual is not good enough for anybody, including business itself, and that they must better integrate social concerns into their long-term strategic goals.”

EFFECTIVE ACCESS TO REMEDIES

7. *Does the existing legal, regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?*

We have no specific comments on the UK legal, regulatory and voluntary framework. However, we do believe that Member States, companies and other social actors should consider the recommendations put forth in the “Protect, Respect and Remedy” Framework under the third pillar—access to remedy, and in particular take note of the principles spelled out in paragraph 92 (UN 2008: 92) which posit that all grievance mechanisms be: legitimate; accessible; predictable; equitable; rights-compatible; and transparent.

8. *If changes are necessary, should these include:*

— *Judicial remedies (If so, are legislative changes necessary to create a cause of action, or to clarify that a cause of action exists; or to enable claims to proceed efficiently and in a manner that is fair to both claimants and respondents);*

We have no specific comments to make.

— *Non-judicial remedies (for example, through the operation of ombudsmen, complaints mechanisms, mediation or other non-judicial means). If non-judicial remedies are appropriate, are there any examples of good or bad practice, which the Committee should consider?*

We have no specific comments to make.

— *Government initiatives, whether by legislation, statutory or other guidance or changes in policy;*

We have no specific comments to make.

— *Initiatives by business or other non-Government actors.*

We have no specific comments to make.

Memorandum submitted Jointly by International Academic Human Rights Programs

EXECUTIVE SUMMARY

This memorandum, submitted on behalf of international human rights institutions and academics from around the world, is in response to the *Call for Evidence* on business and human rights. The memorandum deals with the viability and effectiveness of the framework of the UN Special Representative. It seeks to highlight to the Committee three areas in the framework that could receive additional attention and development. The areas are:

- 1) Community: the framework does not fully or adequately consider the role of local communities whose rights are affected by the operations of corporations. It is submitted that the Committee be guided by the principle of community engagement when considering application of the framework. In particular, additional efforts should be made to institutionalise community involvement in various processes to ensure participatory principles are effectuated;

- 2) Obligations: the division of responsibilities between states and business in the framework could be more robust. It should be applied flexibly in many situations, especially weak governance zones. The submission urges the Committee to require businesses to take on the duty to protect in certain circumstances; and
- 3) Monitoring: the framework does not expound on human rights monitoring of corporate activity in local communities. The submission calls on the Committee to require companies to engage in regular monitoring involving independent third parties.

INTRODUCTION

1. This joint submission of international human rights institutions and academics (“Academic Programs”) represents years of expertise in the field of business and human rights, building on scholarship, applied research and clinical work on a global scale. In this capacity, it welcomes the decision of the Joint Committee on Human Rights to examine the issue of business and human rights following the framework proposed by Professor John Ruggie, United Nations Special Representative of the Secretary General on human rights and transnational corporations.

2. The Academic Programs support the existing commitment of the British government to deal with the matter, as exemplified by s.172(1)(d) of the Companies Act 2006, and its recognition of the impact that companies can have on communities, societies and stakeholders around them. The Academic Programs would highlight the fact that the British government will be among the first to produce a thorough response to the Ruggie framework, making it an international exemplar. The action taken by the Committee will also help confront the issue of “vertical incoherence” highlighted by Professor Ruggie.²³⁵ The Academic Programs urge the Committee to bear both of these facts in mind during its deliberations.

3. This submission responds to the call for evidence on the effectiveness and viability of Professor Ruggie’s framework. Professor Ruggie has described his framework as the result of “a principled form of pragmatism”.²³⁶ While the Academic Programs applaud his efforts and the support his framework has received from the business²³⁷ and civil society²³⁸ communities, they believe that the Ruggie framework is only a starting point. The Academic Programs hope that this submission will help the Committee build upon Professor Ruggie’s suggestions and provide recommendations that will particularly support the rights of communities affected by the actions of British transnational corporations.

4. This submission highlights three potential lacunae that may arise when operationalising Professor Ruggie’s framework. First, the framework provides in-depth analysis of the roles of states and transnational corporations, but the role of local communities receive scant consideration. Second, it divides the responsibilities of the state and transnational corporation up in a formal manner that may be inappropriate to some situations met by British corporations abroad. Third, further detail is required regarding ongoing monitoring of the human rights impact of corporate activity. This submission hopes to provide the Committee with some guidance as to how to deal with these issues.

COMMUNITIES

5. The three pillars of Professor Ruggie’s framework allocate responsibilities in the following way: protect (states), respect (corporations) and remedy (states and corporations). However, it is submitted that such an allocation must be premised upon the duties owed to a particular community local to a company’s activities. Rights derive from the “inherent dignity”²³⁹ of all people, making the role of rights holders crucial to the Committee’s deliberations. The local community, as a key stakeholder in corporate investment and corporate projects, must be the central consideration around which a framework for human rights responsibilities for transnationals is built.

6. The role of local communities has not undergone the same depth of analysis as the roles of businesses and states in Professor Ruggie’s report. Professor Ruggie’s fact-finding was detailed as regards human rights abuses related to corporations and governments, but less so as regards the impact of these abuses on communities²⁴⁰ or their involvement in solutions.²⁴¹ Communities are referred to briefly and on a handful

²³⁵ “The adverse effects of domestic policy incoherence were repeatedly raised at a recent consultation held by the Special Representative: ‘vertical’ incoherence, where governments take on human rights commitments without regard to implementation”, J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, UN Doc. A/HRC/8/5 (7 April 2008), para. 33, p. 11.

²³⁶ J. Ruggie, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. E/CN.4/2006/97 (26 February 2006), para. 81, p. 18.

²³⁷ International Organisation of Employers, *et al.*, *Joint initial views to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights* (May 2008), at http://www.bioc.org/statements/investment/08-05_IOE-ICC-BIAC_letter_on_Human_Rights.pdf (accessed 12 March 2009).

²³⁸ Action Aid, *et al.*, *Joint NGO statement to the Human Rights Council* (May 2008), at http://www.business-humanrights.org/Links/Repository/544398/link_page_view (accessed 12 March 2009).

²³⁹ *Universal Declaration of Human Rights*, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), Preamble, at <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx> (accessed 12 March 2009).

²⁴⁰ Acción de los Cristianos para la Abolición de la Tortura, *et al.*, *Open Letter to John Ruggie endorsed by more than 150 NGOs* (25 October, 2007), 2, at http://www.fidh.org/IMG/pdf/OpenLetter_Ruggie_FINAL_wOct10Endorsements.pdf (accessed 12 March 2009).

²⁴¹ *Joint NGO statement* at 1–2.

of occasions.²⁴² For example, they form part of the “court[] of public opinion”²⁴³ whose “perceptions” may be solicited through the medium of Human Rights Impact Assessments.²⁴⁴ When they are referred to, communities are passive: they are “exposed” to harm by corporations²⁴⁵ or are “impacted” by their activities.²⁴⁶

7. As a result, the framework is limited in that communities are not viewed as central actors. This lessens the importance of community engagement for corporations: if states set the legal standards and corporations must abide by these standards, the incentives to consult or engage with communities are decreased. Yet local communities are those most directly affected by the actions of multinational corporations. It follows that corporations should seek their active participation. The Academic Programs would thus urge the Committee to use community engagement as a guiding principle when formulating its final recommendations.

8. As an example of how the Ruggie framework could specifically involve communities and how the Committee can remedy the above limitation, the requirement of due diligence set out in Professor Ruggie’s report²⁴⁷ is illuminating. Due diligence is envisioned as fitting in with “[c]omparable processes . . . typically already embedded in companies”;²⁴⁸ in other words, an internal process. As an internal process, companies are free to avoid direct consultation with communities. Even if they do not go that far, there is an incentive for companies to limit community consultations to the extent that they discharge the responsibility or legal requirement to perform due diligence (presuming that consultations prove financially costly). Further and notwithstanding, as due diligence is an internal matter, companies are able to keep aspects of the process confidential. This would restrict a local community’s ability to examine and respond to companies’ findings, denying them a voice in the continued management of human rights obligations owed to them.

9. This limitation also has implications for the British government’s duty to protect. If the duty is conceived with local communities in mind, the Committee may see fit to recommend that the government provide for a remedy or grievance mechanism for citizens of a host state. Such a remedy would allow communities to pursue a British company for breaches of its human rights responsibilities in a forum under the aegis of the British government and in situations where no such remedy is available in the host state.

10. While Professor Ruggie’s final findings may engage with the issue of communities, the Academic Programs would urge the Committee to apply the same analytical rigor to communities as was applied to states and corporations in Professor Ruggie’s framework. For this reason, the Academic Programs urge the Committee to require a formal mechanism for community engagement rather than forms of informal consultation. They also submit that the Committee suggest formal requirements be placed on companies to engage with communities, act in a transparent and open fashion and act in good faith with the aim of respecting human rights. These requirements would aptly be placed on due diligence, and may prove useful to the Committee’s deliberations on other matters.

CORPORATE OBLIGATIONS

11. The Ruggie framework allocates duties in the manner outlined in [5] above. The framework envisions the duty to protect as the responsibility of the state and not business. This duty entails fostering a culture of corporate respect for human rights (by the home state) and setting and enforcing human rights standards (by the host and home states). This submission argues that such a distinction may not be appropriate for many situations in which companies affect human rights. Companies’ obligations go beyond the first-order responsibility to respect. When operationalising the framework and delineating responsibilities of businesses, the Academic Programs would urge the Committee to take a flexible and robust approach, requiring companies to take on more responsibility in some cases (such as corporate engagement with stakeholders in areas of weak governance) and less responsibility in others (such as in some contractual definitions of applicable human rights law).

12. A flexible approach is particularly important in so-called “weak governance zones”²⁴⁹ (WGZs), including conflict zones.²⁵⁰ These areas are particularly sensitive, as “government failures” lead to “heightened risks” that human rights will be breached or remain unenforced.²⁵¹ The mechanisms by which this can happen include “widespread solicitation, extortion, endemic crime and violent conflict, abuses by security forces, forced labour and violations of the rule of law.”²⁵²

²⁴² *Protect, Respect and Remedy* at paras. 1, 27, 52, 54, 71.

²⁴³ *Id.* at para. 54, p. 16.

²⁴⁴ J. Ruggie, *Human rights impact assessments—resolving key methodological questions*, UN Doc. A/HRC/4/74 (5 February 2007), para. 14, p. 5, considered at [18–21] below.

²⁴⁵ *Id.* at para. 27, p. 9.

²⁴⁶ *Id.* at para. 71, p. 20.

²⁴⁷ *Id.* at paras. 56–64, pp. 17–19.

²⁴⁸ *Id.* at para. 56, p. 17.

²⁴⁹ Organisation for Economic Co-operation and Development, *Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (OECD, June 2006), at <http://www.oecd.org/dataoecd/26/21/36885821.pdf> (accessed 15 March 2009).

²⁵⁰ *Protect, Respect and Remedy* at paras. 47–49, pp. 13–14.

²⁵¹ *Risk Awareness Tool* at 11–12.

²⁵² *Id.*

13. Professor Ruggie indicates that “Home States could identify indicators to trigger alerts with respect to companies in conflict zones” and then “provide or facilitate access to information and advice . . . to help businesses address the heightened human rights risks.”²⁵³ While recognising the important role businesses can play in filling the governance gap in WGZs, he leaves open the subsequent step of placing a responsibility on the corporate entity to do so in these situations. The Academic Programs submit that the Committee should take that step. For example, it is likely that companies will have good information on the ground as regards governance problems in WGZs, especially if they are to conduct due diligence. Given the weak nature of public governance in these countries, it is unlikely that the home state will have as efficient an access to information, even if it has good relations with the host state. This would imply that the process of developing protections for the human rights of communities in WGZs should entail the home state and company working closely together and further that the company has a responsibility to do so. Given a company’s particular knowledge of the local conditions, the Academic Programs would urge the Committee to recommend establishing a duty on British companies to do all they can in good faith to help the British government realise its duty to protect as regards WGZs.

14. Professor Ruggie also indicates that such actions by the home state should not detract from the host state’s duty to protect.²⁵⁴ The report implies that the duty to protect includes the duty to investigate as the first step in the enforcement of rights.²⁵⁵ However, given the dearth of public governance in WGZs, such a duty may not be easy to realise; further, it may be that it is only realisable given the support of the company whose operations are affecting the local community. A monopsonist firm in a WGZ is close to the community owing to its local operations and its status as sole local employer. The company may thus be better placed than the host government to hear of and respond to allegations of human rights violations such as forced labour. As governance becomes weaker (as indicated by human rights due diligence), heightened scrutiny of their own human rights impact should be required of companies, either directly or indirectly, through funding of a neutral external party to examine grievances. The Academic Programs submit that this supplements a responsibility on the company to conduct preliminary investigations if a *prima facie* valid complaint is brought, as part of monitoring by the company or otherwise (presuming the host state’s judicial mechanisms are insufficient to deal with the matter, which can be ascertained by the company as part of the “remedies” aspect of due diligence).

15. Even beyond the confines of WGZs, it may be desirable to hold companies accountable beyond a limited definition of the responsibility to respect. Companies can become involved in defining the human rights standards to which they are accountable, which falls under the duty to protect rather than the responsibility to respect. For example, in the context of defining the terms of an agreement or contract, be it between the host state and company or local community and company,²⁵⁶ businesses can negotiate the terms of the agreement, including a choice of law clause. This allows them to specify the applicable law and thus the human rights responsibilities that will pertain to their operations pursuant to the contract; in other words, to define their human rights obligations. Stabilization clauses can affect human rights in a similar fashion:²⁵⁷ companies can use their bargaining power with certain host states to negotiate a contract that freezes the law of the host state in time, meaning changes in the applicable human rights law will have no effect on their operations. Companies, either by negotiating specific agreements or by standardising their contracts (for example, with local communities), may define human rights and thereby impinge on the duty to protect.

16. In order to remedy this, the Academic Programs recommend that the Committee outline clearly defined human rights standards for companies to follow. Further, they suggest that the Committee include in its report a requirement on British companies to have in their contracts *as a minimum standard* these clearly defined human rights, acknowledging that the course of negotiations may require companies to increase this standard.

17. The difference between the duty to protect and responsibility to respect is not simply a matter of terminology. Companies are actors to a greater extent than the passive implications of the “responsibility to respect” may suggest, requiring a flexible approach be developed within the Ruggie framework. The Academic Programs would urge the Committee to consider companies as such and ensure in its recommendations that the British government and British businesses are working together to ensure human rights are protected and respected.

²⁵³ *Protect, Respect and Remedy* at para. 49, p. 14.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at para. 82, p. 22.

²⁵⁶ “Clauses providing for this kind of recourse would be similar to those that transnational corporations typically include in the agreements they reach with governments of foreign states where they invest (known as Host Government Agreements).” C. Rees, *Grievance Mechanisms for Business and Human Rights* (Harvard University, January 2008), 29, at <http://www.business-humanrights.org/Links/Repository/725086/jump> (accessed 18 March 2009).

²⁵⁷ *Protect, Respect and Remedy* at para. 35–38, pp. 11–12.

MONITORING

18. Monitoring is an important mechanism to fortify stakeholder rights, especially those of local communities. The Ruggie framework briefly considers monitoring by companies of their human rights impact.²⁵⁸ It sees monitoring as a way to “create appropriate incentives and disincentives for employees and ensure continuous improvement”²⁵⁹ in a company’s human rights record. According to Professor Ruggie, monitoring is, in essence, a way of tracking performance. It is discussed separately from the requirement of due diligence.²⁶⁰ While Professor Ruggie’s current work plan seeks to elaborate upon “the scope and nature of corporate due diligence to avoid human rights abuses”,²⁶¹ the language of the Ruggie framework in front of the Committee does not stress that due diligence is a continuing and continuous responsibility for companies.

19. Professor Ruggie describes due diligence as a process by which a company can discharge risk by “satisfy[ing] a legal requirement or discharg[ing] an obligation.”²⁶² In a business context, this is congruent with a colloquial understanding of due diligence as a pre-transactional process that discharges legal liability. However, such language may not be appropriate in the context of the need to monitor human rights abuses. The human rights of those affected by corporate activity are an ongoing concern throughout the lifetime of a given project. It should be stressed that due diligence need not be a static risk-allocation measure, but rather a way to ensure the continued enjoyment of fundamental rights by communities affected by companies. The Academic Programs recommend that the Committee ensure that monitoring is not subsumed into a version of due diligence that is pre-transactional; rather, that it require transparent and participatory structures be put in place by British companies for the regular re-examination and reassessment of their human rights policies, their practice and implementation, meaning they can adjust to changing circumstances.

20. The internal capacity of companies to carry out such ongoing due diligence (which is analogous to monitoring) is a further concern. Professor Ruggie assumes that “comparable processes [to human rights due diligence] are already embedded in companies. . . .”²⁶³ Yet existing embedded monitoring and due diligence processes that relate to stakeholders often deal with *internal* stakeholders such as employees, such as monitoring processes established in response to the Sex Discrimination Act 1975 (as amended). Human rights monitoring entails engagement with *external* stakeholders, which is substantively different. It bears similarities to embedded due diligence processes only insofar as they are external (such as environmental monitoring). Internal stakeholders have regular contact with the company, while external ones may not. Further, there are cultural, social and political factors that may impede the collection of information, including a lack of trust in the company by the local community.²⁶⁴

21. Such difficulties with human rights monitoring indicate that companies should engage third party experts when their internal expertise or capacity is not sufficient, independent or legitimate.²⁶⁵ Ensuring that external verification is itself sufficient, independent or legitimate is a difficult issue. However, in order for ongoing human rights due diligence to be effective, the Academic Programs submit that British companies should be required to have fully independent, legitimate and competent third-party assessors either continue to monitor their human rights impact or sign off on and regularly review a sufficient and transparent internal monitoring plan.

CONCLUSION AND RECOMMENDATIONS

22. The Academic Programs support the Committee’s decision to consider the issue of business and human rights and to do so using Professor Ruggie’s report as a framework. This submission provides detail on how the Committee could further operationalise community engagement, corporate obligations and human rights monitoring. To that end, the Academic Programs urge the Committee to:

- use community engagement as a guiding principle when formulating its final recommendations;
- require a formal mechanism for community engagement rather than forms of informal consultation;
- suggest formal requirements be placed on companies to engage with communities, act in a transparent and open fashion and act in good faith with the aim of respecting human rights;
- take a flexible approach when delineating responsibilities of states and corporations, especially in weak governance zones;

²⁵⁸ Professor Ruggie discusses monitoring as part of Human Rights Impact Assessments conducted by companies, in *Human rights impact assessments*.

²⁵⁹ *Protect, Respect and Remedy* at para. 63, pp. 18–19.

²⁶⁰ *Id.* at para. 63–64, pp. 18–19.

²⁶¹ J. Ruggie, *Preliminary Work Plan: 1 September 2008—30 June 2011* (10 October 2008), 3., at <http://198.170.85.29/Ruggie-preliminary-work-plan-2008-2011.pdf> (accessed 19 April 2009).

²⁶² *Id.* at n.22, p. 9.

²⁶³ *Id.* at para. 56, p. 17.

²⁶⁴ International Finance Corporation, *et al.*, *Guide to Human Rights Impact Assessment and Management* (IFC, June 2008), 59, at http://www.ifc.org/ifcext/sustainability.nsf/Content/OurStories_SocialResponsibility_HumanRights_Publication (accessed 18 March 2009).

²⁶⁵ *Human rights impact assessments* para. 18, p. 5.

- recommend establishing a duty on British companies to do all they can in good faith to help the British government realise its duty to protect as regards weak governance zones;
- require British companies to conduct preliminary investigations if a *prima facie* valid complaint is brought and to put in place external audits of grievance mechanisms, as part of monitoring by the company or otherwise;
- outline clearly defined human rights standards for companies to follow and require British companies to have in their contracts *as a minimum standard* these clearly defined human rights, acknowledging that the course of negotiations may require companies to increase this standard;
- require transparent and participatory structures be put in place by British companies for the regular re-examination and reassessment of their human rights policies, their practice and implementation, meaning they can adjust to changing circumstances; and
- require British businesses to have fully independent, legitimate and competent third-party assessors either continue to monitor their human rights impact or sign off on and regularly review a sufficient and transparent internal monitoring plan.

AUTHORS

23. This memorandum was authored by Deval Desai (LL.M. '09), Harvard Law School, in conjunction with Tyler Giannini, Clinical Director, Human Rights Program. Chris Jochnick, Lecturer in Law at Harvard Law School, provided valuable input.

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Memorandum submitted by Bonita Meyersfeld

1. This evidence is submitted by Dr Bonita Meyersfeld in response to the Joint Committee on Human Rights' call for evidence on Business and Human Rights. Dr Meyersfeld is an international human rights lawyer, specialising in business and human rights. She is a parliamentary advisor to Lord Rana and was involved in the United Kingdom government's recent confirmation that pension fund trustees are not prohibited from considering social, environmental and ethical issues in their investment decisions, provided they act in the fund's best interests. This was incorporated into John Ruggie's most recent report to the UN Human Rights Council, "Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework", 22 April 2009 (para 25).

2. This submission follows the John Ruggie's structure, focusing on institutional investment and human rights.

3. Institutional investment refers to the investment by highly specialised institutions, such as banks, insurance companies, retirement or pension funds, hedge funds and mutual funds, of large sums of pooled money in companies or financial instruments. Group investment has the advantage of spreading risk, maximising return and protecting wealth creation. There are risks too, as is evident from the recent sharp decline in asset and debt instruments, with the result that many people's investments have devalued significantly.

4. The most well known form of institutional investment is the investment of pension fund contributions. This submission refers mainly to pension funds, although the rationale regarding rights, responsibilities and the role of the UK apply to all forms of institutional investment.

1ST PRINCIPLE: THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

How do the activities of UK businesses affect human rights both positively and negatively?

5. Institutional investors have significant influence in the management of corporations, either by virtue of voting rights in a company or by influencing conduct and providing capital. As a result, institutional investors are often called upon to engage with their portfolio corporations (ie corporations in which they invest) about their corporate governance, human rights or environmental practices.

6. Investors usually experience this pressure where a portfolio company either commits human rights violations directly or supplies goods or services to regimes with poor human rights records. For example, during apartheid, institutional investors were urged to engage with their portfolio companies operating in South Africa. The UK (and other EC member states) adopted a scheme requiring UK companies with more than 50 percent shareholding in a South African subsidiary to report annually to the UK government on steps taken to implement a code of conduct and to report on discriminatory employment practices.²⁶⁶ Today, UK investors are regularly called upon to engage with or disinvest from corporations providing goods and services to the Sudanese Government in connection with the ethnic cleansing of civilians in Darfur.

7. Institutional investors are in a powerful position to ensure that businesses protect and respect human rights. Despite rapid development in so-called “responsible investment”²⁶⁷ practices and the adoption of global, regional and sector-specific voluntary principles, responsible investment still remains on the fringe of mainstream institutional investment practices.²⁶⁸

How do these activities engage the human rights obligations of the UK?

8. There are several international instruments regarding business and human rights but most of these are voluntary principles or guidelines. As regards institutional investment, the most authoritative instrument is the United Nations Principles on Responsible Investment (the UN Principles). The UN Principles, launched in 2006, were developed by institutional investors, and are supported by the UN Global Compact and the UN Environment Programme, with the direct support of the UN Secretary-General. They are intended to develop and promote best practice in the area of responsible investment, through facilitating the integration of environmental, social, and governance issues into mainstream investment practice. The Principles have now been signed by over 400 institutional investors, representing some \$15 trillion of assets under management.²⁶⁹

9. The OECD Guidelines and OECD Declaration and Decisions on International Investment and Multinational Enterprises 1976 are also relevant. These include recommendations and voluntary principles and standards for responsible investment conduct in a variety of areas including human rights.

10. The UK is also bound by the International Covenant on Economic, Social and Cultural Rights (ICESCR) to take steps through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of socio-economic rights.²⁷⁰ It is well-established that international cooperation for development is linked to the realization of these rights and is an obligation of all states, particularly those which are in a position to assist others in this regard.²⁷¹

11. It is unlikely that the Human Rights Act is directly engaged by this framework. However, the UK is bound to comply with international obligations notwithstanding the absence of specific incorporating legislation.²⁷²

Gaps in the legal and regulatory framework

12. There is very little effective regulation of institutional investment in general, and almost none in respect of human rights.

Common Law

13. Institutional investors are bound by common law principles of fiduciary duties to (i) act in the best interests of their beneficiaries; and (ii) be prudent in their financial evaluation of investments, taking into account the highest rate of return at the lowest risk. Part of this is the requirement in respect of pension schemes to retain a diverse portfolio for the purposes of spreading risk as widely as possible.

²⁶⁶ See Department of Trade, Code of Conduct for Companies with Interests in South Africa: Government Guidance to British Companies on the Code of Conduct Adopted by the Governments of the Nine Member States of European Community on 20 September 1977; Cmnd 1-7233 (1978).

²⁶⁷ This is often referred to as responsible investment, socially responsible investment or ethical investment. There is a debate as to which label is preferable. For the sake of simplicity, I use the term “responsible investment”.

²⁶⁸ See “Identifying and Overcoming Behavioural Impediments to Long Term Responsible Investment: A Focus on UK Institutional Investors” by Danyelle Jann Guyatt, Doctoral Thesis, University of Bath, July 2006.

²⁶⁹ See “Responsible investment: a force for poverty alleviation. Framing the debate.” Oxfam report by Rory Sullivan and Helena Viñes Fiestas.

²⁷⁰ Article 2.

²⁷¹ General Comment 3 by the UN High Commissioner for Human Rights, The nature of States parties obligations, art 2 para 1 of the Convention, CESCR General comment 3. (General Comments), December 1990.

²⁷² See “UK’s International Obligations” by Anthony Lester and Bonita Meyersfeld in “Human Rights Law and Practice”, Lester, Pannick, Herberg (eds), 3rd Ed, LexisNexis.

14. Until recently there was uncertainty in the law regarding the extent to which investors' fiduciary duties allow them to take into account additional factors, such as human rights, when making investment decisions. As a result of long-standing and narrowly interpreted case law, it was generally accepted in the UK that all other considerations—including human rights—were extraneous to investors' legal powers. Human rights therefore could not be a consideration when making an investment decision.²⁷³

15. The legal position was clarified by Lord McKenzie during the passage of the Pensions Act 2008, confirming that:

“There is no reason in law why, in making investment decisions, trustees cannot consider social, ethical and environmental considerations, including sustainability, in addition to their usual criteria of financial returns, security and diversification.”²⁷⁴

16. The position is improved in that investors can feel more confident in considering corporations' human rights impact but human rights considerations still are entirely optional.

Statutory Law

17. Section 244 of the Pensions Fund Act 2004 requires trustees of a scheme to prepare a written statement of principles governing their investment decisions. The Pension Protection Fund (Statement of Investment Principles) Regulations 2005 is really the only statutory instrument that refers to “social” and “ethical” considerations. Clause 4(2)(g) requires the statement of investment principles to cover “the extent, if at all, to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments.” (emphasis added)

18. There is no statutory duty that requires institutional investors to prevent or even consider the human rights impact of their investment decisions.

Guidance

19. In March 2000, the government asked Paul Myners to examine whether there were distortions in the investment decision-making of institutional investors. This resulted in the Myners Principles,²⁷⁵ published in 2001 and revised in 2004. The Myners Principles codify best practice in investment decision-making. While they are voluntary, pension fund trustees are expected to consider their applicability to their own fund and report on a 'comply or explain' basis how they have used them. The Myners Principles do not cover social, environmental or human rights considerations.

20. In practice, most institutional investors tend to include social (or human rights) considerations in their statement of investment principles. Very few, however, actually engage their portfolio companies on human rights issues.

Role of Government departments and UK National Human Rights Institutions

21. In his 7 April report to the UN (*Protect, Respect and Remedy: a Framework for Business and Human Rights*), Ruggie stressed the importance of governments employing joined-up thinking, across departments, as regards its business and human rights policies. Ruggie indicates that the business and human rights agenda should not be segregated or “kept apart from, or heavily discounted in, other policy domains that shape business practices, including commercial policy, *investment policy*, securities regulation and corporate governance.” (emphasis added)

22. Far greater guidance and leadership is needed from government departments such as the Department for Business Enterprise and Regulatory Reform, the Department for Works and Pensions, the Foreign and Commonwealth Office and the Department for International Development. These departments should require institutional investors (including the soon to be established Personal Accounts Delivery Authority) to adopt a meaningful policy of responsible investment, following the example of state funds in France, Norway, New Zealand, Canada and Ireland.

23. The National Human Rights Institutions in the UK should monitor and require investors to retain a diverse investment portfolio and proactively engage with companies on human rights and environmental issues. If necessary, their remit should be extended to include human rights violations abroad or a specialised body should be established to monitor the human rights impact of international investment (such as that proposed by the CORE Coalition).

²⁷³ The case of *Cowan v Scargill* [1985] Ch 270 concerned the proper investment of pension trust monies.

²⁷⁴ *Hansard*, Vol 705, 26 Nov 2008: Column WS160.

²⁷⁵ Revised Myners Guidelines:

http://www.hm-treasury.gov.uk/d/consult_myners_response_pu632.pdf
http://www.hm-treasury.gov.uk/d/consult_myners_response_pu632.pdf.

2ND PRINCIPLE: THE RESPONSIBILITY OF BUSINESSES TO RESPECT HUMAN RIGHTS

24. The human rights impact of institutional investment often reaches beyond the borders of the UK, affecting the human rights of people in other countries, usually developing states. But the protection of human rights does not stop at the water's edge and the wellbeing of UK pensioners and investment beneficiaries need not be dependent on the violation of human rights abroad, the degradation of the environment or corrupt corporate practices.

How should UK businesses take into account the human rights impact of their activities?

25. There are a number of ways in which investors can influence corporations to operate ethically, without compromising healthy profits for UK beneficiaries:

- (i) Investors can **engage** with companies in which they hold shares. Recommendations from major shareholders will certainly turn a corporation's "mind" towards human rights standards, thereby limiting the negative fall-out from poor governance, lax safety standards or climate change.
- (ii) Investors may use **positive screening**. Investors may require corporations to demonstrate environmental, social and governance standards in return for their business.
- (iii) Investors may **disinvest**. Usually investors sell shares if the corporation fails to perform financially. Increasingly, however, investors are being asked to disinvest where a corporation is complicit in the severe violation of human rights, such as war crimes, crimes against humanity or genocide.
- (iv) Some investors are now turning to **litigation**. For example, Lothian pension fund is suing BP for the damage to its investment after an oil spill, which it said was caused by BP's negligence.

26. The emphasis should be on engagement with portfolio companies to ensure that they comply with international human rights standards, including poor governance, lax safety standards, collusion in conflict zones and doing business with unstable and unreliable regimes.

27. UK-based businesses are dominant players in global financial services and are well placed to lead on institutional investment and human rights.

Effect of the current economic climate

28. Responsible investment is not inconsistent with profit maximisation. There is increasing evidence that effective management of social issues has a positive impact on investment returns.²⁷⁶ Good governance and transparent corporate practices tend to lead to stable return and long-term profit growth. The European Commission confirms that:²⁷⁷

"Socially and environmentally responsible policies provide investors with a good indication of sound internal and external management. They contribute to minimising risks by anticipating and preventing crises that can affect reputation and cause dramatic drops in share prices."

29. An example of this is the Co-op ethical fund, which had one of the best performances of any all-shares funds in recent times.

30. The economic climate reinforces the need to improve the regulation of institutional investment. The impact of sub-prime lending in the United States on the global economy is an obvious example.²⁷⁸ The large number of people who did indeed end up defaulting on payments, leading to the seizure of collateral, and foreclosure on mortgages, was high, and has led to the current credit crunch and possible worldwide recession. The human rights-to-financial link is clear.

3RD PRINCIPLE: EFFECTIVE ACCESS TO REMEDIES

Does the existing legal, regulatory and voluntary framework provide an appropriate remedy?

31. Apart from NGOs and transnational organisations which "name and shame" corporations and lobby institutional investors to engage with problem companies, there is no monitoring of the human rights impact of institutional investment.

32. Because there are no enforceable human rights guidelines or principles, there is no mechanism to hold institutional investors to account for their investment decisions which contribute to human rights violations.

33. The remit of most of the UK's National Human Rights Institutions is limited to the protection of the human rights of people in the UK. But institutional investment can impact the protection – or violation – of human rights in foreign jurisdictions. Often there is a governance gap in these jurisdictions, where there is no access to judicial or other remedies.

²⁷⁶ See, for example, the 2007 report of the UNEPFI Asset Management Working Group and Mercer, entitled "Demystifying Responsible Investor Performance", available at <http://www.unepfi.org/publications/investment/>

²⁷⁷ European Commission Green Paper, *The Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, COM(2001) 366 final (18/07/2001).

²⁷⁸ In the United States, mortgage lending specifically, the term "subprime" refers to loans that do not meet Fannie Mae or Freddie Mac guidelines. This is generally due to one or a combination of factors, including credit status of the borrower, income and job history, and income to mortgage payment ratio.

Non-judicial enforcement: Emphasising long-term investment v short-term valuations

34. The interests of pension funds and their members are best served by longer-term valuation of companies, given that most people's pensions will be invested for decades before they are paid out. Pension fund managers need to be encouraged to look beyond quarterly results as short-term thinking can lead to lower total returns over a longer period.

35. Many institutional investors, especially pension funds, rely heavily on index trackers, which, put simplistically, follow a pre-determined pattern of investment. Investors often rely on a computer model with little or no human input in the decision as to which securities are purchased or sold. The lack of active management usually gives the advantage of lower fees and lower taxes in taxable accounts. But apart from the fact that this has its own financial risks (known as "tracking errors" or informally "jitters"), tracking usually covers very short periods (usually three months) and obviously does not consider the human rights impact of the portfolio company.

36. The performance of a company over a three month period is very different from the performance of a company over a 20 year period. And it is easy to envisage a situation in which an activity that is profitable in the short term may have negative impacts on the wider portfolio in the long term.

37. Pension fund investors need to be more concerned with the performance of a company over a much longer period and should be encouraged to rely less on short-term tracking.

Regulatory/good practice proposal

38. Institutional investors should be required to make human rights part of their investment policy and to demonstrate the ways in which they comply with that policy.

39. UK NHRI should have the power to monitor the impact of institutional investment abroad.

CONCLUDING COMMENTS

40. Combined with increasing evidence that responsible investment brings performance benefits, this Minister's statement regarding institutional investment shows that trustees should be taking proactive steps to monitor and manage environmental, social and governance risks and opportunities.

Dr Bonita Meyersfield

May 2009

Memorandum submitted by Synergy Global Consulting

Synergy Global Consulting (Synergy) works with organisations to improve the way they understand and manage their relations with society, with a particular focus on the extractive industries and their operations in developing countries. With offices in Oxford, UK; Johannesburg, South Africa and Abu Dhabi, UAE, Synergy has worked in over 40 countries working with private sector companies (including many UK companies), civil society organisations and governmental departments (notably the Department for International Development—DFID). Within its line of work Synergy has had the experience of helping extractive companies understand and manage potential human rights impacts and risks.

INTRODUCTION

Synergy welcomes the Joint Committee on Human Rights' decision to inquire into business and human rights. Acknowledging the progress which has been made over the last few years advancing the multi stakeholder dialogue on business and human rights, Synergy welcomes steps which are now being taken to operationalise these dialogues, including the work of the Secretary General's Special Representative (SGSR) John Ruggie, and the engagement of the UK Joint Committee on Human Rights.

Synergy has based its response to this call for evidence on the knowledge, experience and understanding of the human rights and business context gained from working with both UK and non-UK extractive companies with operations outside the UK. Most human rights cases that involve businesses tend to occur outside of the UK and within the infrastructure, energy, textiles and extractive industries sectors. This has been reinforced by John Ruggie both in his 2008 "Protect, Respect, Remedy" report and its 2009 successor "Business and human rights: Towards operationalising the 'protect, respect and remedy' framework recently submitted to the Human Rights Council". While acknowledging the need to encourage UK based companies to manage their human rights risks for UK based operations, Synergy believes the spirit of the Ruggie framework is predominantly focused on addressing the most serious forms of human rights abuse that tend to be most prevalent in areas of weak governance. Synergy has extensive experience operating in

areas of weak governance and engages at both a field and policy level with the types of human rights risks, which companies face when operating in such environments. As such our submission of evidence will focus on UK companies operating outside the UK and will cover:

1. An understanding of the current context, including the key drivers for change.
2. Recommendations for Her Majesty's Government (HMG) to influence these drivers and to support UK companies operating outside of the UK in managing their human rights risks.

THE CURRENT CONTEXT

The role of the state in protecting individuals from corporate sponsored abuse is at the centre of the international debate on business and human rights. In both his 2008 and 2009 reports Ruggie iterates that the State duty to protect against third party abuse is overtly grounded in international human rights law.²⁷⁹ Despite this Ruggie maintains that “the business and human rights domain exhibit(s) considerable legal and policy incoherence” both horizontally across government departments and vertically in failure to adopt and implement international law and policy.²⁸⁰ According to Ruggie, this “results in ambiguous and mixed messages to business from Governments and international organizations”.²⁸¹

The second element of Ruggie's business and human rights framework concerns businesses' responsibility to respect human rights. Human rights violations by businesses are routinely brought to public attention by civil society groups and the media. Many high profile UK extractive companies have been accused of complicity in various human rights violations as a result of their operations outside the UK. Within this context, UK companies operating outside the UK are having to engage with human rights as a result of a series of key drivers, outlined below:

BUSINESS DRIVERS

- Improved practices in companies: Companies are increasingly considering human rights in business practices. This is particularly notable in companies that have both learned from experience but have also been influenced by individual actors within those companies that have recognised the business and moral imperative for engaging with human rights.
- Role of investors and shareholders: There is increasing recognition that human rights provisions need to better inform UK sponsored investment into countries of weak governance to ensure that such investment does not undermine the ability for such countries to adhere to international human rights commitments, as well as to ensure management of the material financial risks that human rights issues can pose. HMG has influence on this through regulation of the financial sector in the UK and through its shareholdings in various financial institutions.
- Role of civil society: The UK is in many ways at the forefront of the business and human rights debate with a host of NGOs including Amnesty International, Global Witness, ActionAid, CAFOD, Christian Aid, RAID, CORE Coalition, The Corner House, Environmental Justice Foundation, Friends of the Earth, Greenpeace, Oxfam, International Alert and trade unions including the TUC engaging with and pushing the business and human rights debate forward and in some cases initiating consumer pressure campaigns to affect change.
- Role of international standards and multi stakeholder initiatives: HMG and UK based companies support a number of international standards and initiatives that address the link between business and human rights including the Global Reporting Initiative, the UN Global Compact, the Voluntary Principles on Security and Human Rights, the Extractive Industries Transparency Initiative, various certification initiatives, eg SA8000, Fair Trade, and various initiatives for fair trade, and ethical and responsible mineral extraction. There has also been an increase in the number of multi stakeholder initiatives and partnerships aimed at facilitating the engagement of UK companies with human rights including the International Business Leaders Forum and the Business Leaders Initiative on Human Rights.

LEGISLATIVE AND GOVERNANCE DRIVERS

- Role of home country government legislation and governance: At present efforts are clearly being made by HMG to address business engagement with human rights through legislative, policy and governance based initiatives. The role of the Alien Tort Claims Act on influencing the behaviour of some US-based companies demonstrates the potential influence that effective home country legislation could have.

²⁷⁹ SGSR John Ruggie *Business and Human Rights: Towards operationalising the “protect, respect and remedy” framework* April 2009

²⁸⁰ Prepared Remarks by SRSJ John Ruggie Public Hearings on Business and Human Rights Sub-Committee on HR European Parliament

²⁸¹ SGSR John Ruggie *Business and Human Rights: Towards operationalising the “protect, respect and remedy” framework* April 2009

- Role of host country government legislation and governance: Most of the worst cases of business related human rights violations occur in countries of weak governance. Much of the UK's overseas aid programme is already focused on improving governance and therefore has potential to help host states improve their capacity to protect human rights.

In seeking to ensure businesses respect human rights, some arguments emphasise strengthening and creating further legislative drivers, whilst others argue that current business drivers are sufficient and more appropriate to the business sector. Synergy believes that both a strengthening of legislation and the development of a more enabling business and human rights environment are necessary to ensure companies uphold their responsibility to respect human rights.

As part of its duty to protect, a government clearly has the duty to ensure businesses uphold their responsibility to respect human rights. As such, HMG needs to address its role within business and human rights drivers and identify specific actions that would ensure UK companies operating outside of the UK in fulfilling their responsibility to respect human rights.

RECOMMENDATIONS

The following recommendations detail specific actions that could be undertaken by HMG to support UK companies in fulfilling their human rights responsibilities. These recommendations are based on Synergy's field and policy level experience, including our work with DFID. They also draw on a variety of recommendations and frameworks including:

- John Ruggie's 2008 Report: "Protect, Respect and Remedy: a Framework for Business and Human Rights" and the recently published 2009 follow up, "Business and human rights: Towards operationalising the 'protect, respect and remedy' framework";
- DFID's 2006 White Paper;
- The International Development Committee report on Private Sector Development (Fourth Report of Session 2005–06);
- National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries: Advisory Group Report 29 March 2007;
- Outputs from the Mining, Minerals and Sustainable Development (MMSD) programme; and
- The OECD Guidelines for Multinational Enterprises and Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.

HMG demonstrably has influence over the level of engagement companies operating outside the UK have with human rights, and is already taking a wide variety of actions in this area. However, these actions can sometimes be overlapping and occasionally contradictory. We hope that this enquiry will help identify all of these different government actions and be an important step in developing a coordinated, consistent and strategic government approach to this issue.

1. *Supporting improved practices in companies*

1.1 Encourage UK-based companies to endorse SGSR John Ruggie's *Protect, Respect and Remedy* framework.

1.2 Encourage companies to include a specific commitment to human rights in their statement of business principles and codes of conduct.

1.3 Encourage companies to produce explicit human rights policies and ensure that they are integrated, monitored and audited.

1.4 Support the development and implementation of Human Rights Impact Assessments. that can be integrated into other assessment activity.

1.5 Encourage companies to put in place necessary management systems to ensure that assessment outcomes are integrated into business decision making.

1.6 Encourage companies to develop monitoring and reporting mechanisms to track performance, notably producing public reports according to GRI standards.

1.7 Encourage companies to develop grievance mechanisms to ensure that specific rights holders affected by company activities have access to remedy.

2. *Improving the role of investment*

2.1 Promote human rights due diligence of business investments made by financial institutions in which HMG has a shareholding (eg IFC, EBRD, CDC and Actis).and UK banks.

2.2 Engage, facilitate, and encourage businesses and the financial sector to understand the linkages between human rights performance and financial value and risk management and help make this link more relevant to financial sector decisions.

2.3 Ensure that all investment agreements undertaken to facilitate UK foreign investment are not undermining a host countries ability to achieve its legitimate policy objectives, including its international human rights obligations.

2.4 Work with country partners to ensure that stabilisation clauses included within bilateral investment treaties do not undermine the ability of the host country to impose environmental and social regulation on foreign investors.

2.5 Improve advisory services provided by FCO to UK companies investing abroad to ensure that they are aware of their obligations under UK law, international law and the law that they are operating in as well as international norms and human rights standards.

3. *Civil society engagement*

3.1 Continue to support civil society organisations that play an effective role in supporting business engagement with human rights.

4. *Supporting international standards and multi stakeholder initiatives for business conduct.*

4.1 HMG could consider making an overt statement in support of Ruggie's Protect, Respect and Remedy framework.

4.2 HMG could consider the recommendations outlined in Ruggie's Business and human rights: Towards operationalising the "protect, respect and remedy" framework particularly with regard to the State duty to protect both within the UK and extraterritorially.

4.3 Continued support for FCO's lead role in the implementation of the Voluntary Principles on Security and Human Rights.

4.

HMG could use existing forums to enhance international cooperation and peer learning with respect to the business and human rights framework, including treaty bodies, the Human Rights Council's Universal Periodic Review, National Contact Points under OECD Guidelines and regional human rights mechanisms.

4.5 Work to make the OECD Guidelines for Multinational Enterprises more effective in promoting responsible business conduct, particularly in countries with weak governance, including continuing to improve the effectiveness of the National Contact Point.

4.6 Support the implementation of the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, and other tools for companies operating in fragile states.

4.7 Continue to provide input and support towards incorporating a human rights framework within the World Bank Group and the regional development banks standards and guidelines, and the commercial banks' Equator Principles.

4.8 Encourage initiatives that aim to develop and implement standards that improve the role of business in human rights, including the Business Leaders Initiative on Human Rights.

4.9 Work with industry associations and other stakeholders, to develop and distribute information tools and targeted educational programmes to support the continuous improvement of human rights performance among companies.

4.10 Support research partnerships for assessing corporate behaviour and human rights.

5. *UK governance, policy and legislation*

5.1 Develop a formal policy on business and human rights, and a cross Whitehall strategic plan for implementing that policy.

5.2 Improve coordination between key UK Government Departments, eg DTI, FCO, and DFID on business and human rights.

5.3 Revise the Companies Act (2006) to ensure UK companies operating outside the UK are required to undertake full due diligence of their potential human rights impacts.

5.4 Provide guidelines to supplement the Companies Act (2006) to ensure companies understand the due diligence process and enable them to identify human rights issues as material issues to disclose to shareholders.

5.5 Support the further integration of the role of business and human rights into PRSPs.

5.6 Improve FCO's capacity to ensure that UK companies operating abroad are aware of the local political, social and cultural context in which they intend to operate, particularly in weak governance zones.

5.7 Establishing an independent ombudsman to provide advisory, fact-finding and reporting functions relating to grievances raised against UK listed and financed companies.

6. *Host governance and policy*

6.1 Commission, support and conduct assessments in weak governance countries to further determine the linkages between business and human rights.

6.2 Based on these assessments, review HMG's programmes in these countries.

Synergy Global Consulting Ltd

May 2009

Memorandum submitted by Fund for Peace

There has been a movement in the human rights community for legislative remedies to force companies to uphold human rights standards as well as increased litigation against companies accused of human rights violations. Enforcement of human rights is best achieved through a focus on the desired outcome, rather than on mechanisms. At the end of the day, the international community should be most concerned with ensuring that the greatest number of people enjoy the protection of their human rights. These human rights include not only political and civil rights, but access to those things that make life possible, like water, food, employment, health and other needed services, and a healthy environment.

Protection of human rights is, of course, the first responsibility of governments. Most cases against companies accused of complicity in human rights abuses occur in countries where the government either lacks the political will or the ability to protect its own citizens' rights, or where the government is itself a perpetrator of abuses. In these instances, while governments are culpable, companies—guilty or not—may become the focus of protest particularly when communities have no recourse against their own governments while companies operating in the area are visible and accessible.

If companies are indeed complicit in human rights abuses, they should be held accountable. Legislation and litigation focused on corporations run the risk, however, of taking attention away from the governments whose duty it is to protect their citizens. In some cases, the governments responsible for the abuses escape censure and even benefit by having the corporation take the rap for crimes the government committed and possibly continues to commit. Rule of law and good governance should start with government; corporations then have a duty to adhere to local law and community standards.

In impoverished communities, people may be less concerned whether it is the government or a corporation that is building infrastructure or providing services. Their immediate interest, understandably, is to have potable water, food for their families, and educational and economic opportunities for themselves and their children. Sometimes, in the most challenging environments around the world, multinational corporations, including many British companies, provide the only hope of attaining such human and social benefits.

The most important foundation for the protection of human rights is a binding social contract between a government and its citizens. This social contract is created when the people and companies pay taxes to the government, which in return delivers services, including not only infrastructure, but security and social services for livelihood and prosperity. If companies assume this role, which may be necessary in some areas to obtain the social license to operate, then a company has to consider carefully how it can do this without possible negatively affecting the current or future social contract between the government and its citizens. Laws that are not well thought out could force companies into this position without allowing them the flexibility to consider ways to not only provide services but help build government capacity and positively impact the potential for a stronger social contract between the government and its citizens.

Furthermore, it is not yet clear how companies can best contribute to the protection of human rights. It is not likely that we will ever be able to develop universally accepted international standards that are achievable in all instances. Careful analysis is necessary to understand the needs and capacities of local communities and the performance of host governments. Laws forcing companies to apply a pre-determined standard to address the wide range of human rights concerns that may exist could force companies to make choices that are not in the long-term sustainable interest of the communities.

The Fund for Peace is not against legislation that could protect human rights and improve the behavior of corporations across the board. Indeed, drafted properly we would support such legislation. However, we have not yet seen legislation with practicable application to companies operating in extremely varied and complex environments that would lead to overall improvements in human rights. Sanctions, for example, must be "smart"—that is, designed to target perpetrators and not hurt innocent people or organizations. In fact, if negative unintended consequences are not anticipated, legislation could end up forcing companies with the best practices out of an area to be replaced by companies that have not adopted voluntary codes of conduct, developed and implemented policies on human rights, undertaken appropriate social and environmental audits, or made responsible investments in communities. Companies have, in fact, been forced to leave areas through various means already, as in the Sudan, which many recognize to have yielded a worse result for the impacted communities.

Moreover, most of the innovative and successful programs we have witnessed over the last decade come from companies pro-actively adopting strategies that enable them to operate more safely and sustainably in areas that lack public services and the rule of law. While it is true that some change has come about from the valued efforts of international NGOs in calling attention to companies that were failing to meet their ethical obligations, a lot of change has also come in response to necessities on the ground.

We recognize a positive trend in corporations' understanding of social, economic and political complexities and an increase in their positive impact on human rights abroad, particularly in the extractive industry. British companies are among those who have played and continue to play a leading role in defining the responsibilities of companies and how to achieve them. There are still many challenges to face, and no one has all the answers. In the protection of human rights and the appropriate role of corporations, we believe there is much room for development and innovation. We believe companies are increasingly undertaking responsibility voluntarily and for their own reasons, and that sustained engagement with business—not compulsory legislation in a one-size-fits-all approach—is the way to move forward. The role of business in the promotion of sustainable human rights and better governance is an important one. In most instances, it is far more effective to make them partners in this enterprise than to resort to mandatory legal requirements that could result in unintended negative consequences.

Memorandum submitted by James Cockayne, International Peace Institute

1. I write to submit evidence to the Joint Committee on Human Rights (“JCHR”) Inquiry into Business and Human Rights, regarding the relevance of the Public Consultation on Private Military Companies announced by the Foreign Secretary on 24 April 2009 (“PMSC Consultation”). I seek your indulgence in submitting this evidence slightly after the deadline for submissions to the JCHR of 1 May 2009, since this PMSC Consultation was only recently announced.

2. I submit this evidence in a purely personal capacity, having worked on these issues for seven years. I am a United Kingdom citizen. I work as a Senior Associate at the International Peace Institute in New York, a not-for-profit research and policy development organization based in New York which assists the international community to develop effective responses to armed conflict and insecurity. For the last three years I have worked closely with officials from Her Majesty’s Government (HMG) and numerous other governments to improve international regulation of private military and security companies (PMSCs). This culminated in the endorsement by 17 governments (including HMG), on 17 September 2008, of the “Montreux Document”, affirming existing international legal obligations and setting out “Good Practices” for states dealing with PMSCs. I was one of two NGO representatives who provided strategic, drafting and policy guidance to the organizers of this process.

Relevance to the JCHR Inquiry of the FCO Public Consultation on Private Military Companies—A practical opportunity to apply the “Protect, Respect, Remedy” Framework developed by the UN Special Representative of the Secretary-General on Business and Human Rights, Professor John Ruggie

3. On 24 April 2009 the Foreign Secretary announced that the Foreign and Commonwealth Office (FCO) will conduct a Publication Consultation on Private Military Companies, running until 17 July 2009. This PMSC Consultation aims “to seek views from stakeholders and interested parties on the Government’s proposal to promote high standards in the industry by working with the relevant trade association, using our status as a key buyer, and increasing international standards through international cooperation”.²⁸² The consultation documents make clear that the “standards” that HMG seeks to promote through this regulatory package include respect for international humanitarian law and human rights law.

4. The consultation presents a practical opportunity for the JCHR to consider the application of the Ruggie policy framework in the UK regulatory context. The Ruggie framework could provide HMG significant guidance in its domestic regulatory efforts and its international diplomacy to promote an international regulatory framework. Yet to date the PMSC Consultation process has made no reference to the “Protect, Respect, Remedy” framework promoted by Professor Ruggie (and supported by HMG). The danger is that if this regulatory effort proceeds without reference to the Ruggie framework, HMG’s support for that policy framework might be called into question.

5. HMG’s efforts to drive up standards in the private military and security industry are to be commended. The private military and security industry has a uniquely rights-jeopardizing potential amongst major UK business sectors, because the use of force is at the heart of the expertise and services it provides. As HMG itself recognizes in the published Consultation Document, some of the services “offered by security companies ... could have direct lethal consequence. There is a risk that, however unintentionally, PMSC activity might give rise to human rights or humanitarian law concerns, assist internal repression, or provoke or prolong internal or regional tension”.²⁸³

²⁸² Foreign and Commonwealth Office, Consultation Document, Consultation on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally, published 24 April 2009, available at www.fco.gov.uk, (hereafter “PMSC Consultation Document”) page 3.

²⁸³ *Ibid.*, page 6.

6. HMG is therefore consulting on a policy which has two objectives:

- “a) to promote high standards of conduct by PMSCs internationally; and,
- b) to reduce the risk that the activities of PMSCs might give rise to human rights or humanitarian law concerns, assist internal repression, or provoke or prolong internal or regional tension.”

7. To achieve those objectives, HMG has presented a specific policy proposal, namely “a composite package of:

- a) Working with the UK [private military and security] industry to promote high standards through a code of conduct agreed with and monitored by the Government [but implemented and enforced by the British Association of Private Security Companies, a private trade association];
- b) Using our status as a key buyer to contract only those companies that demonstrate that they operate to high standards;
- c) An international approach to promote higher global standards, based on key elements of the UK approach.”²⁸⁴

8. The HMG policy package implicitly acknowledges that HMG has the ability to improve respect for human rights in this particular business sector by:

- more effectively discharging its Duty to Protect through ensuring it contracts only with PMSCs that respect human rights, and through promotion of effective standards at the international level;
- taking steps to ensure that PMSCs themselves adequately discharge their Responsibility to Respect (through adoption and enforcement of an industry-wide Code of Conduct); and by
- ensuring effective Access to Remedy (through the creation of some kind of trade-association operated non-judicial grievance mechanism).²⁸⁵

9. Yet despite HMG’s support for the “Respect, Protect, Remedy” Framework,²⁸⁶ and its evident relevance to the PMSC consultation,²⁸⁷ the consultation documents currently make no reference to the Ruggie policy framework. This disconnect between the PMSC consultation documents and the “business and human rights” policy framework the Joint Committee is now inquiring into presents two real, practical risks for HMG.

10. First, while recognizing the unique characteristics of the PMSC industry, there is a danger that any efforts made by HMG to lend support to the Ruggie policy framework—either through national implementation or through international diplomacy—may be seriously weakened if HMG is seen to be regulating this industry without reference to that framework. It will be hard for HMG to make the case for other governments to regulate business through reference to the Ruggie policy framework if it is regulating this industry—with its recognized potential for “lethal consequence” and human-rights-infringement—without itself referencing the Ruggie policy framework.

11. Second, and distinct from any effect on HMG’s perceived support for the Ruggie policy framework, there is a separate danger that the efforts of HMG to promote effective regulation of and high standards in the PMSC industry may be undermined if the Ruggie policy framework is not incorporated from the start. It would be unfortunate if HMG spent considerable time, effort, and taxpayers’ money to develop a regulatory scheme for the UK PMSC industry—and additionally at the international level, as the HMG policy proposal specifically contemplates—only for these regulatory frameworks to have to be overhauled in two or three years, to bring them in line with the broader “business and human rights” framework states are now backing through the Ruggie mandate process. Indeed, as the Ruggie mandate still has two years to run, there may yet be significant further detail added in to the existing policy framework. It would be more efficient for the Ruggie policy framework to be acknowledged within HMG’s PMSC regulation effort from the outset.

12. In fact, as I lay out in more detail below, the PMSC consultation offers HMG a practical opportunity to consider application of the Ruggie policy framework. And the Ruggie policy framework in turn may offer HMG practical guidance on how to approach certain aspects of PMSC regulation. Below, I set out three non-exhaustive examples.

Recommendation 1: The Joint Committee on Human Rights should invite the Foreign and Commonwealth Office to share its views on the compatibility of Her Majesty’s Government’s proposed policy on the regulation of private military and security companies with the “Protect, Respect, Remedy” policy framework.

Recommendation 2: The Joint Committee on Human Rights should encourage the Foreign and Commonwealth Office to explore how the “Protect, Respect, Remedy” policy framework could be integrated into its work on private military and security companies from now on.

²⁸⁴ Ibid., page 8.

²⁸⁵ Further details of how these different aspects of the proposed package would work are set out in PMSC Consultation Document.

²⁸⁶ The framework was adopted in a unanimous decision of the United Nations Human Rights Council, of which the UK was a member at the time (and remains a member).

²⁸⁷ Professor Ruggie has himself referred to the regulation of PMSCs in his own submissions to the Human Rights Council. See for example “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts”, UN Doc. A/HRC/4/035, 9 February 2007, pp. 17–18.

Example 1: *the State Duty to Protect and potential over-reliance on trade-association-based human rights promotion and enforcement*

13. The Ruggie policy framework, which is supported by HMG, affirms states' existing obligations to protect the human rights of individuals within their territory or jurisdiction from third party abuse, and to remedy violations of rights that do occur. As Professor Ruggie's most recent report to the UN Human Rights Council reminds us

*"The State duty to protect is a standard of conduct, and not a standard of result. That is, States are not held responsible for corporate-related human rights abuses per se, but may be considered in breach of their obligations where they fail to take appropriate steps to prevent it and to investigate, punish and redress it when it occurs."*²⁸⁸

14. Until the specific details of the system of PMSC trade-association-based regulation the FCO envisages are clarified, it will remain questionable whether that system will effectively discharge the PMSC-related aspects of the UK's duty to protect. The proposal presented by the FCO rejects government-run licensing and registration schemes on the grounds that they would be hard for HMG to operate, especially given that breaches of such a regime would occur outside the UK, where "investigation, obtaining evidence and enforcement [are] highly complex and difficult" and expensive.²⁸⁹ The FCO has presented costings suggesting that such regimes would be over £40 million more expensive over three years than a third option: a trade-association operated Code of Conduct regime.

15. That model, which the FCO prefers, may provide an elegant and cost-effective solution. As I have argued elsewhere, it does seem possible for states and business to collaborate effectively to ensure respect for human rights, through combinations of state-based and market-based regulation.²⁹⁰

16. However, the danger is that by relying too heavily on the trade association to discharge the state's obligations of human-rights promotion and human-rights enforcement, HMG may in fact fall short of discharging the UK's duty to protect in this area. The lower predicted costs of HMG's preferred regulatory regime should in fact serve as a warning sign: they indicate that the costs of human-rights promotion and enforcement will be passed on to the industry, and to others who would seek to enforce their rights (ie victims). Absent effective off-setting factors, the result may be strong net disincentives for industry to carry such significant costs of regulation, and serious potential barriers for victims to enforce their rights.

17. The PMSC Consultation documents suggest some off-setting measures that may be put in place. These include linking PMSCs' access to HMG contracts to uptake of the trade association Code of Conduct. Yet as the consultation documents recognize, access to HMG contracts may not be a highly persuasive incentive for many UK-based PMSCs, since they often rely on a largely private clientele (such as extractive companies).

18. The consultation documents also propose an annual review, for three years, by the FCO, of whether the trade-association-based regulation system is working, through measurement of specific indicators (membership targets and reduction in number of complaints upheld).²⁹¹ The danger is, however, of setting up checks that produce "false positives", suggesting greater effectiveness in the regulatory regime than is actually present. A reduction in the number of complaints upheld may indicate, for example, not that companies are performing to higher standards, but simply that victims are finding it harder to access the grievance mechanism put in place. If it is too expensive and difficult for HMG to gather and analyze the information needed for effective PMSC performance monitoring overseas (as the FCO consultation documents argue in rejecting the registration and licensing options), it is hard to see how a trade association with just a couple of staff, or victims of human rights violations, will have the means to gather and present reliable and accurate information on PMSCs' performance, absent considerable assistance from HMG.

19. One particularly key aspect of the state duty to protect which currently is not mentioned in the PMSC Consultation Documents is state prosecution. The Consultation Document does countenance a trade-association-based non-judicial grievance mechanism of some kind (which I discuss further below), but makes no mention of how that mechanism might be connected to state-based criminal prosecution. The ultimate penalty that the PMSC Consultation Documents seem to countenance, where a PMSC is found to have violated human rights, is expulsion from the trade association. Unless provision is made for the trade association to provide information it has garnered about possible human rights violations to appropriate state authorities (whether in the UK or in host states), the result may be that HMG finds itself in the position of failing to discharge its duty to protect (either through investigating and prosecuting human rights crimes committed within its territory or jurisdiction, or through the provision of mutual legal assistance to other states who may be in a better position to conduct such investigations and prosecutions).

²⁸⁸ United Nations, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises", UN Doc. A/HRC/11/13, 22 April 2009, page 7.

²⁸⁹ PMSC Consultation Document, page 12.

²⁹⁰ See James Cockayne and Emily Speers Mears, "Private Military and Security Companies: A Framework for Regulation", International Peace Institute, March 2009, available at www.ipinst.org.

²⁹¹ PMSC Consultation Document, page 9.

20. The PMSC consultation documents also say nothing about whether HMG has considered addressing existing lacunae in UK law to ensure that UK courts have jurisdiction to hear civil and/or criminal cases against:

- UK-based PMSCs and/or their personnel, for conduct occurring outside the UK’s territory or jurisdiction, but in a territory or jurisdiction where no effective remedy is available.
- UK-based PMSCs and/or their personnel, for conduct occurring outside the UK’s territory or jurisdiction, but while performing under contract to HMG.
- Directors of UK-based PMSCs for acts and omissions occurring in UK territory or jurisdiction resulting in human rights violations outside UK territory or jurisdiction.

21. Additionally, the FCO consultation document places great emphasis on the prospect of HMG pushing for the development of an international regulatory framework. This is commendable. As Foreign Secretary Miliband correctly asserts in his foreword to the FCO consultation document: “This is a global issue; it requires a global response.”²⁹² As part of its efforts to discharge its duty to protect, HMG could promote such an international regulatory framework through a number of existing or new channels, including the discussion of a Code of Conduct currently being promoted by the Swiss government, the UN Working Group on Mercenaries (which has a mandate from the Human Rights Council, including the UK, to develop an international convention on private military and security companies) or through a bilateral agreement with the U.S. (whose Congress is currently considering legislation directing US Secretary of State Clinton to negotiate such an international regulatory framework).

22. Any effort by HMG to promote such an international framework should be consonant with the Ruggie policy framework. HMG could incorporate the Ruggie framework into its efforts to promote an international regulatory framework, for example by ensuring that discussions at the upcoming Wilton Park Conference being convened by the Swiss government to discuss possibilities for international regulation considers how to ensure such a regulatory framework accords with the Ruggie policy framework. HMG could also encourage the UN Working Group on Mercenaries to look to the Ruggie POLICY framework as a basis for its own work in this area.

Recommendation 3: The Joint Committee on Human Rights should encourage Her Majesty’s Government to clarify how any system for the regulation of UK-based PMSCs will allow for effective investigation and prosecution of apparent criminal conduct, either in the UK or elsewhere.

Recommendation 4: The Joint Committee on Human Rights should encourage Her Majesty’s Government to incorporate the Ruggie policy framework into its efforts to promote an international regulatory framework for private military and security companies.

Example 2: *the corporate Responsibility to Respect and the proposed PMSC “Code of Conduct”*

23. Another area where the JCHR may wish to consider the practical opportunities provided by the Ruggie policy framework is in the area of corporate “human rights due diligence” in the UK-based PMSC industry. The latest report by Professor Ruggie to the UN Human Rights Council explains that the concept of “human rights due diligence”, within the corporate “responsibility to respect”, involves ongoing analysis of a company’s operating environment, and not simply a one-off, prior-to-performance scan. The concept, explains Professor Ruggie, involves “a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks”.²⁹³

24. While single-company and trade-association Codes of Conduct may be important mechanisms for ensuring such ongoing due diligence, that necessitates establishing an ongoing “feedback loop, alerting Governments, business and society as a whole when all is not well, while providing opportunities for early intervention and resolution before greater harm occurs”.²⁹⁴

25. For that to occur, a company’s human rights due diligence process must consider first, “the country and local context in which the business activity takes place”; second, “what impacts the company’s own activities may have within that context, ... understanding that its presence inevitably will change many pre-existing conditions”; and third, “whether and how the company might contribute to abuse through the relationships connected to its activities, such as with business partners, entities in its value chain, other non-State actors, and State agents”.²⁹⁵

26. This all suggests that the Ruggie policy framework anticipates that companies that discharge their responsibility to respect will engage in ongoing assessment of the human rights impacts of their services and relationships. Any industry-wide Code of Conduct should therefore ensure that companies operate on that basis.

²⁹² PMSC Consultation Document, page 5.

²⁹³ United Nations, “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises”, UN Doc. A/HRC/11/13, 22 April 2009, page 18.

²⁹⁴ *Ibid.*, page 27.

²⁹⁵ *Ibid.*, page 14.

27. Absent further detail, it is unclear whether the “Code of Conduct” being promoted by the FCO for the UK PMSC industry will in fact create incentives for UK-based PMSCs to engage in such ongoing human rights due diligence. At present, HMG has simply stated that the “code of conduct will ... cover compliance in accepting contracts, incidents and accountability, resource management and responsible behaviour and promote respect for International Humanitarian Law and (IHL) [sic] and Human Rights Law (HRL)”.²⁹⁶

28. Whether or not such a Code of Conduct will promote company behaviour in line with the Ruggie policy framework will depend on what is meant by “incidents and accountability” and “responsible behaviour”. It should be clear that a Code of Conduct which deals only with pre-performance behaviour (such as adoption of internal codes of conduct and ethics, criteria for acceptance of contracts, and vetting, equipping and training of personnel) will not be adequate. To comply with the Ruggie policy framework, any Code of Conduct will need to address ongoing performance by assessing human rights impacts throughout the contract or project period. Such assessment should not rely solely on passive receipt of complaints by the company or its trade association, but should promote proactive human rights impact assessment by the company itself, even in the absence of specific grievances being received.

Recommendation 5: The Joint Committee on Human Rights should seek clarification by Her Majesty’s Government of how any “Code of Conduct” for UK-based private military and security companies will ensure they discharge their responsibility to respect human rights, in particular by requiring a process of ongoing human rights due diligence.

Example 3: *Access to Remedy and the proposed trade-association-based PMSC grievance mechanism*

29. The PMSC Consultation Document proposes that an existing trade association, the British Association of Private Security Companies, monitor the conduct of its members, receive complaints against them, and impose sanctions for their failure to comply with the Code of Conduct.

30. The details of this grievance process are not yet specified—they clearly remain to be considered through the consultation process. However, the costings provided by HMG suggest a somewhat rudimentary investigation and review procedure:

“The trade association estimate [sic] that the setting up of a rigorous internal procedure to adjudicate on alleged breaches of the code would cost about £250,000 p.a., to cover legal advice and the services of a reviewer.”²⁹⁷

31. There is no mention made in this impact assessment of financial assistance to complainants, translation services, appeal procedures, raising public awareness of the grievance mechanism, dissemination of its decisions, or conciliation, mediation or arbitration services.

32. It is hard to square such a mechanism, even if its outlines are still somewhat obscure, with the principles for effective non-judicial grievance mechanisms proposed by Professor Ruggie in 2008:

92. Non-judicial mechanisms to address alleged breaches of human rights standards should meet certain principles to be credible and effective. Based on a year of multi-stakeholder and bilateral consultations related to the mandate, the Special Representative believes that, at a minimum, such mechanisms must be:

- (a) Legitimate: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process.*
- (b) Accessible: a mechanism must be publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal.*
- (c) Predictable: a mechanism must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome.*
- (d) Equitable: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms.*
- (e) Rights-compatible: a mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards.*
- (f) Transparent: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.²⁹⁸*

²⁹⁶ PMSC Consultation Document, page 9.

²⁹⁷ HMG Impact assessment, available at <http://www.fco.gov.uk/resources/en/word/5029385/14432318/pm-sc-impact-assessment>, page 16.

²⁹⁸ Footnote omitted. United Nations, “Protect, Respect, and Remedy: A Framework for Business and Human Rights”, UN Doc. A/HRC/8/5, 7 April 2008, page 24.

33. In particular, additional detail could be provided by HMG to explain how the grievance process envisaged will ensure adequate access for overseas victims of alleged human rights violations committed by UK-based PMSCs. This will need to address issues such as the provision of information about the grievance mechanism to the communities where UK-based PMSCs operate; assistance to overcome barriers of language, literacy, finance and distance; and dissemination of the mechanism's decisions.

34. Additionally, HMG could take steps to ensure that any trade-association-run grievance mechanism has adequately "clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process".²⁹⁹ In his latest report to the UN Human Rights Council, Professor Ruggie added a seventh principle to those listed above, stressing that where companies provide a non-judicial grievance mechanism, "they should operate through dialogue and mediation rather than the company itself acting as adjudicator".³⁰⁰ Similar concerns might arguably be in play where companies operate a joint non-judicial grievance mechanism, through a trade association, which is the arrangement apparently envisaged by HMG for UK PMSCs. Such considerations are particularly salient given the experience of the PMSC industry association in the U.S. (the International Peace Operations Association), which has been criticized for the opaque manner in which it has handled complaints against its membership, including Blackwater.

Recommendation 6: The Joint Committee should invite the Foreign and Commonwealth Office to clarify how an industry-run Grievance Mechanism for the private military and security industry will ensure respect for the principles of legitimacy, accessibility, predictability, equity, rights-compatibility, transparency and independence outlined in the Ruggie policy framework.

CONCLUSION

35. The Joint Committee on Human Rights' Inquiry into Business and Human Rights provides an important opportunity for ensuring that HMG demonstrates its commitment to the Ruggie policy framework, as HMG works with the PMSC industry to explore more effective regulatory arrangements. The Ruggie policy framework, in turn, could provide important practical guidance to HMG regarding what kinds of regulatory arrangements ought be put in place.

36. There are many ways in which states can work with business actors to provide effective protection of human rights in the PMSC industry, including licensing, registration, certification, auditing, peer-review and individual-complaints-based grievance mechanisms.³⁰¹ HMG is to be commended for initiating a discussion about how these arrangements might feasibly be put in place for the UK industry, and globally. At the same time, however, any such effort should be consonant with the broader approach by HMG to "business and human rights" issues, or it will risk creating a perception of policy incoherence.

37. The happy coincidence of the JCHR Inquiry and the PMSC Consultation offers an opportunity for HMG to explore, in very practical terms, how the Ruggie policy framework can guide its efforts to ensure respect for—and promotion of—human rights. The JCHR should seize this opportunity to engage with HMG, to apply the Ruggie policy framework and to assist HMG's laudable efforts to improve standards within the PMSC industry.

James Cockayne

May 2009

Memorandum submitted by Margo Drakos, Tarek Maassarani, and Jenik Radon

INTRODUCTION

The benefits of extractive industry investment, production, and development have come at the expense of many of the host states where business is conducted. The world's most corrupt and least developed countries, such as Angola, the Democratic Republic of the Congo, Myanmar, Nigeria, Sierra Leone, and Sudan, contain some of the world's most valuable natural resources. In theory, the revenue generated from these commodities has the potential to elevate developing countries out of poverty and thus minimize the cycles of conflict and humanitarian disasters commonly found in the developing world. In reality, extractive projects frequently adversely affect the environment and disrupt the local economic and social fabric, which potentiates poverty, disease, and conflict.

This submission will describe the Human Rights Impact Assessment (HRIA), a mechanism for multinational corporations (MNCs) to proactively mitigate or eliminate the negative human rights impacts of their operations in the developing world, while magnifying their positive impacts. Moreover, it will demonstrate that pushing for companies to conduct HRIA has the potential to yield economic rewards, hopefully changing the calculus that respecting human rights is an expensive departure from the core mission of extractive enterprises.

²⁹⁹ Ibid.

³⁰⁰ UN Doc. A/HRC/11/13, page 23.

³⁰¹ Further possibilities are explored in James Cockayne et al., *Beyond Market Forces: Regulating the Global Security Industry* (International Peace Institute, forthcoming June 2009), 320 pp.

The authors have published, practiced, and taught on the subject, having examined United States-based businesses and case studies where egregious human rights violations occurred or were mitigated. Additionally, Tarek Maassarani is a litigator for the *Wiwa v. Shell* case which is going to trial in New York City May 26, 2009. This case centers on Shell Corporation's assistance and financing of Nigerian soldiers who used deadly force against the indigenous population, the Ogonis, throughout the early 1990s to repress a growing movement against the oil company. Although our work is centered on the United States legal framework, we believe our findings are applicable to the United Kingdom Government and business community.

BUSINESS AND HUMAN RIGHTS

The world's largest MNCs operate where resources exist, regardless of a host state's infrastructure or capacity. As a result, three core challenges emerge. First, many of these valuable natural and human resources are located in developing countries where the rule of law is weak or nonexistent. Most of these states do not monitor or enforce minimum internationally recognized human rights standards. Second, MNCs are often the only significant economic opportunity for the state. The government often lacks the capacity or legitimacy to reign in the power and activities of MNCs even if they so desired. As a result, the ruling elite, often in an effort to maintain power, overlooks labor, environmental, and safety standards in order to accommodate MNCs and to maintain control of the funds generated. Finally, the lack of uniformity in defining human rights and their relevance to MNCs results in legal uncertainty and unclear regulations for private entities operating in a host state.

In spite of the challenges associated with conducting business in the developing world, there is potential for good. Capital from MNCs provides the opportunity for economic development, which can promote an open society. When MNCs operate with sound judgment, they assist in creating state guidelines that ensure transparency and the appropriation of funds. They also have the potential to raise a state's labor, health, human rights, and environmental standards. In reality, these benefits are rarely realized. Extractive industry projects in the developing world commonly cause direct or indirect environmental, health, and human rights violations; legitimize corrupt regimes; and provide little to no job opportunities for the domestic economy. These infractions are intertwined, but they can be classified into five general categories.

1. *Corrupt Regimes Become Legitimized.* When MNCs begin project development planning, dealing with one regime reduces the MNCs' complexities. In this instance, the ruling elite controls all aspects of the negotiated deal and services for the MNC; from transportation and security personnel to payment and revenue allocation structures, those controlling the state's power provide all services. When commercial production begins, the new source of revenue serves to legitimize, empower, and enable the existing, often autocratic or rebel, regimes. The misappropriation of economic benefits from resource revenue is rampant and devastating to the host state.ⁱ

2. *Forced Relocation of Populations around MNC Projects.* Construction of facilities and infrastructure necessarily requires resettlement of populations, often involuntarily. Displaced villagers are rarely provided with explanations and information regarding their resettlement, meaningful and adequate compensation, or basic necessities in their new home sites.ⁱⁱ

3. *Abuses at the Hands of Security Guards.* Without buy-in from local communities and sufficient planning for sustainable development, it becomes necessary for MNCs to employ security guards for their facilities and infrastructure. When MNCs turn to the ruling elite to secure or clear a production field or pipeline route, guards are often government or paramilitary forces. Security personnel are often antagonistic to local populations and commonly subject them to forced labor and other physical abuses.ⁱⁱⁱ

4. *Environmental Degradation Violates Health and Living Standards.* Once production facilities are up and running, public health catastrophes can result from a project's toxic leaks, gas flares, and dumping of waste.^{iv}

5. *"Dutch Disease": The Boom Town Effect.* Large-scale projects can drastically change local economies, a phenomenon commonly referred to as "Dutch Disease." The sale of extractive exports increases the value of the local currency, making other export goods uncompetitive in the international market. As a result, a country becomes solely dependent on resource extraction. As the costs of goods and services rise sharply, labor is drawn away from traditional sectors, such as education and agriculture, into temporary cash service jobs. Traditional culture and social cohesion are disrupted by these jobs and incentives for corruption are increased. Far from home, workmen often engage with flourishing drug and prostitution markets, contract HIV/AIDS, and then unknowingly spread the deadly virus in their home communities. Additionally, the precarious economic system collapses once a project matures, leaving vulnerable and dependent workers in an under-diversified economy with fewer employment opportunities than prior to the beginning of resource extraction.^v

THE HUMAN RIGHTS IMPACT ASSESSMENT FRAMEWORK

The HRIA is designed to serve as a practical medium- and long-term risk management tool that incorporates the human rights rubric into a company's decision-making process. Corporate risk through the human rights lens is defined here as legal liability, potential for project interruption or abandonment, and/or negative impacts on the corporate brand. An HRIA is designed to anticipate corporate risk prior to,

during, and after project implementation. An HRIA focuses on human rights impacts occurring within a corporation's sphere of influence, which may either, contribute to or detract from the fulfillment and progressive realization of internationally-recognized human rights standards.

The HRIA framework is grounded in the successes of environmental and social impact assessments that have been the cornerstone of environmental and social protection in developed countries. Both these EIAs and SIAs represent proactive, transparent, and structured approaches that avoid or mitigate significant and irreversible damage through describing preexisting conditions on the site, creating a plan for action, identifying potential impacts that may occur as a result of the action, and evaluating impacts and risk-mitigating alternatives. Impact Assessments are disclosure tools that governments and corporations recognize and accept. This submission proposes building on the SIA/EIA principles to create the HRIA, an early warning system and an essential first step in creating transparent accountability within corporations and host states. The seven crosscutting basic principles that should guide the corporate HRIA are described below.

1. *Designing an HRIA Team: Work with Competent Practitioners and Credible Data.* It is essential to choose the right team to work with an MNC in order to devise an effective and efficient HRIA. External auditors should exhibit familiarity with HRIAs, and maintain financial and institutional independence to avoid actual or perceived corrupt practices, the team should report directly to the MNC's board of directors. Employing and consulting with credible experts in the field of human rights, anthropology, political science, and local NGOs provides an MNC insight into the geopolitical complexities on the ground; this is essential to building a sound HRIA that is integrated into corporate decision-making and viable to the international community.

2. *The Business Case: Involve All Stakeholders and Create a Sense of Ownership for All.* Once the HRIA team is defined and has peripherally assessed the host state's social, political, and economic climate, the team needs to identify and meet with representatives of all groups that will be involved with or affected by the project. This should include everyone from senior staff to under-represented stakeholders such as project workers, host communities, and local NGOs. Maximum inclusion of all actors, especially any politically marginalized segments of the state's population, is particularly critical when operating in states where the rule of law and infrastructure is virtually absent. Community buy-in, joint problem-solving, cultural exchange and liability protection is essential to maximize short- and long-term project investment opportunities. In the event that misappropriations of funds or human rights violations result during project implementation, the MNCs will have established a relationship with all players and documentation of that interaction.

3. *Design Methods for Defining, Measuring, and Addressing Impacts.* Once all potential stakeholders are determined, impacts need to be identified, defined, and classified into categories. Similar to a practical risk management tool, this step simulates the interests and demands of all stakeholders throughout the length of a project. Each impact should then be pre-classified as a: (1) potential problem; (2) potentially mitigated problem; or (3) potentially reversible problem. The HRIA team should create a methodology to address each category. Each proposed action should be assessed while examining its impact on local dynamics. This will create long-term risk management by strengthening and legitimizing the impact assessment while simultaneously encouraging accountability. It is timely and cost efficient to discuss, define, and forecast potential complex issues surrounding the project's impact on local communities prior to production; for example, once production is under way, the daily burn rate is significantly increased compared to the pre-project planning stage. A byproduct of this step is the creation of a complex emergency response system, should problems arise during or after production. This system can be used in tandem with the local and international community experts, who would have been previously approached by the team.^{vi}

4. *Assess Equity of Impacts.* After gathering reliable and informed data, the HRIA team should determine the positive and negative impacts from the project and any potential unbalanced distributions between communities, such as the state's current human rights situation, stability, and any historical divisions. Assessing the equity of impacts directly confronts potential complicity and liability issues; this requires MNCs to be familiar with existing labor, environment, health, and housing standards around the project as they pertain to human rights. Groups that are disenfranchised may become frustrated and aggressively retaliate, thereby threatening production, as is witnessed in Nigeria.

5. *Internalize the Impact Assessment in Corporate Decision Making.* The HRIA assumptions and projections should be institutionalized throughout the corporate management structure; otherwise it will be a useless exercise. Clearly delineated internal codes of conduct need to be outlined for receiving and internalizing in-formation with explicit policies for addressing discrimination, labor, security, and indigenous peoples. At this time, staff training and management protocol should be designed for overseeing contractors and local employees. If the perceived risks outlined by the HRIA suggest that the human cost from the project could be devastating, the board room is required to consider suspending the project. If the project is recommended, communication between the HRIA team and the corporate decision-makers should be clearly outlined. Once revenue is flowing into the community, bi-monthly meetings are recommended with the HRIA team and the corporate decision makers. The MNC needs to create a sense of ownership in the project that permeates through every stakeholder, including the local population and

NGOs, company crane operators and engineers, the host state government, Wall Street executives, and stockowners. When team pride and integrity is nurtured at all levels of a business, optimal production and results will be realized, even when operating in complex and volatile areas.

6. *Transparency: Share Findings.* The first step in gaining credibility with the company's stakeholders, international initiatives, and human rights organizations is to publicly disclosing the process and results of a HRIA. The public disclosure of findings by MNCs sends the right message to the ruling elite, encourages discussion, media coverage, and transparency, and potentially decreases corporate complicity in the event of litigation or human rights atrocities. International organizations, such as branches of the UN, World Bank, IMF, and Open Society, can provide economic and development advisors to the state, offering petroleum revenue allocation structures, debt restructuring, development, and education initiatives. MNCs are presented with a unique opportunity to create internal standards early, involve the public, and set operating procedures on the international stage. The MNCs must honestly disclose the HRIA study to an appropriate extent in order to legitimize the corporation's process and decision-making as well as encourage the host state's government and local population participation.

7. *Ongoing Monitoring and Evaluating: Managing Human Rights.* Once a project is underway, the HRIA team should aggressively monitor all human rights impacts related to the project. Detailed monitoring and reporting should include disclosure of profits, payments dispersed to given entities, estimated production rates, fluctuations in the value of the commodity, the impact on the ground, and the status of potential impacts assessed during pre-project planning. Now is the time for the team to draw on the HRIA investment, sharing successes with crane operators, the boardroom, and the press, or working through potential complex issues surrounding complicity, inhumane practices by subcontractors, or misappropriation of funds by the government.

A SMART INVESTMENT

With a global economic recession, plummeting oil prices, and the decrease in oil production, MNC executives are under pressure to cut costs, promote efficiency, increase productivity, and maintain strong profit returns and competitiveness. It may seem contrary to the CEO mindset to dedicate energies toward promoting transparent and ethical dealings with corrupt state regimes. To be sure, MNCs cannot be solely responsible for a state's success or failure to effectively utilize resource revenue to elevate populations out of poverty. However, conducting HRIAs has the potential to yield economic returns in the medium- and long-term. This system is an ethical, promising, and cost-effective tool for MNCs to assess and control the impact of their development activity in places where host governments are unable to safeguard their citizens' rights. HRIAs are win-wins for the corporation. Although more time and money is initially required, an HRIA is a sensible insurance policy, especially considering the monetary and public costs of facing a trail in the long run. Additionally, while oil production is down, it is an optimal time to integrate the HRIA into corporate decision-making, design an independent HRIA team to work with MNCs, and engage the developing world. New processes and procedures are easier to implement when beginning new projects.

RECOMMENDATIONS

Drawing on United States legislation and international voluntary initiatives, the Joint Committee on Human Rights is presented with the opportunity to lead the Western world in designing an HRIA for applicable United Kingdom private- and public-sector overseas projects. The scope of this legislation may encompass extractive and/or other projects with significant human rights impacts undertaken, financed, or otherwise supported by corporations operating or registered in the United Kingdom. This legislation would include application to private lenders, the European Commission on Development, the UK Department for International Development, the British armed forces, and the Commonwealth. The UK Government may design tax incentives for MNCs that adopt and incorporate the HRIA tool into their corporate decision making. It is recommended that the U.K. Government support the creation of an independent and competent board of human rights auditors and/or an auditor certification scheme to provide corporations with reliable and timely impact assessments. To avoid allegations of impropriety, it is advisable to establish a funding or payment mechanism that ensures the financial integrity of the HRIA process.

The United Kingdom should encourage the adoption of Human Rights Impact Assessments at the supranational level and incorporate the cross-sector codes urged by the Global Compact, World Bank, International Monetary Fund, Equator Principals, and others. At the international level, the U.K. Government is encouraged to seek an agreement among states holding corporations directly liable for their HRIA obligations in the absence of domestic accountability. The international community should put significant pressure on developing world leaders to address any real or potential problems from an HRIA. This may include resolutions from the United Nations Security Council, sanctions by the U.K. and other western governments, or MNC royalty penalties outlined as a result of the HRIA.

The development of HRIA continues apace. In June 2007, the International Business Leaders Forum, the International Finance Corporation, and the Global Compact jointly produced their draft Guide to Human Rights Impact Assessment and Management to be tested by businesses and finalized by mid-2009. Independent organizations have also taken salient steps to create HRIA tools and frameworks. Canadian

organization Rights and Democracy is conducting HRIA methodology trials in five countries; The Danish Institute for Human Rights and Aim for Human Rights, a Netherlands organization, have produced HRIA tools that are available online.

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ⁱ For example, DeBeers, the world's largest diamond producer, enabled multiple autocratic regimes to maintain power. However, the company realized that dealing exclusively with corrupt ruling elite often results in human rights atrocities and damages the company's brand—a massive anti-DeBeers publicity campaign was launched in New York City after it became apparent that the company's corporation was legitimizing violent rebels and funding multiple civil wars. “A diamond is forever,” the company's popular advertising phrase turned into a marketing nightmare when grassroots organizations brought worldwide attention to “blood diamonds.” The company operated mines in Botswana, Namibia, South Africa, and Tanzania, and had effectively traded guns for gems with rebel groups in conflict zones such as Angola, the DRC, and Sierra Leone. The diamond industry has a contrived value, largely through marketing campaigns, and regulates supply to match demand. DeBeers took this negative press, turned it into a positive by working with the international community, including the United States, and avoided liability for passive or active complicity in human rights violations. In 2002, following UN Security Council resolutions imposing sanctions against “blood diamonds,” diamond traders, DeBeers, and major diamond trading countries created an international protocol known as the Kimberly Process, which calls for minimum standards of certification of rough diamonds from conflict regions. The countries and companies agreed to establish internal controls to eliminate the import and export of conflict diamonds from their territories. Although steps have been taken to ensure transparency and independent monitoring, many technical and operational complexities remain with significant loopholes. As will be described below, conducting an HRIA has the potential to add another level of accountability and protection for host-state citizens.

ⁱⁱ Chevron discovered vast, significant oil fields in southern Sudan in the 1980s, but was forced to withdraw from Sudan in 1984, due to the instability in the region; during this time three Chevron employees were killed by southern rebels. In 1988, Chevron resumed its activities and developed a six-year exploration and drilling program. With the Sudanese civil war intensifying between the north and south, and production facility and employee safety a significant concern, Chevron relinquished all of its Sudanese land concessions in 1991, after spending more than \$1 Billion. By 1992, CNPC, Britain's Greater Nile Operating Company (GNPC), and the National Company of India (ONGC) had moved into Chevron's former drilling blocks. To provide access for companies to drilling sites, the Sudanese government forcibly removed local people, their cattle, and grain from the resource-rich land. The government, using helicopter gunships to curb resident opposition, relocated large population groups to “peace camps” in western Sudan, Darfur, where they were forced to live and work for the soldiers for free. While 3 Million western Sudanese citizens have been displaced and over 200,000 killed by the government-backed janjaweed, China and other consortiums continue to operate throughout the region.

ⁱⁱⁱ In 1996, the Union Oil Company of California, UNOCAL, became the first corporation in U.S. history to face trial for committing human rights abuses abroad under the Alien Tort Claims Act of 1789. During the 1980s, the oil giant and its partners had hired local military forces in Burma, now recognized as Myanmar, to secure a pipeline carrying natural gas from the Andaman Sea into Thailand. These army units forced locals to work on the pipeline, raped, robbed, and murdered civilians, and displaced entire villages. Thirteen peasants from Myanmar filed suit against UNOCAL officials in U.S. federal and California state courts, accusing the oil company of forced relocation, slave labor, rape, torture, and murder. The Supreme Court of California ruled in favor of the peasants, noting that UNOCAL “knew or should have known that the military did commit, was committing, and would continue to commit these tortuous acts.” After nearly a decade of litigation, UNOCAL agreed to a confidential multi-Million-dollar settlement. UNOCAL was acquired by Chevron Corporation shortly after the settlement.

^{iv} The Amazon region of Ecuador has suffered grave environmental degradation due to oil extraction. In 1971, Texaco began building oil wells in areas of the Ecuadorian rain-forest, which were inhabited by indigenous communities, and continued project development through 1992. The rivers in the region are vital to the livelihoods of the native people, providing them with food, hygiene, and transportation. Texaco's contamination of the rivers brought about alarming rates of cancerous tumors, auto-immune diseases, birth defects, and spontaneous miscarriages to the indigenous populations. Dwindling fish stocks led to widespread malnutrition, poverty, and migration to the cities where employment was already lacking. In 2001, the Chevron Corporation acquired Texaco, which became a brand name under Chevron. In 2003, United States trial attorneys and thousands of Ecuadorian peasants brought a class action lawsuit against Chevron for environmental and human rights infractions while Texaco was operating in Ecuador. Charged with dumping Billions of gallons of toxic oil waste into the local rivers and contaminating an area the size of Rhode Island, Chevron also faces human rights accusations including cultural genocide, and racial and ethnic discrimination. In early 2008, an Ecuadorian court-appointed independent geological engineer recommended that Chevron spend \$8 to \$16 Billion to clean up the environmental degradation, if the company loses the case currently in New York courts. In April 2008, Chevron reportedly lobbied the U.S. government to end trade preferences with Ecuador over the lawsuit; the New York court ruled that the case should be tried in Ecuador and is currently under appeal.

^v In the 1960s, Nigeria possessed a diversified economy; it was the largest producer and exporter of palm oil, the second largest producer of cocoa, and the leading exporter of cotton, rubber, and hides. Farmers produced 70% of Nigeria's exports and 95% of its domestic food needs. Although oil was discovered in the Niger Delta in 1956 by Royal Dutch Shell and British Petroleum, it was not until the end of the Nigerian Biafran war and the rise in oil prices in 1971 that Nigeria began to receive significant petroleum revenue. In 1983, imports financed from borrowed resources had risen dramatically to over 33% of gross domestic product. Today this figure is almost double from 1974 figures when imports were 17.8% of GDP. Nigeria's economy has become single commodity-based; in 2007 with the high price of petroleum, oil and gas was more than 95% of Nigeria's exports, accounted for 85% of government revenues, and 52% of GDP. Nigeria is now a food-importing economy. Due to corruption, poor governance, and microeconomic policy, the government incurred \$37 Billion in external debt at its peak in 2005, up from \$1 Billion in 1971. As the Nigerian population increased, agriculture production decreased, employment opportunities vanished, and today 54% of the population lives on less than one dollar a day.

Memorandum submitted by the Institute of Employment Rights

INTRODUCTION

1.1 The activities of business affect human rights in a number of ways, but most obviously as employers. There are a number of human rights obligations to which the United Kingdom is a party which are designed to protect the human rights of people while at work and to regulate the abuse of power by businesses over their employees. We would accept that not all international labour treaties are classified as human rights treaties; and here we address only a few those which are so classified. We accept also that these treaties are not normally addressed to businesses directly; but they create norms with which businesses can be expected to comply, or in relation to which the State has a duty to compel compliance.

1.2 The IER is concerned that these fundamental human rights provisions inadequately implemented in the United Kingdom. The state of law is such that it is possible for British business operating in this country to act lawfully in circumstances in which these obligations are not circumvented. As will be clear from what follows, the human rights obligations that affect businesses as employers are vast. Space permits only a brief account of one of these aspects of the problem, namely the right to freedom of association. Questions relating to the role of British business overseas are considered in a separate submission by ICTUR, which we support.

INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

2.1 The starting point is the International Labour Organisation which is responsible for advancing and protecting labour standards throughout the world. There are now 182 countries which are members of the ILO (a United Nations agency), and at the present time there are 188 international labour conventions (treaties binding in international law, when ratified). These conventions include a number of Conventions (all of which have been ratified by the United Kingdom) dealing with what are regarded by the ILO as human rights issues, as follows

- Freedom of association and the effective recognition of the right to collective bargaining (Conventions 87 and 98);
- Effective abolition of child labour (Conventions 138 and 182);
- Elimination of all forms of forced or compulsory labour (Conventions 29 and 105);
- Elimination of discrimination in respect of employment and occupation (Conventions 100 and 111).

2.2 In addition to the ILO, a second source of human rights obligations designed to constrain the activities of business (and others) is the Council of Europe. Here the European Social Charter of 1961 (ratified by the United Kingdom) includes a number of obligations addressed to States though designed to deal with the protection of workers from abuse by business (and other employers). They include the

- The Right to Organise (article 5)
- The Right to Collective Bargaining (article 6(2));
- The Right to Strike (article 6(4)).

There is now a Revised Social Charter of 1996 (signed but not ratified by the UK), which includes a more comprehensive list of rights and a procedure (the Collective Complaints procedure) for their better supervision. The United Kingdom has signed but not ratified this treaty, though we have proposed in the past that it should do both.

2.3 The foregoing ratified treaties have yet greater force by reason of the reliance on ILO and Social Charter jurisprudence by the European Court of Human Rights in recent cases on article 11 of the ECHR. This provides protection for the right to freedom of association "including the right to form and join trade unions for the protection of his interests". The cases include *Wilson v United Kingdom*³⁰² which related to

³⁰² [2002] IRLR 568.

the conduct of Associated Newspapers in withholding benefits from Mr Wilson because he refused to surrender his rights relating to collective bargaining; and more recently the breath-taking decision of the Grand Chamber in *Demir and Baykara v Turkey*, 12 November 2008, where the Court repudiated earlier jurisprudence on article 11. Influenced by ILO Convention 98, the European Social Charter and the national traditions of member states of the Council of Europe, the Grand Chamber said that

*having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the “right to form and to join trade unions for the protection of [one’s] interests” set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.*³⁰³

2.4 Finally, so far as business and human rights are concerned, reference should also be made to the OECD Guidelines on Multinational Enterprises,³⁰⁴ which have been endorsed by all 30 OECD member states, as well as 11 other countries.³⁰⁵ The guidelines (revised in 2000) provide

Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:

- (a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers’ associations, with such representatives with a view to reaching agreements on employment conditions.
- (b) Contribute to the effective abolition of child labour.
- (c) Contribute to the elimination of all forms of forced or compulsory labour.
- (d) Not discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.

THE RIGHT TO MEMBERSHIP OF A TRADE UNION

3.1 As we have thus seen, the right to membership of a trade union is recognised by a host of human rights treaties: ILO Conventions 87 and 98, the ECHR, article 11, and the European Social Charter 1961, article 5. It is also protected by British law, in the form of the Trade Union and Labour Relations (Consolidation) Act 1992, which makes it unlawful for an employer to refuse to employ someone because of his or her trade union membership (widely construed by the courts). It is also unlawful to subject someone to a detriment because of his or her membership of a trade union or participation in trade union activities, and unfair to dismiss someone or select someone for redundancy for the same reasons. These provisions were strengthened by the Employment Relations Acts 1999 and 2004, the latter amendments having been introduced only after the European Court of Human Rights found that the discrimination against a trade union activist by Associated Newspapers (the publisher of the *Daily Mail* and the *Mail on Sunday*) violated article 11 of the ECHR.³⁰⁶ The Employment Relations Act 1999 (s 3) makes additional provision for the making of regulations to deal with employer blacklists, though these powers have never been invoked.

3.2 In addition, trade union membership data is sensitive personal data for the purposes of the Data Protection Act 1998, and as such cannot be processed without the consent of the individual to whom it relates. This, however, has not been effective. On 6 March 2009, the Information Commissioner’s Office issued a Press release in which it was alleged that 44 construction companies had used the services of the Consulting Association Ltd run by a man called Mr Ian Kerr.³⁰⁷ According to the ICO, this man is believed to have “run the database for over 15 years”, and it was said to have included the details of 3,213 workers. According to the ICO. “it uncovered evidence at Kerr’s premises that named construction firms subscribed to Kerr’s system for a £3,000 annual fee” It was stated further that “[c]ompanies could add information to the system and pay £2.20 for details held on individuals”, and that “[i]nvoices to construction firms for up to £7,500 were seized during the raid”. According to press reports, details of workers’ trade union activities and past employment conduct were said to have been recorded on cards, with one individual said to be a “poor timekeeper, will cause trouble, strong TU [trade union]”, while another card referred to a member of the Union of Construction, Allied Trades and Technicians as “Ucatt ... very bad news”.³⁰⁸

³⁰³ Application No 34503/97 , para 154. See also *Enerji Yapi-Yol v Turkey*, 21 April 2009—the ECtHR re-asserted the right to strike as inherent in article 11.

³⁰⁴ For more details, see the submission to this inquiry by ICTUR.

³⁰⁵ Reference might also be made also to the UN Global Compact which provides by principle 3 that: “*Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining*”; and to the ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (4th ed, 2006).

³⁰⁶ *Wilson v United Kingdom* [2002] IRLR 568.

³⁰⁷ http://www.ico.gov.uk/upload/documents/pressreleases/2009/tca_release_060309.

³⁰⁸ *Guardian*, 6 March 2009.

3.3 The companies alleged to have been involved are: Amec Building Ltd; Amec Construction Ltd; Amec Facilities Ltd; Amec Industrial Division; Amec Process & Energy Ltd; Amey Construction Ex-member; B Sunley & Sons Ex-member; Balfour Beatty; Balfour Kilpatrick; Ballast (Wiltshire) plc Ex-member; Bam Construction (HBC Construction); Bam Nuttall (Edmund Nuttall Ltd); C B & I; Cleveland Bridge UK Ltd; Costain UK Ltd; Crown House Technologies; (Carillion/Tarmac Construction); Diamond (M & E) Services; Dudley Bower & Co Ltd Ex-member; Emtor (Drake & Scull) Ex ref; Emtor Rail; G Wimpey Ltd Ex-member; Haden Young; Kier Ltd; John Mowlem Ltd Ex-member; Laing O'Rourke (Laing Ltd); Lovell Construction (UK) Ltd Ex-member; Miller Construction Ltd Ex-member; Morgan Ashurst; Morgan Est; Morrison Construction Group Ex-member; NG Bailey; Shepherd Engineering Services Ltd; Sias Building Services; Sir Robert McAlpine Ltd; Skanska (Kvaerner/Trafalgar House plc); SPIE (Matthew Hall) Ex-member; Taylor Woodrow Construction Ltd Ex-member; Turriff Construction Ltd Ex-member; Tysons Contractors Ex-member; Walter Llewellyn & Sons Ltd Ex-member; Whessoe Oil & Gas Ltd; Willmott Dixon Ex-member; Vinci plc (Norwest Holst).³⁰⁹

3.4 An enforcement notice was issued by the ICO against Mr Kerr,³¹⁰ who according to the BBC “faces prosecution and a £5,000 fine if found guilty of breaching the Data Protection Act”, while the businesses using his services “would be issued with a legal order not to repeat the offence, and if they breached it they too would face prosecution”.³¹¹ That, however, does not seem an adequate response to the very real hardship potentially suffered by the blacklisted individuals, as reported in the national and regional press.³¹² In our view, a scheme should be introduced to compensate these people, with a template for this purpose to be found in the Employment Act 1980.³¹³ This established a publicly funded retroactive compensation scheme for workers who claimed that they had suffered loss as a result of having been excluded from employment because of their non-membership of a trade union where a union membership agreement was in force. The individuals who appear on Mr Ian Kerr’s blacklist should be informed of that fact;³¹⁴ they should be informed of the identity of the companies which were supplied with their personal data (if that information is currently available); and they should be also entitled to make an application under the proposed compensation scheme if they are able to demonstrate the likelihood of having suffered loss because of unemployment relating to their blacklisting. Legislation which may be necessary for these purposes should also impose a levy on the employers who used the services of Mr Kerr, to pay for the compensation of the workers affected. This would be in addition to any other possible legal remedies the blacklisted workers may have against Mr Kerr, his company, and the businesses that used Mr Kerr’s services.

THE RIGHT TO BARGAIN COLLECTIVELY

4.1 The right to bargain collectively is also protected by a number of the international human rights treaties referred to above; it has also been read into article 11 of the ECHR, with potentially important implications for domestic law, particularly in view of the Court of Appeal’s reluctance to engage with the issue in a case involving Mirror Group Newspapers.³¹⁵ According to the Court of Appeal, “the right to be recognised for the purposes of collective bargaining does not fall within the rights guaranteed by Article 11” (para 35).³¹⁶ In the *Mirror Group* case, the company had recognized a small union (BAJ) which had at most one member, in a deliberate attempt to prevent recognition by the NUJ which was thought to have a majority of the workers of the bargaining unit in membership. This dispute arose in the context of the statutory recognition procedure, which enables trade unions to make an application for recognition to the Central Arbitration Committee with a view to a bargaining order being imposed unless the employer agrees to recognize the union voluntarily in the meantime. The process, which requires the union to demonstrate majority support, is complicated and provides employers with many opportunities to resist the union’s application. The TUC has also made complaints to the ILO that the procedure fails to comply with Convention 98.³¹⁷ Many businesses have resisted collective bargaining arrangements and have usually been able to avoid extending bargaining rights to their workers despite the procedure.³¹⁸ These include household names such as Amazon, Asda, Black and Decker, BSkyB, Gatwick Express, Kettles’ Foods, Kwik-Fit, Ryanair, Shoezone, and T Mobile. Others include the following.

³⁰⁹ See www.ico.gov.uk/upload/documents/pressreleases/2009/tca_release_060309.

³¹⁰ See www.ico.gov.uk/upload/documents/library/data_protection/notices/tca_enforcement_notice.

³¹¹ According to the BBC, “Balfour Beatty said it would co-operate with the ICO investigation, and that it did not condone the use of blacklists “in any circumstances”. Other companies either said they would conduct their own investigation, or had “inherited” their links with the Consulting Association from previous firms they had taken over”.

³¹² The matter has also been raised in Parliament by Mr Michael Clapham MP.

³¹³ See K D Ewing and W M Rees, “Closed Shop Dismissals 1974—1980—A Study of the Retroactive Compensation Scheme” (1983) 12 ILJ 148.

³¹⁴ At the time of writing, the ICO is prepared to provide this information to those workers who contact them, a helpline having been set up for this purpose.

³¹⁵ *R (NUJ) v CAC* [2005] EWCA Civ 1309.

³¹⁶ *Ibid*, para 35. Following *Demir and Baykara v Turkey* (para 2.3 above), however, that is no longer an accurate statement of the law.

³¹⁷ These complaints relate to the exclusion of small businesses, the role of employer created staff associations, and the lack of adequate protection against unfair practices. See for the most recent consideration of this issue by the ILO Committee of Experts: <http://www.ilo.org/ilolex/gbe/ceacr2009.htm>.

³¹⁸ In the sense we understood to be contemplated by Convention 98, that is to say bargaining with independent trade unions.

4.2 News International, like media companies all over the world relies heavily on human rights instruments as the foundation of its business, including the right to freedom of expression, which it is assiduous in promoting, through the courts at the highest level if necessary. News International derecognized the print and journalist unions in the 1980s in controversial circumstances, and ceased collective bargaining with them. Since then the company has established the News International Staff Association which it recognized for the purposes of collective bargaining, but which has been denied a certificate of independence from the Certification Officer for Trade Unions and Employers' Associations (the trade union regulator) on the ground that while it was no longer subject to domination or control by the company, it could not be said that it was not "liable to interference".³¹⁹ Nevertheless, independent trade unions are not permitted to make an application for recognition under the statutory procedure because the Employment Relations Act 1999 prevents an application being made by one union where another is already recognized. Although an application for recognition can be made only by an independent trade union, an application by such a union can be blocked by the pre-existing recognition of a non-independent trade union. This is despite the fact that ILO Convention 98 provides that "workers" and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration' (article 2). It is also provided that "Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles" (article 3).

4.3 Cable and Wireless plc has a Code of Ethics and Business Principles in which it is committed "to providing a working environment in which employees can realise their full potential and contribute to business success". It also declares that the company will "respect the dignity of the individual and support the Universal Declaration of Human Rights and the ILO Core Conventions".³²⁰ The latter include the right to freedom of association, which for this purpose includes the right to bargain collectively. In 2007 the CWU made a request for recognition which was refused. The company contested the admissibility of the claim, it contested the union's proposed bargaining unit before the CAC and then all the way to the High Court, it successfully contested the union's right to automatic recognition (despite the union having a majority of members in the bargaining unit), it resisted a union complaint that it had indulged in an unfair practice, for example by means of a letter from the CEO of the company to staff during the balloting period "which mentioned, in the first paragraph, the successful trading year and the size of the consequent bonus payments and then, in the second paragraph drew attention to the union recognition ballot and urged colleagues to vote "No", and it won the ballot, with the union securing 77 votes (23% of those voting), despite having 185 members (55.2%) at the start of the balloting period.³²¹ The CAC procedure took over a year to complete, the company was represented by city solicitors (with a partner of Herbert Smith attending one of the CAC cases) and a member of the Bar at key stages, and it employed the services of labour consultants The Burke Group, whose web site brazenly states that it has expertise in "union avoidance", and "preventive labor relations—union free workplaces".³²² Such organizations are sometimes referred to colloquially as "union busters".

4.4 General Electric has an impressive code of conduct, entitled *The Spirit and the Letter*,³²³ in which it commits to

Fair employment practices do more than keep GE in compliance with applicable labor and employment laws. They contribute to a culture of respect. GE is committed to complying with all laws pertaining to freedom of association, privacy, collective bargaining, immigration, working time, wages and hours, as well as laws prohibiting forced, compulsory and child labor and employment discrimination. Beyond legal compliance, we strive to create an environment considerate of all employees wherever GE business is being conducted.

General Electric is also a participant in the UN Global Compact,³²⁴ as well as a TOP Olympic sponsor, and as such enjoys various legal privileges bestowed upon it by the British State in the Olympic and Paralympic Games Act 2006. GE companies have, however, strongly resisted collective bargaining in the United Kingdom:

- GE Caledonian is a company based in Scotland; its website proudly carries both the GE and the Olympic logos. The company refused an application for recognition by AEEU as it then was, and in the process tried unsuccessfully to persuade the CAC to provide the company with a list of the names of its employees who had signed the union's petition requesting recognition (a claim can only get off the ground with the support of 10% of the workforce). If that application had succeeded, it could have had very significant implications for the statutory procedure as a whole, though this was denied by the company's legal representative (Mr Martin Warren), as placing "too much reliance is placed on unsubstantiated allegations of employer victimisation". In that case a union activist formerly employed by the company told the CAC that a company circular sent around the time of the application for recognition invited employees to attend small group

³¹⁹ See K D Ewing "It's Nicer with NISA" *Federation News*, Autumn 2001.

³²⁰ www.cw.com/corporate-social-responsibility/code-of-business-principles.

³²¹ *CWU v Cable & Wireless plc*, CAC, TUR 1/570[2007].

³²² See www.tbglabor.com.

³²³ www.ge.com/files_citizenship/pdf/TheSpirit&TheLetter.pdf.

³²⁴ www.unglobalcompact.org/ParticipantsAndStakeholders/search.

- meetings during which the company would present both sides of the argument in respect of union recognition. He then explained that these meetings had in fact been management presentations as to why union recognition had to be resisted.³²⁵ Support for collective bargaining was overwhelmingly rejected in a ballot (by 449 to 243 on a 95% turnout).³²⁶
- In another case involving a GE company (GE Thermometrics UK Ltd), the union (Amicus) had 47.1% membership (49 members) in a bargaining unit of 104 workers, with support from 55% of the workforce. The union claimed that there had been large scale anti union activity from the company, and “provided evidence of briefings for the workers indicating that recognition will bring about a loss of flexibility which the parent company would not stand for and would endanger the future of the plant and their jobs”. The union also “pointed out that all this went on at a time when the Union had no official access to the workforce and coupled with the one-to-one meetings where pressure was put on workers to resign from the union and a “25th hour” speech on the issue by the worldwide CEO of the company placed unreasonable pressure on the workers to vote against recognition”. The latter were said to be “personal views which the Company had sought to distance itself from”, the company also dismissing “allegations of intimidation as a misrepresentation or misunderstanding of the company’s attempt to make its views about recognition know[n] by the workers”. On another high turnout (95%), a majority voted against the union, with only 38 workers voting in favour of recognition³²⁷.

THE RIGHT TO STRIKE

5.1 The third of the human rights affecting business considered in this submission is the right to strike. As we pointed out in pars 2.1—2.3 above, it is widely recognized as a human right in international human rights treaties, and indeed has incongruously (in light of the current state of English law) been recognized as such by the Court of Appeal.³²⁸ British law has been widely criticized by international human rights agencies over many years for failing to comply with minimum international standards, a matter to which we have brought to the attention of the JCHR on an earlier occasion. These criticisms have been levelled by the UN Committee on Economic, Social and Cultural Rights, the ILO Committee of Experts (on which sits an English High Court judge (Cox J)) and the ILO Freedom of Association Committee, as well as the Social Rights Committee of the Council of Europe.³²⁹ These criticisms relate to the circumstances in which trade unions may be restrained from taking collective action and the circumstances in which individual workers can be dismissed without a remedy for taking such action. In recent years a number of businesses have taken advantage of legal rules operating in the United Kingdom to undermine the right to strike as recognized in international instruments.

5.2 One of the most notorious cases on the dismissal of strikers in recent years relates to the conduct of Friction Dynamics in 2001. The details are to be found in an article published in *The Lawyer* magazine by Mr Andrew Chamberlain, a partner in the law firm Addleshaw Goddard which acted for the company in unfair dismissal claims from August 2002 until the company went into liquidation. According to Mr Chamberlain,

On 30 April 2001, having followed the correct balloting and calling procedures, 86 of [Sir Bill] Morris’s members at the company commenced industrial action. On 1 May 2001, company management wrote to each striker telling thme that “you have . . . repudiated your contract of employment. The company accepts your repudiation”.³³⁰ Following several ACAS brokered meetings between ACAS and T&G officials, the company wrote a further letter to each striker on 27 June 2001, just over eight weeks after the strike started, in which it purported to dismiss them with effect from the following day.³³¹

The story is continued by Ward LJ, according to whom the 86 strikers “brought claims before the Employment Tribunal in Liverpool and in December 2002 that Tribunal found that they had been unfairly dismissed”, with “the compensation which would have become payable to the strikers by Friction . . . estimated to amount to approximately £3 million”.³³² There is evidence that the company’s owner, a Mr Craig Smith, told an employee that “Friction would not be paying the strikers following the decision by the Liverpool Employment Tribunal”, and soon thereafter the company went into voluntary liquidation. However, the business was reformed as Dynamex Friction, buying back the assets from the

³²⁵ See K D Ewing, S Moore and S Wood, *Unfair Labour Practices: Trade Union Recognition and Employer Resistance* (IER, 2003), p 23.

³²⁶ *AEEU v GE Caledonian*, CAC, TUR 1/120[2001].

³²⁷ *Amicus v GE Thermometrics*, CAC, TUR 1/347[2004].

³²⁸ *London Underground Ltd v NUR* [1996] ICR 170, at p 181 (Millett LJ).

³²⁹ See our previous evidence to this committee: HL 193/HC 1188, 2003-04 (21st Report).

³³⁰ According to Ward LJ in *Dynamex Friction Ltd v Amicus* [2008] EWCA Civ 381, it was the company that repudiated the contracts: The company’s response was to repudiate the contracts of employment with the result that 86 of the strikers were dismissed.

³³¹ A Chamberlain, “The Role of the ‘Eight Week Rule’ in the Friction Dynamics Dispute”, *The Lawyer*, 3 November 2003. The employment tribunal held that the 1 May letter “unequivocally tells the applicant that his contract of employment is terminated. It dismissed him”. Consequently the dismissal fell within the protected period (then eight weeks now 12). Even if it did not, (there was no appeal), the employer’s conduct extended the period to the second letter. See Employment Tribunal extended reasons, dated 4 December 2002, Case No 6500432-02.

³³² *Dynamex Friction Ltd v Amicus* [2008] EWCA Civ 381.

administrator, but leaving the dismissed strikers to pursue their claim against the empty shell that was their former employer. In subsequent unfair dismissal claims by a number of the non striking employees one member of the Court of Appeal (Ward LJ) referred to the employer (Mr Craig Smith) as having engaged in “Machiavellian machinations” (para 38), questioned whether he had “cynically manipulated the insolvency of Friction” (para 61), and accused him of being guilty of “scheming” and “lacking in fair play” (para 62).

5.3 Gate Gourmet is a large airline catering company, owned by a US private equity firm called Texas Pacific, which boasts that it is “a leading global private investment firm with over \$50 billion of capital under management.”³³³ According to Hendy and Gall,

on 10 August 2005, “667 low paid workers, mostly middle-aged Asian women, and mostly members of the TGWU, gathered in the works canteen to discuss the implications of the introduction by the company that day of 130 agency workers on lower rates of pay than themselves. Whilst the union representatives were talking to management, the workers in the canteen were instructed by megaphone to return to work within three minutes or be sacked. Those who failed to return to work (virtually all) were sacked. Those who turned up the next day were given the choice of signing new contracts on worsened terms or being unemployed”.³³⁴

According to the ICFTU (now ITUC) there were “strong suspicions that Gate Gourmet management had deliberately provoked industrial action to give it the excuse to dismiss staff and replace them with cheaper labour”, and that a “management plan [to] that effect came to light, but Gate Gourmet, while acknowledging the existence of the plan, claimed that it had been drawn up under its previous directors, and the existing directors had rejected such a plan”. It is further claimed that “the Transport and General Workers’ Union (TGWU) tried to negotiate the reinstatement of the sacked workers with Gate Gourmet did appear ready to reinstate the sacked workers, but the talks collapsed when it the company said it would only do so selectively”.³³⁵ Because the action was unofficial none of those dismissed from taking part in the industrial action was entitled to bring a claim for unfair dismissal, and although 272 workers were reinstated, another 411 given the equivalent of redundancy, while 130 workers got nothing.

5.4 British Airways is one of the largest airline companies in the world. A document on its website states that the company “aspire[s] to work together as one team, to treat each other fairly, respecting individual and collective rights, and striving for high levels of employee motivation and satisfaction through training, development and honest communications”.³³⁶ In 2007, BA announced plans to offshore part of its operation to France following the liberalisation of the rules relating to transatlantic flights. This caused some concern on the part of BALPA the airline pilots union, which balloted its members for industrial action. A large majority voted in favour and the union duly gave notice of industrial action, to be threatened by the company’s lawyers that if it proceeded with the action (which appears to have been perfectly lawful under British law—said by Tony Blair to be the most restrictive in the western world),³³⁷ would be unlawful under the newly created liability for collective action created by the European Court of Justice on 11 December 2007 in its notorious *Viking* case.³³⁸ What is more, the union was also advised that the company’s losses would run to £100 million per day, a sobering prospect which could have the effect of liquidating the union if the action went ahead, if the company was able to establish liability, and if the company then sought to recover the losses in question. The union took the unusual step of seeking a High Court declaration that its proposed industrial action was lawful, but this aborted as futile, in the light of BA’s vigorous defence which meant that the exercise of collective rights (to the limited extent protected by British law) had to be called off. BALPA has made a formal complaint to the ILO alleging a breach of Convention 87 on Freedom of Association and Protection of the Right to Organise.

LABOUR CONSULTANTS AND LAWYERS

6.1 Related to the activities of companies are the activities of the businesses who advise them—the labour consultants and the lawyers. One such business which has attracted some notoriety is the Burke Group. According to its own web site

The Burke Group [TBG], established in 1982, is the international leader in guiding management during union organizing (recognition) and union card signing campaigns. With 1400 clients in 50 industries and 10 countries (including the United States, E.U., Canada, Mexico and China), we have participated in over 800 elections and employees in 96% have either voted no, decertified or experienced petition withdrawal. Our record of success is unequalled and our professional labor relations consultants are the most culturally diverse and experienced in the world.³³⁹

³³³ www.texaspacificgroup.com/about/index.html.

³³⁴ J Hendy and G Gall, “British Trade Union Rights Today and the Trade Union Freedom Bill”, in K D Ewing (ed), *The Right to Strike* (IER, 2007), p 248.

³³⁵ ICFTU, *Annual Survey of Violations of Trade Union Rights* (Great Britain) (2006).

³³⁶ British Airways, *Standing Instruction No 2: The BA Way of Business* (June, 2006).

³³⁷ *The Times*, 31 March 1997.

³³⁸ Case 438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* [2008] IRLR 143.

³³⁹ www.tbglabor.com.

TBG's expertise is said to rest in "union avoidance", and "preventive labor relations—union free workplaces". Although operating mainly in the United States, a report for the TUC by Dr John Logan claims that TBG has conducted "several high-profile organizing campaigns in the UK, including ones at T-Mobile, Amazon, Virgin Atlantic, Honeywell, GE Caledonian, Eaton Corporation, Calor Gas, Silberline Ltd, FlyBe, Cable & Wireless, and Kettle Chips".³⁴⁰ Others include European Hydraulics Operation, where the TUC reports a company director as saying that that "Union free activities are high adrenal and time consuming events.... TBG was able to assess the situation and provide confidential shop—floor data that helped drive a successful union free strategy. I was amazed [about] ... the accuracy of the information...".³⁴¹ The TUC report also points out that "many of TBG's anti-union campaigns have had a devastating impact",³⁴² citing the examples of

- Amazon, where "the GPMU stated that the company mounted "the most aggressive campaign it had ever encountered", receiving "fewer votes than it had members in a company—sponsored ballot", and accusing the company of sacking a union activist and acting unfairly in other ways.³⁴³
- Kettles' Foods—where "organisers reported that the most striking aspect of the Kettle campaign was the aggressive use of supervisors to spearhead the anti-union drive and the company's manipulation of the bargaining unit—tactics that consultants have used in the US for decades".³⁴⁴

6.2 Other recent TBG campaigns (including Cable & Wireless, GE Caledonian and T Mobile) are said to have displayed a similar pattern of what has been referred to as "aggressive anti—union behaviour".³⁴⁵ Although Cable & Wireless recognizes unions in several European countries, including the Republic of Ireland, it resisted workers' right to collective bargaining in the UK. Advised by TBG, it "appealed to the courts the appropriateness of the CAC-defined bargaining unit, bombarded employees with anti-union emails, and held one-on-one sessions with local managers in advance of an expected representation ballot".³⁴⁶ On this occasion, however, depending on one's point of view, the work of TBG scaled new heights or plumbed new depths, when it was reported in the press that:

In the most recent case involving Cable and Wireless (which the union lost despite having 56% membership), the CAC panel said that it "shares the union's concerns about TBG's unfortunate track record, according to union and academic sources". TBG complained and the Chairman of the CAC forced the panel to reissue its decision with the offending passage replaced to read that "TBG is alleged by the union to have an unfortunate track record". The TBG chairman was said to be "happy" with the committee's decision.³⁴⁷

It is not clear how widespread is such commercial responsiveness to the legal process, or how widespread is the willingness of the legal process to respond to these initiatives from the commercial sector. Nevertheless, it can hardly be considered to be good practice for quasi-judicial bodies to respond in such a fashion. More generally, however, businesses of this kind appear to us to raise questions similar to those businesses that make money by trading in blacklists (though unlike blacklisting such business activity of course is perfectly lawful). Although the nature of the businesses are very different, it appears nevertheless to be the case that at least one purpose of a labour consultancy is to prevent unionization of an enterprise, and thereby deny workers the opportunity to engage in collective bargaining. We do not understand why it should be lawful in this country to conduct a business (of any kind), where the successful provision of its services will impede the exercise of human rights, in this case the human rights of workers, including the most vulnerable workers in society.

6.3 So far as solicitors are concerned, we are aware of one firm that advertises on its website that it "help[s] employers maintain a union-free environment". This is despite the recognition in the UN Global Compact that "*Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining*", and despite the recognition of collective bargaining as a human right in international treaties. It is not clear if this applies only to Dechert LLP's US practice or whether it applies elsewhere as well. We are, however, aware of press reports published on the eve of the implementation of the recognition procedure introduced by the Employment Relations Act 1999 that one prominent British law firm was organizing a "Trade Union Roadshow" for the benefit of business-people at which an "unambiguous" message was being conveyed to those attending about trade unions in the workplace. Those invited were said to include McDonalds, Dow Chemical and Bristol Myers Squibb, though it is not clear which if any of these companies attended. According to a long article in the press in which two Eversheds' partners are quoted or referred to (Mr Martin Warren and Mr Owen Warnock), Eversheds' preparations "appear to have been carefully planned", the firm having "made contacts with leading US consultants, who advise management on tactics to win recognition battles using videos and other "persuasive" techniques".³⁴⁸ *The Observer* also writes that Eversheds was "pushing US methods in the UK", these methods having been described earlier in the article as "union resistance techniques".

³⁴⁰ J Logan, *US Anti-Union Consultants: A Threat to the Rights of British Workers* (2008), p 16.

³⁴¹ *Ibid*, p 17.

³⁴² *Ibid*, p 16.

³⁴³ *Ibid*. See also HC 90-II, 2004-05, Appendix 10 (Evidence by GPMU).

³⁴⁴ *Ibid*, p 18.

³⁴⁵ *Ibid*.

³⁴⁶ *Ibid*, p 17.

³⁴⁷ *Daily Telegraph*, 3 August 2008.

³⁴⁸ *The Observer*, 4 June 2000.

6.4 A number of other law firms were named in this article, though it was based mainly on Eversheds, which appeared to enjoy the attention, with their annual report in 2002 reproducing a magazine article which pointed out that

Eversheds . . . is also the most highly regarded law firm among HR professionals, according to a survey conducted for Personnel Today and Employers' Law. The unions take a different view. When Eversheds ran a "TU roadshow" last summer advising companies on US style strategies for preserving a union—free workplace, the TUC was not amused.³⁴⁹

We do not suggest that this conduct by law firms is improper or unlawful. But it does raise general questions about the extent to which legal businesses should be involved to any extent in activity that may have the effect (albeit inadvertently) of undermining the human rights of third parties (such as workers). Although such conduct is perfectly lawful and no doubt ethical under the existing Code of Conduct for Solicitors, we would nevertheless invite the Committee to examine whether the existing ethical boundaries within which legal businesses may operate take adequate account of human rights standards within which these businesses should operate. In the present context we would invite the Committee to consider in particular the extent to which it is appropriate for legal businesses to provide services which may have the effect—intended or otherwise—of frustrating the exercise by workers of their fundamental right to engage in collective bargaining, and to be protected by a collective agreement.

NEW POWERS FOR BUSINESS TO UNDERMINE HUMAN RIGHTS

7.1 We have already highlighted the recent decision of the European Court of Justice in Case C 438/05, *ITF and FSU v Viking Line*.³⁵⁰ In that case the ECJ introduced a number of treaty-based restrictions on the right to strike, which as we have also seen greatly empowered BA in a dispute with BALPA. A week after *Viking*, the ECJ published its decision in the *Laval* case where it was held that Swedish trade unions could not take collective action to require a Latvian contractor to observe the terms of a Swedish collective agreement in the construction sector.³⁵¹ This decision has major implications for the right to bargain collectively, a right which is to be found in the EU Charter of Fundamental Rights, but which the ECJ failed to acknowledge. According to the Court, businesses posting workers from one EU member state to work in another cannot be required to observe the terms of collective agreements in the host State except to the limited extent provided for by the Posted Workers Directive. This means that where the latter does not apply, businesses which have won contracts in this country cannot be required to observe collective agreements here, with an obvious risk to the integrity of these agreements and the rights of those protected by them.

7.2 The *Laval* case was followed in turn by the decision in *Ruffert* where it was held that businesses posting workers (in that case to Lower Saxony from Poland) could not be required as a condition of a public procurement contract to comply with collective agreements save to the limited extent provided by the PWD.³⁵² In requiring contractors to pay certain minimum terms and conditions of employment, Article 3(1) of the PWD refers to those terms laid down in "law, regulation or administrative provision". In some cases (notably construction), the Directive also says that member states must require contractors to pay the minimum rates laid down in collective agreements negotiated between trade unions and employers. But under Article 3(8) of the Directive this applies only where these collective agreements have been declared universally applicable to all undertakings in the geographical area and in the profession or industry concerned. There are no such agreements in this country, though it was open to the British government to require businesses posting workers here to abide by agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned. Although there are almost certainly agreements that could be deemed to fall within this provision,³⁵³ the power to require contractors to abide by these agreements has not been taken by the British government, whether in relation to the construction sector, or any other sector.

7.3 The toxic mix of the United Kingdom's regulatory failure topped up by the ECJ decision in *Viking* and *Laval* and their progeny was spectacularly revealed by the bitter dispute at the East Lindsey oil refinery in late January/early February 2009, when construction workers walked out in protest at the use of posted workers by an Italian company (IREM), which was a sub-contractor to a UK company, which in turn had a broader sub-contract to a US company, which had the primary construction contract³⁵⁴. There was an expectation that all workers on the site would be paid in accordance with the National Agreement for the Engineering Construction Industry (NAECI) (although they were not under a duty to do so). There was concern on the part of the unions, however, that the posted workers were employed on terms and conditions

³⁴⁹ Eversheds Report 2002, p 7. The firm's website currently states that "Recent legislation has created significant trade union recognition rights and is now presenting a considerable challenge for employers. *Eversheds has carried out more work in this area than any other law firm in the UK. This includes advising employers seeking to resist recognition, assisting the negotiation of the best possible collective agreement and representing companies at the Central Arbitration Committee*": www.eversheds.com/uk/Home/Services/Labour_law_and_trade_unions/cac_applications_union_recognition.page?

Emphasis added.

³⁵⁰ [2008] IRLR 143.

³⁵¹ Case 341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160.

³⁵² Case 346/06, *Ruffert v Land Niedersachsen* [2008] IRLR 467.

³⁵³ National Engineering Construction Committee, *Protecting National Agreements in UK Construction: A Report by AMICUS, GMB and TGWU* (October, 2005).

³⁵⁴ For a full account of the dispute, see BBC News, 29 Jan—3 Feb 2009.

that may have been well above the statutory minima for pay in this country, but were below the terms and conditions in the NAECI agreement. This, the unions thought, enabled the Italian contractor to obtain a competitive advantage.³⁵⁵ The concerns over terms and conditions related specifically to hours of work, travel allowances, and auditing of wages as well as wage levels themselves.³⁵⁶ In an inquiry into the dispute, ACAS did less than justice to the issues involved, finding “no evidence” that any of the parties involved (contractors or sub-contractors) had “broken the law in relation to the use of posted workers or entered into unlawful recruitment practices”.

7.4 This, however, was not the point, the main question being whether the sub-contractors were complying with non—legally binding collective agreements. On this latter issue, the best ACAS appeared able to offer was that it had received assurances from the management that they will abide by the NAECI agreement “though there are clearly some issues of interpretation to be determined between management and the trade unions”. The most revealing passage in the report, however, is that found in paragraph 11 where it is stated that “ACAS has inspected the contract documentation which commits IREM to pay the going rate; but IREM were not yet in a position to provide evidence to demonstrate that they were doing this”. In other words, nobody knows what rates were being paid. ACAS confirmed, however, that by reason of *Laval* and *Ruffert* the NAECI collective agreement could not be imposed on the Italian contractor.³⁵⁷ Although the terms and conditions under which the posted workers were engaged was never confirmed (though the companies in question denied any exploitation or undercutting), the incident nevertheless provided a glimpse—on the basis of highly charged speculation—of life under the PWD, as it had been gift wrapped for employers by the ECJ. As the ACAS report pointed out, because of the government’s failure to legislate to protect collective agreements, “the mandatory rules governing the terms and conditions of posted workers in the construction sector are derived only from the law or from administrative provisions”.

CONCLUSION: WHAT NEEDS TO BE DONE?

8.1 There is so much that needs to be done to address the problems identified above, with initiatives required at domestic, EU and international level. One thing which is clear, however, is that self-regulation does not appear to work, as revealed by those companies which have codes of conduct extolling virtues which the companies do not appear to comply with in practice in all of their operations. This suggests to us that companies should be placed under stronger obligations, and that businesses over a prescribed size which are incorporated in this country should be required by law to have a human rights audit conducted on a regular basis by an independent person to assess the extent to which the business in question complies with human rights obligations of the kind found in ILO Conventions, international human rights treaties, and the OECD Guidelines. There should be an additional obligation that these independent audits are distributed to shareholders and made publicly available. Criteria would have to be developed to establish mechanisms to ensure the independence of those conducting the audits.

8.2 There are also, however, other steps that need to be taken to reform British labour law to take account of some of the issues identified above. These include

- Right to Organise: Invoking the power in the Employment Relations Act 1999, s 3, to make it an offence to compile, hold, trade in, solicit, or use blacklists which include details of people’s trade union membership or activities. This would be in addition to the retroactive compensation scheme to which we refer in para 3.4 above, and to the powers available to the Information Commissioner under the Data Protection Act 1998.
- Right to Collective Bargaining: Amending the statutory recognition procedure to remove the barrier to applications where there is already a non independent union recognized by the employer; remove the requirement that recognition can only be awarded where there is majority support; and take steps to improve the weak unfair labour practice provisions in the statutory procedure, including a ban on the use of union busters.
- Right to Strike: Amend the existing legislation so that lawful strike action is not regarded as a breach but as a suspension of the contract of employment; employers are required to re-employ workers at the end of collective action; and that collective action may be taken in line with international standards, as developed under ILO Convention 87 and the Council of Europe’s Social Charter.

8.3 In addition to the above, we believe that these rights ought to be safeguarded and protected from erosion in a British Bill of Rights. We do not understand how there can be a Bill of Rights for everyone except trade unions, and were astonished by the absence of any significant discussion of trade union rights in either the Government’s Green Paper, or the JCHR’s report on *A Bill of Rights for the UK?* (which dealt with the matter in less than six lines).³⁵⁸ The exclusion of from the latter is all the more remarkable in view of the facts that

³⁵⁵ See ACAS, *Report of an Inquiry into the Circumstances surrounding the Lindsey Oil Refinery Dispute* (2009). See also UNITE the Union, *Unite Briefing on the current UK power industry walkouts* (2009).

³⁵⁶ See ACAS, *ibid*, paras 10-12.

³⁵⁷ *Ibid*, paras 14-22.

³⁵⁸ See HL 165, HC 150, 2007-08.

- four of the 31 written submissions (TULO, TUC, Unite, and Thompsons) directly addressed this question (and warranted the courtesy of a fuller response);
- trade union rights as protected by human rights treaties are extensively violated by the UK (as the TULO submission points out);
- the South African Constitution which the Committee studied (at taxpayers' expense) expressly includes trade union rights in Chapter 2 entitled "Bill of Rights", including the right to strike and collectively bargain in section 23 (as well as freedom of association in section 18 and the right to picket in section 17);
- such rights have been developed in the constitutional jurisprudence of important common law jurisdictions, notably in Canada under the freedom of association provisions of the Charter of Rights and Freedoms;³⁵⁹
- such rights are included in the national constitutions of many of our partners in the European Union, including the bulk of those countries which have most recently joined;
- recent decisions of the ECJ have put trade union rights at serious risk (as in the BALPA case in which the union was faced with the risk damages of £100 million a day (for exercising a human right)), in a manner that should send shivers down the spine of anyone with a passing knowledge of British social history.³⁶⁰

We believe that the right to organise, the right to collective bargaining, and the right to strike should be included in a Bill of Rights, either expressly or by means of incorporating an appropriate treaty (such as the European Social Charter) on the model of the Human Rights Act. We note, however, that these rights are quickly emerging under the fascinating and progressive jurisprudence of the European Court of Human Rights, and will be enforceable under domestic law as a result of the HRA, leading in turn to the possibility of a long overdue direct challenge to the Thatcher inheritance in the courts.³⁶¹

8.4 Finally, we believe that steps should be taken to address the decisions of the ECJ which threaten to undermine both the right to collective bargaining and the right to strike, as indicated above. To this end, we recommend that the British government should

- Introduce regulations to implement the Posted Workers' Directive (following the example of the Irish government) so that collective agreements which are widely applied within a sector can be registered with the Central Arbitration Committee, with a view to becoming obligatory on all employers in the sector in question, including in particular employers who post workers to this country. Amending legislation should also be introduced to counter aspects of the *Viking* decision by making clear that the existing cap on trade union liability in damages applies to actions brought under EC law, as well as to action brought for unprotected common law liability.
- Support steps proposed at EU level to amend the EC Treaty by the introduction of a social protocol. As proposed by the ETUC, this provides that
Nothing in the Treaties, and in particular neither economic freedoms nor competition rules shall have priority over fundamental social rights and social progress as defined in Article 2. In case of conflict fundamental social rights shall take precedence³.

Steps need also to be taken to amend the Posted Workers' Directive, so that employers posting workers to this country can be required to apply any appropriate collective agreement, whether or not it is generally applicable within the terms of the existing Directive. We would hope that these matters will be taken more seriously by the Committee on this occasion than on the occasion of its Bill of Rights inquiry, and that trade unions can feel confident that their internationally recognized human rights will be shown the same respect by Parliament as the human rights of others.

May 2009

Memorandum submitted by the International Centre for Trade Union Rights (ICTUR)

INTRODUCTION

1.1 Businesses impact on human rights in different ways within the UK and abroad. The precise nature of these impacts depends upon the nature of the business and the socio-economic, political and human rights situation in the country concerned.

- In the UK businesses have a clear and direct impact upon the labour rights of their employees: including trade union rights, such as the right to form and join trade unions, as well as rights such as equality and principles of non-discrimination. For more on the domestic situation please have regard to the submissions prepared by the Institute of Employment Rights.

³⁵⁹ *Health Bargaining etc v British Columbia*, 2007 SCC 27.

³⁶⁰ Since the JCHR report, the Northern Ireland Human Rights Commission (*A Bill of Rights for Northern Ireland—Advice to the Secretary of State for Northern Ireland*, 10 December 2008), has advised the Secretary of State for NI that "A provision should be drafted to ensure that—workers have the right to strike and the right to engage in collective bargaining" (p 124).

³⁶¹ *Demir and Baykara v Turkey*, 12 November 2008; *Enerji Yapi-Yol v Turkey*, 21 April 2009.

- Overseas, and in the developing world in particular, the activities of multinational companies can have a profound influence. Multinationals often dominate industries in developing countries, with the result that their employment conditions set the de facto standard for industry-wide or even generally-applicable terms and conditions. Our submission addresses specifically the nexus of human rights responsibility, supervision and enforcement in the context of the overseas activities of UK businesses.

UK multinationals in particular may have dominant roles in former colonies. The terms and conditions of employment set by UK multinationals in such situations can have profound impacts upon local labour standards not only in the company concerned but in respect of industry-wide conditions and even in respect of generally applicable national employment standards. UK companies have a responsibility to ensure that the role they play in former colonies in particular is positive, upward, and stabilising.

1.2 An area of particular concern to ICTUR is the role of global companies in relation to the internationally protected rights of workers to join trade unions for the protection of their interests. This right is recognized by a host of international human rights treaties, including the UN Covenant on Economic, Social and Cultural Rights, along with ILO Conventions 87 and 98, in addition to a host of regional instruments such as the European Convention on Human Rights and the European Social Charter. Also important are the OECD Guidelines for Multinational Enterprises, while reference might also be made to the UN Global Compact, where these rights are also recognized. Quite apart from these international legal instruments, the role of trade unions in TNCs is crucial: trade unions locally, nationally, regionally and globally provide a measure of accountability in the exercise of corporate power, wherever that power may be exercised; trade unions provide a voice for workers and ensure that workers' interests are fully considered before any major decisions are taken; and trade unions help to drive up standards and prevent the exploitation of the weak and vulnerable. We illustrate the problems of British business and respect for human rights standards by giving an account of the activities of what is thought to be the United Kingdom's largest global company, certainly in terms of the number of people employed throughout the world.

CASE STUDY: G4S

2.1 G4S is a major global security company, created by a merger of Group 4 Falck and Securicor in July 2004. The company is British based, it has been extraordinarily successful, and it is the largest employer quoted on the London Stock Exchange, with a secondary stock exchange listing in Copenhagen.³⁶² Although it has its headquarters in the United Kingdom, G4S has operations in over 110 countries and over 585,000 employees. The company is thought to be the second or third largest private sector employer in the world, and it is the largest private employer in Africa. Group 4 Securicor operates in 18 African countries: Botswana, Cameroon, Central African Republic, Democratic Republic of the Congo, Gambia, Ghana, Ivory Coast, Kenya, Lesotho, Malawi, Morocco, Mozambique, Namibia, Sierra Leone, South Africa, Tanzania, Uganda, and Zambia. In 2005, Profit margins from "New Markets"—which includes Latin America and Asia, as well Africa—have been reported as being 60 % greater than its European margins. According to the company's annual report for 2008, Group turnover increased by 22% to £5.94 billion (US \$8.85 billion), pre-tax profits rose by 23% to £416.4 million, and recommended total dividend per share increased by 30%.³⁶³ By way of contrast, according to the CIA, the GDP of Malawi – one of the countries in which the company operates – was only US \$ 11.56 billion in 2007.

2.2 The company courted controversy for several years in the recent past because of labour standards in a number of countries. Despite boasting an impressive Business Ethics Policy (at the heart of which was a commitment to freedom of association and the right to collective bargaining in accordance with local legislation and practice), allegations were made by UNI (a global trade union federation) that these commitments were not always observed in practice. It was alleged—for example—that in Kenya the company refused to recognise the Kenya Guards and Allied Workers' Union, notwithstanding a court order in 2003 that security firms do so 'either as an Association or individually'.³⁶⁴ Legal proceedings in the following year revealed that there was by then 'no collective agreement',³⁶⁵ and in 2005 the union was still complaining that it had not been recognised by the company, despite claiming a majority of the employees in membership. It has also been alleged that

- In Uganda, the Amalgamated Transport and General Workers' Union was refused recognition by G4S, despite the fact that a majority of the employees at the G4S subsidiary voted to form a union. It was claimed that 'G4S used a variety of delaying tactics, from busy schedules to a change in the company's name and address, to avoid recognising the union', and that 'in stark contrast', the other major private security firms in Uganda had recognised the union and negotiated with it as a group 'to raise standards in the industry'.³⁶⁶

³⁶² G4S, Annual Report (2008).

³⁶³ Ibid.

³⁶⁴ Kenya Guards and Allied Workers' Union v Security Guard Services and Kenya Union of Commercial, Food and Allied Workers (Cause No 70/2002, Industrial Court of Kenya, p 22.

³⁶⁵ Kenya Guards and Allied Workers' Union v Factory Guards Ltd (Cause No 8/2004, Industrial Court of Kenya), p 17.

³⁶⁶ UNI, Submission to R W Box, UK National Contact Point for OECD Guidelines for Multinational Enterprises, 12 December 2006, p 6.

- In the Democratic Republic of the Congo (where G4S was said to be not only the largest private security firm but also the only multinational company operating in the country), it was claimed that the union Sythac had made repeated attempts to meet the G4S subsidiary to discuss union recognition. Again, it is reported that ‘G4S [had] consistently put them off, refusing to meet with them or committing to appointments at G4S offices and then failing to make the proper person available at the time of the appointment’.³⁶⁷

2.3 A particularly notorious case involved Indonesia, where a serious dispute broke out in 2005 during a merger between two security services entities, PT Securicor Indonesia and Group 4 Falck. PT Securicor Indonesia refused to negotiate with the union in relation to the merger prompting the union to call a strike involving 600 workers. According to the ILO Freedom of Association Committee, in the course of the dispute, ‘the employer committed several acts of anti-union discrimination and harassment, including: preventing the union president and officials from entering company premises; dismissing 238 union officials and members in May 2005, refusing to reinstate them in spite of several court orders to that effect; and attempting to coerce and intimidate union members by calling their families’.³⁶⁸ The strike attracted critical media coverage in the United Kingdom,³⁶⁹ it led to mass demonstrations against the company outside the British Embassy in Jakarta, and ‘the rather difficult strike in Indonesia’ was raised in the House of Commons by Kitty Ussher MP.³⁷⁰ The matter ended up before the Supreme Court of Indonesia,³⁷¹ which ordered the company to reinstate and pay compensation to workers who had been dismissed for taking part in a strike that the Court found was legal. Moreover, a complaint was made by the Indonesian union ASPEK against the government of Indonesia to the ILO Freedom of Association Committee, alleging that there had been a breach of ILO Convention 87 (Freedom of Association and Protection of the Right to Organise). Although the dispute was settled by an agreement on 26 July 2006, the Freedom of Association Committee reported as follows—

960. The Committee observes from the complainant’s allegations and the Government’s reply that: (i) 308 workers were dismissed by PT Securicor Indonesia in May 2005 for having staged a strike as of 25 April 2005; (ii) all instances, including the P4P, the High Court for State Administrative Affairs and the Supreme Court found that the strike which began on 25 April 2005 was legal and that the employer should reinstate the dismissed workers and pay wages owed; (iii) 24 workers were reinstated on 27 December 2005 pursuant to the order issued to that effect by the Supreme Court after hearing the case in the last instance; (iv) on 28 July 2006 the two parties reached an agreement by which they agreed to terminate the employment relationship between the enterprise and the workers concerned, in return for payment of full compensation.

961. While taking due note that the two parties have finally reached a settlement agreement, the Committee wishes to recall that no one should be penalized for carrying out or attempting to carry out a legitimate strike (Digest of decisions and principles of the Freedom of Association Committee, fifth edition, 2006, para. 660). In this respect, the Committee requests the Government to specify the circumstances under which only 24 out of 308 workers were finally reinstated pursuant to their dismissal for having participated in the strike which began on 25 April 2005.

962. The Committee further notes with regret that the Government does not reply to the complainant’s allegations concerning the repeated summons of the union President Fitriajansjah Toisutta and members Tri Muryanto and Edi Putra for interrogation by the police and the Prosecuting Attorney as well as the pressing of charges against them on 7 July 2005 for the crime of committing “unpleasant acts” against the company. The Committee recalls that measures depriving trade unionists of their freedom on grounds related to their trade union activity, even where they are merely summoned or questioned for a short period, constitute an obstacle to the exercise of trade union rights (Digest, op. cit., para. 63). The apprehension and systematic or arbitrary interrogation by the police of trade union leaders and unionists involves a danger of abuse and could constitute a serious attack on trade union rights (Digest, op. cit., para. 68). Recalling that the strike which began on 25 April 2005 was declared legal by the competent authorities, the Committee emphasizes that no one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike (Digest, op. cit., para. 672). The Committee requests the Government to indicate whether the charges brought against the union President Fitriajansjah Toisutta and members Tri Muryanto and Edi Putra for committing “unpleasant acts” against the company are pending before the courts or whether the charges have been dropped. In the event that this matter is still before the courts, the Committee requests the Government to institute an independent inquiry into this matter and, if it is found that the charges were brought for having organized or participated in the peaceful strike which began on 25 April 2005, to ensure that they be dropped immediately and to keep it informed of developments in this respect.

³⁶⁷ Ibid.

³⁶⁸ ILO Freedom of Association Committee, Complaint against the Government of Indonesia presented by the Indonesian Association of Trade Unions (ASPEK Indonesia) Report No. 348, Case No. 2494, para 959.

³⁶⁹ See *Guardian*, 12 August 2006.

³⁷⁰ House of Commons, Public Accounts Committee, 15 March 2006, Q 75. For the company response, see *ibid*, Q 78.

³⁷¹ UNI, Submission, above, p 10. It is claimed there that while ‘G4S eventually, under international pressure, accepted [the] Supreme Court decision and fulfilled its legal obligations to its workers, it refused to meet these obligations for over a year’.

963. The Committee also notes with regret that the Government does not reply to the allegations concerning acts of harassment against union members and their families, including phone calls at their homes by the company, in the context of the merger between PT Securicor Indonesia with Group 4 Falck and the new management's refusal to negotiate the terms and conditions of employment of the employees, as well as the transfer of a certain number of the employees under new management. The Committee recalls that the Government's obligations under Convention No. 98 and the principles on protection against anti-union discrimination cover not only acts of direct discrimination (such as demotion, dismissal, frequent transfer, and so on), but extend to the need to protect unionized employees from more subtle attacks which may be the outcome of omissions. In this respect, proprietorial changes should not remove the right to collective bargaining from employees, or give rise to direct or indirect threats against unionized workers and their organizations (Digest, *op. cit.*, para. 788). Furthermore, acts of harassment and intimidation carried out against workers by reason of trade union membership or legitimate trade union activities, while not necessarily prejudicing workers in their employment, may discourage them from joining organizations of their own choosing, thereby violating their right to organize (Digest, *op. cit.*, para. 786).

964. Finally, the Committee notes with regret that the Government does not reply to the serious allegations made with regard to the Government's failure to ensure an effective mechanism of protection against acts of anti-union discrimination.³⁷²

2.4 It is true that the complaint by ASPEK was against the government of Indonesia and not against the company. The company, however, can hardly escape responsibility for conduct that sits uneasily with its Business Ethics Policy commitment to freedom of association. Although it is true that it is the law of Indonesia that was under scrutiny by the Freedom of Association Committee (not for the first time), it was the company's conduct that provoked the complaint, it was the company which chose to take advantage of the legal regime, and it was the company's activity that led to the critical conclusions of the Committee in this case. Yet it is not to be imagined that the allegations against G4S on freedom of association were confined to Africa and Asia (with Nepal being another bone of contention identified by UNI).³⁷³ A major issue was the conduct of Wackenhut, the company's US subsidiary. Several complaints against Wackenhut were made by UNI, though in one case the company was found by the National Labor Relations Board in the USA to have been in violation of the National Labor Relations Act 1935. This was related to anti-union conduct by the employer after an attempt by the union (SEIU) to organize security guards at the IMF building in Washington DC. The company was ordered to cease and desist its anti-union activities following an NLRB finding that

By telling employees that the International Monetary Fund would respond negatively if employees formed a union, telling employees that the International Monetary Fund contract prohibited unions, threatening employees with the loss or cancellation of the International Monetary Fund contract, as well as the loss of their jobs, if the employees unionized, telling employees that it was aware that they had signed union authorization cards, telling employees that it was nonunion, telling [one employee] that he should transfer to [another] worksite if he wanted to continue his union activity and then asking him whether he intended to continue with union activity, standing next to or near [a second employee] on public property as she attempted to distribute union literature to employees arriving for work, and asking employees about the union activities of other employees, the Respondent violated Section 8(a)(1) [of the National Labor Relations Act].³⁷⁴

OECD GUIDELINES

3.1 A detailed complaint was eventually lodged against G4S under the OECD Guidelines by Union Network International (a global union federation) on 12 November 2006.³⁷⁵ The complaint detailed a wide range of alleged shortcomings from around the world relating to what was seen to be a failure of the company to 'contribute to economic, social and environmental progress with a view to achieving sustainable development' (as provided for in Chapter II, para 1), and to 'respect the right of their employees to be represented by trade unions' (as provided for in Chapter IV, para 1(a)) of the OECD Guidelines. The complaint the company had 'chosen to violate national law and drive down standards across the world', was long and detailed and addressed specifically alleged violations in Malawi, Mozambique, Greece, the United States, Israel, Uganda, the Democratic Republic of the Congo, and Nepal. These were said to be among the most egregious cases from around the world, it being claimed also that workers from South Africa, Cameroon, Kenya, India, Indonesia, Morocco, Panama, and other nations 'have gone on strike against G4S or protested over poor pay and conditions within the last year'. The complaints were wide ranging, from low pay, long hours, failure to pay for work done, failure to make severance payments, and failure to make

³⁷² ILO Freedom of Association Committee, Complaint against the Government of Indonesia presented by the Indonesian Association of Trade Unions (ASPEK Indonesia) Report No. 348, Case No. 2494.

³⁷³ UNI, Submission, above, p 7.

³⁷⁴ Wackenhut Corporation v SEIU, Case 5-CA-31927 (20 April 2005). Additional cases are cited in UNI, Submission, above, pp 8 – 10.

³⁷⁵ UNI, Submission, above.

back awards in line with court judgments. In the case of Malawi, UNI claimed that this was one of the ten poorest countries in the world with G4S guards being paid less than \$20 a month, a wage claimed not to 'provide for their basic needs'.³⁷⁶

3.2 The OECD Guidelines for Multinational Enterprises (the Guidelines) were first agreed in 1976, following public concern that multinational enterprises were becoming too powerful and unaccountable. The Guidelines may not be binding in a legal sense at the international level, but they are not optional for corporations. Governments have committed themselves to respecting the principles and have established complaints mechanisms and supervisory procedures to this end. Within the parameters of its obligations to the OECD the UK is obliged to ensure implementation. Key provisions of the Guidelines have already been referred to in the preceding paragraph, and it is important to emphasise that unlike many voluntary corporate codes, the OECD Guidelines (i) explicitly adopt all four of the core ILO principles recognised in the ILO Declaration on Fundamental Principles and Rights at Work (1998), as well as (ii) embrace standards on matters which have been excluded from the ILO Declaration (such as minimum conditions of employment and health and safety at work). On freedom of association, the Guidelines require enterprises 'within the framework of applicable law, regulations and prevailing labour relations and employment practices' to

respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions.

Enterprises are also expected to 'provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements', and 'provide information to employee representatives which is needed for meaningful negotiations on conditions of employment'.

3.3 Since the 2000 revision of the OECD Guidelines for Multinational Enterprises, all adhering governments have established National Contact Points (NCPs). The NCPs have a two-fold mandate: to promote the Guidelines and to facilitate complaints from a variety of stakeholders, notably trade unions and NGOs, concerning alleged non-compliance with the Guidelines by companies registered in or operating from their countries. Over the past year the UK NCP has been substantially re-organised. It now takes the form of a bipartite body, comprising two government departments. The OECD's Trade Union Advisory Committee has consistently noted that 'tripartite NCPs have generally been more effective than others', referring specifically to the incorporation of trade unions. Under the new UK NCP structure a trade union representative has a position on an NCP advisory panel. The Report of the UN's Special Representative on Human Rights and TNCs specifically endorsed the OECD Guidelines as a useful mechanism for addressing the Business and Human Rights agenda. But the Special Representative noted also that the Guidelines have 'too often failed to meet this potential'³⁷⁷.

"The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential. The housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest. NCPs often lack the resources to undertake adequate investigation of complaints and the training to provide effective mediation. There are typically no time frames for the commencement or completion of the process, and outcomes are often not publicly reported. In sum, many NCP processes appear to come up short"³⁷⁸.

3.4 In the case of the G4S complaint, however, the procedure appears to have worked well, and there are lessons to be learned for future cases. For the first time in the history of the office, the UK NCP appointed an arbitrator, John Mulholland to manage a formal mediation and conciliation process. Mr Mulholland brought the parties together in a series of meetings which resulted in a voluntary settlement, and to the conclusion of a global framework agreement. It would be a mistake to exaggerate the importance of this process, as other factors were at work in helping UNI secure a global agreement with the company, including the global campaign against the company. Nevertheless, it would be quite wrong to under-estimate the work of the NCP in the United Kingdom, with Christy Hoffman from UNI advising us that

Initially, the OECD process legitimized our complaints about the G4S global operations and this was a very important element. Subsequently, the mediation meant that both sides in the dispute had to sit down face to face, peel away the rhetoric and try to grapple with some difficult problems which affected thousands of workers. Once some good will was established, the step towards a global relationship for handling similar issues in the future was a natural one. It is possible that we would have reached a global agreement in any event, but the role of the OECD mediator helped to speed up the process. A critical element of the parties' willingness to negotiate was the power of the mediator to issue a recommended settlement, which would have been difficult for either party to reject. Without that authority, I am less confident that the process would have been effective.

³⁷⁶ Ibid, p 4.

³⁷⁷ J Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, A/HRC/8/5, 7 April 2008, paras 98-99.

³⁷⁸ Ibid.

 THE GLOBAL FRAMEWORK AGREEMENT

4.1 Although we began this submission with an account of the allegedly controversial conduct of G4S, the matter did have a good outcome, a global framework agreement being concluded between G4S, UNI and the GMB (the British trade union with which G4S has a recognition agreement) on 11 December 2008. Indeed, this is thought to be the first such agreement between a British based multinational and a global union federation, though UNI has posted 22 such agreements on its website with a range of other (European based) multinational corporations. These include Carrefour, Danske Bank, and France Telecom.³⁷⁹ These agreements first emerged in the mid 1990s, with a landmark deal being struck by another global union federation (the International Union of Foodworkers) and Accor.³⁸⁰ These agreements – which are in some respects a response to skepticism about unilateral and voluntary company codes of conduct, which now litter the multinational corporate scene, and which are largely discredited as unenforceable pious declarations of good intent – typically commit the companies concerned to respect various labour standards (usually the ILO standards) throughout their global operations. The G4S agreement is an advanced version of the genre, and to that extent it is to be highly commended, though the campaign to secure the agreement was hard – fought, raising questions about the role of the State in encouraging or requiring its multinational companies to negotiate and conclude agreements of this kind as a matter of good practice rather than as a resolution of a transnational industrial dispute.

4.2 Under the terms of the agreement the company undertakes to respect rights established through the core labour standards of the ILO ‘where legally possible’, these rights being defined as Conventions 87 and 98 (freedom of association); 29 and 105 (forced labour); 138 and 182 (child labour); and 100 and 111 (discrimination at work). So far as the first of these is concerned, the agreement proceeds in some detail to commit the company to support ‘the rights of employees to join and be represented by a union of their own choosing’, and to work with UNI in defined ways ‘to support these rights’. These defined ways include

- G4S will not oppose the right of employees to join or not to join a trade union, and on request will ‘communicate to employees that they are entitled to a free choice over whether or not to join and become active in a union’;
- Both G4S and UNI committed to work with national affiliates and managers in order to enable freedom of association to be exercised in a non confrontational environment, avoiding misunderstanding and minimizing conflict’;
- G4S agreed ‘specific access arrangements for local unions to explain the benefits of joining and supporting the union’, any such access to vary according to ‘local legal and practical considerations’;
- G4S agreed to recognize ‘representative and legitimate trade unions’, and to this end the agreement provided that ‘the parties should agree a fair and expeditious system for checking support for the union’.

The agreement makes it explicit that freedom of association includes the ‘right of unions to be recognized for the purposes of collective bargaining’.

4.3 In addition to questions of trade union membership and recognition, the agreement also addressed a wide range of other employment related matters, the company undertaking to respect the OECD Guidelines (which as already pointed out, go some way beyond the ILO Declaration of 1998). Thus, it is expressly stated that terms and conditions of employment for each country in which G4S operates ‘will be at least as favourable as the legal minimum standards set out in each country for working hours, pay, health & safety and holidays’. The agreement also provides, however, that ‘over time’, the parties to the agreement ‘wish to drive up terms and conditions for G4S employees’, to ensure not only that the company attracts the best people but also that it ‘has a positive impact on the wider communities in which it operates’. Alongside this commitment to comply with the law and the aspiration to do better, there is a parallel commitment that ‘negotiated terms and conditions should provide at least a living wage while securing a work life balance for employees’. One problem recognized in the agreement is the competitive nature of the business in which the company operates and its perceived need to maintain its market share. Here the agreement addresses the problem of high standards leading to G4S being undercut by its competitors which may not be committed to principles of this kind. As a result the agreement provides that ‘the local union and management team will develop a joint strategy and action plan to monitor and raise standards among all of the companies in the market and create an environment in which G4S will be able to raise standards without compromising its competitive position’.

4.4 Finally, the agreement also deals with implementation and the resolution of disputes between the parties. Under the terms of the agreement G4S accepts, first the need for transparency and awareness, it being provided that all three parties ‘jointly commit to publicise the agreement through the union membership and corporate structure respectively’. Secondly, G4S accepts responsibility for its implementation across the business, and undertakes to ensure that managers ‘support the rights’ it establishes. Any serious contraventions of the agreement by managers are to be dealt with under the

³⁷⁹ For a study of some such agreements, see K D Ewing, ‘International Regulation of the Global Economy – The Role of Trade Unions’, in B Bercusson and C Estlund (eds), *Regulating Labour in the Wake of Globalisation* (2007), ch 10.

³⁸⁰ See J Wills, ‘Bargaining for Space to Organise in the Global Economy: A Review of the Accor – IUF – Trade Union Rights Agreement’ (2002) 9 *Review of International Political Economy* 675 – an outstanding study.

appropriate G4S disciplinary procedure. Thirdly, it is recognized that there may be disputes about the interpretation or application of the agreement, and a procedure is established for resolving such disputes. The procedure is a typical industrial relations procedure, with disputes to be addressed initially at the local level, working up to the special review procedure established by the agreement, which may, if unable to resolve the dispute, refer the matter to a 'neutral arbiter to find a mediated solution'. Fourthly, the parties agreed to meet regularly (twice a year) to consider progress under the agreement under the aegis of the Review Meetings for which provision is made in an Appendix. Finally, the agreement is stated unequivocally not to be legally binding, a provision which is consistent with the normal practice of collective agreements in British law (albeit unusual in other legal systems). The clearly expressed statement to this effect is already implied by law, assuming that the agreement falls within the definition of a collective agreement under the Trade Union and Labour Relations (Consolidation) Act 1992 (sections 178 and 179).

CONCLUSION

5.1 ICTUR believes that a number of important lessons can be learned from the experience of this particular story, which as we happily acknowledge has had a good ending (so far). The starting point, however, is that the allegations against the company, the role of the OECD Guidelines, and the concluding of a global framework agreement arose in the context of the changing global situation in which legal, political and economic power is moving from nation states to TNCs. The current economic downturn may offer some respite from this development, but is unlikely to reverse it. Yet while power is gravitating inexorably to a transnational plain, so international legal standards (such as core ILO Conventions) remain addressed to national governments, which may not be powerful enough to take on the TNCs operating in their territory, with the annual turnover of some of the TNCs exceeding the GDP of many of the countries in which they operate.³⁸¹ This suggests to us that there is a need for greater control over TNCs by national law, but more importantly a role for the better regulation of such bodies in international law. If it is possible to contemplate the global regulation of the banking industry, it ought also to be possible to contemplate the regulation of the employment conditions of TNCs, at least to the extent of ensuring that these accumulations of economic power comply with minimum international labour standards.

5.2 As a minimum, ICTUR believes that British based TNCs should be required to accept as a matter of law that they have human rights obligations, and as a corollary to adopt Business Ethics Policies. However, these policies should be required to comply with prescribed legal standards (notably the OECD Guidelines), and they should be subject to independent scrutiny and supervision on a regular basis. The human rights reports of individual companies should be published, and appropriate penalties should be contemplated for those companies found to be in serious breach of human rights obligations. In addition, ICTUR believes that any such obligation should coincide with a strengthening of the complaints mechanisms under the OECD Guidelines. Although the Guidelines have been strongly criticized for a number of reasons, they were shown to have played a valuable role in the G4S case, though we are under no illusion that the union (UNI) came in to the process from a position of considerable strength, having conducted an effective transnational campaign against the company. Nevertheless, it is important to embrace some of these criticisms with a number of initiatives: (i) the government ought to make the guidelines more visible; (ii) the government should offer more in-house company training and education about the guidelines; (iii) the ILO principle of tri-partism should be at the heart of administration of the guidelines in the United Kingdom (with the government's interest represented by DfD as well as BERR); (iv) an office independent of government should be established for the operation, administration and supervision of the guidelines; and (v) the development of dispute resolution mechanisms of the kind deployed in the G4S complaint should be continued.

5.3 More fundamentally, however, steps need to be taken to require TNCs to enter into agreements with GUFs, just like companies operating at national level can be required by national law to enter into recognition agreements with representative trade unions. These latter provisions were introduced in the United Kingdom by the Employment Relations Act 1999 (and they have parallels in other countries), and are now strongly reinforced by the decision of the European Court of Human Rights in *Demir and Baykara v Turkey*,³⁸² in which the Grand Chamber appears to hold not only that the right to collective bargaining is now an essential feature of the right to freedom of association under article 11 of the ECHR, but that States are under a duty to have in place a collective bargaining procedure that complies with minimum international labour standards. As the Court pointed out in a crucial passage in its judgment:

The absence of the legislation necessary to give effect to the provisions of the international labour conventions already ratified by Turkey, and the Court of Cassation judgment of 6 December 1995 based on that absence, with the resulting de facto annulment ex tunc of the collective agreement in question, constituted interference with the applicants' trade-union freedom as protected by Article 11 of the Convention (Emphasis added).³⁸³

³⁸¹ See S Haseler, *The Super-Rich – The Unjust New World of Global Capitalism* (2000).

³⁸² Application No. 34503/97, 12 November 2008. See also *Enerji Yapi-Yol Sen v Turkey*, 21 April 2009 (ECtHR recognises the right to strike under ECHR, article 11), with potentially important implications for litigation under the Human Rights Act 1998.

³⁸³ *Ibid*, para 157.

This suggests to us that it will be difficult for an incoming Conservative government to repeal the existing procedure without putting something in its place, and that business friendly aspects of the existing procedure are ripe for challenge in the courts with a view to their removal (such as the arbitrary denial of collective bargaining rights to workers employed in businesses with less than 21 workers).³⁸⁴

5.4 A parallel legal obligation of TNCs to deal with GUFs could emerge in one of two ways:

- in the short term, as a unilateral act of the British Parliament to introduce a procedure under domestic law which requires TNCs headquartered in the United Kingdom not only to develop and implement the Business Ethics Policies referred to in paragraph 5.2 above, but to do so with the negotiated agreement of an appropriate GUF at the request of the latter;
- in the long term, steps could be taken to initiate and support a long overdue recognition in international law the right of GUFs to enter into transnational bargaining with TNCs about compliance with international labour standards.³⁸⁵ At the present time, international labour law is at a very primitive stage of development, drafted for an economy in the mid 20th rather than the early 21st century.

There is thus a need to complement existing international labour standards, with measures which guarantee a right to organize, a right to collective bargaining and a right to collective action, at transnational level. The G4S experience provides a compelling reason for these international standards to be revised, to reflect the world as it is now, rather than the world as it was sixty years ago. It ought to be possible to secure a global framework agreement as a matter of corporate obligation underpinned by international law, rather as a result of transnational trade union pressure.

Daniel Blackburn (Director)
K D Ewing (Vice-President)
 1 May 2009

Memorandum submitted by the Latin American Mining Monitoring Programme (LAMMP)

1. LAMMP congratulates the Joint Commission on undertaking this inquiry into business and human rights. Despite significant progress, such as companies producing human rights statements and becoming signatories to international agreements, much work still needs to be done to document and address the day-to-day concerns of people suffering the consequences of irresponsible business practices.

2. LAMMP's mission is to assist and empower the poorest sectors of Latin American civil society in their efforts to ensure that natural resources are exploited in a sustainable way and within a framework of respect for their human rights.

3. The focus of LAMMP's work is Latin American rural and indigenous women, a most vulnerable and marginalised group so far excluded from the mining debate despite bearing the brunt of its consequences. LAMMP has developed a database for the documentation of HR abuses against women challenging mining companies. With this, we seek to encourage a broad debate and provide evidence that links poverty and violence against women to mining conflict. We work in partnership with grass-roots groups in Ecuador, Venezuela, Peru, Bolivia and Guatemala. All of the work we support focuses on providing women with financial resources and technical tools to understand and challenge mining policies and practices that make and keep them poor.

4. LAMMP's submission focuses on the Tintaya mine, wholly owned by London listed Xstrata Plc. It brings to your attention the voice of Hilda Huaman, a woman lawyer of Quechua extraction who has suffered years of persecution as a result of her work in defence of the province of Espinar, home to many communities affected by the activities of the Tintaya mine.³⁸⁶

5. The first operator of the Tintaya copper mine was the Peruvian government, back in 1980. In 1994 Magma Copper bought it and subsequently in 1996 sold it to Australia's Broken Hill Proprietary Inc. After January 2001 (when BHP Ltd and UK Billiton merged) the mine became BHP Billiton Tintaya. In 2006 Xstrata Plc acquired the Tintaya mine from BHP Billiton for US 750 million.

6. The impact of the mine on communities is severe and widespread. Complaints include:

- On livestock rearing: Despite a proud tradition of livestock rearing, over the years the local cattle trade has declined significantly. Pasture areas have been affected by mining dust and animals are ill as a result of drinking contaminated water. Communities complain of becoming poorer not just due to loss of land but also as a result of the deteriorating quality of the water to the point that it has limited use.

³⁸⁴ See ILO, Committee of Experts, Individual Observation Concerning Right to Organise and Collective Bargaining Convention, 1949 (No 98) United Kingdom (2009) (raising questions about a number of aspects of the trade union recognition procedure that would now seem ripe for challenge in the light of *Demir and Baykara*). Compare *R (NUJ) v CAC* [2005] EWCA Civ 1309.

³⁸⁵ See K D Ewing and T Sibley, *International Trade Union Rights for the New Millennium (ICTUR/IER)*, (2000).

³⁸⁶ The province has more than 70,000 inhabitants. 60% of the population live in rural areas and speak the Quechua language. FONCODES "Mapa de la Pobreza 2000" put income in eight districts of Espinar as very low/extreme poverty.

- On rivers: There are reports that waste water from the mine’s processing plant had leaked into local rivers and springs,³⁸⁷ contaminating pasture land (this was recorded by Oxfam/AUS Mining Ombudsman in her Annual Report 2001). A reduction in the number of fish has also been reported.
- On soil: The village of Alto Huancane reported (and it was later confirmed) that large extensions of grazing areas have been inundated with tailings. Animals are often sick and seeds don’t grow. A study carried out by Peruvian NGO CooperAccion in 1999 concluded that families affected by the mine are not able to satisfy their basic needs.

7. In response to demands from local organisations, on 3 September 2003 BHP Billiton Tintaya S.A. signed a Framework Agreement (known as Convenio Marco) with the Espinar Province. Local authorities and local organisations participated in the process of formulating this agreement which among others made provision for environmental monitoring, building capacity of local people, setting up an independent commission for monitoring environmental impact of the mine and investment on sustainable development, as well as a financial contribution of 3% of pre-tax profits with a minimum of US \$1.5 million (not linked to taxes).

8. As a lawyer and Human Rights Secretary to the United Front for the Defence of Espinar (“Frente Unico de Defensa de los Derechos de Espinar”), Hilda Huaman played an important role in the drafting of the agreement. Once the Framework Agreement was signed, Hilda was named president of the “technical commission” responsible for overseeing that this ground-breaking agreement was upheld by all parts.

9. On 17 May 2005 frustration on the part of the organisations with what appeared to be back-tracking by BHP Billiton Tintaya S.A. led to a public meeting at which leaders and the affected communities agreed to re-formulate the agreement dating from 2003. The technical commission produced a new re-formulated agreement (“Convenio Marco reformulado”), which was discussed and approved by leaders of local organisations during a public consultation. This new agreement demanded that BHP Billiton spend twenty million dollars on social projects and infrastructure between Espinar and Arequipa. The local Mayor signed the new draft and agreed that it should be delivered to the corporation.

10. On the 18th a delegation formed by members of the technical committee presented itself at the mine (as president of the technical commission Hilda Huaman was also present), handed in the new “Convenio Marco reformulado” and requested an answer from the corporation by 20 May 2005.

11. On 20 May several organisations, among them the United Front for the Defence of Espinar, held an extraordinary meeting in the local plaza to discuss the corporation’s lack of response to the document previously handed in. Records of the meeting confirm that public protests were called for the days 23rd, 24th and 25th. The local Mayor agreed that buses could be used in order to facilitate transport of women with children etc. As secretary Hilda Huaman was responsible for minute-taking of decisions agreed during this meeting.

12. In the early morning of the 23rd, around 3,000 people made their way from the city of Espinar (Cusco) to the offices of the mine. The purpose was to oblige Edgar Basto Baez, legal representative of Tintaya S.A. to meet community leaders. However, the delegation was not able to see Mr Basto who was away in the city of Arequipa. Local radio stations reported that the national police dispersed the demonstration with tear gas and bullets.

13. On the 24th around 3,000 people got together and again made the trip to the Tintaya mine. Although Mr Basto was in his office, at around 2pm he informed the crowd that he would not meet with the delegation. Newspaper reports of the day suggest that many people felt angry at this decision, and an unknown number of them walked into the buildings and proceeded to ransack the offices. The intrusion was filmed (it is difficult to identify people). Shortly after 8pm police buses arrived and detained those who had not had time to escape from the mine’s buildings. As the community remained vigilant outside the corporation’s offices, late in the evening the police allowed those detained to leave the building. The police remained, protecting the building.

14. On the 25th people from Espinar and surrounding communities once again went to the mine site and waited outside requesting to see Mr Basto. Police officers stationed outside the building spread the rumour among protesters that a private meeting between the local Mayor and Mr Basto had taken place the night before. When the local Mayor and his advisors came to talk to the group, many people felt betrayed by his alleged alliance with the mine and attempted to lynch him in some kind of “mob justice”.³⁸⁸ As a direct result of the above incidents, the government declared a state of emergency and called for the army to regain control and maintain order.

15. Tintaya S.A estimated damages at 10,886,897.88 US dollars. This figure included loss of revenue, as the mine was shut for a month for fear of more vandalism.

16. As a result of BHP’s official complaints, the Public Prosecutor brought a lawsuit against 74 protestors (process 2005-118-10-0808-JP-01). Despite a lack of evidence, Hilda Huaman’s name was among those accused of being responsible for damage to the mine and preventing police for carrying out their duties. Hilda believes that she was singled out because of her high profile as community leader, her involvement in

³⁸⁷ <http://www.24horaslibre.com> 25 May 2005 “Alcalde de Espinar apedreado por pobladores”

³⁸⁸ <http://www.24horaslibre.com> 25 May 2005 “Alcalde de Espinar apedreado por pobladores”

the drafting of the new agreement as well as for forming part of the group that handed it over. Throughout the investigation none of the legal documents established either her crime or her legal responsibility. Furthermore, she was not identified as being directly responsible for illegal acts nor did the public prosecutor provide evidence that she participated in the public protest. Equally important, no attempt was made to establish Hilda's degree of participation (individualisation of her responsibility).

17. Given that the crimes were not specified, Hilda never knew exactly what she had done. This in turn limited the effectiveness of her defence. Such irregularities go against the right to have a proper legal process and Article 14 (numeral 3, literal b) of the International Covenants for Civil and Political Rights which establishes that a person has the right to know of what s/he is accused. Furthermore the OEA Convention on Human Rights establishes that a person is entitled to have clear and abundant details regarding the accusation.

18. In November 2008 in support of Hilda and the 73 other implicated in the investigation, the Environmental Defender Law Center (EDLC³⁸⁹) with the support of English-based solicitors³⁹⁰ requested EDLC's admission as *Amici Curiae* for the case. In a 26-page brief the lawyers show that under international and regional treaties on human rights signed and ratified by Peru it is not possible to condemn Hilda (and fellow citizens) for participating in a protest against a mining company that had caused severe environmental damage and failed to adhere to agreements to redress this situation. They argued that the government's hidden intention with the process was to silence not only those protestors included in the lawsuit but also many others legally protesting against the environmental consequences of the activities of BHP Billiton Tintaya S.A. In other words, the government's final goal was the criminalisation of a range of actions vigorously protected by international legislation on human rights, regional legislation on human rights and Peru's national legislation

19. EDLC legal argument is summarised in three points. (1) Punishing the protesters represents a violation of their rights to freedom of expression, assembly, association, petition, participation in public affairs and the right to a healthy environment. (2) Under criminal law nobody can be made responsible for the illegal acts of others on the basis that they participated, organised or led a public protest. (3) Finally, EDLC argued that the accusations have to be seen as part of a global problem; that is, the global persecution of citizens defending themselves against damage to their environment. In this context EDLC presented dozens of example from countries including Peru in which environmental defenders have been accused of fabricated crimes, sent to prison, attacked and sometimes killed. Given this situation, EDLC concluded that the lawsuit represented the attempt of a government willing to use environmental human rights defenders as targets in an effort to silence not only them but also the people they represent.

20. On 9 December 2008 Hilda as well as the others included in the process were declared innocent by the Tribunal of Sicuani, province of Canchis.

21. Between June 2005 and March 2006, Hilda reported being subject to threats from mine workers as well as from workers of the local council. She had to move house as her home was under constant surveillance (films, photos and someone outside her house in a visible place). As she felt her safety was compromised and feared for her life, in March 2006 she moved to the city of Arequipa where she still resides.

22. BHP Billiton never admitted that the devastating impact of its activities on people's lives together with its failure to adhere to agreements with the community was the reason for the protests. To this day, Hilda reports that the absence of systems for monitoring and reporting for example spills, together with the mine's total disregard for civil society groups means that the company is accountable to no one in the community. As a result, the conflict between the company and the communities deepens every day.³⁹¹

23. The lawsuit was brought by the state of Peru, at the request of Tintaya S.A, which supplied all evidence including names of the people responsible for damage to the company's property. At LAMMP, we believe Hilda Huaman's case is important as an example of bad practice of a company that does not accept responsibility for persistent violation of people's rights to a healthy environment. It also shows how the company, having recognised the critical role played by Hilda as defender of the rights of the communities, pursued a lawsuit that according to EDLC's *Amici Curiae* brief would be inadmissible in the UK or the USA.

24. LAMMP welcomes the interest of the UK government in identifying both measures to prevent this pattern of corporate abuse repeating itself as well as proactive policies for the protection of human rights defenders.

³⁸⁹ <http://edlc.org>

³⁹⁰ Garrett Byrne and Jack Anderson, 4-5 Gray's Inn Square, London WC1R 5AH

³⁹¹ December 2007 CoperAccion "Primer Informe. Observatorio de Conflicitos en el Peru".

Memorandum submitted by Global Witness

**HIGHLIGHTING THREATS TO HUMAN RIGHTS BY UK COMPANIES OPERATING IN
CONFLICT OR HIGH RISK AREAS**

1. Global Witness appreciates the opportunity to make this submission to the Joint Committee on Human Rights.

2. We identify the circumstances that need to be taken into account by UK-based companies that operate in conflict or high risk areas where there is an abundance of natural resources. The UK Government has failed to take action to prevent or deter abuses by UK companies operating in these areas, in particular in the Democratic Republic of Congo (DRC). As a result, the UK Government should play a greater role in regulating and advising these companies in order to minimise human rights violations and other abuses. Drawing upon Global Witness' work, we highlight five specific instances where current UK Government action has been inadequate. A recommendations section and annex with five case studies are also included.

3. Global Witness is an NGO that exposes the corrupt exploitation of natural resources and international trade systems. We obtain evidence which we use to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses. Global Witness was nominated for the 2003 Nobel Peace Prize for its work on conflict diamonds. We work predominantly in conflict-affected countries, emerging markets and in countries with totalitarian regimes and low levels of transparency.

4. As articulated in Professor John Ruggie's report "Protect, Respect and Remedy: a Framework for Business and Human Rights" home states (*i.e.* countries where companies are registered) need to play a greater role in minimizing human rights abuses caused or contributed to by their companies operating in conflict affected areas.

5. In 2007, Global Witness seconded a member of staff to work with Professor John Ruggie and his team. As part of this secondment, a policy paper and number of recommendations were submitted pertaining to the regulative, advisory and facilitative role that home states can play in minimizing human rights abuses caused by their companies operating in conflict areas.

6. Global Witness believes that greater regulatory and policy measures that have an extra-territorial effect are required which will apply to UK-registered companies operating in conflict or high risk areas.

7. We take the position that human rights are non-negotiable regardless of the economic climate. We strongly believe that the UK government should not loosen its ethical requirements of UK business operating in conflict or high risk areas in order to reduce the impact of the global recession.

8. Global Witness restates Professor's Ruggie's position that companies have a responsibility to do "no harm" when it comes to human rights. We also believe that when corporate related human rights abuses occur, often as a result of core operations, that these cannot be off-set by other philanthropic behaviour such as building clinics or schools.

9. We support a number of submissions made by other NGOs, including CORE's proposal for the establishment of a new commission with sanctioning powers over UK companies.

UK companies are at risk of committing or contributing to human rights violations in conflict or high risk areas

10. Currently, UK companies are operating in conflict or high risk areas where there is fighting, widespread repression and weak protection against human rights violations. These volatile areas are not limited to areas of armed conflict, as defined by international humanitarian and criminal law, but also include areas experiencing civil war, an absence of rule of law and accountability, brutal government regimes that seek to repress human rights, or, those post-civil war countries with sporadic violence, and localised areas of civil unrest.

11. Often in these conflict or high risk areas the host government (*ie* the country where corporate operations are being conducted) is *unable or unwilling* to assume its responsibility in safeguarding human rights. Thus, protections are weak and companies are at a greater risk of committing and exacerbating human rights violations. In these areas, gross human rights violations take place and criminal activity often goes unchallenged. Without regulation and targeted policy developments at the international level, and interventions made by the home states of these companies, corporate involvement in human rights abuses will continue unabated.

12. In addition, the lucrative "rents"³⁹² available from natural resources are known to spur a state party or warring factions to gain control over them, which can cause or exacerbate conflict and human rights violations. A recent UN report on the relationship between natural resources and conflict, finds that forty percent of all intrastate conflicts since 1960 have a link to natural resources. It also concludes that intrastate conflicts linked to natural resources are twice as likely to relapse within five years.

³⁹² "Rents" are unearned funds that are used by governments or controlling factions for financial gain—they reflect revenues that exceed costs or what would be normal profit margins for that resource. In conflict or high risk areas these profits are often larger because actual costs are lower due to underpaid labour and/or illegal operations.

13. For example, Global Witness' field research in eastern DRC and neighbouring countries in 2008 and 2009 uncovered substantial evidence of the involvement of armed groups in the exploitation and trade of cassiterite (tin ore), gold, and other minerals in North and South Kivu. These economic activities are perpetuating the instability in the region and UK companies are involved.

14. Ultimately, the unaccountable exploitation of natural resources can lead to states suffering the "resource curse": the phenomenon by which the generation of natural resource wealth from the exploitation of natural resources in states captured by unaccountable elites, results in poor standards of human development, bad governance, increased corruption and state looting, and very often conflict.

15. In these instances home states, such as the UK Government, need to assume both a proactive and sanctioning role to fill in the "governance gaps" by taking steps to ensure that their companies neither perpetuate nor are complicit in human rights abuses arising by virtue of their operations in these areas.

16. As highlighted by Professor Ruggie, international law does not prevent the UK Government from playing a role in protecting against corporate human rights abuses in conflict or high risk areas. Moreover, because of the unique circumstances associated with conflict or high risk areas, the UK may even be entitled to take more assertive action.

17. Already, countries such as Norway and Sweden have started to recognise their role as primary caretakers for protecting human rights arising from their business in conflict affected areas.³⁹³

18. In addition, responsible business has asked for increased guidance for companies operating in weak governance areas. The International Chamber of Commerce has stated that national governments needed "...to create the underlying legal framework for protecting human rights and to take action when those rights are denied."³⁹⁴

CURRENT SHORTCOMINGS RELATING TO THE UK GOVERNMENT'S ACTIONS IN PREVENTING OR DETERRING ABUSES

19. The UK Government's response to instances where their companies are operating in conflict or high risk areas has been on an ad-hoc basis. For example, in the past official statements have been made by the UK Government warning UK-registered companies against operating in Burma and Zimbabwe. We believe such public statements are valuable, however, their infrequency highlights the lack of a systematic approach.

20. In addition, the UK Government is a signatory to a number of corporate and human rights related voluntary initiatives including: the Voluntary Principles on Security and Human Rights and the OECD Guidelines for Multinational Enterprises (OECD Guidelines). However, voluntary initiatives are insufficient. They must be supplemented with accountability mechanisms that ensure compliance and whereby there are significant consequences such as criminal sanctions where necessary.³⁹⁵

FIVE SPECIFIC INSTANCES ARISING FROM GLOBAL WITNESS' WORK:

i) *Global Witness complaint against Afrimex under the OECD Guidelines (January 2007)*—(see: Annex "A" Case Study 1)

21. Global Witness applauds the UK National Contact Point's (NCP) final statement upholding allegations that UK-registered Afrimex had failed to ensure that its trading activities did not support armed conflict and forced labour in eastern DRC. A significant part of NCP's conclusions rested upon the fact that Afrimex had not exercised sufficient due diligence to its supply chain, and that some of its suppliers had made payments to rebel groups thus contributing to the conflict.³⁹⁶ Nevertheless, the NCP final statement in itself is insufficient.

22. In the final statement, issued in August 2008 the NCP made a number of recommendations to Afrimex. However, by February 2009 the NCP had not received any information from Afrimex about the implementation of its recommendations.

23. Since submitting the OECD complaint in January 2007, information gathered by Global Witness confirmed that Afrimex continued to trade in 2007 and 2008 with at least one supplier identified in the December 2008 UN Final Report of the Group of Experts for the Democratic Republic of the Congo (UN Expert Report),³⁹⁷ as buying minerals produced by rebels and responsible for grave human rights abuses.

³⁹³ Both countries have adopted a zero tolerance approach for state investments in project finance deals that have a negative impact on human rights. Notably, Norway's Pension Fund and Ethical Guidelines for investment implemented by the Council of Ethics.

³⁹⁴ IOE, ICC and the Business and Industry Advisory Committee (BIAC) submission "Business and Human Rights: The Role of Business in Weak Governance Zones, Business Proposals for Effective Ways of Addressing Dilemma Situations in Weak Governance Zones" (December 2006).

³⁹⁵ See: Global Witness publication "Oil and Mining in Violent Places" located at http://www.globalwitness.org/media_library_detail.php/580/en/oil_and_mining_in_violent_places.

³⁹⁶ Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008; Department for Business Enterprise and Regulatory Reform (BERR) press release "Mineral trade helped fund rebels", 28 August 2008.

³⁹⁷ <http://daccessdds.un.org/doc/UNDOC/GEN/N08/618/77/PDF/N0861877.pdf?OpenElement> (last accessed 29 April 09).

24. In March 2009 Afrimex finally advised the UK NCP that it had stopped trading in minerals from eastern DRC in September 2008, after the final statement was issued. However, this claim remains unsubstantiated by Global Witness and the UK Government.

25. The UK government should take further action to ensure that Afrimex fundamentally change its practices regarding eastern DRC, and that the investigation and conclusions of the NCP are more than just a theoretical exercise. At the international level, the UK Government should report Afrimex and its directors to the UN Sanctions Committee pursuant to UN Security Council Resolution 1857. Global Witness believes that continued trade by Afrimex justifies that it falls within the criteria of paragraph 4(g) of that Resolution.³⁹⁸ See: Recommendations Section paragraphs 43–44.

26. Global Witness believes the OECD Guidelines remain a weak, non-binding mechanism. In particular, the NCP cannot compel a company found to be in violation of the Guidelines to change its corporate practices. This underscores the need for the UK Government to monitor company behaviour after final statements are issued and ensure compliance. Without doing so, breaches of the OECD Guidelines may continue thereby perpetuating and endangering human rights.

27. Furthermore, the UK government should send a clear signal to UK-registered companies that it expects them to carry out thorough due diligence to ensure that their trade is not funding any of the warring parties in high risk areas. The UK Government should be able to define the conditions under which companies should be permitted to operate in these areas. It is not good enough that a company be transparent with respect to its trading partners—due diligence should be regularly performed and updated throughout the lifecycle of operations. With respect to Afrimex, the UK Government should have taken steps to sanction the company long before Global Witness’ intervention—these important cases should not only be left to civil society to undertake. See: Recommendations Section paragraphs 45–47.

ii) *Amalgamated Metal Corporation (AMC) cited in UN Expert Panel reports as funding warring factions in eastern DRC—(see: Annex “A” Case Study 2)*

28. Stronger measures are required to supplement current UK Government practice as demonstrated by the identification of two UK based companies in the 2008 UN DRC Report.³⁹⁹

29. The 2008 UN Expert Report establishes that one of main suppliers of THAISARCO (a subsidiary of AMC) in eastern DRC has close links with an armed group responsible for committing grave human rights abuses against civilians.

30. As early as 2002, AMC were included in a list of companies considered by the UN Panel of Experts to be in violation of the OECD Guidelines.

31. In December 2008, Global Witness wrote to THAISARCO and its UK-registered parent company AMC inquiring about their trade with the DRC and their due diligence policies. AMC responded by letter dated 19 January 2009 outlining its general policy toward the DRC.

32. Global Witness believes that THAISARCO and AMC fall within the criteria of paragraph 4(g) of UN Security Council Resolution 1857⁴⁰⁰ and urges the UK Government to investigate AMC and its four constituting UK companies and, if warranted, recommend to the UN Sanctions Committee that these companies, and their directors, be included in the list of companies and individuals against whom sanctions are imposed. See: Recommendations Section paragraphs 43–44.

iii) *Turkmenistan and the UK Export Credits Guarantee Department—(see Annex “A” Case Study 3)*

33. Within the context of the UK Government’s support for gas exploration projects in Turkmenistan, Global Witness submits that the UK Government should ensure that human rights concerns remain central to all exploration agreements made by UK companies requiring its financial support. The UK Government should: 1) set higher standards than those that currently exist for UK companies; and 2) take measures to ensure that its funding is not fuelling human rights abuses 3) require companies to provide a Human Rights Impact Assessment (HRIA) and show that adequate due diligence has been taken to ensure that they will not be complicit in any human rights violations. As a precondition, export credit should only be provided on the basis that UK companies disclose payments made to foreign governments. See: Recommendations Section paragraph 52.

34. Global Witness is especially concerned by recent moves to downgrade the UK Government’s ability to police ethical and environmental standards when offering taxpayer-guaranteed insurance to British companies wanting to work on overseas projects. As reported by the press, the proposed new Industry and

³⁹⁸ UN Security Council Resolution 1857 (2008), 22 December 2008 S/RES/1857 (2008) calls for the renewal of the arms embargo with respect to the DRC and financial and travel restrictions against those acting in breach of the embargo, until 30 November 2009. The basis for our request rests in paragraph 4(g) of the Resolution, which states that the criteria for sanctions extend to “individuals and entities supporting illegal armed groups in eastern DRC through illicit trade in natural resources.” Sanctions would include an assets freeze and travel ban. Afrimex has been named by UN Panel of Expert Reports for the DRC since 2002.

³⁹⁹ The two named UK companies included Afrimex and AMC.

⁴⁰⁰ See explanation in footnote 398—the basis for our request rests in paragraph 4(g) of the Resolution 1857, which states that the criteria for sanctions extend to “individuals and entities supporting illegal armed groups in eastern DRC through illicit trade in natural resources.” Sanctions would include an assets freeze and travel ban.

Exports (Financial Support) Bill will be a step backwards with respect to the UK Government's efforts to fulfil its obligations under the State Duty to Protect.⁴⁰¹ We call for strong human right standards particularly in places where the UK Government is providing financial support through export credit guarantees to UK companies operating in conflict or high risk areas.

iv) *Anvil Mining and DFID Funding in the DRC—(see: Annex "A" Case Study 4)*

35. Global Witness and RAID have repeatedly expressed concern relating to DFID's decision to work with Anvil Mining on a proposed Public Private Partnership (PPP) with USAID in Katanga.⁴⁰² Our concern was that DFID was directly or indirectly supporting a mining company which local prosecutors allege have been involved serious human rights violations, and which has so far refused to acknowledge any responsibility for its role. In 2006, the prosecutor at Katanga's Military Court in the DRC indicted three former expatriate employees of Anvil Mining Congo SARL for complicity in war crimes.⁴⁰³ In June 2007 the military tribunal acquitted the defendants. In reference to the trial, the UN High Commissioner for Human Rights, Louise Arbour, stated, "*I am concerned at the court's conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations.*" To date, no prosecution has been started in the home states of the indicted employees.

36. Global Witness refers the Committee to the joint publication it issued with Rights and Accountability for Development (RAID) "*Kilwa trial: a denial of justice. A chronology, October 2004—July 2007*"⁴⁰⁴ which details the injustice faced by victims of the Kilwa Massacre during the DRC Military Trial in 2006–07. See: Recommendations Section paragraphs 53–54.

v) *"Undue Diligence" and UK-registered financial institutions—(see: Annex "A" Case Study 5)*

37. There are currently no laws in place that require "due diligence" vis-à-vis the provision of financial services to human rights violators nor guidelines specific to conflict and high risk areas. Although not specifically addressed by Professor Ruggie's framework, the UK Government should clarify the human rights obligations of UK-registered financial Institutions.

38. This need for clear guidelines is underscored by the Apartheid Alien Tort Claims case currently being litigated in the United States. It is alleged that the defendants, including Deutsche Bank, Citibank and Barclays Bank "*...actively and willingly collaborated with the South African government to perpetuate the repressive, race-based system of apartheid*".⁴⁰⁵ Although defendants deny the charge, the case is still proceeding through the courts.

39. Furthermore, Global Witness has uncovered evidence that Citibank and Deutsche Bank, both of which have a substantial presence in the UK with London-based headquarters, have facilitated and enabled other forms of human rights abuses to occur in the past: a) Citibank facilitated the funding of two vicious civil wars in Sierra Leone and Liberia by enabling the warlord Charles Taylor, now on trial for war crimes in The Hague, to loot timber revenues. Citibank has a head office in the UK.⁴⁰⁶ b) Deutsche Bank assisted the late President Niyazov of Turkmenistan, a notorious human rights abuser, to keep billions of dollars of state gas revenues under his personal control and off the national budget.

40. The UK Government should take a lead in making reforms to the financial regulatory system to prevent financial institutions from becoming complicit in human rights violations in conflict and high risk areas. See Recommendations Section paragraph 56.

RECOMMENDATIONS CALLING FOR UK GOVERNMENT ACTION

1) *UK Government—Action at the international level*

41. The UK Government should support calls for a UN Secretary General's report that examines the impact of natural resource exploitation and trade on human rights in conflict and post-conflict settings, including the lessons that can be learned and the ways in which existing standards of conduct for corporate and state actors may be strengthened.⁴⁰⁷

⁴⁰¹ The Times "*Lord Mandelson accused of weakening rule on ethical exports*" 13 April 2009 located at April <http://www.timesonline.co.uk/tol/news/politics/article6082922.ece> (last accessed 27 April 2009).

⁴⁰² We understand that DFID has subsequently discontinued its work with Anvil Mining.

⁴⁰³ For details of the local prosecutor's allegations see: http://www.globalwitness.org/media_library_detail.php/560/en/kilwa_trial_a_denial_of_justice; it should be noted that Anvil Mining Congo SARL is a subsidiary of Canadian/Australian Anvil Mining Limited. A holding company for Anvil is located in the UK.

⁴⁰⁴ http://www.globalwitness.org/media_library_detail.php/560/en/kilwa_trial_a_denial_of_justice

⁴⁰⁵ Global Policy Forum (May 13, 2008) located at: <http://www.globalpolicy.org/intljustice/atca/2008/0513apartheid.htm>

⁴⁰⁶ See: Global Witness's report, "*Undue Diligence: How banks do business with corrupt regimes*," 2009 located at http://www.globalwitness.org/media_library_detail.php/735/en/undue_diligence

⁴⁰⁷ In June 2007 the UN Security Council convened a first ever thematic debate on natural resources and conflict and called for more international action to address the issue. The Belgian government has since proposed that the UN General Assembly (UNGA) convenes a debate on the same topic. The immediate objective would be a UNGA resolution calling for a UN Secretary General's report.

2) *UK Government—Regulatory actions at the national level*

42. The UK Government should enforce and compel compliance around minimum legal standards, including the legal risks identified in the *Red Flags* document published by FAFO and International Alert.⁴⁰⁸ This document successfully synthesises legal wrongs which Global Witness has investigated in our own work. It captures nine liability risks for companies to be aware of when operating in conflict or high-risk areas. These represent a threshold and are based on legal breaches sourced from both national and international legal systems.

a) Enforce existing laws and legal obligations

43. Proactive action requires that the UK Government enforce current laws that favour investigating and prosecuting human rights abuses stemming from corporate activities in conflict and high risk areas. This will require that domestic criminal investigators and legal practitioners be more aware, receptive, and better trained to take up these cases. For example, the UK Government can call on legal experts to: draw out (in practical terms) the elements required for establishing: i) the war crime of pillage (*i.e.* theft of property affecting human rights during armed conflict) or ii) the facilitation of state looting either during or after a war, in UK courts.

44. The UK Government should focus on improved enforcement and prosecution of individuals and companies that violate UN Chapter VII sanctions. The UK Government should recognize these as principles of international law and prioritize their application. This requires that the UK Government actively investigate UK companies identified by the UN, and report to the UN Sanctions Committee any companies that fall within the criteria of UN Security Council Resolutions.

b) Create new laws that apply extra-territorially in conflict and high risk areas

45. The UK Government should introduce legislation that requires companies that source natural resources produced in conflict or high risk areas—for example cassiterite, coltan, wolframite, and gold from eastern DRC—to ascertain the date of extraction and location where the minerals are produced.

46. The legislation should require that UK companies operating in or buying from conflict or high risk areas conduct sufficient due diligence in their supply chains to ensure that they do not commit or contribute to human rights abuses, or the facilitation of state looting and continuation of bad governance. This obligation extends to a company's supply chain, especially where the company is in a position to influence any abusive human rights practices used by them.

47. This will require that the UK Government also be able to assess the level of due diligence carried out by a company operating in these areas.

3) *UK government—Policy measures at the national level*

48. In addition to regulation, the UK should adopt a series of policy and due diligence measures, and issue public statements to minimize UK corporate related human rights abuses.

a) Proactive policy measures

49. The UK Government should take proactive steps to clarify expectations and principles relevant to business; to identify indicators to trigger alerts with respect to companies operating in conflict affected areas. This will require that the UK Government review and condense into one document all human rights principles that currently apply to UK companies operating in conflict areas. The UK Government should evaluate and determine the effectiveness of these principles and further develop them. These principles should include the nine Red Flags as a basis for developing higher standards. This synthesis should act as a framework of expectations for registered companies when operating in conflict areas.

50. The Government should strengthen, formalize and monitor the implementation of existing voluntary codes such as the OECD Guidelines. The Government should ensure that companies comply with these human rights standards. The UK should be prepared to sanction those companies that fall below these standards, whether intentionally or otherwise. The UK Government should uphold final statements made by the UK NCP and take steps to ensure that they are brought to the attention of all arms of government.

51. The UK should make use of tools available to the government in exercising leverage over companies breaching human rights. As one method, the Government should recommend that, when appropriate, their public financial agencies divest from companies that are found to violate human rights standards. To achieve this, the Government should replicate and customise current best practice models such as the Norway Pension Fund. In addition, the Government should strengthen the human rights components of the OECD Guidelines, which are currently very general.

⁴⁰⁸ The FAFO and International Alert, *Red Flags* document states that Red Flags exist when actions result in: displaced peoples; forced labour; the handling of questionable assets; making illicit payments; engaging with abusive security forces; trading goods in violation of UN international sanctions; providing the means to kill; and the financing of crimes.

52. As mentioned previously in this submission, the UK Government should make more effective use of the ECGD by requiring that they explicitly state that human rights are operational principles applicable to companies seeking financial support and insist that red flags are adhered to as minimum criteria for insurance. The UK Government should act proactively and withdraw its support altogether, when companies are found to be committing or complicit in human rights abuses. Furthermore, UK Government can take steps to ensure that complicit companies cannot get support from other financial institutions.

b) Due diligence within UK government departments

53. The UK Government needs to ensure that officials in government agencies who promote foreign investments and provide development assistance are aware of the human rights situations in volatile areas and explicitly require that corporate human rights related due diligence be performed. This should be assessed by the official before approval is provided. As one example, DFID should ensure that the PPPs in which it is involved, include businesses not alleged to be involved in human rights violations.

54. The UK Government needs to be able to provide meaningful on-the-ground advice to companies, for example, through their embassies in host countries, on whether or not they should continue to conduct business in conflict or high risk areas or how they should manage human rights risks. Professor Ruggie recently stated that “the OECD has developed a generic risk-assessment tool for companies operating in weak governance zones, but what companies need is real-time information and advice.”⁴⁰⁹

c) Public warnings

55. The UK Government should adopt and express a “no-go” position where it is determined that direct or indirect violations of human rights cannot be mitigated by a UK-registered company. In these instances the UK should take a public position stating its reasons for concern and calling for companies to cease economic activity until the human rights conditions improve. This would be short of sanctions, but can be helpful in some cases. The UK has already used this technique on an ad hoc basis, whereas a more systematic approach is necessary.

4) UK Government—Guidelines and integration of human rights benchmarks for financial institutions

56. Calling for clear guidance to be given to UK-based financial institutions and requiring that minimum human rights standards be integrated into all their business with companies that operate in conflict or high risk areas. The UK Government can specifically engage in the following:

- (a) Require that commercial banks integrate Red Flags (ie minimum legal standards) into all dealings with companies that operate in conflict areas. If banks have a client operating in a conflict or high risk area, they should be required to undertake enhanced due diligence, using the Red Flags’ model to identify potential abuses, and then to avoid doing business if risks were identified.
- (b) Ensure that their own credit agencies operate on the same model and use their leverage as donors to the international financial institutions to press for them to do the same.
- (c) Engender a changed culture of “due diligence”—banks should only take the business if they have identified that the ultimate beneficiary is not a known human rights violator or a key government official or family member associated in state looting.
- (d) Ensure that new global rules are put in place to help banks avoid funds gained through the commission of human rights violations. Every country should produce full public online registers of the ultimate beneficial ownership of all companies and trusts under its jurisdiction, to help banks identify and avoid business with a human rights risk.

Annex “A”

CASE STUDIES TO GLOBAL WITNESS’ SUBMISSION

CASE STUDY 1: THE AFRIMEX CASE BROUGHT BEFORE THE UK NCP FOR THE OECD GUIDELINES

Afrimex is a UK-registered company which operates in eastern DRC through the Congolese registered companies Société Kotecha and SOCOMI,⁴¹⁰ both based in Bukavu. In February 2007, Global Witness filed a complaint against Afrimex for breaches of the OECD Guidelines for Multinational Enterprises, in connection with its trade in minerals during the war in the Democratic Republic of Congo (DRC) from 1998.⁴¹¹ The UK Government’s National Contact Point (NCP) for the OECD Guidelines investigated the case and, in August 2008, published its final statement, upholding the majority of Global Witness’s allegations. It concluded that Afrimex had failed to ensure that its trading activities did not support armed conflict and forced labour. A significant part of its conclusions rested upon the fact that Afrimex had not

⁴⁰⁹ “Prepared Remarks by SRS John G. Ruggie Public Hearings on Business and Human Rights Sub-Committee on Human Rights European Parliament” (Brussels, 16 April 2009).

⁴¹⁰ Afrimex’s mineral *comptoir*.

⁴¹¹ See Global Witness, “Afrimex (UK)—DRC: Complaint to the UK National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises”, 20 February 2007.

exercised sufficient “due diligence” to its supply chain, and that some of its suppliers—which included the *comptoirs* Muyeye and Olive—made payments to rebel groups (at that time, the RCD-Goma), thus contributing to the conflict.⁴¹²

The NCP made a number of recommendations to Afrimex, relating, among other things, to the formulation, implementation and periodic review of a corporate responsibility policy which should take into account the human rights impact of the company’s activities. By February 2009, the NCP had not received any information from Afrimex about the implementation of its recommendations.

Even after the OECD complaint was submitted in 2007, Global Witness gathered information that confirmed that Afrimex continued to trade in minerals from eastern DRC, albeit on a smaller scale than it had during the earlier years of the war. Furthermore, one of its suppliers in 2007 and 2008 was Muyeye, named by the UN Group of Experts as buying minerals produced by the rebel group FDLR (*Forces démocratiques pour la libération du Rwanda*), responsible for grave human rights abuses. Congolese government statistics list Afrimex as having imported 382.5 tonnes of cassiterite from Goma and 1,102.5 tonnes of cassiterite and 112.5 tonnes of wolframite from the *comptoirs* Muyeye and Bakulikira in South Kivu in 2007.⁴¹³ A sample of monthly reports for 2008 from the Congolese Government’s Centre for Evaluation, Expertise and Certification (CEEC) show Afrimex as having imported 22.5 tonnes of cassiterite from Muyeye on 27 May 2008 and 45 tonnes from Bakulikira and 90 tonnes from Muyeye in June 2008.⁴¹⁴ Afrimex’s mineral supplier and associated company SOCOMI, is listed as an officially licensed *comptoir* for cassiterite in South Kivu, having paid its licence fee of US \$9,000 for 2008.⁴¹⁵ Several other sources interviewed by Global Witness in mid 2008 confirmed that SOCOMI and Société Kotecha were still operating and handling minerals.⁴¹⁶

In January 2009, Global Witness wrote to Afrimex asking, among other things, for an update on the company’s progress in implementing the NCP’s recommendations.⁴¹⁷ In March 2009, Afrimex replied to the NCP, copying Global Witness, stating that it had stopped trading in minerals and that its last shipment left the DRC in or around the first week of September 2008.⁴¹⁸ This claim remains unsubstantiated by Global Witness and the UK Government.

Global Witness refers the Committee to paragraphs 21–27 of our submission.

CASE STUDY 2: AMALGAMATED METAL CORPORATION (AMC) GROUP, THAISARCO AND UN GROUP OF EXPERTS

The December 2008 Final Report of the UN Group of Experts establishes links between THAISARCO and the *comptoir* Panju (based in eastern DRC), which has close links with the rebel group FDLR. Panju is one of the top five exporters of cassiterite, coltan and wolframite from South Kivu, according to 2007 Congolese Government statistics. The UN Group of Experts identified Panju as one of the *comptoirs* in Bukavu directly complicit in pre-financing *negociants*, who in turn work closely with FDLR. The Group further states that Panju was aware “*that certain mines they buy from are controlled by FDLR*” and that this was common knowledge within the mineral houses in South Kivu. The Final Report states that “*the Group has also obtained documents showing that all of Panju’s minerals purchases were sold to the Thailand Smelting and Refining Company*” (*THAISARCO*).

In 2002, AMC were included in a list of companies considered by the previous UN Panel of Experts to be in violation of the OECD Guidelines.

DRC Government export records obtained by Global Witness confirm that THAISARCO purchased over 2,000 tonnes of cassiterite, coltan and wolframite from Panju in 2007. In December 2008, Global Witness wrote to THAISARCO and its UK-registered parent company AMC inquiring about their trade with the DRC and their “due diligence” policies. In their replies, THAISARCO and AMC attempted to create a distance between their trade and the situation in eastern DRC by stating that they do not operate “directly” in the DRC. THAISARCO also claimed that “*most parties and commentators appear to be in agreement that the continued trade in minerals from DRC is fundamental to the well being of the artisanal mining communities*” and concluded: “*In summary, we believe we are providing a very valuable service to the DRC economy although we recognise that improvements in the visibility of the supply chain are both desirable and necessary.*”

⁴¹² Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008; Department for Business Enterprise and Regulatory Reform (BERR) press release “*Mineral trade helped fund rebels*”, 28 August 2008.

⁴¹³ Rapport Annuel 2007, Division des Mines, North Kivu and South Kivu.

⁴¹⁴ CEEC, Rapport mensuel d’activités, mois de mai 2008 et mois de juin 2008, Antenne de Bukavu, Sud-Kivu.

⁴¹⁵ Performances des *comptoirs* du Sud-Kivu en 2008, Division des Mines, South Kivu, 19 July 2008.

⁴¹⁶ Global Witness interviews in Bukavu, 28 July and 3 August, and in Goma, 7 and 8 August 2008; report by a Uvira-based human rights organisation on illicit exploitation of minerals in the territoires of Uvira and Fizi, January-July 2008. For an explanation of the relationship between Afrimex, Société Kotecha and SOCOMI, see Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008.

⁴¹⁷ Global Witness letter to Afrimex, 6 February 2009.

⁴¹⁸ E-mail from Ketan Kotecha, director of Afrimex, to Margaret Sutherland, NCP, copied to Global Witness, 2 March 2009.

AMC PLC's Annual Report 2007 and Accounts state that the company's tin smelter is based in Thailand and operated by the Thailand Smelting and Refining Company, aka THAISARCO. It refers to THAISARCO as a "*principal subsidiary and operating unit*" of AMC PLC, and states that AMC PLC owns 75.25% of THAISARCO.

Company registration information and details relating to AMCO Investments Limited, Amalgamated Metal Corporation PLC, Amalgamated Metal Investment Holdings Limited, and British Amalgamated Metal Investments Ltd and their directors are publicly available and provide an explanation of the companies' corporate structure and shows how several of these entities share the same directors.

Global Witness refers the Committee to paragraphs 28–32 of our submission.

CASE STUDY 3: UK GOVERNMENT TO PRIORITISE HUMAN RIGHTS IN GAS EXPLORATION IN TURKMENISTAN

Turkmenistan possesses the fourth largest gas reserves in the world, and in light of recent concerns over Russia's control of the European gas supply through Ukraine and Belarus, western Europe has recently turned to Turkmenistan as a potential new source of energy. Frameworks for European investment have been signed and steps toward exploration are moving rapidly: in November 2007, the UK Government signed a protocol of intention with the Turkmen Government and in May 2008, the European Union (EU) signed a memorandum of understanding with the Turkmen government regarding energy co-operation. In April 2009, the European Parliament agreed to sign an interim trade agreement with Turkmenistan despite little progress in terms of human rights which it had previously requested. Though the parliament called for "*strict monitoring and regular reviews of developments in key areas of human rights,*" and for the agreement to be suspended "*if there is evidence that the conditions are not being met,*" there is concern that these calls are being taken seriously. In addition, companies have not answered calls from NGOs as to how these issues will be addressed. Any energy deals struck with the Turkmen Government must address issues relating to human rights and have strict provisions governing cooperative engagement. Yet the EU looks set to engage with the Turkmen Government with no preconditions.

Global Witness refers the Committee to paragraphs 33–34 of our submission.

CASE STUDY 4: ANVIL MINING, THE KILWA MASSACRE AND ACCUSATIONS OF CORPORATE COMPLICITY

Anvil Mining stated that it had no option but to agree to supply air and ground transport to the Congolese military (FARDC) in response to rebel activity in Kilwa in October 2004; the Congolese troops were involved in the deaths of around 100 unarmed civilians. In investigating events, the UN Mission for the DRC (MONUC) and human rights NGOs documented incidents of summary executions, torture, illegal detention and looting by the Congolese forces. In 2006, the prosecutor at Katanga's Military Court in the DRC decided to indict three former expatriate employees of Anvil Mining Congo SARL for complicity in war crimes. Anvil Mining Congo SARL is a subsidiary of Canadian/Australian Anvil Mining Limited. The trial in the DRC began in December 2006. In June 2007 the military tribunal acquitted all defendants in the Kilwa trial. In reference to the trial, the acting UN High Commissioner for Human Rights, Louise Arbour, stated, "*I am concerned at the court's conclusions that the events in Kilwa were the accidental results of fighting, despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations.*" To date, no prosecution has been commenced in Canada or South Africa, the home states of the indicted employees, nor Australia. A holding company for Anvil is located in the UK.

Global Witness refers the Committee to paragraphs 35–36 of our submission.

CASE STUDY 5: OIL, DEUTSCHE BANK AND NATURAL RESOURCE REVENUES FUNDING HUMAN RIGHTS VIOLATIONS

Since the mid 1990s, Deutsche Bank has been the main banker for the Turkmen Government, widely regarded as one of the most corrupt and worst human rights abusing regimes in the world. Yet the bank has never properly answered questions regarding its commitments to upholding human rights in relation to these accounts. Though the accounts are nominally held by the Turkmen Central Bank, in actuality the autocratic president controls all money flows. This was most apparent under the now deceased former president, Saparmurat Niyazov, who maintained a US\$3 billion fund (The Foreign Exchange Reserve Fund or FERF) at Deutsche Bank which he used to build his ubiquitous personality cult, replete with golden palaces and statues of himself. A former Turkmen Central Bank Chairman has gone on record to say that only Niyazov could access money from this fund. Meanwhile 75% of government spending was done off-budget from other funds at Deutsche Bank, making it one of the most fiscally opaque countries in the world. There were calls by civil society for all accounts at Deutsche Bank to be frozen after Niyazov's death in December 2006, when the rightful constitutional acting president arrested. A new president, Gurbanguly Berdimukhamedov, was elected in February 2007, yet questions remain concerning what happened to the money in the FERF and to the control of Turkmenistan's revenues in general. These concerns are such that the European Bank for Reconstruction and Development EBRD currently refuses to lend to the Turkmen government. Though Deutsche Bank has confirmed that it holds Turkmen government accounts it has refused to comment on how it ensures that these revenues are not used for corrupt ends or to curb the human

rights of the Turkmen people. It cites its commitments to the UN Global Compact, but again, has refused dialogue on how its commitments are implemented in this case. The UN Global Compact has no mechanism to ensure whether companies are truly living up to its ideals.

Deutsche Bank AG's UK Head Office is located at 1 Great Winchester Street, in London.

Global Witness refers the Committee to paragraph 37–40 of our submission.

Gavin Hayman
Campaigns Director

May 2009

Supplementary memorandum submitted by Global Witness

After Global Witness' oral testimony on Tuesday 7 July, you mentioned that we could email key points that we wanted to make, but could not because of a lack of time.

The key points that we would like to put forward for the record include:

1. For the UK Government to issue warnings and post advice to UK companies operating in conflict affected areas with respect to human rights concerns prevalent in those areas.
2. For the UK Government to be proactive by engaging in outreach and monitoring activities of UK companies operating in conflict areas and provide advice and assistance to enable those companies to operate whilst respecting human rights concerns prevalent in those areas.
3. For the UK Government to sanction UK companies found to be in violation of the OECD Guidelines or named in UN report at the national level through mechanisms and techniques reflecting the severity of the violations by public and private companies including: blacklisting companies, withdrawing any/all government support (eg insurance and other support from the ECGD), affect companies public procurement contracts, revoking a companies license to operate, engage with the FSA to de-list a company from the London Stock Exchange, engage with the World Bank and other international institutions, etc...
4. For the UK Government to compel companies to carry out due diligence to ensure that trade in natural resources from conflict affected areas is legal and complies with international human rights instruments. UK companies must be able to demonstrate the precise location and date of the extraction and the identities of all parties involved in extracting, handling and taxing the materials. Companies must ensure that any materials that they buy neither finance armed groups nor military units, nor involve or contribute to human rights abuses at any point along the supply chain.
5. For the UK Government to proactively monitor, investigate and report UK companies identified in UN reports (eg UN Group of Expert and UN Panel of Expert reports).
6. For the UK Government to pass legislation that criminalises UK companies for use of force violations using the foreign provisions of the anti-corruption bill as a precedent.

Memorandum submitted by the Business Leaders Initiative on Human Rights

The Business Leaders Initiative on Human Rights, a six-year initiative founded in Brussels in 2003, has drawn together leading companies from across a range of business sectors. Its express intention has been to demonstrate how the Universal Declaration of Human Rights can be integrated into business management across a range of geographies, political contexts and business functions.

We have taken an evidence-based approach and have developed processes, tools, essential steps and methodologies to enable us and other businesses to move forward on this critical issue.

Our member companies are some of the biggest in the world: ABB, Areva, Barclays, Ericsson, Gap Inc., General Electric, Hewlett Packard, National Grid, Novartis, Newmont, Novo Nordisk, StatoilHydro, The Coca-Cola Company and Zain. The initiative was been chaired by Mary Robinson, former President of Ireland and former United Nations High Commissioner for Human Rights.

Everything that we say here is said with a sense of humility. Our member companies are open about the complexity of the challenges they continue to face but have developed a confidence and proactive approach to human rights. The past six years have reinforced to us that the business and human rights movement is still in its infancy but is arriving at another critical point in its development—one that requires a greater lead from states and inter-governmental organisations. Some of the comments I will make here are as true of business as they are of states. This is not a critique, much more an invitation for closer partnership.

We have been at the fore-front of business support for the work of Professor John Ruggie, and we joined the member states of the United Nations Human Rights Council in supporting the Protect, Respect and Remedy framework. Others also have commended this common framework:

"... a well-constructed and clearly articulated framework for addressing business and human rights... which has significantly advanced the debate."

This quote comes not from Amnesty International, although it might—given their warm endorsement of the framework, but instead from three of the world’s umbrella business associations: the International Organisation of Employers, International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD.

In the brief time allowing we would like to make just three major points in this statement.

- First, that Business needs States to champion this common framework
- Second, that the voluntary/mandatory nature of the debate has been over-polarised within the European Union; and
- Third, there is a real opportunity for UK and European leadership.

1. BUSINESS NEEDS STATES TO CHAMPION THIS COMMON FRAMEWORK

The State Duty to Protect Human Rights requires Governments to deliver a leveller playing field to business in terms of enforced regulation but also political expectation. We see as essential much better alignment between trade, investment, corporate law, securities regulations and human rights policy and it considerably increases the risk of business when regulation is unmatched and sometimes contradictory.

There needs to be much closer alignment between the human rights expectations of companies and those expounded through bilateral trade and investment, host government agreements, export credit guarantees, overseas development assistance and also the activities of EU embassies throughout the world.

Some European states have become powerful leaders in business and human rights dialogues with other global regions but we would like to see a stronger position from the European Union itself.

Companies also look to States to hold the laggards and free-riders to account. There is a clear need for much better remedies and accountability mechanisms to penalise companies who currently give little concern to the abuse of human rights, or their complicity or direct involvement in them. The European Union could do much to strengthen the position of OECD National Contact Points and/or develop an Ombudsperson for the Union.

Crucial, is that European States also bring into the framework other global regions so that business from Africa, Asia and the Americas are also held to account by their home and host governments. At present, a few high-profile European companies attract a high percentage of public and political angst about corporate human rights abuse: sometimes this is deserved, but sometimes it hides the deeper reality that Chinese, Russian, Brazilian and Indian companies need also to be as accountable for their actions at home and overseas. We are pleased to report that business leaders from these and other regions are also now stepping up into the dialogue.

Nevertheless, Europe should lead by example and there is much we can do to ensure European business is world-class in human rights. States also have a particular additional role to play when these companies are:

- fully or partly state-owned or operated (it is a sector rising in significance due to the current economic climate);
- major suppliers to state authorities;
- small and medium sized enterprises across the Union where there is a real issue of capacity and need for shared resources;
- or for the companies (many of whom are not publicly listed) in the corners of Europe who may have been less accessible to member nation tax policies but need to be just as accountable to human rights.

2. THE VOLUNTARY/MANDATORY DEBATE HAS BEEN OVERLY POLARISED IN THE EUROPEAN UNION AND OBSCURES THE BUSINESS REALITY

The real human rights challenges for European business operating throughout the world are often complex dilemmas. There are very many places where States are unwilling or unable to protect their populations due to internal conflict, corruption or poverty. There is a very uneven regulatory environment for human rights and even then business has often to navigate the competing demands of local populations and sometimes conflicts between human rights themselves.

It remains clear that the duty to protect human rights rests with states—and in particular host governments. But businesses often find themselves having to assess the requirements of national laws, international human rights norms and the social, investor and political expectations on a company in order to guide business action.

An approach to “Corporate Social Responsibility” that might have some meaning within the 27 member states of the European Union where there is relatively strong state capacity and something of a regulatory level playing field is one thing. But this may mean little, in human rights terms, when European business operates beyond the Union.

3. THERE IS A REAL OPPORTUNITY FOR UK AND EUROPEAN LEADERSHIP

Some of the best partnerships between Government and Business on human rights have been outside the European Union—and when they have involved European States it has often been despite and not because of the European Union position on CSR. Some of the most innovative work is currently underway in parts of Africa, the Middle East, South and East Asia. Some of this is supported by the Overseas Development Agencies of EU member states.

Companies are willing to step up into leadership positions: first it was labour rights in supply chains, then civil and political rights relating to security in oil and mining companies. Now it is multi-faceted. For example:

- Google, Yahoo and Microsoft have launched their own code on freedom of expression and privacy;
- Novartis, Novo Nordisk and Sanofi-Aventis are the first pharmaceutical companies to recognise their responsibility for the right to health;
- Suez, Veolia, Thames Water, Coca-Cola and Pepsi have all recognised human rights in relation to water and so on.

We need a state position that matches this business leadership. There is no better framework than advanced by the United Nations and initiated by Professor John Ruggie. The Business Leaders Initiative on Human Rights commends this framework to the UK Government and hopes it might inspire your and our actions over the months and years ahead.

Memorandum submitted by the Institute for Human Rights and Business

The Institute for Human Rights and Business welcomes this opportunity to submit the Institute's views in relation to your Session 2008–09 No.21 on business and human rights, and in particular the mandate and work of the Special Representative of the United Nations Secretary-General (SRSG) for business and human rights, Professor John Ruggie.

The Institute (registered in the UK but with a global remit, operations, and perspective) is chaired by Mary Robinson, the former UN High Commissioner for Human Rights.⁴¹⁹ The Institute brings together expertise from business, government and civil society. We find great utility in the Protect, Respect and Remedy framework developed by the SRSG and endorsed unanimously by the United Nations Human Rights Council last year. The current international financial and economic environment we all now face has strengthened, not diminished, the need for a common framework of universal social values, good governance and accountability in relation to business activity. Human rights are ideally placed to provide such a framework.

We will tackle the eight questions posed by the Committee in the order presented.

IN RELATION TO THE DUTY TO PROTECT HUMAN RIGHTS

1. *How do the activities of UK businesses affect human rights both positively and negatively?*

Business is a significant economic and social actor, and as such has potential—and real—positive and negative impacts on the full range of human rights as delineated in the International Bill of Rights and the related Conventions and expert opinions of the United Nations and International Labour Organisation. This covers the spectrum of civil, political, economic, social and cultural rights and includes internationally recognised labour rights. UK businesses have positive and negative impacts in a number of spheres of influence. These include:

- Through their direct operations, within the UK or overseas, in respect of their own product development, marketing, human resources, logistical, capital allocation, financial, legal and other functions;
- Impacts on their own workforces, customers, shareholders or other stakeholders, such as the communities surrounding operations or the public more generally;
- Through the activities of suppliers, partners, associates, contractors or others with whom the business has a contractual arrangement;
- Through the action of others, including businesses and governments, with whom the UK business may have a beneficial relationship. (The notion of “complicity” is indeed complex; but a business in close proximity or relationship with a perpetrator of human rights abuse runs the risk of complicity, if the business has assisted the abuse in any way, and has known about it and done nothing to prevent it from occurring).

⁴¹⁹ The Institute's Board members are currently: Mary Robinson (Chair), Chris Marsden (Vice-Chair), Bennett Freeman (ex-U.S. State Department), Wambui Kimathi (Kenyan National Human Rights Commission), Irene Khan (Secretary-General at Amnesty International), Kavita Prakash-Mani (senior executive at Sustainability), Caroline Rees (Director at Harvard Kennedy School), and Peter Woicke (ex-Managing Director of the International Finance Corporation). A further four Board members are to be appointed shortly. www.institutehrb.org

If the above categories were self-evident and the relationships clearly understood, then the work of the Joint Committee, and indeed our own, might be relatively clear-cut. However, there are a number of complexities which make the relationship between UK (as well as all other) companies and human rights less clear:

- What are the additional precautions a business should take, and what, if any, additional responsibilities may they have, when a government is unwilling or unable to fulfil its obligation to protect human rights? A state may be unable to protect human rights due to resource constraints, or lack of control over the territory—particularly in conflict situations—or may be unwilling to do so, due to, *inter alia*, corruption, conflict, discrimination, lack of accountability, and/or weak governance.
- How should business operate when national law or custom is in conflict with international human rights norms?
- What are the duties of the state, and responsibilities of a business, when the business in question is state-owned, partly state-owned or operated; or when the business is performing traditional state functions, notably public service provision?
- Do the responsibilities of companies change when they are small and medium-sized and require the state to provide resources to help them meet their responsibilities?
- How should governments and businesses deal with dilemmas created between competing claims of different rights-holders or conflicts between specific rights themselves?

Clearer analysis and greater consensus around such issues in relation to specific business sectors and geographies is critical in order to determine meaningfully the positive and negative effects of UK businesses on human rights.

2. How do these activities engage the human rights obligations of the UK?

The complexity of the relationship between business and human rights requires the UK Government to think carefully about all its international human rights commitments in relation to business. This includes the human rights covenants and conventions of the United Nations and ILO, the European Convention on Human Rights and also international humanitarian law (eg the Geneva Conventions) and international criminal law (eg the Rome Statute) commitments to which the UK is party. These matters are not only of concern to the Foreign Office and Department for International Development, but to all domestic UK Government Departments engaged in social and economic provision within the UK as well as the administration of justice.

Several countries have taken steps to ensure greater policy coherence between different government departments with regard to business and human rights. Some governments have appointed ministers responsible for cross-department information sharing and coordination; others, such as France and Sweden, have appointed ambassadors to foster greater integration of human rights principles and standards between government departments: including those addressing business and other trade and economic related issues. In some countries, like Kenya and South Africa, it is the National Human Rights Institution that has played this coordinating role. In the UK, there is great need and great opportunity for one or both of these approaches to be harnessed.

3. Are there gaps in the current legal and regulatory framework for UK business which need to be addressed, and if so, how?

Whilst the UK Government has signed and ratified most of the core international human rights Conventions, there is very little recourse for British or other citizens to take action against UK registered companies under most of these. Even within the context of the European Convention on Human Rights, the extra-territorial applicability to the actions of business is very limited. The one mechanism available for this purpose, the National Contact Point (NCP) of the OECD Guidelines on Multinational Enterprises, has no legal standing at present. The NCPs, it should be noted, are meant to provide mediation between parties in dispute that can be settled in a non-judicial setting. While such a mechanism may be appropriate in dealing with certain kinds of rights-based disputes, they are frequently inappropriate in cases of grave abuses, which often require legal recourse and, in some cases, prosecution. A recent case,⁴²⁰ involving a UK-registered company operating in the Democratic Republic of Congo, in which the NCP found that the company had breached the Guidelines and issued recommendations for remediation only to have the recommendations summarily ignored, shows the gap that exists in the UK's regulatory framework.

Another concern is what SRS John Ruggie has termed the lack of 'horizontal' and 'vertical' integration of existing human rights policies with those relating to trade, investment, corporate governance, finance and other government policy that impacts on business.⁴²¹ The UK Government itself could do much more to

⁴²⁰ www.berr.gov.uk/files/file47555.doc

⁴²¹ For example, the Foreign Office, DFID, and the then DTI had differing perspectives on trade in conflict diamonds from African countries. DFID was focused on poverty alleviation, and saw trade restraints as interfering with artisanal miners' livelihood; DTI saw any restraint as interfering with the policy of removing trade restrictions; and the Foreign Office was leading the effort to get the Kimberley Process Certification Scheme adapted quickly, to give meaning—and teeth—to UN sanctions on diamonds from Sierra Leone and Liberia. In the end, the three departments agreed, but after presentations by human rights NGOs to representatives of DTI and DFID, to explain the gravity of the situation.

align policies and practices, such as ensuring that export credit guarantees, political risk insurance schemes, advisories to businesses, agreements UK companies sign as investors with host governments, or bilateral investment or trade treaties, are consistent with existing or future human rights commitments. It is distinctly inconsistent that the UK Government encourages overseas governments to improve their human rights record, if other areas of international policy prohibit or undermine efforts to do so in relation to UK or domestic businesses.

Setting up a national commission on Business and Human Rights would constitute one potentially useful way through which the UK Government could explore strategies aimed at closing existing legal and regulatory gaps. The Institute would also encourage the UK Government to work in partnership with other EU states, and harness the commitment of the Commission, Parliament and Council of the European Union to achieve a greater alignment of policy in these areas. As many businesses (including the Business Leaders Initiative on Human Rights⁴²²) have made clear, businesses value clarity and consistency. They look for greater certainty and a level playing field across international borders with regard to human rights relevant issues. Many governments today tend to view ‘business and human rights’ exclusively as an aspect of corporate social responsibility. While many CSR initiatives are valuable, their (often) voluntary status⁴²³ has resulted in approaches that give inadequate attention to legal matters connected to international human rights standards and obligations.

4. Does the UK Government give adequate guidance to UK businesses to allow them to understand and support the human rights obligations of the UK? If not, who should provide this guidance?

Our own experience of working closely with UK companies around the world indicates that adequate guidance is largely absent. Whilst there is very good work within specific business sectors⁴²⁴ in raising awareness and developing best practices, as well as the guidance provided by several voluntary organisations⁴²⁵, the state duty to protect human rights requires the UK Government to take a much more strategic position than has been the case. At a recent meeting organised by the Swiss Department of Foreign Affairs, the Institute was invited to present its views on state responsibility in ‘fragile zones’.⁴²⁶

Activities the UK Government can initiate immediately include extending guidance information and training offered by UK Government departments to their own staff being posted overseas – in particular to oversee UK involvement in those business sectors and those countries where the risk of abuse and complicity is highest. Improved sharing of human rights intelligence and capacity-building by UK Government missions overseas are urgently needed, in particular in countries with insufficient domestic/national protection of human rights.

The Institute urges the UK Government either to create a UK Commission to deal with the issue of awareness or capacity amongst others, and/or to increase the remit and capacity of the Equalities and Human Rights Commission to do so.

5. What role, if any, should be played by individual Government departments or the National Human Rights Institutions of the UK?

In addition to the points already made under Question 4 above, the UK Government should be mindful also when the State Duty to Protect in relation to business requires greater alignment at the European and global levels. Evidence shows that there is a need for much greater extra-territorial accountability of companies in relation to human rights. What is less clear is how much of this should be advanced at the domestic level, at the European level or through inter-governmental organisations such as the United Nations, OECD or perhaps even WTO or the Bretton Woods institutions.⁴²⁷ Certain actions require global co-operation, others can be advanced unilaterally – such as clarifying how the UK’s existing treaty obligations relate to UK business operating overseas.

It has been noted that the UK Equalities and Human Rights Commission does not yet play the active role in the field of business and human rights as National Human Rights Institutions have done in countries such as Denmark, South Africa or Kenya. It remains less engaged in business and human rights than many of the organisations accredited to the Paris Principles.⁴²⁸ This is mystifying and does not reflect the interests of either UK business or civil society. It is worth noting that the newly-formed Scottish Human Rights Commission intends to be active in the arena of business and human rights.

⁴²² www.blihr.org

⁴²³ There is no single agreed definition of Corporate Social Responsibility, which indeed can be seen as one of the limitations of the term. Some definitions, such as that currently adopted by the European Commission, stress only voluntary approaches.

⁴²⁴ Such as, for example, the extractive sector, the apparel sector, and a few commodities.

⁴²⁵ Such as: human rights NGOs, peace-building NGOs, development NGOs, and business-focused associations and fora.

⁴²⁶ Five key areas of home government activity were outlined, namely to: (i) Advise: Make information and legal implications accessible; (ii) Warn: Public or private, as appropriate; (iii) Prevent: Restrict trade, refuse export finance or access to political risk insurance, deny concessional lending; (iv) Prosecute and Punish: Publicise bad conduct, institute inquiry, remove supplier status, prosecute in the face of evidence of clear breach of law, cooperate with international tribunals; and (v) Promote: Lobby host government; act in concert with others; train judges, police, army; channel development aid to security sector reform; assist improved prison conditions.

⁴²⁷ It is noted, for example, that the International Finance Corporation (part of the World Bank Group) has an Ombudsperson for complaints (including some aspects of human rights) in relation to projects funded or part-funded by the IFC.

⁴²⁸ <http://www.unhcr.ch/html/menu6/2/fs19.htm>

 IN RELATION TO THE RESPONSIBILITY OF BUSINESSES TO RESPECT HUMAN RIGHTS

 6. *How should businesses take into account the human rights impacts of their activities?*

Business activities can have positive or negative impacts on human rights. As the SRSB has noted, undertaking human rights impact assessments before initiating a specific project is necessary in some cases, and desirable in most cases. There are instances when specific business actions cause abuses—for example—pollution of the environment, use of security forces that use disproportionate force, treating different consumers differently and denying access to rights-linked essential services where some consumers are not able to pay, such as water.

Timely risk assessment and due diligence can reduce the likelihood of such abuses. But even businesses that undertake such assessments, and perform due diligence, may find that some of their activities lead to human rights abuses, even when not intended.

Some examples of bad practice include:

- Approaches that promote knee-jerk or damage limitation strategies (such as a business dropping a supplier when reports of use of child labour emerge, regardless of the impact on workers or the community or consideration of the potential for the business to influence future practices of the supplier through increased training and other support);
- Simplistic and/or limited understanding of human rights, or codes of conduct which include only references to labour rights, or civil/political rights, but ignore the broader international human rights agenda and the indivisibility between rights;
- Exclusive preference for voluntary business approaches rather than a more carefully considered analysis of where mandatory regulation by government may be needed and more effective not only in terms of costs to business but in terms of results which are consistent with human rights obligations.

Some examples of better practice include:

- Approaches which integrate community consultation and where impact on local communities can actually be measured objectively and accepted by the communities themselves;
- Approaches that address the complexity of human rights and the need to attempt to address some of the systemic issues as well as their manifestations in the workplace;
- Multi-stakeholder approaches that bring together business, government, trade unions and/or civil society organisations to develop best practice within specific sectors or to address specific challenges, such as labour practices or use of security forces;
- Analogous multi-stakeholder approaches focusing in-country in particular host countries where UK businesses operate and/or address the value chain, or particular commodities: such as cocoa, palm oil, cotton, diamonds or sugar.

The Institute for Human Rights and Business does not take a specific view on the public authorities in relation to the European Convention on Human Rights.⁴²⁹ It is clear, however, that the state duty to protect against human rights abuses committed by third parties, including business actors, is a legal obligation and is, as such, of a higher and different nature of responsibility than the business responsibility to respect all human rights. It should be stressed, however, that the responsibility of a business increases when it operates in lieu of state (in certain “weak governance zones”) or when it takes over, under contract, functions normally performed by the state (such as through privatisation of essential services).

It is also the view of the Institute that UK business should not restrict its responsibilities purely in terms of the European Convention on Human Rights, given that the Convention offers limited inclusion of economic, social and cultural rights. The same level of responsibilities should apply to UK business wherever it is operating. Similarly business responsibilities do not change based on the level or size of corporate operations, particularly when measured against the severity of impacts caused.

EFFECTIVE ACCESS TO REMEDIES

7. *Does the existing regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?*

The short answer is ‘no’ – existing mechanisms and frameworks are clearly insufficient. At the same time, there is single no bullet—magic or silver—that can deliver the necessary level of accountability and redress. A small number of complementary mechanisms are likely to be needed, some domestic others extra-territorial.

Whilst UK businesses need to be more accountable for their actions, this should not be seen outside the context of:

- The accountability of the UK Government for its actions overseas;
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⁴²⁹ As requested in the Call for Evidence

- The accountability of businesses registered in other jurisdictions – as diverse as Switzerland or China—whether listed or not, whether owned by the state or the private sector;
- The accountability of other UK-registered non-state actors, including NGOs.

8. *Possible changes could include:*

- **Judicial remedies**—The Institute does not claim expertise in UK law. Never-the-less, it is clear that it is not easy to bring business and human rights cases to court where the extra-territorial application of laws become necessary (the latter is essential while dealing with conduct of UK companies overseas, particularly in areas of weak law enforcement). Whilst the European Convention on Human Rights and the UK Human Rights Act afford a range of protections to individuals, they are limited in both their geographical reach and also applicability to business.⁴³⁰ The need for stronger judicial remedies is necessary, and the Institute encourages further exploration of options, in consultation with human rights organisations and relevant stakeholders.
- **Non-judicial remedies.** The Institute believes that judicial and non-judicial mechanisms can be complementary if their remits are clear.⁴³¹ There are strong arguments in favour of—and against—creating a single Ombudsperson (as against a committee) – and that further research is essential to develop the best model for the UK, in order to achieve tangible results.
- **Government Initiatives:** The Institute believes that prima facie the greatest need in the UK is for a more strategic positioning of the government’s approach and thinking. Government activities often remain poorly aligned and sometimes contradictory. A strong central focal point—at a senior level – within the Government can help identify existing gaps and the need for new legislation.
- **Initiatives by business and non-Government actors.** The Institute supports civil society-led and business-led activities within the sphere of business and human rights, provided they are based on the underpinning principles of a rights-based approach. Business tools and best practice are often best developed by businesses themselves and correspondingly, civil society engagement is critical for effective accountability mechanisms. The Institute encourages the UK Government to take leadership where necessary to underscore its commitment, to ensure quality control, and to set an example in this sphere. It can do so by re-evaluating its public procurement policies by requiring companies to follow a specific human rights reporting code, impact assessment standard, or other measure. Some other Governments have already selected specific reporting or performance codes in relation to their own procurement or the behaviour of state-owned enterprises.⁴³²

The Institute hopes this submission is helpful and we would be happy to attend any hearing or provide more specific evidence on any of the points raised.

Institute for Human Rights and Business

May 2009

Memorandum submitted by RAID

ABOUT RIGHTS & ACCOUNTABILITY IN DEVELOPMENT

Rights and Accountability in Development (RAID) works to promote human rights and responsible corporate behaviour. RAID has investigated the human rights impacts of the privatisation of Zambia’s copper mines and its report *Zambia: Deregulation and the denial of human rights* was published in 2000. RAID participated in the 2000 review of the *OECD Guidelines for Multinational Enterprises* and is a founder of OECD WATCH, an international network of NGOs that works for the effective implementation of the Guidelines. RAID has submitted more than a dozen complaints against companies using the OECD Guidelines’ implementation procedures and has submitted recommendations for improving the mechanism to the UK Government and to the OECD.

RAID’s 2004 report *Unanswered questions: Companies, conflict and the Democratic Republic of Congo* RAID examined the role of companies in human rights abuses, corruption and in perpetuating the conflict in the Democratic Republic of the Congo (DRC). RAID analysed the companies’ reactions to being listed by a UN Panel of Experts set up by the Security Council to investigate the illegal exploitation of the Congo’s natural resources. In the report RAID explored the issue of how corporations should conduct business in zones of conflict and whether their behaviour ought to be regulated.

⁴³⁰ Unlike the rulings of the Constitutional Court in South Africa, for example.

⁴³¹ Many large-scale cases have their roots in smaller grievances that have been poorly handled, or stem from protests/violence/escalation that was generated due to a lack of effective grievance handling for entirely separate issues. Non-judicial mechanisms have a huge role to play in dealing with these lower-level grievances and thereby helping prevent some of the egregious cases.

⁴³² For example, the Swedish Government’s requires its State Owned Enterprises to report using Global Reporting Initiative (GRI) indicators.

RAID initiated the international campaign for a review of the mining contracts in the DRC; its 2007 report “Key Mining Contracts in Katanga: the economic argument for renegotiation” proposed an economic rationale for renegotiating some of the key copper and cobalt mining contracts in the Democratic Republic of Congo (DRC).

In 2006, in response to the UK Government’s consultation on the UK NCP’s implementation of the *OECD Guidelines*, RAID with The Corner House submitted detailed proposals many of which, with support from the All Party Parliamentary Group on the Great Lakes’ Region, were adopted. RAID has written a number of reports about the *OECD Guidelines* including *Five Years On: a Review of the OECD Guidelines for Multinational Enterprises* (2005), *A Model National Contact Point* (2007) and most recently *Fit for Purpose? A Review of the UK National Contact Point for the OECD Guidelines for Multinational Enterprises* (2008).

RAID is the moderator of the Corporate Accountability Working Group of the International Network on Economic, Social and Cultural Rights (ESCR-Net) and has actively engaged with the Special Representative of the United Nations Secretary General on Business and Human Rights, by drafting joint submissions and attending consultations and expert meetings.

RAID’s director is an alternate external member of the Steering Board for the UK NCP.

INTRODUCTION

1. Rights & Accountability in Development (RAID) welcomes this opportunity for presenting written evidence to the Committee. This memorandum contains four sections: the first addresses gaps in the *Protect, Respect and Remedy Framework*; the second looks at weaknesses in the regulation of London’s secondary market, the Alternative Investment Market (AIM), and the implications for human rights; the third section comments on the government’s proposals for the self-regulation of private military companies; the fourth section considers the effectiveness of the *OECD Guidelines for Multinational Enterprises*. Recommendations are listed at the end of the Memorandum. Case studies based on some of RAID’s investigations in the Democratic Republic of the Congo (DRC) are included in an annex.

The Protect, Respect and Remedy Framework

2. The framework of the Special Representative of the United Nations Secretary-General on Business and Human Rights (SRSG) was adopted by the Human Rights Council in June 2008. Although they have not endorsed the framework, a number of NGOs have recognized that it provides a useful basis for the continuing business and human rights deliberations. RAID shares that view but, like many other NGOs, remains concerned that the framework and the priorities for further study are not sufficiently informed by the experiences of those negatively affected by the activities of companies—namely workers and communities in developing countries. It is troubling that the British Government did not support efforts at the Human Rights Council to ensure that in his second term the SRSG was given an explicit mandate to examine situations of corporate-related abuses. NGOs believe that case studies and an understanding of the particular contexts in which abuses occur should underpin the elaboration of the framework and proposed policy responses.⁴³³ It is to be hoped that the Committee in the course of its own inquiry can rectify this omission by considering some specific cases in depth.

3. The Committee should take note of the fact that the text of the Human Rights Council’s June 2008 resolution, in acknowledging the need for efforts to bridge governance gaps at the international level, draws attention to the need for transnational solutions to help address corporate abuses, a point also raised in relation to the role of “international cooperation” to help give effect to the state duty to protect.⁴³⁴ The Council’s resolution recognizes the need to consolidate standards with a view to developing a comprehensive international framework in the future. This is in line with the long-held view among academics and human rights activists that there is a serious gap in the international human rights architecture. With the growing importance of companies based in emerging economies such as China and India a global standard on business and human rights becomes increasingly relevant. Ultimately there is a need for States to agree global standards by, for example, the adoption of a UN Declaration, to define a common benchmark for business conduct in relation to human rights.

4. In 2001 the OECD conducted a review of business approaches to corporate responsibility. It noted that voluntary initiatives have a crucial, but necessarily only partial role, to play in the effective control of business conduct.⁴³⁵ Some initiatives have been used by business to deflect calls for formal regulation. The effectiveness of voluntary codes is closely linked to the effectiveness of the broader system of private and public governance from which they emerge—private initiatives cannot work well if other parts of the system work poorly. Nevertheless the British Government continues to insist that voluntary initiatives offer the only solution to the growing problem of corporate abuse of human rights. Yet these mechanisms lack the means

⁴³³ Joint NGO Statement to the Eight Session of the Human Rights Council concerning the Third Report of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises available at: <http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council>

⁴³⁴ http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf

⁴³⁵ Organisation of Economic Cooperation and Development (2001) *Corporate Responsibility: Private Initiatives and Public Goals*. Paris. OECD available at: <http://www.oecd.org/dataoecd/58/54/35315900.pdf>

to hold companies to account for human rights abuses. As Human Right Watch has pointed out after almost a decade the Voluntary Principles on Security and Human Rights still lack clear rules and an independent means to verify implementation.⁴³⁶ The UK Government is an active proponent of corporate responsibility and has advocated various multi-stakeholder initiatives. But its record is less good as regards enforcing existing legislation as a means of correcting corporate misconduct.

THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

5. The UK Government does have extraterritorial human rights obligations and by amending or tightening existing laws or regulation and adopting more effective policies it could do much more to restrain the harmful human rights impacts of companies abroad. When public funds are engaged as with the CDC (formerly the Commonwealth Development Corporation) or the Export Credit Guarantees Department (ECGD) these bodies should be required to undertake human rights due diligence checks and where companies in receipt of such funds abuse human rights support should be withheld or withdrawn.

Tighter Regulation of the Alternative Investment Market

6. There is widespread agreement that business should respect all human rights (economic, social and cultural as well as civil and political). The social and economic development of a country is dependent on how business is regulated. This in turn has an impact on the population's enjoyment of their fundamental human rights including rights to health, education and housing. For over a decade the reckless way in which some extractive industries have negotiated agreements in resource rich developing countries with weak institutions or poor governance has been a major cause of concern for the international community.

7. In 2000, the United Nations Security Council appointed a Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo. In its 2002 report the UN Panel listed 85 companies as in violation of the *OECD Guidelines on Multinational Enterprises* for helping to perpetuate the war and of profiteering from it.⁴³⁷ The British Government has responded to these concerns by promoting multi-stakeholder initiatives like the Extractive Industries Transparency Initiative (EITI). But there are more effective means at the government's disposal. It should enforce or strengthen the regulations of the Alternative Investment Market (AIM) as a means of curbing or correcting corporate misconduct overseas. The time has come for a re-appraisal of AIM's rules and procedures in particular in relation to disclosure, transparency and accountability.

8. AIM's self-regulatory regime has arguably been a significant factor in its success as the leading international growth market. But this success has been achieved not only at the cost of the London Stock Exchange's reputation, but also at the expense of the human rights of communities in developing countries like the Congo. To draw a parallel, the global financial crisis has exposed the dangers of over-reliance on self-regulation as, the Secretary General of the OECD recently observed, "One of the main lessons of this crisis is that companies and markets can't rule themselves. Financial innovation sacrificed business ethics for the sake of extraordinary profit."⁴³⁸

9. Although, in the wake of the global economic downturn, the number of companies listed has fallen and the aggregate value of AIM companies has dramatically declined, the case for reform remains compelling.⁴³⁹ AIM, with its minimal approach to regulation, remains the index of choice for many mining and natural resources companies. Over a quarter of overseas AIM companies are registered in Bermuda, the British Virgin Islands or the Cayman Islands.⁴⁴⁰ Oil, gas and mining companies, many with assets in the developing world, make up over 30% by market value of international AIM companies.⁴⁴¹ Many of these resource companies have exploration rights but no proven track record, capital or income.

10. Some oil and mining companies operate in highly volatile, unstable and even lawless parts of the world.⁴⁴² About a dozen mining companies that are or have been listed on AIM have concessions in the Democratic Republic of the Congo where the true provenance of the assets has not been established and the

⁴³⁶ Arvind Ganesan, Human Rights Watch (2009) "Viewpoint: Why Voluntary Initiatives Aren't Enough" in *Leading Perspectives*—Spring 2009

⁴³⁷ Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 16 October 2002, S/2002/1146.

According to the World Bank many of the Congo's state-owned enterprises entered into mining contracts at a time of distress or without proper evaluation of the assets under the partnership agreement. In 2007, the manifest unfairness of these contracts led the Congolese government to undertake a wholesale revision of mine licences issued during the war or its immediate aftermath.

⁴³⁸ Remarks by Angel Gurría, OECD Secretary-General, 22 January 2009 delivered at the European Business Ethics Forum (EBEF) available at: http://www.oecd.org/documentprint/0,3455,en_2649_34855_42033219_1_1_1_34529562,00.html

⁴³⁹ Richard Wachman Wednesday 4 March 2009 "AIM is way off after downturn slices 64% from share values" *The Guardian* p. 29. "Since January 2008 the AIM 100 index has fallen more heavily than the FTSE 100 losing 65% against the FTSE's 43% drop. At the height of the boom, AIM companies had an aggregate value of £107 billion, but by the end of February 2009, that had plummeted to £38 billion, a fall of 64%..."

⁴⁴⁰ Bermuda, the British Virgin Islands and the Cayman Islands account, respectively for 7.8%, 10.4% and 10.1% of international AIM companies by number, as of December 2007. See http://www.londonstockexchange.com/en-gb/products/company-services/ourmarkets/aim_new/Trade+and+Investing/statistics.htm (visited 27 March 2008).

⁴⁴¹ *Ibid.*

⁴⁴² White Nile (now Agriterria) controversially acquired oil concessions in Southern Sudan (which it later lost). The Australian company, Range Resources Limited, has acquired rights to oil blocks in the disputed semi-autonomous region of Puntland in Somalia.

legitimacy of mine licences continues to be keenly disputed. The Exchange has adopted a permissive attitude towards non-disclosure of information concerning the acquisition of DRC mining concessions, which means that neither investors nor affected peoples have been alerted to the reputation of key individuals associated with AIM-listed companies, who have personally profited from the transactions. In the case of the DRC, such individuals have appeared on UN, EU or US Sanctions lists, or in expert reports to the Security Council as meriting financial or other restrictions. Significant shareholders or key managers have been the subject of legal proceedings or even criminal investigations abroad. Complaints have been filed against some companies for alleged breaches of the *OECD Guidelines for Multinational Enterprises*. Yet such crucial information is not automatically disclosed under existing AIM rules, especially when a company makes such acquisitions after it has been admitted to the market: the level of due diligence undertaken at admittance is not repeated in the case of most subsequent transactions.

11. Much of the responsibility for AIM's regulation is delegated to Nominated advisors (finance firms, accountants or brokers). Nominated advisors (known as nomads) are supposed to be independent from the companies they represent and to demonstrate that no conflict of interest exists.⁴⁴³ Since October 2004 the Exchange has taken disciplinary action against a small number of AIM companies and nomads. In only a handful of prominent cases has censure been public. The Exchange has been criticised for neither naming parties found to have breached AIM rules nor for releasing details of these cases and the rationale behind any action taken. This secrecy puts the interests of the company above those of investors and the wider public. (See Annex 1: Oryx Natural Resources Ltd.)

RESPONSIBILITY OF BUSINESSES TO RESPECT HUMAN RIGHTS

Private Military and Security Companies

12. The operations of private military and security companies (PMSCs) are unique in that they have the potential to have a direct and negative impact on individuals' human rights. PMSCs are active in a number of highly sensitive areas including security and risk management services for private companies operating in conflict or post-conflict situations; business intelligence, pre-employment screening, counter-surveillance as well as activities previously performed by national militaries, which are now increasingly outsourced to private contractors.⁴⁴⁴ Where PMSCs act as agents of the State they may be seen to have positive duties to protect human rights. At the end of April 2009 the Foreign and Commonwealth Office (FCO) launched a public consultation on the government's proposals to improve standards across the Private Military and Security (PMSC) industry globally.⁴⁴⁵ The scope of the consultation is limited because the government, after discussions with "the industry", has ruled out of consideration a national licensing regime and instead favours self-regulation through an industry association. This is despite the fact that the previous consultation on the 2002 Green Paper on Options for Regulation elicited a large number of responses that called for more robust form of regulation.

13. Given the length of time that has lapsed since the Green Paper, the three-month period for the FCO's consultation is extremely short. RAID is concerned that the FCO's proposals seem unduly influenced by the interests and wishes of the British Association of Private Security Companies (BAPSC) which enjoys high level political contacts.⁴⁴⁶ Both the UK government and the (BAPSC) are participants in the Swiss Initiative which was launched in 2006.⁴⁴⁷ The aim of the Swiss initiative is to develop a Code of Conduct for PMSCs to address "the normative and accountability gaps" in the sector. While the perils of deregulation in the banking sector have belatedly been recognized, the wider lessons of the failings of self-regulation have not been drawn by the government. While an international code of conduct for PMSCs may be desirable, self-regulation is not sufficient to control the activities of individuals deploying lethal force or engaged in activities that directly impinge on the human rights of others.

14. RAID is not convinced that the secretive and unregulated world of PMSCs can be made accountable through market forces alone. In RAID's experience it is often not possible to draw a distinction between reputable and disreputable PMSCs. As BAPSC acknowledges "Most tenders and bidding processes on the private market happen under severe time constraints"; how therefore would it be possible for PMSCs to vet staff thoroughly or assess the likely impact upon human rights of the contract in question?

⁴⁴³ RNA, Part Two, 21—22. Independence in relation to rule 21 is elaborated in Schedule One.

⁴⁴⁴ Andy Bearpark and Sabrina Schulz (2007) "The future of the market" in Simon Chesterman and, Chia Lehnardt (ed) *From Mercenaries To Market: The Rise And Regulation Of Private Military Companies*. Oxford. Oxford University Press available at: http://www.bapsc.org.uk/key_documents-policy_papers.asp

⁴⁴⁵ Foreign and Commonwealth Office "Consultation on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally" available at: www.fco.gov.uk

⁴⁴⁶ Sir Malcolm Rifkind, a former Foreign Secretary and Minister of Defence, is the chairman of Armor Group, the biggest private security company operating in Iraq. Andy Bearpark, was the Private Secretary to Prime Minister Margaret Thatcher and Press Secretary to the ODA Minister Baroness Chalker. From 1991 to 1997 he was Head of the Information and Emergency Aid Departments of the Overseas Development Administration (ODA).

⁴⁴⁷ On 17 September 2008, 17 States—Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States of America—finalised the so-called "Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict". The Montreux Document is the first international document to describe international law as it applies to the activities of private military and security companies (PMSCs) whenever these are present in the context of an armed conflict. It also contains a compilation of good practices designed to assist states in implementing their obligations under international law through a series of national measures.

15. The FCO proposes that once an international code of conduct has been agreed it should be supported by “an effective complaints mechanism” (Paragraph 21). An international secretariat would be established paid for by an annual licence fee levied on PMSCs. The right to lodge a formal complaint with the international secretariat against a PMSC for a specific incident would reside primarily with the host state. But such a mechanism would seem to exclude directly affected people from filing a complaint. There are situations where governments in developing countries would be unwilling to lodge a complaint for example where their security forces are parties to human rights violations involving the private sector. Furthermore, such a mechanism would not apply to PMSCs that are not participants to the scheme. Without more effective methods of scrutiny, there is a risk that the outsourcing of security functions to PMSCs will continue to be used as a means of shielding governments and their agents from accountability for violations of international law. (See Annexe 2: Avient Limited)

ACCESS TO A REMEDY

CDC (formerly the Commonwealth Development Corporation) and human rights

16. The International Commission of Jurists (ICJ) recognises “that civil liability is increasingly important as a means of ensuring legal accountability when a company is complicit in gross human rights”.⁴⁴⁸ Nevertheless, victims of human rights abuses continue to face considerable obstacles when seeking an effective remedy. These obstacles are compounded when companies facing allegations of complicity in grave human rights violations are supported by the British government. Investments by the the British publicly owned international development fund, CDC (formerly the Commonwealth Development Corporation) are not subject to the scrutiny or human rights due diligence procedures. CDC does not make its development impact assessments and reports public on the grounds of commercial sensitivity.

17. Anvil Mining, a Canadian-Australian company has been accused of involvement in serious human rights violations and war crimes in the DRC. Despite the gravity of the allegations against the company and some of its employees, and the manifest failure of the Congolese government to investigate the incident properly or to conduct a trial in conformity with international standards, Anvil Mining has received support from the British publicly owned international development fund, CDC (formerly the Commonwealth Development Corporation). The DFID Minister, Gillian Merron, defended CDC’s investment in a letter to RAID and Global Witness.⁴⁴⁹ According to DFID the fact that CDC has no direct stake in Anvil Mining and that the investment is made through the Emerging Capital Partners (ECP), which specializes in private equity investing in Africa, there is no cause for concern. In 2005 CDC contributed \$47.5 million to ECP’s second pan-African fund. ECP (a US-based fund) made the investment in Anvil Mining in March 2006, following approval of its Investment Committee. The Minister explained that CDC is not a member of the ECP Investment Committee and does not pre-approve investments by its fund managers. It is unacceptable that at the time CDC’s investment was made, Anvil’s role in the Kilwa massacre was under investigation by the Australian Federal Police (see Annex 3: Anvil Mining Limited and the Kilwa Massacre).

The OECD Guidelines for Multinational Enterprises

18. Given the obstacles to an effective remedy RAID believes that the *OECD Guidelines for Multinational Enterprises* remains an important additional tool for enforcing higher standards of corporate behaviour. It is to date the only corporate accountability instrument that offers a complaints mechanism. Since 2000, the UK National Contact Point (NCP) for the OECD Guidelines has received 25 complaints from unions and trade unions about the alleged misconduct by British companies abroad. It was only after the introduction of major reforms following a consultation (which ended in June 2006) that the UK NCP has started to show some capacity to hold companies to account. In 2008 the UK NCP decided that the activities of two companies (DAS Air and Afrimex) operating in Eastern Democratic Republic of the Congo had contributed to human rights violations. These decisions have set an important precedent in making companies—even when they are not publicly listed—answerable for their actions abroad.

19. The *OECD Guidelines for Multinational Enterprises* cannot of course offer a remedy to the victims of abuse and cannot impose penalties on companies for their misconduct and so are therefore not sufficient. There is also the important question of what should happen when a company that has been found to have breached the Guidelines, continues to act abusively. If the Guidelines are to act as a credible deterrent some further measures should be taken eg delisting if the company is publicly listed; or debarring company directors. Professor Ruggie has expressed concern at the failure of most export credit agencies to consider explicitly human rights at any stage of their involvement.⁴⁵⁰ Where companies have proved themselves unable to adhere to the Guidelines, government support such as export credit guarantees or political risk insurance, should be withheld or withdrawn.

20. For serious human rights abuses the government should consider developing a more effective redress mechanism for victims of corporate abuse. It should have powers to sanction companies and impose penalties. Nonetheless, as the UK NCP has shown, when there is political will to examine complaints fairly

⁴⁴⁸ International Commission of Jurists (2008) *Corporate Complicity & Legal Accountability* Volume 3 Geneva p 4.

⁴⁴⁹ Gillian Merron, Parliamentary Under-Secretary of State, DFID letter dated 29 September 2008 to Patricia Feeney, Executive Director of RAID and Simon Taylor, Director of Global Witness.

⁴⁵⁰ Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, April 2008; A/HRC/8/5, paragraphs 39 and 40.

the *Guidelines* can contribute towards improvements in company behaviour.⁴⁵¹ But this progress can only be sustained if there are continued adequate levels of staffing and resources as well as oversight by the Steering Board and parliament of the UK NCP.

21. The OECD is poised to review the *Guidelines* in particular the human rights provision in response to the criticisms contained in the reports of the SRSG. It is imperative that the UK offers leadership in these efforts to ensure that the standards are not diluted but strengthened. Despite repeated demands by members of parliament and others, there has been little progress in producing guidance for companies working in areas of conflict and weak governance.

RECOMMENDATIONS

- While there is a place for voluntary initiatives and private codes of conduct, these should be balanced by credible means of regulation, sanction and redress.
- The rules and procedures of the Alternative Investment Market (AIM) should be tightened to curb or correct corporate misconduct overseas, particularly that of extractive industries.
- The government's proposals for the self-regulation of private military and security companies are insufficient and need to be complemented by other measures including legislation.
- CDC should be required to conduct human rights due diligence before public money is invested in companies abroad. Given the public interest, its development impact assessments and reports should be made available.
- The government should offer leadership in strengthening the OECD Guidelines for Multinational Enterprises, particularly in relation to its human rights provision and guidance to companies operating in areas of conflict or weak governance.
- The government should consider taking further measures against companies who, having been found in breach of the Guidelines, continue to act abusively such as by withholding or withdrawing export credits; delisting companies or debarring company directors.
- For grave human rights abuses the government should consider developing a more effective redress mechanism such as a Commission for Business, Human Rights and the Environment with powers to sanction companies and impose penalties which has been proposed by the Corporate Responsibility (Core) Coalition.
- The government should acknowledge the need for States to agree global standards by, for example, the adoption of a UN Declaration, to define a common benchmark for business conduct in relation to human rights.

Raid

May 2009

Memorandum submitted by the CAB

INTRODUCTION: THE CAB SERVICE AND HUMAN RIGHTS

Citizens Advice provides free, independent, confidential and impartial advice to everyone on their rights and responsibilities, though a network of 420 bureaux providing quality assured services in over 3,000 locations throughout England and Wales. The CAB service values diversity, promotes equality and challenges discrimination. In 2007–08 the CAB service dealt with 5.5 million problems in total, including consumer issues, employment and housing.

Our approach is that equality, diversity, and human rights are inextricably linked with good customer service standards and business practices. We are all different or diverse, and yet we all share a common, equal humanity. In providing advice and promoting equality, we focus on peoples' rights as consumers to equal and fair treatment in law and in practice, challenging injustice and discrimination. Many of the problems that bureaux deal with can engage convention (EHRC) rights, for example:

- In 2007–08 bureaux dealt with 79,296 problems related to immigration, asylum and nationality issues—approximately 21% of these concerned nationality and citizenship, 27% family, dependents & partners, and 15% refugees and asylum seekers.
- CABx dealt with over 73,846 health and community care enquiries; 12% of enquiries concern services for people with mental health problems, and 34% relate to residential or community care issues.
- In 2007–08 bureaux handled 274,814 enquiries relating to legal issues. A third of these of these concerned court proceedings.

⁴⁵¹ RAID (2008) Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises in association with The Corporate Responsibility Coalition and The Trades Union Congress.

- Bureaux currently handle over 22,000 discrimination advice enquiries every year. The majority of these concern sex, disability and race discrimination, although the numbers of discrimination enquiries relating to age, religion and belief, and sexual orientation are growing.

Bureaux also work in trying to help consumers access their rights where they have been treated unfairly, many of the same issues arise with commercial providers as those services supplied by the public sector and particular detriments can arise for consumers where “social products” such as mortgages are mis-sold or inappropriately managed and delivered. For example:—

- In 2007–08 bureaux dealt with 64,053 problems on Mortgage & secured loan arrears and 99,922 problems over private rented property.
- Over this period bureaux also dealt with 127,433 problems on Bank & building society overdrafts, many of which resulted in serious adverse debt consequences for consumers and detrimental impacts.

We therefore welcome this inquiry as extremely timely given the current debate in the political arena about legislating more widely for a culture of “rights and responsibilities” in the UK. It is a common misconception about human rights that they are relevant only to those living under or fleeing repressive regimes in other countries, and are mainly concerned with torture or the grossest kinds of cruelty and ill-treatment. In fact, human rights are equally relevant at an individual and community level underpinning many aspects of everyday life and contractual decisions; they are rooted in the affirmation of every person’s individual dignity and worth. As ten years have now passed since the Human Rights Act was enacted, it is an opportune moment to review how far social institutions have come in building a human rights culture, the role of business transactions in respect of human rights, and the development of wider corporate social responsibility (CSR) agendas based on human rights principles.

SUMMARY OF KEY POINTS

Our starting point is that economic and social rights are integral to the enjoyment of rights guaranteed under the European Convention, and are especially important to our clients in the current conditions of economic uncertainty. The link between economic and social rights on the one hand and civil and political rights on the other is especially important in the context of business transactions supplying goods and services to mass markets. The effects of business behaviour on individual rights can be evidenced from the experience of CAB clients in the following ways:—

- Consumers often depend on the financial and legal services sectors for the realisation of many key rights such as security of the home and family, and access to the legal system. Regulation of these sectors therefore needs to incorporate a human rights strand.
- Many key “public goods” (eg utilities and other essential services) which go with human rights are only accessible through consumer markets rather than the state. We therefore question the presumption that only the state should have obligations under human right law; it is now widely accepted that business should be covered by equality legislation enforceable by the Equality and Human Rights Commission, so if follow that human rights norms should also apply.
- Key public services can also be delivered through market mechanisms, for example through public sector procurement. These services provided by business range from legal aid to care services and publicly funded work training programmes—some of these services may not always “public authorities” for the purposes of the Human Rights Act, but service failures can have devastating consequences for peoples’ rights in the UK.
- Employees and workers have varying levels of protection against abuse of their rights; workers in the “informal economy” can face particular exposure to the abuse of their fundamental rights where businesses are operating at the boundaries of legality and light regulation. Protection of rights in this sphere is particularly important given the Government’s welfare to work policies which emphasis the value of law paid work as an alternative to benefits.

The boundaries between the public and private sectors can therefore very often be blurred. It is widely accepted that the State has duties to all citizens with respect to the protection of fundamental human rights, the case now needs to be made that business should also have similar duties when managing the delivery of public goods, public employment and public services.

Take for example our system of courts and legal redress. The justice system in particular needs to uphold the highest standards of human rights; Citizens Advice have often expressed concerns from our evidence about the activities of a range of business intermediaries in the “justice market” who work with civil law processes, from civil recovery to claims management and debt collection practices. Often we see examples of bullying, mis-selling and intimidation of clients in the name of the justice system, and the poor outcomes delivered as a result. The standards of all activities and agencies in the justice system must be informed by human rights principles.

Another clear example is the housing sector, a mixed market of public and private provision of ownership and tenure. Weak legal protection can leave people unnecessarily exposed to homelessness risks, and exploitation by some unscrupulous landlords and property market intermediaries.

We are therefore using this enquiry to call for a strengthening of regulatory regimes and civil law remedies, whether judicial or non-judicial, and the extension of human rights standards beyond their current application to public authorities. However success in human rights policy can only be measured in terms of prevention of widescale abuses and breaches of rights, rather than restitution where breaches occur.

The Government therefore needs to be proactive with business and the voluntary sectors so that human rights can become better understood and mainstreamed within customer service standards. In our policy work we have called for

- Extending the ambit of the Human Rights Act to all public services whether provided by organisation from the public, commercial or not for profit sectors
- Enhancing sectoral regulation and licensing regimes with a human strand to inform customer standards, and a co-regulation approach with respect to the interaction between human rights institutions, trade bodies, regulators and inspectorates.
- Strengthening regulation of commercial agents and intermediaries in key sectors such as legal services and housing.
- Introducing vulnerability criteria—informed by human rights standards—into consumer protection and the regulation/mitigation of informed choice in contract law.
- A general fair trading duty
- Enhancement of private law remedies and redress rights.
- Redressing imbalances in the legal aid system.
- The establishment if a general consumer Ombudsman

PRELIMINARY COMMENTS—BUSINESS AND HUMAN RIGHTS.

Business drives today’s economy both at the global and local level and many of the key levers of political power and social capital, so it is necessary to engage business governance in matters which affect human rights in the economic sphere. Often it is forgotten that economic and social rights are as integral to the enjoyment of human rights as civil and political rights are.

The preamble to the Universal Declaration on Human Rights, which was adopted by the United Nations in 1948, states that the highest aspiration of peoples was the “advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want.” In this foundational human rights document civil and political rights (to vote, to be free from torture and slavery, to speak freely, to have religious freedom) and social and economic rights (to work, health, education, food and shelter, and social security) were set out together, as interlocking and interdependent rights. Moreover, the International Covenant on Economic, Social, and Cultural Rights commits governments to taking steps to ensure that everyone has an adequate standard of living, including adequate food, clothing and shelter. This Covenant also guarantees rights to: just and favourable conditions of work; the highest attainable standard of physical and mental health; free basic public education; participation in trade unions; social security, such as pensions and employment insurance; and support for families.

The human rights framework therefore cuts across all areas of business, commercial and public service delivery and provides important protection for vulnerable or disadvantaged groups. The CAB service is passionate about these issues, because many of our clients have poor basic skills, speak English as a second language, live in poverty, suffer financial hardship, experience some form of discrimination because of race, religion, gender, sexuality, age, disability, have disability or health problems, have offended or be at risk of offending, and experience difficulty in accessing services. For bureaux, human rights can therefore be an important lever to help empower vulnerable groups.

The UK has a strong human rights record and a strong tradition of fairness in legal and administrative decisions. However, increasing use of automated systems by business in service delivery, the application of blanket policies without discretion, poor customer service, and misunderstanding about how human rights principles can be used to enhance service design and decision-making can sometimes leave people short changed on their rights, especially those from minority communities or vulnerable groups or where individuals have particular needs. There remains significant scope for improvement in respecting people’s human rights when designing the delivery systems for providing services to the public and mass markets.

Our first main general concern is that the existing human rights framework is very poorly understood in terms of benefits to both business and consumers. Low levels of awareness and misconceptions about human rights in the community mean that people may not perceive their problem or complaint as a “human rights issue”. The Joint Select Committee on Human Rights has previously concluded that the Government has done ‘nowhere near enough’ to use the Human Rights Act to improve the delivery of services and has allowed a catalogue of myths to build up around the true purpose and use of the Act in the UK, including the false notion of a “compensation culture”.⁴⁵² Peoples’ understanding of their rights and possible remedies

⁴⁵² JCHR—Sixth Report: *The Work of the Committee in 2007 and the State of Human Rights in the UK*

is limited; and as yet there is little awareness of the EHRC or what it does. Recent initiatives in public legal education have demonstrated that low levels of legal literacy in the UK contribute to mis-perceptions of human rights.⁴⁵³

Secondly, we consider that the Government's continued exclusion of economic, social and cultural rights from the legal framework to be a disappointment and a public policy failure. As the Joseph Rowntree Trust points out discrimination against people on the grounds of poverty is a common but unacknowledged feature of life in the UK and the lack of socio-economic rights within our legal framework prevents discussion on combating poverty on the basis on the human rights values and principles.⁴⁵⁴ The UK does however have a robust legislative regime for combating discrimination and in promoting equality including specific duties on public authorities. By way of contrast, human rights principles have a more general application and one of the useful roles for human rights is in "filling the gaps" where vulnerable or disadvantaged groups may be without legal protection. We would therefore like to see the human rights framework developed as a way of strengthening existing regulatory or legal protection regimes.

The key strategic challenge is how to engage business constructively in the Human Rights agenda. CABx and the wider voluntary sector have an important role here in developing partnerships with business so that a culture of rights is more widely acknowledged as desirable and normative. As the IPPR have suggested, insufficient capacity within the voluntary sector to develop human rights advocacy is one of the reasons that the HRA regime is seen more as blunt instrument of litigation than a vehicle for social change and development.⁴⁵⁵

INQUIRY QUESTIONS

1. *How do the activities of UK businesses affect human rights both positively and negatively?*

We consider that it is important to engage the business community in human rights issues, as the following activities and sectors of UK businesses can affect human rights both positively and negatively.

- The legal services industry
- The financial services industry
- The care industry
- Landlord and property intermediaries
- Welfare to work services providers
- Labour providers (eg Gangmasters)
- Utilities and basic services
- Door step sales and pressure/rogue selling or fraud/scams

CAB evidence on these sectors and activities sometimes raises concern that human rights can become engaged, and compromised, where poor business practices and customer service standards are allowed to develop unchecked and without redress. There is therefore an extremely important role for the sectoral regulators and the legal system, as well as market mechanisms, to ensure that business practices are kept in check for both their positive and negative impact on the enjoyment of human rights in the UK.

2. *How do these activities engage the human rights obligations of business in the UK?*

We will attempt to answer this with reference to the specific sectors we have mentioned above.

THE HOUSING SECTOR

Articles 12 and Article 1 (Protocol 1) of the European Convention refer to the protection of home and family life—rights which can be clearly affected by practices and the legal framework across the whole housing sector, not just local authority housing departments which can be held liable as public bodies under the existing framework of the Human Rights Act. And whilst the Government have responded to mitigate the crisis over rising home repossessions from unsustainable mortgage debt, we are concerned as are many housing charities, that private tenants are now the forgotten victims of the repossessions crisis—especially tenants who risk losing their homes when their landlords are repossessed.⁴⁵⁶ Landlords and businesses in the private letting businesses have significant power over peoples housing rights, and tenants often lack legal protection. So for example, the current legal framework in the private rented sector (Housing Act 1988) means that the majority of lettings are made on an assured shorthold basis. This type of tenancy gives the tenant very little security of tenure after the initial six months fixed term. A consequence of this lack of security is that tenants fear to exercise their statutory rights or to complain about issues such as disrepair, in case the landlord retaliates by serving a Section 21 notice. Tenants are therefore effectively disempowered,

⁴⁵³ *Public Legal Education and Support (PLEAS) Taskforce Report, Ministry of Justice 2007*

⁴⁵⁴ *Discrimination on grounds of poverty, JRT briefing 2007*

⁴⁵⁵ *Human Rights, Who needs them IPPR 2004*

⁴⁵⁶ *A Private Affair—Private tenants: the forgotten victims of the repossessions crisis. Shelter and CAB joint briefing 2009*

and are often reluctant to exercise the few legal rights which they do have (for example the right to a gas safety check, or the right to have their deposit protected) for fear of loss of their home through “retaliatory eviction”.⁴⁵⁷

Around 3 million households live in the private rented sector and the majority (60%) of private rented homes are now let via an agent rather than directly from landlords; we have concerns about practices in this largely unregulated market also.⁴⁵⁸ A further problem arises in the private rented sector in circumstances where the landlord has fallen into mortgage arrears and is being repossessed by the lender. This has become more common in the current economic climate and bureaux dealt with around 1000 such cases in 2008/9. In these circumstances, the property rights of the lender to regain possession “trump” even the minimal rights of the tenant (whose home it is), to a two months notice period and separate court action before being evicted. Instead, all the tenant is entitled to receive is a letter from the lender addressed to “the occupier” providing information about the date of the lender’s court hearing against the landlord/borrower. This can apply even where the tenant is fully up to date with their rent and/or is in the fixed period of a tenancy. Bureaux regularly report cases where the tenant never gets to see the notice letter and the first they know that anything is wrong is when the bailiffs arrive to evict them. For example

A CAB client living in Staffordshire and suffering from cancer who first heard of his landlady’s repossession when he received a Notice of Eviction from the Bailiffs. He was assured by his landlady not to worry as it was all being sorted out. This was untrue as the bailiffs then came in, evicted the client and changed the locks before he could even remove his possessions and essential medication.

Citizens Advice therefore welcomed the independent review of the private rented sectors whose terms of reference are “to consider what barriers exist in ensuring the sector consistently offers a fit for purpose product, what role it has into the future and what actions could be taken to influence and support that role.” We hope that the review will provide an opportunity to take forward these issues, and we have also called for the complete removal of Ground 8 eviction route from all housing suppliers.⁴⁵⁹

THE LEGAL AND FINANCIAL SECTORS

Article 6 of the European Convention recognises that access to justice and fair treatment from the justice system is fundamental right, and is closely allied to all the other convention rights. Businesses which operate as private agencies within the civil justice system therefore need to be mindful that the purpose of the justice system is to protect basic rights, however contentious or difficult the process can be for some people. So profit motives should never be used to override basic human rights standards in the administration of justice or apportionment of contractual and tortious responsibilities.

In this context, Citizens Advice have raised several concerns about the activities of many intermediaries in the legal services market, especially claims management companies, and some industries connected with civil law enforcement such as private bailiffs. It is axiomatic to the success of the Human Rights Act that the legal system is used appropriately and proportionately. Where Citizens Advice have found evidence of systemic consumer problems with accessing personal injury redress for example, with widespread misselling of conditional fee agreements to PI claimants, who have often incurred more costs than the compensation to which they are entitled, we have campaigned for better regulation of this sector on the basis of human rights principles.⁴⁶⁰

Another example, is that in recent years Citizens Advice has received a steady stream of reports from Citizens Advice Bureaux about the use of the ‘civil recovery’ process against both (dismissed) employees alleged to have committed theft during the course of their employment, and alleged shoplifters. The vast majority of these cases involved the same self-proclaimed “civil recovery specialists” which claim to have recovered more than £3 million on behalf of many well-known companies since starting operations in 1998. This company works on a ‘no win no fee’ basis for its clients which includes many household names such as Argos, Boots, Iceland, Ikea, Lidl, Morrisons, Tesco, TK Maxx, and Waitrose. It does so by sending demands for “redress for the loss and damage caused by your wrongful actions”, and threatening “use of all civil law remedies”, including county court proceedings, if payment is not made. Total amount demanded vary considerably—from as little as £87.50 to several thousand pounds—according to the circumstances of the case, but is usually made up of separate amounts for each of: “the value of the goods or cash stolen, if not recovered or unfit for resale” (which in some cases is given as “nil”); “staff and management time”; “administration costs”; and “apportioned security and surveillance costs”. Some of their letters also state that “the personal information we hold [on you]” will “now be held on a national database of incidents of dishonesty” and “may be used in the prevention of crime and detection of offenders including verifying details on financial and employment application forms”. The company’s website claims that it has “the largest database of dishonest people, outside the Police Force”.

⁴⁵⁷ *The tenant’s dilemma—warning: your home is at risk if you dare complain*. Sefton CAB (2006)

⁴⁵⁸ *CAB report on Letting Agents* (forthcoming)

⁴⁵⁹ *Unfinished business Housing associations’ compliance with the rent arrears pre-action protocol and use of Ground 8* Citizens Advice (2008)

⁴⁶⁰ *No Win, No Fee No Chance—CAB evidence on access to personal injury compensation* Citizens Advice (2004)

However, from the cases reported by CABx, it would appear that, notwithstanding this company's self-description as "dedicated civil litigators", it has successfully pursued few if any demands in the civil courts since three cases in the late 1990s, all in the same Court. The company appears to play the percentage game, thus making its income from the majority who are sufficiently ashamed and/or intimidated by the mere threat of legal action to pay the amount demanded, and quietly dropping most—if not all—of those demands that are challenged robustly, or simply ignored. These intimidatory practices are surely incompatible with human rights standards for the justice system.

The bailiff and debt collection industry and practices is another area within the legal and financial sector where we have serious concerns about the appropriate use of the legal powers and the regulation of actual debt recovery practices. Some of these practices can also engage other rights such as respect for property and private life, and sometimes which see behaviour in the industry which is so intimidatory to clients that it could reasonably be understood as degrading treatment.

WELFARE SERVICES, EMPLOYMENT PROTECTION AND WELFARE TO WORK

In recent years we have seen the development of many new businesses and enterprises working with people who have been unemployed, sometimes lacking appropriate skills and struggling on low incomes, and who need to access either benefits or basic employment. This business sector plays an increasingly important role in social policy, from the direct delivery of public services and public service outcomes, as intermediaries and also as providers of employment, training and other services.

Our evidence raises particular concerns on the conduct of medical and other assessments undertaken for the purposes of determining incapacity and disability benefit entitlement, and work capacity under the Government's various "welfare to work" programmes.⁴⁶¹ These assessment schemes are largely operated from the private sector on a contracted out basis, and within a policy framework that is increasingly moving towards conditionality and compulsion.

The Government's "Welfare to Work" strategy places considerable emphasis on the value of low paid, low skilled work as a subsistence alternative to living on benefits. However, hundreds of thousands of the most vulnerable and low paid workers in the UK economy, many of them performing unglamorous but essential tasks, are exposed to persistent inequality and unfair treatment by businesses as employers. This workforce are non-unionised, and are working from home or in small workplaces such as care homes, hairdressers, bars, restaurants and hotels, shops and other retail centres, food processing factories, cleaning companies, and other low-skilled or "service" jobs in which, according to many economic analysts is the sector of the economy in which there has been significant growth in recent years, and it is entrenching inequality and social immobility into our society. In some cases, this lack of social and employment rights protection and entrenchment of socio-economic disadvantage can undermine our culture of respect for basic human rights, perhaps for example most graphically illustrated by the tragic events of Morcambe Bay. CAB evidence points to the difficulties of enforcing rights in these sectors—despite regulatory interventions such as gangmaster licensing;⁴⁶² for example:—

East Lindsey reported the case of a Polish couple who had both been working through a GLA-licensed gangmaster. The husband had been employed as a driver of one of the gangmaster's minibuses, and both he and his wife had been summarily dismissed when he refused to drive an unsafe minibus.

CARE SERVICES

It is in the care system that people are at their most vulnerable, so we have argued that it should be completely unambiguous that human rights laws and standards must apply directly to all health and care service providers, quite regardless of their sectoral affiliation/classification, profession etc. Moreover, regulators and healthcare authorities must ensure that these standards are adhered to; failure to deal with abuses in the care market is as much an issue for human rights. Bureaux often come across situations in which poor decisions, care standards or inadequately trained personnel can endanger people's life quality, and seriously compromise personal dignity and family relationships or even their right to life.

ESSENTIAL SERVICES, SELLING AND GENERAL CONSUMER MARKETS.

There are many services that could be described as "public goods" only accessible through consumer interactions with markets. Some systemic unfairnesses can arise in these markets, where there is too great an imbalance of power between providers and consumers—for example where low income consumers have to pay a "poverty premium." In addition, individual cases reported by Citizens Advice Bureaux in the last few months reveal the detrimental impact that dubious sales and marketing activities can continue to have on individual CAB clients, many of whom are vulnerable in some way:

A CAB in Cambridgeshire reported a case involving a client who has ongoing mental health problems and suffers from depression. The client was alone in his girlfriend's house when he was cold-called on the doorstep by a representative acting on behalf of a fuel supplier about changing the electricity supplier for the house. The client told them that it was not his house and he could not make any decisions about switching

⁴⁶¹ *What the Doctor Ordered: CAB evidence on medical assessments for incapacity and disability benefits*, Citizens Advice (2006)

⁴⁶² *Why vulnerable workers and good employers need a 'fair employment commission'*, Citizens Advice 2007

supplier without seeing examples of their charges. The sales representative then persuaded the client to sign a piece of paper so they could show him their charges. The client did not check what he was signing but now accepts he must have unwittingly signed for a change in supplier. He has now received a demand for £706.17 from a debt collection company acting on behalf of the supplier.

The use of pressure selling itself raises human rights issues, and can often be the basis of fraudulent activity which can hurt consumers in ways which extend beyond pure economic loss. Sometimes vulnerable people can be persuaded into purchases in order to get rid of the salesman, or find themselves trapped in their homes in receipt of silent calls from firms engaged in distance selling. These practices are illegal under consumer protection law and the enforcement community and regulators have powers to investigate, but they cannot re-instate the individual's sense of security and well-being.

3. Are there any gaps in the current legal and regulatory framework for UK business which need to be addressed, and if so, how?

From the above evidence we can identify significant regulatory gaps where vulnerable consumers can be adversely impacted by poor business and sales practices. For example

- Housing—we have argued for much stronger regulation of the private sector, including letting agents,
- Legal and Financial—although there have been considerable regulatory developments across these sectors—but it has not been a high enough political priority to make regulatory change happen. An obvious example is the regulation of Bailiffs, a matter that has been under discussion since and a review was initiated in 1998, but with few discernable regulatory outcomes.
- Employment—We have seen much exploitation of vulnerable workers (who have limited legal protection rights) through unethical “rogue” business practices and have called for the establishment of a Fair Employment Commission. We have also argued for better regulation of some types of employment agencies and labour providers (Eg gangmasters licensing).
- General consumer and essential services—the key gaps are around the enforcement capacity of regulators and the availability of redress rights.

Some of the above raises wider questions about regulatory policy/design and business conduct. Much has been said about the link between the causes of the current economic downturn to regulatory failures in the financial services market, Citizens Advice does not have the expertise to comment on this directly, but we believe that this link raises a key issue that should be the starting point for any consideration about regulation and its relationship to consumer/human rights. Namely that there can be significant negative consequences resulting from regulatory failure.

Finally, in respect of consumer rights, we have called for the introduction of a general duty to trade fairly in both EU and domestic law.

4. Does the UK Government give adequate guidance to UK businesses to allow them to understand and support the human rights obligations of the UK? If not, who should provide this guidance?

5. What role, if any, should be played by individual Government departments or the National Human Rights Institutions of the UK?

We shall answer questions 4 and 5 together. Human rights institutions/NGOs, trade bodies, regulators and inspectorates all have extremely important strategic roles in disseminating good practice in respect of customer service and human rights. In order to build human rights cultures into customer service delivery practices, the job of giving adequate guidance should not be the responsibility of one agency alone, but rather requires a “co-regulation” approach.

This “co-regulation” approach is particularly important in the development

and dissemination of guidance and good practice standards. The key questions are around how guidance gets implemented, and secondly how relevant information that gets passed on to consumers. In order UK businesses to understand and support human rights obligations, human rights issues should be incorporated in EHRC guidance on statutory equality duties and also in guidance provided by inspectorates such as the Health and Safety Commission.

Guidance on good practice in customer service standards should also have a strong consumer focus about the need for clear communication between providers and consumers, including explanations around contractual rights and responsibilities as well as price. It is clear that there is a desire among consumers for quality of service information about rights and market choice. For example, our own research shows that substantial numbers of people would make use of customer service information to help them choose utility suppliers; this research found that if customers could get clear and independent information about the quality of customer service offered by utility companies, including information about how they deal with customer calls, then many consumers would make fundamentally different choices.

6. *How should UK businesses take into account the human rights impact of their activities (and are there any examples of good or bad practice which the Committee should consider)? How can a culture of respect for human rights in business be encouraged?*

- Should UK businesses' responsibility to respect human rights vary according to:
- Whether or not they are performing public functions or providing services which have been contracted out by public authorities; Is it clear when the Human Rights Act 1998 does and does not apply directly to businesses?
- Whether they are operating inside or outside the UK;
- the size, type or nature of their business?
- How, if at all, should the current economic climate affect the relationship between business and human rights?

These questions appear to be at the heart of this inquiry, whether Human Rights can be extended from the public law to the private law field. We would argue strongly that the basis of human rights liability should not just be whether business is performing a “public function” or operating under public sector procurement rules. But also where business may be supplying “p but also whether business is supplying public goods (such as utilities). In our view, this means going beyond the public authority framework in the Human Rights Act.

Secondly, the question of extending human rights into business obligations also raises the juridical issue of under what circumstances should human rights “trump” contractual or property obligations. In our view, there is a case for introducing vulnerability criteria—informed by human rights standards—into consumer protection and the regulation and mitigation of informed choice in contract law. Obvious examples would include diminished capacity or mental health issues.

Ensuring that business acknowledges human rights as a basis for good customer services standards should be a key priority for regulatory policy. There is of course, an inevitable and obvious tension between ensuring good standards of business practice across markets and the costs that this would entail for business. We are conscious of the need for regulation to be proportionate and not place any unnecessary burden on business, not least because these costs tend to get passed on to consumers in one way or another. However we believe that the “light touch” discourse that prevailed in the recent past has tended to go too far in prioritising concerns over regulatory costs.

EFFECTIVE ACCESS TO REMEDIES

7. *Does the existing legal, regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege that their human rights have been breached as a result of the activities of UK businesses?*

8. If changes are necessary, should these include:

- Judicial remedies (If so, are legislative changes necessary to create a cause of action, or to clarify that a cause of action exists; or to enable claims to proceed efficiently and in a manner that is fair to both claimants and respondents)
- Non-judicial remedies (for example, through the operation of ombudsmen, complaints mechanisms, mediation or other non-judicial means). If non-judicial remedies are appropriate, are there any examples of good or bad practice which the Committee should consider?
- Government initiatives, whether by legislation, statutory or other guidance or changes in policy;
- Initiatives by business or other non-Government actors.

We shall answer questions 7 and 8 together. For many CAB clients making a complaint or seeking a remedy, this will be the first time they have come into contact with the legal redress system in any shape or form. They are not repeat players and tend to approach the idea of pursuing a complaint with caution and trepidation. Apprehension of officialdom and authority is the norm, so it is vital that redress systems have a user focus and high standards of fairness in decision-making.

ACCESS TO JUSTICE, INFORMATION AND ADVICE

In our experience, effective remedies can only be made meaningful and realisable where consumers have appropriate and effective channels of access to justice, information, advice and advocacy. Better public information is important, as is widening access to the advice sector. As Citizens Advice research on unmet demand, and the civil justice surveys of the Legal Services Research Centre amply demonstrate, there is considerable “unmet demand” amongst the general population for information and advice relation to rights. Current capacity within the advice sector cannot meet this demand. And the Human Rights Act project research showed that where respondents had indicated that they felt their treatment fell short if that identified HRA principles or customer service factors, only 3% said that they had sought advice from a CAB, and a further 3% that they had complained under the HRA.⁴⁶³

⁴⁶³ *Human Rights Insight Report*. Ministry of Justice 2008

JUDICIAL REMEDIES

In the consumer field, it is extremely difficult for those who have left out of pocket and feel humiliated as a result of scams and bad business practices to use the legal system to gain redress. And in low value claims, under the small claims procedure there is little support available in bringing forward a case—and under existing codes Judges are now allowed to lower the evidential bars to help claimants get their issues resolved. One way to enhance access to justice is to take forward proposals mooted by the Civil Justice Council and others on developing a “collective redress regime” in the UK.

The JCHR may want to consider what more could be done to enhance private law redress rights. This issue is currently being investigated by the Law Commission, and is particularly important at the moment as the proposed Consumer Rights Directive which will replace much of our existing domestic consumer protection law whilst strengthening legal duties, does not contain the distinct rights of private law redress currently available within the existing consumer protection regime.

Finally, we also need to look at the legal aid system. Expenditure on legal aid is concentrated on criminal cases and defence rights; however, it is important to note that human rights also cut across civil issues. It should therefore be a matter of concern to the JCHR that civil legal aid is now increasingly restricted in terms of scope, eligibility and supplier availability.⁷ For example, legal aid no longer funds consumer cases. This situation needs to be rebalanced in order to achieve meaningful access to justice.

NON-JUDICIAL REMEDIES

In Citizens Advice’s experience, non-judicial remedies are often more appropriate in helping vulnerable consumers to access their rights. Citizens Advice have therefore called for the establishment of a general consumer Ombudsman post with enhanced powers across key market sectors.

Memorandum submitted by Professor Cees van Dam

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Relevant professional activities

- advised the International Commission of Jurists (Geneva) on “Corporate Complicity and Legal Accountability”, particularly Volume III (Civil Remedies) (<http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity>) (2008);
- involved in litigation in the Netherlands regarding liability of a Dutch based oil company for environmental damage in an African country;
- participated in expert meeting in Beijing prior to the EU-China summit (November 2008).

GENERAL REMARKS

The Committee’s call for Evidence is a very timely one and rightly adopts Professor John Ruggie’s framework as a basis for the business and human rights debate. This framework is not a basis for litigation in the courts of justice but it can be the basis for accountability of businesses in the courts of public opinion. This is particularly useful as the latter courts can have more impact in the short term whereas legal litigation is time consuming and very expensive. The experiences with the Alien Tort Claims Act (ATCA) in the United States confirm this. This is not to say that the ATCA is not important, on the contrary. But it would take too much time if victims of human rights violations, businesses, governments and NGO’s have to learn through litigation what is right and what is wrong in this respect.

The Ruggie framework can speed up this learning process and provide rules for proper business practices within years rather than decades. This would create more certainty and this is important as businesses are currently often uncertain about their obligations as regards respecting human rights.

Even though the Ruggie framework is not a legal one, many of his questions are similar to the ones a court of justice would ask. Carrying out “due diligence” is akin to acting as a reasonable man (company) in order to avoid damage to people who can be foreseeably affected by the company’s activities. This means that developing Ruggie’s framework may lead to standards of conduct that can also be useful to establish what is legally required.

On an optimistic note one could even say that if Ruggie's framework and norms have led to voluntary compliance by an important part of businesses, this may lead to calls from these businesses for minimum legal norms in order to create and protect a level playing field.

1. *How do the activities of UK businesses affect human rights both positively and negatively?*

Negative impacts can be established through Professor Ruggie's framework as well as by applying tort law instruments.

Professor Ruggie rightly argues that businesses can impact on virtually all human rights. From a constitutional and international law perspective the interesting discussion is about the question whether businesses can violate human rights. However, also tort law calls businesses to account as it aims to protect many rights (life, health, bodily integrity, property) even though they are not indicated as being "human rights". Its history goes back to much earlier times than when human rights saw the light of day. Tort law is also a broader and more directly usable framework for the accountability of businesses than the constitutional and international law framework as it can deal with virtually all (negative) impact business can have on human rights.

The Ruggie framework and tort law also deal with the indirect involvement of business in human rights violations. This is important because in many cases companies do not infringe peoples' rights directly but rather indirectly by supporting or cooperating with those who do (governments, suppliers, etc.).

Positive contributions of companies can follow from the factual influence they have in the country where they operate and which they can use to encourage respect for human rights. This applies not only to their company policies but also to contracts they conclude with their business relations such as suppliers. Embassies can encourage businesses to respect human rights and to advise them accordingly.

2. *How do these activities engage the human rights obligations of the UK?*

The European Convention on Human Rights obliges the United Kingdom to protect human rights, not only against infringement by public bodies and businesses performing public functions but also against infringement by individuals and business performing private functions. For example, if a business uses slave labour or child labour in its factory, the UK government has an obligation to interfere and to protect the people whose human rights are affected. However, the UK is not obliged to act when the human rights violations take place outside the UK territory.

3. *Are there any gaps in the current legal and regulatory framework for UK businesses which need to be addressed, and if so, how?*

An obvious gap is caused by the fact that governments are not entitled to enforce human rights abroad. For example, when the subsidiary of a business uses child labour in its factory in Bangladesh, it is for those authorities to interfere. Although this is as such a sound principle of international law, the consequence is that in many poorer countries human rights are not or poorly enforced against transnational companies (sometimes the country is poorer than the company it has to supervise).

One of the options to address this problem without interfering with principles of international law is to encourage cooperation between home and host governments to help the host country to improve its human rights enforcement structures. Cooperation between businesses, NGO's and UK-embassies could be useful too.

Another way to solve the problem is to hold the parent company to account for the human rights record of its subsidiary abroad. An obvious problem in this respect is the way companies use complex group structures to avoid liability. To a certain extent group structures are a useful tool but the question is whether this should also be allowed in situations where a subsidiary (domestic or abroad) is involved in human rights violations. Generally, there is an imbalance in tort law between the amount to which a parent can benefit from its subsidiaries and the amount for which it has to take responsibility for their losses and liabilities.

This is a more or less global legal problem that can only be solved at an international level. In the short term it is up to the courts to impose duties of care on parent companies to "look after" their subsidiaries (*Lubbe v Cape plc* (HL) [2001] 1 WLR 1545).

6. *How should UK businesses take into account the human rights impact of their activities (and are there any examples of good or bad practice which the Committee should consider)? How can a culture of respect for human rights in business be encouraged?*

UK businesses should take into account the human rights impact of their activities by following the guidance provided by governments, NGO's and international organisations like the United Nations and the OECD. Transnational companies ought to carry out impact assessments about possible human rights impacts by their subsidiaries or business partners abroad. Subsequently, they need to develop strategies to avoid human rights impact and develop reporting and control mechanisms to ensure these strategies are implemented and followed at all times.

Good examples are the Business Leaders Initiative on Human Rights and the UN Global Compact. The latter provides for a continuing learning process for companies and possibilities to cooperate.

One of the ways for a government to encourage such a culture could be to oblige businesses that ask the government for benefits (credit guarantees, subsidies) to prove that they respect human rights. This means that they have a company policy that is implemented and effectively enforced.

For example, the Dutch government has adopted a policy that if a company wants to be represented on a ministerial trade mission abroad it has to show that it does not use child labour in its supply chain.

Another option for a public body is to adopt sustainability as one of the leading criteria when purchasing goods and services. The Netherlands aims to implement such a policy by 2010.

Finally, one may think of a European import ban of products made with the help of the most serious forms of child labour. This option is currently investigated by the European Commission. There is an interesting parallel with the RAPEX system and the General Product Safety Directive which helps to keep unsafe products off the market.

Should UK businesses' responsibility to respect human rights vary according to:

- *Whether or not they are performing public functions or providing services which have been contracted out by public authorities. Is it clear when the Human Rights Act 1998 does and does not apply directly to businesses?*

See my answer to question 1.

- *Whether they are operating inside or outside the UK?*

In principle, it should not make a difference. Human rights are for everyone, not only for the rich and the white. The problem is that trade has been globalised but justice not (yet). International law protects the freedom of trade but does not regulate the way companies use this freedom in international trade. As a consequence, many western companies shift their costs to the environment, to employees and to children in countries in the developing world.

The current situation represents what I call *human rights protectionism*. We protect human rights of our own people but we ignore human rights of people in other parts of the world. Rather we benefit from infringements of their human rights for our western economic good. In a global economy, *human rights protectionism* is unsustainable.

Obviously, these are issues the UK cannot deal with on its own. International cooperation is pivotal as are legal measures to be taken at international level by the EU and the WTO.

- *The size, type or nature of their businesses?*

In principle, my answer would be no. However, it is important to make sure that SME's policies and practices in this respect are facilitated as much as possible by the government and possibly other businesses. For example, one of the major problems in a proper human rights policy is to know what happens at the supplier's factory in a country far away from the UK. Structural cooperation between businesses, UK embassies and NGO's can be helpful in this respect.

How, if at all, should the current economic climate affect the relationship between business and human rights?

A financial crisis was needed to realise the importance of global regulation and of tougher domestic regulation of the financial sector. Important causes of the financial crisis were a lack of social responsibility, an emphasis on short term profits, and externalisation of costs and risk. These shortcomings are similar to the ones that negatively affect the sustainability of world trade in general and the lack of respect for human rights. In fact, we are talking about the same problem: large inefficiencies due to a lack of proper (global) regulation. Albeit with one important difference: western countries suffer from the financial crisis (and are therefore prone to change) whereas they generally benefit from companies abusing human rights (and are therefore less prone to change).

The topic of business and human rights is not about human rights and social norms only. It is, in fact, part of the sound economic principle that business should pay its way. If the price of a product does not reflect the real costs (including costs that are too low because they benefit from human rights violations), this will lead to inefficiencies that are, in the longer run, unsustainable.

I would therefore prefer to reframe the discussion on business and human rights to one about correcting (global) market failures. First, correcting vertical market failures between companies and the victims of human rights abuse caused by the companies' dominant positions. Second, correcting horizontal market failures between companies in order to create a level playing field and encourage fair competition.

8. *If changes are necessary, should these include:*

- *Judicial remedies (if so, are legislative changes necessary to create a cause of action, or to clarify that a cause of action exists; or to enable claims to proceed efficiently and in a manner that is fair to both claimants and respondents)?*

Obviously, a proper remedies system is needed to hold businesses to account and to provide victims of human rights violations access to justice. Even though the Ruggie framework is very useful indeed, there will always be a need for litigation, particularly in bigger cases where serious human rights violations are at

stake. However, the current system generally deters victims to go to court and have their case heard because of the costs involved and the risks of having to pay costs if they lose the case. Victims and NGO's supporting them do not have the means to take this risk, although sometimes law firms may be prepared to take on a case on a no win no fee basis.

- *Non-judicial remedies (for example, through the operation of ombudsmen, complaints mechanisms, mediation or other non-judicial means). If non-judicial remedies are appropriate, are there any examples of good or bad practice which the Committee should consider?*

As remedies are not only about compensation but also, perhaps even more, about stopping human rights violations, non-judicial remedies may be very effective too. Publicity can be an important means to this, as it often encourages a company to stop its involvement in the violations. Considering the high costs to obtain a judicial remedy, it is very important to encourage the development of non-judicial remedies. In this respect it could be considered to further strengthen the role of the National Contact Point.

Professor Cees van Dam

May 2009

Memorandum submitted by Business for Social Responsibility

Thank you for the opportunity to provide evidence to the Joint Committee's inquiry on business and human rights, one of the most important human rights debates of our time.

A leader in corporate responsibility since 1992, Business for Social Responsibility (BSR) works with its global network of more than 250 member companies to develop sustainable business strategies and solutions through consulting, research, and cross-sector collaboration. Our membership includes 17 multinational companies based in the UK and many more with significant operations in the UK. With six offices in Asia, Europe, and North America, BSR leverages its expertise in human rights, economic development, environment, and transparency and accountability to guide global companies toward creating a just and sustainable world.

We welcome the Joint Committee's decision to acknowledge the framework for business and human rights proposed by John Ruggie, the UN secretary-general's special representative on business and human rights, as a significant step forward in the effort to clarify the responsibilities of state and non-state actors for human rights.

We can only overcome the considerable challenges we still face in this area if all actors, including government, businesses, and civil society collaborate to develop effective solutions to these challenges. This is why we strongly support the Joint Committee's inquiry into this subject and its approach to seek input from a variety of stakeholders.

The UK has been and continues to be at the forefront of this important progress. Many UK businesses and the UK government have catalyzed leadership initiatives on human rights and thus helped set best practice standards for managing company human rights impacts. It is critical that both the government and companies continue this leadership on human rights, as much work remains to be done.

Over the past decade, we have seen significant progress in the business and human rights sphere. Where once multi-stakeholder dialogue on human rights was rare, now, several initiatives are thriving, from the Extractives Industry Transparency Initiative and the Voluntary Principles on Security and Human Rights, of which the UK Government is a co-founder, in the energy and mining sectors; to the Ethical Trading Initiative, the Fair Labor Association, and SA8000 on labor rights; to the newly founded Global Network Initiative on free expression on the Internet. All of these initiatives capture the promise of dialogue, debate, and collective action.

Where once there was little or no institutional support for advancing business support for human rights, now there is the UN Global Compact and the International Finance Corporation's social standards, both of which include human rights standards.

Where once there was little human rights information available and accessible for business, we now have the rich resource of the UK based Business & Human Rights Resource Centre. A large number of companies have established institutional support for the human rights debate.

While there are several signs of important progress in strengthening corporate human rights practices, much work remains to be done. Below, I will outline important areas for further debate as we see them, seeking to answer the Committee's specific questions, and following the Committee's suggestion of using the Ruggie framework's three pillars as an outline:

1. THE STATE DUTY TO PROTECT HUMAN RIGHTS

Weak Governance and Rule of Law

Human rights protections remain the primary responsibility of states. This responsibility includes governing corporate human rights impacts through effective regulation and enforcement. Yet, many governments remain unwilling or unable to effectively protect their citizens' human rights. Companies operating in those countries risk becoming complicit in government human rights violations. Further, the most difficult human rights dilemmas companies face often involve a conflict between domestic law and international human rights protections.

The UK government could help address this challenge in a number of ways. Wherever possible, the government should include human rights and specifically corporate human rights issues in its public diplomacy and dialogue with other nations, aimed at helping to close the gap between international human rights standards and domestic law or its enforcement. This would also support businesses in addressing some of the most difficult dilemmas in this area. By supporting capacity building, training and education projects, financially and operationally, to strengthen rule of law and governance, the UK government could help address critical root causes of human rights violations around the world.

Policy Integration and Alignment

As John Ruggie has stated, too often human rights are compartmentalized in one government agency or department tasked with advancing them. Yet, many business and human rights dilemmas arise outside of the traditional public policy forums for human rights. International trade policy, regulations on foreign direct investment, development aid, export credit mechanisms, and corporate law can all have significant implications for corporate human rights impacts. The UK Government should consider assessing to what extent its current corporate regulatory regime aligns with its human rights policies and ensure that human rights are an important consideration in revising all aspects of that regime in the future.

Legal Clarity

It is critical for companies to understand the regulatory environment within which they operate. This is especially true for an issue as complex as the human rights responsibilities of business. A clear legal standard would help level the competitive playing field, rewarding those companies that are already proactively managing their human rights impacts. In this light, the UK Government should seek to clarify the applicability of the Human Rights Act 1998 to private actors, including corporations: Questions remain both on the applicability of the Act to businesses and around the definition for public functions or services provided by private actors. Added clarity here would be a very valuable contribution to this debate, even beyond the specific UK legal context.

2. CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

Human Rights Impacts of Businesses

The human rights impacts of businesses, including UK companies, are manifold: Companies can impact human rights positively and negatively, directly or indirectly, they can impact communities in their home state, in host countries, as well as communities in other far away regions of the world, through the company's operations or use of its products or services.

Examples of positive impact include job and wealth creation, furthering the human rights to work and an adequate standard of living, facilitation of the right to free expression through information and communications technology and services, and advancement of the right to health through development and provision of medicines.

Negative human rights impacts can include substandard working conditions in a company's supply chain, complicity in a government's human rights violations, such as abuses by police or security forces to protect a company asset, or severe pollution of air and water, potentially harming the human rights to health, food, and access to clean water.

Research conducted by John Ruggie's mandate and presented as a supplement to Ruggie's June 2008 report to the UN Human Rights Council showed that allegations of human rights violations had been made against companies in virtually all business sectors, all regions of the world, and alleging violations of a wide variety of human rights, including civil and political, labor, and economic, social and cultural rights.

Therefore it is our strong belief that the baseline business responsibility to respect all human rights should be the same for all companies, regardless of the type, nature and size of their business. Most importantly, this baseline responsibility does not vary based on where a company operates.

Due Diligence

To discharge their responsibility to respect human rights, proactive measures are required from companies. These measures, which John Ruggie refers to as human rights “due diligence”, should include key elements of a business management system, including a formal policy, impact assessments, integration of human rights throughout the business, and measuring and reporting on impact. In practice, while the baseline responsibility should be the same for all companies, the implementation will and should vary depending on the type, nature and size of the company.

Additional Responsibilities for Companies Performing Public Functions

It is important to stress that the responsibility to respect all human rights, to do no harm, is a baseline responsibility. Companies can and should go further in advancing human rights where possible. In addition, where companies or other private actors perform public functions or provide public services, additional responsibility should apply. States are charged with the primary duty to protect and fulfill human rights—where the state passes on the provision of essential services that further human rights to non-state actors, including companies, the responsibility associated with the human rights in question should extend to those private actors. For example, private prison operators should be held to account for violations of the human rights of prisoners in the same way that state actors could be held accountable.

Additional Efforts

In addition to the points raised above, we see a number of specific areas in which the UK government, and other governments, can take action to improve human rights conditions relevant to business:

- Procurement policies: The UK government should ensure that all its procurement is conducted in a manner consistent with human rights principles. In doing so, it will mirror best practice, and also help to create and expand commercial incentives for companies globally to integrate human rights protections into their operations.
- Widening the circle of engaged companies: The London-based Business & Human Rights Resource Centre reports that only 241 companies, out of 4,000 monitored, have adopted formal human rights policy statements. Too many multinational companies remain unwilling to take the risk involved with stating their commitment to respect basic human rights principles. But in 2009, the concern that mentioning the Universal Declaration of Human Rights in corporate policy will bring unnecessary risk of legal liability simply hasn’t been borne out by experience.
- The UK government could encourage a culture for respect by requiring or promoting public reporting on human rights impacts by companies. The Global Reporting Initiative, the most commonly accepted standard for social and environmental reporting, already includes a number of human rights indicators that could serve as a reference point. In addition, the government can publicly acknowledge and reward the many UK companies that have led and continue to lead in this area, through an awards program, a speaker series, or another public event.
- Deepening the practical understanding of what human rights means for business: Even for companies employing leading human rights efforts, understanding and implementation can remain incomplete. There is a sufficient community of practice and expertise in organizations like BSR and others such that operational advice is available to any company that wishes to look for it. To help deepen the understanding and advance implementation of human rights among companies, the UK Government could provide financial and operational support for training programs on human rights for companies, both in the UK and abroad.
- Measuring progress: John Ruggie’s work is immensely helpful in that it is setting some parameters on just what a company’s duties are. Yet, today few companies are in a position to measure their impacts, and the wider world generally only sees violations, which are often quickly attributed to business. A better means of measuring and reporting on impacts, both positive and negative, will illuminate this poorly understood debate. The UK government could support this effort by ensuring that it considers impact and outcomes, including positive impact, when addressing corporate responsibility for human rights in regulatory efforts, as well as through multi-stakeholder initiatives.
- Examining horizon issues in today’s world: The world from which the Universal Declaration emerged in 1948 is gone. Today’s wired world presents a very different picture, with fluid connections across borders, NGOs growing by the day, and political influence dispersing from Europe and the United States. Every company will spend the coming decades wrestling with its approach to privacy, free expression, and access to economic rights—items that are not well understood today. Supporting continued research and study of this continuously evolving field is a key contribution that the UK Government could make to further human rights protections around the world.

3. EFFECTIVE ACCESS TO REMEDIES

Access to remedies for those whose rights have been violated remains weak in many parts of the world. In fact, where human rights violations are most likely to occur, access to remedies often is least effective. Given the magnitude of this challenge, we strongly believe that a debate between judicial and non-judicial mechanisms is misguided. Rather, effective access will require a number of different avenues, both judicial and non-judicial, to be available to victims of human rights abuses involving companies.

In addition to fulfilling its duty to protect citizens from human rights abuses through law, effective enforcement, and judicial remedies, the UK Government could provide significant support to improving access to remedies around the world. As mentioned above, the government can help build capacity in countries with weak rule of law and ineffective judicial mechanisms. Providing financial and operational support for training, educational exchange, and continued research would all prove valuable.

Regarding non-judicial remedies, we believe that the different options the Committee listed in its call for evidence, including ombudsmen, complaint mechanisms, alternative dispute resolution, and mediation, all have merit. All of these instruments have already proven successful in various aspects of corporate social responsibility, including ethics, anti-corruption programs, and labor rights. They should not be seen as replacing judicial mechanisms, but as important alternative avenues towards redress for victims. Non-judicial mechanisms provided by business, other private actors, or international organizations are especially needed where rule of law and judicial avenues are weak.

The OECD National Contact Point system is a non-judicial mechanism that could be improved to provide effective access to remedies for victims more widely. The UK National Contact Point has been significantly more active than other contact points in investigating complaints of alleged human rights violations involving companies. Exploring further the successes and challenges of this process and sharing the results widely would be very valuable. Based on such a study, the UK National Contact Point's process could be optimized and other countries could be encouraged to adopt a similar process.

In closing, I would like to again thank the Committee for the opportunity to provide BSR's view on this important debate. We will continue to work with our member companies on developing effective solutions to the many human rights challenges businesses face around the world and we look forward to the Committee's and the UK government's continued efforts to advance human rights globally.

Business for Social Responsibility

May 2009

Memorandum submitted by Leigh Day & Co.

SUMMARY OF SUBMISSIONS

This paper addresses the following issues of which we have direct experience, and which arise from the list of questions in the call for evidence:-

1. Application of the Human Rights Act to businesses to which public functions have been contracted out by public authorities.
2. Effectiveness of judicial mechanisms for holding UK business to account for human rights violations committed overseas.
3. Funding issues relating to 1 and 2 above
4. Effectiveness of non-judicial mechanisms for holding UK business to account for human rights violations committed overseas.
5. Possible legislative, judicial and non-judicial changes that could be introduced in relation to 1 and 2 above.

1. APPLICATION OF THE HUMAN RIGHTS ACT ("HRA") TO BUSINESSES TO WHICH PUBLIC FUNCTIONS HAVE BEEN CONTRACTED OUT BY PUBLIC AUTHORITIES

Section 6 of the HRA provides that the HRA applies only to "public authorities". No definition is provided in the HRA, save for stating that courts and tribunals are public authorities for the purposes of the act. The lack of provision of guiding principles and/or non-exhaustive list of bodies considered to be public authorities has led to litigation producing anomalies and the question of whether a person or body is a public authority for the purposes of the HRA can be very difficult to determine. In 2003, the House of Lords confirmed that there was no single test of universal application to distinguish what is or is not a public authority.⁴⁶⁴

The anomalies produced are illustrated by the case of *Johnson & others v LB Havering; YL v Birmingham City Council*⁴⁶⁵ in which the House of Lords held that an individual placed in a privately-owned care home by a local authority was not a public authority. This result means that Mr A, who through no choice of his

⁴⁶⁴ See *Aston Cantlow & others v Wallbank [2003] 3 All ER 1213*

⁴⁶⁵ 3 WLR 112

own, is placed in a privately-run care home by his local authority loses the protection of the HRA; yet Mr B who is placed in a local authority run care home retains the protection. This anomaly required addressing through primary legislation (see Health & Social Care Act 2008, brought into force on 1 April 2009).

A key area in which the protection of the HRA fails (and in which Leigh Day & Co are often instructed) is in relation to private companies running immigration detention centres and providing escort services for removals and deportations. There is a plethora of complaints and litigation surrounding the maltreatment of immigration detainees by these private companies, including multiple allegations of assault, inhuman and degrading treatment, and deprivation of liberty. We refer you to the Medical Justice report “Outsourcing Abuse.”⁴⁶⁶ The Home Office argue that it is not responsible for the actions of the private companies and hence rigorously defend HRA claims, and the companies themselves state that they are not subject to the HRA. This issue has yet to be determined by the Court, and highlights the unnerving ability of public authorities to potentially contract out of their human rights obligations.

2. EFFECTIVENESS OF JUDICIAL MECHANISMS FOR HOLDING UK BUSINESS TO ACCOUNT FOR HUMAN RIGHTS VIOLATIONS COMMITTED OVERSEAS

Criminal Accountability

Thor Chemicals (see further below), a UK multinational involved in the manufacture of mercury-based chemicals, shifted its operations, lock stock and barrel to Natal. This was after serious concerns had been expressed by the HSE. 40 South African workers were poisoned, including 1 fatality. Thor was charged and fined the equivalent of approximately £3,000 by the Pietermaritzburg Magistrates. At the time, other companies commented that the paltry fine made it difficult to justify health and safety expenditure to shareholders.

In the event of no action being taken in the local courts, it is possible, under the International Criminal Court Act 2001, for a prosecution to be brought against individual UK citizens responsible for specified offences overseas, including “aiding and abetting” the commission of “crimes against humanity” and “torture”. Officers and employees of UK businesses that have engaged in conduct ancillary to such offences could therefore be prosecuted under the Act. To date, we are unaware of any such investigations having been undertaken.

Civil Action in the UK courts

Case Study: BP, a UK multinational, was involved in the exploration and exploitation of oilfields in the Department of Casanare, Colombia, in the early 1990s. A pipeline was built by a locally registered company (OCENSA) to transport the oil from the oilfields to a port on the Caribbean coast. Civil claims were initiated in Colombia against OCENSA by peasant farmers whose livelihoods had been destroyed as a result of environmental damage to their land, which they claimed was caused by the construction of the pipeline. The claims were stifled as a consequence of the inadequate Colombian justice system and the perilous position of human rights lawyers in Colombia.⁴⁶⁷ The lawyer acting for the farmers ultimately sought asylum in the UK following increased threats from paramilitary groups due to her involvement in the case. The farmers subsequently instructed Leigh Day & Co and a successful settlement was eventually reached with BP by way of a mediation in June 2006.

A ruling of the ECJ⁴⁶⁸ confirmed that the UK courts do not have jurisdiction to stay proceedings commenced against a UK-domiciled corporation, on the grounds of *forum non conveniens*. This is a welcome development given the substantial resources and court time wasted on this issue in the litigation against Cape PLC, Thor Chemicals⁴⁶⁹ and Rio Tinto.

Claims directly alleging human rights violations cannot be brought in the UK against non-state entities. This contrasts for example with the position in the US, where a federal statute, the Alien Tort Claims Act, specifically provides for such claims.⁴⁷⁰ However, in light of *Owusu* and the recent coming into force of the Rome II Regulation, claims arising overseas will invariably be governed by local (foreign) law.⁴⁷¹ Consequently, should the local law provide for human rights causes of action, it should be possible to pursue these in the UK courts.

Overseas operations of UK businesses are usually conducted through local subsidiaries. In general, in order for the UK courts to have jurisdiction, the UK parent company will need to be sued. However, in view of the “corporate veil”, the parent is not generally liable for the wrongdoing of its subsidiaries.⁴⁷² In light of this well-established precedent, the focus in such cases has been on the direct negligence of the parent

⁴⁶⁶ Available at <http://www.medicaljustice.org.uk/images/stories/reports/outsourcing%20abuse.pdf>

⁴⁶⁷ See, for example, the Law Society’s report on its August 2008 International Human Rights Mission to Colombia, due to be launched on 6 May 2009

⁴⁶⁸ *Owusu v Jackson and Others Case C-281/02*

⁴⁶⁹ *Sithole & Others –v– Thor Chemicals Holdings Ltd and Another* (Times Law Report dated 15 February 1999)

⁴⁷⁰ *Doe v Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997). An action by Burmese villagers alleging complicity by Unocal in human rights violations perpetrated by the military around a pipeline.

⁴⁷¹ Rome II applies where (a) proceedings are commenced from 11 Jan 2009 and (b) events giving rise to damage occurred after 19 Aug 2007.

⁴⁷² *Adams v Cape Industries Plc* [1990] 2 WLR 657; the “veil” can be “lifted” in the event of fraud on the part of the parent or an agency relationship [between parent and subsidiary].

company itself in causing the harm in question. This type of approach is infinitely more complex, factually, than one entailed in a claim against a local operating company. The position is graphically illustrated by the RTZ tree (appendix 1) researched and produced for the Connelly case (in which the parent, at the top of the tree, was sued in respect of damage arising at Rossing Uranium Ltd, the entity at the bottom of the tree).

This increased level of complexity has important consequences. First, significantly more resources are required to investigate the relationship between different entities within the corporate group. Secondly, this makes the prospects of success more uncertain. Such cases are also necessarily subject to the funding considerations described below.

Case management procedures for group actions enable cases to be run on a more cost-effective manner than a multiplicity of individual cases. However, the need to commence claims within the requisite limitation periods – whichever limitation law applies – and the extent to which individual particulars are required procedurally, tends to make cases prohibitively expensive. Class action legislation of the type that exists for example under Australian federal law (or the law of Victoria) would enable an issue to be resolved through a single representative claim, whilst at the same time suspending limitation.⁴⁷³

3. FUNDING ISSUES

Access to justice against businesses is subject to the ability of individuals or communities to fund legal proceedings against large corporations and the fundamental inequality of arms that this engenders. The vast majority of individuals simply cannot afford to risk litigating because of the costs risks involved.

Due to the erosion of the availability of Legal Aid over recent years by stringent means testing and by its removal from certain fields of law such as personal injury, often the only available mechanism for funding legal cases is a Conditional Fee Agreement (CFA). CFAs do not protect an individual from adverse costs risks, and the practical reality is that it is only feasible to act for clients under a CFA when the prospects of success and the overall value of the claim are sufficiently high to persuade a third party litigation funder to support the case.

In order to act under a CFA, legal representatives have to possess the necessary resources (which are invariably huge in the case of a large group action) to fund the case pending its conclusion, a risk that represents a significant disincentive for all but a few firms to carry out this type of work. In spite of these hazards, CFAs have been subject to criticism by politicians who seem to have been successfully lobbied by business, creating a climate which risks further distancing the individual from effective access to justice.

One further potential mechanism to assist access to remedies is the Protective Costs Order (PCO). PCOs limit or extinguish the risk of having to pay adverse costs. PCOs are available in limited circumstances where public law proceedings brought are considered to have a wider public interest. Although still relatively rare, the Courts have gradually indicated a growing acceptance of PCOs to facilitate public interest litigation (particularly in the environmental context). For example the proceedings against the SFO in the BAE case were brought with the benefit of a PCO (and a CFA to cover our legal costs). Leigh Day & Co has subsequently applied for PCOs in over 15 public law cases, of which approximately 95% of applications have been successful.

That said, PCOs offer no certainty and although such orders are in principle available in private law proceedings against non-public authorities, there is to our knowledge only one occasion on which a PCO has been made (namely in proceedings directly linked to the later BAE public law case).

4. EFFECTIVENESS OF NON-JUDICIAL MECHANISMS FOR HOLDING UK BUSINESS TO ACCOUNT FOR HUMAN RIGHTS VIOLATIONS COMMITTED OVERSEAS.

In light of the difficulties associated with judicial remedies outlined above, individuals and organisations have often had to look to “soft law” mechanisms as an alternative source of corporate accountability. Among these the OECD Guidelines are the most prominent. The Guidelines were adopted by all thirty OECD Countries and eight non-members in 1976 and were updated in 2000. Observance of the Guidelines is voluntary and not legally enforceable”.⁴⁷⁴ Significantly, among the principles companies are asked to take into account is to:

“Respect the human rights of those affected by their activities consistent the host government’s international obligations and commitments.”

Governments adhering to the Guidelines have been obliged to set up “National Contact Points” (“NCPs”) to promote the Guidelines and ‘contribute to the solution of problems which may arise’.

Since 2007, the British Government has demonstrated a real commitment to a more robust implementation of the Guidelines. It has found that two British companies breached the Guidelines because of their activities in the DRC. The first company, Afrimex (UK) Ltd, is a mineral trading company which sourced minerals from the DRC occupied by rebel troops until 2003, and according to the NCP, it thereby contributed to the conflict.

⁴⁷³ The value of class action legislation in increasing access to justice can be illustrated, for example, by the fact that, apart from in the US, legal action against Merck Inc, for compensation for heart attack and strokes suffered following the use of anti-arthritis drug Vioxx, has only been launched in Victoria (Australia) and Canada.

⁴⁷⁴ Para 1of Concepts and Principles of the OECD Guidelines.

The second company, DAS Air, was a UK airline which was found to have broken the Guidelines when it flew into Eastern DRC to transport minerals between 2000 and 2001. The British Government has stated that the OECD Guidelines are their leading CSR tool and that it “expects all UK businesses to be able to prove they meet the OECD Guidelines”.⁴⁷⁵

The Guidelines are criticised on three principal grounds:

- (i) They are voluntary and any decision cannot be legally enforced against the company;
- (ii) They lack independence from Government and thus are not perceived as impartial;
- (iii) The NCP has no power to award damages or to otherwise sanction companies who are guilty of misconduct.

Leigh Day & Co is of the view that these criticisms are important and should be addressed. The Government has recently shown a willingness to improve the implementation of the Guidelines but much must be done. In particular, the implementation of the Guidelines should be conducted by a body which is independent of Government, sufficiently well resourced, staffed by legally trained personnel and given significant investigative powers. Secondly, the decisions of an NCP should be legally binding upon the companies and consideration should be given to giving the NCP the power to award damages and/or fine companies who are in breach.

Guidance

The JCHR “Call for Evidence” asks whether the UK Government gives adequate guidance to UK business. It is our view that this is a major cause for concern and many responsible businesses are now demanding clearer guidance as to how they conduct business in the developing world and in conflict zones in a way which respects human rights principles. Currently the Government states that it expects compliance with the OECD Guidelines but offers no guidance at all as to how these instruments should be implemented and considered by British business.

Furthermore, there exists a plethora of voluntary initiatives, codes of practice and CSR principles but it often remains entirely unclear how these principles apply in specific situations or industries. In addition, apart from the OECD Guidelines, no international instrument benefits from a complaints mechanism, which is vital in order to encourage the compliance of all business. Leigh, Day & Co supports the CORE Coalition’s proposal for a *UK Commission on Business, Human Rights* to offer greater guidance to business and to provide a more robust complaints mechanism for those cases which cannot be dealt with in the civil courts.

5. RECOMMENDATIONS

In light of the issues raised above, Leigh Day & Co suggests the following possible legislative, judicial and non-judicial changes for consideration by the Committee:

- (i) *Amendment of UK legislation to make business subject to ICC provisions where an offence is authorised or permitted by (a) the board (b) a “high managerial agent” of the business; (c) as a result of a “corporate culture” within the business.*⁴⁷⁶
- (ii) *An inference, rebuttable with the onus on the defendant, that a parent company does, as a matter of fact, have control over the conduct of its overseas subsidiaries.*
- (iii) *Introduction of opt out class actions into UK law.*
- (iv) *Extension of the HRA to cover all publicly funded functions, including businesses to whom functions have been contracted out by public authorities, such as private companies running immigration detention facilities and providing escort services during immigration removals and deportations; and private businesses with publicly funded safety obligations, such as Railtrack.*
- (v) *Expansion of the acceptance/use of PCOs to all cases where the interests of justice and need for equality of arms require it, including private law proceedings against private companies.*
- (vi) *Unification of the various soft law initiatives, codes of practice and principles for corporate accountability into a single independent body or commission which would have the dual roles of i) providing detailed guidance to business as to best practice when conducting business in the developing world and ii) offering a robust complaints mechanism and remedies for victims of those companies who have flouted human rights standards when conducting business. We would support the CORE Coalition proposal for a UK Commission on Business, Human Rights and the Environment, however, we accept that a good deal of thought would have to be given as to how this would work in practice.*

Leigh & Day

April 2009

⁴⁷⁵ Press release. Dept for Business Enterprise & Regulatory Reform. 27 August 2008. Ref 2008/183.

⁴⁷⁶ Section 12.3 of the Australian CriminalCode

Memorandum submitted by the Business and Human Rights Resource Centre

The charity I direct (Business & Human Rights Resource Centre), headquartered in London, has developed an independent, online hub that pulls together in one place information on this subject from across the world. Our aim is to encourage a constructive debate and informed decision-making, and to promote respect for human rights by business. We cover more than 150 issues in over 180 countries, and we track reports on the human rights impacts (positive and negative) of more than 4000 companies. We have regional researchers based in Hong Kong, India, South Africa and Ukraine – soon also in Senegal.

We congratulate the Joint Committee on undertaking this inquiry. This is one of the most important fields of human rights, and there is much work to be done.

UK ORGANIZATIONS

One advantage you have is that the UK has been somewhat in the forefront of business & human rights debates, and there are many NGOs, businesses and others in the UK whose work and thinking will be helpful to the inquiry.

Ten years ago few NGOs had the private sector on their radar. Particularly over the past five years a number of UK-based NGOs have given much attention to business & human rights issues, including ActionAid, Amnesty International, Anti-Slavery, CAFOD, Christian Aid, CORE Coalition, Cornerhouse, Environmental Justice Foundation, Friends of the Earth, Global Witness, Greenpeace, Human Rights Watch, International Alert, Oxfam, Pesticide Action Network, Rights & Accountability in Development, Save the Children, Survival International, War on Want, WWF – and many others. Labour organizations such as the TUC have done the same.

Corporate responsibility organizations such as International Business Leaders Forum have done considerable work on these issues over the years, including producing many learning tools for business.

UK businesses and business organizations have become much more engaged in these discussions over recent years. For example, Barclays, Body Shop and National Grid have taken part in the Business Leaders Initiative on Human Rights, a group of companies working with Mary Robinson and others to operationalise human rights in their core business. BP developed a human rights training guide for its managers. Many UK companies participate in the UN Global Compact. Over half of the FTSE 100 companies have adopted a formal human rights policy statement – I believe this is the highest percentage of any country.

CONTINUING CONCERNS

Despite clear progress, there are many challenges, and while my colleagues and I increasingly post on our website reports of positive human rights initiatives by business, much of our time is spent posting reports of alleged abuses by companies.

CIVIL SOCIETY IN DEVELOPING COUNTRIES

One of the most important developments over the past five years has been that NGOs and community groups in developing countries have been giving much more attention to human rights issues relating to the private sector. But too often their voices are left out of debates in Europe and North America. I hope your inquiry will find ways to include input from those in developing countries who have been affected by the operations of UK companies.

THE WORK OF JOHN RUGGIE

John Ruggie was appointed in 2005 by Kofi Annan as Special Representative of the UN Secretary General on business & human rights. He is a Harvard professor of international relations who directed the Center for Business and Government at Harvard's Kennedy School of Government, and had served as an Assistant Secretary-General of the United Nations.

Professor Ruggie's 28-page 2008 report starts off with a frank recognition of the problems in this field:

“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization. These governance gaps provide the permissive environment for wrongful acts by companies without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.”

His report puts forward a three-part framework:

- the State duty to protect against human rights abuses by business*
- the corporate responsibility to respect human rights*
- the need for greater access by victims to effective remedies*

Addendum 2 of his report summarized the scope and patterns of alleged corporate-related human rights abuse found in a sample of 320 cases posted on the Business & Human Rights Resource Centre website from February 2005 to December 2007. Professor Ruggie noted that all industry sectors were alleged to impact human rights, and impacts were alleged to occur in all regions. He found that corporations are alleged to have impacted the full range of human rights: civil, political, economic, social and cultural.

The UN Human Rights Council was unanimous in welcoming Ruggie's framework and in extending Ruggie's mandate for another three years, asking him to focus now on operationalising this framework, by providing more concrete content and guidance for states and companies.

Since being appointed Professor Ruggie has convened a total of about 15 multi-stakeholder consultations on five continents and conducted more than 25 research projects—the reports of these consultations and research projects, and commentaries by NGOs about John Ruggie's work, should be very useful to your inquiry. One example of a specialised initiative feeding into Professor Ruggie is the work being done by Caroline Rees (who is here today) on non-judicial remedies, ie how various forms of conciliation and mediation might help resolve conflicts between business and affected communities.

Two recent comments by John Ruggie make important points in relation to the government's duty to protect against human rights abuses by business:

—“Governments should not assume they are helping business by failing to provide adequate guidance for, or regulation of, the human rights impact of corporate activities. On the contrary, the less governments do, the more they increase reputational and other risks to business.”

(John Ruggie's 2008 report to UN Human Rights Council, 3 Jun 2008, paragraph 22)

—“Governments are the most appropriate entities to make the difficult balancing decisions required to reconcile different societal needs. Yet, as I noted earlier, most governments, whether host or home states, take a relatively narrow approach to managing the business and human rights agenda. Often human rights concerns are kept apart from, or heavily discounted in, other policy domains that directly shape business practices, including commercial policy, investment policy, securities regulation, and corporate governance...

Therefore, the human rights policies of states in relation to business need to be pushed beyond their narrow institutional confines. Governments need actively to promote a corporate culture respectful of human rights at home and abroad. And they need to consider human rights impacts when they sign trade and investment agreements, and when they provide export credit or investment guarantees for overseas projects in contexts where the risk of human rights challenges is known to be high.”

(John Ruggie speech at 3rd Annual Responsible Investment Forum, New York, 12 Jan 2009)

SOME RECENT INITIATIVES BY OTHER GOVERNMENTS

CANADA

A Canadian Parliamentary Standing Committee tabled in 2005 a landmark report on Mining in Developing Countries and Corporate Social Responsibility. The report recommended that the Canadian Government move away from its current voluntary approach to CSR. It called for policies that condition public assistance for Canadian companies on compliance with international human rights and environmental standards, including core labour rights. The report also identified the need for legislation that holds companies accountable for their actions overseas. That Canadian Parliamentary Committee held public hearings on the subject. They also held special hearings where they heard from representatives of victims and affected communities in developing countries—these special hearings were held in camera in order to ensure the security of those testifying.

The Canadian Government failed to adopt the majority of the recommendations put forward by the Parliamentary Committee, but did commit to hosting a series of national roundtables with the aim of identifying ways for Canadian companies to meet or exceed international standards and best practices. The Canadian Government then sat down with business and civil society to write a concluding document to the roundtables—eventually the government pulled out of this process, but it is interesting to note that that business and civil society continued working together on this, and agreed to an outcome document: an Advisory Group report and recommendations to the government issued in March 2007, which includes summaries of the national roundtables.

Recommendations from that document or from other Canadian initiatives include calls for the establishment of:

- a Canadian ombudsperson on business & human rights;
- multi-stakeholder advisory committees to the government, each committee to include civil society and business representatives and to focus on one sector (eg extractive industry, financial industry, IT industry);
- guidelines specifying when the government would withdraw support from a particular company, including loans or export credits and guarantees.

DENMARK

Denmark recently adopted a law requiring corporate social responsibility reporting by its 1100 largest companies.

NETHERLANDS

The Dutch Government has adopted a national action plan for sustainable public procurement, which provides that from 2010 environmental and social criteria will apply to all public procurement. Public bodies will need to ensure that their purchasing is from companies with supply chains that respect criteria including core conventions of the International Labour Organization (relating to freedom of association and collective bargaining, child labour, forced labour, etc).

In relation to the OECD Guidelines for Multinational Enterprises, since 2007 the Dutch National Contact Point has been, as stated on its website, “an independent body, comprising four independent members from various fields and four official representatives from different government ministries.”

NORWAY

The Norwegian Government has just adopted a 100-page white paper on Corporate Social Responsibility, which frames the responsibilities and dilemmas of companies. It gives special attention to subjects such as the challenges involved in operating in conflict zones, and issues relating to indigenous peoples. The paper also proposes strengthening the National Contact Point system of the OECD Guidelines for Multinational Enterprises.

SWITZERLAND

The Swiss Government generally, and the Swiss Federal Department of Foreign Affairs particularly, have given much attention to business & human rights issues.

One of the Swiss Government’s initiatives, launched with the International Committee of the Red Cross in 2006, resulted in the “Montreux Document” on private military and security companies (PMSCs), finalised in 2008. This document was developed with the participation of governmental experts from 17 countries including the United Kingdom. So far 20 countries, including the UK, have agreed to the Montreux Document.

The Montreux Document is described on the ICRC website as follows: “The Montreux Document reaffirms the obligation on States to ensure that private military and security companies operating in armed conflicts comply with international humanitarian and human rights law. The document also lists some 70 recommendations, derived from good State practice. These include verifying the track record of companies and examining the procedures they use to vet their staff. States should also take concrete measures to ensure that the personnel of private military and security companies can be prosecuted when serious breaches of the law occur.”

UNITED STATES

A draft law was introduced in the last session of the US Congress, the Global Online Freedom Act, which, according to a 2 May 2008 analysis of the bill by the non-profit Center for Democracy & Technology, would mandate “that U.S. Internet companies take certain actions to combat censorship and protect personal information, or otherwise be subject to criminal or civil prosecution...or civil lawsuits brought by private litigants.” According to a 1 May 2008 report by the technology news website Ars Technica, “the Act appears to be a direct response to the furor over Yahoo’s involvement in outing a number of Chinese dissidents to the government, resulting in their arrest and imprisonment.” The proposed law has not yet been adopted.

THE REALITY OF HOW UK COMPANIES ARE IMPACTING HUMAN RIGHTS ON THE GROUND

The cases mentioned in this section are drawn from the following charts available on our website covering companies in all countries:

1. Companies we invited to respond to concerns in our Updates -- indicating the country and issue, and whether or not the company responded (Feb 2005 to present)

2. Positive human rights initiatives by companies featured in our Updates (Feb 2005 to present)

We have also produced two UK-specific charts that include the cases mentioned below and others concerning companies headquartered in the UK:

1. UK companies we have invited to respond to concerns

2. Positive human rights initiatives by UK companies

First I want to point to examples of positive initiatives by UK business that we have drawn to international attention on our website:

— Accenture has been involved in the China Health Alliance, a partnership against TB and AIDS.

-
- Anglo American now ties managers' promotions to their safety record, in an initiative to achieve zero deaths at its mines.
 - Anglo American and Rio Tinto announced that they would require Chinese joint venture partners in Africa to pledge adherence to human rights and environmental standards.
 - Barclays and Lloyds TSB were among the top 5 firms in Stonewall's workplace equality index ranking gay-friendly employers.
 - C&A, Marks & Spencer and Tesco announced that they were taking measures to exclude Uzbek cotton from their products.
 - Diageo was among 10 companies receiving awards in Nigeria for initiatives to help achieve the UN Millennium Development Goals.
 - G4S recently signed a global agreement with Union Network International on labour rights.
 - GlaxoSmith-Kline's CEO last week pledged a major new initiative to cut prices of medicines for the poor, and challenged other pharmaceutical firms to follow suit.
 - Tate & Lyle sugar became the largest UK Fairtrade firm.
 - Unilever worked with Oxfam to come up with a joint report on how Unilever's business impacts poverty in Indonesia, positively and negatively.
 - Vodafone Foundation and UN Foundation joined in an initiative to improve health in poor countries through access to data.
 - Waitrose has focused on letting farmworkers make the decisions in social, educational and health initiatives funded by the company.

One section of our site, the Corporate Legal Accountability Portal, profiles human rights lawsuits against companies, including the following ones brought against UK companies with mixed results:

- Anglo American was sued in South Africa by former gold miners suffering from silicosis.
- Anglo American, Barclays, BP, NatWest (part of Royal Bank of Scotland) and Rio Tinto were among the companies sued in the US for apartheid reparations.
- BP was sued in the US by a group of Inupiat Eskimos in Alaska, alleging that BP's activities would destroy their traditional way of life.
- BP was also sued by Colombian farmers in the English High Court alleging that an oil pipeline caused severe environmental damage to their lands.
- British American Tobacco was sued in Nigeria by the federal government and an NGO alleging that it was marketing its tobacco products to under-aged persons.
- Cape plc was sued in the UK by workers suffering from asbestos-related disease who had not been given adequate protective gear.
- Private security firm Erinys was sued in UK over the shooting of civilians in Iraq in disputed circumstances.
- Rio Tinto was sued in the US court by residents of Bougainville, Papua New Guinea, alleging that the firm was complicit in human rights abuses by the army, harmed their health; and engaged in racial discrimination against black mine workers.

UK lawyers representing victims in these cases would like to see a review of UK company law so as to make it simpler for a parent company to be held responsible for the human rights abuses committed by its subsidiaries overseas and for abuses committed by foreign companies in respect of which it is a material shareholder.

Specific concerns have been raised by civil society about businesses in all sectors and from all countries, including the UK. When John Ruggie surveyed the nature and scope of alleged abuses by business in his 2008 report, we were gratified that he drew the data from our website and said in his report that our site was "the most comprehensive, objective information source available".

As for reports of alleged abuses by civil society, our practice is to invite companies to respond to allegations before we post the reports on our site or in our Weekly Update, so that one has access to both perspectives. This response process sometimes helps encourage constructive engagement between the complainant and the company. 75% of companies have responded when we invited them to do so.

I would like to mention some examples of concerns raised about UK companies over recent years. I should emphasise that in many of these cases the company has provided some sort of a response to the allegation, which should also be taken into account; each allegation and response can be seen in the charts listed at the beginning of this section.

- Burma Campaign UK said firms providing insurance to companies operating in Burma support the military government – the firms named included Atrium Underwriting and Lloyd's of London.
- Barclays was accused of lending to Zimbabwe government ministers on an international blacklist.

- Friends of the Earth, Christian Aid and Action on Smoking & Health said British American Tobacco was using Corporate Social Responsibility to try to block anti-smoking initiatives.
- Residents of Douala, Cameroon, accused Guinness (part of Diageo) of chemical pollution of their neighbourhood -- green water had flowed from the Guinness factory down a cliff and into a residential area for several years.
- NGOs said GCM Resources' Phulbari coal project in Bangladesh threatened the health, water and livelihoods of local communities.
- A *South China Morning Post* article provided evidence that Chinese wig manufacturer Henan Rebecca used forced prison labour – HSBC was listed among the top shareholders of Henan Rebecca, holding shares on behalf of clients.
- Bench Marks Foundation said platinum mines in North West Province of South Africa owned by companies including Lonmin were putting workers' and communities' health at risk.
- A mine run by Metals Exploration was accused of “endangering lives” in Vizcaya, Philippines, the community claiming there was a risk of a potential landslide among other concerns.
- A Global Witness report and *Financial Times* article raised concerns that an oil-backed loan by banks (including Royal Bank of Scotland and Standard Chartered) to Angola's state oil company Sonangol without IMF involvement would perpetuate corruption and poverty.
- A 2005 ActionAid report said women working on fruit farms in South Africa supplying Tesco work in “appalling” conditions – receiving “poverty wages”, exposed to pesticides, living in “dismal housing” and losing out on benefits.
- Christian Aid, Action for Southern Africa & Scottish Catholic International Aid called on multinationals in Zambia (including Vedanta) to give the country a fairer deal in copper mining contracts, otherwise the government's ability to fund development, education and health in the country would be undermined.

CONCLUSION

I will close by wishing you well in this inquiry. Following Professor Ruggie's 2008 report, the world is watching to see whether and how governments will move ahead through law, regulation and other initiatives to fulfil more effectively their duty to protect against abuses by business, so the timing of this inquiry could not be better.

Business and Human Rights Resource Centre

May 2009

Memorandum submitted by Justice/International Commission of Jurists

INTRODUCTION

1. The International Commission of Jurists is an international human rights organisation based in Geneva. Founded in 1952, the ICJ is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights.

2. JUSTICE is the British Section of the ICJ. Founded in 1957, it a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law.

3. The ICJ and JUSTICE welcome the Joint Committee's inquiry on this issue. The field of business and human rights is an important and rapidly evolving area that is increasingly relevant for the enjoyment of human rights by many in the UK and in countries where UK companies operate.

4. This submission aims to provide an international perspective based on the current debates in international human rights forums, in particular within the United Nations, and on the ICJ's own work on the legal accountability of companies. We believe it is important to draw attention to the existing international human rights obligations binding upon the UK and to the legislation implementing those obligations. We hope that the Joints Committee's inquiry will identify not only gaps in the current law but also the areas for potential development. The emergence of global companies that operate across borders and by way of an increasingly complex web of subsidiaries, contractors, suppliers and joint ventures poses a critical challenge to the adequacy of national legal frameworks to protect human rights.

5. International law gives companies a significant degree of protection for their activities , (eg through bilateral investment treaties and trade agreements, access to international arbitration, etc) but requires little in terms of accountability. International efforts in recent years have yielded mixed results but there is nonetheless a growing consensus at the international level on the responsibilities that businesses have in respect of human rights. The current debate takes place mainly at two levels: (i) the clarification or development of substantive standards and (ii) the establishment, or improved effectiveness, of enforcement mechanisms.

 DEFINING CORPORATE HUMAN RIGHTS RESPONSIBILITIES

6. Despite the hesitant progress made in relation to enforcement mechanisms, there is at least broad agreement within the international community that companies have a responsibility to respect all human rights. Nor is the requirement on companies to respect the full range of human rights (civil and political, economic social and cultural) limited to those areas in which grave violations occur or where government is weak: the obligation applies to companies in the richest and most developed countries as much as in the poorest.⁴⁷⁷ The fact that the UN Human Rights Council widely supported the notion that corporations have the responsibility to respect all human rights makes clear the universality and global extent of the obligation. The corollary of this emphasis upon the universality of human rights in relation to businesses is the requirement of uniformity of approach: voluntary undertakings by businesses to protect human rights are no longer sufficient. Companies are under a duty to take positive action to respect human rights.

7. Central to this duty upon companies to respect human rights is the concept of due diligence. Just as under UK law, companies are required to undertake due diligence to, for example, determine whether a particular transaction exposes a company to unacceptable liabilities or risks, companies must be mindful of the risks and implications of their proposed actions for human rights. Just as businesses are required to act with prudence in their everyday commercial activities, they also must act with similar diligence in circumstances and jurisdictions where governance is weak or non-existence. However, although particular attention has been given to businesses acting in high-risk zones and the dilemmas and risks that companies face in those situations, and while those situations may require a particular degree of prudence, they are by no means the only situations in which a duty to be diligent is relevant.

THE ICJ PANEL REPORT ON CORPORATE COMPLICITY AND LEGAL ACCOUNTABILITY

8. A central problem for the legal accountability for businesses in the field of human rights is the fact that most trans-national companies operate through a web of subsidiaries, contractors, suppliers, business joint ventures and other arrangements. The opaque nature of these commercial structures have frequently made it difficult to establish clear lines of responsibility, especially where a parent company has been alleged to be complicit in abuses committed by subsidiaries or partners. In 2006, the ICJ established a special panel of eight legal experts to work to clarify the meaning of corporate complicity in law and policy. The final report of the Panel was released in September 2008. A copy of the three volumes is enclosed.

9. The ICJ report analysed three main areas: criminal law (especially international criminal law), civil remedies, and public policy. The report made recommendations concerning the kind of conduct a prudent company should ordinarily observe as well as the appropriate standards of prudence in situations of increased risk so to avoid the risk of liability for complicity. In particular, the report suggested a series of questions the management of a company should ask in the context of its operations.⁴⁷⁸ The report placed particular emphasis on the concept of the “reasonable person”. Just as the conception of the “reasonable person” plays a central role in the law of torts and of contract, the concept of the “reasonable person” also helps businesses to identify what is expected of a responsible, careful actor in the field of business and human rights. It is, of course, worth noting that those expectations have evolved over time: what was the norm of social expectations some years ago may no longer be the norm today and, consequently, many companies that set policies and practices under certain assumptions may fail to realize that they are lagging behind from what is expected today from them. What is expected from businesses today includes the respect to human rights as defined in such international instruments as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights.

10. The corollary of the above is that, since expectations evolve and include today the need to respect all human rights and certain standards of respect and protection for the environment, it is important that companies carry out periodic review of their policies, methods and practices in relation to human rights. In our view, consideration should be given to the question of whether UK law should explicitly require companies by way of legislation to undertake due diligence measures in relation to their activities in the field of human rights. In our view, this would be a major step forward in securing the compliance of businesses, particularly those which operate on a transnational basis, with fundamental human rights guarantees.

POSITIVE DUTIES

11. The responsibilities of businesses in the field of human rights are not simply negative duties to refrain from breaching human rights. Companies also have positive duties also, particularly when a company performs a function that is either explicitly public (eg operating a prison) or essentially of public nature (eg providing residential care for patients funded by a local authority). Even in cases where the state itself is not directly implicated, private companies must not be allowed to evade their own responsibilities in the field of human rights.

⁴⁷⁷ See eg the UN Human Rights Council’s reception of the report of the UN Special Representative on Human Rights (U.N. Doc. A/HRC/6/5).

⁴⁷⁸ Report on Corporate complicity, vol. 3, p. 16

12. Companies are also generally required to be diligent in identifying the risks of human rights violations in their operations and take precautionary measures to avoid harm or mitigate the effects.⁴⁷⁹ In this regard, they are required to take proactive steps to ensure that harm to others is avoided.

ACCESS TO JUSTICE: THE RIGHT TO AN AFFECTIVE REMEDY

13. Article 2(3) of ICCPR requires States party to “(a) ensure that any person whose rights or freedoms ... are violated (shall) have an effective remedy...”, that “any person claiming such remedy (shall) have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop possibilities of judicial remedy”, and “to ensure that the competent authorities shall enforce such remedies granted”. Article 13 of the European Convention on Human Rights also requires that anyone whose rights and freedoms are violated shall “have an effective remedy before a national authority”. Both treaties have been ratified by the United Kingdom.

14. The increasing complexity of corporate structures and operations worldwide poses an important challenge for victims seeking to obtain justice. There are a number of obstacles to access to justice in this field, including the application of statutes of limitation to bar claims, the application of the doctrine of separate legal personality, litigation costs and problems obtaining of legal aid.

15. These problems are exacerbated in situations where victims may not have access to justice in their own countries, due to reasons ranging from the instability of the system or lack of solid institutions to the lack of independence of the judiciary, lack of enforcement of decisions in practice or insecurity for the plaintiffs and their families. In such circumstances, the obstacles to seeking justice in the jurisdiction of the parent company become more relevant for victims when they cannot obtain justice in their own country. At the international level, neither the Global Compact nor the OECD system of National Contact Points provide an effective remedy in this regard.

16. In the view of ICJ and JUSTICE, the need to provide an effective remedy for victims of companies in such circumstances is one of the central challenges raised by the issue of business and human rights. As Canada Supreme Court Justice Ian Binnie stated recently, “*You cannot have a functioning global economy with a dysfunctional global legal system. There has to be somewhere, somehow, that people who feel that their rights have been trampled on can attempt redress*”.⁴⁸⁰ Proposals to improve the legal framework applicable to claims for corporate abuse occurring abroad or the accessibility of British courts or other mechanisms should be given serious consideration. The UK should also take a greater role in discussions at the international level concerning new bodies and new legal mechanisms to fill existing gaps.

RECOMMENDATIONS

17. The United Kingdom is an important player in the global economy and international politics. As home to some of the biggest transnational corporations, the United Kingdom can do much to ensure those corporations respect human rights wherever they operate. Action in this regard can be taken at the global level, within the United Nations, the OECD, the European Union and within the United Kingdom itself. The UK should:

- promote the adoption of global human rights standards for corporations within the UN including a mechanism for monitoring compliance.
- Promote the revision of the OECD Guidelines for Multinational Enterprises and support efforts to provide the Global Compact with a mechanism to ensure that member companies do comply with the principles.
- The UN Working Group on the use of Mercenaries visited the UK in 2008. The report contains a series of recommendations to which the ICJ calls the Committee’s attention, especially to those relating to the need for better regulation for private security and military companies domiciled in the UK. A parallel consultation process by the Foreign and Commonwealth Office is currently underway and the Committee should pay attention to any outcome of that process within the sphere of its competences.
- The Joint Committee should include in its scrutiny of legislation the need to ensure the legal accountability of companies for their transnational activities, in particular the implementation of the Company Act 2006

Justice

May 2009

⁴⁷⁹ Report on Corporate complicity vol. 3, p. 19

⁴⁸⁰ <http://www.lawyersweekly.ca/index.php?section=article&articleid=745>

Memorandum submitted by Business in the Community

INTRODUCTION

The Joint Committee on Human Rights has issued a call for evidence on the subject of business and human rights. Business in the Community (BITC) has an established record on working with our member companies on human rights issues in the UK and overseas and welcomes the opportunity to respond to the call for evidence on what is a vitally important issue to address if we are to build greater confidence and trust in business. This paper sets out BITC's current thinking on the issue of business and human rights which we continue to research. Business in the Community has not sought to respond to every discussion point in the call for evidence, but has concentrated its response to those areas where it has relevant experience and expertise.

BUSINESS IN THE COMMUNITY'S APPROACH

Business in the Community works to inspire, engage, support and challenge companies on responsible business to continually improve their positive impact on society. Membership of Business in the Community is an active commitment. Our 850+ members recognise the relationship between their company's values and responsible business practice and the role this plays in creating wealth, building trust and addressing social need.

Our robust, relevant and integrated approach to responsible business provides a clear framework to address new challenges and improve business performance. We work across four impact areas: marketplace, workplace, environment and community, with business leadership sitting at the heart of our approach.

Six key overarching principles run through Business in the Community's work and underpin our public voice:

- support for sustainable development: "development that means the needs of the present without compromising the ability of future generations to meet their own needs";
- recognition of the mutuality between business and society;
- conviction that progress in achieving higher standards of corporate responsibility will best be achieved through a voluntary approach, rather than regulation, where possible;
- different indicators of success in corporate responsibility have different levels of materiality in each company as expectations can reasonably vary by business size, sector and location;
- business, by and large does good by virtue of the goods and services provided and how it does it: creating wealth, enabling economic stability, providing opportunities for employees, suppliers and customers, as well as paying tax; and
- belief that excellent understanding of communities from which a business draws its customers and employees makes it more effective and profitable.

BACKGROUND

Business in the Community's work on business and international human rights goes back to the Business Impact Task Force established in 1998 and its final report "Winning with Integrity" (2000).ⁱ Our work on Human Rights issues in the UK has been advanced by our Workplace team, which has launched campaigns on race and gender equalityⁱⁱ and health & well-beingⁱⁱⁱ, as well as our Marketplace team, which first launched in 2006 the Marketplace Responsibility Principles^{iv} taking a supply chain view of human rights issues. In 2008 we launched the Voluntary Code of Practice on Employing Migrant Workers/Overseas Staff in Great Britain.^v

Despite this, until recently, confusion has continued around the extent of business's responsibilities internationally. Some argue this has clouded the issue preventing constructive action. The debate around the applicability of specific rights to business and the extent of the obligations to respect and protect has now been clarified by the work of Professor John Ruggie the UN Special Representative on Business and Human Rights. BITC welcomes the work of Professor Ruggie in his framework *Protect, Respect and Remedy (2008)*^{vi} and considers there is now a great opportunity to move the agenda forward and look at practical ways to improve business's impacts on human rights.

IMPACT OF BUSINESSES ON HUMAN RIGHTS

The impacts of business, positive and negative, are far reaching. Globalisation, and a trend towards the privatisation of many key services previously provided by government, has seen an increase in the potential impact on human rights of multinational corporations. While the primary responsibility for human rights still lies with the state, this has led to calls by a diverse range of stakeholders for greater business accountability on human rights issues throughout global supply chains.

As the role of business in society has grown, human rights benefits have been derived in many locations through job creation, economic regeneration and growth. This has seen improvements, particularly in respect of social and economic rights, such as adequate standards of living for many people throughout the world.

Many businesses have taken steps to improve access to healthcare or medicines for their employees. Some businesses have also taken a more proactive role in respect of civil and political rights. One such example is the Co-operative Bank which through the operation of its Ethical Policy, refuses to provide finance to businesses that advocate discrimination and incitement to hatred or are involved in the manufacture or transfer of armaments to oppressive regimes^{vii}. Such examples demonstrate that the considerable global power of business, when harnessed responsibly, can help support and enhance human rights.

However, BITC also recognises that the lack of accountability of some businesses has led to abuse of human rights, particularly in countries that have weak governance structures where governments are unable or unwilling to hold corporations accountable. The current difficulties around accountability are explored in CORE & LSE's recent report *The Reality of Rights: Barriers to accessing remedies when business operates beyond borders*^{viii}. At the most severe end of the scale businesses have been accused of complicity in killings and torture, but as John Ruggie's Framework points out business can affect the full spectrum of human rights both positively and negatively.

Awareness within business about human rights is now growing thanks to the work of a wide range of organisations including the Business & Human Rights Resource Centre, CORE, Realizing Rights, initiatives such as the UN Global Compact, as well as the new accountability that the growth of internet communications is delivering. BITC's CR Index, the UK's leading voluntary benchmark of corporate responsibility, helps companies to integrate and improve responsibility throughout their operations by providing a systematic approach to managing, measuring and reporting on business impacts in society and on the environment. There is therefore a growing recognition within business that human rights is a vitally important issue that will only grow in significance. This is reflected in the growing number of companies that have specific policies on human rights as tracked by the Business and Human Rights Resource Centre.

GUIDANCE & SUPPORT TO BUSINESS ON HUMAN RIGHTS

Fostering a corporate culture which respects human rights was highlighted by John Ruggie as an important component of the state duty to protect human rights. The government has made some inroads in this respect. John Ruggie's report noted introduction of s172 in the Companies Act 2006 as a positive step. S172 obliges a company to consider the interests of employees as well as the impact of the company's operations on the environment and community. This clearly communicates to business that their responsibility is not to increase returns for shareholders at any social cost.

Many companies are now developing human rights policies. Business setting down its commitment to human rights is undoubtedly a positive step and should be further encouraged by the government and civil society. However BITC is mindful that policies need to be lived by the whole business to be effective. The integration of human rights considerations into core business will be challenging for many companies particularly those with decentralised structures and considerable support will be required to achieve this ends. BITC believes that in addition to challenging business, celebration of success is also an important factor in changing behaviour. BITC runs the UK's leading corporate responsibility awards programme—Awards for Excellence—recognising those companies which have shown innovation, creativity and a sustained commitment to corporate responsibility. This includes an International Award.

John Ruggie's Framework points out that leadership within business is central to ensuring integration of human rights considerations throughout a company. It is therefore essential that buy in from business leadership on this issue is achieved.

Collaborative, industry initiatives on human rights can help make significant progress on sector specific human rights issues. Examples include the Kimberley Process, the Electronics Industry Code of Conduct and the International Council on Mining and Metals. Such initiatives have considerably raised the profile of human rights issues within business and sought to establish practical tools to improve business performance. Unfortunately UK/EU competition law currently appears to hinder business collaboration in some areas that would be in the public interest, including human rights. BITC therefore considers that this barrier should be better understood and addressed.^{ix} In contrast Australian competition law provides a mechanism for the prior "authorisation" of collaborative agreements between companies.^x

We would recommend the Joint Committee explores the following issues and ideas:

1. Issue mapping and transparent reporting is important in helping businesses establish their impacts and ensure they are taking the appropriate due diligence steps. Businesses should be encouraged to carry out human rights impact assessments and report their material human rights impacts. Guidance from Government working with relevant advisory bodies would be helpful on what businesses reporting should cover depending on their size, location and sector.
2. A wide range of existing organisations, are well placed to offer support to businesses as they seek to introduce reporting and improve their business processes. Strategic partnerships between government and civil society should be encouraged to pool expertise. Investment in intermediary organisations such as trade bodies and NGOs including BITC can ensure dialogues on the business and human rights agenda are convened and business leaders are mobilised.

3. Funding must be sufficient and sustained for government departments and quangos such as the Department for International Development (DFID) and the Equalities and Human Rights Commission, which are currently supporting human rights efforts.
4. The Government should seek to utilise its purchasing power to improve human rights through all public procurement both in the UK and abroad. Through its broader monitoring and watchdog functions the Sustainable Development Commission (SDC) may also have a role to play in advancing human rights, particularly in public sector procurement at the workplace.
5. An area of concern highlighted by Professor Ruggie has been the negative consequences of bilateral investment treaties that fail to correctly balance the need to provide adequate protection to foreign investors with the host state's need to protect and promote human rights. The Government should ensure that investor protections are pursued in a way that does not hinder a host state's ability to improve human rights. Further investors should be encouraged not to adopt stabilization clauses in investment contracts which secure exemptions from new legislation concerning human rights or entitle it to compensation if such legislation is introduced.
6. The Government can directly impact human rights through ensuring the Export Credit Guarantee Department carries out human rights impacts assessments and factors human rights considerations into finance decisions. Professor Ruggie's recent report *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework*^{xi} highlights the practice of some states of linking export credit to: "...companies having a CSR Policy, participating in the United Nations Global Compact, or confirming their awareness of the OECD Guidelines."
7. Initiatives such as the Kimberley Process should be encouraged and supported by the government where possible. The Government should also take steps to ensure that any voluntary collaborative action which raises human rights standards is not deterred by UK/EU competition law.

GRIEVANCE MECHANISMS

Company level grievance mechanisms were highlighted by John Ruggie as part of the corporate responsibility to respect human rights. Through tools such as BITC's CR Index we encourage business to voluntarily adopt internal systems and build the capacity to engage with stakeholders proactively. The establishment of structures in more businesses to deal with the grievances of wider stakeholders would greatly benefit not only those that take issue with the operating behaviour of a company but would also be beneficial to business in terms of risk management and stakeholder engagement. BITC would like to see the Government working with NGOs to encourage and support business to improve stakeholder relations and set up independent internal mechanisms that deal with human rights concerns proactively.

The UK has established one of the leading OECD National Contact Points (NCP); in the last two years the UK NCP has made significant headway in increasing corporate accountability. In particular there have been groundbreaking decisions in which the NCP found companies in breach of the OECD Guidelines for Multinational Enterprises. Although the NCP cannot pass a binding judgment, its decisions have still had considerable impact. This was demonstrated when it helped broker a deal between G4S and UNI in response to a complaint brought under the Guidelines in 2006. The actions of the UK NCP have helped increase the standing of the UK internationally and increased our competitiveness by reducing the reputational risk for those investing in UK-based companies. BITC considers it vital that the recently increased resources of the NCP is maintained going forward.

There are increasing calls from a wide range of stakeholders for the establishment of a body with powers to address human rights abuses committed by UK companies abroad. In particular CORE has proposed a UK Commission for Business and Human Rights and the Environment.^{xiii} BITC agrees that accountability for serious corporate human rights abuses overseas needs to be increased. However, BITC considers that research is needed into the economic impact of limiting such a body to UK companies and the potential benefits for business and society. A European wide or global body would ensure a level playing field was maintained and would remove the risk of divestment from the UK. While BITC acknowledges that securing international support and agreement for such a project would be difficult, a European wide agreement should be easier to achieve particularly with current demands for enhanced business accountability. We note that the European Commission is in the process of commissioning research in this area and will read its conclusions with interest.

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- iii Business Action on Health, <http://www.bitc.org.uk/health>
- iv "Marketplace Responsibility Principles" (2006/8), BITC, http://www.bitc.org.uk/resources/publications/blank_1_1.html

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- vii <http://www.goodwithmoney.co.uk/ethical-banking/>
- viii “The Reality of Rights: Barriers to accessing remedies when business operates beyond borders” (2009), LSE/CORE, http://www.lse.ac.uk/collections/enterpriseLSE/pdf/reality_of_rights.pdf
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- xii “Filling the Gap: a new body to investigate, sanction and provide remedies for abuses committed by UK companies abroad” (2008), Jennifer A. Zerk, A report prepared for the Corporate Responsibility (CORE) Coalition, http://www.corporate-responsibility.org/module_images/Filling%20the%20Gap_dec08.pdf

Memorandum submitted by The Corner House

INTRODUCTION

1. The Corner House is a not-for-profit research and advocacy group, focusing on human rights, environment and development.

2. Over the past ten years, The Corner House has closely monitored the human rights impacts of overseas projects that are operated or financed by UK multinationals, UK government agencies, commercial banks, investment funds and, more recently, the “shadow banking” sector.⁴⁸¹ A particular focus of our work has been the support given to UK multinationals by the UK Export Credits Guarantee Department (ECGD).⁴⁸²⁴⁶⁸

3. The Corner House is firmly of the view: (i) that decisions taken in the UK, whether by government or business, should not adversely impact the human rights of others, whether those others are in the UK or abroad; and (ii) that the UK government has a responsibility to ensure that the appropriate laws and policies are in place to give practical effect to that principle and to hold those who breach it to account.

4. The Corner House welcomes the Joint Committee’s current inquiry and is grateful for the opportunity to comment on the issues that the Committee has chosen to examine. This submission focuses on Part I of the Committee’s Call for Evidence, namely “The Duty of the State to Protect Human Rights”, with particular reference to the policies and practices of the UK Export Credits Guarantee Department (ECGD).

THE EXPORT CREDITS GUARANTEE DEPARTMENT (ECGD)

5. The ECGD is the UK’s export credit agency.⁴⁸³ It derives its functions and powers from the Export and Investment Guarantees Act 1991.⁴⁸⁴ Its primary function is to facilitate the export of goods and services by providing companies with guarantees, credits and insurance. In carrying out its functions, the ECGD makes use of a variety of different financial instruments including different forms of credit and insurance. Many of the exports supported by ECGD would not go ahead without an official credit guarantee.

6. According to the ECGD’s 2007–08 accounts, the value of guarantees and insurance policies issued by the Department was £1.83 Billion.

⁴⁸¹ For a discussion of the role of the “shadow banking system” in financing projects involving human rights abuses, see: Hildyard, N., “A (Crumbling) Wall of Money: Financial bricolage, derivatives and power”, The Corner House, October 2008, <http://www.thecornerhouse.org.uk/pdf/briefing/39wallmoney.pdf>.

⁴⁸² For example, The Corner House has participated in nine field missions to assess the social and environmental impacts of a number of projects for which ECGD support has been sought and undertaken in-depth research into a number of ECGD-backed projects that have been tainted by allegations of bribery.

⁴⁸³ Export credit agencies are public, quasi-public or private agencies that provide loans, guarantees, credits and insurance to private corporations from their home country to assist them doing business overseas. Such support is particularly requested in relation to projects in the developing world because of the perceived financial and political risks involved in such projects and would be more expensive if obtained through the private sector. Where the ECA is public or quasi-public, the loans are backed by the agency’s national government.

⁴⁸⁴ Under the Export and Investment Guarantees Act 1991, the ECGD, acting on behalf of the Secretary of State for Business, Enterprise and Regulatory Reform, is required to “facilitat[e], directly or indirectly” the supply of British exports.

7. Although the ECGD is subject to a ministerial requirement to operate at “no net cost to the taxpayer”,⁴⁸⁵ the UK government is ultimately liable for any losses that cannot be covered by the premiums charged to the ECGD’s client businesses or by debt recovery. In 2005, the UK admitted that the annual cost of the ECGD to the taxpayer is an annual £150 million.⁴⁸⁶

8. The Corner House believes that where companies receive publicly-backed finance, as is the case with support from ECGD, they should be subject to legally-binding conditions that require compliance with the UK’s international human rights obligations, and that these conditions should have extraterritorial scope.

9. As a public agency supporting UK exporters, the ECGD should therefore give practical effect to the UK’s acknowledged obligation “to promote . . . the universal respect for, and observance of the human rights and fundamental freedoms for all”⁴⁸⁷ and the government’s stated aim of putting human rights at “at heart of foreign policy.”⁴⁸⁸

10. ECGD has provided guarantees and other support for a range of projects and programmes that have involved allegations of human rights abuses, including the export of Hawk jets to Indonesia,⁴⁸⁹ oil pipelines such as BP’s Baku-Tbilisi-Ceyhan project in the Caspian region,⁴⁹⁰ dams such as Muella in Lesotho⁴⁹¹ and power plants such as Dabhol in India.⁴⁹² The ECGD has also supported arms sales to countries with authoritarian governments and poor human rights records, such as Saudi Arabia.⁴⁹³

11. In 2000, in response to public and parliamentary pressure, the ECGD adopted a new mission statement⁴⁹⁴ and accompanying set of “Business Principles”.⁴⁹⁵ These committed ECGD to ensuring that “its activities accord with other Government objectives, including those on sustainable development, human rights, good governance and trade.”⁴⁹⁶

12. The ECGD has since introduced procedures and policies to give effect to this undertaking.

Procedures

13. All civil, non-aerospace exports and guarantees are now screened by ECGD for their environmental and social impacts. Under the screening procedures, ECGD considers the following human rights concerns:

- Possible impacts arising from involuntary resettlement, compulsory land acquisition, impacts on minority or vulnerable groups, the use of child or bonded labour, and the use of armed security guards.⁴⁹⁷

⁴⁸⁵ National Audit Office, ECGD and Sustainable Development, 2008, para 9, http://www.nao.org.uk/publications/0708_ECGD_and_sustainability.pdf.

⁴⁸⁶ Secretary of State for Trade and Industry/ Chief Secretary to Treasury, “Estimating the economic cost of ECGD”, 16 March 2005, <http://www.berr.gov.uk/files/file16384.pdf>

⁴⁸⁷ Foreign and Commonwealth Office, “Promoting Human Rights, Good Governance and Democracy, <http://www.fco.gov.uk/en/fco-in-action/conflict/human-rights/>, accessed 7 April 2009: “As a member of the United Nations it is our obligation to promote: ‘the universal respect for, and observance of the human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion’”. See also: Foreign and Commonwealth Office, “The Obligation to Promote Human Rights”, <http://collections.europarchive.org/tna/20080205132101/http://www.fco.gov.uk/servlet/Servlet?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1028302591752>, accessed 7 April 2009: “The duty not to intervene in matters within the domestic jurisdiction of other States is a recognised principle of international law, reflected in Article 2(7) of the UN Charter. However, Articles 55 and 56 of the Charter set out the obligations of all UN Members to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’. This obligation was expressly recognised at the Vienna World Conference, which declared that: ‘The promotion and protection of all human rights is a legitimate concern of the international community’. The UK Government strongly supports this view. It is for countries to decide whether to accede to legally binding international human rights instruments. But failing to accede cannot exempt a country from international attention and criticism.”

⁴⁸⁸ Foreign and Commonwealth Office, “Human Rights”, accessed 7 April 2009, <http://collections.europarchive.org/tna/20080205132101/www.fco.gov.uk/servlet/Servlet?Front%3fpagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1028302591712>.

⁴⁸⁹ Gilby, N., “Arms Exports to Indonesia”, Campaign Against Arms Trade, <http://www.caat.org.uk/publications/countries/indonesia-1099.php>.

⁴⁹⁰ The 1,760 kilometre-long Baku-Tbilisi-Ceyhan (BTC) oil pipeline runs from Baku in Azerbaijan, through Tbilisi in Georgia to a new marine terminal at Ceyhan on Turkey’s Mediterranean coast. The aim of the project is to carry up to 1 million barrels of oil per day from the Caspian Sea to the Mediterranean. For details of human rights and other concerns, see: Baku Ceyhan Campaign, <http://www.baku.org.uk/>.

⁴⁹¹ The Muella Hydropower Project (ECGD support: £16 million) is part of the Lesotho Highlands Water Project, which resulted in the forced resettlement of 27,000 people, the shooting of striking construction workers, proven corruption and major environmental impacts. See: Pottinger, L., “Police Kill Striking Workers in Leostho”, World Rivers River, September 1996, <http://internationalrivers.org/files/WRR.V11.N4.pdf>; International Rivers, “Lesotho Water Project”, <http://internationalrivers.org/en/africa/lesotho-water-project>.

⁴⁹² Human Rights Watch, “The Enron Corporation: Corporate Complicity in Human Rights Violations”, 1999, <http://www.hrw.org/legacy/reports/1999/enron/>.

⁴⁹³ Campaign Against Arms Trade, “Saudi Arabia”, <http://www.caat.org.uk/issues/saudi-arabia.php>.

⁴⁹⁴ ECGD, Mission, <http://www.ecgd.gov.uk/index/about-ecgd/mission-and-objectives.htm>.

⁴⁹⁵ ECGD, Business Principles, <http://www.ecgd.gov.uk/ecgds-business-principles.pdf>.

⁴⁹⁶ ECGD, Mission Statement, <http://www.ecgd.gov.uk/index/aboutecgd/ecgdmissionandobjectives.htm>.

⁴⁹⁷ ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 5.11, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

- Whether or not support for overseas projects “might breach any international obligations or policies of the UK government”,⁴⁹⁸
- Whether or not the host country has ratified “the six core UN Human Rights treaties⁴⁹⁹ and eight International Labour Organisation fundamental conventions⁵⁰⁰” in order to “identify those with which the project should comply”,^{501 502}
- Whether or not the benefits of the project (including employment opportunities for local people) will be open to all, regardless of “race, religion, gender, social grouping etc”.⁵⁰³

14. Defence sales are not screened at all by ECGD for human rights impacts. However, ECGD requires that any necessary export licences are obtained as a pre-condition of cover.⁵⁰⁴

Policies

15. ECGD has no dedicated human rights policies.

16. It has, however, made a number of commitments that pertain to human rights. For example:

- It is now ECGD policy that “projects should comply in all material respects with the relevant safeguard policies, directives and environmental guidelines of the World Bank Group.”^{505 506} These cover a number of areas encompassing human rights considerations – projects involving involuntary resettlement, for example, must have an accompanying Resettlement Action Plan.
- ECGD has introduced a policy “not to provide support to projects that involve harmful child labour . . . bonded or forced labour.⁵⁰⁷ (Until as recently as 2004, the ECGD was prepared to consider such projects in “exceptional circumstances”).⁵⁰⁸

CONCERNS OVER ECGD’S POLICIES AND PROCEDURES

17. On paper, the ECGD’s procedures and policies on human rights go far beyond those adopted by many other export credit agencies. However, in practice, the policies lack teeth and their implementation is weak. As the Chair of the Trade and Industry Committee remarked in 2004: “at times there is a tendency towards carelessness or a lack of attention in some respects, certainly to human rights”.⁵⁰⁹

18. The Corner House shares this concern. In particular, it would draw the Committee’s attention to the following weakness of the ECGD’s policies and procedures:

ECGD’s human rights policies are considered a secondary duty

19. ECGD views its Business Principles and stated policies on human rights as entirely “secondary” (its wording)⁵¹⁰ to the fulfilment of what the Department views as its primary purpose: the facilitation of UK exports.^{511 512}

⁴⁹⁸ ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 5.13, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

⁴⁹⁹ See Annex 5 of FCO Human Rights Annual Report 2003: www.fco.gov.uk/Files/kfile/Annexes,0.pdf

⁵⁰⁰ See: www.ilo.org/ilolex/english/newratframeE.htm.

⁵⁰¹ ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 5.18, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

⁵⁰² Where applicable, the European Convention on Human Rights is also taken into account. See: ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, footnote 10, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

⁵⁰³ ECGD, Impact Questionnaire, 2007, question 9, http://www.ecgd.gov.uk/impact_questionnaire_april_2007_-_final.doc.

⁵⁰⁴ ECGD, Business Principles Unit, Case Handling Process Information Note, September 2008, p.5, <http://www.ecgd.gov.uk/ecgds-case-handling-process-information-note-september-2008.pdf>.

⁵⁰⁵ ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 2.6, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

⁵⁰⁶ These guidelines include: the ten “Safeguard Policies” operated by the Bank’s International Bank for Reconstruction and Development (IBRD); and the recently introduced Performance Standards operated by the International Finance Corporation (IFC), the private sector arm of the World Bank. See: www.worldbank.org/safeguards; <http://www.ifc.org/ifcext/sustainability.nsf/Content/EnvSocStandards>.

⁵⁰⁷ ECGD, Impact Questionnaire, 2007, p.iv, http://www.ecgd.gov.uk/impact_questionnaire_april_2007_-_final.doc

⁵⁰⁸ Previously, the ECGD allowed for such projects under exceptional circumstances. In its April 2003 Guidance Notes for its Impact Analysis Procedures, for example, it stated: “There must be exceptional circumstances for ECGD to provide cover to projects which involve child labour”. A similar derogation was applied to the ILO Convention on Forced Labour, although the ECGD states that “it is difficult to imagine circumstances in which the ECGD could provide cover to projects which involve forced labour.”

⁵⁰⁹ Trade and Industry Committee, “Export Credits Guarantee Department”, 11 May 2004, Q499. The quote is taken from an uncorrected transcript of evidence and its use is subject to the following caveat: “Neither witnesses nor Members have had the opportunity to correct the record. The transcript is not yet an approved formal record of these proceedings”.

⁵¹⁰ ECGD, Sustainable Development Action Plan 2007, http://www.ecgd.gov.uk/sdap_final_2007-3.pdf. Para 10: “ECGD also has certain *secondary* duties set for it by Ministers. These include compliance with its Statement of Business Principles . . .” (emphasis added).

⁵¹¹ The ECGD’s statutory powers derive from the Export and Investment Guarantees Act 1991, under which the Department, acting on behalf of the Secretary of State for Business, Enterprise and Regulatory Reform, is required to “facilitating, directly or indirectly” the supply of British exports.

⁵¹² It is perhaps of note that the ECGD does not even mention sustainable development objectives as part of its statement of aims on the Department’s home web page. The ECGD’s aim is stated as being “to help UK exporters of capital equipment and project-related goods and services win business and complete overseas contracts with confidence. See: ECGD, “Welcome to ECGD”, <http://www.ecgd.gov.uk/>.

20. The consequences of this ordering of priorities are evident at every level of the ECGD's decision-making. For example, the ECGD recently relaxed its rules so that it could still support UK exporters even where up to 85 % of the content of the goods covered had been manufactured outside of the UK.⁵¹³ The Corner House and others raised concerns that this could lead to the UK facilitating labour abuses abroad, particularly where UK exporters were taking advantage of cheap labour in developing countries.⁵¹⁴ However, the ECGD has declined to adopt new rules to ensure against labour abuses in the supply chains used by UK exporters. No action will be taken unless agreement can be reached internationally with other export credit agencies.⁵¹⁵ As a result, the ECGD now has a policy that (on paper) prohibits the use of child, bonded or forced labour in projects but turns a blind eye to its potential use in the manufacture of the exported goods. The Corner House believes that unilateral action could and should have been taken by the UK in order to fulfill the UK's international obligation to respect and promote human rights.

21. The Corner House believes that ECGD's founding Act should be amended to ensure that the ECGD's duty to facilitate exports is subject to a duty to uphold the UK's international human rights obligations.

ECGD's policies and procedures are discretionary

22. Although ECGD's human rights policies appear to be unequivocal ("It is ECGD policy that . . .), ECGD has reserved wide powers to derogate from them, thus seriously weakening their effectiveness. Categorical policy statements (for example, that all projects should comply with World Bank safeguard policies) are hedged by other statements allowing ECGD to exercise wide discretion in their application (for example, that its procedures as laid down in its 'Case Impact Analysis Process' paper are "not a statement of what will be done in every case"⁵¹⁶). In the example of BP's Baku-Tbilisi-Ceyhan oil pipeline,⁵¹⁷ for which ECGD provided cover of £81,703,893, The Corner House and other non-governmental organization found evidence of 83 breaches of the World Bank guidelines, many of them related to human rights abuses.⁵¹⁸

23. The Corner House believes that the application of ECGD's human rights policies should be mandatory and that derogations should be permitted only in very limited circumstances and must be publicly justified.

Limited extra-territorial application

24. ECGD has adopted a number of policies that make its support to companies conditional upon their giving undertakings relating to their actions outside of the UK. An example is its anti-bribery policy, which requires companies to give a signed undertaking that they have not paid bribes in the UK or elsewhere to obtain the contracts that ECGD would underwrite.

25. However, apart from its policy on child, bonded and forced labour, the ECGD has declined to require similar extraterritorial undertakings on human rights.

26. Although it assesses a project's compliance with the UK's policies on human rights, it does not condition support on companies adhering to those policies. It merely identifies where there may be gaps in compliance.

27. Such conditions as it does apply amount to little more than a requirement that companies comply with host country legislation on human rights. For example, the requirement that companies observe the six core UN Human Rights treaties and eight International Labour Organisation fundamental conventions only applies where these have been ratified by the host government: it does not apply to projects in countries where the treaties and conventions have not been ratified. India, where ECGD is currently considering a High Impact project, is a case in point.⁵¹⁹

⁵¹³ ECGD, "Consultation on changes to ECGD's policy support for foreign content", June 2006, http://www.ecgd.gov.uk/foreign_content_consultation_pdf.pdf.

⁵¹⁴ The Corner House et al, Submission to ECGD Consultation on Foreign Content, 2006, http://www.ecgd.gov.uk/revised_cornerhouse--att364533.pdf.

⁵¹⁵ ECGD, Public Consultation on ECGD Support for Foreign Content, March 2009, <http://www.ecgd.gov.uk/ecgd-support-for-foreign-content-supply-chain-2009-03-10.pdf>.

⁵¹⁶ ECGD, Business Principles Unit, Case Impact Analysis Process, May 2004, para 2.1, http://www.ecgd.gov.uk/ecgd_case_impact_analysis_process_-_may_2004-4-1-1-0.pdf.

⁵¹⁷ The 1,760 kilometre-long Baku-Tbilisi-Ceyhan (BTC) oil pipeline runs from Baku in Azerbaijan, through Tbilisi in Georgia to a new marine terminal at Ceyhan on Turkey's Mediterranean coast. The aim of the project is to carry up to One million barrels of oil per day from the Caspian Sea to the Mediterranean.

⁵¹⁸ See: The Corner House et al., "Review of the Environmental Impact Assessment for the Turkish section of the Baku-Tbilisi-Ceyhan oil pipeline", 8 October 2003, , http://www.bakuceyhan.org.uk/eia_review.htm.

⁵¹⁹ ECGD's due diligence on child labour in project in India is of concern. In 2005-06, it gave support for an export to a steel mill in India operated by Jindal Vijayanagar Steel Ltd, a company which has been accused of using raw materials derived from mines where child labour is alleged to be employed. Although the charge has been denied by the company, The Corner House believes that the ECGD's absolute ban on the use of child labour should have triggered enhanced due diligence. The completed screening form for the project, however, gives no indication that ECGD was even aware of the allegations. Indeed, ECGD appears to approved the project despite key questions in the impact questionnaire for the project being left unanswered by the applicant, including those relating to resettlement and whether or not the project would "cause, require, bring about or stimulate" child labour. The completed forms, which were released under Freedom Of Information legislation, are available on request from The Corner House.

28. The Corner House believes that the ECGD should condition its support for companies on their undertaking to comply with those human rights conventions to which the UK is a party.

29. The Corner House accepts that the extent to which the UK has a duty under international human rights law to regulate the extra-territorial activities of UK businesses is contested, not least by the UK government. However, it notes the recent report to the UN General Assembly of the Special Representative on Human Rights and Business, in which he states:

“The extraterritorial dimension of the duty to protect remains unsettled in international law. Current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis, and that an overall test of reasonableness is met. Within those parameters, some treaty bodies encourage home States to take steps to prevent abuse abroad by corporations within their jurisdiction”.⁵²⁰

30. The Corner House believes that one such test of reasonableness would be whether or not a government is making taxpayer-backed finance available to companies to support their activities abroad.

Limited due diligence

31. NGOs have also questioned the thoroughness of the ECGD’s due diligence on human rights and that of the Foreign Office, on which the ECGD relies for advice.⁵²¹

32. There is also concern that the focus of the ECGD’s due diligence is too limited. For example, there is no requirement to assess the extent to which freedom of expression is guaranteed in the host country and thus the extent to which affected communities might face repression should they raise concerns over the project. This is of concern given allegations of intimidation (or worse) of those who have challenged a number of projects that ECGD has backed. In the case of BP’s Baku-Tbilisi-Ceyhan oil pipeline, those seeking to uphold the rights of villagers affected by the Turkish section of the pipeline have been accused of being “traitors to their country” and of supporting the outlawed PKK Kurdish guerilla movement.⁵²² Ferhat Kaya, a human rights defender who was working to assist affected communities in the Ardahan region of Turkey, was also subject to arbitrary arrest and alleged mistreatment by the police for his work in assisting villagers obtain proper compensation or redress for grievances arising from the expropriation of their land.⁵²³

33. The reliance on the World Bank Group’s safeguard policies as the primary benchmark for assessing human rights impacts is also problematic. Although, as noted, the World Bank safeguard policies cover a number of areas that involve human rights considerations, they do not explicitly require adherence to binding international human rights conventions.

34. The Corner House believes that the ECGD should be required to screen fully all applications for their potential human rights impacts and that an independent Human Rights Impact Assessment should be mandatory for “High Impact” projects. Projects that do not meet the UK’s international human rights obligations should be excluded from ECGD support. Such screening would require the human rights context of a project to be taken into account.

35. The Corner House notes that a range of specific human rights screening procedures are already available and could easily be adopted by ECGD. Examples include the Danish Human Rights and Business Project’s Human Rights Compliance Assessment (developed with industry to meet industry’s requirement that screening should take no more than 40 hours to complete), the Norwegian development agency (NORAD)’s Human Rights Impact Assessment, and Rights & Democracy’s human rights impact assessment⁵²⁴ currently being developed in collaboration with affected communities.

Lack of grievance mechanisms

36. The ECGD has no grievance mechanism through which those affected by the projects it supports could seek redress. By contrast, a number of other export credit agencies, such as Canada’s Export Development Corporation, have introduced ombudsman or other grievance mechanisms. The Corner House would recommend that the ECGD does the same.

⁵²⁰ Para 15, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

⁵²¹ See, for example: “Correspondence between the Foreign and Commonwealth Office and the Kurdish Human Rights Project and the Corner House: Letter from the Kurdish Human Rights Project and the Corner House—quality of human rights advice supplied by FCO to ECGD on BTC pipeline project”, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/374/374we08.htm>.

⁵²² See: “Baku-Tbilisi-Ceyhan oil pipeline: Human Rights, Social and Environmental Impacts – Turkey Section”, Final Report of Fourth Fact Finding Mission, September 2004, http://www.baku.org.uk/publications/turkey_ffm_2004.pdf, in particular “Section 6: Human Rights abuses and intimidation”; “International Fact Finding Mission: Baku-Tbilisi-Ceyhan pipeline – Turkey Section”, http://www.baku.org.uk/publications/Tu_FFM.pdf, in particular, “Section 1: BTC, Security and Human Rights”.

⁵²³ Ferhat Kaya, “Witness Statement”, reproduced at pages 45-52 in “Baku-Tbilisi-Ceyhan oil pipeline: Human Rights, Social and Environmental Impacts – Turkey Section”, Final Report of Fourth Fact Finding Mission, September 2004, http://www.baku.org.uk/publications/turkey_ffm_2004.pdf.

⁵²⁴ For further details, see: <http://www.dd-rd.ca/site/publications/index.php?subsection=catalogue&lang=en&id=2094>; and http://www.dd-rd.ca/site/_PDF/publications/Getting-it-right_HRIA.pdf.

37. The Corner House believes that ECGD should also be accountable in law to those impacted by the projects and exports it facilitates. The Corner House would therefore urge the amendment of ECGD's founding Act to include a 'Duty of Care' clause with regard to the human rights of those affected by ECGD-supported projects.

CONCLUSION

38. The Corner House believes that the UK's duty to promote and respect human rights should be given full effect through conditions placed on the use of taxpayer-backed finance to support UK industry in its activities abroad, notably through the ECGD.

39. The ECGD's current policies and procedures on human rights are inadequate. Parliament should consider amending the ECGD's founding Act to ensure that UK support for exporters is conditional on protecting and not infringing human rights.

The Corner House

May 2009

Supplementary memorandum submitted by The Corner House

1. This second submission to the Joint Committee on Human Rights inquiry into Business and Human Rights addresses the human rights implications of the Government's Draft Bribery Bill May 2009¹ and the Industry and Exports (Financial Support) Bill 2009² for which the Committee requested additional evidence as relevant to its inquiry.

DRAFT BRIBERY BILL

2. The Corner House³ welcomes the Joint Committee's inclusion of the Draft Bribery Bill in its Business and Human Rights inquiry. Acts of bribery often infringe upon a wide range of human rights, both directly and indirectly. The Draft Bribery Bill could have a potentially positive impact on human rights if it deters businesses from bribing.

3. There have long been significant gaps in the UK's domestic legislation to prevent and deter bribery. Jack Straw MP, Lord Chancellor, Secretary of State for Justice and "anti-corruption champion", has identified the Bill's aims to:

- consolidate, remove inconsistencies and fill gaps in the existing criminal law of bribery;
- reform and modernise the legislation so as to bring transparency and accountability to the UK's international business transactions;
- make anti-bribery legislation easier for the public to understand and for prosecutors and the courts to apply.

Since December 1999, the OECD Working Group on Bribery has repeatedly urged the UK to enact appropriate anti-bribery legislation as a matter of priority. If the Bill achieves these aims, it could have a positive impact on deterring bribery and thus on human rights.

4. Most large-scale bribery is committed for the benefit and on behalf of businesses. The Draft Bribery Bill (Clause 5) introduces criminal sanctions against corporations that have negligently failed to prevent bribery within their organisations. This could have a positive impact on human rights as long as the sanction is effective. This new offence should not be turned into a civil or regulatory regime for imposing fines on companies but should remain a criminal offence as currently drafted.

5. The offences in the Draft Bribery Bill apply not only to actions taking place in the UK but also to those that take place abroad if they are carried out by a British national, a British resident, a national of a British overseas territory or a body incorporated in the United Kingdom (Clause 7). This extraterritoriality in scope is welcome and could set a precedent for other legislation and public policy (*see* first Corner House submission to this inquiry).

6. Despite these potential positive impacts on human rights, however, the Draft Bribery Bill could also have significant negative impacts on human rights. Major gaps in the legislation could result in well-founded allegations of bribery offences not being investigated properly or prosecuted. If these gaps are not filled, the law may not be applied equally across the board to all, and may even encourage large scale cross-border bribery rather than deter it.

Additional clauses need to be included to ensure that those investigating and prosecuting the bribery of foreign public officials are not influenced by considerations of national economic interest or the potential effect upon relations with another state or the identity of the natural or legal persons involved.

These potential positive and negative impacts are outlined in more detail below.

Bribery and corruption infringe upon a wide range of human rights

7. Bribery and corruption are not victimless crimes. As the UK Secretary of State for International Development said in 2006 on the occasion of the G8 Summit:

“The problem is that corruption, like temptation, exists everywhere, but in poor countries it can kill. Money meant for drugs for a sick child, or to build a hospital, can be siphoned off into overseas bank accounts or to build a luxury house. And poor people fare worse. They have to pay bribes to get healthcare, bribes to get their children a decent education.”⁴

8. For multinationals, bribery enables companies to gain public sector contracts (particularly for public works and military equipment) or concessions that they would not otherwise have won, or to do so on more favourable terms. Such grand corruption diverts public spending away from less lucrative sectors such as health care, education and the maintenance of existing infrastructure towards high kickback areas such as new construction contracts and military supplies.

9. The foreword to the UN Convention Against Corruption (which the United Kingdom signed on 9 December 2003 and ratified on 9 February 2006) states that when funds intended for development are diverted into other areas because of the incentive of bribes and other corrupt practices, a government’s ability to provide basic services is undermined and the whole process feeds inequality and injustice.

The OECD points out that “the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare.”⁵

10. Corruption also has profound implications for national security, acknowledged by the leaders of the G8 countries in their final communiqué from the 2006 St Petersburg Summit:

“We recognize that corrupt practices contribute to the spread of organized crime and terrorism, undermine public trust in government, and destabilize economies.”⁶

The Home Office’s 2004 strategy document on combating organised crime notes that:

“Bribery overseas can be a factor which supports corrupt governments, with widespread destabilising consequences.”⁷

11. Corruption is a major feature of “failed states”, contributing to and feeding off the lack of accountable government. Saudi Arabia, for example, was ranked 73rd out of 146 in the 2006 “Failed States Index”; corruption has been specifically singled out as contributing to this ranking:

“Although there have been increasing pressures for political reform . . . Saudi Arabia remains an absolute monarchy with little transparency or accountability. In addition to continuing with these reforms, the government needs to address the issue of corruption within the royal family, and work to improve its human rights record.”⁸

Corruption in Saudi Arabia and arms purchases by the Saudi government have prompted some Saudis to embrace a radical interpretation of Islam.⁹

12. In many countries, the work and lives of those who challenge, investigate or report corrupt practices are often endangered.

13. This brief overview indicates that the struggle against bribery and corruption is central to the struggle for human rights. Corruption encourages discrimination, deprives vulnerable people of income, and prevents people from fulfilling their political, civil, social, cultural and economic rights. When bribery and corruption are widespread, people do not have access to justice, are not secure and cannot protect their livelihoods.

Several UN treaty bodies and UN special procedures have concluded that, where corruption is widespread, states cannot comply with their human rights obligations.¹⁰

14. The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises has included corruption among the abuses of human rights committed by transnational corporations.¹¹

Bribery is a major part of corruption (even though the human rights impacts of corruption extend far wider). Commenting on the bribery behaviour of multinational companies headquartered in OECD countries, the World Bank notes that when they are operating abroad but within the OECD, their behaviour is “very similar to that of their domestic counterparts in the OECD home country”. But when they are operating in non-OECD countries, they “exhibit much lower (often illegal) corporate ethics standards.”¹² The World Bank concludes:

“This speaks to the need not only for tightening the monitoring and enforcement of the OECD Anti-Bribery Convention, but also for implementing complementary measures to change the incentives for bribery abroad.”¹³

The Asian Development Bank similarly identifies the “supply-side” of corruption as a major problem:

“. . . an ‘unholy alliance’ often exists between corrupt officials and corrupt foreign firms, many of whom are based in donor countries. Our policy requires the Bank to address both those who would give bribes and those who would take them.”¹⁴

A first step towards holding to account those who bribe and towards stopping human rights abuses is to criminalise bribery and to make corporations—the major beneficiaries of grand corruption—criminally liable for bribery. The Draft Bribery Bill does this (although there is scope for improvement) and thus could have a positive impact on human rights.

Consolidating, modernising and filling gaps in UK anti-bribery legislation

15. In addition to signing and ratifying the UN Convention against Corruption (UNCAC), the UK also signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“the OECD Anti-Bribery Convention”) on 17 December 1997, for which it deposited its instrument of ratification on 14 December 1998. The essence of the OECD Anti-Bribery Convention is to require an effective domestic remedy against foreign bribery by means of prosecution and enforcement by competent national authorities in accordance with the standards set out in the Convention.

16. Under UNCAC and the OECD Anti-Bribery Convention, the UK committed itself to:

- criminalising bribery overseas;
- ensuring effective investigation, prosecution and sanction of bribery and corruption;
- establishing specialised anti-corruption authorities with sufficient resources and appropriate training to investigate such offences;
- ensuring that domestic money-laundering and accounting legislation is in place to prevent and detect such offences; and
- providing prompt and full international cooperation.

Given the international nature of many business transactions today, most states agree that international cooperation is needed to create a level playing field for all.

But the UK has been slow to introduce key provisions of the OECD Anti-Bribery Convention into UK law. If the Draft Bribery Bill was to enact in domestic legislation the commitments the UK made internationally over a decade ago, it could have a significant positive impact on deterring bribery and thus on human rights.

Negligently failing to prevent bribery within a commercial organisation should be a criminal offence

17. Clause 5 of the Draft Bribery Bill creates an offence of negligently failing to prevent bribery committed in connection with a commercial organisation’s business. This Clause should be a criminal offence, as currently drafted, and should not be turned into a civil or regulatory regime for imposing fines on companies. Its positive human rights implication would be lessened if it was weakened in this way. Moreover, to repeat: bribery is not a victimless crime; it kills.

18. Bribes are invariably paid by an employee or individual for company benefit and advantage, if not with company facilitation and knowledge, rather than solely for the employee’s or individual’s personal gain. As the Serious Fraud Office has noted:

“... it is in the pursuit of corporate objectives that individual employees use bribes. Individuals do the bribing, corporations benefit. Thus to sideline the key player/offender is to ignore the essence of the problem. This is not a case of an offence which sometimes corporations also commit, such as for example fraud or even manslaughter. The mischief at which the bribery offences are directed is almost entirely confined within business activity . . . ”¹⁵

As such, it is the company that should face criminal liabilities for the criminal offence of bribery.

Imposing a civil or regulatory scheme of fines would send a message that bribing and its attendant fines are simply the cost of doing business abroad. It might also encourage companies based in those countries that do have corporate criminal liability to channel their bribes through their UK-registered subsidiaries and affiliates.

19. It would be preferable for corporate criminal liability to be introduced across the board for all criminal offences. But it is unclear when the Law Commission’s ongoing review of corporate criminal liability for criminal offences will be completed and its recommendations followed up by Government.¹⁶

The OECD Working Group on Bribery recommended in October 2008 that “the UK adopt appropriate [anti-bribery] legislation on a high priority basis *irrespective of any broader reform efforts on corporate liability*”.¹⁷

Given that the UK has not introduced an effective regime against corporate bribery with dissuasive sanctions despite signing and ratifying the OECD Anti-Bribery Convention more than ten years ago, The Corner House does not believe that corporate criminal liability for bribery should be left any longer.

When the Law Commission’s review is completed, however (and depending on its conclusions, recommendations and Government follow-up), there should be scope to improve the Clause 5 offence of corporate failure to prevent bribery and bring it into line with overall corporate criminal liability.

The extraterritorial scope of the Draft Bribery Bill could set a precedent for other UK legislation and public policy

20. Clause 7 of the Draft Bribery Bill concerns the territorial application of the various bribery offences created in the Bill. Its effect is to give UK courts jurisdiction to prosecute acts of bribery committed abroad by British nationals, British residents, nationals of a British overseas territory or a legal body incorporated in the United Kingdom. For the purposes of the offence of failure of a commercial organisation to prevent bribery, it is immaterial where the conduct element of the offence occurs.

21. The extraterritoriality aspect of bribery had already been introduced by means of Part 12 of the Anti-Terrorism, Crime and Security Act 2001, which gave UK courts jurisdiction over crimes committed abroad by UK nationals and UK companies under the existing law governing domestic bribery. Clause 7 extends these provisions to persons ordinarily resident in the UK, irrespective of their nationality. But UK corporate subsidiaries or affiliates not incorporated in the UK are still not included within the draft legislation.

22. Despite this loophole, the application of UK law to offences committed outside abroad by UK nationals, residents and companies is a welcome step forward. As Jack Straw stresses in his Foreword to the Draft Bribery Bill:

“As . . . all economies become increasingly more inter-reliant, we must ensure that the law provides our courts and prosecutors with the tools they need to tackle bribery effectively, *whether it occurs at home or abroad*”.¹⁸ (emphasis added)

Similarly, the Home Office’s 2004 strategy document on combating organised crime stated that:

“Bribery overseas can be a factor which supports corrupt governments, with widespread destabilising consequences. We are duty-bound to promote high standards of fairness and integrity and *to ensure that UK citizens do not contribute to corruption either at home or abroad.*”¹⁹ (emphasis added)

23. As noted in The Corner House’s first submission to the Joint Committee’s Business and Human Rights inquiry, the extraterritorial dimension of the State’s duty to protect human rights is unsettled in international law. States are not prohibited from regulating the extraterritorial activities of businesses incorporated in their jurisdiction—but they are not required to do so either.

In contrast, the two major international anti-bribery agreements—the UN Convention Against Corruption and the OECD Anti-Bribery Convention—both require signatory states to criminalise bribery in their jurisdictions even when the act took place outside their jurisdictions.

24. Without this extraterritorial dimension, many businesses would remain unpenalised for bribery offences in which they are implicated. The Corner House believes that the precedent set by the UK’s willingness to accept extraterritoriality in relation to the crime of bribery offers an opportunity to strengthen domestic human rights legislation.

Well-founded allegations of foreign bribery offences may not be investigated properly or prosecuted unless the Draft Bribery Bill contains additional clauses

25. Cross-border corruption is notoriously difficult to tackle. This is particularly so if the bribed foreign public official is senior in status and is in a position to blackmail or otherwise threaten adverse consequences if his/her conduct is exposed through an investigation or prosecution or to protect the interests of the company or individual that bribed.

Tackling cross-border corruption is particularly difficult if the bribing company, or individual acting on a company’s behalf, is able to exert undue or improper influence over those investigating and prosecuting bribery, or is able to persuade others to exert such influence, such as other public officials, whether domestic or foreign. Larger companies are more likely to be in a position to exert such influence than are small and medium enterprises (SMEs).

Investigators, prosecutors and the Courts need to have legislative, Parliamentary and Executive support and backing to resist such threats, blackmail or other undue or improper influence. Without such backing, the demands of *realpolitik* often mean that bribery investigations and prosecutions do not take place or are terminated. If investigators, prosecutors and the courts capitulate to such threats, blackmail or influence, the end result is that bribery flourishes.

In its 2009 report, *Corruption and Human Rights: Making the Connection*, the International Council on Human Rights Policy and Transparency International stresses that:

“Political interference in the judicial system occurs when those in political power use their influence (including threat, intimidation or bribery) to force or induce a judge (or other court official) to act and rule according to their interests and not in accordance with the application of the law.”²⁰

26. The current legal situation in the UK is that bribery investigators and prosecutors can legally abandon an investigation into or prosecution of the criminal offence of bribery overseas allegedly instigated by a UK corporate body or individual if they perceive that the investigation or prosecution might affect the UK’s national economic interest, or the UK’s relations with another country, or because the person or

company being investigated has a high profile or position of influence. Article 5 of the OECD Anti-Bribery Convention states that bribery investigators and prosecutors must not take into account these considerations.²¹ The Draft Bribery Bill does not change or address this situation.

This legal status was made clear as a result of the House of Lords ruling in the Appeal of the Director of the Serious Fraud Office against the High Court judgment of the judicial review application brought by The Corner House and Campaign Against Arms Trade of the Director's decision to stop the investigation into BAE System's alleged corruption in arms deals with Saudi Arabia.²²

27. As a result, all foreign states and officials know that they can dispose of an embarrassing or awkward bribery prosecution in the UK and protect the interests of the company that purchased their cooperation through the bribe if they can construct a credible threat to the UK's economic interest or diplomatic relations.

The more ruthless and powerful the recipient of the bribe, the less likely that the bribe payer will ever be prosecuted. As larger companies are more likely than small and medium enterprises to have "friends in high places" who can bring sufficient pressure to bear, the notion of equality before the law is turned on its head.

28. As UK companies become aware that investigations into bribing a foreign public official can be scotched in the UK if they might be construed as jeopardising relationships with another country or the UK's interests, some companies may believe that they can bribe with impunity. In the current economic recession and resulting higher unemployment, arguments about potential job losses, or loss of orders and contracts may be more persuasive and readily accepted as reasons not to investigate or prosecute.

29. Knowing that an investigation or prosecution of a foreign bribery allegation can be scuppered in the UK may also encourage foreign public officials to demand bribes from UK companies, UK nationals and UK residents. It may also encourage companies based in countries that do investigate and prosecute bribery more thoroughly to channel their bribes through the UK.

30. It could therefore be said that, unless additional clauses are included in the draft Bribery Bill, the proposed legislation could have the bizarre effect of encouraging bribery of foreign public officials rather than having a preventive effect.

31. The new Bribery law needs to lead to both effective enforcement and to have a preventative effect. The Corner House believes that additional clauses must be included in the draft Bill requiring that considerations of national economic interest, relations with other states or the identity of the persons at issue shall not influence decisions to investigate or prosecute the new criminal offence of bribery of foreign public officials. Such clauses would directly and expressly implement Article 5 of the OECD Anti-Bribery Convention into UK law.

32. Without such additions, the new law will not lead to effective enforcement or have a preventative effect—rather the reverse. There is a high risk that it will not in practice be applied to those for whose benefit and on whose behalf most large-scale bribery and corruption crime is committed: companies.

Without these additional clauses, the inclusion of the new offence in the draft Bribery Bill will, at best, amount to little more than a box-ticking exercise encompassing just a part of the OECD Anti-Bribery Convention and will make little practical difference to tackling large-scale bribery; at worst, it will allow bribery in international business transactions to flourish.

If this regulatory gap is not plugged, grand corruption carried out by businesses will continue to have a detrimental impact on human rights.

INDUSTRY AND EXPORTS (FINANCIAL SUPPORT) BILL

33. The Industry and Exports (Financial Support) Bill amends section 1(1) of the Export and Investment Guarantees Act 1991, the founding Act of Parliament of the Export Credits Guarantee Department (ECGD). It does so in a manner that The Corner House considers to be entirely negative.

Under the Bill, the Export Credits Guarantee Department (ECGD) is permitted to approve support for exporters retrospectively.²³ Where an exporter has already supplied parts for, say, an oil pipeline, the ECGD is permitted to approve support for these parts even though they have already been supplied. Before this Bill, ECGD could grant support only when the goods and services had not been exported and thus where it was "facilitating" the export.

34. The Government has given an undertaking that any retrospective financing by ECGD will be subject to the Department's social and environmental safeguard policies (as outlined in The Corner House's first submission to the Joint Committee's Business and Human Rights inquiry)—albeit after the event.

But retrospective financing would render the ECGD's (already weak) human rights policies and procedures toothless. Such procedures are all that currently stands in the way of ECGD backing projects that have a potential negative impact on human rights and the environment.

Social and Environmental Impact Assessment is a pro-active tool intended to identify potential harm *before* any damage is done. Retroactive assessment defeats its very purpose.

Indeed, the World Bank, to whose safeguard policies ECGD-backed projects are expected to conform, explicitly requires assessments to be completed prior to financing being agreed. Retrospective financing therefore places ECGD in breach of its own stated standards and international undertakings.

35. With the ECGD under pressure to “get money out of the door” to ease exporters’ difficulties because of the “credit crisis”, there is a danger that projects will be rubber stamped without difficult questions being asked if retrospective financing is permitted.

36. When ECGD tried to apply procedures retrospectively in 2000 in order to finance the controversial Ilisu Dam in south-east Turkey, which would forcibly displace up to 78,000 ethnic minority Kurds, Parliament’s International Development Committee was scathing:

“There is good reason for the expectation that relevant international criteria should be met *before* a proposal is agreed and cover sought—it is a sign of political will, institutional capacity, developmental commitment and good faith.”²⁴

30 June 2009

ENDNOTES

1. <http://www.justice.gov.uk/publications/docs/draft-bribery-bill-tagged.pdf>
2. <http://www.publications.parliament.uk/pa/cm200809/cmbills/070/09070.i-i.html>
<http://services.parliament.uk/bills/2008-09/industryandexportsfinancialsupportbill.html>
3. The Corner House has a track record of detailed policy research and analysis on overseas corruption and on corporate accountability. See: <http://www.thecornerhouse.org/uk/corruption>
It has also brought two judicial reviews on corruption-related decisions by public bodies: one, by the Export Credits Guarantee Department to weaken in November 2004 its rules aimed at reducing corruption; the other by the Director of the Serious Fraud Office (SFO) in December 2006 to terminate the SFO investigation into alleged bribery and false accounting by BAE Systems in relation to the Al Yamamah deals with Saudi Arabia.
See:
— “Corner House Double Victory on UK Government Department’s Anti-Bribery Rules and Public Interest Litigation”, 25 January 2005, <http://www.thecornerhouse.org.uk/item.shtml?x=107362>.
— <http://www.controlbae.org>.
4. Hilary Benn, Secretary of State for International Development, Holyrood, Edinburgh, 22 June 2006, “Governance and Development”, <http://www.dfid.gov.uk/news/files/Speeches/governance-development.asp>
5. OECD Directorate for Financial, Fiscal and Enterprise Affairs, “The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications”, DAF/IME/WPG(2001)15/Final, [http://www.oilis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/d1bada1e70ca5d90c1256af6005ddad5/\\$FILE/JT00115758.PDF](http://www.oilis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/d1bada1e70ca5d90c1256af6005ddad5/$FILE/JT00115758.PDF).
6. G8, “Fighting High Level Corruption”, July 2006, available at <http://en.g8russia.ru/docs/14.html>
7. Home Office, “One Step Ahead: a 21st Century Strategy to Defeat Organised Crime”, March 2004, available at <http://www.archive2.official-documents.co.uk/document/cm61/6167/6167.pdf>.
8. Fund for Peace, “Saudi Arabia”, http://www.fundforpeace.org/publications/profiles/cp_saudi_arabia.pdf.
9. A *fatwa* issued by Osama bin Laden in 1996, entitled “Declaration of War against the Americans Occupying the Land of the Two Holy Places”, cites corruption in Saudi Arabia and arms purchases by the Saudi government as major justifications for his call for a Jihad not only against the United States but also against the Saudi Royal family.
See: Online News Hour, “Bin Laden’s Fatwa”, August 1996, http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html.
Authoritative accounts of the genesis of Al Qaeda underline the role that corruption played in motivating key figures in the network. For example, Jason Burke in his book *Al Qaeda: The True Story of Radical Islam* cites the “obvious corruption and ostentation on the part of the elite and government officials” as two of the underlying “root causes of the appeal of the Islamic radicals” in Egypt following the 1981 assassination of President Sadat.
See: Jason Burke, *Al Qaeda: The True Story of Radical Islam*, Penguin, 2004, p.153.
10. “States face serious problems of corruption, which have negative effects on the full exercise of rights covered by the Covenant [ICESCR]”
Committee on Economic, Social and Cultural Rights, E/C.12/1/ADD.91, 2003, para. 12.
The Committee on the Rights of the Child “remains concerned at the negative impact corruption may have on the allocation of already limited resources to effectively improve the promotion and protection of children’s rights, including their right to education and health.”
CRC/C/COG/CO/1, para 14.
Statement by the UN Special Rapporteur on independence of judges and lawyers, E/CN.4/2006/52/Add.4, para 96.

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11. UN. Doc. E/CN.4/2006/97, paras. 25-27.
12. Kaufman, D., “Corruption, Governance and Security: the challenges for the Rich countries and the world”, in World Economic Forum, Global Competitiveness Report, September 2004, chapter 2, p.92, http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/Kaufmann_GCR_101904_B.pdf
13. Ibid., p.98.
14. Asian Development Bank, “ADB/OECD Conference on Combating Corruption in Asian and Pacific Economies”, <http://www.adb.org/documents/speeches/1999/ms1999012.asp>
15. Serious Fraud Office, written response to the Law Commission’s consultation on anti-bribery legislation, quoted in para 75, OECD Working Group on Bribery, *United Kingdom: Phase 2bis, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.
16. <http://www.lawcom.gov.uk/1150.htm>
17. After para 92, page 25, OECD Working Group on Bribery, *United Kingdom: Phase 2bis, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.
18. Jack Straw MP, Lord Chancellor and Secretary of State for Justice, “Foreword”, *Bribery: Draft Legislation*, Ministry of Justice, 25 March 2009, p.4, <http://www.justice.gov.uk/publications/docs/draft-bribery-bill-tagged.pdf>.
19. Home Office, “One Step Ahead: a 21st Century Strategy to Defeat Organised Crime”, March 2004, available at <http://www.archive2.official-documents.co.uk/document/cm61/6167/6167.pdf>.
20. International Council on Human Rights Policy and Transparency International, *Corruption and Human Rights: Making the Connection*, Geneva, Switzerland, 2009, p. 37, http://www.ichrp.org/files/reports/40/131_web.pdf
21. Article 5 of the OECD Anti-Bribery Convention is intended to remove barriers to the investigation and prosecution of international bribery and corruption:
 “Investigation and prosecution of the bribery of a foreign public official . . . shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”
 Signatories to the OECD Convention agree not to accede to diplomatic threats and other forms of blackmail commonly used to frustrate embarrassing international bribery prosecutions in exchange for a similar promise by other states. If all signatory countries maintain the same common high standard of refusing to abandon bribery investigations and prosecutions on the basis of diplomatic and economic threats (real or bluffed), all states ultimately benefit. Each country agrees to limit its freedom of action individual cases in order to secure long-term benefits for all. To do so, uniformity of interpretation of the Convention and of enforcement is essential.
22. “R (Corner House Research & Campaign Against Arms Trade) v Director of the Serious Fraud Office [2008] 3 WLR 568”, *Opinions of the Lords of Appeal* by Lord Bingham, Lord Hoffmann, Lord Rodger, Baroness Hale and Lord Brown, 30 July 2008, <http://www.thecornerhouse.org.uk/pdf/document/Lords-Judgment.pdf>.
 For background to the judicial review and other key legal documents, see: <http://www.controlbae.org>
 In October 2008, the OECD Working Group on Bribery highlighted the “inadequate status of Article 5 in the domestic legal order” (p.95) governing both investigations and prosecutions of alleged foreign bribery. It concluded that:
 “. . . Article 5 must be equally applicable in all member states of the Working Group. Because the Article addresses investigation and prosecution decisions taken in the domestic legal order, it must apply with full force and effect in that sphere, both as a practical and legal matter, in order for its purposes to be achieved.
 “. . . The lead examiners accordingly recommend that the UK take all necessary measures to ensure that Article 5 applies to all investigation and prosecution decisions in foreign bribery cases.”
 (After paragraph 108, *OECD United Kingdom: Phase 2bis Report*, 16 October 2008, <http://www.oecd.org/dataoecd/23/20/41515077.pdf>.)
23. Industry and Exports (Financial Support) Bill 2009, Clause 2: Assistance in connection with exports of goods or services:
 (1A) “Arrangements under subsection (1) may be made in connection with goods or services supplied before the arrangements are made . . .”
<http://www.publications.parliament.uk/pa/ld200809/ldbills/039/09039.i-i.html>

24. International Development Committee, Sixth Report, *ECGD, Developmental Issues and the Ilisu Dam*, House of Commons, The Stationery Office, 6 July 2000, p.vii.

The UK consortium seeking ECGD support for the proposed Ilisu Dam eventually withdrew its application, admitting that the Dam did not meet international standards.

Memorandum submitted by CBI

1. The Confederation of British Industry (CBI) is the national body representing the UK business community. It is an independent, non-party political organisation funded entirely by its members in industry and commerce and speaks for some 240,000 businesses that together employ around a third of the UK private sector workforce. The CBI's membership includes the majority of the FTSE 100, some 200,000 small and medium-sized enterprises (SMEs), more than 20,000 manufacturers and over 150 sectoral associations. It also represents UK business internationally through membership of international business organisations, through its extensive network of contacts, and through offices in Brussels, Washington DC, Beijing and representation in New Delhi.

THE CONTEXT

2. Issues related to business and human rights have attracted increased attention from all stakeholders. Some of the debate surrounding these issues has been divisive, mainly because it had been impossible until recently to reconcile conflicting views. In June 2008, the UN Human Rights Council adopted a report written by Professor John Ruggie, the UN Secretary-General's Special Representative (SRSG) on business and human rights. This report, which introduced a policy framework based on the principles of state duty to protect, corporate responsibility to respect and access to remedies, and its subsequent adoption by the UN, marked a turning point. It provided the first widely supported advance in the ongoing discussions not just because of the rigour of its analysis, but also because of the exemplary and transparent multi-stakeholder consultation process that the SRSG undertook.

3. The CBI strongly supports this framework and the decision of the UN Human Rights Council to extend the SRSG's mandate for a further three years with a view to operationalising his framework. We believe that this is the best and most effective way to address an extremely complex set of issues in a balanced, objective and practical manner. There were some who called for the mandate to include a complaints receiving mechanism or to move towards a global ombudsman approach. We believe the UN Human Rights Council was right to continue to focus the mandate on where and how it can make continued progress towards its goals in the allotted timeframe.

4. Businesses are one of the key building blocks in society. They generate wealth, create jobs, supply goods and services, provide tax revenues, raise living standards and help lift people out of poverty. The vast majority of businesses are committed to operating in a responsible and sustainable way. Responsible business conduct has legal compliance at its heart. In addition, it may include activities that are undertaken voluntarily which are above and beyond legal requirements. Such initiatives are commonly defined as corporate social responsibility activity and are rooted in the fundamentals of the business itself. They can take many forms and can be global, national, sectoral or company specific.

5. The CBI believes that business and respect for human rights are mutually supportive. Responsible businesses have always taken account of their impact on human rights as well as the need to support them in the workplace and in the community. Indeed, many CBI members are employers of choice at home and abroad because of their approach to human rights. Recently, we have seen greater, more public activity and interest from business due to a growing awareness that these are pressing issues, especially as more and more companies have become involved in complex supply chains and new markets, a recognition of the important contribution that they can make to this evolving set of issues and the positive climate that the SRSG has helped to create. We welcome the Joint Committee's inquiry, particularly since it is aligned with the work of the SRSG. The CBI hopes that the Committee's inquiry will follow the same spirit that has characterised the efforts of Professor Ruggie as it examines the rights and responsibilities of the UK Government, businesses and other stakeholders.

STATE DUTY TO PROTECT

6. Governments are the primary duty bearers of human rights. This lies at the heart of the SRSG's framework and the CBI supports the recognition of the obligation on states to protect human rights. There are clear differences between what governments must do and what business can be expected to do. Business can never take the role of nor should it be expected to become a surrogate government. Attention should continue to focus on the need for national governments to create the underlying legal framework that protects human rights as well as ensuring adequate implementation and enforcement of that framework.

7. In our view, domestic and multinational companies require the same basic principles and government policies to protect human rights. These include good governance, the rule of law, open markets, and sound economic, social and environmental policies. This will have a positive impact on the vast majority of the world's companies that are part of a global supply chain or that are domestic businesses.

8. The failure or inability of governments to meet their duty to protect is, in our view, the basic cause of most abuses of human rights. These governance gaps need to be identified and ways found to close them.

9. Most egregious abuses of human rights take place in countries or regions with weak governance, limited political and civil freedoms, endemic corruption or conflict. Such situations are by their very nature not easy to resolve. Attempts to do so will require the international community to work together through government-to-government dialogue, international co-ordination, and good working relationships between governments and all stakeholders.

10. It has been suggested by some that the output of the mandate should be a UN treaty or global legal instrument covering business and human rights. The CBI does not support this view. We believe that such an initiative would take a significantly long period of time to negotiate, it would divert resources away from the promise offered by the SRSG's current mandate and it is unclear as to how any such treaty might actually be enforced. The SRSG has expressed his concerns along similar lines.

11. In his latest report to the UN Human Rights Council, the SRSG provides further comment about the coherence of government policies towards human rights across the totality of its activities. But we would counsel caution that, in examining these issues, appropriate attention must be given to the reasons why an instrument, policy or government support is given. For example, bilateral investment treaties (BITs) provide legitimate and crucial protection to foreign investors against such things as illegal expropriation, expropriation without adequate compensation or arbitrary decision-making. We believe that the correct balance of interests must be struck and excesses or misuse of BITs avoided. Without such investor protection, however, the likelihood of a significant decline in foreign direct investment and capital flows would loom large.

12. Similarly, care must be taken when looking at linkages between guidance given to companies and legal penalties imposed. For example, the OECD Guidelines are obligatory on signatory governments to promote but voluntary for business. In addition, the complaints mechanism—the National Contact Point—is not a judicial body. Taken together, it would therefore not be appropriate either under the law or otherwise to sanction directly a company found to be in breach of the Guidelines. It might, however, be appropriate to consider taking into account these circumstances in future contacts.

CORPORATE RESPONSIBILITY TO RESPECT

13. The distinction between state duty to protect and corporate responsibility to respect is recognised by the SRSG in the analysis that led to the production of his framework. We believe this was critical in getting beyond the log-jam that had existed before the start of the first mandate. And it will be critical to the success of the current mandate too.

14. The CBI has been very clear in its leadership role within the international business community in stressing that all companies must comply with the law wherever they operate. They should also respect the principles of relevant international instruments where national law is absent or poorly enforced. This applies in equal measure to multinational, domestic, public, private or state-owned companies. We also see no justification for thinking that the current economic situation would justify a lessening of that commitment to respect human rights.

15. At the heart of the responsibility to respect human rights is effective due diligence and risk management. This enables a company to ensure that it can meet the SRSG's criterion to do no harm. The process is an evolving one with an active learning component, but there are some emerging trends that the SRSG has identified. These include having a human rights policy and identifying relevant issues; looking at whether human rights impact tools might be relevant; integrating the policy throughout the business; and tracking or measuring performance. The CBI concurs with this, and with the conclusion that the sphere of influence concept is not the right way to address corporate responsibility in the context of human rights.

16. Business is assisted in its responsibility to respect by a wide range of instruments and tools. Amongst the leading initiatives are the OECD Guidelines, the ILO MNE Declaration and the Global Compact. Sectoral and company codes of conduct often reflect the content of these initiatives but are also tailored to meet some of the specific requirements of their operations. For additional due diligence in weak governance zones, the OECD has produced the Risk Awareness Tool as a complement to the OECD Guidelines. The International Organisation of Employers, the International Chamber of Commerce and the Business and Industry Advisory Committee to the OECD have also jointly compiled a list of issues and approaches that companies should consider when operating or contemplating starting to operate in weak governance zones.

ACCESS TO REMEDIES

17. Following state duty to protect and corporate responsibility to respect, it is self-evident that there needs to be effective access to remedies. This is not related solely to business and human rights issues. It is a general principle that all parts of society should be able to seek redress for grievances through either judicial or non-judicial means. In this context, though, it is important that such mechanisms reflect and are built upon the principles in the SRSG's report.

18. One of the most persuasive arguments in the report is that addressing potential grievances at an early stage may prevent escalation and lead to faster effective resolution of disputes. The SRSB is developing a non-judicial grievance mechanism as part of the access to remedies workstream that will include piloting. We support this initiative.

19. We are, however, uneasy about the potential for the extension of extraterritorial jurisdiction. Business has rightly had long-standing principled concerns about extraterritoriality. Our basic point of departure is that domestic legislation should not be given extraterritorial reach unless there is a substantive and demonstrable link to that domestic jurisdiction. In addition, such a move could promote a growth in forum shopping where claims are brought in accordance with perceived advantage. This would send a very negative signal and provide no incentive to those states that are unwilling to undertake their duty to protect human rights. Finally, it is open to question whether domestic legal systems and courts would have the capacity or expertise to sit in judgement over human rights issues in another jurisdiction.

20. There are some lobby groups that have called for the creation of a global ombudsman. We do not think that this idea has merit and it is very difficult to envisage how it could be made to work effectively. The SRSB's 2009 report to the UN Human Rights Council explains why he does not believe that such an idea meets his basic standards of fairness and rigour, and it would do little to help provide an effective remedy to those with grievances.

CONCLUSION

21. This is a time of progress in the business and human rights arena. The reports of the SRSB and his work towards operationalising his framework of protect, respect and remedy offer great potential. It is worthy of support and the CBI will continue to play its part in contributing to the mandate. We hope that the Joint Committee's inquiry will do the same and reinforce the validity of its direction and outputs.

CBI

May 2009

Supplementary memorandum submitted by the CBI

1. The Confederation of British Industry (CBI) is the national body representing the UK business community. It is an independent, non-party political organisation funded entirely by its members in industry and commerce and speaks for some 240,000 businesses that together employ around a third of the UK private sector workforce. The CBI's membership includes the majority of the FTSE 100, some 200,000 small and medium-sized enterprises (SMEs), more than 20,000 manufacturers and over 150 sectoral associations. It also represents UK business internationally through membership of international business organisations, through its extensive network of contacts, and through offices in Brussels, Washington DC, Beijing and representation in New Delhi.

THE CONTEXT OF THE SUPPLEMENTARY WRITTEN EVIDENCE

2. During oral evidence, the Joint Committee asked for additional information from the CBI. This submission covers those points.

3. The CBI would wish, however, to stress the strong support it has given for the work of Professor John Ruggie, the UN Secretary-General's Special Representative (SRSB) on business and human rights. We believe his mandate is the best and most effective way to address an extremely complex set of issues in a balanced, objective and practical manner. The work that he is undertaking to operationalise the framework of state duty to protect, corporate responsibility to respect and access to remedies will address much of what the Joint Committee is examining. We therefore urge the Joint Committee to ensure that it reflects and reinforces the SRSB's work.

STOCK EXCHANGE LISTING REQUIREMENTS

4. The London Stock Exchange exists to fulfil a particular role. We doubt that human rights falls within the statutory financial markets regime regulated by the Financial Services and Markets Act and so not within the remit of the London Stock Exchange. Furthermore, we do not see that listing rules can easily and practically be adapted to regulate human rights conduct by companies listed on the Exchange. One suggestion that was made to us in oral evidence included the phrase "firms which have committed or are complicit in human rights abuses". It is not clear to us the basis upon which such judgements would be made and by whom. The CBI would therefore not support this concept.

5. There are two other broader points we would make. First, the Companies Act 2006 includes the concept of materiality and the Business Review may include a wide range of issues deemed to be material. Second, it is important to focus on what a company does when it finds out that something has gone wrong, often in circumstances that were not of its making. Any policy response should therefore allow those companies to find ways of resolving the matter and to improve performance.

 CONTRACT COMPLIANCE IN PUBLIC PROCUREMENT

6. It is a matter for the contract framers to consider how they wish to construct a contract, given all the factors that they will have to take into account. This includes the duties they have under various pieces of legislation. Tender documentation will need to reflect any of those duties that will then be passed on to the suppliers.

7. Value can be seen as a concept that encompasses multiple elements. Multilateral obligations to which the UK is a signatory, such as those at the World Trade Organisation under the Government Procurement Agreement, embody the principles of transparency, non-discrimination and fair and effective competition amongst contracting parties as key elements of ensuring optimal value.

8. In addition, companies have codes of conduct, belong to sectoral or trade associations that run compliance programmes, and are members of schemes that provide kite marks or other endorsements related to sourcing, behaviour and compliance. All these may be drawn upon if the contracting parties so wish and they can serve as important criteria in evaluating bids for public contracts.

EXTRATERRITORIALITY

9. The business community has very severe reservations about the extraterritorial application of legislation. These are both principled & practical in nature. We believe that extraterritoriality undermines basic legal principles whereby a State regulates persons and activity within its borders. In addition, it increases legal and commercial uncertainty; increases the prospects of retaliation, protectionism and political disputes; distorts trade and investment; and produces conflicting requirements that have negative consequences, including enhanced transaction and compliance costs, on business.

10. In general, the CBI believes that this argues for a State to refrain from attempts to exercise jurisdiction unless there is a clear, demonstrable and substantial link to its territory.

11. In oral evidence, the question of the US Alien Tort Claims Act (ATCA) of 1789 was raised. The CBI wishes to re-affirm that we do not believe that an Act that was passed to deal with the actions of States can be made applicable to other actors. The US Supreme Court has narrowed the scope of the extraterritorial impact of the Act quite considerably when it has been petitioned. As of now, there have been no judgements handed down from US courts involving companies that impose financial or other penalties. Any settlements that have been made have been agreed out of court. This statute will not work for actions for which it was never intended and should not accommodate.

12. Finally, we would note in this context the recent statement by the Republic of South Africa welcoming the decision of the US District Court (Southern District of New York) to dismiss claims made under ATCA “based solely on the fact that companies merely did business with the apartheid government”. This decision addressed some of the South African Government’s concerns. The same statement also welcomes moves to have remaining matters resolved outside the court process in the Republic of South Africa.

THE CORE COALITION PROPOSAL

13. The CBI has discussed the proposal for a UK commission on human rights with the Core Coalition. It seems to be a mix of legal, quasi-legal and non-legal activity. We are unable to support it for significant reasons, mainly because it makes no attempt to analyse current instruments, codes, processes, conventions, how law is enforced, or where the gaps are in any objective manner. In that sense, we are concerned that there is a danger that it could undermine the global solutions that the SRSR is seeking to put in place.

14. In addition, the extraterritorial nature of the proposal whereby a UK public entity is set up to judge standards of behaviour in other jurisdictions raises major barriers and problems. This is separate to the issue of upon which and whose standards will such activity be based. We doubt whether the effect of the commission in this area will be anything other than to drive the wrong-doer away from any influence that good practice UK companies can seek to deploy. Even in the area of advising and guidance, which is perhaps the better part of the proposal, we remain to be convinced that the UK-centric basis of such a commission could properly address complex and evolving issues overseas.

15. Finally, we believe the commission would undermine the operation of the OECD Guidelines and the National Contact Point (NCP) process at a time when the UK reforms of the NCP have been endorsed by all stakeholders as major advances. Such a move would hamper the ability of the UK to lead opinion in the forthcoming review of the Guidelines, as well as making access to remedies more confrontational and combative.

16. For all of these reasons, the CBI strongly endorses the statement of the Minister of State at the Ministry of Justice, Mr Michael Wills MP, who told the Joint Committee in oral evidence on 14 July 2009 that there was no need for a commission as a working framework was already in place.

 CONCLUSION

17. In concluding this supplementary submission, we reiterate the positive role that the CBI will continue to play in contributing to the mandate and work of the SRSRG.

20 September 2009

 Memorandum submitted by Amalgamated Metal Corporation Plc

1. BACKGROUND TO SUBMISSION:

This evidence has been prepared by AMC and its subsidiary, Thailand Smelting & Refining Company (Thaisarco). Both AMC and Thaisarco have been named in sessions held by the Joint Committee as companies whose trade with the Democratic Republic of the Congo (DRC) should give rise to human rights concerns. AMC and Thaisarco absolutely refute that suggestion.

These submissions cover two main issues:

- (a) the issue of Business and Human Rights; and
- (b) a human rights framework for trading with the Democratic Republic of Congo.

The Committee has not asked AMC to respond to individual allegations but are interested in our views on the general issues raised by the inquiry. Nevertheless, in view of the specific criticisms of AMC made by Global Witness, the following facts are pertinent:

- (i) Contrary to Global Witness' evidence AMC was not "cited in UN Experts Panel report as funding warring factions in Eastern DRC".
- (ii) AMC was included in a 2002 UN report (S/2002/1146) but, importantly, Global Witness overlooked the fact that AMC was subsequently cleared by the UN panel (S/2003/1027).

2. THE AMC BUSINESS

AMC is a broadly based metals, raw materials and intermediate products supplier to industry. It operates in a number of sectors ranging from dealing on the London Metal Exchange to the manufacture of construction products in Canada to tin smelting in Thailand. It operates in eleven different countries, is a significant contributor to the UK economy and is, a long established corporation with a reputation for reliability and probity.

AMC operates in line with generally accepted business standards for multinational enterprises. Where it operates in developing countries (eg Thailand) it has a strong social policy—supporting education and development through scholarship schemes and donating to local communities in need.

These submissions relate mainly to the need for business to be given clear guidance on whether trade with countries like the DRC is acceptable and, if so, what standards of due diligence need to be applied.

Thaisarco has historically purchased cassiterite from the DRC for tin smelting. In September 2009 it suspended purchases from the DRC, although it will continue to honour existing contracts.

3. BUSINESS AND HUMAN RIGHTS

Business can only take place if there is a clear legal framework, both in the UK and elsewhere, within which it can work. It is largely for Governments to set that framework. Internationally, Governments should take responsibility for ensuring that states have proper systems of human rights enforcement. Each Government should take responsibility for setting clear standards with which it expects businesses to comply. Business should clearly respect those standards and should face enforcement measures where there are transgressions.

In the absence of a legal framework or clear standards, it is difficult for business to operate, particularly in countries such as the DRC, where state based human rights systems are at an early stage of evolution and where local responsibilities are sometimes opaque. The difficulties arise from the establishment of appropriate standards for a developing economy such as the DRC, for which the application of generally accepted developed economy standards of operation would lead to an effective embargo on external economic activity. Business needs to operate in a certain trading environment and it should be the task of Government to set appropriate minimum standards for developing countries, which may be different to those applied in a developed economy, to ensure that trade can continue. Furthermore, Government should clarify the extent of the responsibility of companies to ensure compliance at all points in the supply chain. These issues were recognised in the evidence of Lord Malloch-Brown to the Joint Committee. He said:

"...who is responsible for enforcing human rights law? I just want to make the point that the FCO, which is engaged extensively internationally in terms of capacity building with states to make them implement human rights law better, is engaged with a whole range of actors on different corporate social responsibility issues. In the US we established the voluntary principles on security in human rights; with Professor Ruggie we have been doing a lot; we have the Kimberley Process on diamonds.

But behind all of them lies the assumption that what you are trying to do is to strengthen a states-based system of human rights enforcement. Obviously there are those voices which would argue that with corporates operating now multinationally across borders that somehow, either through pressure on those corporates directly or through the evolution of law, the right way of addressing this is to hold corporations directly responsible to the international community for human rights enforcement. That has not been our approach and I just wanted to lay that out straightaway because it is, as I say, in a sense the conceptual dividing line with which the human rights community has to struggle in dealing with these issues."

Without a clear legal framework which includes appropriate standards, it is possible for lawful business in states such as the DRC to be mischaracterised and criticised, with significant effects on wider business relationships by bodies who may simply have a different opinion about whether business has "done enough" to force improvement in the supply chain. Without a clear legal framework responsible businesses will disengage and will seek alternative uses for their capital, with profound effects on local economies. This will have adverse effects on the quality of life and basic human rights of those left without functioning economies.

By contrast, with clear legal frameworks, business can make a real contribution to local economies, with significant human rights benefits. This framework should set out the clearly the standards to which business should be expected to work, and the type of due diligence process that needs to be followed to achieve those standards.

4. HUMAN RIGHTS AND TRADING WITH THE DRC

The minerals trade in DRC supports up to two million artisanal miners, and an even greater number of dependents. It is a major driver of economic activity in the country, and in the eastern region of the DRC in particular. There is a general consensus that continued trade with the DRC is beneficial.

There is no embargo or ban on trading with DRC. The UN sanctions regime applies to those who through illicit trade in natural resources directly or indirectly fund illegal armed groups. So far as the minerals trade is concerned it is clear that the UN focus is on ensuring that illicit trade does not fund continuing conflict and the consequent human rights abuses. UN Member States are encouraged to take such measures as they deem appropriate to ensure that importers, processing industries and consumers of DRC mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase. Neither the UN nor any Member State has yet developed any guidance, standard or system for the exercise of due diligence.

There is a climate of criticism of companies continuing to trade with the DRC on the basis that there is a risk that some natural resources might unknowingly have been sourced from areas or passed through areas in the control of both illegal armed groups (subject to the sanctions) and the DRC army (clearly outside the scope of the sanctions). The absence of a clear legal framework within which trade can take place, and which clearly identifies when trade cannot take place, allows this type of criticism to flourish.

In order to fill the gap left by the lack of a clear legal framework, AMC is working with the tin industry body ITRI, and with the rest of the supply chain, to implement a due diligence system that could be used in the DRC. No due diligence process in the DRC will provide an absolute guarantee that an element of the funds generated have not been misdirected. Standards of due diligence must be set that reflect what can be achieved with the aim to improve these as local governance improves. This will then give businesses the confidence that, if they comply with the agreed due diligence standards, they will have taken all appropriate steps to limit human rights abuse.

The ITRI Tin Supply Chain Initiative (iTSCi) provides a standard against which business activities can be measured, and provides a good level of traceability of minerals. Further due diligence procedures are being developed that will monitor the provenance of minerals more closely from the mine and in transit. It will take time for these measures to be implemented.

At the moment the core responsibility in the iTSCi is on the exporter (the Comptoir) to certify provenance and to confirm that there has been no interference with the minerals in transit. If they do so then businesses should be able to rely on that certificate. Comptoirs are licensed in the DRC and there are DRC Government representatives in Comptoir offices to confirm the trade that is taking place. As multiple parties have pointed out, the Comptoirs have a good level of local knowledge and are capable of giving accurate and honest certificates.

If there is any real evidence that a Comptoir has failed to exercise due diligence then they should be considered for designation under the sanctions regime. So far, despite concerns having been raised, no Comptoir has been designated. If there is insufficient evidence to designate Comptoirs then it is difficult to see circumstances in which businesses who purchase from them can properly be designated.

The iTSCi is an industry led mechanism. As a consequence it cannot, by itself, give business the comfort that would be provided by a clear legal framework. If the iTSCi was endorsed and supported by the UK Government it could do so and would allow appropriate trade with DRC to continue and to grow. If continued trade is seen to be one way to reduce longer term human rights concerns in DRC, then Government should either endorse the iTSCi due diligence standards or develop an alternative workable set of standards.

As noted above AMC has directed Thaisarco to suspend trading with the DRC, despite it being lawful, because of public criticisms causing damage to the Groups' good name. Although AMC continues to sponsor the iTSCi, the suspension of trade risks the withdrawal of one of the potential catalysts for positive change in DRC.

Thaisarco will only lift its suspension if it receives satisfactory support for the ITSCI due diligence initiative or an appropriate alternative.

5. SUMMARY

AMC and its subsidiary Thaisarco are responsible organisations and employers and are concerned that human rights should be upheld throughout the supply chain. It is concerned to ensure that it meets UN requirements, and does not fund illegal armed groups by purchasing illicit minerals.

AMC has been working with ITRI to implement a due diligence system. It has worked with the DRC Government, the UK Government, Non Governmental Organisations and the supply chain in general to develop a workable system. This builds on practices that AMC already had in place to prevent indirect funding of illegal armed groups.

The continuing absence of an agreed due diligence process will drive the minerals trade underground, or into less discerning hands, with no improvement to human rights. AMC believes that the most responsible approach is for the UK and other Governments to engage with all members of the supply chain to develop due diligence standards, that will improve progressively over time. That will provide security for business trading in the DRC, and that business will bring improvements to the quality of life and human rights.

It is the role of Government to set out a clear legal framework and to identify the appropriate due diligence standards. Without such clarity business cannot do business, and cannot help economies to recover in a way that is able to protect human rights.

Memorandum submitted by BHP Billiton Limited

On 3 June we received an email from Ms Emily Gregory on behalf of the Joint Committee on Human Rights in relation to the Committee's inquiry into Business and Human Rights advising that BHP Billiton had been referred to in evidence and inviting us to respond.

We have read the submissions that make reference to us and would like to make the following comments.

BHP Billiton considers human rights to be a very important issue and we recognise, support and are committed to the following international instruments which are directly relevant to different aspects of human rights: the UN Declaration of Human Rights; the US-UK Voluntary Principles on Security and Human Rights; the UN Global Compact and the World Bank Operational Directions on Involuntary Resettlement.

The management of human rights are embedded in our management systems that are regularly audited and our performance publicly reported. For example, as part of this system our Sustainable Development Policy requires that wherever we operate we will ensure that we understand, promote and uphold fundamental rights within our sphere of influence.

At an operational level all our sites and facilities that we either own or operate must undertake a human rights assessment and identify any actual or potential human rights issues, and where so identified develop and implement a human rights management plan as well as ensuring that all employees and contractors receive training to facilitate compliance with our human rights commitments.

The human rights assessments must be reviewed annually to ensure that it remains relevant and there are also reporting obligations on sites to ensure that it is carried out as well as reporting any human rights transgressions.

BHP Billiton reports its sustainability performance which includes reporting on human rights issues. Our latest sustainability report, *Resourcing the Future*, is available on our website at: <http://www.bhpbilliton.com/bb/sustainableDevelopment.jsp>.

Human rights information in this report includes, for example, details about the number of employees and contractors participating in human rights training in FY2008 (23,876), that there were no recorded human rights transgressions in that year and how we have met our commitments under the Global Compact.

In relation to the comments made in the submissions about BHP Billiton we note that there are a number of errors and much of the information is out of date.

Finally, we also recognise that one of our challenges is to continue to manage the potential exposure to human rights issues in an ever changing world and in diverse locations where we operate but we believe with our commitment to human rights and detailed management systems that we are able to remain sensitive to and appropriately manage human rights issues.

Ian Wood

Vice President Environment and Community Relations

12 June 2009

Memorandum submitted by Associated British Foods/Primark

INTRODUCTION

Associated British Foods plc (ABF) is a diversified international food, ingredients and retail group with sales of £8.2 billion and over 96,000 employees in 44 countries.

Primark, a subsidiary company within the Associated British Foods group, is a major value retail group, operating 190 stores with 5.7 million sq ft of selling space in the high streets of the UK, Ireland and Spain.

Primark sources goods from 36 countries in three continents. We strive to maintain the highest possible standards, and we keep our policies in relation to ethical trading and ethical supply chain issues under constant review.

We welcome this opportunity to contribute to the important work the Joint Committee on Human Rights is conducting, and we look forward to giving evidence to the Committee on 30 June 2009.

WORKING WITH THE DEVELOPING WORLD

Our starting point is that trade with and in developing countries is good for those countries, its people and local economies—and that it is good for the UK economy. Indeed, at a time of rising unemployment, ABF/Primark has created 900 jobs in the UK alone for this financial year

Primark contributes to the employment of over 630,000 workers, and it is estimated that two million people are supported indirectly. Indeed, between September 2007 and September 2008 ABF/Primark invested £700 million in developing countries and our investment programme is on-going.

ABF/PRIMARK'S COMMITMENT TO ETHICAL TRADING

A principle based approach:

Primark do not own the factories it sources from and so we have in place a Code of Conduct to ensure the highest possible standards from its suppliers. We are committed to sourcing ethically and our code states the following within our supply chain:

- Employment is freely chosen.
- Freedom of association and the right to collective bargaining are respected.
- Working conditions are safe and hygienic.
- Child labour shall not be used.
- Living wages are paid.
- Working hours are not excessive.
- No discrimination is practised.
- Regular employment is provided.
- No harsh or inhumane treatment is allowed.

Ethical management:

Primark takes these responsibilities very seriously: ethical trade is a permanent agenda item at Primark Board meetings; and day-to-day management of ethical issues is driven by our UK-based ethical trade team, working closely with our growing network of regionally-based ethical trade managers.

Central to ensuring that our supply chain responsibilities are being upheld and adhered to is auditing. In recent years we have intensified the auditing process, prioritising the largest suppliers and products and countries considered to be the biggest risk. We are consolidating our supply base and doubling the number of audits carried out so that in 2008 a total of 567 were completed and in 2009 1,000 factories will be audited.

Primark also has a commitment to remediate and train directly employed personnel, as well as suppliers. In addition we are developing our network of third party auditors, and we have created a new, online database to help support our internal auditing and tracking processes.

Working with others to make a difference:

We recognise that we need to work with others to address these challenges. For example, in Bangladesh we work with a respected NGO, NUK, to focus on women's rights; with them we are working with 16 of our contract factories to improve labour standards in those facilities.

Similarly, in the Tirupur region of India we are working with SAVE, an established NGO, who are conducting an extensive three year survey on our behalf to identify at risk groups in the communities of the factories who supply to us and others in the industry.

AN INDUSTRY WIDE CHALLENGE

The challenges and issues Primark face in terms of sourcing as ethically as possible are shared problems across the industry. Indeed, more than 95% of factories supplying Primark also supply other international brands, meaning that the issues we face are the same issues that most other retailers face too.

The need for industry wide solutions to these challenges is widely accepted. In the UK, the Ethical Trading Initiative exists to promote improving standards and to challenge all parts of the industry to improve standards.

Primark attaches huge importance to its relationship with the ETI, of which we are active members, included in various working groups: ETI UK China Forum, Wages Working Group; Home Workers Group in Delhi, India; UK National Home Workers Group; Principles of Implementation Process Group, and finally we recently joined the Purchasing Practices Working Group.

Like the ETI, and many others in the industry, we recognise that the only way to successfully ensure that supply chains are ethical, and that standards continue to improve, is through collective action from all parties: retailers, suppliers, NGOs, pressure groups and governments, who have a vital role to play in terms of enforcement of standards in their jurisdictions.

Associated British Foods and Primark appreciates that these are complex and sensitive issues. We take our responsibilities very seriously. The issue of ethics in a business context is constantly evolving, and we intend to continue to play our part in addressing these issues. We look forward to discussing these important matters further on 30 June 2009.

Paul Lister

Director of Legal Services and Company Secretary
Associated British Foods plc

June 2009

Memorandum submitted by Cable & Wireless plc

INTRODUCTION

Cable & Wireless plc welcomes the opportunity to respond to the Joint Committee on Human Rights' inquiry. The application of human rights is taken seriously by Cable & Wireless, which operates through two separate operating units—Worldwide and CWI.

The evidence submitted to the Committee on 1 May 2009 specifically highlights Cable & Wireless with regard to "freedom of association and the right to bargain collectively". Therefore it is this aspect of the International Labour Organisation (ILO) Convention which this response focuses on.

The wider principles of Human Rights are outlined in the recently revised Cable & Wireless Ethics Policy which replaces the Code of Ethics and Business Principles previously referred to in the Committee's evidence. This is available at: <http://www.cw.com/corporate-responsibility/ethicspolicy>

CASE FACTS

The Communications Workers Union (CWU) applied for statutory union recognition in C&W Field Services in May 2007. C&W Field Services is part of the Cable & Wireless Worldwide operating unit. It comprised approx 360 employees representing 7% of Worldwide's total 5,000 employees.

Following the CWU's application, the Central Arbitration Committee (CAC) designated the Field Service team as an "appropriate bargaining unit" for union recognition. C&W Worldwide decided to challenge this decision due to the relatively small size of the unit and concerns about potential fragmentation.

The process was therefore delayed for a few months whilst a Judicial Review hearing reviewed whether the CAC's interpretation of an "appropriate bargaining unit" could lead to fragmentation within the Field Services team. The CAC decision was upheld and on 4 April 2008, the CAC ordered a workforce ballot as the best way to decide the most appropriate form of colleague representation.

The Burke Group (TBG) referred to in the evidence submitted to the Committee, was engaged by Cable & Wireless to advise on the statutory recognition process as it was unfamiliar to Cable & Wireless. TBG helped Cable & Wireless to implement a fact-based approach to the ballot—enabling managers to inform their teams about union recognition and what it would mean for them.

The Burke Group did not interface directly with employees in the bargaining unit but were engaged to support the process.

Cable & Wireless Worldwide had two primary concerns re the bid for union recognition. Firstly that separate collective bargaining would duplicate and undermine the good work being carried out by our Employee Consultation Forum (ECF). Secondly, that union recognition represents the view of union members only, not all employees, whereas the ECF represents all employees (whether union members or not).

Both C&W and the CWU had equal access to colleagues during the 20 day ballot process. The turnout for the vote was very high—92% of Field Services employees voted. The vote was substantially against the CWU—77% voted against the CWU being assigned the rights to negotiate their pay, working hours and holidays.

COLLECTIVE WORKPLACE REPRESENTATION

Cable & Wireless is committed to the principles of collective workplace representation. Our preference is to represent colleagues' views through our in-house consultative body—the Employee Consultation Forum (ECF) rather than through union recognition. The ECF represents everyone across the business and is driven by elected colleagues representing the views of their peers.

The business is committed to the ECF because it is direct, inclusive and built upon the principle of mutual interest whilst at the same time not conflicting with the right of individual colleagues to hold union membership. We believe this is the best way to create a positive culture in our organisation which will enable our colleagues to deliver great service to our customers.

ECF ENGAGEMENT

The Cable & Wireless ECF was formally established 15 years ago to represent the views and interests of all employees in Cable & Wireless. The company is legally required to, and wants to, inform and consult the ECF on a range of business, employment and organisational matters. Our ECF's constitution makes clear, both in letter and practice, that its activities go way beyond this statutory minimum.

The ECF gives senior managers the opportunity to get feedback and take account of ECF views before implementing business changes. It is also an important forum for ECF delegates to represent the opinions and concerns of employees.

There are 18 ECF delegates, each representing employees in a discrete constituency. The constituency map is constantly changing to ensure that ECF keeps abreast of the changes in the organisation.

The ECF has successfully challenged a number of business-driven changes resulting in a better outcome for employees, and is able to put forward its own proposals on how to make Cable & Wireless a better place to work through:

- Regular meetings with Exec/Leadership Team.
- Extraordinary meetings at either side's request.
- Key Health & Safety legal responsibility.
- Detailed participation in working groups progressing critical issues such as:
 - Pay Review principles.
 - Bonus Scheme design.
 - Transformation activities.
 - Career Paths.
 - “Straight Talking” performance management.
 - HR Policies.
- Consultation with local management.
- Direct communications with constituents, including dedicated listening groups and open site surgeries.

CONCLUSION

We respect every individual's legal right to belong to a trade union (or not) and we are committed to the principles of collective workplace representation. However our preference is for colleagues' views to be represented through our in-house consultative body—the Employee Consultation Forum—and not via union recognition as the ECF recognises the views of all employees.

The facts that the Field Services team chose overwhelmingly not to recognise the CWU as their representative body shows that the Cable & Wireless employees prefer the ECF method of representation.

The Burke Group was employed to support Cable & Wireless as the company had no previous experience of the union recognition process.

30 July 2009

Memorandum submitted by Campaign Against Arms Trade

1. The Campaign Against Arms Trade (CAAT), which was established in 1974, is working for the reduction and ultimate abolition of the international arms trade, together with progressive demilitarisation within arms-producing countries. CAAT has worked on three of the topics in your additional call for evidence—Private Military and Security Companies, export credits and bribery.

PRIVATE MILITARY AND SECURITY COMPANIES

2. While mercenaries have long been around, the growth of the “Corporate Mercenary” company, which both the industry and the Government prefer to call the Private Military and Security Company (PMSC), is a fairly recent phenomenon. The growing industry is anxious to legitimise itself, but has, nonetheless, attracted much criticism of its activities in places such as Sierra Leone and Iraq.

3. CAAT intends to respond to the Foreign and Commonwealth Office’s consultation on Promoting High Standards of Conduct by PMSCs. It is extremely disappointing that the Government is proposing to abdicate responsibility for regulating the industry to the trade association, the British Association of Private Security Companies (BAPSC). The Government appears to feel that by working with the trade association; by itself only using PMSCs with high standards; and liaising on the international level, will be enough.

4. Since the activities of PMSCs can result in killings and in human rights violations, this is totally inadequate. Not least, it fails to address the fact that overseas governments, mining companies, media organisations, aid agencies and others also have contracts with PMSCs—the UK government’s purchasing power is not a solution in these cases.

5. CAAT thinks the Government should immediately scrap its proposal of self-regulation by BAPSC and make an alternative proposal which includes the following features:

- (a) PMSCs should be prohibited from combat and banned from providing training, strategic advice and other support for combat;
- (b) all other PMSC services should be open to individual licensing requirements and open to prior parliamentary and public scrutiny. This should be complemented by an open register of PMSCs;
- (c) the PMSCs should be made responsible under UK law for any breaches of human rights or the laws of war that may be committed by their employees.

EXPORT CREDITS

6. Recently, military industry, more than any other, has benefited from Export Credits Guarantee Department (ECGD) support. Even though arms account for just 1.5% of total UK exports, in 2006–07, 42% of all export credits were for military goods and, in 2007–08, the figure was even higher, 57%. Arms manufacturer BAE Systems topped the list of companies receiving export credit guarantees.

7. This has now changed. Although on 31 March 2008 the ECGD’s total liability for BAE’s Saudi Arabia arms deals was £750 million, the company cancelled the cover with effect from 1st September 2008. BAE has kept ECGD cover for other military deals, including those with South Africa and Romania, but the removal of its Saudi business would have left the ECGD without approximately half its income. For the ECGD staff, it was fortuitous that the economic downturn has given the ECGD new roles.

8. At least in the near future, it appears that military goods will form a smaller proportion of the ECGD’s portfolio. CAAT does, however, still have concerns arising from the Industry and Exports (Financial Support) Bill and the proposed Letter of Credit Guarantee Scheme (LCGS) and is responding to the consultation on the latter. CAAT does not think there should be any ECGD cover for military projects, or other unproductive expenditure, but thinks the current proposals might make matters worse than at present.

9. Although it is, of course, understandable that the Government would wish to introduce new measures to support business during a financial crisis, it is essential that this does not mean that any anti-corruption, human rights, development or environmental checks are watered-down, or responsibility for them devolved.

10. For instance, CAAT’s understanding of the LCGS is that a master guarantee would be given to a bank, which would then be responsible for the individual customers. Notwithstanding that the Government says that the LCGS would probably be used for small amounts, so would more likely involve consumer products than military goods, infrastructure projects, etc, there is a danger that once standards are relaxed there will be more exceptions to them.

11. As the ECGD does not screen military projects for human rights, environmental or development impacts—it relies on the export licensing process, even though this has an extremely poor record of taking human rights concerns into account, takes little notice of development impacts and makes no environmental assessment—it is the attitude to anti-corruption that is most pertinent to CAAT. Here the ECGD still needs to repair the damage done to its international reputation. The October 2008 Report from the Organisation for Economic Co-operation and Development's Anti-Bribery Working Group said that the SFO had handed the ECGD evidence of misrepresentations by BAE to the ECGD in connection with the issuance of insurance, but that the ECGD had done nothing about it.

12. As with PMSCs and the BAPSC, CAAT does not think the Government should pass its responsibility for ensuring that its funds do not underwrite corruption (or, indeed, exports with socially undesirable impacts) to a third party, in this case, the banks. The progress made with anti-corruption measures and the Business Principles must not be rolled back for the sake of short-term expediency.

DRAFT BRIBERY BILL

13. Together with The Corner House, CAAT took legal action on the Government's December 2006 decision to stop the Serious Fraud Office (SFO) investigation into BAE's Al Yamamah arms deal with Saudi Arabia. In July 2008 the House of Lords overturned a High Court ruling and said that the SFO Director had acted lawfully when he ended the inquiry after threats from Saudi Arabia to the UK's national security.

14. CAAT has not made a submission to the Committee examining the draft Bribery Bill as it believes others have greater expertise to undertake the detailed legal critique required. However, CAAT believes it is vital that the loophole that allowed the House of Lords' judgment is plugged. People with friends in powerful places should not be able to use threats to evade justice, even when these threats are couched in terms of national security.

15. The new anti-bribery legislation must make it clear that investigations and prosecutions cannot be stopped on grounds of national security unless there is an imminent risk to life and all other options have been explored.

June 2009

Memorandum submitted by ClientEarth

CLIENTEARTH'S REVIEW OF ENVIRONMENTAL AND SOCIAL TRANSPARENCY UNDER THE COMPANIES ACT 2006

Relevance to the Joint Committee on Human Rights' inquiry on Business and Human Rights

INTRODUCTION

ClientEarth has been requested to submit its review of environmental and social transparency under UK law for consideration by the Joint Committee, having been mentioned by a submission in the official call for evidence in May 2009. This note seeks to give an overview of ClientEarth's review and place it in the context of the Joint Committee's inquiry.

CLIENTEARTH'S REVIEW OF THE COMPANIES ACT 2006

ClientEarth's review examines the UK legal framework that governs company annual reporting on environmental and social issues. It examines the legal provisions that set out content requirements for the reports, and also the mechanisms established by law to scrutinise the reports (audit requirements, regulatory oversight, Annual General Meetings). It identifies specific reform proposals that we consider necessary to make the current legal framework effective, and achieve the objectives of the Companies Act 2006.

The reporting requirements

Under the Companies Act 2006, UK-based companies are required to account and report annually to their shareholders. In the case of public quoted companies, the accounts and reports must also be published on the internet.

As well as the numerical accounts and accompanying notes, these annual reports must contain a "narrative" review of the business. The Companies Act 2006 brought in enhanced requirements for this narrative "business review", including explicit requirements (for "quoted" companies⁵²⁵) to report on environmental, social and community issues, "to the extent necessary for an understanding of the development, performance or position of the company's business".⁵²⁶ ClientEarth examines what we

⁵²⁵ Companies officially listed on the London Stock Exchange, on the list of an EEA State, or on a New York Stock Exchange.

⁵²⁶ Section 417(5) Companies Act 2006. This also explicitly requires them to include information about any policies of the company in relation to those matters, and the effectiveness of those policies.

consider these provisions to mean, in light of the policy objectives of the Companies Act 2006, as developed in the Company Law Review⁵²⁷ and laid out in the UK government's white paper "Company Law Reform", which led to the Companies Act 2006.

Fundamentally these requirements are about increasing and protecting company value. The key innovation of the Companies Act 2006 was to develop and implement the concept of "enlightened shareholder value", which re-interprets shareholder value (and therefore the ultimate objective of the public company) through a long-term perspective.⁵²⁸ It thereby acknowledged that shareholder value could not be equated solely with short-term financial bottom-line, and that in order to succeed or even survive in the long-term, companies need to have regard to and effectively manage its relationships with a range of stakeholders, and a range of social and environmental issues. This policy consideration shaped the new statutory duties of directors,⁵²⁹ and combined with the policy objective of "enhancing shareholder engagement and dialogue",⁵³⁰ underpins the requirements for companies to report on environmental, social or community issues, and the rest of the enhanced business review.⁵³¹

We have produced a framework through which these requirements can be understood and interpreted in comprehensive detail. We have broken down the ways in which environmental and social issues can be understood to affect a company's business, into a number of categories of "intangible assets and risks": reputation, social licence to operate, regulatory freedom, access to capital and litigation risk.

For instance, we would argue that complaints or allegations made against a company regarding complicity with human rights abuses overseas should be understood as an issue which is important in understanding the position of the company's business, in that it affects company reputation and potentially social licence to operate, both of which have real if intangible implications for the company's long-term value. As such, we would argue that such a controversy, and the way that company management is approaching and managing it, should be reported in accordance with the Companies Act 2006.

Scrutiny of company reporting

ClientEarth's review also examines the mechanisms established by law to scrutinise company annual reports and ensure their compliance with legal requirements. First, companies are required by statute to commission an independent audit of their annual accounts and reports. Second, the Financial Reporting Review Panel (FRRP)⁵³² holds statutory powers and responsibilities to monitor and ensure company compliance with legal requirements in practice. Third, the statutorily required Annual General Meeting (for public companies) provides an opportunity for shareholders to ask questions and raise any concerns about the accuracy, usefulness or compliance of the annual accounts and reports. ClientEarth's review identifies critical problems with these mechanisms as currently constituted or operating, which in our view seriously undermines the capacity for the law to achieve its policy objectives.

ClientEarth's proposals

ClientEarth's review identifies and proposes straightforward steps that the UK government and regulator should take, that in our view would enhance the current legal framework, providing much needed clarity to the existing reporting obligations established by the Companies Act 2006. Details of these specific proposals can be found in the attached document.

Our proposals are aimed at improving the efficacy of the current framework, in order to better achieve the objectives of the Companies Act 2006. We are not proposing a change to the fundamental parameters of the law, or the policy that underlies the law.

As such, our proposals relate to improving a reporting process that is fundamentally about *business* interests, not the broader public interest (other than to the extent that the generation of financial value serves the public interest) or the protection of human rights.⁵³³

⁵²⁷ An independent review of UK company law by a group of experts, practitioners and business people, set up by the Department for Trade and Industry to frame the forthcoming company law reform.

⁵²⁸ See, for example, Company Law Review Steering Group, "Modern Law for a Competitive Economy: The Strategic Framework" (February 1999), p. 37, for an overview of the concept and the alternative approach that the Review rejected (a "pluralist" approach).

⁵²⁹ See section 172 Companies Act 2006.

⁵³⁰ See Department of Trade and Industry, "Company Law Reform" (March 2005), p. 16.

⁵³¹ See section 417 Companies Act 2006.

⁵³² An operating body of the Financial Reporting Council (FRC). The FRRP is an independent regulator with statutory powers that seeks to ensure that the provision of financial information by public and large private companies complies with relevant accounting and reporting requirements.

⁵³³ Notwithstanding this focus, it is not to suggest that ClientEarth would not consider that a more expansive mandatory reporting framework for these issues, approaching with the fundamental goal of protecting human rights, rather than maximising long term company value, would not be appropriate. This could be complementary to the regime we are examining, if designed appropriately. It is not, however, a matter that we are pursuing for the time being.

Our emphasis in this work is on implementation. Provisions are set in legislation, and a regulatory framework is in place, but without supplementary measures and appropriate regulatory scrutiny, we do not consider that the law can achieve what it was intended to (ie ensure that companies report in a thoughtful and thorough way about the way that the business of their company engages with environmental, social and community issues⁵³⁴).

THE JOINT COMMITTEE'S INQUIRY ON BUSINESS AND HUMAN RIGHTS: WHERE CLIENTEARTH'S WORK FITS IN

ClientEarth considers that an enhanced company reporting regime with appropriate regulatory intervention, as identified in our review, can play an important role in facilitating and driving better corporate practice in relation to human rights.

We consider that our work falls under questions 3 and 6 of the Joint Committee's official call for evidence of March 2009: gaps in the current legal and regulatory framework for UK business which need to be addressed, and how; and (part of) how UK businesses should take into account the human rights impact of their activities, and how a culture of respect for human rights in business can be encouraged.

In terms of human rights practice, our work is not strictly seeking mandatory standards and associated regulatory structures (eg a national legal framework to articulate business' legal duties to avoid complicity in human rights violations, and an associated tribunal or ombudsman to enforce that code), nor adopting an approach that solely "encourages" the adoption of voluntary standards of practice (eg The Global Compact or other codes of practice with regard to human rights or other issues).⁵³⁵

We are advocating a system that brings certainty and accountability to companies' responses to what might be thought of as "voluntary" or "business" drivers for high standards of human rights practice. It is a mechanism that could drive "laggard" companies, those which respond slowly or poorly to the business drivers for better human rights practices.

To improve business practices, this type of reporting framework relies on the existence of other business drivers, whether arising from civil society or media scrutiny, public interest litigation, community representation and organisation or many other sources. What such a reporting framework can achieve is to enhance companies' responsiveness to these drivers, and facilitate positive investment choices or interventions.

ClientEarth's work is to an extent about advocating the "business" case for companies to progressively manage and engage with environmental and social issues (including human rights issues), and advocating long-term business thought.

We are aiming to stimulate a process of transparent corporate thought about the way that companies understand these issues in relation to their businesses. A legal reporting framework that ensures that companies discuss their relationship with human rights issues and how those issues relate to the "business" of the company can drive a progressive culture in which companies understand the business implications of their human rights practices, and seek to address associated problems. For many companies, it makes business sense for them to take human rights issues seriously, and address them in a progressive and proactive way.

Higher quality company transparency, in the terms discussed above, also helps to identify where business factors do *not* drive higher standards of practice, or the limits to which business drivers can contribute to human rights protection. This type of transparency can therefore assist dynamic and effective policy decision-making in a broader context, as policy-makers or regulators have easier access to more detailed, accurate and balanced information about where and to what extent "voluntary" or business-driven approaches to human rights protection (or other social or environmental issues) can work, and where they may not be effective.

Transparency on these questions also allows society at large a clearer understanding of the way that companies relate to these issues, aiding a process of demystification in an area (public perception of companies in relation to environmental and social issues) where balanced perspective and clarity of motive and substance are sorely lacking.

There is great potential for a better alignment between company practice, societal perceptions and expectations, the long-term interests of companies, and high standards of human rights protection. An effective legal regime for company transparency on these matters can facilitate and drive business' adaptation to these challenges, and changing business and regulatory environments. Therefore in ClientEarth's view it is an important component of an overall solution to the governance gap in the area of business and human rights.

⁵³⁴ The review contains further detail on the nature of the intentions underlying the law.

⁵³⁵ This is not to suggest that ClientEarth does not support either of these approaches as part of an overall, coordinated solution to the governance gap in business and human rights.

Memorandum submitted by The Danish Institute of Human Rights, Human Rights & Business Project

INTRODUCTION

1. The Danish Institute for Human Rights (DIHR, <http://humanrights.dk/>) is an independent, national human rights institution modeled in accordance with the UN Paris Principles. The Institute, which was established by statute in 2002, pursues a legislative mandate originally vested in the Danish Centre for Human Rights in 1987. This encompasses research, education and the implementation of national and international human rights programmes.

2. Within DIHR, the Human Rights and Business Project (<http://humanrightsbusiness.org/>), which was established in 1999, with the support of the Danish government (DANIDA), the Confederation of Danish Industries (DI), and the Danish Industrialisation Fund for Developing Countries (IFU), is a non-profit entity dedicated to promoting business' compliance with human rights. To this end, the Human Rights and Business Project undertakes consultancy projects with corporate partners, develops tools and methodologies to help companies implement human rights, engages in capacity building partnership projects with a wide range of public and civil society actors internationally, and conducts strategic research on concepts of relevance to the field.

STRATEGIC ADVICE TO BUSINESS ON HUMAN RIGHTS

3. As regards our consultancy work, this primarily relates to international corporations. The Human Rights and Business Project is engaged by over a dozen of the Fortune 500 companies, and our approaches and tools have been applied in more than 200 additional companies, across the extractive, apparel, agriculture, pharmaceutical and financial sectors. The Human Rights and Business Project provides advice to a number of UK-based companies, such as Shell International. The range of services performed on a consultancy basis includes policy analysis, for instance, to evaluate internal policies and operating procedures for human rights compliance, site visits, country risk analysis and personnel training, for example, focusing on specific issues or functions (such as security).

TOOLS AND METHODOLOGIES FOR BUSINESS AND HUMAN RIGHTS

4. A key resource for our consultancy work is the Human Rights Compliance Assessment (HRCA, see further, <https://hrca.humanrightsbusiness.org/>). This tool, which takes the form of an online database, was developed over a six-year period in cooperation with 70 companies, 50 NGOs, 35 human rights experts and several major employer organisations and trade unions, across 14 European countries. The development process was engineered to ensure that the standards and indicators produced accurately embodied the relevant human rights law standards while also reflecting on-the-ground business realities. The HRCA is the most comprehensive and in-depth tool available for companies to check their performance on human rights. Using the HRCA, corporate managers or compliance officers can scrutinise company operations and policies, and benchmark company performance against a set of indicators based on more than 80 international human rights conventions and covering all internationally-recognised human rights. Currently over 500 businesses and other organizations in 59 countries around the world are currently registered users of one or more modules of the HRCA. Versions of the HRCA tailored to specific countries (eg South Africa, China), industry sectors, and human rights issues (eg company dormitories) have been developed, often in collaboration with local civil society and business partners. A number of further such adaptations are in development.

5. Currently the HRCA is being updated and reformatted, to incorporate feedback from company and institutional users worldwide, as well as developments in the business and human rights field since its inception. To be launched in August 2009, HRCA 2.0 will include facilities for individualization to each company user, according to industrial sector and geographical location of its operations, country risk matching (see further below) an incorporation of the tool into company IT platforms.

6. In addition, the Human Rights and Business Project's HRCA *Quick Check* (available at http://humanrightsbusiness.org/?f=compliance_assessment) is a free of charge, condensed version of the full HRCA tool. The result of collaboration with a group of development finance institutes, the Quick Check includes approximately 10% of the questions contained in the HRCA database. Using it, companies can generate an overview of human rights risks across their operations.

7. A further project currently underway, in partnership with the Confederation of Danish Industries (DI) and the Danish Industrialisation Fund for Developing Countries (IFU), is the adaptation of the HRCA to generate a self-assessment tool for businesses with regard to the United Nations Global Compact's 10 Principles. When complete, this will result in a further free of charge tool for business, which will be made available via the UN Global Compact website.

8. Country Risk Assessments are another type of service provided to business by the Human Rights and Business Project. One insight acquired through 10 years' experience of working directly with the private sector is that understanding human rights risks in the context of the local operating environment is a key step in ensuring that company activities are compatible with the interests and needs of all local groups. Business actors' implication in human rights abuses can result from inadequate or ineffective legal regimes, weak standards or practices locally. The Human Rights and Business Project's Country Risk Assessments thus provide country-, region—and right-specific human rights information, with a focus on those risks and

issues of greatest relevance to company operations. Based on the Universal Declaration of Human Rights, constitutional and other provisions of national law, the Country Risk Assessment examines the likelihood of violations of each enumerated human right. Every right is rated high, medium or low risk according to the incidence and severity of violations reported and their likely proximity to companies. This evaluation is accompanied by due diligence recommendations for company personnel on how to prevent their own involvement in human rights abuses as well as how to mitigate the risk of complicity in human rights violations by third parties. High-risk issues—such as child labour, forced labour, discrimination or poor working conditions—are compiled into detailed Focal Areas to assist companies in focusing their management efforts.

CAPACITY BUILDING ON BUSINESS AND HUMAN RIGHTS

9. The Human Rights and Business Project's international capacity building work has the objective of improving compliance with human rights standards of companies operating in developing countries, by promoting the capacity of local National Human Rights Institutions (NHRIs) and NGOs to address human rights and business issues in the local context, while also strengthening cooperation and dialogue between local human rights groups and business leaders concerning corporate responsibility and human rights. Capacity building initiatives thus follow a partnership model. Local partners for collaboration and cooperation are first identified from amongst local human rights groups, business leaders or confederations, trade unions, universities and, if possible, host state governments. This is followed by training and capacity building of a local "focal point" for business and human rights issues, and awareness-raising through roundtables, seminars and training. A locally-adapted Human Rights Compliance Assessment may then be produced, including identification of high-risk human rights issues, new questions and indicators based on these risks, and contextualization with respect to relevant national and local legislative provisions. Locally-tailored versions of the HRCA tool can then be run through a pilot implementation process, where companies in cooperation with human rights NGOs test the tool in their operations, with feedback incorporated into a final version.

NHRIS AND THE BUSINESS AND HUMAN RIGHTS AGENDA

10. Our involvement in the formation of an International Coordinating Committee of National Human Rights Institutions' Working Group on Business and Human Rights has recently added to a further strand to our capacity building work. In July 2008, the Danish Institute for Human Rights hosted in Copenhagen a Roundtable meeting of National Human Rights Institutions on Business and Human Rights. Fifteen National Human Rights Institutions, in addition to DIHR, were represented at the Roundtable (Canada, Kenya, Luxembourg, Malawi, Malaysia, Mongolia, Nepal, Niger, Norway, the Philippines, South Africa, Tanzania, Togo, Uganda and Venezuela).

11. The Roundtable concluded that National Human Rights Institutions are uniquely placed to address the challenge of securing business' compliance with human rights in the context of global economic integration. Accordingly, it was agreed that National Human Rights Institutions ought to increase their focus on the human rights impacts of business operations as an element of their mandates, in concurrence with views stated by the United Nations' Secretary General's Special Representative on Business and Human Rights in his report submitted in July 2008 to the United Nations Human Rights Council. In its concluding Report (http://www.humanrightsbusiness.org/files/320569722/file/final_nhri_hrb_roundtable_report.pdf), the Roundtable recommended the establishment of an International Co-ordinating Committee (ICC) Working Group on Business and Human Rights. It also outlined current and potential future activities for NHRIs, first, in Strengthening Government Protection of Human Rights in the Corporate Sector and second, in Promoting Human Rights in the Corporate Sector.

12. That recommendation was taken up by the ICC during 2008, leading to the formation of a Steering Committee, comprising four NHRIs, to develop proposals for the formation of an ICC Working Group on Business and Human Rights. The Danish Institute for Human Rights was Co-ordinator of the Steering Committee, which developed proposals for the constitution of an ICC Working Group on Human Rights and its programme of work. On the basis of these proposals, the ICC decided by consensus at its meeting in March 2009, to establish a Business and Human Rights Working Group.

13. The ICC's four world regions have now each selected two of their member NHRIs to participate in the Business and Human Rights Working Group, so that the following will be represented: Denmark, Jordan, Kenya, Nicaragua, Scotland, South Korea, Togo and Venezuela. Canada, *ex officio* as the current Chair of the ICC, will also participate. The Working Group's first meeting will be held in Copenhagen in August 2009, to be hosted by DIHR. It is anticipated that, during this first meeting, a strategy and programme of work will be devised for the ICC Working Group on Business and Human Rights.

14. Discussions at that meeting will be informed by the Report of the 2008 Roundtable of NHRIs on Business and Human Rights, already mentioned above, as well as the report of the Side-Event to the 11th Session of the Human Rights Council, held on 5 June 2009 and organized by the ICC and the UN Office of the High Commissioner for Human Rights, "Engaging NHRIs in securing the promotion and protection of human rights in business". Comments made at this event, concerning the role of NHRIs regarding business and human rights and challenges for NHRIs in fulfilling this mandate, by Ms. Claire Methven O'Brien of the Human Rights and Business Project of the Danish Institute for Human Rights, by Lene

Wenland of OHCHR, Commissioner Florence Simbiri-Jaoko of the Kenyan National Human Rights Commission, Ms. Myriam Montrat of the Canadian Human Rights Commission and Mr. Chris Avery, of the Business and Human Rights Resource Centre, are available at www.business-humanrights.org. These presentations highlight the ongoing work by NHRIs across a number of jurisdictions, in both the global north and south, to promote compliance with human rights by corporate actors. This work spans, for example, efforts to address emergent issues arising from the growth in multi-national enterprises, and their activities, for example in Export Processing Zones (as in Kenya), as well as NHRIs historically well-established role in adjudicating or providing a forum for alternative dispute resolution, for example, in relation to claims of discrimination in employment.

STRATEGIC RESEARCH

15. A fourth and final limb of the Human Rights and Business Project's work on business and human rights contributes to the development of the field's conceptual framework through strategic research. Responding to the widely accepted need for greater clarity in relation to the definition of the scope and content of companies' human rights obligations to various stakeholders, research findings are communicated through a range of publications. Some of these, such as *The Arc of Human Rights Priorities: A new model for Managing Business Risk*, produced in conjunction with the UN Global Compact, and available at http://www.humanrightsbusiness.org/files/11111/file/arc_of_human_rights_priorities_road_testing_version__1_june.pdf, and our series of *Due Diligence Maps for Business* (available at <http://humanrightsbusiness.org/?f=publications>), are created specifically for companies as guides to help them identify and address their responsibilities for human rights accurately and effectively. Other publications contribute to enhancing understanding of the business and human rights field more broadly, for instance, through in-depth consideration of specific issues raised in individual national contexts, such as the need to establish company level workers' representative mechanisms in jurisdictions where the right to freedom of association and collective bargaining may be curtailed by national law.

CONCLUSION

16. The Human Rights and Business Project of the Danish Institute for Human Rights welcomes the Joint Committee's Inquiry on Business and Human Rights. While activities conducted under the mandate of the United Nations Special Representative on Business and Human Rights are making an important contribution to debate at the international level concerning the definition of an appropriate conceptual and legal framework to address business' now undoubted responsibilities to comply with human rights standards, real and concrete progress demands that this is now supported by strong engagement on the part of the executive, legislative and judicial branches of individual states—both North and South. Furthermore, as indicated in this submission, National Human Rights Institutions also have a key role to play, not only in their traditional role as a monitor of state action (though this remains important, and should be interpreted as extending to issues relevant to the business and human rights agenda) but also through programmes of work focused directly on business actors, and the human rights risks which they inevitably encounter domestically and, in the context of today's trans-nationally integrated economic system, also extraterritorially.

June 2009

Memorandum submitted by the Equality and Human Rights Commission

1. INTRODUCTION

The Commission was established on 1 October 2007 under the Equality Act 2006. It promotes equality and human rights for all, works to eliminate discrimination, reduce inequality, protect human rights and build good relations, and to ensure that everyone is treated with dignity and respect and has a fair chance to participate in society.

The new Commission brings together the work of the three previous equality commissions, the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC). The Commission's remit now covers race, disability, gender, gender reassignment, age, sexual orientation, religion or belief and human rights.⁵³⁶

In relation to human rights, the Commission has duties to promote and protect human rights, and encourage compliance with the Human Rights Act (HRA) and other human rights obligations under international treaties.⁵³⁷ The Commission does not currently have the power to give legal assistance to individuals claiming a breach of the HRA unless there is also a claim of a breach of equality legislation. However, it can take judicial review proceedings in its own name in relation to alleged breaches of the Human

⁵³⁶ It is to be noted that in relation to human rights issues in Scotland, the Commission has jurisdiction over matters reserved to the Westminster Parliament. In relation to matters devolved to the Scottish Parliament the Scottish Human Rights Commission has jurisdiction although the two Commissions can co-operate and do consult each other on human rights issues in Scotland.

⁵³⁷ Section 9 of the Equality Act 2006.

Rights Act and it can intervene in proceedings domestically and in the European Court of Human Rights to provide independent submissions to the courts on claims relating to the HRA and European Convention of Human Rights.

In addition, one of the Commission's key roles is to provide authoritative advice and guidance across its remit, including to business.

The Commission welcomes the opportunity to provide evidence on the issue of business and human rights. The private sector is very important for the Commission's human rights and equalities agenda in a number of key respects: firstly in relation to the issue of the circumstances in which private bodies are carrying out public functions and therefore subject to human rights obligations under the HRA; secondly in relation to procurement as it is a key function covered by the Equality Duties; and thirdly in relation to the employment policies and practices of private bodies as employers which links to requirements on employers not to discriminate in employment.

The Commission also welcomes the United Nations report proposing a framework for businesses and human rights which contain three core principles: the State duty to protect against human rights violations by businesses, corporate responsibility to respect human rights, and the need for individuals to have effective access to remedies for breaches of their human rights by businesses.⁵³⁸ The Commission believes this is a useful conceptual basis for work relating to businesses, including transnational businesses. We note however that the focus of the Commission's work to date has been on the activities of businesses within the jurisdiction of Britain, not overseas given that the jurisdiction of the Commission is limited to Britain and the need to be strategic with our powers and resources.

Our response addresses several questions asked by the Committee, in particular questions 3, 5, 6 and 7.

2. THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

Question 3: *Are there any gaps in the current legal and regulatory framework for UK business which need to be addressed, and if so how?*

This question relates to the fundamental issue under section 6(3) of the HRA as to the circumstances in which a private body is considered to be carrying out public functions, and therefore, the extent of human rights protection for individuals in the UK. The question also links to question 7 in relation to effective access to remedies for breaches of human rights by UK businesses.

The Commission has done a considerable amount of work on this issue with interventions in relevant human rights claims and policy work to influence changes in legislation. The Commission agrees generally with the conclusions of the JCHR's report on the meaning of a public authority under the HRA.⁵³⁹ In particular the Commission has been concerned with the narrow interpretation by the courts on the issue and the need to address the issue comprehensively rather than merely on a case by case basis. This is of even greater significance given the increasing levels of procurement by public authorities and the potential gaps in human rights protection.

Private Care Homes

The House of Lords in *YL v Birmingham City Council* [2007] UKHL considered the issue of the circumstances in which a private care homes will be considered to be carrying out public functions.

The Commission believes that the majority took an overly narrow approach in distinguishing between the local authorities arranging of the care of person in private care homes (public function) and the actual provision of that care by private care homes (private function).⁵⁴⁰ This Given the outcome of the judgment, the Commission subsequently undertook substantial work using its powers under section 11 of the Equality Act 2006 to call on and advise the government on introducing legislation to ensure that private care homes would be deemed to be carrying out public functions for the purposes of the HRA. The Commission welcomed the legislative amendment which became section 145 of the Health and Social Care Act 2008 to provide that private care homes providing care under public arrangement are deemed to be caring out public functions for the purposes of section 6 of the HRA.

Although this amendment was very welcome, it falls short of bringing all publicly arranged care within the scope of the Human Rights Act. We would like to draw attention to three further categories of care that is publicly arranged or authorised which were omitted from the list of "relevant statutory provisions" under Section 145 of the 2008 Act:

⁵³⁸ Protect, Respect and Remedy: a Framework for Business and Human Rights, Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie 7 April 2008, A/HRC/8/5

⁵³⁹ "The meaning of a public authority under the Human Rights Act", JCHR, Ninth report of session 2006–07, 19 March 2007

⁵⁴⁰ The Commission considers the approach of the minority preferable. For example Baroness Hale stated: "...there is no doubt that the state has taken the responsibility of securing that the assessed community care needs of the people to whom section 21 ...applies are met...it is artificial and legalistic to draw a distinction between meeting those needs and the task of assessing and arranging them, when the State has assumed responsibility for seeing that both are done." (para 66)

- Section 117 Mental Health Act 1983 places a duty on health and social services to provide aftercare services to certain patients who have been detained under the Act. Aftercare services must be provided free of charge and can include residential accommodation as part of the package—sometimes provided by the independent sector.
- Sections 4A and 4B Mental Capacity Act 2005, together with relevant schedules, establish safeguards for people lacking mental capacity who are deprived of their liberty without their consent. Deprivation will only be lawful if it is formally authorised. Many people affected are self-funding residents in independent care homes.
- NHS continuing healthcare is a package of long-term care funded by the NHS to meet someone’s medical needs, which is often provided by an independent care home. The legal authority for this arrangement is found in NHS Directions, which are binding instructions issued by the Secretary of State using powers under primary legislation.

The Health Bill, currently going through Parliament, presents a potential opportunity to amend Section 145 Health and Social Care Act 1998 to extend the meaning of “public function” under Section 6(3) (b) Human Rights Act to these types of care that are publicly arranged or authorised. The Commission will consider whether to support an amendment to include these areas as being public functions.

In relation to all other persons that are in private care homes but not under public arrangement, the Commission recognises that such persons are not currently protected under the HRA. Our approach to that category of persons is to focus on the role of the regulator (the newly created Care Quality Commission) given that they have inspection responsibilities for all care homes. Under section 4(1)(d) of the Health and Social Care Act the CQC must have due regard in performing its functions to the need to protect the human rights of those using its health and social care services. The Commission has submitted to the CQC the importance of this provision in monitoring for all private care homes (and other health and social care providers) compliance with human rights obligations. The Commission will work with the CQC to develop this role.

Registered Social Landlords

The Commission also recently intervened in the Court of Appeal claim relating to whether or not RSLs are carrying out public functions for the purposes of the HRA in the allocation management and termination of social housing.⁵⁴¹ This is an important issue for the Commission as social housing links to both issues under the article 8 right to private life and the right to housing under article 11(1) of the UN Convention on Economic Social and Cultural Rights. The Commission also submitted applications for anti-social behaviour orders and parenting orders by RSLs, and the operation of contracted out homelessness functions by local authorities should also all be considered to public functions for the purpose of the HRA.

On 18 June 2009 the Court of Appeal held (by a 2 to 1 majority) that the RSL was exercising public functions in the allocation, management and termination of social housing.⁵⁴² This decision will have important implications for all RSLs with similar arrangements to the London and Quadrant Housing Trust, confirming the need for a “broad and generous” application of section 6(3) of the HRA. As a result RSLs will need to take a human rights approach to the provision of social housing, considering possible breaches of human rights particularly in the termination of social housing.

The need for a comprehensive solution

The Commission agrees with the JCHR report from 2007 that case law on the issue is in itself unsatisfactory without a more comprehensive approach. The Commission is concerned that despite the government’s commitment during the passage of the amendment to the Health and Social Care Bill to consulting the public on the effect of section 6(3) of the HRA generally, to date no such consultation has been produced.

The Commission has considered this issue in the context of the submission to the government on the need for an Equality Guarantee in the Equality Bill in which we included in our draft clause a list of relevant factors in determining whether a private body was carrying out public functions.

The Commission has also had sight of the Private Members Bill tabled by Andrew Dismore MP regarding the meaning of public functions under the HRA.⁵⁴³ We agree that it would be better to have an interpretative statute regarding the effect of section 6 of the HRA rather than an amendment to the HRA itself which would have concerning constitutional implications. We also agree with Clause 1 of the Private Members Bill regarding the factors to be taken into account when determining whether functions are public. Such an interpretative statute would help to provide greater clarity for businesses and the general public as to the factors that need to be weighed up in assessing the facts in any particular situation.

⁵⁴¹ *Weaver v London and Quadrant Housing Trust* [2009]

⁵⁴² The Court also held unanimously and confirmed that where RSLs are exercising powers relating to ASBOs, parenting orders and similar powers they would be considered to be exercising public function under the HRA.

⁵⁴³ Human Rights Act 1998 (Meaning of Public Function) Bill, 18 December 2007.

The provisions in the Equality Duties

The Commission has also been considering the implications of section 6(3)(b) of the HRA on the Gender and Disability General Equality Duties and the General Equality Duty proposed under Clauses 143 and 144 of the Equality Bill. The Equality Duties confirm that private bodies exercising public functions will be subject to the General Equality Duties and use a similar definition as under the HRA. Clause 144(5) states in particular that a public function is a function “that is a function of a public nature for the purposes of the Human Rights Act 1998”.

However the Commission is considering whether this provision should not be restricted to its meaning under the HRA and whether or not it should seek an amendment to the Bill. This is because the nature of the Equality Duty is different from the nature of section 6 of the HRA. The Equality Duty is intended to mainstream the promotion of equality in all the functions of public authorities whereas the HRA provides that public authorities and those exercising public functions must not breach human rights. In our view the approach under the General Equality Duty may need to reflect the broader aims of the duty.

Question 5: What role, if any, should be played by individual Government departments or the National Human Rights Institutions of the UK (in providing guidance on their human rights obligations)?

The Commission recognises that it has a vital role to play as a National Human Rights Institution to provide guidance on the effect of the Human Rights Act, including where private bodies may be exercising public functions and therefore have human rights obligations. This will be vital to ensure that all such organisations adopt a human rights based approach to their decision making, strategies and policies and practices.

The Commission launched its report of its Human Rights Inquiry on 15 June 2009.⁵⁴⁴ The inquiry had two main terms of reference:

- to assess progress towards the effectiveness and enjoyment of a culture of respect for human rights in Great Britain;
- to consider how the current human rights framework might best be developed and used to realise the vision of a society built on fairness and respect, confident in all aspects of its diversity.

One of the key findings of the inquiry was that there was a need for accessible and relevant guidance and advice available about human rights. The Commission indicated in its report that it has a vital leadership role regarding raising awareness of human rights and that it will provide guidance (such as on its website) on human rights and the HRA. The Commission will consider as part of its human rights strategy following up the inquiry the best means by which the Commission could provide guidance relevant to private bodies that may or do exercise public functions such as private detention and deportation facilities, private care homes and Registered Social Landlords.

3. THE RESPONSIBILITY OF BUSINESSES TO RESPECT HUMAN RIGHTS

Question 6: How should UK businesses take into account the human rights impact of their activities? How can a culture of respect for human rights in businesses be encouraged?

There are three issues that the Commission wishes to highlight relating to encouraging businesses to respect human rights: firstly the role of procurement and an equality standard being used as a lever to promote equality in the context of the Equality Duties; secondly a requirement in the Equality Bill for large private bodies to report on the gender pay gap; and thirdly the proposal by the Commission that the government consult on introducing a human rights duty similar to the Equality Duties.

3.1 *The role of procurement and an equality standard*

Procurement

The Equality Bill proposes a new single Equality Duty on public authorities, which consolidates the three existing public duties on race, disability and gender and additionally covers age, sexual orientation, religion or belief, pregnancy and maternity and gender-reassignment. The Commission strongly supports the extension of the duty to the other grounds.

Procurement is a key function of public authorities. Under the existing equality duties public authorities are required to have due regard to the need to eliminate discrimination, harassment, and promote equality of opportunity in carrying out all their functions, including procurement.

The public sector spends over £175 billion per year on contracts with private sector organisations for goods, works and services. This is around one-third of total public expenditure and 13% of GDP. However, many public sector organisations have told us that they are not sure how to apply equality to procurement decisions—or whether they are even legally permitted to do so. For example, in 2005, only 40% of local authorities in England specifically addressed equality and diversity in their procurement strategies by using

⁵⁴⁴ <http://www.equalityhumanrights.com/fairer-britain/human-rights/human-rights-inquiry/>.

examples or targets.⁵⁴⁵ This evidence reflects a lack of clarity in the Equality Duties as to how and when procurement can be used to advance equality. Non-statutory guidance on the use of procurement to advance equality has not been particularly effective.

Under Clause 149 of the Equality Bill, the connection between the use of procurement and the new single Equality Duty is made more explicit. It contains a new power to impose specific duties on public authorities in relation to public procurement functions under the EU Public Sector Directive 2004/18/EC. The Commission supports this new power to impose specific duties relating to procurement. The Government Equalities Office (GEO) is currently consulting on the content of the specific duties on procurement.⁵⁴⁶ Among other things, it is proposing that public authorities be required to:

- set out how they will ensure that equality factors are considered as part of their public procurement activities when setting out their equality objectives;
- consider the use of equality-related award criteria where they relate to the subject matter of the contract and are proportionate;
- consider incorporating equality-related contract conditions where they relate to the performance of the contract and are proportionate.

Business is broadly supportive of using public procurement to promote equality. For example, the CBI have stated that employers believe public procurement is a highly effective lever for increasing diversity and share the position of the National Employment Panel that there must be more systematic use of public purchasing power to achieve this aim. However, small business representatives have expressed concerns that the practice adversely affects small and medium-sized enterprises (SMEs).

The Commission believes that a common and streamlined approach to equality in public procurement would provide greater clarity and actually help to reduce burdens on business, especially SMEs.

National equality standard

In its response to the Discrimination Law Review, the Government announced that it would develop an equality “kite mark” for business which would allow companies to demonstrate that they are equal opportunity employers. The Commission is currently working with the Government to explore the feasibility of creating such a standard.

It has been suggested that an equality standard could eventually be used to streamline the procurement process, for example by allowing accredited companies to bypass the Pre-qualification Questionnaire (PQQ) stage. Research has shown that existing standards tied to procurement are particularly popular with small businesses. However, in order to maximise its effectiveness, the new standard would have to be recognised by all public authorities. The GEO is currently consulting on the desirability of a new equality standard linked to procurement in its consultation on the specific duties under the Equality Bill.

3.2 Reporting on the gender pay gap

Discrimination against women on grounds of pay in both the public and private sectors remains one of the key areas of the discrimination faced by women in society. This also an issue that relates to the right to work and non-discrimination in the enjoyment of that right under the UN Convention on Economic Social and Cultural Rights. The Commission submitted a detailed report to the UN Committee on Economic Social and Cultural Rights on the UK government’s performance under the Convention in April 2009. The report highlighted the continuing significant pay gap for women particularly in the private sector, such as the finance industry. The Commission is also conducting a formal inquiry into the pay gap in the finance industry and what solutions are necessary.

There is currently no obligation on the private sector to report equality and employment data, which makes monitoring progress towards equality goals very difficult. Often companies choose not to monitor equality issues in order to avoid perceived risks associated with the holding of such data. Where information is held, it may be unpublished or inaccessible.

Under Clause 73 of the Equality Bill there is a new power to permitting the government to introduce regulations to require companies with 250 or more employees to publish information about the differences in pay between their male and female employees. The Commission supports this provision as an important tool to force businesses to eliminate pay inequalities. The Government’s aim is for employers regularly to publish information on a voluntary basis. If sufficient progress on reporting has not been made over the next four years it will use the power from 2013. It has asked the Commission to develop a set of metrics for reporting on the gender pay gap, and over the summer of 2009 the Commission will be consulting with stakeholders—including business—on the most appropriate way to do this.

⁵⁴⁵ Department for Communities and Local Government, *The National Procurement Strategy for Local Government Two Years On*, August 2006.

⁵⁴⁶ See Government Equalities Office, *Equality Bill: Making it work—Policy proposals for specific duties: A consultation*, June 2009.

3.3 *A human rights duty*

In the Human Rights Inquiry a number of witnesses recommended that there should be a new statutory duty to promote human rights similar to the Equality Duties to create an integrated approach to equality and human rights.⁶⁶⁴ If such a duty was created and similar to the Equality Duties it could also provide for private bodies carrying out public functions to be subject to the duty and help to mainstream the consideration of human rights obligations by private bodies exercising public functions. The Commission recommended that the government should consult as to whether or not a statutory duty should be developed.

4. EFFECTIVE ACCESS TO REMEDIES

Question 7: Does the existing legal regulatory and voluntary framework in the UK provide adequate opportunity to seek an appropriate remedy for individuals who allege breaches of human rights as a result of businesses?

The existing framework under the Human Rights Act is that a person will only have a judicial remedy against a business where the business is exercising public functions. This has proved a complicated legal issue.

The JCHR asks what changes may be needed regarding judicial and non-judicial remedies or mechanisms to achieve those remedies. Witnesses to the Human Rights Inquiry gave evidence of the lack of capacity in the advice giving sectors making it difficult to determine whether a human rights violation had occurred and regretted the fact that the Commission has no power to assist members of the public wishing to take claims based solely on human rights. The Commission has recommended in the report that the government should review its decision not to give the Commission the power to assist individuals in strategic cases. It also recommended that the Commission should be empowered to provide conciliation or mediation services.

June 2009

Memorandum submitted by G4S

G4S is pleased to respond to the Joint Committee on Human Rights' invitation to businesses who have engaged directly with human rights issues to comment on their impact on the private sector.

INTRODUCTION TO G4S

G4S was formed in 2004 after the merger of Group 4 and Securicor—two of the dominant and well-regarded players in the traditional security industry. Since then, G4S has grown to become the leading international security solutions group and second largest multinational employer in the world, with almost 600,000 employees helping businesses and governments in around 115 countries “secure their world”.

G4S specialises in assessing current and future risks and developing secure solutions to minimise their impact. Its employees protect the safety and security of their customers, colleagues and the general public, often playing critical roles in society, for example:

- Protecting national infrastructure, including prisons, airports and cash circulation.
- Providing overseas government logistics and close-protection in hostile environments.
- Contributing expertise in fields ranging from event security to youth justice.

GOOD CORPORATE CITIZENSHIP

G4S recognises its ethical responsibility towards its employees, customers, investors, local communities and other stakeholders. As a major global organisation the group plays a significant role in the lives of thousands of people—both directly through employment and our relationships with customer and suppliers, and indirectly through our involvement in the communities in which our employees live and work. In fact, at the heart of our business strategy is the safety and security of our customers, their assets and the general public, so in our everyday business we are constantly contributing to a safer society.

We have an extensive business ethics policy which provides the backbone to our culture and practice in this area, describing the group's core standards in relation to different audiences. The policy is reviewed regularly to ensure it continues to reflect our business model and areas of operation. To demonstrate its importance within G4S, each year the CEO asks all senior managers and executives around the group to reaffirm their personal commitment to this key policy. All new managers also receive the business ethics policy and are made aware of its importance to the group, signing up to its principles on an annual basis.

OUR EMPLOYEES

The foundation of our code for good corporate citizenship lies with our employees—we are well aware that the organisation’s future success is being driven by the performance of our employees, and for this reason we pay particular attention to their rights and our responsibilities to them.

In our Business Ethics Policy we recognise the need to optimise individual and business performance through employing the best people at all levels and creating an environment in which they want to and are able to contribute fully to the Group’s success. This principle is further substantiated by specific commitments to comply with employers’ obligations under labour and social security laws and support the ILO Declaration on Fundamental Principles and Rights at Work.

Building on these core commitments, the group has also established a range of internal standards which set out the good employment practice which all G4S businesses are expected to follow to enable us to acquire, engage and develop our employees for our mutual benefit.

Our specific commitments and policies in a number of areas where human rights impact on our employees and the business are set out below.

Freedom of association & the right to collective bargaining

Our relations with our employees and their representatives are extremely important to us and we are fundamentally committed to constructive social dialogue, believing that long-term partnerships with employees and their representatives, including trade unions, can help us raise standards wherever we operate.

In 2008 we agreed an Ethical Employment Partnership with UNI, the global union federation, which will drive improvements in employment standards across the global security industry. The agreement sets out particular terms which help provide practical support to facilitate freedom of association and offers specific commitments on recognition of legitimate and representative unions. As the first UK business to enter into such an agreement, we are proud to be setting a new global benchmark for good labour relations.

In addition to this ground-breaking agreement, our principled support for genuine, active social dialogue is backed up in practice, and thus:

- We have over 200 formal union recognition agreements around the world and 1 in four of our employees are union members
- More than a quarter of our global workforce is covered by the terms of a union collective agreement, rising to over 80% in Europe
- We have constructive relationships around the world, many going back decades—for example, in the UK our relationship with the GMB, one of the UK’s largest unions, has continued for more than 40 years

Equal opportunities & diversity

Our employees deliver the service that our customers rely on to keep them and their assets safe and secure. Our success will depend on our ability to attract and retain talented people so that we have the resources to support the challenges of our diverse customers and our continued business growth, and we therefore strive for diversity in our workforce to draw on all available talents. We value all our employees for their contribution to our business and their opportunities for advancement are equal and not influenced by considerations other than their performance, ability and aptitude.

The size and shape of G4S is constantly changing as the business continues to grow, entering new countries and developing new service lines. Five years ago we employed 365,000 people—now we have more than 585,000 employees in more than 110 countries. One in three of our employees work in North Africa and the Middle East, one in six in Africa and one in eleven in Latin America. Our employees speak over 50 different national languages. Diversity is therefore already a source of strength for the group and one that gives us a key competitive advantage. With such a diverse workforce, we are better placed to understand the needs of our customers and identify opportunities for innovation and improvement.

Going forward, we are building an inclusive working environment in which the best people can thrive and reach their full potential regardless of race, sex, religion or beliefs, disability, marital or civil partnership status, age, sexual orientation, gender identity or expression. Our policies and practices are created to ensure that local legislation is adhered to and, in the event that none exists, provide minimum standards to which all businesses must comply.

However, there are many examples of G4S businesses going well beyond these core requirements, for example, in South Africa, where legislation promotes diversity and inclusion through skills development and employment equity, we demonstrate and measure our commitment to Black Economic Empowerment Codes in a number of ways. For example, at Mangaung Correctional Centre, the percentage procurement spend on black enterprises, the investment in skills development and the levels of black management control are all monitored closely to help ensure the workforce is truly representative of the local community and

small businesses are well supported. The commitment of the management team to diversity and to developing an inclusive culture at Mangaung has paid off in a number of ways. 83% of all employees are black and 80% of all promotions are filled by internal candidates

Health & safety

G4S places the highest priority on promoting the health and safety of employees, always considering our employees' physical and mental wellbeing, especially in harsh or hostile environments.

We are in the business of managing risk, whether that is people, property or possessions. The business is challenging and, in some parts of the world, dangerous. We work in hostile environments, clearing mines, providing armed escorts for convoys and dealing with the fallout from terrorist attacks. In the cash solutions markets we are often a target for attack ourselves. We fully recognise the dangers these challenges present and work extremely hard to ensure that our employees have appropriate training, equipment and back up support to enable them to remove or significantly reduce the risks they encounter at work. We also continue to work with the police authorities, trade unions and other security companies to bring those who have caused injury or harm to our people to justice and to do all we can to protect our people whilst carrying out their work.

As evidence of our track record in this area, last year six G4S UK businesses were presented with the ultimate award for their impeccable health and safety standards. Two prison facilities (HMP Wolds & HMP Altcourse), Court Services, GCHQ, Manchester Magistrates Court and Nuffield Orthopaedic Centre were recognised with Swords of Honour from the British Safety Council. This means these businesses are among the top 40 performing companies in the world to have achieved this accolade in 2008.

Employee welfare

As a good employer, the welfare of employees is of paramount importance to G4S and we aim to ensure that employees are supported through difficult times. To help provide this support, the G4S Employees' Trust, is able to provide financial assistance, at the discretion of the fund's trustees, to employees and former employees in need of urgent financial assistance.

- In Indonesia, the fund paid to re-build homes of a number of employees which were demolished by an earthquake.
- In the Democratic Republic of Congo, after an employee was killed during a riot, the fund helped to support his family by paying them two years' salary.
- In the UK, following a serious injury to an employee during service, the fund provided him with financial assistance to cover his recuperation and recovery.
- In Canada, the fund has granted a sum of money to support an employee who is sole carer for a family member with a terminal illness.
- As a result of post-election violence in Kenya, over 60 employees were left without homes. G4S provided a programme of support and assistance to those involved including counselling those suffering from post-traumatic stress and financial assistance to those rebuilding their homes.

During 2008, the Employees' Trust Fund made grants totalling over £250,000 to over 130 employees who had suffered particular financial hardship, 80% of these employees were based in our new markets businesses.

Memorandum submitted by GCM Resources

GCM RESOURCES AND THE PHULBARI COAL PROJECT

GCM Resources plc (GCM or the Company) welcomes the important work being undertaken by the Joint Committee to inquire into business and human rights, the impact of business, and the responsibilities of the UK Government.

COMMENTS ON THE REVIEW

Business, including extractive industries, can make a positive contribution to human rights in developing countries. In the case of Bangladesh, the human right to development is being hampered by the lack of available power and energy to fuel the economy. The Phulbari Coal Project (the Project), the main asset of GCM, will make a significant contribution to relieving the country's energy crisis. The social and environmental impacts will be managed to international standards and affected people will be fully and fairly compensated for loss of assets and provided with new opportunities for development.

We believe that being a good corporate citizen is a competitive advantage irrespective of the regulation in the UK or host country. But, in this emerging field of business and human rights, government has an important role to play in providing support and advice to businesses and helping to share examples of good practice.

The activities of business are rightly subject to review and challenge by other parties and we welcome opportunities to discuss and debate, explain our activities and learn from others. It is inevitable that businesses operating in developing countries are subject to higher levels of scrutiny—we accept this. In our experience, however, not all comment and analysis is well informed, balanced or constructive and so any changes to the UK framework should include safeguards to ensure that a UK company does not expend unnecessary resources in responding to ungrounded accusations from ill-informed organisations. Any formal UK process for investigating complaints against UK companies should include controls to screen out unsubstantiated allegations at as early stage as possible so that the company's reputation is not tarnished nor is it necessary for it to expend significant financial resources and management time. An absence of such controls would put UK companies at a disadvantage relative to those incorporated in other countries where controls are less exacting or nonexistent.

RESPONSE TO NGO SUBMISSIONS

GCM appreciates the Committee's invitation to respond to the submissions made by the London Mining Network and the World Development Movement which mention GCM and its Phulbari Coal Project. We would like to take this opportunity to clarify the facts about the Project and restate the strong commitment GCM has to respecting human rights throughout its business operations.

Firstly, we believe it is important to provide some information regarding the context in which the Project will be developed. Bangladesh is currently facing an acute energy crisis, brought about by reliance on depleting reserves of gas and rising energy demand. Two thirds of the 150 million people who live in Bangladesh do not have access to electricity, and those that do suffer from frequent power cuts from load shedding. Agricultural production has been hampered as a reliable supply of power is not available for farmers' irrigation pumps and the Government is having to ration gas between power generation and fertiliser production. Other industries are also suffering due to chronic load shedding. The Project will make a significant contribution to the country's energy security by providing reliable supplies of coal to new power stations. Independent studies forecast that over its 30+ year life, the Project has the potential to increase annual Gross Domestic Product by up to 1.0% per annum and create some 17,000 direct and indirect jobs. In order to even maintain economic growth levels of 5–6% and continue to make some progress against the Millennium Development Goals, Bangladesh must resolve this energy crisis.

Following the terms of its contract with the Bangladesh Government the Company embarked on detailed exploration of the Phulbari Coal field in 2004. This led to a Feasibility Study which included an extensive Environmental and Social Impact Assessment (ESIA) carried out by SMEC International Pty Ltd, a leading Australian consulting firm with over twenty years experience in Bangladesh. The ESIA includes a Resettlement Plan, an Indigenous Peoples Development Plan (the first of its kind in Bangladesh), a Livelihood Restoration Plan, various Water Management Studies and a Public Consultation and Disclosure Plan. Environmental Clearance was granted in September 2005.

In October 2005 the Company submitted its Feasibility Study to develop an open pit coal mine in the northwest of the country, and awaited approval from the Government of Bangladesh to proceed. Some months afterwards a public debate began regarding the development of a coal industry in the country, as well as a debate on the role of foreign companies in the energy and power sector.

In August 2006, a protest against the mine took place in the Project area. Estimates of the numbers of people attending the protest vary but are generally agreed to be several thousand (certainly not 50,000). The protest included local residents as well as many who had been transported to the area from outside. The protest ended in tragedy with loss of life and many suffering injury reportedly following actions taken by the Bangladesh Rifles to manage the crowd.

Since 2006 the debate has continued. There are a number of people who vocally oppose the Project and others who are strongly supportive. GCM has always welcomed and expects open debate on all aspects of the planned coal mine. The World Development Movement refer in their submission to an "Expert Committee Report". As was reported in the media at the time, the Committee's final Report is contentious as it was not signed off by the majority of its members and was therefore never publicly released.

At the end of 2008, following a two-year State of Emergency, the Bangladeshi people elected a new government by an overwhelming majority. As stated in their manifesto, key issues to be addressed by this new government to add capacity to the national grid include special initiatives to ensure economic use of coal and the development of coal-based power plants. The new government is currently examining the different opinions of experts within and outside the country, in particular with regard to the social, environmental and local economic impacts of mining to form its approach to developing a coal industry in the country.

Important points:

- The Project will adhere to national regulations, to the social and environmental safeguard policies of any institutional investor and to the revised Equator Principles (www.equator-principles.com) which are required by many commercial banks for project financing and reflect the International Finance Corporation's Performance Standards on Social and Environmental Sustainability. The Environmental and Social Impact Assessment (ESIA) prepared by GCM has already been subject to independent review and this approach will continue throughout its lifetime.

- The Company recognises that a key component of the Project is regular and ongoing engagement with the community. Despite the difficulties of doing so in a complex environment, the Company continues to meet with numerous groups to explain the Project (including NGOs and media) and has also provided information about the Project in Bangladesh on the website: www.phulbaricoal.com. Once approval is granted the Company will restart extensive consultation with local stakeholders. Furthermore, considering the delay in the Project timeline, the Company will also reconfirm various data regarding who will be impacted and what their preferences are with regard to resettlement options and livelihood support. The Project will continue to ensure that local stakeholders are fully informed and have been consulted prior to Project commencement.
- Compensation measures for the approximately 40,000 people who will need to be resettled will meet the requirements of the IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement. This covers titled and non-titled landowners and illegal settlers. People will be able to move into homes in the village resettlement sites and the western extension of the Phulbari Township. These homes will be an improvement on their current living conditions and investments will be made in education and health facilities and improved infrastructure. The capital budget for all resettlement and community provisions is the largest single item in the Project development costs.
- The Project itself, while requiring approximately 5,900 hectares of land over its 30+ year lifetime, will only use around a third of this area at any one time. As mining progresses southwards the excavated pit will be backfilled and the land rehabilitated. At the end of the Project's life, agricultural land will be available once more, along with newly created forest area, and a lake which will be an important community asset.
- During the Feasibility Study the Company conducted agricultural studies and field demonstrations, together with the Department of Agriculture Extension and over 200 local farmers. The studies show an expected increase in agricultural productivity in the Project area due to the introduction of improved farming practices, crop varieties, and year round availability of water for irrigation.
- Livelihood restoration is an important component of the overall social management plan for the Project. To facilitate this, the Company has developed a Livelihood Restoration Strategy which will enable local stakeholders to take advantage of the opportunities generated by the stimulation of the local economy, the establishment of cottage industries and improved farming methods. Many spin off industries will also be created through the use of co-products from the mine including sand, gravel, china clay and rock aggregate and thousands of jobs will be created. Training and development will be provided and preferential employment policies will enable local people to benefit from the creation of new jobs associated with the Project.
- Extensive water management studies have been undertaken to ensure that the Project manages its impacts on water. The Company's plans reflect the requirements of farmers and the community. Water from the Project will be provided for irrigation, village and town reticulated water supplies. The comprehensive Water Management Plan includes injecting water into the aquifer to maintain the water table away from the Project area and to thus restrict drawdown to the near vicinity of the Project area. A water distribution system will ensure reliable access to water for residents, businesses and farmers; existing water bores and pumps will be upgraded by the Project. This Water Management Plan is not unique and there are many examples of successful implementation elsewhere in the world.

Over the last 10 years, the mining industry has consistently improved the way in which it manages its social and environmental impacts and GCM takes great care to stay up to date on such improvements. The various studies contained in the ESIA are living documents and are subject to regular review and improvement. As such, while awaiting Government approval for the Project, the Company has engaged various experts to improve our social and environmental management plans and keep staff informed of new developments in best practices. For example, last year, senior management were trained on the latest developments with regard to human rights and business and fully understand how our social and environmental management plans have been developed to protect such rights. Earlier this year, the Company joined the UN Global Compact and is actively integrating the 10 principles into its own management systems.

GCM and its subsidiary Asia Energy Corporation (Bangladesh) Pty Ltd remain committed to undertaking the Phulbari Coal Project to the highest international standards and look forward to helping Bangladesh overcome the current energy crisis, reach its development goals, and ensure we deliver significant benefits for all our stakeholders and attractive returns for our shareholders. In so doing, we believe that we will help protect human rights, including the human right to development (1986 Declaration on the Right to Development).

Steve Bywater
Chief Executive

26 June 2009

Memorandum submitted by GoodCorporation

GoodCorporation welcomes the enquiry by the Joint Committee on Human Rights into the way in which businesses can affect human rights both positively and negatively. As auditors of responsible business practice, we have a clear insight into the management practices that should be implemented by business in order to guarantee that their corporate behaviour contributes to the protection and preservation of human rights.

INTRODUCTION

While Governments undoubtedly have the primary responsibility for ensuring the basic human rights of citizens, it is clear that business increasingly has a role to play. According to the Center for Constitutional Rights, some of the worst perpetrators of human rights abuses have been corporations.

There have been numerous voluntary initiatives to establish guidelines for the human rights responsibilities of companies. However, while co-operative standard-setting is important, it has shortcomings, most notably the tendency towards “lowest common denominator” results which concentrate on what is acceptable, rather than what is actually required to ensure the delivery of basic human rights. Voluntary initiatives often leave out small companies, companies from developing countries, state-owned companies and companies with poor human rights records hoping to avoid scrutiny.

Both Amnesty International and the United Nations are calling for binding legal standards for corporate accountability for human rights. With prosecutions hitting the headlines, such as the recent trial in New York of Royal Dutch Shell, business itself cannot afford the reputational damage that results from any complicity in human rights abuses in the communities where they are located. More importantly, GoodCorporation believes that there is a growing imperative for corporations to behave responsibly. This is allied to the recognition that a good human rights record can support improved business performance, which, in turn, will contribute to the sustainable economic growth that is needed to bring the global economy out of the current crisis.

THE GOODCORPORATION PERSPECTIVE

GoodCorporation conducts independent and confidential assessments of an organisations management practices and business relationships. Since its launch in 2001, it has completed over 250 audits in more than 40 countries working across a variety of industries including oil and gas, construction, pharmaceuticals, media and telecommunications. Its clients include 11 FTSE 100 and four CAC40 organisations including GDF-SUEZ, Total SA, British Land, BG plc, DHL, Shire plc, FTSE, Telefónica and Xstrata.

Organisations are assessed against the GoodCorporation Standard that was developed in conjunction with the Institute of Business Ethics, or against the companies own code of conduct or business principles. The GoodCorporation Standard is based on a core set of principles that define a framework for responsible management in any type of organisation. The Standard respects human rights as defined by the United Nations Global Compact and the Universal Declaration of Human Rights. Under each principle, the Standard sets out management practices that can be assessed to determine how well the organisation works in reality. The assessment obtains feedback from employers, customers, suppliers, regulators and shareholders. It also examines a company’s commitment to the wider community and the environment.

UPHOLDING HUMAN RIGHTS

From these assessments, GoodCorporation can identify the key areas of corporate responsibility for ensuring basic human rights. We would argue that companies that abide by the principles outlined below, taken from the GoodCorporation Standard, would be adhering to appropriate due diligence processes which would enable them to demonstrate to themselves and their stakeholders that they respect human rights.

EMPLOYEES

The GoodCorporation Standard outlines fundamental principles which, when implemented, ensure that an organisation is protecting and preserving the basic human right of its employees.

Best Practice

Rigorous organisations will provide clear and fair terms of employment underpinned by a written policy (EMP1). Freedom of association and organisation of employees is also respected and guaranteed (EMP5)

The organisation will also undertake to provide clean, healthy and safe working conditions (EMP8). A fair remuneration policy will be implemented wherever it operates which takes into account the local cost of living and market rates (EMP11). There will be no discrimination on the grounds of disability, colour, ethnic origin, gender, sexual orientation, age, religion, political or other opinion. It will encourage diversity and undertake to recruit, promote and reward employees on the basis of merit alone (EMP12). Sexual, physical or mental harassment or bullying of employees will not be tolerated (EMP15). There should also be clear policies and processes to ensure that only voluntary and appropriately aged employees are employed

(EMP16/17). Where employees are working in parts of the world governed by an unstable regime, there are a number of additional human rights requirements such as the sensible management of security personnel and the establishment of clear rules of interaction with local police and security forces.

CUSTOMERS

It is also imperative that businesses manage their relationships with their customers appropriately, with clear policies and procedures openly in place to guarantee that their human rights are also preserved.

Best Practice

Organisations which implement best practice will be honest and fair in their dealings with customers, respecting clearly outlined terms of business (CUS1). In addition an organisation will also take all reasonable steps to ensure the safety of the products and services it provides (CUS11). It will also have a rigorous process in place to ensure that no forms of bribery or corruption of customers is permissible (CUS12).

SUPPLIERS

A failure to manage the supply chain has led to alleged breaches of human rights, particularly as regards to the treatment of factory workers in developing countries or the treatment of migrant labour within developed countries.

Best Practice

To demonstrate integrity in its relationships with suppliers an organisation must have a clear and transparent process for the selection of suppliers and contractors (SUP1). It must implement a clear process to ensure that no form of bribery and corruption of suppliers or contractors takes place (SUP8). There must also be a clearly understood process in place which informs suppliers and contractors about the organisation's responsible business practices and encourages them to abide by these principles. The organisation must be able to manage the employment, environmental and ethical risks in its supply chain (SUP11). It should also ensure that contractors working on its behalf have responsible health and safety practices (SUP12).

COMMUNITY

Corporations have been rightly criticized for damaging communities, charged with a variety of offences ranging from dumping toxic waste to destroying rainforests or housing. The GoodCorporation Standard states that an organisation should "contribute to making the communities in which it operates better places in which to live and do business."

Best Practice

A company adhering to best practice will ensure that its plans and activities take into account the impact on the communities in which it does business (COM1).

There should be a process in place to ensure that there are no forms of bribery or corruption in relation to public officials and public bodies (COM5). There must also be a process to ensure that risks to public safety resulting from the organisation's products and operations are minimized. This should include engaging in meaningful dialogue with the community, particularly where there may be concerns about its products, services or operations (COM6)

CONCLUSION

GoodCorporation supports the Joint Committee on Human Rights in its investigation into the responsibility of businesses to respect human rights. It is time for both corporations and Governments to take human rights in all areas of business.

Memorandum submitted by National Express

National Express has recently become aware that during their fact finding trip to Washington D.C., several members of the UK Joint Committee on Human Rights (the "Committee") met with employees of NEC who were either members of, and/or were accompanied by representatives of, The International Brotherhood of Teamsters ("Teamsters"). It has been reported that these employees met with four members of the Committee and discussed "their stories of human and workers' rights abuses by National Express Corporation (NEC) in the United States and Canada."

Whilst we remain unaware of the exact content of the discussion, we would like to take this opportunity to provide a brief overview of National Express's attitude towards the rights and wellbeing of its employees.

National Express is committed to providing and maintaining a work environment free of discrimination and harassment. The Company is equally committed to respecting all rights of our employees both inherent and provided for under applicable law and regulations, including the right of employees to decide whether or not they wish to be represented by a labour union in their employment relationship with the Company.

National Express has adopted policies to ensure full compliance with labour laws throughout all of our operations, both in the United Kingdom and the United States and Canada. Additionally, the Company has dedicated staff to ensure compliance with these policies across all our operations. To date, National Express has never been found to have been in material or widespread violation of any provision of the National Labour Relations Act (the United States' labour laws) or Canada's labour laws, nor any of the various employment Acts in the United Kingdom.

Our employees are the most important part of our business and we are committed to treating them fairly and honestly, and to respect and recognize each as an individual. Our success as a Company is based on the skills and effort of our employees and therefore, we strive to do our best to provide an environment that develops and recognises their importance.

National Express conducts business in accordance with the best practices of corporate governance and labour relations, and we continually review our policies and activities to ensure that we maintain these high standards. Responsibility lies at the heart of our business and in the continuous challenge of maintaining our status of employer of choice. We believe it is our responsibility to give open, honest and fact based information to our employees concerning all issues that may affect their employment so that they may make educated, informed, personal decisions.

In an effort to monitor the quality of employee relations within our organisation, employees are regularly surveyed with regard to various matters. These survey results provide us with feedback that has resulted in a number of improvements such as increased communication between management and staff, an enhanced appraisal structure, better development of our employees' talent and increased visibility of management in operational environments. Within the United States and Canada, National Express Group's core questions for employee engagement and overall satisfaction levels have remained consistently very favourable compared with industry standards.

Throughout the United States and Canada, the Company has numerous operations that are already subject to collective bargaining relationships with various labour organisations. At these operations, we have and will continue to respect the rights of our employees who have chosen a labour organisation to represent them and will deal with the union fairly, in good faith, and as guided by the National Labour Relations Act.

In light of the communication issued by Teamsters, the Company is extremely keen to ensure that its position is well understood in relation to the rights of our employees. As such, National Express would welcome the opportunity to provide further information to the Committee, either written or oral.

26 June 2009

Memorandum submitted by New Look Retailers

1. INTRODUCTION

New Look is an international fashion retailer based in the UK. Founded in 1969 in Taunton, Somerset since then the company has rapidly expanded and now operates across a chain of over 600 stores internationally. New Look is committed to engaging with suppliers and factories to understand the human rights risks throughout its entire supply chain in an effective and responsible way.

We are grateful for the opportunity to submit evidence to the Joint Committee on Human Rights and hope our commentary assists the Committee in its inquiry. For the purposes of this submission we focus on a brand perspective of the current state of play regarding the garment industry and its effect on human rights and the challenges ahead for government and retailers.

2. CHALLENGES WITHIN THE GARMENT INDUSTRY

The motivation behind brands taking responsibility for the impact of the industry on the rights of people along their supply chain varies widely: from truly caring about the issues to compliance reasons, to tick boxes and gain recognition. Arguably motivations for taking responsibility do not matter, what matters is that action is taken and results are achieved. This submission therefore focuses on the *people* in the garment industry and how the garment industry behaves towards the people in its supply chain.

Clothing sales in the UK in 2007 accounted for 12% of all retail sales, UK customers spent nearly £40 billion on clothes. Broadly speaking, the West consumes what the East produces, over 95% of the clothing sold on our high streets is produced outside the UK. Millions of people the world over are employed by the garment industry, over 15 million in China, two million in Bangladesh, three million in Turkey, and the wages they earn support further millions. It is an industry that has a perceptible effect on the world which means that the behaviour of retailers has a definite impact on the lives and rights of millions.

The fashion industry puts pressure on suppliers in the East to deliver cheaper products faster. Most workers in the garment industry are on a minimum wage rate, which of course can be a long way off a living wage. Furthermore as the cost of living rises in the developing world; the gap between minimum and living wage is widening. Progress on implementing a living wage fashion industry supply chains has been very slow. We need to admit that working conditions can often be poor and working hours long.

The industry is caught in a vicious circle where:

- governments are less than effective in establishing reasonable minimum wage levels;
- producers prioritise on-time production, resulting in long working hours, so as to receive payment;
- retailers are adept at shifting production between suppliers and countries so as to control costs and preserve margins.

However amongst these discordant voices there is a lot of passion and motivation to take action. It stands to reason that the fashion industry could do more in the way of collaboration so as to achieve results.

3. NEW LOOK'S POSITION

In 2008, New Look worked with 339 suppliers in 29 countries—New Look's products were made in 938 factories based predominantly in Bangladesh, Cambodia, China, India, Turkey and Vietnam. An estimated 233,905 people are employed as part of New Look's supply chain.

As part of New Look's commitment to understanding the human rights risks throughout its entire supply chain New Look is an active member of the ETI and engages with a range of projects to address human rights issues throughout its supply chain. This year New Look achieved an "*Achiever*" rating in all five categories the ETI use to assess companies.

New Look's engagement with ethical trade is not only outwards, concerned with making changes factories, but is also reflective: We analyse the effect of purchasing practices on suppliers and factories and are developing an ethical buying programme involving members of the buying team as Ethical Champions.

Some of New Look's most progressive projects have been to bring ethical trade closer to the core strategy of business success. We have engaged with suppliers and factories to roll out productivity projects where productivity means working smarter not harder. New Look has been working with a key supplier in Bangladesh to introduce a trial line with improved productivity processes. Productivity went up between by 33% and 50% per month; total take-home wages for the lowest paid worker increased by 24% for 46% fewer overtime hours. Workers went home two hours earlier, and the production speed increased. This programme is being rolled out to other factories in India, Bangladesh, China, Vietnam and Cambodia. In China, New Look is working with another key supplier to improve working conditions with the results of decreased turnover.

4. CHALLENGES

Challenge One: It has been noted that voluntary labour standards initiatives are insufficient in bringing widespread change. It also stands to reason that governments should assume responsibility for legislation and enforcement of laws. Although the ETI is an arterial route into government, retailers should seek to engage with government more directly.

Challenge Two: Could forms of business recognition that exist already be used; for example could Investors in People be extended to the field of ethical trading?

Challenge Three: the West has exported millions of jobs and it is now necessary for the West to also export productivity expertise. We call on retailers and government to join us in working with suppliers to promote productivity improvements and to share the gains with workers. We would encourage the government to supplement these gains through duty incentives. This would allow wages to rise without triggering price rises in the UK.

Challenge Four: Retailers should to review their buying practices to identify and correct situations where bad buying contributes to a situation in which workers are badly paid, badly treated and work long hours.

Memorandum submitted by T-Mobile

In written evidence received to this Inquiry, T-Mobile UK was referenced in two areas of human resources policy; how employee representation is structured, and the engagement procedures with employees for remuneration and similar arrangements.

I am delighted to make the following response to the Committee, and this Inquiry.

T-Mobile UK is an integral part of Deutsche Telekom (DT), a leading global provider of integrated services in the information and communication technology sector.

The UK human resources strategy is developed in cooperation with the DT Group HR strategy and the broader Commercial and strategic vision. This is important, as it ensures that our employees in all departments and at all levels play a vital role in the success of T-Mobile UK. The strategy ensures alignment

at Group level in creating a modern, competitive and sustainable employee base with a global workforce of 240,000 people, and in delivering on the wider Group strategy in a commercially competitive and escalating customer expectation market.

The focus of our UK human resources strategy is to ensure that our workforce remain adaptable to the dynamic change and competitive factors in our sector, implementing a talent and performance management programme that supports a sustainable approach to employee and skill development, retention, and, a service model culture geared around customers.

T-Mobile fully understands that effective employee relationships are based around common values and strategy, which requires an open dialogue with employee representatives and effective communication with our employees.

DT's strong "social partnership" model supports the role of employees at all levels and across all departments to facilitate engagement with the management of the UK business, and at Group level.

T-Mobile UK fully acknowledges the benefits of a self-determined representative structure and the legitimacy of democratic employee representation within the workplace

T-Mobile UK is committed to its Local and National Employee Representative structure in providing employees an independent "vehicle" to inform and consultation on issues that may have an impact on our people. The structure of the Employee Workers Council (EWC) has direct access to senior management within T-Mobile at national and group level.

This mature employee representative structure has been in place for over five years and has proved very successful in ensuring all areas of the business have a coordinated approach to granting employees the opportunity of an open dialogue with Employee Representatives on issues affecting their everyday working lives.

The role of trade unions within our workplace is for the individual employee to decide. T-Mobile UK neither encourages nor discourages its employees to join a trade union. We believe the establishment of the Employee Representative structures and the support this receives from employees across the UK business has led to a successful employee representative structure that our employees choose to have.

A number of T-Mobile employees are members of unions', and with one of these union's, T-Mobile has established a "Union Companion" scheme that facilitates a union companion to represent T-Mobile employees for discipline and grievance issues where appropriate.

T-Mobile UK also treats the welfare and satisfaction of its employees as a top priority. We feel that our range of benefits, from competitive salaries, final salary pension scheme, private medical care, and our consultative culture make us a highly desirable company to work for.

Mark Martin
Human Resources Director

12 October 2009

Memorandum submitted by Tesco

1. INTRODUCTION

1.1 This submission seeks to provide an overview of our approach to human rights across our business. Not being international human rights experts, it does not seek to comment more widely on what is a complex debate. We do however hope that by sharing our own experience we can help inform the Committee's considerations.

2. OVERVIEW

2.1 We share the view that businesses have a responsibility to respect human rights in the way in which they operate. This means having regard for human rights in both their direct and indirect impacts on individuals and communities.

2.2 For us this means: managing all aspects of our business responsibly and in accordance with our core values; looking after our people; and being fair and responsible and in the way we work with others.

2.3 In this submission we focus on what we are doing as a business to ensure human rights are respected, in particular:

- our approach to ensuring human rights are respected in the way we run our business through our values and our management of corporate responsibility;
- how we treat our people and respect and promote their rights and interests; and
- how we manage and uphold human rights in our supply chain.

3. OUR VALUES AND CORPORATE RESPONSIBILITY

3.1 At the heart of our business and underpinning everything we do are our values. These are a clear expression of what we stand for and our core purpose as a business. They embody our commitment to our people, our customers and the communities in which we operate. Refreshed this year and being rolled out worldwide they are:

No one tries harder for customers

- Understand customers.
- Be first to meet their needs.
- Act responsibly for our communities.

Treat people how we like to be treated

- Work as a team.
- Trust and respect each other.
- Listen, support and say thank you.
- Share knowledge and experience ...So we can enjoy our work.

3.2 These values are reflected in the way we manage the business, which we do using our Steering Wheel. This is our balanced scorecard approach which brings together the key elements of our business—Customers, Operations, People, Finance and Community—and ensures corporate responsibility is not a specialist function but a core part of our business.

3.3 The Community segment of the Steering Wheel reflects our new Community Promises, which were launched in the UK in 2008 and are being launched internationally this year. These are: actively supporting local communities; buying and selling our products responsibly; caring for the environment; giving customers healthy choices; and creating good jobs and careers.

4. OUR PEOPLE

4.1 We are the largest private sector employer in the UK and provide diverse career opportunities for 470,000 people worldwide. Alongside the UK we have businesses in Thailand; Poland; South Korea; Hungary; Japan; the Republic of Ireland; the USA; the Czech Republic; Turkey; China; Slovakia; Malaysia and India.

4.2 Our success depends on our people and our commitment to them has a number of elements. It includes employing people who reflect the diverse nature of society; supporting flexible working; and giving our people “an opportunity to get on” through investing in their training and development. Proper consultation and communication is also important. We do this through staff question times, face-to-face briefings, store and distribution centre forums, staff publications, our intranet and our annual staff survey, Viewpoint.

4.3 It also means respecting our people’s right to freedom of association. Our employees across our business are free to join unions. In particular, we have an industry leading partnership agreement with Usdaw in the UK and similar agreements with Solidarity in Poland and Katz in Hungary.

4.4 We have a whistle-blowing policy and helpline in place in all countries in which we operate. “Protector Line” is a 24-hour confidential telephone line and email address for employees to report grievances and ethical concerns. We ensure concerns raised are properly investigated.

4.5 We also offer higher than minimum wage salaries across our businesses internationally, and benefits in each market that reflect employees’ priorities. In many developing markets, staff place most value on good basic pay and being paid fairly for overtime, and these are our priorities. For example, in Malaysia where there is no legal minimum wage, the minimum wage a Tesco employee will receive is 30% more than the Poverty Line Index for a household. We also offer a wide range of competitive benefits in line with local labour laws and regulations and reflecting local circumstances and priorities. So in the US we pay at least 75% of the cost of medical, prescription drug, dental and vision coverage after 90 days’ employment, whereas in South Korea we provide tuition subsidy.

5. OUR SUPPLY CHAIN

5.1 Providing excellent value for our customers means sourcing the best products from around the world—at the best prices. This helps families stretch their budgets further, brings more products within the reach of ordinary people, and helps to drive economic growth.

5.2 To deliver this, we source from many countries around the world. We believe that international trade helps people in developed and developing countries improve their quality of life, creating jobs and raising standards. The record of export-led growth and poverty reduction in China and other parts of Asia bears testimony to this.

5.3 At the same time we recognise that regulation and levels of enforcement of labour standards vary in different countries. Our ethical trading policy and programme applies to every country from which we source, including the UK, identifying risks and helping our suppliers to address them.

5.4 Our approach to ethical trading has five stages:

5.4.1 *Setting and communicating standards*

- We only work with suppliers who share our values and demonstrate commitment to the ETI Base Code, of which we are a founder member. This sets out that employment is freely chosen; freedom of association and the right to collective bargaining are respected; working conditions are safe and hygienic; child labour shall not be used; living wages are paid; working hours are not excessive; no discrimination is practised; regular employment is provided; and no harsh or inhumane treatment is allowed.
- We evaluate potential new suppliers to ensure they understand these standards and can meet them. We will not work with a supplier if we identify major problems at this stage and cannot resolve them.
- In 2008 we issued a new, accessible Code of Practice so suppliers can be absolutely clear on our programme and expectations.

5.4.2 *Monitoring supplier performance*

- With a large and diverse supply chain, we know that some suppliers will not always maintain the high labour standards we expect. In order to help suppliers address problems and to support them in improving labour standards, our first step is to ensure we know what is going on, by gathering detailed feedback on conditions in the farms and factories our suppliers run around the world.
- As we are not able to monitor all our suppliers' sites all the time, we take a risk assessment approach to information gathering. We assess all direct supply sites to all our businesses around the world.
- For suppliers to the UK business we, along with other retailers, use risk assessment tools including the Supplier Ethical Data Exchange (SEDEX)—an independent, online, not-for-profit database through which ethical data about suppliers can be shared. It significantly improves the transparency of retailers' supply chains, and stores detailed information on gender, ethnicity, languages spoken and permanent and temporary workers.
- We aim to undertake independent audits of those supplier sites identified as high risk every year, and medium risk every two years. Low-risk sites are required to complete an annual self-assessment, which we monitor.
- In January last year we launched our Auditor Recognition Programme to improve the quality of audits across our supply chain and ensure the information they provide is consistent and reliable.

5.4.3 *Addressing problems*

- *We always ensure action is taken when audits identify major breaches of the ETI Base Code. Following an audit report, suppliers must address every non-compliance identified and develop improvement plans. We follow up these plans and have them independently verified or request further improvements as required.*
- *In addition to reports by auditors, breaches of the Code can also be reported by suppliers themselves, workers, non-governmental organisations and trade unions. We investigate any such reports immediately.*
- *Our priority is to ensure there is no child labour, forced or bonded labour, or any form of abuse in our supply chain.*

5.4.4 *Building capacity*

- *We develop the skills and capabilities of our buyers, technical teams and suppliers so they can improve labour standards in our supply chain.*
- *Last year we revised our core training programmes for buyers and for technical managers, which are mandatory for all new starters. We also tailored our core supplier training following feedback that our workshops could be more specific to local conditions, enabling greater sharing of experience and best practice.*

5.4.5 *Working with others*

- *Partnership has an important part to play, particularly in tackling challenges that go wider than our own supply chain.*
- *For example, we took part in the ETI Supervisor Training project, which culminated in a successful pilot to tackle sexual harassment on farms in Kenya. We were also involved in other ETI working groups on China, homeworkers, wages and purchasing practices. We continue to sit*

on the board of SEDEX and contributed to its working groups on audit methodology, risk assessment and system development. We chair the Global Social Compliance Programme, a business driven programme where leading companies work together to build consensus on best practice in supply chain labour standards.

June 2009

Supplementary memorandum submitted by Tesco

During my recent oral evidence to the Committee I promised to set out in writing the background to both our decision to stop taking cotton from Uzbekistan and our approach to our people and the unions in our US business, Fresh & Easy. I therefore enclose supplementary written evidence on both these issues which I hope you and your Committee find useful in your ongoing deliberations. Indeed, if you or any of your colleagues plan to visit the west coast of the US we would be delighted to arrange for you to visit one of our stores so you can speak to some of our employees and see for yourself how the business operates.

I very much look forward to seeing the final report when it is published in the autumn and if in the meantime I can be of further assistance, please do not hesitate to let me know.

TESCO SUPPLEMENTARY INFORMATION ON UZBEK COTTON, JULY 2009

OVERVIEW

1. We have been boycotting Uzbek cotton since January 2008 to ensure that our garments are free from cotton grown using government sanctioned, forced child labour. We were the world's first major retailer to do so.
2. We hope that the boycott will be a short term measure and that the Uzbek government will start genuine reforms and rescind forced child labour.
3. To be certain where our cotton comes from we have adopted tracking systems that show, for the first time, that it is possible to trace the country of origin of conventional as well as Fairtrade and organic cotton. We plan to roll out the tracking system to our entire UK cotton supply in 2009.
4. We now sell five million Fairtrade cotton items a year—at no extra cost to our customers compared to non-Fairtrade cotton products. Sales increased fivefold in the last year and we are the world's second biggest retailer of Fairtrade cotton.
5. In autumn 2008 we were recognised for our industry-leading efforts on cotton at the ReFashion Awards, and were the only major retailer to be nominated in any category.

BACKGROUND

6. Cotton is grown across every continent and is traded as a commodity so traceability of origin has historically been difficult to establish. The length and location of global textile and clothing process chains—from cotton producer, ginner, spinner, fabric mill, dyer, garment maker, to brand or retailer—adds to this complexity.
7. We began detailed research into cotton production in 2007. This was prompted in part by the launch of our organic and Fairtrade ranges which meant we had to understand the backward supply chain in more depth to be able to verify claims about the cotton in these products. It also reflected growing concerns about conditions in the cotton supply chain.
8. As part of this research we engaged with experts such as the Environmental Justice Foundation (EJF), as well as building relationships with cotton merchants to understand better the issues around cotton production.
9. In the autumn of 2007 (before the Newsnight programme aired) a member of our Clothing Technical Team visited Uzbekistan to look at garment facilities there and to understand current practice in relation to child labour in cotton production. We also tried to identify a credible partner to work with in Uzbekistan to help improve working conditions and tackle the issue of child labour. This did not prove possible.
10. What our visit confirmed was that unlike other developing countries, the child labour in the cotton sector of Uzbekistan is a result of a deliberate policy of coercion adopted by the central government.
11. Every year, starting in September, schools across the country are closed for a minimum of two months. Students collect cotton by order of the central and local authorities. Children work at least eight hours a day on the cotton fields and maybe exposed to chemicals, pesticides and defoliants.
12. In 2007 we also began working with Historic Futures, the supply chain traceability experts, to establish whether we could trace the country of origin of the cotton used in our products. By working with them we established that by using their online String traceability system we were able to track the country of origin for conventional cotton.

13. During the December of 2007 we then worked with key suppliers to understand what the implications of a ban of Uzbek cotton would be (in terms of availability, lead time and price) and continued to work closely with the EJF about the practical implications of ensuring full traceability.

14. Once we knew we could credibly trace cotton country of origin and had assessed the implications of a ban we took the step to stop the use of Uzbek cotton in our clothing and home products in January 2008.

FURTHER ACTION

15. Following our decision to ban Uzbek cotton we have worked with the Ethical Trading Initiative (ETI) and other brands internationally, as well as the National Retail Federation in the US and the Retail Industry Leaders Association, to share our experience with other clothing brands and retailers. This has included co-hosting a cross industry meeting in May 2009 with EJF and the ETI to discuss cotton sourcing and assisting the EJF on their guidelines on how to track cotton: <http://www.ejffoundation.org/page93.html#other>

16. Following a trial period we have rolled out the online String traceability system for suppliers in Bangladesh and Pakistan and have recently trained suppliers in Turkey, Morocco, Egypt and Romania, with the system going live shortly. We plan to roll out this tracking system to our entire UK cotton supply this year. In advance of this roll-out and as an interim measure suppliers are required to hold a paper copy of a certificate of origin for their cotton on file to be randomly inspected.

TESCO SUBMISSION ON FRESH & EASY NEIGHBORHOOD MARKET, JULY 2009

INTRODUCTION

1. Fresh & Easy Neighborhood Market is the subsidiary of Tesco in the United States. Fresh & Easy opened its first store in November 2007. It currently employs just over 3,000 people and operates 120 stores in California, Arizona and Nevada.

2. This submission details Fresh & Easy's approach to its people and employment practices.

WORKING ENVIRONMENT

3. As with Tesco as a whole, we believe that our people are one of the key strengths of the Fresh & Easy business. The Tesco core value of "treating people how we like to be treated" is applied throughout its network of stores, its Riverside California distribution facility, and at the head office in El Segundo Los Angeles.

4. We have sought to establish a positive team-based culture. This is borne out in employee satisfaction surveys that are among the best in the Tesco Group. In the most recent survey, which was conducted anonymously, 90.1% of staff said that they "enjoy working at Fresh & Easy".

PAY AND BENEFITS

5. Fresh & Easy offers a very competitive pay and benefits package. Starter rates are above the minimum wage requirements as well as above the starter rates of many of our key competitors. Rates rise with service.

6. Every employee is entitled to work at least 20 hours, so they are eligible for comprehensive healthcare, with Fresh & Easy paying at least 75% of the cost. The past year has seen substantial increases in costs for employer sponsored medical plans in the U.S. Fresh & Easy has kept the cost to our employees flat, and in some cases has reduced it.

7. During the economic downturn Fresh & Easy has not gone the way of some other companies in reducing benefits. Fresh & Easy has enhanced its company-sponsored retirement plan (401(k) plan). Beginning on 1 January 2009, Fresh & Easy began matching up to a maximum of 4% of pay, and team members are immediately vested in the company contributions.

TRADE UNIONS

8. Fresh & Easy complies with all U.S. legislation relating to labour practices and trade unions.

9. All our employees have the right to join a trade union and we believe it is very important that they are able to exercise this right.

10. There has been coverage in the UK of attempts by the US United Food and Commercial Workers Union (UFCW) to secure collective bargaining rights with Fresh & Easy.

11. Tesco has positive relations with unions around the world, including USDAW in the UK, Solidarity in Poland and Katz in Hungary. Elsewhere in the Tesco group, where we have constructive union relations, we support unions communicating with staff in our stores. In Poland, Hungary and Slovakia this is part of a partnership agreement we have with the Union. In the Czech Republic it is more of an informal arrangement. In the UK, USDAW also have an employee representative among store staff, a store notice-board and advise on store policies and procedures.

12. We had hoped to have good relations with unions in the U.S. as we recognise the benefits union representation can bring. But it is difficult to develop relations with an organisation which has set out to damage our business from day one. The evidence submitted by the UFCW to this inquiry completely misrepresents the truth about the way Fresh & Easy treats its staff. It further confirms to us there is no room for a national dialogue with the UFCW.

13. Fresh & Easy is not therefore currently prepared to let UFCW officials meet with our staff in store. This does not breach any legal requirements, and reflects, we believe, the views of a large majority of our staff. Allowing unions into our stores to recruit members is something requested by only a very small number of our staff.

14. Our position is by no means exceptional in the US. A number of other retailers, including Whole Foods and Aldi do not have a collective bargaining agreement with a union.

15. In September 2008, at one store, Huntington Beach, Fresh & Easy received a letter from a store employee stating the necessary threshold of support had been reached and the majority of the staff had requested a union. Fresh & Easy responded to the letter suggesting the appropriate next steps clearly laid out by U.S. law should be followed. This involves asking the electoral commission to run a secret ballot. We in no way obstructed this legal process that would achieve union recognition at this store. We have not heard anything further on this matter.

16. Our staff remain free to join a union should they choose to and have many ways in which they can find out about and get in touch with unions if they want to—from reading their leaflets to visiting their website.

HUMAN RIGHTS IN THE FRESH & EASY WORKPLACE

17. Fresh & Easy recognises the importance of employee rights in the workplace.

18. Fresh & Easy regularly exceeds the standard in U.S. law. There is no requirement to have contracts in the U.S. and most employers do not. At Fresh & Easy, however, no member of staff is dismissed without warning, as a company policy, with the exception of severe cases, like stealing or fraud. Furthermore, unlike many of our competitors in the U.S., we offer equal access to full time benefits to both full and part time staff.

19. Fresh & Easy regularly briefs employees and managers on their rights under U.S. legislation and ensures that they have information about joining a union.

20. Fresh & Easy's "Open Door Policy" gives staff a voice in the workplace. The policy provides for a number of things including: monthly staff forums giving staff an opportunity to share what is on their mind; a hotline which staff can call and share their concerns anonymously; a bi-annual anonymous employee satisfaction survey; and a designated employee relations manager for each functional area independent of operation line managers.

Lucy Neville-Rolfe
Executive Director

13 July 2009

Memorandum submitted by TUC

ABOUT THE TUC

With member unions representing some 6.5 million working people, the TUC campaigns for a fair deal at work and for social justice at home in the UK and abroad. The TUC, together with its member trade unions are affiliated to a range of European, and international trade union bodies. Together this global trade union family places respect for human and trade union rights at the centre of its work, and in particular rights to freedom of association and collective bargaining.

Guaranteeing fundamental rights for trade unions and for trade union members benefit workers, the economy and wider civic society. Through collective bargaining and effective worker representation trade unions play a central role in reducing inequality as well as enabling organisations to adapt to increased global competitive pressures. As the ILO recently concluded in major study inequality in developed and developing countries: "high trade union density, a more coordinated collective bargaining structure, and greater coverage of collective bargaining agreements tends to be associated with lower inequality".⁵⁴⁷

THE GAPS IN RESPECTING FUNDAMENTAL LABOUR RIGHTS ABROAD AND AT HOME

UK business can play a positive role in providing decent work in other countries by investing in or sourcing from them. Yet without a strong set of rules and institutions to balance the profound inequalities that often exist between UK business and the host country it operates in, UK business can have a significantly negative impact on labour rights.

⁵⁴⁷ ILO (2008) World of Work Report: Income Inequality in the age of financial globalisation

The International Trade Union Confederation's (ITUC) annual survey on trade union rights extensively documents workers seeking to defend their rights suffer harassment, discrimination, intimidation, assault, illegal dismissal, imprisonment and murder.⁵⁴⁸

Examples of the positive and negative impact of UK business on human rights include respectively:

- Under the ILO's "Better Factories" programme in Cambodia, garment firms were rewarded with better market access if they could demonstrate improvements in labour standards. Firms, working with local trade unions, government and ILO technical experts and supported by major UK brands were able to record significant improvements in labour standards. The result has been better wages and better working conditions for Cambodia's 350,000 mostly female garment workers—wages they have sent home to their families to help them overcome food shortages. Importantly, it has resulted in a more productive and competitive industry.
- Globally, Unilever, whose headquarters are in the UK, has a deliberate policy of moving much of its global workforce onto temporary contracts with very poor terms and conditions of work with labour hire companies. For example, in Pakistan, Unilever only directly employs 317 workers out of 8000 workers in its factories. Globally, attempts by such workers to form or join trade unions in response, have been met with illegal terminations, withholding of benefits, lock-outs, assault or reduction in working hours, as has been extensively documented.⁵⁴⁹

UK international obligations

The latter actions should be at odds with the UK's obligations under international law. The UK has ratified all eight of the fundamental conventions of the ILO on forced labour, child labour, discrimination and freedom of association and the right to collective bargaining.⁵⁵⁰ Further, it is a signatory to the International Covenant on Economic, Social and Cultural Rights additionally covering in Article 7, the right to a living wage, safe and healthy working conditions and reasonable hours of work. The UK is also a signatory to the European Social Charter of 1961 which affords protection inter alia for the right for a fair remuneration sufficient for a decent standard of living (article 4); the right to organise (article 5); the right to bargain collectively (article 6(2)); and the right to strike (article 6(4)). The UK has also ratified the European Convention on Human Rights, the provisions of which also cover the right to freedom of association (article 11).

Under international law, the UK has a duty to comply with human right standards to which it is a signatory and to protect against human rights abuses by non-state actors, including UK business. The TUC has expressed repeated concerns that UK law currently fails to comply with international labour standards in a number of important respects. As the Committee will be aware, since 1989 the ILO Committee of Experts has consistently found that UK trade union laws fail to comply with ILO Convention 87 (on freedom of association and protection of the right to organise) and ILO Convention 98 (on the right to organise and bargain collectively).⁵⁵¹ The view that UK law fails to comply with international human rights on freedom of association and the right to be bargain collectively have also been reiterated by the Social Rights Committee of the Council of Europe (in relation to Article 5 and 6 of the European Social Charter 1961) and the UN Committee on Economic Social and Cultural Rights (in relation to Article 8 of the International Covenant on Economic, Social and Cultural Rights).

In addition, the TUC has serious concerns about the implications of the recent decisions by the European Court of Justice in the *Viking*⁵⁵² and *Laval* line of cases. It appears that these cases have placed new restrictions on fundamental rights to freedom of association and the right to bargain collectively, as well as limiting the ability of national government to use national legislation and procurement arrangements to promote social objectives and worker protection.

Impact of state obligations on employers

There are also strong ethical, economic and political arguments for the UK government (and host country governments) to hold UK business to account while operating outside the UK. There is however a limited legal framework for doing so.⁵⁵³

⁵⁴⁸ ITUC Annual Survey of Violations of Trade Union Rights (2008)

⁵⁴⁹ See the report by FNV Mondiaal (2009) *Adding Insecurity to Life* available at http://www.fnv.nl/binary/Unilever%20erratum%202009_tcm7-23546.pdf

⁵⁵⁰ The Core ILO conventions include: Forced Labour (no.29); Freedom of Association and Protection of the Right to Organize (no. 87); Right to Organize and Collective Bargaining 1949 (No.98); Equal remuneration (No.100); Abolition of Forced Labour (No. 105); Discrimination (Employment and Occupation) (No.111); Minimum Age Convention (No.138); and Elimination of the Worst Forms of Child Labour (No. 182)

⁵⁵¹ For the ILO Committee of Expert's most recent observations see <http://www.ilo.org/ilolex/qbe/ceacr2009.htm>.

⁵⁵² C 438/05 *IFF and FSU v Viking Line* [2008] IRLR 143

⁵⁵³ *This is despite all ILO member states committing to respect, promote and realise core labour standards under the ILO Declaration on Fundamental Principles and Rights at Work 1998.*

States are often unable to apply and enforce human rights standards. For example, core ILO conventions on Freedom of Association and Collective Bargaining have been ratified by 148 and 158 member states respectively (out of 181 ILO member states), yet, as the ITUC's annual survey on trade union rights documents, these rights are, "subject to massive and often vicious violations. Evidently, ratification is one thing and application quite another".⁵⁵⁴ In terms of state capacity, key problems here include chronically under resourced labour inspectorates and judiciaries, corruption, state abrogation of responsibility or intimidation.

Secondly, many countries deliberately restrict the application of such rights, particularly in an effort to attract investment. Trade unions are effectively banned in export processing zones in countries such as Honduras, Pakistan, Bangladesh and Guatemala. Last year, labour legislation was amended to reduce the application of fundamental rights in Malaysia, El Salvador, Morocco, and Vietnam.⁵⁵⁵ Bilateral Investment Treaties also restrict the application of human rights law to companies investing in host states.

Thirdly, the increasingly complex structures of businesses operating across borders makes it easier for parent companies to avoid liability for the actions of their subsidiaries or suppliers. Where legal action does exist eg UK tort law, it is poorly suited to covering a UK business's complex sphere of influence and activities presenting potential plaintiffs with significant practical and legal barriers to commencing proceedings.

International trade agreements that do cover labour rights have a mixed record. They typically only apply to states, not firms, and have a limited record in reducing human rights abuses. For example the EU's GSP+ system awards trade preferences to states demonstrating adherence to fundamental human rights. Yet only in the most extreme cases of human rights abuses has GSP+ status been revoked (Belarus, Burma) while states notorious for failing to prevent, or being complicit in, the murder of hundreds of trade unionists (Colombia, Guatemala) were not even investigated under the recent renewal of preferences. The system could be greatly strengthened.

The ability to hold company directors to account for conduct both inside and outside the UK is limited. The legal duties of company directors have recently been codified for the first time. Section 172 of the Companies Act 2006 requires directors to "promote the success of the company for the benefit of its members as a whole" and in so doing "have regard" to the long-term impact of decisions, the interests of the company's employees, supplier and customer relationships, community and environmental impacts and the company's reputation. These new duties are mirrored in the reporting requirements in section 417 of the Act, which include, for quoted companies, a requirement to report on environmental matters, employees, social and community issues and supplier relationships.

These new legal requirements are helpful in setting a general framework for the way in which companies should carry out their business operations. However, directors' duties are very difficult to enforce,⁵⁵⁶ so while they provide ammunition for those arguing for higher corporate standards and should encourage directors to take account of the impact of their decisions on their stakeholders, they do not provide a mechanism for holding companies to account for their actions. The wider reporting requirements are also positive, but the requirements are not backed up by statutory guidance as to which elements of information companies should report, so there is a danger that reports will be inconsistent both with each other and over time, detracting from comparability. Both the new duties and the business review reporting requirements would benefit from being backed up by detailed statutory guidance for companies and mechanisms for enforcement.

Finally, and most significantly, workers suffering human rights abuses face—particularly in low income countries—almost impossible barriers to accessing justice.

STRENGTHENING THE RESPONSIBILITY OF BUSINESSES TO RESPECT HUMAN RIGHTS

The responsibility of business to respect core labour standards should be universal, irrespective of where the business is operating or how big it is. The standards were drafted and agreed upon by ILO representatives of employers, government and employees to be applied universally, irrespective of the country and its level of development. Special initiatives, guidance or technical assistance can assist companies understand their human rights obligations and the impact of its activities eg guidance for small or medium enterprises, or companies operating in difficult environments is widely available.

The current climate should strengthen the obligations of business to protect and promote human rights for several reasons:

Firstly, the drastic contraction of flows of investment, remittances and trade is having a severe effect on jobs, incomes and livelihoods globally, particularly for women, youth, migrants and older persons in low income countries. Recent ILO projections of working poverty across the world indicate between 2007 and 2009, up to 200 million workers will be added to those living on less than USD 2 per day. This extreme poverty both represents severe breaches on labour rights and places severe pressure on others. This is therefore a powerful moral argument for business to respect them.

⁵⁵⁴ ITUC (2008) Annual Survey of Violations of Trade Union Rights, p.5

⁵⁵⁵ ITUC Ibid.

⁵⁵⁶ Directors' duties can only be enforced by shareholders and such actions are very rare.

Secondly, respect for fundamental labour rights can be an important driver of economic recovery. Collective bargaining and provision of a living wage has a vital role to play in preventing systemic deflationary spirals by re-inflating the economy and ensuring a more balanced distribution of the gains from growth and reducing excessive inequalities—a key factor behind the crisis.⁵⁵⁷ Further, the ILO has recently estimated that the “opportunity cost” of forced labour to the workers affected in terms of lost earnings is some USD 20 billion.⁵⁵⁸

Finally, there is an emerging international consensus, voiced by G8 Social Summit in March and endorsed by the recent London Summit that “the current downturn should not be taken as a pretext to weaken workers’ rights...”.⁵⁵⁹ Stemming out of these meetings is the proposal to include a labour chapter in the proposed “Merkel Charter” on global business standards for sustainable development—a clear global endorsement of the need for business to strengthen respect for labour rights in response to the crisis.

ADDRESSING THE CHALLENGE

To address the foregoing, the TUC firmly supports realising the three principles of the Ruggie Framework namely:

- The duty of states to protect;
- That business should respect fundamental and human rights
- That victims of corporate harm should have effective access to remedies

Given the extent of the gaps in respecting fundamental labour rights, as identified above, realising this framework will require pursuing a number of complementary approaches at least in the medium term. The TUC believes that institutional reform should have the following aims:

- (a) Promoting high standards of conduct for business organisations in their operations.
- (b) Ensuring understanding and buy-in from business organisations and other relevant actors on the standards that they are expected to uphold in their operations;
- (c) Enforceability of such standards, so that infringements followed by a refusal to take voluntary corrective actions lead to sanctions that are appropriate to the infringement and the size of the company;
- (d) Mechanisms for redress for victims of infringements.

The TUC believes that creation, promotion or strengthening of the following are essential steps towards these aims:

- A review of UK labour law and EU law with a view to ensuring compliance with international labour standards.
- The establishment of a UK Commission on Business, Human Rights and the Environment as proposed by the Corporate Responsibility (CORE) coalition;
- Strengthening the UK National Contact Point to the OECD Guidelines for Multinational Enterprises and advocating for the strengthening of the OECD treaty itself during the mooted 2010 review;
- The promotion of effective multi-stakeholder initiatives such as the Ethical Trading Initiative; and
- The promotion of Global Framework Agreements between Multinational Enterprises and Global Union Federations;

Review of UK labour law and EU laws

In its Report on the International Covenant on Economic, Social and Cultural Rights,⁵⁶⁰ the Joint Select Committee concluded “The CESCR [Concluding Observations of the UN Committee on Economic Social and Cultural Rights] concludes that current law places undue restrictions on the right to strike, as protected in Article 8 ICESCR. We consider that the Government should take seriously the successive findings of the authoritative international bodies overseeing treaties to which the UK has become party, and should review the existing law in the light of them.” The TUC supports this conclusions and notes that limited progress has been made in this area since the Committee reached its conclusions in 2004. We take the view that the Government should review UK labour law and in particular the provisions of the Trade Union Labour Relations (Consolidation) Act 1992 to ensure the proper implementation of and compliance with international labour law standards.

⁵⁵⁷ ILO (2009), *The financial and economic crisis: A Decent Work Response* pg.53

⁵⁵⁸ ILO (2009) The cost of coercion: *Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2009*.

⁵⁵⁹ G8 Social Summit: People first: Tackling the human dimension of the crisis: http://www.g8italia2009.it/static/G8_Allegato/conclusioni_ENG.pdf

⁵⁶⁰ Joint Committee on Human Rights (2004) *The International Covenant on Economic, Social and Cultural Rights: Twenty-first Report of Session 2003–04*.

The recent investigation by the Information Commissioner's Office in the construction sector has highlighted the need for introduction of new laws outlawing blacklisting activities designed to discriminate against trade union members and activists. The TUC welcomes the recent announcements by the Government that it will seek to use the powers contained in section 3 of the Employment Relations Act 1999 to introduce regulations in this area. We call on the Government to introduce effective and robust blacklisting regulations which protect fundamental rights of UK workers to freedom of association.

We also call on the UK to review and address the implications of recent ECJ judgments on fundamental freedoms, and in particular rights to freedom of association and the right to bargain collectively. The TUC supports proposals from the ETUC for revisions to be made to the EU Posting of Workers Directive and for the adoption of a Social Progress Clause which would provide that EU law, including free movement principles contained within the EU Treaty are interpreted in a manner which respects fundamental social rights, in particular the right for unions to bargain collectively and to take industrial action. Where a conflict arises, precedence should be given to fundamental social rights.

A UK Commission for Business, Human Rights and the Environment

The TUC supports the proposal put forward by the Corporate Responsibility (CORE) Coalition for the government to create a *Commission for Business, Human Rights and the Environment*.⁵⁶¹ It is a compelling and sensible realisation of the framework that Ruggie proposes. The TUC would welcome being a part of the process to establish such a Commission.

Rather than repeat the details of the proposal the TUC makes the following supplementary comments in support of it:

Firstly, the Commission will not be an unfair cost on UK business: Abusing human rights should never be a competitive advantage, and there are significant commercial and reputational advantages in respecting human rights. Aside from failing to address human rights abuse, the absence of a level playing field created by such a mechanism could see ethical businesses undermined by those less ethical.

Secondly, the Commission could play an important role in strengthening local systems of justice, not undermining them. Penalties awarded against companies could be used to run capacity building activities to strengthen local judicial systems. Such an approach under the labour side agreement of NAFTA was effective in convincing the Mexican government to outlaw discriminatory pregnancy testing in workplaces.⁵⁶²

The OECD Guidelines on Multinationals

For trade unions, the OECD Guidelines for Multinational Enterprises are an important soft law instrument in holding companies to account, especially as most complaints under the guidelines concern alleged breaches of chapter IV—Employment and Industrial Relations of the guidelines.⁵⁶³ Recent reforms to the UK's National Contact Point (NCP) to the Guidelines such as increased staffing, an oversight body with external representative, and the use of independent professional mediators have increased its effectiveness and are welcomed by trade unions. The reformed NCP played an important role in encouraging global security firm G4S to sign a global framework agreement with the Global Union Federation UNI to respect core labour standards in the 112 countries where it operates.

However significant shortfalls remain. The capacity of the NCP to investigate complaints is still weak. The NCP is unable to compensate victims or penalise companies breaching the Guidelines, enabling companies such as Unilever, currently facing four complaints, to unreasonably delay the process, or in the case of Afrimex, to completely ignore the NCP finding that it breached the Guidelines. The Guidelines also have a very low profile. These weaknesses explain the very low usage of the Guidelines globally: since their revision in 2000, each of the 40 NCPs has received on average only one complaint every 16 months.⁵⁶⁴

The TUC recommends that the UK government:

- Increase the level of resources for the NCP to allow it to better investigate complaints.
- Develop a system to penalise companies failing to remedy breaches of the Guidelines; perhaps through withdrawal of subsidies or export credits; placing companies under supervision, requiring them to report this fact to shareholders or referral to the Companies Investigation Branch of BERR.
- At the mooted 2010 review of the OECD guidelines advocate for amendment of the Guidelines to adopt the Ruggie Framework.
- Better promote the guidelines to UK business.

⁵⁶¹ CORE (2008), Filling the Gap: A new body to investigate, sanction and provide remedies for abuses committed by companies abroad, available at: http://www.corporat.e-responsibility.org/module_images/Filling%20the%20Gap_dec08.pdf

⁵⁶² Polaski, Sandra, "Protecting Labor Rights through Trade Agreements: An analytical guide", *Journal of International Law and Policy* 14 J 2004, pg.24

⁵⁶³ OECD (2008) Annual Report on the OECD Guidelines, p.21

⁵⁶⁴ Calculated from Ibid, p.21

The Ethical Trading Initiative and other voluntary initiatives

The Ethical Trading Initiative is an important multi-stakeholder body enabling UK companies working with trade unions and NGOs, to better understand how decisions they make can negatively impact on workers' rights in their global supply chains, and then set about improving respect for workers rights. Even seemingly benign decisions of a UK business can profoundly undermine respect for core labour standards in ways not immediately obvious. For example, a UK company placing a high volume order with a tight turnaround time with a supplier in a low income country often forces the supplier to implement excessive overtime or lock-ins, pay wages well below the absolute poverty line, suppress workers' attempts to organising, or even to use forced or child labour.

An impact study on the effectiveness of ETI found that progress on improving health and safety, working hours and wages was made but that discrimination, harassment, and restrictions on freedom of association remained serious problems.⁵⁶⁵ A core conclusion of the study is that a strong legal framework for respecting freedom of association is essential to making any progress on improving respect for labour standards, especially in allowing workers to monitor and work with management to remedy any breaches. Therefore, the ETI model remains an important complement to a bigger framework on rights but it is certainly no substitute for it.

This conclusion is shared by a comprehensive survey of the effectiveness of mechanisms in trade agreements to improve labour standards, where the author concludes that it is the "combination of negative and positive incentives that are more likely to change firm behaviour than purely informative or voluntary activities".⁵⁶⁶

UK government guidance to business on respecting human rights is limited and piecemeal, consisting largely of different government departments supporting a range of voluntary initiatives. For example, BERR's recent report on corporate responsibility lists a range of such initiatives but there is no evidence of their reach or effectiveness.⁵⁶⁷ Many such initiatives lack credibility, a conclusion shared by the overwhelming majority of UK "elites" in a recent poll.⁵⁶⁸

The TUC recommends to the UK government to:

- Conduct research into the reach of such initiatives and their effectiveness in driving respect for human rights; with a view to providing positive incentives to UK business to become members of multi-stakeholder initiatives that can demonstrate improvements in respect for human and labour rights;
- Task a specific government body with developing and coordinating a cross-Whitehall approach on business and human rights;
- Run awareness-raising activities for UK business eg mandatory in-country inductions for UK business when establishing operations there.

Global Framework Agreements

Underpinning the operation of health and safe workplaces, free from harassment or discrimination, with a skillful and productive workforce working reasonable hours for fair wages is the ability of workers themselves to advocate for them. Freedom of association is therefore the foundation upon which respect for all other labour rights rests.

The UK government could play a stronger role in promoting freedom of association globally, particularly in the areas that Prof. John Ruggie describes as facing "governance gaps". It can do so by promoting Global Framework Agreements. These are instruments negotiated between a multinational enterprise and a Global Union Federation (GUF) to establish an ongoing relationship between the parties and ensure that the company respects the same core labour standards in all the countries where it operates. There are at least 60 agreements currently.⁵⁶⁹

The TUC recommends that the UK government:

- Explore the effectiveness of the Norwegian government's approach⁵⁷⁰ in encouraging its companies to enter into global framework agreements with global union federations with a view to enacting this approach itself.

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⁵⁶⁵ Ethical Trading Initiative (2006) *The ETI code of labour practice: do workers really benefit?*

⁵⁶⁶ Polaski Ibid.

⁵⁶⁷ <http://www.berr.gov.uk/files/file50312.pdf>

⁵⁶⁸ 73% of respondents to a recent UK poll on Multinational Companies and international development thought that companies only invested in such initiatives to deflect criticism of their business practices. Multinational Companies Poll, PSB and Foreign Policy Centre, 19 May 2009

⁵⁶⁹ See for example:

http://www.unglobalcompact.org/issues/Labour/Global_Framework_Agreements.html

⁵⁷⁰ Although not yet available in English, the Norwegian Government's newly launch strategy on business and human rights should be considered by the Joint Committee: <http://www.regjeringen.no/pages/2146192/PDFS/STM200820090010000DDDDPDFS.pdf>

Memorandum submitted by UNICEF

1. INTRODUCTION

UNICEF UK is pleased to submit this document in response to the call for evidence by the Joint Committee on Human Rights as part of its enquiry into Business and Human Rights.

UNICEF is the world's leading organisation working for children and their rights. We work with families, local communities, partners and governments in 193 countries to help every child realise their full potential. UNICEF UK is one of 36 UNICEF National Committees based in industrialised countries. Part of our work in the UK is to champion children's rights and advocate for lasting change. This document reflects this focus of UNICEF UK's work, and relates it to the three focal areas of the Committee's enquiry.

2. THE DUTY OF THE STATE TO PROTECT HUMAN RIGHTS

Having ratified the United Nations Convention on the Rights of the Child (CRC) the UK is obliged to do all it can to ensure that children and young people in the UK enjoy the highest attainable standards of health, safety and well-being.

The CRC is often not incorporated into discussions on the relationship between companies and human rights. This is a serious omission. Children's rights, as outlined in the CRC, are often directly affected by corporate activity. Yet children themselves usually cannot influence company or government decisions and are in many ways dependent on adults. This leaves children especially vulnerable to exploitation and human rights abuses. For example, British children are increasingly exposed to media activity. Research conducted by the Family and Parenting Institute shows that young children are more easily influenced than adults by commercial pressures. This can violate children's right to reliable information,⁵⁷¹ as they may not always understand the messages contained in the mass media.

Specific areas of particular concern to UNICEF UK relate to child pornography, climate change and child labour.

Child Pornography

The criminalisation of child pornography is still subject to governance gaps, despite sexual exploitation being an enormously harmful violation of children's rights. In the UK the Protection of Children Act 1978 and the Criminal Justice and Immigration Act 2008 address visual and Internet related child pornography, however, British Internet service providers currently self-regulate under the coordination of the NGO "Internet Watch Foundation" and this remains controversial. Despite its stating in 2006 that it would make UK internet providers face up to their responsibilities, should 100% sign up not be realised, little has been done by the UK Government to improve the situation. This has left the children's charities to call upon Government to ensure that this target is reached. Further to this, the All Party Parliamentary Group on Communication launched an enquiry in April 2009, investigating the effectiveness of the current approach to child sexual abuse images. Effective action is needed and must be led by government.

Climate Change

An area requiring further attention is the relationship between human induced climate change and its impact on human rights. Of particular concern are the rights of children, who will be the most negatively affected by the consequences of greenhouse gas emissions and natural resource consumption of their predecessors. For example, children's right to food (CRC Article 24) is directly impacted by climate change and its effect on agricultural productivity. Violation of this right can impair physical and mental growth at a critical stage of a child development leading to life long disability. Article 24 of the CRC outlines the UK government's commitment to protect children's rights to life, health and a clean environment.

Child Labour

Of particular concern to UNICEF UK is the health and safety of children working in corporate supply chains. Mining and agriculture are the two industries causing the most fatalities globally. Child workers in the cotton industry, which uses 75% of the world's pesticides, are particularly exposed to serious health risks. This is because children are twice as vulnerable to the negative effects of pesticides as adults, due to their greater skin/body ratio and deeper inhalation rates. Through the CRC the UK Government has not only committed itself to ensuring that children and young people have a right to life, health and a clean environment within its own national borders, but also to assist developing countries in achieving the same for their young citizens.⁵⁷² Furthermore, the Universal Declaration on Human Rights outlines the universal right to "just and favourable conditions of work".⁵⁷³

⁵⁷¹ CRC, Article 17

⁵⁷² CRC, Article 24

⁵⁷³ Universal Declaration of Human Rights, Article 23

3. THE RESPONSIBILITY OF BUSINESS TO RESPECT HUMAN RIGHTS

The Universal Declaration of Human Rights calls upon every individual and every organ of society to protect and promote human rights. This includes the responsibility of business to respect Human Rights.

UK legislation in the fields of labour, environment and health and safety offers considerable protection from corporate human rights abuses at the national level. However, in developing countries, where states may exercise weak or no influence over the negative impacts of corporate activities, there may be little incentive for firms to actively engage with the fundamental rights of their stakeholders. Moreover, in some poorer countries enterprises enjoy a higher degree of structural power than the national government, which renders State sovereignty moot.⁵⁷⁴ The fact that the world's top 200 corporations have been estimated to control a quarter of the world's productive assets⁵⁷⁵ is a strong indication of the structural power enjoyed by business in the global political economy. So the regulation of UK based multinational companies by the UK Government is needed to ensure that they respect children's rights.

The current plethora of voluntary codes of conduct and best practice certification schemes in the broader field of corporate responsibility may suggest that private actors are independently living up to their social and environmental responsibilities.⁵⁷⁶ However, the inherent weakness of such soft law lies in its voluntary nature, which ultimately renders labeling and certification initiatives unenforceable. Although UNICEF UK welcomes the contribution of some labeling initiatives to raising the profile of child protection issues as well as their intentions to promote sustainable development, they do not always achieve positive results on the ground. A Fair Trade labeled product, for example, does not ensure that child labour has been excluded from the supply chain. Monitoring of long supply chains remains problematic and local capacity and resources to adequately enforce Fair Trade standards are often lacking. In sum, labeling initiatives alone do not ensure that UK businesses respect human rights, as their effectiveness is dependant upon enterprises proactively living up to (sometimes costly) extra-legal obligations. Voluntary schemes must therefore be reinforced by government legislation.

The UK Government should work to encourage the protection of children's rights abroad and at home by publicly endorsing sound corporate responsibility initiatives. The UK government can contribute to fostering a culture of respect for Human Rights through its public procurement strategies. The existing UK Government's Sustainable Procurement Action Plan specifically focuses on delivering targets related to environmental sustainability. However, this Action Plan should be extended to incorporate a more comprehensive approach to sustainable development, including Human Rights obligations. UNICEF UK, for example, demands that its partners actively include the CRC in their risk assessments and due diligence processes. In line with this, supply chains must be re-visited through a protection lens and vulnerabilities mapped. Failure to do so risks complicity.

The current global economic crisis has shown the need for government intervention in the economy. Many children's rights advocates, including UNICEF UK, therefore expect increased government regulation in the future, as well as a heightened acceptance of the need to embed ethics within incentive structures. Improved risk assessment and due diligence processes from the side of private enterprise are also needed.

UNICEF UK recommends mandatory corporate social and environmental reporting by all British based Transnational Corporations (TNCs), in order to deliver transparency and increase pressure to improve their social and environmental performance.

4. EFFECTIVE ACCESS TO REMEDIES

Prof John Ruggie's mapping of 400 public allegations against businesses, to which already vulnerable people often fall victim, highlights the extent to which effective remedies are lacking in this context.⁵⁷⁷ In line with its obligations under the CRC, the UK Government must provide separate legal representation for a child in any judicial dispute concerning their care. However, when seeking remedies for violations of their rights, particularly at the hands of private enterprises, children encounter significant difficulties in using the judicial system. The fact that there are limited organisations mandated to protect children's rights further aggravates this problem.

Children and those working with them must be able to report Human Rights violations inflicted upon them by companies in order to access remedies. Children must be enabled to monitor and report on violations of their rights. This requires targeted documents and processes to be made accessible to children and young people. Such measures are still lacking despite the UK Government's obligation to fulfill the right to freedom of expression.⁵⁷⁸ In line with this, UNICEF UK recommends that the four UK Children's Commissioners be part of a future monitoring process of the impacts of UK companies on children's rights.

⁵⁷⁴ This is for example the case for tobacco companies in Malawi

⁵⁷⁵ See note by the UN Secretary General, *The Right to Food*, 28 August 2003

⁵⁷⁶ E.g. The OECD Guidelines for Multinational Enterprises, The United Nations Global Compact as well as schemes managed by the International Organisation for Standardisation (ISO) and the International Labour Organisation (ILO).

⁵⁷⁷ Reported in 11th Session Human Rights Council 22nd April 2009

⁵⁷⁸ CRC, Article 12

Memorandum submitted by Unite the Union

Unite the Union welcomes the Inquiry by the Joint Committee on Human Rights into Business and Human rights. Our experience is that the ways in which businesses work impacts on human rights both positively and negatively. If there is the good, then undoubtedly there is the bad. We have longstanding experience in this field. For example, the Transport and General Workers Union was a founder member of the Ethical Trading Initiative and our Deputy General Secretary, Jack Dromey, addressed its 10th Anniversary Conference in November of last year. Through the ETI and working with others, we have taken numerous initiatives both domestically and in the international arena to persuade businesses to use their power positively and not to abuse their power, driving down costs along their supply chain and not abiding by the stated aims of the ETI Base Code. Our experience ranges from Britain to Bangladesh.

As part of this Inquiry, the Union would like to draw the Committee's attention to the biggest supermarket in Britain, Tesco PLC. Tesco is a successful and highly profitable retailer and we make no criticism of their employment practices in their stores here in Britain. Having said that, despite the fact that Tesco is a member of the ETI and subscribes to the ETI Base Code, their procurement practices frequently impact negatively on the human rights of workers in their supply chain here in Britain and internationally. There is a particular problem in the Meat Industry in Britain and Ireland.

Unite the Union is the largest union in the Food Industry and we have a wealth of experience of the business practices of Tesco. As part of our campaign "Every Worker Counts", Unite the Union has exposed the treatment of workers employed by companies in the British and Irish Meat Industry supplying Tesco stores. Tesco has abused its 30% UK grocery market share to drive down costs, creating a systemic pattern of structural discrimination by way of a two-tier workforce. More and more agency workers, overwhelmingly migrant, have been employed on poorer pay and conditions. The newly arrived are, therefore, exploited and indigenous workers undercut. Some of the evidence of employment patterns in the Tesco supply chain is truly shocking. That includes a significant casualisation of work, with many workers not knowing from one day to the next if they have work and with some being punished for not using agency housing or transport by the withdrawal of regular work.

Over two years ago, Tesco and Unite worked together under the auspices of the ETI, commissioning an independent study by Ergon, which confirmed that there was a systemic pattern of structural discrimination. Yet Tesco failed to act and the Equalities and Human Rights Commission has now launched an Inquiry. The evidence is clear and that is that that pattern of structural discrimination causes division in the workplace and damages social cohesion.

Unite the Union has asked Tesco to use its influence with its suppliers to establish minimum standards guaranteeing the same treatment of those who do the same job, agency worker and the directly employed. Another leading supermarket is now moving down that path, establishing Ethical Model Factories. Tesco has declined so to do despite the fact that the necessary readjustment of their supply chain would be cost neutral. That readjustment would, however, make a dramatic difference to the everyday lives and human rights of the people who work in the Tesco meat supply chain.

Working with other unions and NGOs, we have discovered that the problems faced by UK workers in the supply chain are not isolated to this country but witnessed elsewhere around the world:

- In Thailand, there are concerns regarding the rights and welfare of workers in the country's meat suppliers that supply Tesco. The International Union of Foodworkers has discovered disturbing evidence regarding working conditions and compliance with Health and Safety Regulations.
- The Clean Clothes Campaign in its recent report *Cashing In* highlighted the fact that workers in Sri Lanka sewing clothes for Tesco regularly work more than 64 hours per week for less than £40 a month. The women workers say that, if you try to form a union, you will lose your job. In one Sri Lankan supplier, more than half the workers were employed on a casual basis, increasing job insecurity.
- War on Want and trade unions in Kenya and Colombia report of abuses of workers in the Flower Industry that supply Tesco with cut flowers. The complaints are all too familiar:
 - low pay;
 - temporary contracts;
 - intimidation of workers that want to join a trade union; and
 - poor health and safety practices.

It should be stressed that we have sometimes been able to work with Tesco to take progressive initiatives, ranging from the successful campaign to take the Gangmasters Licensing Bill through Parliament, establishing the Gangmasters Licensing Authority, to tackling abuse in the company employing thousands of migrant strawberry pickers here in Britain, S&A Foods. Having said that, knowing what the evidence is,

Tesco has continued with practices that impact negatively on vulnerable workers in the Meat Industry here in Britain and overseas. The Tesco rhetoric of “Every little helps” is far removed from the reality experienced by workers in the Tesco supply chain and we hope that the Joint Committee on Human Rights will be able to call Tesco to account so that they use their enormous market power to promote human rights and ethical standards. As part of your Inquiry, Unite the Union would be pleased to give oral evidence.

May 2009

Memorandum submitted by Virgin Holidays

This submission seeks to provide evidence relevant to questions 1,4 and 5 of the committee’s framework.

Part of the Virgin Travel Group and with Virgin Atlantic as its parent company, Virgin Holidays is a tour operator selling package holidays from the UK to long haul destinations worldwide. Approximately 350,000 customers per year are carried, principally to Florida and the Caribbean, but also increasingly, to destinations including Dubai, Mauritius, South and East Africa, India and the Far East. The company has been operating since 1985

1. How do the activities of UK businesses affect human rights both positively and negatively?

Virgin Holidays aims to have a positive impact on the communities in the destinations in which we operate, both the UK and overseas. In the UK the company has a programme of local charitable support, and also allows staff paid time off to volunteer in the community. Awareness of employment legislation is kept up to date and of course adhered to, however Virgin Holidays aims to go beyond this, particularly in the areas of staff training and development, work/life balance and internal communications to ensure it lives up to its reputation as an exemplary employer.

Overseas the company has various initiatives in place to reduce poverty and empower individuals and communities in holiday destinations. These include:

- the funding of an annual university degree scholarship for up to four Caribbean students per year to study tourism management, to empower young Caribbean nationals to be able to take a leading role in shaping the future development of tourism in the region;
- an “agro-tourism” linkages programme operating in St Lucia and Jamaica, in conjunction with UK development charity, Oxfam, to boost the capacity and incomes of local farmers and provide a willing market for their produce amongst hotels on the islands;
- support for a school of entrepreneurship in Johannesburg South Africa, established to provide youth from Soweto and other townships with the opportunity to build a better future for themselves;
- support for a ticketing system for tourist tribal village visits in Kenya, designed to ensure the local Masaaï population receive maximum financial benefit from tourist visits;
- Virgin Holidays has also adopted the Travelife system of auditing hotel suppliers for sustainability. This system assesses environmental impact, staff management, labour relations and local community integration. Virgin Holidays is engaged in rolling out a hotel sustainability auditing programme, utilising the Travelife system worldwide. The company’s target is for 51% of featured hotels to be visited and sustainability audited by March 2010. With the aim for all hotels contracted to be engaged with the Travelife scheme by 2013; and
- in addition, Virgin Holidays is the only mainstream UK tour operator to include a charity donation (of 50p per adult, 25p per child) in the price of every holiday sold. Initially the funds raised from this scheme were donated to the charity Tourism Concern—who campaign for human rights in tourism. Since 2007, however, this has changed to benefit The Travel Foundation—an organisation with a broader sustainable tourism remit and more relevant to Virgin Holidays’ activities (with a Tourism Concern representative on the Board). The scheme raised approx £150,000 for the Travel Foundation (on top of Virgin Holidays’ own corporate donations) in the 2008–9 financial year.

4. Does the UK Government give adequate guidance to UK businesses to allow them to understand and support the human rights obligations of the UK? If not, who should provide this guidance?

Virgin Holidays would welcome a collaborative approach and to that end, would be keen to have further advice and support to allow us to better understand our human rights obligations.

5. What role, if any, should be played by individual Government departments or the National Human Rights Institutions of the UK?

Providing clarity on the extent of responsibility would be useful, as would guidance for those businesses not merely wishing to comply, but to go further in ensuring human rights are respected. The impact of British industry should be looked at as a whole, rather than just by sector to build up a cumulative picture of involvement. For example, Virgin Holidays will buy hotel rooms from suppliers and, as mentioned in answer

to question 1 it aims to ensure suppliers do not abuse the human rights of their employees or the local community. However, Virgin Holidays does not own hotels, it merely buys and sells hotel rooms. Thus, it can't easily establish that abuses were not taking place during hotel construction. Tour operator involvement typically commences when a property is complete—often many years after completion.

Where hotel construction issues impact the human rights of local communities, again due to Virgin Holidays lack of involvement in this stage, in common with other UK tour operators it relies on information from NGO's such as Tourism Concern, who campaign on human rights and tourism to raise awareness of particular issues. This organisation has been effective in raising tourism related human rights abuse issues amongst tour operators in the UK—their longstanding campaign against tourism to Burma is an example. However they are heavily underfunded and would benefit from government or other agency support.

Email from Professor Paul Hunt, University of Essex, dated 20 May 2009

Regarding the Joint Committee's inquiry into business and human rights:

Between 2002–08, I was the UN Special Rapporteur on the right to the highest attainable standard of health. In that capacity, I submitted some 30 right-to-health reports to the UN General Assembly and UN Human Rights Council.

One of the recurrent themes in my work was access to medicines and the right to health responsibilities of States and pharmaceutical companies.

After consulting on the issue for some years, in 2008 I submitted to the General Assembly *Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines*.⁵⁷⁹ Please see chapter four and the annex in the attached report to the UN General Assembly.

Last year, as UN Special Rapporteur, I undertook a formal UN mission to GlaxoSmithKline (GSK), considering its access to medicines policies through the right-to-health lens. This was the first time that a UN human rights “special procedure” undertook a formal human rights mission to a specific business enterprise.

The reason why I write now is that this week my report on GSK was published by the UN. It will be presented to the UN Human Rights Council in Geneva next month.

Before examining some of the activities of GSK, the report sets out, in chapter 2, the right to health responsibilities of pharmaceutical companies in relation to access to medicines. This chapter is specific and contextual. In effect, it applies the *Human Rights Guidelines* to GSK. The chapter explicitly builds on the generic framework recently set out by John Ruggie.

I hope the Committee will find both the Guidelines and the GSK report useful. They endeavour to apply human rights, specifically the right to health, to the specific context of one very important and powerful business sector.

⁵⁷⁹ Available at http://www.essex.ac.uk/human_rights_centre/research/rth/docs/Final_pharma_for_website.pdf