



30 April 2009

SUBMISSION OF EVIDENCE

To the Joint Committee on Human Rights
Committee Office, House of Commons
7 Millbank, London SW1P 3JA, UK

Dear Members of the Committee

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.¹ 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:

¹ 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

- 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).

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 (e.g. the Geneva Conventions) and international criminal law (e.g. 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 case², 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 SRSJ 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.³ The UK Government itself could do much more to 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 Rights⁴) have made clear, businesses value clarity and consistency. They look for greater certainty and a level playing field across international borders with

² www.berr.gov.uk/files/file47555.doc

³ 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.

⁴ www.blihr.org

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 status⁵ 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 sectors⁶ in raising awareness and developing best practices, as well as the guidance provided by several voluntary organisations⁷, 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’.⁸

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.⁹ 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

⁵ 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.

⁶ Such as, for example, the extractive sector, the apparel sector, and a few commodities.

⁷ Such as: human rights NGOs, peace-building NGOs, development NGOs, and business-focused associations and fora.

⁸ 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.

⁹ 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.

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.¹⁰ 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.

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 SRSG 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.

¹⁰ <http://www.unhchr.ch/html/menu6/2/fs19.htm>

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 Rights¹¹. 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;
- 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 business¹².

¹¹ As requested in the Call for Evidence

¹² Unlike the rulings of the Constitutional Court in South Africa, for example.

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.¹³ 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.¹⁴

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.

Yours faithfully

John Morrison
Executive Director, *Institute for Human Rights and Business*

cc. Salil Tripathi, Director of Human Rights Policy
Frances House, Director of Strategy
Scott Jerbi, Director of Communications and Public Affairs

¹³ 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.

¹⁴ For example, the Swedish Government’s requires its State Owned Enterprises to report using Global Reporting Initiative (GRI) indicators.