

# **Amnesty International UK**

## **Memorandum of Evidence to the Joint Committee on Human Rights**

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.

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# **Business and Human Rights Enquiry - Memorandum of Evidence to the Joint Committee on Human Rights**

## **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.<sup>1</sup> 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.<sup>2</sup> 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".<sup>3</sup>

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".<sup>4</sup>

#### **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.<sup>5</sup> 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 per cent 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*”.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

### **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.<sup>11</sup> 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."*<sup>12</sup> 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.<sup>13</sup>

### **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.<sup>14</sup> 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*”.<sup>15</sup> The EHRC also lacks the legal power to recommend new human rights laws.<sup>16</sup>

#### **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 5<sup>th</sup> 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.<sup>17</sup>

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”.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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<sup>1</sup> Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States Of America, UN Doc. CERD/C/USA/CO/6 (February 2008).

<sup>2</sup> The Nature of States Parties Obligations (Art. 2, par.1) 14/12/90. CESCR General comment 3.

<sup>3</sup> UN CESCR, General Comment No.14, para 39.

<sup>4</sup> General Comment No.15, para 33. See also General Comment No 19, par 54.

<sup>5</sup> Corporate Responsibility (CORE) Coalition and LSE, *The reality of rights: Barriers to accessing remedies when business operates beyond borders*, 2009.

<sup>6</sup> 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 3.

<sup>7</sup> Corporate Responsibility (CORE) Coalition, *Filling the gap: A new body to investigate, sanction and provide remedies for abuses committed by UK companies abroad*, Jennifer Zerk, 2008.

<sup>8</sup> 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:

[http://www.corporate-responsibility.org/module\\_images/NCP\\_report\\_2008.pdf](http://www.corporate-responsibility.org/module_images/NCP_report_2008.pdf)

<sup>9</sup> See *Corporate Social Responsibility (CSR): An FCO Strategy*, 2007-08:

[http://www.fco.gov.uk/resources/en/pdf/pdf16/fco\\_csr\\_strategy\\_papers](http://www.fco.gov.uk/resources/en/pdf/pdf16/fco_csr_strategy_papers)

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>

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<sup>10</sup> 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>

<sup>11</sup> 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/IO61/001/1999/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>

<sup>12</sup> 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.

<sup>13</sup> Export and Investment Guarantees Act, 1991:

[http://www.opsi.gov.uk/Acts/acts1991/ukpga\\_19910067\\_en\\_1](http://www.opsi.gov.uk/Acts/acts1991/ukpga_19910067_en_1)

<sup>14</sup> 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>

<sup>15</sup> See the list of enactments in section 33 of the Equality Act 2006.

<sup>16</sup> 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.

<sup>17</sup> <http://www.justice.gov.uk/publications/docs/ICESCR-whole-report.pdf>, para 70.

<sup>18</sup> Ibid, para 91.

<sup>19</sup> Corporate Responsibility (CORE) Coalition and LSE, *The reality of rights: Barriers to accessing remedies when business operates beyond borders*, 2009.

<sup>20</sup> 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>

<sup>21</sup> 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.