



Joint Committee on Human Rights (JCHR): Business and Human Rights Call for Evidence

Submission of the Scottish Human Rights Commission (SHRC)

May 2009

Statement of purpose:

On 6 March 2009 the Joint Committee on Human Rights of the Houses of Parliament (JCHR) decided to inquire into business and human rights. The inquiry examined 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.

This is the SHRC written evidence to the JCHR inquiry.

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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 (e.g. 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"¹. 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.

¹e.g. *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL)

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 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 on 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 2005.² 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.

• ***Should UK businesses' responsibility to respect human rights vary according to:***

² Cairn Energy plc Corporate Responsibility Report 2005, p20

(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.