

# Call for Evidence: Business and Human Rights

## About the author

### *Professional background*

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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.