

The reality of rights

Barriers to accessing remedies when
business operates beyond borders





THE LONDON SCHOOL
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POLITICAL SCIENCE ■

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Barriers to accessing remedies when
business operates beyond borders

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Foreword

Multinational corporations today operate seamlessly across national boundaries. But the way in which the human rights and environmental impacts of major companies are governed is far from seamless.

As the United Nations Special Representative on Business and Human Rights, Professor John Ruggie, has pointed out, some governments, particularly in developing countries, may lack the institutional capacity to enforce national laws and regulations involving transnational firms doing business in their territory. And even when the will and resources are present, they may feel constrained from doing so by having to compete internationally for investment. At the same time, home states of major firms operating globally may be reluctant to regulate against overseas harm by these corporations, either because the permissible scope of relevant regulation remains poorly understood, or out of concern that firms based in these states might lose investment opportunities or relocate their headquarters.

These issues present difficult and complex questions. But it is clear that governments must live up to their human



rights obligations, including the duty to protect against abuses involving corporations or other non-state actors. Where governments are unwilling or unable to do so, there is a role for home states to play where multinational companies are listed or headquartered. At the international level, increasing calls for action are heard today, including by United Nations expert bodies which monitor state compliance with treaty obligations.

The Corporate Responsibility (CORE) Coalition's proposal for a *UK Commission for Business, Human Rights and the Environment* is a welcome initiative in helping clarify the responsibilities of home state governments in this area. The innovative approach this report puts forward is a significant contribution to ongoing debates which should be taken seriously by governments and businesses committed to responsible action at home and abroad.

A handwritten signature in black ink that reads "Mary Robinson".

Mary Robinson

President, Realizing Rights:
The Ethical Globalization Initiative

Former President of Ireland and former
UN High Commissioner for Human
Rights

Executive summary

The principle that internationally recognised human rights should be protected by way of appropriate systems of binding enforcement and redress is clearly established in both international law and in broader norms governing international political relations. However, some UK companies that are engaged in transnational business activities abuse the human rights of individuals and communities in developing countries, or are complicit in their abuse by other parties, in the course of their operations abroad. These abuses occur despite the uncontested nature of core human rights norms and associated state responsibilities to respect, promote and protect these rights.

Drawing on illustrative case studies across a range of countries and sectors in which UK companies are currently doing business, this report assesses the effectiveness and limitations of existing systems of redress available to individuals and communities whose human rights have been violated in some way as a consequence of the operations of UK companies abroad. On this basis, the report then briefly assesses the case for developing more effective complementary systems of redress by implementing legal and institutional reform within the UK.

The report establishes a framework through which the role of redress mechanisms within overall systems of human rights compliance can be understood and their effectiveness evaluated. A broad definition of redress is adopted, encompassing non-judicial as well as judicial mechanisms. Evidence is then presented from a series of illustrative cases drawn from five countries, identifying major barriers to achieving redress at both local and international levels.

Within countries hosting investment, common barriers include: *jurisdictional and other legal barriers; practical and financial access barriers; capacity barriers* resulting from weaknesses within the administrative or regulatory agencies charged with implementing processes of redress; and barriers arising from the *motivation or commitment of government decision makers* to prioritise rights protection over other public or private goals – often referred to as a problem of ‘political will’. In many cases, the power of companies *vis-à-vis* both government

decision makers and local communities is used to reinforce or take advantage of each of the above barriers.

At an international level, available *non-judicial mechanisms* of redress commonly suffer from the unavailability of appropriate remedies and from weak enforcement. In some cases, legally binding avenues of redress can be pursued via *extra-territorial legal action* in the national courts of home countries i.e. where the parent company is listed or headquartered. All too often, however, use of these avenues is also impeded by multiple obstacles, reflecting in part the development of such laws for purposes other than human rights remedy. Such obstacles include: the limited scope of human rights violations for which redress can be pursued; remedies available to victims are typically limited to monetary compensation; jurisdictional barriers can present significant obstacles to cases being accepted by home country courts; where cases are accepted, the doctrine of separate legal personality, which treats each member of a corporate group as a legally distinct entity, tends to create significant additional barriers to establishing parent company liability; and finally, the practical and financial barriers associated with access problems within almost any legal system are often intensified at the international level.

Although the types and severity of such barriers vary in important ways between countries, sectors and specific instances of corporate activity, these major types of barrier are shown to recur across cases. Together, they systematically

undermine the effectiveness of both local and international systems of human rights compliance and redress, and permit the continuation of ongoing violations of the human rights of many workers and communities around the world without any effective remedy.

Many of these barriers are shown to have structural origins, stemming from deeply entrenched features of host states' political, economic and social institutions, and from the jurisdictional limitations on *nationally* bounded systems of redress that seek to govern *transnational* systems of corporate decision-making and power. Analysis therefore suggests that although the strengthening of local systems of redress continues to be a *necessary* condition for effective human rights compliance, the provision of solely local systems can no longer be considered *sufficient* to ensure the protection of internationally recognised human rights.

In light of these findings, the report briefly evaluates the potential for local

systems of redress to be complemented by strengthened avenues of redress located within the home jurisdictions of transnational companies. Although the UK government has a limited role in rectifying barriers to redress that are deeply embedded at the local level, there appears to be significant potential for the UK government to enhance its contribution to the protection of international human rights standards by supporting further development of transnational systems of redress. Some improvements could be achieved by strengthening and better coordinating the range of mechanisms that already exist. However, it is suggested that the UK's contribution to goals of human rights protection could be further strengthened by the creation of a specialised body – such as a *Commission for Business, Human Rights and the Environment*, as proposed by The Corporate Responsibility (CORE) Coalition – to ensure adherence of UK companies with internationally agreed human rights standards.

Glossary

BDT – Bangladeshi Taka	IFC-CAO – IFC Compliance Advisor Ombudsman
BTC – Baku-Tbilisi-Ceyhan	IGA – Inter-Governmental Agreement
BTC Co. – BTC Consortium	ILO – International Labour Organisation
CEC – Central Empowered Committee (a subcommittee of the Indian Supreme Court)	KNCHR – Kenya National Commission on Human Rights
EBRD – European Bank of Reconstruction and Development	MNE – Multinational Enterprise
EBRD-IRM – EBRD Independent Recourse Mechanism	NCP – National Contact Point
EIA – Environmental Impact Assessment	NEAA – National Environment Appellate Authority (of India)
EPZ – Export Processing Zone	NGO – Non-Governmental Organisation
ETI – Ethical Trading Initiative	NHRC – National Human Rights Commission (of India)
HGA – Host Government Agreement	NNPC – Nigerian National Petroleum Corporation
ICCPR – International Covenant on Civil and Political Rights	OECD – Organisation for Economic Cooperation and Development
ICESCR – International Covenant on Economic, Social and Cultural Rights	UDHR – Universal Declaration of Human Rights
IFC – International Finance Corporation (a member of the World Bank Group)	

Introduction

Concerns regarding the impacts of transnational business activity on the human rights of individuals and communities in the developing world have a long history, and such concerns have intensified in the context of contemporary economic globalisation over the last decade. Human rights impacts can result from companies' activities as producers, service providers, employers and neighbours, as well as by way of broader relationships with business partners, suppliers, state agencies and other non-state actors associated with their core business activities.¹ In recent years, recognition of the possible negative consequences of business activity in respect of the human rights of external stakeholders has grown, along with increasing acceptance that companies bear a direct responsibility for avoiding or mitigating such consequences.²

Both in international law and within broader understandings of appropriate political practice, it has conventionally been assumed that these are properly dealt with primarily within the national legal and political jurisdictions where violations of human rights norms occur. Despite such assumptions, substantial failures of regulatory systems at the national level persist, allowing human rights abuses by UK and other multinational companies to continue unchecked.

Against this backdrop, the central goal of this report is to evaluate the effectiveness of existing systems of redress available to individuals and communities affected by human rights abuses of UK companies. The majority of redress mechanisms are situated in the countries hosting investment where abuses occur. For this reason, much of the report's analysis focuses on barriers at the local level. However, consideration is also given to potential avenues of redress at the transnational level – established within non-state, inter-governmental or home state forums. On this basis, the prospects for existing systems of redress to be complemented by legal and institutional reform within the UK are then briefly examined.

The analysis draws on the large research literature that examines issues of human rights compliance and redress relating to transnational business, as well as on the experiences of affected communities and workers in five different sectors and locations. These five cases are: garment workers in Bangladesh; cut flower workers in Kenya; communities

affected by gas flaring in Nigeria; communities in India affected by a bauxite mining project; and communities affected by the construction of an oil pipeline in Georgia. The cases were selected as a result of relationships that had been formed between the non-governmental organisations (NGOs) contributing to this report, and the communities and workers affected by inward investment involving UK companies. While the cases were by no means selected randomly and are not 'representative' in a formal sense, they are nevertheless designed to illustrate some of the recurring problems that face workers and communities around the world when they attempt to seek redress for human rights abuses committed by UK companies operating abroad.

In exploring each of these cases, the report draws on a combination of public reports, internal documents and verbal discussions with staff from a number of NGOs that have been directly involved in the cases being discussed. Some of these are UK NGOs belonging to The Corporate Responsibility (CORE) Coalition, while others are NGOs based in the countries hosting UK investment where the alleged human rights abuses have occurred. The writing of the report has drawn heavily on documents provided by these NGOs, and therefore tends to reflect the perspective of individuals and communities in the countries hosting UK investment and the UK NGOs that work with them. However, the author has endeavoured to supplement evidence provided by NGOs with a broad range of other publicly available documents wherever possible.

Importance of effective redress mechanisms

Mechanisms of redress provide for a process by which people and communities can seek to put right or compensate a wrong caused by a violation of rights or breach of duties.³ Redress mechanisms must therefore be defined in relation to a clear set of standards concerning rights and duties, and these mechanisms must encompass both a means of evaluating alleged breaches and provision for some form of remedy.

The redress mechanisms with which we are concerned in this report are defined with reference to ‘internationally recognised human rights standards’ as they apply to relationships between individuals and communities affected by the offshore activities of UK businesses. It must be acknowledged, however, that the boundaries of what counts as ‘internationally recognised human rights’ remain somewhat slippery and contested. In addition to the Universal Declaration of Human Rights and the core human rights treaties, there are many other instruments relating to human rights, which differ considerably in their legal status.⁴ Moreover, the scope and content of human rights protection in a given context depends not only on the direct applicability of international law, but also on a range of relevant national measures such as constitutional protections of human rights, legislative provisions, administrative mechanisms and case law.⁵ A relatively broad definition of internationally recognised human rights is adopted for the purpose of this report, reflecting the broad and widely varying range of human rights issues at stake in the cases examined.⁶ The kinds of rights of greatest relevance to the cases presented in this report are those associated in particular with labour rights, environmental rights, rights to livelihoods and property, and in some cases civil and political rights often associated with protests around other categories of rights. Relevant international human rights instruments in which such rights are recognised are identified in relation to each case.

The availability of mechanisms of redress relating to these internationally recognised human rights standards is important for

several reasons. First, redress mechanisms are important for the pursuit of *individual justice*. In this context, the provision of such mechanisms recognises that disputes over companies’ human rights impact are likely to occur within even the best designed institutional systems, and simply offer a means through which individuals, workers and communities whose human rights are negatively affected by corporate operations can seek appropriate remedies.⁷ Second, redress mechanisms can contribute to *remedial and problem solving* functions within the rights compliance system as a whole. Thus, provision of a ‘pressure valve’ mechanism for dealing with individual complaints can complement top-down forms of monitoring and, in doing so, can help to tackle systemic problems as well as isolated incidents. In this way, redress mechanisms can operate as a vehicle for promoting broader regulation and enforcement. They can achieve this by: contributing to the overarching regulatory ‘shadow’ of potential sanctions for breaches of designated standards; promoting dispute resolution, relationship building and normative change; and contributing to systemic learning.⁸ These distinct functions are by no means separate in practice; outcomes from specific incidents can often generate broader pressures for altered business practices, even when this was not the primary purpose of the actions taken.⁹

In these various ways, a system of redress helps to create an institutional infrastructure through which standards can be monitored and enforced, as well as providing a means of redress in case of violation.¹⁰ A well designed redress system therefore helps to promote future

compliance with relevant standards, as well as enabling past wrongs to be redressed.¹¹

Although all redress systems have these basic functions in common, they vary in terms of the institutional mechanisms through which the functions are performed. Judicial channels of redress represent the most formalised, regulated form of response to violations, with binding outcomes. In some cases, administrative channels also provide for formal avenues. All of these judicial or broader arbitral means of redress in public law tend to have more enforceable decisions and in many cases tend to function under more settled rules and safeguards of due process.

At the other end of the formality spectrum are those political avenues of redress that operate by means of public protests and direct actions, civil society campaigns, or direct submissions to political representatives.¹² Intermediate in this spectrum are an increasing number of extrajudicial mechanisms, including state-based non-judicial mechanisms – for example, national human rights institutions or mechanisms such as the Organisation for Economic Cooperation and Developments' (OECD's) National Contact Points (NCPs) – along with non-state mechanisms provided by industry organisations, multi-stakeholder initiatives or specific companies or projects.¹³ Available remedies also vary, depending on the mechanism used. Remedies can include compensation, restitution of damage, guarantees of non-repetition or cessation of business operations, disclosure of information, changes in relevant law, and public apologies.¹⁴

The relative merits of different redress mechanisms tend to vary depending on the nature of the abuse and the goals of the parties involved. Often non-judicial mechanisms offer more immediate, accessible, affordable and adaptable points of initial recourse. On the other hand, legal and judicial systems can often provide greater clarity and predictability for all actors, achieving this by way of: relatively clearer codification and the development of jurisprudence;¹⁵ stronger incentives for due diligence within companies; and

the ability to offer both compensation and punitive sanctions of a kind that are rarely available by means of non-judicial mechanisms – including those criminal sanctions appropriate for some serious cases of abuse.¹⁶ Although mechanisms of all kinds can contribute positively in certain situations, the provision of formal legal systems is indispensable in some cases (such as in relation to crimes) and may provide the most appropriate source of remedy in a range of other cases.¹⁷

Key steps in a pathway of redress

Figure 1 (opposite) sketches out a pathway through which we can conceptualise the redress process, entailing five key steps.¹⁸

Irrespective of the particular mechanism of redress being used, satisfactory implementation of each of these five steps will be required. If the process as a whole is to operate consistently, predictably and equitably, certain institutional qualities such as accessibility, effectiveness and enforceability will be essential (as indicated in Figure 1).¹⁹ This identification of the institutional qualities required at each key stage in a pathway of redress serves to establish a common benchmark against which the effectiveness of existing systems of redress can be evaluated, and the nature of documented barriers better understood.

On the left of Figure 1, the transnational relationships linking UK businesses to workers and communities abroad are depicted. These may take the form of supply chain relationships and/or relationships based on membership of a corporate family. At this first step in the redress process, there is a requirement that these relationships be governed by *rights compatible standards* – that is, they must be governed by internationally recognised human rights norms as mediated through regulatory and compliance systems at the local or transnational levels.

At the point where a breach of these standards occurs, the victim may survey available avenues for redress, and consider whether or not to initiate a process of investigation, mediation and/or adjudication. In some cases the victim might evaluate available options and

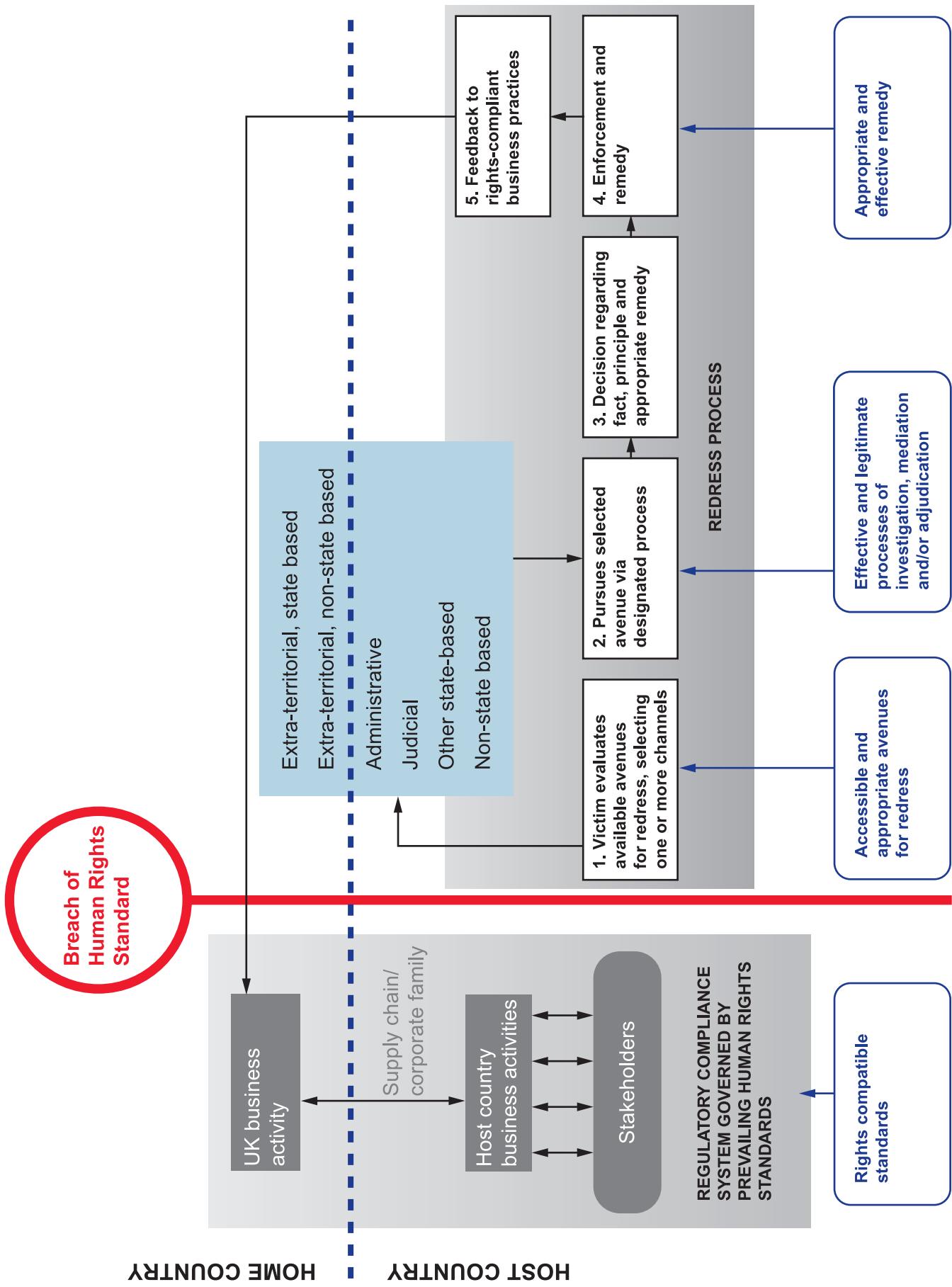
decide that all are too costly or otherwise unattractive. In other cases, the victim will select one or more avenues to pursue.²⁰ Clearly, if the process is to advance past the initial stage, *accessible and appropriate avenues* for redress must be available, requiring adequate provision of information, expert assistance and where necessary other forms of financial or practical assistance or advice.

If the redress process advances beyond the first stage, its effectiveness will depend upon the availability of *effective and legitimate processes of investigation, mediation and/or adjudication* – details of which will vary depending on the avenue selected. At this point, qualities of transparency, independence, consistency and equity are often important to ensure fairness and integrity of the process. Achievement of these elements in turn requires sufficiently competent and resourced institutions through which these core functions can be performed.

A decision then has to be reached regarding relevant facts and appropriate remedies, and at this next stage the availability of *appropriate and effective* remedies is a key requirement. However, as discussed above, the suitability of different remedies will rest on the type of change being sought: prevention, exposure or compensation.²¹ Availability of appropriate remedies is particularly important to achieve goals of individual justice, since the absence of such remedies may discourage victims of abuse from entering at all into costly and time-intensive processes.

Both the nature of available remedies and the nature of the process through which investigation and mediation occurs will influence the extent to which lessons from the specific violations being redressed can *feed back* in ways that *strengthen rights-compliant business practices* within the ongoing relationships between businesses and external stakeholders. The promotion and facilitation of rights-compliant practices will typically depend on the quality of processes of learning, capacity building and normative change, and on the establishment of precedents that create incentives for reforming corporate behaviour.²²

Figure 1: Key stages of a well functioning process of redress



Barriers to redress in five illustrative cases

As the above discussion highlights, the requirements for a system of redress to operate effectively can be rather demanding, and barriers can arise at each step in the process, with potentially serious consequences for the protection and promotion of human rights.²³ The following five case studies illustrate some of the ways in which barriers to redress operate in practice, drawing on evidence concerning specific UK companies and their relationships with stakeholders in a range of locations. The aim is to explore the sources of barriers to redress in each case, and to document some of the consequences of these institutional weaknesses for the lives of affected workers and communities.

Labour rights for flower workers in Kenya

The cut flower industry is one area of transnational business activity that engages UK companies in ongoing relationships with large numbers of vulnerable workers and communities abroad. The sector is of particular importance to the Kenyan economy, representing the nation's second largest agricultural source of foreign exchange, and providing employment to an estimated 135,000 people. Many of these are migrant workers with low education who have travelled to flower growing districts to work on the farms, and rely heavily on employment in this sector.²⁴

The majority of the farms are owned and run by Kenyan businessmen, but many of the larger farms are operated by foreign investors, including some from the UK.²⁵ Moreover, about 75% of Kenya's flower exports are eventually purchased by UK retailers; some purchase directly from Kenyan farms, while others source them via the Dutch flower auctions. Large supermarkets such as Sainsbury's, Waitrose and Tesco have become particularly important players in this market.²⁶

The dominant position of UK supermarkets enables them to exercise significant power over the terms of sourcing contracts with Kenyan producers, and thus ultimately also over the working conditions and health and safety of Kenyan workers. UK buyers use this power to pass pressures within the competitive UK retail sector down the

supply chain to Kenyan flower producers, who in turn pass this pressure on to workers in the form of lower wages and demands for employees to work longer and harder. In this way, buyers in the UK directly influence working conditions within the sector.²⁷

Human rights standards governing these relationships in Kenya

The conditions of work among Kenyan flower workers are regulated by several legal instruments, including several of international labour and human rights conventions that Kenya has ratified.²⁸ In addition to core International Labour Organisation (ILO) Conventions (of which Kenya has ratified all but one – Convention 87 on Freedom of Association and Protection of Union Rights), the three main international human rights instruments that incorporate provisions related to labour rights are the Universal Declaration of Human Rights (UDHR; especially Articles 23, 24 and 25); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR).

These core human rights documents set out detailed standards relating to workplace health and safety, as well as standards such as the right to non-discrimination and equal protection of the law, the right to freedom of association, the right to work, to "just and favourable



Kenyan flower worker harvesting flowers inside greenhouse.

Guillermo Rogel, War on Want, 2007

conditions of work”,²⁹ equal pay for equal work, the right to form and join trade unions and the right to reasonable limitation of working hours. While there is no internationally recognised human right to a ‘living wage’, the UDHR does claim that each individual has “the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity.” Similarly, the UDHR and ICESCR protect “just and favorable conditions of work”. ILO recommendations and guidance relating to minimum wages have tended to suggest that these requirements be interpreted with reference to costs of living as well as the general level of development of the country.³⁰

The governing pieces of legislation regulating employment conditions in Kenya – which were recently strengthened by way of reforms to employment law which came into effect in late 2007 – also entrench a broad range of labour protections, providing for rights-compliant standards in most respects.³¹

Alleged breaches of human rights standards

Despite extensive legal protections for internationally recognised labour rights, violations of such rights occur in a number of ways. Workers receive wages ranging from around 80p a day to £1.25 in the

highest paying firms – significantly below what workers would need to provide for their basic needs.³² Low wages are a particular problem for women in the context of widespread *gender discrimination*, as the lower paying jobs such as those working in greenhouses tend to be given to women, while the more skilled and highly paid jobs carrying out spraying are given disproportionately to men. *Sexual harassment* is also a major problem, with many women workers reporting that systematic abuse by supervisors and sometimes fellow workers is allowed to continue in the workplace without redress. *Excessive working hours* are also a common cause

of grievance in the sector, with workers expected to work up to 16 hours a day during periods of peak demand around Mother's Day, Valentine's Day and Christmas, in clear violation of Kenyan employment law.³³ Violations of *health and safety standards* are also widespread in the industry. While a number of farms have improved their practices relating to chemical sprays in recent years, workers on many farms continue to be exposed routinely to extremely toxic chemicals, with many reporting serious health effects. Workers are also at very high risk of acquiring disabling repetitive strain injuries which can cause chronic pain and severely restrict their ability to work. Attempts by some workers to organise collectively to tackle these widespread abuses are impeded by restrictions to *freedom of association*. While trade unions are formally recognised and have been formed on a small minority of farms,³⁴ in practice workers tend to be discouraged from joining.

Available avenues for redress

For workers suffering from violations of these human rights standards, several avenues of redress are potentially available. Workers can seek redress by means of administrative avenues, by reporting grievances to the Labour Inspectorate or the Directorate of Occupational Health and Safety, both of which are housed within the Ministry of Labour. The latter has the power to close down a workplace if it is ruled unsafe, and both are able to impose sanctions on companies found to be in breach of legal standards.

The Labour Court provides an important judicial avenue through which alleged violations can be adjudicated and remedies imposed. It is a specialised court of law with powers to deal specifically with all matters relating to labour and employment, and may hear claims brought in relation to individual grievances, or adjudicate on the outcomes of inspections if these are contested by either employers or unions.³⁵ Since the 2007 labour reforms, the Labour Court has the same powers

as a High Court to enforce its rulings with fines or a prison sentence.³⁶

The Kenya National Commission on Human Rights (KNCHR) is another national agency that has the potential to provide workers whose rights have been violated with means of redress. Although the KNCHR was not conceived to play a central role in the domain of labour rights, it is equipped with extensive powers of investigation and adjudication to which workers can in theory appeal when other more specialised avenues have been exhausted.

In addition, a broad range of non-state mechanisms of regulation and redress are available. The Ethical Trading Initiative (ETI) has played a prominent role in the sector, offering an informal system of investigation as well as mediation through which local organisations such as the Kenyan Women Workers Organisation have been able to channel complaints through the NGO Women Working Worldwide, which is a member of the ETI.³⁷ The ETI has operated alongside an array of corporate social responsibility certification schemes and initiatives that exist at the international and national levels, all of which tend to adopt an informal approach to complaints.³⁸ The human rights NGO the Kenya Human Rights Commission (not to be confused with the KNCHR) has played a significant role in supporting processes of research and advocacy associated with many non-state processes of redress.

At the international level, the ILO plays some role in reviewing labour practices in the sector as a whole, though its formal Article 26 complaints procedure – enabling collective grievances in relation to a failure of states to protect against systematic violations of labour standards – has not been used. Moreover, jurisdictional barriers together with legal difficulties in establishing parent company liability within an arms length supply chain relation have precluded direct legal action in the UK.

Accessibility and appropriateness of available avenues

In practice, how effectively are workers able to access those avenues for redress that are formally available? *Practical and financial access barriers* of various kinds confront workers attempting to access the Kenyan court system, including the high cost of legal fees, weak knowledge of rights, and poor understanding of complicated legal procedures. In some cases these barriers are exacerbated by the weakness or politicisation of trade unions.³⁹ Some cases have also been reported in which companies have allegedly sought to *intimidate* organisations working in support of labour rights in the sector. In one case, the Kenyan Women Workers Organisation alleges that representatives of the flower company accused the organisation and its leader of economic sabotage, following their submission of a report to the ETI documenting corporate rights abuses, and threatened to take them to court. It is also alleged that a representative of the National Security Intelligence Office visited the NGO's Nairobi office to reinforce such threats. Although these threats were not followed up after the subsequent involvement of the ETI and major European buyers, this example clearly illustrates the ways in which tactics of intimidation can be used to discourage workers making use of formally available avenues of redress.

Effectiveness and integrity of available grievance processes

For those workers who succeed in proceeding past the initial access stage to pursue one of the available avenues for redress, further barriers to achieving adequate remedies present themselves.

With only two judges sitting to hear cases in the Labour Courts, a huge *bottleneck* is created within the industrial court system, meaning that many workers have to wait as long as several years to have their grievance heard. Some workers have attempted to take individual grievances to the KNCHR, but the Commission's grievance handling processes are not

primarily oriented towards the processing of large numbers of labour complaints of this kind, and workers pursuing this route are often directed back to the labour dispute settlement systems of the Ministry of Labour to exhaust this route first.⁴⁰ The capacity of workers to win remedies by way of the court system is further weakened by the resource gap between employers, who are able to employ experienced lawyers to represent them in court, and workers, who can at best hope for representation by a union representative.

Resource constraints within the labour inspection regime represent a further barrier to effective redress. Both the Labour Inspectorate or the Directorate of Occupational Health and Safety lack an adequate number of inspectors, as well as transport that would enable the inspectors to travel between farms. The 2005 Annual Report of the Labour Department of the Ministry of Labour draws attention to the severe funding shortfalls within the Department, pointing out that staffing levels were 282 instead of the approved number of 618. According to this report, most local stations were not able to carry out planned inspections because of lack of funds and transport. Similarly, while the Directorate of Occupational Health and Safety Services has the authority to inspect farms and work sites, it was reported as having only 52 inspectors instead of the 168 required to cover the entire country.⁴¹ Problems of *corruption* are also reported by some local workers' groups to be widespread among labour inspectors, with a number of workers complaining that inspectors sometimes arrive at the farms only to be 'pocketed' by management.⁴²

Against the backdrop of a widespread fear that large foreign investors will re-locate to cheaper production sites in other countries,⁴³ many also believe that the effectiveness and integrity of administrative processes of redress are undermined by the *influence of business interests* over regulators and law enforcement agencies, and their capacity to press for the subordination of human rights protections to broader goals of employment creation and export growth.

Informal international mechanisms such as those offered by the ETI have made some contribution to facilitating redress. The ETI's involvement in investigating abuses in the sector during 2003 has also played an important role in the establishment of the Horticultural Ethical Business Initiative at the local level.⁴⁴ Such initiatives are widely viewed as having interacted constructively with efforts by local industry groups – most notably the Kenya Flower Council – to strengthen labour standard compliance by means of promotion of self-regulatory codes of practice. Local NGOs such as the Kenya Human Rights Commission have contributed importantly to such processes. Following the reporting of various human rights violations among flower farm workers, the Commission conducted a research study on the working and living conditions among flower workers, documenting widespread abuses of the kinds described above.⁴⁵ It also initiated a labour rights project in support of a network of workers' leaders and human rights activists engaged in advocacy, monitoring and support for worker organisation. Moreover, it has supported a range of workshops and

initiatives seeking to promote capacity building, dialogue and normative change among various stakeholders involved in the sector.

However, while such initiatives have made some contribution to raising working standards in the sector as a whole, the generally informal grievance mechanisms offered by such schemes tend to rely heavily on the goodwill of farm management as a basis for achieving remediation.⁴⁶ In many cases, informal mechanisms can strengthen incentives for implementation of effective remedies, primarily as a result of their ability to impose reputational costs of various kinds on companies. However, there remain many cases in which such incentives prove insufficient as a basis for securing effective remedy, in the absence of more strongly coercive means of enforcement.

Human rights outcomes

Attempts by Kenyan workers to pursue redress by way of the range of available mechanisms have led to some increase in the rights compliance of business practices in the sector, although such improvements have tended to be concentrated among those larger farms that are dependent on some ethically sensitised European buyers. Moreover, many workers have been unable to overcome initial access barriers, and others have found that the weakness and inconsistency of the remedies offered by the patchwork of available avenues allow violations of workers' rights to continue throughout the sector.

Overview of barriers to redress in Kenya

Alleged human rights violations and desired remedy

Rights breached	Codification of rights	Remedies sought
<ul style="list-style-type: none"> ■ Breaches of right to a 'just and favourable remuneration' ■ Breaches of right to freedom from gender discrimination ■ Breaches of right to freedom from sexual harassment ■ Breaches of limits on maximum working hours ■ Breaches of health and safety standards ■ Breaches of right to freedom of association 	<ul style="list-style-type: none"> ■ Core ILO conventions ■ Universal Declaration of Human Rights (especially Articles 23, 24 and 25) ■ International Covenant on Economic, Social and Cultural Rights ■ International Covenant on Civil and Political Rights ■ Domestic labour law 	<ul style="list-style-type: none"> ■ Compensation ■ Remediation at individual and systemic levels

Avenues of redress

Avenue of redress	Avenue used? If no, why not?	If yes, barriers encountered to achieving satisfactory remedy
Complaints to labour/health and safety inspectorates	Yes	<ul style="list-style-type: none"> ■ Resource constraints within inspection regime ■ Corruption ■ Influence of business interests
Labour Courts	Yes	<ul style="list-style-type: none"> ■ Financial costs of accessing court and obtaining representation ■ Lack of knowledge of rights and legal procedures ■ Under-resourcing of the system leading to delays
Kenya National Commission on Human Rights	Occasionally	<ul style="list-style-type: none"> ■ Labour disputes not its primary function; complaints tend to be referred back to Labour Courts until legal avenue exhausted
Ethical Trading Initiative and other voluntary codes	Yes	<ul style="list-style-type: none"> ■ Weakness of enforcement capacity ■ Intimidation of complainants
National Contact Point for OECD Guidelines for Multinational Enterprises	No: judged a poor investment of resources given weakness of enforcement capacity	
Home country courts	No: jurisdictional barriers; barriers establishing UK company liability; cost of access; uncertainty of success	
ILO	Article 26 complaints procedure: No Informal reviews: Yes	<ul style="list-style-type: none"> ■ Weakness of enforcement capacity

Labour rights for garment workers in Bangladesh

The business relationships linking major UK retailers to workers and communities in Bangladesh are extremely important for all those involved. Classified as a 'least developed' country with an estimated 40% of the population living below the poverty line,⁴⁷ Bangladesh has become highly dependent on the ready made garment (RMG) sector as a source of employment and export revenue.⁴⁸

The average wages received by Bangladesh's workforce are currently ranked as the lowest in the world. Half of all Bangladesh's garment exports are destined for the European market, including the UK – major UK retailers such as Asda, Tesco and Primark buy tens of millions of pounds worth of clothing produced by Bangladeshi workers each year.⁴⁹ UK retailers manage this offshore purchasing by means of 'arm's length' purchasing relationships with local companies and foreign manufacturers in Bangladesh. The power wielded by these large UK buyers over the terms of purchasing contracts is used to impose very demanding requirements for low prices and fast turn around times on orders, which fuels strong downward pressure on factories within Bangladesh to achieve competitiveness, often at the cost of workers' rights.⁵⁰

Human rights standards governing these relationships in Bangladesh

An extensive range of protections are entrenched in Bangladeshi law. Bangladesh has ratified seven out of the eight core ILO conventions,⁵¹ as well as the three main international human rights instruments that incorporate provisions related to labour rights (the UDHR, the ICESCR and the ICCPR – the most relevant sections of which were summarised in the previous case). Recent reforms to the country's employment law, introduced in 2006, have extended protections in several areas, including provision for some maternity leave. Despite major weaknesses remaining in areas such as freedom of association,

child labour, forced labour, discrimination and excessive overtime,⁵² the content of the relevant legal provisions is not the major source of demonstrated failures of enforcement and redress within the sector.

Alleged breaches of human rights standards

The way in which UK companies manage the procurement and sourcing side of their business by means of supply chains reaching into Bangladesh has direct implications for the human rights of Bangladeshi workers, in ways that impact significantly on their immediate health, safety and well-being, as well as affecting their prospects of future escape from poverty.

First, UK business practices contribute to sustaining extremely low wages among workers, the majority of whom receive an average monthly wage of less than £25 (BDT 3000).⁵³ Such wages are far below what has been calculated to represent the costs of basic necessities in this country. Workers are typically required to work 10-16 hours a day, in violation of both existing Bangladeshi law and ILO conventions.⁵⁴ Workplace *health and safety* is an additional major problem in much of the sector. Over the past decade, at least 30 cases of factory collapses and fires have occurred, leaving hundreds of workers dead, and thousands injured.⁵⁵

The denial to most garment workers of *freedom of expression* is another major problem in the sector, constituting a direct violation of core civil and political rights, as well as contributing to the conditions in which other violations have become systemic across the industry.⁵⁶ While Workers' Associations and Participation Committees are permitted, these models of organisation are often facilitated by factory management and subject to management influence. Trade unions that enable independent representation of workers' interests and concerns remain illegal within the export processing zones (EPZs) and face legal barriers outside them.⁵⁷ A caretaker government ruled Bangladesh

from January 2007 to December 2008 during which time both industrial action and trade union activity were punishable with a sentence of between two and five years' imprisonment.⁵⁸

In addition to legal barriers to workers exercising their rights to *freedom of expression* and *collective bargaining*, workers commonly face harassment (including sexual harassment) and intimidation if they seek to defend their rights. In some cases, workers report that *physical violence* has been used to repress organising efforts. Some workers attempting to organise claim to have been illegally dismissed, harassed, beaten by law enforcement agencies or factories' private security, or imprisoned on falsified charges.⁵⁹ Responsibility for such abuses can be properly attributed to companies to the extent that the company is directly involved as the primary agent of the abuse, or where the company can be considered to be 'complicit' in abuses by other parties.⁶⁰

Available avenues for redress

In the face of these ongoing abuses of recognised human rights standards, several avenues of redress are available at the local level for Bangladeshi workers. First, an *administrative avenue* of redress is available by means of direct reporting of violations to labour inspectors, coordinated by the Ministry of Labour and Employment.⁶¹ If factories are not compliant within a set time frame, the Ministry may take employers to one of the country's seven labour courts, which constitute the major *judicial channel* of redress. Workers, or their union representatives, may directly seek redress by means of these courts as a result of the 2006 reforms to the Labour Law which gave the labour courts jurisdiction over both civil law matters and criminal prosecutions.⁶² Non-binding mechanisms of redress are also available at the local level, most notably by way of the *Arbitration Committee*, established in 1997 as the outcome of an agreement



Bangladeshi garment workers in Dhaka garment factory.

Laia Blanch, War on Want, 2008

between the major trade associations, trade unions and the Ministry of Labour. This body sits each month to hear, and attempt to resolve, small individual labour and industrial disputes. It operates in parallel with the labour court system.⁶³

The above avenues for redress are oriented almost exclusively towards individual grievances such as those relating to unfair dismissals or unpaid wages. Groups of workers seeking to bring collective claims concerning systemic problems throughout the sector find few legal remedies within the existing regime, beyond direct lobbying or participation in broader

political and administrative policy making processes.⁶⁴ In addition, such avenues generally provide only for the pursuit of redress from the local factories that directly employ the affected workers. UK companies such as Tesco and Primark are not the legal owners and operators of the factories that make their clothes, so workers cannot use the above avenues as a means of seeking remedy directly from these UK companies.

At an international level, the UK-based *Ethical Trading Initiative* (ETI) plays a significant role as a multi-stakeholder initiative involving companies, trade unions and NGOs. Its goal is to improve

working conditions in global supply chains. UK retailers such as Tesco are members of the ETI. This means the ETI can be called on to investigate and mediate in disputes that directly involve these UK buyers. This remit also gives it greater potential than most locally available avenues to address those structural failures within compliance systems which arise from business practices located in home countries.

From time to time the ILO's oversight activities have provided an informal means for pursuing worker grievances in relation to systematic violations in the sector, though the ILO's formal Article

26 complaints' mechanism has not been used. While the NCP mechanism is associated with the OECD Guidelines on Multinational Enterprises (MNEs) could be used as a forum for bringing complaints directly against UK companies,⁶⁵ it has not yet been used in this way by Bangladeshi garment workers or their representatives. In theory, civil law claims relating to harms imposed by the buying practices of UK companies could be pursued in UK courts, although both jurisdictional barriers and barriers to establishing UK company liability represent serious legal barriers, given the arm's length nature of the relationships between UK retailers and their Bangladeshi suppliers.

Accessibility and appropriateness of available avenues

In practice then, how effectively are workers able to access the avenues for redress that are theoretically available? Even for those workers with sufficient knowledge of relevant legal rights and procedures, financial barriers to access present an important obstacle for some: fees for accessing legal channels begin at around £12 (1500 BDT).⁶⁶ This represents close to the monthly wage received by some entry level workers, and half the monthly wage of the average worker. In addition, the fact that legal cases commonly drag on for months, or years, discourages many workers from entering such processes. Potentially, local organisations such as unions or worker-oriented NGOs could play an important role in helping to confront some of these barriers. This means that the capacity constraints and repressive environment confronting the union movement in Bangladesh seriously complicates access barriers for many workers. It also remains unclear whether successful resolution of individual legal disputes would result in significant change to the systemic rights violations across the garment industry.

Effectiveness and integrity of grievance processes

Workers who manage to overcome the initial access barriers then frequently encounter further barriers due to weaknesses in judicial or administrative processes.

The severely *under-resourced judicial system* is a significant problem in Bangladesh. The country has only seven labour courts – three based in Dhaka, two in Chittagong, one in Rajshahi and one in Khulna – compared to 1300 magistrates' courts. As well as creating excessive waiting times and overall lack of system capacity, this means that physically accessing the courts is often a major problem for those in the many major industrial towns and cities lacking a labour court.⁶⁷

Administrative systems of redress also suffer from significant *resource constraints*, with recent evaluations reporting weaknesses in numbers of inspectors, provision of training, and availability of transport facilities and equipment. For example, a report submitted to the ILO in 2006 evaluating the manning and operation of the Bangladesh Factory Inspectorate – the key body responsible for enforcing health and safety law – revealed serious problems of understaffing, employing only four safety inspectors and three health inspectors, who were responsible for 11,665 premises.⁶⁸ The small number of inspectors limits the inspectorate's capacity to monitor working conditions throughout the sector. It also constrains their capacity to press prosecutions in court, because inspectors who file criminal complaints relating to health and safety violations are required to be present during the relevant trials.⁶⁹

Some also question the integrity of state-based processes of redress by pointing to the powerful networks of linkages between local garment industry owners and both executive and

legislative arms of government. It appears that pressures on various agencies of the Bangladeshi state to *prioritise the interests of the export sector over the protection of workers' rights* result not only from the strategic importance of this major export sector for the economy as a whole, but also from the direct involvement of senior politicians and government officials in the garment business. Of 300 members of parliament elected in the country's December 2008 elections, 29 directly own garment factories, and a large number of other MPs are involved indirectly in the business by means of broader personal and business relations.⁷⁰

The effectiveness of *non-binding systems of regulation and redress* such as those provided by way of the ETI's systems have also been questioned in relation to perceived insufficiencies in their investigatory powers, their powers of enforcement, and their ability to provide appropriate remedies in cases of violations.⁷¹ Although the ILO has played some supervisory role in the sector, including in relation to collective grievances, its role has generally been very limited. The limited sanctions at the ILO's disposal as means of enforcing its recommendations remain a particular weakness.

Human rights outcomes

Confronted with systematic violations of their human rights by UK companies and their local business partners, Bangladeshi workers can, in theory, pursue their grievances by means of a range of formal and informal avenues at the local and international levels. But in practice, while some individual workers have succeeded in accessing redress by way of a combination of these mechanisms,⁷² the vast majority of workers, whose rights have been negatively affected by the business practices of UK retailers, have been unable to access appropriate remedies.

Overview of barriers to redress in Bangladesh

Alleged human rights violations and desired remedy

Rights breached	Codification of rights	Remedies sought
<ul style="list-style-type: none"> ■ Breaches of right to a 'just and favourable remuneration' ■ Breaches of limits on maximum working hours ■ Breaches of health and safety standards ■ Breaches of right to freedom of association ■ Breaches of right to freedom from sexual harassment ■ Breaches of right to freedom from physical violence 	<ul style="list-style-type: none"> ■ Core ILO conventions ■ Universal Declaration of Human Rights (especially Articles 23, 24 and 25) ■ International Covenant on Economic, Social and Cultural Rights ■ International Covenant on Civil and Political Rights ■ Domestic labour law 	<ul style="list-style-type: none"> ■ Compensation ■ Remediation at individual and systemic levels

Avenues of redress

Avenue of redress	Avenue used? If no, why not?	If yes, barriers encountered to achieving satisfactory remedy
Complaints to Factory Inspectorate	Yes	<ul style="list-style-type: none"> ■ Resource and capacity constraints within inspectorate ■ Subject to influence from garment sector industry interests
Labour Courts	Yes	<ul style="list-style-type: none"> ■ Waiting times ■ Court availability only in some geographical regions ■ Financial costs ■ Capacity constraints facing local organisations
Arbitration committee	Yes	<ul style="list-style-type: none"> ■ No requirement for firms to submit to arbitration ■ Weak enforcement of remedies
Ethical Trading Initiative	Yes (informally)	<ul style="list-style-type: none"> ■ Weakness of enforcement capacity
National Contact Point for OECD Guidelines for Multinational Enterprises	No: judged a poor investment of resources given weakness of enforcement capacity	
Home country courts	No: jurisdictional barriers; barriers to establishing liability of UK firms within an arm's length supply chain relation; cost of access; uncertainty of success	
ILO	Article 26 complaints procedure: No Informal reviews: Yes	<ul style="list-style-type: none"> ■ Weakness of enforcement capacity

Gas flaring in Nigeria: human rights of local communities

Since Shell first discovered oil in the Niger Delta in 1956, the importance of this resource to both the company and the Nigerian economy has grown rapidly. Nigeria is now the largest producer of crude petroleum in Africa, the fifth largest producer within the Organisation of Petroleum Exporting Countries, and the eighth largest exporter of crude oil in the world. As one of the poorest countries in the world, with around 70% of the population falling below the international poverty line of roughly US\$1 a day,⁷³ Nigeria's dependence on the oil industry is striking: it earns over 95% of its export revenue from the oil and gas sector, which accounts for over 20% of gross domestic product and around 65% of the country's budgetary revenues.⁷⁴

More gas is flared in Nigeria than almost anywhere else in the world – this country having recently been displaced from its first place status by Russia.⁷⁵ Gas flaring is a practice that oil companies undertake when oil deposits are mixed with gas and it is judged more profitable simply to burn off the associated gas rather than capturing it for utilisation or re-injection.⁷⁶ The practice continues to be highly controversial due to its detrimental environmental impacts among local communities, and its emission of high levels of greenhouse gases. In recognition of these damaging effects, Nigerian legislation controlling gas flaring was passed in 1979. Legislation generally prohibiting it was passed in 1984. However, companies have still been permitted to flare gas in a particular field or fields if a ministerial certificate is lawfully issued to that effect. Almost all the flaring is carried out by local subsidiaries of five multinational oil companies, operating in joint ventures with the Nigerian National Petroleum Corporation (NNPC), which is a statutorily established, state-owned corporation. Shell makes a greater contribution to this total than any other individual company.⁷⁷

Human rights standards governing these relationships

A broad range of relevant human rights protections are entrenched in Nigerian

law. Human rights provisions have been included in the Nigerian Constitution since its independence in 1960, though these were suspended under various military governments.⁷⁸ In addition, Nigeria has ratified nine out of the 13 core international human rights treaties currently in force, and has ratified the African Charter on Human and Peoples' Rights (the African Charter) and incorporated this into domestic law. Both the African Charter and the Nigerian Constitution contain articles that courts have interpreted as applying to incidents of environmental pollution, particularly those relating to the rights to life, and dignity of the human person.⁷⁹ These provisions are complemented by a broad legislative framework for environmental regulation.⁸⁰ The existence of a right to a decent or healthy environment as a freestanding human right is still controversial at the international level, but in many specific circumstances it is widely accepted that *environmental* rights are part of well-established human rights such as the right to life, right to health, and rights of indigenous or minority groups to non-discrimination, as protected in a range of international human rights instruments.⁸¹

Alleged breaches of human rights standards

Despite the range of legal protections for rights associated with Shell's gas flaring activities, the flaring activities have so far been permitted to continue, resulting in alleged harms to the health, environment and livelihoods of communities living near to the flaring sites. Flares contain a cocktail of substances such as benzene and particulates, which *harm health and the environment* and contribute to acid rain, corroding villagers' buildings.⁸² It has been reported that local people exposed to gas flaring suffer from respiratory problems such as asthma and bronchitis, along with other ailments such as cancer, leading to premature death. Pollution from the flaring is also widely claimed to damage the crop production of local communities, thereby *adversely affecting*

*their food security.*⁸³ The burning of gas and associated venting practices also contribute to *climate change* by way of emissions of methane and CO₂.⁸⁴ The global climate change to which gas flaring in the Niger Delta contributes is likely to produce particularly detrimental impacts in Nigeria, given the Niger Delta's vulnerability to damage of multiple kinds associated with rising sea levels.⁸⁵

Available avenues for redress

In theory, members of the communities adversely affected by Shell's gas flaring have access to a number of potential avenues of redress.

Legal remedies are available under traditional *common law provisions in tort* (mainly nuisance and negligence). Such mechanisms have been used extensively in recent years by communities seeking compensation for damage inflicted by oil companies as a result of incidents such as oil spills.⁸⁶ It would also be possible, in theory, for those affected by Shell's flaring activities to attempt to bring a civil claim in a home country jurisdiction in relation to harms suffered.

Legal remedies are also available under the *Constitution*, whereby it is possible to argue that gas flaring constitutes a breach of certain fundamental freedoms – particularly the rights to life and to dignity. These constitutional rights are reinforced by Articles 4, 16 and 24 of the *African Charter*.⁸⁷

Another avenue of address that is theoretically available, according to Nigerian law, is pursuit of *judicial review* of the administrative decisions leading to the issuance of both ministerial certificates to permit gas flaring in certain fields, as well as administrative approval of the required Environmental Impact Assessments (EIA).⁸⁸

Accessibility and appropriateness of available avenues

Members of affected communities wishing to seek redress in this case therefore had – theoretically – a range of legal avenues



A man stands outside in a local neighbourhood with gas flaring in the background.

Friends of the Earth, 2004

for redress, but the practical prospects of accessing these avenues and using them to achieve the desired remedy of an ordered end to the flaring varied significantly. Each option confronted a distinct cluster of barriers.

Practical and financial barriers

The first point to emphasise is that – given the legal character of all significant available avenues – the vast majority of those affected by Shell's activities were unable to access redress of any kind due to a range of practical and financial access barriers. *Financial barriers* and a *lack of knowledge of and trust* in legal rights and processes are widely acknowledged as serious barriers in Nigeria. Factors such as geographical distance to courts and intimidation by public bodies or potential parties to proposed legal action also play a role in discouraging the use of formally available mechanisms.⁸⁹ Delays in the disposal of cases are also a generalised problem within the Nigerian legal system, although this barrier is less significant in relation to the specific procedure for pursuing claims in Nigeria based on constitutional rights. This is much faster than other Nigerian litigation procedures.⁹⁰ Access barriers of these financial and practical kinds would probably be even greater in the case of any attempts by communities to pursue legal action within the UK (or other home country jurisdiction).

Barriers confronting the potential tort track

Even for those able to overcome generalised access barriers, the tort-based legal track is particularly unattractive. Some previous gas flaring cases attempted to use this avenue but met with significant difficulties. First, bringing a successful claim in relation to alleged harms such as environmental damage requires strict proof of *causal connection*, which often demands the presentation of precise and overwhelming expert evidence.⁹¹ While such evidential requirements operate to protect important values of justice in their own right, many plaintiffs confront significant barriers in attempting to produce sufficient

evidence of causation to meet with evidentiary requirements. Producing such evidence often requires the capacity to access expert scientific advisors and to advance complex technical arguments. Such requirements tend to have the practical effect of making it difficult for complainants to gather the requisite evidence to build a successful case, in the absence of support being provided to complainants for this purpose.⁹² The requirement under Nigerian company law for foreign corporations to reincorporate as a Nigerian company before they can operate in Nigeria further assists parent companies of subsidiaries in Nigeria to deny liability for adverse consequences of their operations.⁹³ Even more importantly, the tort-based legal avenue is generally unable to offer appropriate remedies to potential plaintiffs in gas flaring cases who are seeking cessation of the flaring activities, and not merely monetary damages (compensation) for individual victims. Any attempt to bring such a claim in a home country jurisdiction would confront a similar set of barriers, compounded further by potential jurisdictional challenges.

Barriers confronting a potential path of judicial review

In theory the judicial power of review could be invoked to challenge the issuance of both the ministerial certificates that provide permission for gas flaring in specific instances, and the EIA approvals. The integrity of the administrative processes through which these are issued has been questioned on a number of grounds. Serious questions have also been raised in relation to the *conflicts of interest* that afflict the administrative processes through which EIAs are carried out, according to which the Federal Environmental Protection Agency works in conjunction with the Ministry of Petroleum Resources in carrying out EIAs.⁹⁴ The integrity of administrative processes is undermined further by widespread charges of *corruption* among individual government officials,⁹⁵ and as a result of the enormous *political influence* of the oil companies, given the importance of oil production in

providing the government's main source of revenue.

Furthermore, the feasibility of judicial challenge to the lawful basis of such administrative decisions is seriously impeded by the almost complete *lack of transparency* surrounding either the outcomes of administrative decisions regarding the issuance or non-issuance of ministerial certificates – such decisions not being made public⁹⁶ – or the reasoning underlying such administrative decisions.⁹⁷ Until such time as the ministerial certificates are disclosed, along with, the information on which their issuance was based, members of the public have little basis on which to challenge the legality of the processes through which certificates are issued.⁹⁸

Relative merits of the constitutional route

Barriers of various kinds also confront attempts to seek legal redress on the basis of claims that gas flaring violates fundamental constitutional rights. One access barrier that has not yet been fully surmounted is the possibility of a court ruling that, in environmental pollution cases affecting many people, individuals must come one-by-one to the court to prove their personal case, thus preventing human rights cases from being brought in respect of a community. Court rulings in such cases have so far been mixed.⁹⁹

Although the applicability of constitutional rights to environmental pollution cases had not been accepted by the Nigerian courts prior to the gas flaring litigation discussed below, this avenue was attractive because of the ability of claims made for the enforcement of fundamental rights to be pursued by way of a special, quicker procedure that enables disposal of the case via affidavit (sworn written) evidence. In view of this advantage, together with this pathway's potential to achieve a court order for the cessation of gas flaring, a number of individuals and communities in the Niger Delta judged this route to be more attractive than alternatives. Initiating legal action in 2005 in the Federal High Court of Nigeria, they argued that Shell's

oil exploration and production activities in their locality, which entailed incessant gas flaring, violated their rights to life and the dignity of the human person under sections 33(1) and 34(1) of the Nigerian Constitution and Articles 4, 16 and 24 of the African Charter guaranteeing their rights to life, integrity of the person, health and a satisfactory environment.¹⁰⁰

Effectiveness and integrity of the selected grievance process

How then have those claiming to be affected by Shell's gas flaring and attempting to pursue redress via this avenue fared? The first of these cases, heard by the Federal High Court of Nigeria in Benin City, was brought by Jonah Gbemre on behalf of himself and the Iwhereken community in Delta State, in the Niger Delta area of Nigeria, against Shell Petroleum Development Company (Shell Nigeria), the NNPC and the Attorney General of the Federation. In November 2005, the court held that the flaring of gas by Shell Nigeria constituted a "gross violation" of the constitutionally-guaranteed rights to life and dignity of Mr Jonah Gbemre and the Iwherekan community in Delta State.¹⁰¹ This judgment represented the first time a Nigerian court had applied the rights to life and dignity in an environmental case. Shell Nigeria was ordered to stop flaring in the community immediately. The court also held that the legislation from 1984 and 1985 permitting flaring of gas in Nigeria with ministerial permission was inconsistent with the Nigerian Constitution and therefore "unconstitutional, null and void". It ordered the Attorney General to meet with President Obasanjo and associates to set in motion the necessary processes for new gas flaring legislation that is consistent with the Constitution.

Another of these gas flaring cases was brought later by four individuals and communities against Shell, Chevron, Agip and Total, and heard by a judge in the Federal High Court of Nigeria in Port Harcourt. The final judgment in this case was given in September 2006. The judge declined to follow the judgment of the Federal High Court at Benin City in the

above case, and dismissed the action.¹⁰² This is currently being appealed.

Although the final outcome of this judicial process therefore remains undetermined, the effectiveness and integrity of the process through which the grievance has advanced has suffered as a result of what some observers have perceived as political and corporate interference in the judicial process, and an abuse of due process by Shell.

While it is very difficult to present smoking-gun evidence of *political interference* in the judicial process with respect to specific decisions, the evidence surrounding the development of the Gbemre case raises serious concerns in relation to principles of judicial integrity and independence.¹⁰³ When Mr Gbemre's legal representative attended the Benin City court on 30th April 2007, he discovered that not only had Shell failed to submit the detailed scheme for the cessation of flaring activities as previously ordered, but that Justice Nwokorie had been removed from the case, having been transferred to another court district in the far-northern State of Katsina. It is further alleged by some involved in the case that the court file for the case had mysteriously gone missing, and no representatives of the company or government had turned up.¹⁰⁴

Moreover, during the Gbemre case, the company engaged in an elaborate series

of procedural manoeuvres through which it apparently attempted first to avoid the case being brought to court, and then to delay and adjourn initial hearings of the case over nine different occasions within a period of five months. In the final judgment, the judge accused the lawyers for Shell and NNPC of acting "in bad faith" and called their repeated motions for stays "an abuse of the process of this Court".¹⁰⁵

Shell subsequently resisted compliance with the November 2005 order of the Federal High Court, leading to the filing of contempt of court proceedings in December 2005. The court then softened its original order somewhat, granting a 'conditional stay of execution' in which the company was given an additional year until April 2007 to stop flaring, on several conditions. While the Court of Appeal effectively removed one of these conditions, the remaining conditions of the court order still have not been met almost two years later (at the time of writing), and the flaring continues.

Human rights outcomes

Beyond the court order of November 2005, and the extra boost that Shell Nigeria's non-compliance has given to an enhanced international campaign, the court's ruling has thus far had little practical effect – the oil companies are yet to comply and are appealing the order.

Overview of barriers to redress in Nigeria

Alleged human rights violations and desired remedy

Rights breached	Codification of rights	Remedies sought
<ul style="list-style-type: none"> ■ Harm to public health ■ Environmental harm ■ Harm to food security 	<ul style="list-style-type: none"> ■ African Charter on Human and People's Rights (especially Articles 4, 16 and 24) ■ Nigerian Constitution ■ Universal Declaration of Human Rights ■ International Covenant on Economic, Social and Cultural Rights ■ Domestic environmental law 	<ul style="list-style-type: none"> ■ Cessation of gas flaring activities

Avenues of redress

Avenue of redress	Avenue used? If no, why not?	If yes, barriers encountered to achieving satisfactory remedy
Common law provisions in tort	No: Inappropriate remedy offered; barriers to acquiring necessary evidence	
Constitutional challenge to flaring permits	Yes	<ul style="list-style-type: none"> ■ Practical and financial barriers ■ Lack of trust in court system ■ Ambiguity regarding legal entitlement of communities affected by environmental pollution to bring a case collectively ■ Possible political interference in judicial process ■ Corporate delaying and evasion tactics ■ Corporate failure to comply with court order
Judicial review of administrative decisions	No: lack of transparency surrounding administrative decisions	
Home country courts	No: inappropriate remedy; jurisdictional constraints	
National Contact Point for OECD Guidelines for Multinational Enterprises	No: judged a poor investment of resources given weakness of enforcement capacity and other weaknesses	

Human rights of communities affected by bauxite mining and aluminium production in India

The involvement of UK companies in the Indian mining sector follows a long tradition, and for companies such as the UK-listed company Vedanta,¹⁰⁶ mining activities in the Indian State of Orissa continue to comprise an extremely important focus of their business. India contains one-eighth of the world's untapped bauxite reserves,¹⁰⁷ much of which lies just beneath the ground in the highly impoverished and highly indebted State of Orissa.¹⁰⁸ In this context, mining has become one of the State government's primary intended means of raising desperately needed revenues.

Over the past few years, Vedanta has been ramping up its bauxite mining operations across India.¹⁰⁹ While this company is involved in mining activities in a number of Indian regions, the present discussion focuses on its recent construction of an integrated aluminium complex in Orissa. This involves the proposed extraction of bauxite from a mine in the Niyamgiri Hills, the construction of an alumina refinery in Lanjigarh at the foot of the Niyamgiri Hills and a smelter at Brundamal in the Jharsuguda district some 350km from the refinery.¹¹⁰ From the outset, the project has been surrounded by controversy and accusations of human rights violations among the communities living in the surrounding area. Of particular concern has been the location of the mining site on 660 hectares of protected forest which forms part of the hill regarded as a living god by the last 8,000 remaining Kondh tribal people.

Human rights standards governing these relationships

In addition to India's ratification of core international human rights conventions (ICESCR and ICCPR), a broad range of protections are available under Indian law for those whose human rights may be affected by proposed mining activities. According to the provisions of the Indian

Recognition of Forest Rights Act of 2006, the rights of scheduled tribes and other traditional forest dwellers over their habitat are formally recognised.¹¹¹ Moreover, the Supreme Court of India has repeatedly held that the right to a clean environment and to water are components of the right to life contained in Article 21 of the Indian Constitution. The right to religious practices and beliefs is also protected by Article 25 of the Indian Constitution.

Alleged breaches of human rights standards

Although the mining of bauxite has not yet begun, the company's operations in establishing the mining site and refinery have already given rise to verbal claims of environmental and human rights abuses by the tribal people living in affected areas. Concerns have focused, in particular, on alleged damage to local livelihoods, health, environment and ways of life.

One of the principal alleged human rights abuses at issue has been the displacement of tribal families to make way for the refinery, which is claimed to have violated the cultural rights of these indigenous communities. The Kondh tribal people have claimed that their spiritual, cultural and economic wellbeing is intrinsically linked to Niyamgiri, which they worship as a living god. They have suggested that if the mining project goes ahead it will undermine their collective identity and way of life, destroying what is left of their tribe. It is also claimed that communities' *economic rights* are being violated, particularly their rights to property and livelihoods. To make way for the construction of the Lanjigarh refinery, villages have already been razed and over 100 tribal families moved from their land, in many cases to a crowded cement-house "rehabilitation colony", which lacks land for farming and grazing. Petitioners to the Supreme Court of India in 2005 alleged incidents of forcible removal and collaboration by company

officials and local police against those resisting the evictions.¹¹²

Moreover, there has been widespread concern over alleged harms to *public health, livelihoods and the environment* associated with the mining project. Particular concerns have focused on Vedanta's toxic waste management at the Lanjigarh refinery, which produces up to three million tons of caustic soda waste each year.¹¹³ People have complained of breathing difficulties and skin problems, as well as damage to crop yields and livestock.

Available avenues for redress

In addition to the use of straightforward *political channels* of redress involving public protest and lobbying of politicians, two key avenues are available to communities affected by the proposed mine. First, an *administrative appeal* process is available, enabling clearances given by the Ministry of Environment and Forestry to be challenged, by way of appeal to the National Environment Appellate Authority (NEAA).

Second, affected individuals or communities can pursue an alternative *judicial channel* by filing complaints directly to the Supreme Court of India. This judicial channel can also be utilised by those failing in the administrative appeal process. Tort-based actions are another avenue of legal redress potentially available in this case.

In addition to these two major avenues, the Indian government has established a *National Human Rights Commission* (NHRC), which is empowered to receive complaints from individuals or to enquire on its own initiative into human rights violations.¹¹⁴ In addition, fourteen Indian States have set up human rights commissions to deal with violations at the state level.

At an international level, affected communities could, in theory, attempt to bring a civil claim in the UK, as the home



The Vedanta refinery in Lanjigarh, Orissa

Sanjit Das/ActionAid

country jurisdiction, in relation to harms suffered. They could also make use of the UK's NCP for the OECD Guidelines for MNEs.

Accessibility and appropriateness of available avenues

Barriers to using political channels
Tribal families affected by the refinery and proposed mine have attempted repeatedly to make use of political channels of redress, such as public protest and direct lobbying of political representatives. At each stage, serious obstacles have been confronted. Petitioners to the Supreme Court allege that at the local level,

communities approached the District Collector (the head government official in the district), but found him to be closely aligned with those promoting the project – in fact working actively to pressure villagers to accept compensation from the company to relocate.¹¹⁵ Strategies of political protest were also reportedly impeded by local police, who were also claimed to be working predominantly in support of company officials. It is alleged that in some cases local police refused to register human rights abuses when individual victims approached them. In other cases police and local administration were alleged to be working

together with corporate hired gangs to intimidate local communities.¹¹⁶

Together with thousands of environmentalists and human rights advocates, communities then appealed directly to the Indian Prime Minister, and to members of the Orissa State parliament. However, such efforts in turn met with little success, in face of the close links between corporate executives and investors and senior figures within the Orissa State government.¹¹⁷ The Orissa government at the time of this conflict was headed by Naveen Patnaik, who was openly committed to a new wave of industrialisation that depended importantly

on striking deals with numerous mining companies, based on the premise that exploiting the state's rich mineral reserves would transform Orissa from poor to rich and pay off its debts. In the Orissa Assembly on 4th December 2004, Patnaik declared: "No-one – I repeat no-one – will be allowed to stand in the way of Orissa's industrial development and the people's progress".¹¹⁸ Recent announcements suggest the State government will benefit directly from the prospective exploitation of the bauxite deposits, by means of a planned Special Purposes Vehicle in which Sterlite/Vedanta is likely to hold 40% of the shares, the Orissa State government 26%, and its state-owned mining company (Orissa Mining Corporation) the remaining share.¹¹⁹ There have also been widespread claims both by leading Orissa newspapers and by the opposition party in the Orissa Assembly that consent for the project was also facilitated by the provision of kickbacks to a number of members of Congress within the State government.¹²⁰ Within this political climate, it is perhaps not surprising that political channels of redress have so far proved unsuccessful.

Barriers to using the National Human Rights Commission (NHRC)

The relatively weak legal power vested in the NHRC has been an important factor explaining the disinclination of affected communities to pursue this route for redress. While the NHRC has extensive powers of enquiry and recommendation, its recommendations are not legally binding and it is powerless if the government declines to accept its recommendations.¹²¹

Barriers to administrative appeal

Environmental clearances are required to be issued by the Ministry of Environment and Forestry for each distinct component of the project (the refinery, the smelter plant at Jharsuguda and the mining itself). At each stage, issuance of such clearances can be challenged on administrative appeal to the NEAA.

In the case of the refinery, a strong substantive basis for such an appeal existed, given what the Supreme Court's Central Empowered Committee later

criticised as a failure on the part of the Ministry to interpret correctly and apply both its own guidelines and its constitutional obligations when evaluating the proposed mine's environmental clearance request, and its failure to facilitate the public hearings that it is obliged to organise prior to issuing environmental clearance for such a project.¹²² The integrity of the project's administrative approval process was further undermined by Vedanta's establishment of the Lanjigarh refinery before receiving permission from the environmental ministry, as well as by the company's provision of misleading information about its intentions to mine protected forest on Niyamgiri.¹²³ However, in practice, affected communities were not able to take advantage of the available appeal process, for two main reasons. First, the NEAA requires that an appeal be filed within a period of 30 days from issuance of the clearance, which provided insufficient time for affected groups to organise and initiate an appeal. Second, the NEAA's jurisdiction is limited to directly affected persons or associations working in the field of the environment in the local area, which posed a significant practical barrier to access for the local community given the nascent state of local environmental organisations at that time. An appeal was launched at the NEAA against the grant of environmental clearance to the smelter plant, but this was dismissed on the ground that the appellant was not an aggrieved person and thus not competent to file the appeal. An appeal has been filed in the Delhi High Court against this decision.

Barriers to using international avenues

As in the Nigerian case, pursuit of a civil law claim in the UK against Vedanta (the parent company listed and registered in the UK) would probably fail to offer the desired remedy of preventing the proposed mining activities from going ahead. In addition, such a claim would be likely to face jurisdictional barriers that could delay, if not derail, the attempted action, as well as difficulties in establishing Vedanta's direct liability for

damage inflicted, given its legal separation from its Indian subsidiary. A complaint at the international level could potentially be brought with greater ease by way of the UK's NCP, but the non-binding nature of any resulting recommendations would be likely to weaken significantly its ability to offer a meaningful remedy for affected communities.

The relative merits of pursuing a judicial avenue of redress by way of the Supreme Court

Significant barriers to accessing judicial channels confront many within affected communities, as a result of the high financial costs of accessing the Indian courts, an ineffective legal aid system, and extensive time delays throughout the legal process. Low levels of literacy and high levels of isolation from mainstream society among tribal communities compound such barriers, as do the remote location of the community, language barriers, and other barriers to accessing requisite information and knowledge of legal rights and processes.

Nevertheless, having confronted barriers and failures in relation to alternative avenues of redress, some within affected communities have turned to available judicial channels, giving rise to a drawn-out legal process centred on the Supreme Court of India (the highest court in the country). Three separate complaints were filed against Vedanta in the Supreme Court of India by Indian environmental and human rights organisations, with all the petitions alleging environmental violations on a range of counts.¹²⁴

Effectiveness and integrity of the judicial grievance process

Following these petitions, a subcommittee of the Supreme Court – the Central Empowered Committee (CEC) – set out to investigate Vedanta's alleged violations.¹²⁵ In the hands of the court process, the fate of the local communities has swung back and forth as the case has been passed between multiple fora of review. Throughout this process, communities have struggled both to

find the requisite resources to persist with the claim in the face of long delays and to gather adequate documentary evidence of human rights violations. These are common problems confronting marginalised communities that attempt to access the Indian court system.¹²⁶

Initially, in September 2005 the CEC rejected the mining of Niyamgiri, demanding that Vedanta also answer for illegally constructing the refinery. However, in early 2006 the Supreme Court side-stepped the verdict of its own subcommittee, referring the matter to a government advisory group which then approved diversion of forest land for the mining project, subject to certain conditions. In November 2007, India's Supreme Court made an interim ruling which refused permission for Vedanta to

mine bauxite from Niyamgiri, but stated that it was not opposed to the project in principle, and allowed Sterlite Industries (one of Vedanta's Indian subsidiaries) to reapply for permission through a "Special Vehicle". In August 2008, Sterlite was given clearance by the Indian Supreme Court to acquire forest land in the Niyamgiri hills by means of a Special Vehicle joint venture with the Orissa State government and its state-owned mining company. Although the mining project has not yet received environmental clearance (at time of writing), and domestic avenues for challenging the project are not yet completely exhausted, it seems probable that the full mining project will ultimately go ahead, fulfilling local communities' worst fears.

Human rights outcomes

To date, despite attempts by local communities fighting against Vedanta's mining activities in the Niyamgiri Hills to pursue their grievance via a broad range of political and legal channels at the national level, it appears increasingly likely that the company will soon be permitted to initiate full-scale mining activities on the site. With available remedies at the national level close to being exhausted, and an absence of appropriate and effective mechanisms at the international level, many fear that the human rights abuses associated with Vedanta's operations in this community are likely to intensify.

Overview of barriers to redress in India

Alleged human rights violations and desired remedy

Rights breached	Codification of rights	Remedies sought
<ul style="list-style-type: none"> ■ Alleged displacement of tribal families violating property rights ■ Alleged physical violence associated with forced displacement ■ Harm to collective identity and way of life of tribal communities ■ Harm to public health and environment ■ Harm to livelihoods 	<ul style="list-style-type: none"> ■ Indian Constitution (especially Section 18, protecting tribal land rights; Article 21 protecting the right to clean environment and water as components of the right to life; and Article 25 protecting the right to religious practice and beliefs) ■ Universal Declaration of Human Rights ■ International Covenant on Economic, Social and Cultural Rights ■ Domestic environmental law ■ Indian Recognition of Forest Rights Act 	<ul style="list-style-type: none"> ■ Denial of permission for mining project ■ Compensation

Avenues of redress

Avenue of redress	Avenue used? If no, why not?	If yes, barriers encountered to achieving satisfactory remedy
Political channels	Yes	<ul style="list-style-type: none"> ■ Support among political authorities at local and State level for the mining project
Common law provisions in tort	No: Inappropriate remedy offered; barriers to acquiring necessary evidence	
Administrative appeal to the National Environment Appellate Authority	<p>No, in the case of the refinery's environmental clearance:</p> <ul style="list-style-type: none"> ■ Only directly affected communities can initiate an appeal, and communities affected lacked sufficient organisation and resources; ■ Constraining limitation period requiring complaints to be filed within 30 days <p>Yes, in the case of the environmental clearance for the smelter plant</p>	<ul style="list-style-type: none"> ■ Ambiguity surrounding standing of appellant ■ Lack of independence of members of the National Environment Appellate Authority
Appeal to Indian Supreme Court	Yes	<ul style="list-style-type: none"> ■ Financial and socio-economic barriers ■ Delays
Indian National Human Rights Commission	No: evidential barriers; weakness of enforcement capabilities	
Home country courts	No: inappropriate remedy; jurisdictional barriers; difficulties establishing parent company liability	
National Contact Point for OECD Guidelines for Multinational Enterprises	No: judged a poor investment of resources given weakness of enforcement capacity and other procedural weaknesses	

Human rights of Georgian communities along the Baku-Tbilisi-Ceyhan pipeline

The 1,770-km long Baku-Tbilisi-Ceyhan (BTC) pipeline was constructed over a four year period from 2002-2006, with the aim of transporting up to one million barrels per day of crude oil from an expanded Sangachal terminal near Baku in Azerbaijan, through Georgia, to a new marine terminal at Ceyhan in Turkey on the Mediterranean coast.

A number of powerful corporate and governmental actors have been involved in this massive infrastructure project. Corporate interests – led by British Petroleum (BP) – were organised by the BTC Corporation¹²⁷ (BTC Co.), while the Government of Georgia was represented by the Georgian International Oil Corporation. The project has been financed by major international funders, in particular the World Bank and the European Bank of Reconstruction and Development (EBRD), and has also received export credit guarantees from the UK.¹²⁸

The pipeline was to be buried along its entire route, which passed through hundreds of communities situated across the three affected countries. Construction of the pipeline therefore required the temporary acquisition (typically for a period of three years) of land under which the pipeline was to be buried. In total, 450 communities (about 750,000 people) including some 100,000 landowners were registered to be affected by the pipeline within the three countries through which it passes.¹²⁹ Some also criticized the environmental impacts of the pipeline's chosen route, which cut through the Borjomi-Kharagauli National Park area, near to the Borjomi mineral water plant. From the time the project was first mooted, its potential implications for communities living along a vast stretch of territory have been the subject of controversy.

Human rights standards governing business relationships with local communities

Some of the terms of the Host Governmental Agreements (HGAs), which form an important element of the legal framework for the project as a whole,¹³⁰ were widely criticised for containing provisions that could potentially operate to weaken the Georgian Government's commitment to current and future international human rights obligations.¹³¹ Generally speaking, however, legal protections of human rights affected by the construction of the pipeline within Georgia are extensive. The companies participating in the pipeline construction are committed under the project's "Prevailing Legal Regime"¹³² to respecting the highest applicable international human rights standards, as laid out in – among other documents – the UDHR, the OECD Guidelines for MNEs, the European Convention on Human Rights and the multi-stakeholder Voluntary Principles on Security and Human Rights.¹³³

Alleged breaches of human rights standards

Claims of human rights violations associated with construction of the pipeline have centered on several main issues, encompassing economic, social and political categories of rights. Disputes surrounding the process of *land acquisition* along the route of the pipeline have been a recurring source of grievances, with large numbers of affected communities alleging that construction had begun before compensation had been provided, violating rights to property,¹³⁴ and that levels of compensation were inadequate. Many also reported suffering significant *damage to livelihood resources*, including loss or degradation of land due to the construction, damage to irrigation or drinking water supply pipes, lack of access to land plots due to the pipeline,

and loss of economic activities due, for example, to eradication of colonies of bees or loss of agricultural income. Many claims also focused on reported ancillary damage to houses and local infrastructure as a result of blasting and other construction activities. In addition, there were widespread reports of *intimidation and violence* directed at villagers who attempted to protest against construction of the pipeline. BTC Co. employees are alleged to have responded to talk of demonstrations with threats of physical violence and claims that engaging in protest would damage villagers' chances of compensation.¹³⁵

Available avenues for redress

In addition to informal political channels for grievances, the most important formal avenue for redress has been the *Common Court system* of Georgia, which handles civil, administrative and criminal disputes. The Common Court system encompasses District and City Courts; the Court of Appeal; and the Court of Cassation (Supreme Court), the latter having been established in 2005 to serve as the court of the highest, and final, instance for justice administration in the country.

In theory, some grievances could have been pursued extra-territorially in the courts of home states where companies involved in the BTC project are listed and headquartered, though the financial, jurisdictional and practical obstacles to such actions would have been out of proportion to the relatively small scale of most of the claims.¹³⁶

More *informal channels* of redress were also available at the international level in several forms. First, BTC Co. was required by both the World Bank and the EBRD, as a condition of the project's financing, to establish its own independent mechanism for settlement of disputes arising in relation to the project in each participating country, to operate throughout the period in



Construction of pipeline in Borjomi National Park.

Friends of the Earth, 2004

which construction was taking place.¹³⁷ Operating in parallel to this mechanism were two international grievance mechanisms provided directly by multilateral funders of the project: the International Finance Corporation-Compliance Advisor Ombudsman (IFC-CAO) and the EBRD Independent Recourse Mechanism.¹³⁸ The NCP mechanism enabling grievances to be brought in relation to the OECD Guidelines for MNEs was also available within a number of countries whose companies were involved in the project.

An additional avenue of redress that could potentially have been pursued at the local level is the country's national human rights institution – the office of the *Public Defender of Georgia*.¹³⁹ In theory, the Public Defender is a kind of ombudsperson responsible for supervising the protection of human rights and fundamental freedoms in the territory of Georgia, eliciting the facts of violation of human rights and assisting in redress where rights have been infringed. However, in practice, none of the grievances arising as a result of the pipeline project were reviewed by this ombudsperson.

Accessibility and appropriateness of available avenues

During the four years over which the construction of the pipeline occurred, affected individuals and communities attempted to make use of a range of both political and judicial channels of redress.

Barriers to the use of political channels

Before pursuing judicial channels of redress, the vast majority of affected communities attempted to use *political channels* to register their grievances directly. Letters of complaint were sent to the BTC Co. and local self-government

units, as well as to representatives of both executive and legislative branches of Government, including both the Prime Minister's office and individual parliamentary representatives. Many within affected communities also engaged in direct forms of *public protest*, in some cases organising strikes, or resorting to measures such as blocking off construction sites and major roads. In total, approximately 300 direct actions and rallies were organised by affected communities, some of which allegedly led to violent reprisals from police.¹⁴⁰ Protests were also registered by some groups in relation to the environmental impacts of the pipeline's chosen route, as the proposed route cut through the Borjomi-Kharagauli National Park area, near to the Borjomi mineral water plant.

While politicians and their officials could have responded by refusing planning permission for the proposed route, or demanding more extensive concessions for affected communities, concerns have been raised by some Georgian NGOs and local media regarding the alleged exertion of countervailing political pressure in support of the project by BTC Co. and its powerful foreign supporters, at the highest levels of the Georgian Government. One instance of such pressure being applied is believed to have occurred early in the development of the project, during the process of approval for the proposed route for the pipeline, which was being contested, in particular, by those concerned about its route through the Borjomi National Park. On 26 November 2002, then Georgian Environment Minister Nino Chkhobadze initially refused to agree to BP's choice of route for the pipeline through the Borjomi National Park, stating that "BP representatives are requesting the Georgian Government to violate our own environmental legislation".¹⁴¹ Intense pressure was then allegedly placed directly on then President Shevardnadze by both BP representatives and a special envoy sent by the US government, inducing Shevardnadze, in turn, to pressurise Chkhobadze until she finally signed the permit at 3a.m. on the night before BP's deadline.¹⁴²

Barriers to use of the Public Defender mechanism

Despite being one of the most trusted institutions in Georgia,¹⁴³ recommendations of the Public Defender lack any binding powers. Those occupying the post of Public Defender that have adopted an activist stance critical of the Government have faced significant resistance from the Georgian Parliament, which has on several occasions declined to approve the Defender's reports. The power of the Public Defender to act in defence of human rights in the face of contrary objectives within the Georgian Government is therefore very limited, undermining the usefulness of this mechanism for those seeking binding remedies.

Partial access to redress by way of the Georgian judicial system

As in so many other cases, *financial barriers* associated with access to the judicial system have created serious obstacles for many within affected communities, particularly since the pipeline passes largely through rural areas characterised by widespread poverty. Court fees were raised significantly in July 2006, increasing these barriers further.¹⁴⁴ Moreover, Georgia's judicial institutions are some of the least trusted institutions in the country, and this lack of trust presents an additional disincentive for victims to undertake costly and time-consuming forms of litigation.¹⁴⁵

Nevertheless, a number of cases pertaining to the pipeline project were submitted to the Common Courts, the majority of these actions being initiated by villagers and local NGOs acting on their behalf. Some involved claims for compensation against BTC Co., while others sought to appeal the administrative decisions through which environmental permission for the project had been granted by Georgia's Ministry of Environment. In one case, BTC Co. itself brought a suit against the landowners with whom it could not reach an agreement about land acquisition, demanding necessary right of way on their land parcels. Many of these cases ended in the Supreme Court, and some have still not been finally resolved.

Use of informal grievance mechanisms established by project financers

A number of cases have been taken through BTC Co.'s internal grievance mechanism, as well as the World Bank and EBRD mechanisms, and the NCP for the OECD Guidelines. Between 2002 and 2006, the BTC Co.'s mechanism received around 2500 grievance complaints, involving 600 contractor companies.¹⁴⁶ While 31 cases were taken through the World Bank's IFC-CAO, only three were registered with the EBRD, due to the late establishment of the mechanism (it came into force only in late 2004, when the construction phase of the project was already underway) and the weak dissemination of information about the mechanism among affected communities.

Effectiveness and integrity of the judicial grievance process

Barriers confronted by those attempting to access justice through the Georgian court system are multi-faceted. As in so many other countries, problems of *under-resourcing* reflected in an over-burdened case load and long waiting lists are endemic. Even in cases where the court's initial decision has been favourable for local communities, attempts to pursue enforcement of court orders can drag on, sometimes for years.¹⁴⁷

Moreover, the Georgian judiciary is generally considered to suffer from serious deficits of independence and integrity.¹⁴⁸ The exercise of *political influence over the judiciary* can be a particular problem in cases such as these, where senior figures within the government are committed to facilitating the smooth operation of the project, and are willing to override the human rights of affected communities in order to do so. In some cases the exercise of such influence is direct, taking the form of what many refer to as 'phone justice'. During one case in Akhaltsikhe, the lawyer representing the affected communities reported being approached by the judge overseeing the case, mistaking him for the representative of BTC Co. 'Everything will be OK', the judge is reported to have

assured the lawyer, 'since I have received a call from the National Security Council of Georgia'.

In other cases, the channels through which political pressure appears to have been exercised over the judiciary have been more subtle. The environment of underlying political pressure and lack of independence in which the judiciary operates is such that often it is sufficient for lawyers to make arguments invoking state interests, and judges will take such considerations into account in making their decisions without the need for such direct forms of political intervention. In one case, in which BP's alleged abuse of the environmental obligations placed on the project were being challenged, the lawyers representing the Government and BTC Co. were said to have spent more time making speeches about the importance of the BTC pipeline for Georgia than in addressing the particulars of the case being considered by the court. In private talks with one of the local NGOs involved with the case, a representative of the environmental ministry is said to have acknowledged that the claimants were right on the merits of their case, but asserted that "in this country in this period it is impossible to win a case against BTC and the Government".

Weak enforcement provided by private and voluntary systems of redress

While BTC Co.'s internal grievance mechanism provided a forum within which some small complaints were able to be resolved, many attempting to use this mechanism were highly critical of the process, suggesting that the company took advantage of the absence of binding remedies to avoid payment of, what would otherwise be considered, reasonable levels of compensation.¹⁴⁹ Likewise, while the IFC-CAO mechanism provided a useful forum for negotiation over some small claims,¹⁵⁰ facilitating the provision of remedy even in the absence of formal powers of enforcement, critics complained that as soon as significant sums of money were at stake, the mechanism's leverage over the companies decreased enormously.¹⁵¹ In a number of cases the company simply refused to submit to the IFC-CAO process.¹⁵²

Although the EBRD's grievance system was not so widely used in this case, similar evaluations have been made of this mechanism. It has also been claimed that BTC Co., their subcontractors and the Georgian Government have sought to avoid responsibility by referring complainants to one another via the multiple, parallel mechanisms of redress.¹⁵³

The OECD Guidelines mechanism was also used in this case, with complaints being filed in April 2003 simultaneously

before UK, Italian, French, German and US NCPs, accusing BP of seeking tax and legal exemptions in contravention of OECD guidelines, as well as unduly influencing the governments in the construction of the pipeline in Georgia and Turkey.¹⁵⁴ The case received its most extensive consideration from the UK NCP, which undertook a field visit to Georgia in September 2005 to collect further details regarding the case at the local level. After a drawn out process, the UK NCP reached a decision to exonerate the company, a decision that was strongly criticized for relying heavily on an undisclosed report presented by BP. The transparency and impartiality of the NCP mechanism have been widely criticised, as have the procedural barriers arising from the filing of the case in multiple jurisdictions, leading a number of NCPs to attempt to shift responsibilities from one to the other.¹⁵⁵ Five and a half years later, the case has still not been fully resolved.¹⁵⁶

Human rights outcomes

While some individual claimants have succeeded in winning small victories via the range of legal and quasi-legal channels through which they have pursued their grievances, many affected individuals and communities have remained uncompensated for alleged loss and damage of property, infrastructure and local environments associated with the construction of the pipeline.

Overview of barriers to redress in Georgia

Alleged human rights violations and desired remedy

Rights breached	Codification of rights	Remedies sought
<ul style="list-style-type: none"> ■ Violation of property rights as a result of inadequately compensated land acquisition ■ Damage to livelihood resources ■ Intimidation and violence directed at those protesting against the project 	<ul style="list-style-type: none"> ■ Universal Declaration of Human Rights ■ European Convention of Human Rights ■ Host Governmental Agreements also encompassing commitment to OECD Guidelines for MNEs and Voluntary Principles on Security and Human Rights 	<ul style="list-style-type: none"> ■ Compensation

Avenues of redress

Avenue of redress	Avenue used? If no, why not?	If yes, barriers encountered to achieving satisfactory remedy
Political channels	Yes	<ul style="list-style-type: none"> ■ High level political support for the project, including foreign political influence
Common courts – civil and administrative disputes	Yes	<ul style="list-style-type: none"> ■ Financial barriers ■ Lack of trust in the judiciary ■ Weak and under-resourced judiciary ■ Delays in both hearing of cases, and enforcement of court orders ■ Political influence over judicial decisions
BTC Co. internal grievance mechanism	Yes	<ul style="list-style-type: none"> ■ Weakness of enforcement capacity
IFC Compliance Advisor Ombudsman	Yes	<ul style="list-style-type: none"> ■ Weakness of enforcement capacity
EBRD Independent Recourse Mechanism	Yes	<ul style="list-style-type: none"> ■ Weakness of enforcement capacity ■ Lack of community knowledge of the existence of the mechanism
Georgian Public Defender	No: weakness of enforcement powers of recommendations	
Home country courts	No: Financial barriers; jurisdictional barriers; lack of proportionality of such costs to the size of the claims	
OECD Guidelines for Multinational Enterprises National Contact Point	Yes	<ul style="list-style-type: none"> ■ Weakness of enforcement capacity ■ Long delays ■ Lack of independence of the UK NCP from the government department promoting UK trade and investment

Common lessons regarding barriers to redress

The above cases generate a number of conclusions regarding the extent of existing barriers to redress, and the consequences of these for the human rights of vulnerable individuals and communities. The legal provision of rights-compatible standards in host countries was shown to be reasonably extensive in most cases. However, it was found that in practice a range of barriers exist which undermine the availability of accessible and appropriate avenues for redress, as well as the availability of appropriate and effective remedies. Various barriers also operate to undermine the effectiveness, legitimacy and equity of processes of investigation, mediation and adjudication within those avenues of redress that are available.

The particular combinations of barriers encountered differed significantly between cases. The extent and form of different categories of barriers in any given case varied along a number of different axes: between different countries hosting UK investment; different kinds of redress mechanisms; different kinds of business activities; different kinds of rights violations; and so on. There was also variation between cases in the extent to which the human rights abuses at issue were committed directly by UK companies, or primarily by other parties but with the complicity of these companies.¹⁵⁷ Nevertheless, it is possible to identify a number of barriers that recurred across many of the cases – operating both at local and international levels.

Why local avenues of redress are failing

Practical and financial barriers to access

Socio-economic barriers of various kinds are often important determinants of whether or not an affected individual or community is able to enter into even the first stage of a redress process, particularly for judicial avenues of redress. Lack of access to requisite information and financial resources can

be a particular problem, especially where availability of relevant legal expertise and legal aid are also limited, and when collective institutions at the local level which might help to mitigate such barriers are weak. Barriers of these kinds were observed in some form across all of the cases documented above.

Other factors found to discourage the use of formally available avenues of redress include: repeated experiences of political marginalisation; broader distrust of the legal system (particularly evident in the Georgia and Nigeria cases); actual or anticipated time delays and uncertainty of outcomes (particularly pronounced in relation to extra-territorial legal actions); and weak or inappropriate remedies associated with the available avenues.¹⁵⁸ Although the details and severity of such problems varied widely, barriers of this kind were reported across almost all of the cases.

Barriers in this category tend to be particularly serious for individuals and communities that are marginalised within broader social power relations as a result of economic, class, gender or other varieties of social hierarchy or exclusion.¹⁵⁹ In varying combinations, such access barriers commonly prevent victims of abuse from advancing past the first step in a potential grievance process.

Capacity barriers

Capacity barriers within available systems of redress can take several forms. One obvious set of problems are weaknesses in the financial and human capacity of the administrative or regulatory agencies charged with implementing processes of redress (observed in some form across all of the cases).¹⁶⁰ Also, judicial systems in host countries typically suffer from problems of: overloaded capacity; poor financing; and in some cases (such as Georgia), limited expertise or inappropriate professional norms among judges and lawyers. In those cases where the integrity of administrative or judicial processes is also undermined by corruption of individual

officials, the capacity of such processes to provide effective redress is further weakened. The incidence and severity of problems of both state capacity and the integrity of state processes varied widely between the cases examined in this report. Such variation is also evident in studies of the governance capacity of developing country governments in other contexts.¹⁶¹ Nevertheless, these kinds of capacity barriers in varying forms are widespread, operating to weaken both the effectiveness and legitimacy of redress processes.

Motivational barriers

Barriers to redress can also result from the motivational characteristics of those government decision makers who choose to subordinate protection of rights to other competing public or private goals. Inferring the presence of such barriers in any specific case can often be difficult, given the broad range of circumstances in which a given set of business activities may have the potential to create employment and development opportunities (and thus to support widened fulfilment of a range of economic rights), but at the same time to impact negatively on human rights of other kinds (such as labour or environmental rights).

The extent to which such circumstances may give rise to genuine dilemmas of competing rights claims remains intensely contested. While many business groups and some governments maintain that such conflicts are real and inescapable, international bodies such as the ILO, together with a broad range of other actors who advocate on issues of worker rights, question the view that goals of job creation and social protection are in necessary tension. This view has been prominently reflected in recent mobilisation around the concept of 'decent work',¹⁶² which is understood to be about creating decent and productive work based on principles of freedom, equity, security and human dignity.¹⁶³ The UN Economic and Social Council has also expressed its support for the framework of 'decent work', incorporating it into

the targets underpinning the Millennium Development Goals as a potential means of linking objectives of job creation, social protection and poverty alleviation.¹⁶⁴

Despite this ongoing debate, it is reasonably uncontroversial to observe that in making judgments regarding the appropriate weighting of potentially competing goals, policy makers are not always motivated primarily by attempts to strike the optimal balance between conflicting goals of human rights promotion and protection. Rather, in many cases any such concern for rights-oriented developmental goals appears to be significantly diluted and undercut by motives more closely related to the desire of government decision makers to promote the private interests of themselves or business allies with whom they hold privileged and in some cases highly profitable relationships.¹⁶⁵ Such an interpretation would probably be least controversial in relation to the Nigerian case, though similar concerns have been raised in some form across all the cases examined in this report.

Legal barriers

Limits to *legal protections of rights* constitute one type of legal barrier to redress. In some of the cases described above, legal protections for specific rights such as freedom of association, or principles of non-discrimination were shown to be very weak. Overall, however, weak provision of laws themselves appears not to be the major problem faced by those seeking redress for human rights violations.¹⁶⁶

Another type of legal barrier to redress arises at the local level in those cases where the parent company, that is registered in another country, has control or significant influence over the harmful activity. In such cases, the legal separation between home country headquarters and host country subsidiaries, or supply chain associates, impedes attempts to hold parent companies liable in host country courts for harms to which they have significantly contributed. (This problem of establishing parent company liability is discussed further below in relation to

potential claims in home country courts.) Even in those cases where liability can be established, legal separation between the parent company and its subsidiary can also make it more difficult to extract adequate compensation.¹⁶⁷

Corporate exploitation of existing barriers

The power of companies *vis-à-vis* both government decision makers and communities can at times be used to reinforce, or to take advantage of, each of the above barriers. While companies are entitled to attempt to counter the claims against them in a reasonable way, they may go beyond the boundaries of legal and democratic due process (as many believe to have occurred in the cases of Shell in Nigeria and Vedanta in India), or may take advantage of their leverage over government officials and agencies to intimidate affected individuals and communities (a strategy of which Vedanta was also accused in India). Such strategies may serve both to dissuade potential claimants from pursuing redress in specific cases, and potentially also to contribute to the erosion of trust in the justice system as a whole.¹⁶⁸ Companies' financial power can be used to exploit capacity barriers within government and to undermine the equity of judicial processes, while their disproportionate access to financial resources, legal advice and 'expert' scientific knowledge can be used to counter claims made against them, to wear out under-resourced complainants by using delaying tactics, or to deter potential plaintiffs from bringing cases by making threats of retaliatory legal action.¹⁶⁹ Companies may also deploy their financial, technological and broader bargaining power as a means of incentivising or pressuring governments to prioritise corporate interests at the expense of human rights protection (a tendency that was particularly notable in the Nigerian and Georgian cases).

Why international avenues of redress are failing

Barriers facing voluntary and quasi-judicial intergovernmental mechanisms

Voluntary or 'soft law' mechanisms, such as the NCPs for the OECD Guidelines for MNEs, the IFC Ombudsman and the EBRD Independent Recourse Mechanism, are often (although not always) relatively easy to access, and they can make important contributions to enabling redress by facilitating processes of mediation or investigation, and producing recommendations. In some cases, such mechanisms are able to facilitate the provision of effective remedy not only by facilitating processes of mediation, but also by bringing to bear informal pressures for enforcement. Such pressures include a range of market-driven incentives to protect company reputations,¹⁷⁰ and in some cases also direct pressure from governmental actors associated with the operation of these mechanisms. However, in those cases where such incentives prove insufficient to outweigh the costs of compliance, the lack of stronger enforcement powers can present a serious barrier to effective remedy.

The NCP system has also been criticised for what is perceived as weak investigatory and fact finding powers, lack of transparency, possible conflicts of interest, inequitable treatment of parties, excessively long timeframes for resolving disputes, and inconsistency across different countries' NCPs in their approaches to interpreting the scope of the OECD Guidelines.¹⁷¹ Although many of those using the OECD Guidelines mechanism have worked in recent years to address some of these weaknesses, the underlying problems with the conception and mandate of the mechanism remain, reflecting limitations inherent in the reliance on voluntary initiatives to improve corporate behaviour.¹⁷²

Complaints mechanisms available within international organisations such as the ILO suffer from some similar weaknesses. The ILO has tended to rely primarily on its elaborate supervisory

mechanisms, with the ILO's formal grievance procedure being used very rarely, and in none of the cases considered here. Regardless, those wishing to implement recommendations or findings from the ILO have few means of enforcement at their disposal, and this mechanism can be used only in relation to collective claims of systemic abuses, with complaints directed against states rather than companies.¹⁷³

Barriers facing extra-territorial claims in home country courts

Another possible avenue for redress at an international level is the use of legal action in extra-territorial national courts. Most states do not have specific laws or regulations adjudicating corporate human rights abuse abroad,¹⁷⁴ nor do they give victims specific causes of action against transnational companies for their abuse of such rights. Therefore, attempts to take claims to courts in home country jurisdictions have generally relied on the use of existing national civil and criminal law provisions,¹⁷⁵ the former being of much greater relevance to the cases considered in this report.¹⁷⁶ Attempts to seek redress via such mechanisms usually encounter a number of serious obstacles. Indeed, such avenues have not yet been attempted in any of the cases documented in this report, for a variety of reasons, many of which resonate with analyses documented elsewhere.¹⁷⁷

First, the scope of *human rights abuses* for which redress can be pursued tends to be rather limited. Civil liability essentially covers harm to an individual's person and property. This means that while claims relating to harm to person and property, personal assault or trade/livelihood may be pursued under existing tort law,¹⁷⁸ matters relating to issues such as child labour, excessive working hours or racial or sexual discrimination will not amount to claims in tort under English law (assuming the absence of applicable statutory provision) unless actual harm of the types tort law recognises can be established. Similarly, harm to the environment *per se* will not be recognised as a basis for such a claim.¹⁷⁹ Remedies available to victims

are also typically very narrow, generally offering only monetary compensation. While this is the desired outcome in some cases, it is of much less value in others, such as the Indian and Nigerian cases considered above, where binding court orders in relation to a contested business activity are being sought.

Jurisdictional barriers can present significant obstacles to cases being accepted by home country courts, since for a case to proceed to be heard on its merits, it is first necessary to establish jurisdiction over the company's conduct abroad. The approach adopted by most common law countries is that the plaintiff has the right to choose the jurisdiction of the court with a preference for where the harm was committed. While home states are entitled to take jurisdiction over cases involving a locally incorporated parent company as a defendant, the defendant may invoke the doctrine of *forum non conveniens* to stay the proceedings.¹⁸⁰ European law now significantly restricts the extent to which UK courts may deny jurisdiction on this basis, although there is still the potential for courts in England to stay, or strike out, proceedings on this ground under certain conditions.¹⁸¹ In a number of recent cases plaintiffs have successfully overcome jurisdictional barriers, with home country courts permitting some cases to proceed on their merits. Nevertheless, uncertainty regarding the conditions under which courts will accept cases of this kind remains, allowing jurisdiction barriers to complicate and delay proceedings, even where cases are eventually permitted to proceed.

Where cases are accepted, the doctrine of separate legal personality, which treats each member of a corporate group as a legally distinct entity, tends to create significant additional barriers to establishing parent company liability, since a parent will not be held liable for the acts of a subsidiary merely by virtue of its equity interest. In order to pursue civil claims against parent companies in the home state jurisdiction, it must be established that the parent company is liable for acts of subsidiaries and associates.¹⁸² In general, the twin

concepts of separate legal personality and limited liability therefore operate to insulate each member of an MNE from the obligations (civil or criminal) of the other members of the economic group. Under existing law, a parent company can only be held liable for environmental and human rights abuses where: it clearly failed to adhere to its duty of care; it authorised or abetted the abuse; or where the corporate structure has deliberately been used to advance fraud or other illegal or wrongful purposes.¹⁸³ Even where such criteria have been fulfilled in practice, demonstrating cause-effect relationships between manifested effects and particular corporate decisions in court is usually extremely demanding in evidentiary terms.¹⁸⁴

Moreover, *practical and financial barriers* that give rise to access problems within almost any legal system tend to be intensified at the international level – though such barriers can be reduced significantly by initiatives such as 'no win no fee' policies of individual law firms, which can be available in some cases. Even to the extent that direct costs of access can be overcome, additional barriers may be presented by practical impediments such as the need to facilitate travel by witnesses, problems of finding advocates, and barriers to accessing the requisite legal knowledge and expertise to investigate possible causes of action in foreign jurisdictions.¹⁸⁵ In the absence of developed case law, the complexity and uncertainty of most existing legal avenues of this extra-territorial kind intensifies the disinclination of many potential plaintiffs to pursue such avenues, given likely delays and extremely uncertain outcomes.

Overall then, while there are some available avenues for redress beyond host country jurisdictions, which can play a role in some cases, they clearly fall far short of bearing the regulatory expectations that are increasingly being placed on them due to the inadequacy of avenues of redress at the local level.

Structural nature of existing barriers to redress

The above evidence of multiple barriers to redress might be viewed as evidence of the need for renewed efforts of institutional strengthening at the host country level. Certainly, some of the barriers documented above could be tackled in important ways by providing capacity building assistance to host governments, and by broader support for those local actors (state and non-state) that are seeking to promote agendas of rights compliance within local policy-making processes.

However, many of the documented barriers are products of deeper underlying features of the social, political and institutional environments within host countries. Consequently, they cannot simply be 'reformed' in such ways – at least not within a reasonably foreseeable timeframe. The existence of deeper *structural* barriers of this kind may have quite different policy implications, pointing towards the medium-term need to provide mechanisms of redress that can function within the terms of such constraints.

Barriers to redress can be understood as structurally entrenched within host countries in at least three important ways. *First*, the creation of strong institutional systems for the protection of human rights among marginalised communities is often in some degree of conflict with the perceived interests of political and economic elites, or with those of a broader 'public' concerned with promoting goals of economic growth. Accordingly, social power relations within and beyond the state can hamper the protection of

human rights, such that in many countries the strengthening of a range of rights and rule-of-law agendas has depended historically on support from middle-class social and economic constituencies. Conversely, in countries where sufficiently powerful social alliances in support of rights agendas have not developed, the protection of rights can remain systematically subordinated to other public or elite agendas.

Second, state 'capacities' are in many respects a product of host countries' subordinate position within the broader international political economy, where they are dependent on resource- or labour-intensive export sectors, are often highly indebted, and suffer chronic fiscal shortages. Such capacity constraints are likely to persist in some form for as long as such countries' power and status in the international system remains essentially unaltered.

Third, serious constraints to effective local redress result simply from the

jurisdictional limitations confronted by *nationally* bounded systems of redress that seek to govern *transnational* systems of corporate decision-making and power.¹⁸⁶

Some may be willing to wait many decades until structural problems of these kinds can at least in theory be overcome, accepting that it is either morally acceptable, or at least inevitable, that human rights compliance be put on hold within societies and economies that are still on the pathway to ‘development’. Others would accept in principle that home country governments bear some share of responsibility to contribute to strengthening systems of redress available to populations in host countries affected by foreign corporate activities, but hold that existing contributions to capacity building efforts at the local level – such as is currently provided in the form of international development assistance in the justice sector – offer a sufficient means of discharging this responsibility.

However, to the extent that structural barriers to host country regulation and redress are shown to be important, it seems apparent that continuing to rely on host country governments alone to bear responsibility for the protection of their populations’ human rights is likely to facilitate continuing violations of human rights in many host countries, without effective redress. While strengthened local redress clearly remains a *necessary* condition for the effectiveness and legitimacy of available systems of redress, it seems likely that excessive weighting of efforts to strengthen systems of redress towards the local level, in the presence of structurally entrenched barriers to local level redress, will fail to provide a *sufficient* basis for protecting internationally recognised human rights.

Potential for the UK government to contribute to strengthened systems of redress

It is generally accepted that UK companies should respect internationally recognised human rights standards and applicable national law when they operate abroad. However, there is less consensus on what, if anything, the UK government should do to strengthen available avenues for redress when UK companies abuse these internationally recognised standards. A number of proposals have been advanced for possible ways in which the UK government's role could be strengthened. Some proposals would involve working through existing legal and institutional frameworks in appropriately adapted form, while others would involve the establishment of new institutions to govern the offshore business activities of UK companies.¹⁸⁷

One such proposal for a new institution has been put forward by The Corporate Responsibility (CORE) Coalition on the basis of a detailed review of possible avenues for reforming existing systems. 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.¹⁸⁸

More specific functions proposed as part of its mandate include: developing and overseeing compliance with codes of best practice relating to the global management by UK companies of their labour, environmental and human rights impacts; monitoring the impacts of UK companies abroad in relation to recognised standards; performing research, education and training, and advisory functions; receiving and investigating complaints and resolving disputes regarding alleged breaches of recognised standards outside the UK; and contributing to outreach, networking and capacity building functions by entering into co-operative agreements with foreign regulatory agencies. It is envisaged that the Commission would offer remedies, including financial award, publication of apology (and/or explanation), and orders to companies in relation to specific breaches.¹⁸⁹

Recent debate surrounding institutional reform proposals concerning business responsibility for human rights has tended to turn on two key clusters of issues. First, questions have been raised regarding the implications of extra-territorial forms of redress for political and legal principles of national sovereignty. Second, many have questioned the capacity of any specific set of institutional reform proposals to add value to the existing array of local and international mechanisms. Each of these broad issues is briefly considered below – the first being examined in general terms, and the second with reference to The Corporate Responsibility (CORE) Coalition's proposal for the creation of a new UK Commission for Business, Human Rights and the Environment.

Would the strengthening of UK systems of extra-territorial redress violate established legal or political norms of sovereignty?

Conventionally, it has been assumed both in international law and in broader norms governing international political relations that states have a duty to protect against human rights abuses by non-state actors, including businesses, when the abuses affect persons within their territory or jurisdiction. This view is reflected in the prevailing definition of state responsibility to respect, protect and promote rights *within their territory or jurisdiction* by providing systems of both regulation and redress.¹⁹⁰ This essentially implies a simple territorial division of responsibilities for rights protection: as long as each state is able to provide effective means of regulation and redress within its own

territory, it is assumed that the resulting human rights system combines the benefits of local systems of regulation and redress with comprehensive protection of internationally recognised human rights.

However, the logic underpinning such assumptions is increasingly challenged by the empirical reality that many host country governments fail to protect their citizens adequately from activities of foreign corporations that negatively impact their human rights. In such cases, is the UK Government then obliged to provide for such protection? Or would adoption of such a duty involve the intrusive exercise of extra-territorial power in breach of accepted norms of national sovereignty and non-intervention? This question can be variously interpreted in either legal or political terms.

The legal variant of this question searches for an answer in the duties or constraints imposed by prevailing law, but it turns out that this question cannot be clearly resolved by reference to existing international law. Most agree that states are not generally *obliged* under existing international law to exercise extraterritorial jurisdiction in defence of internationally recognised human rights, although human rights law is still developing in these areas and important areas of disagreement between experts remain.¹⁹¹ Nevertheless, it is also generally recognised that the exercise of certain kinds of extra-territorial jurisdiction in defence of internationally recognised human rights is *not prohibited* under existing international law, provided it meets certain minimum conditions.¹⁹²

The political variant of this question focuses on concerns regarding the protection of national sovereignty and principles of non-intervention in the affairs of foreign states. For some, this reflects long-established political concerns that extra-territorial mechanisms of regulation and redress within developed countries may in practice operate to usurp the rightful role of sovereign host states, potentially imposing inappropriate standards on companies and local communities by sheltering under unjustified claims of universality. Even if

only on practical grounds, such concerns must be taken extremely seriously, since widespread perceptions of this kind would be likely to erode the legitimacy of any newly created UK mechanism.

For others, suspicion of extra-territorial institutions imposed from outside reflects more pragmatic concerns for the effectiveness, sustainability and legitimacy of specific mechanisms. Local mechanisms are widely viewed as better able to reflect and respond to local values and cultural norms in the formulation of applicable standards. They may also enable greater participation by those affected, thus potentially strengthening both effectiveness and legitimacy. Greater participation and involvement of grass root stakeholders may, in some cases, facilitate faster handling of individual disputes, and may be less costly.¹⁹³ By enabling the participation of local experts, government agencies, and key participants in local business communities, local processes of redress may also strengthen communication and working relationships between such groups, laying the foundation for stronger processes of learning and capacity building.¹⁹⁴

There are a number of ways in which such political and institutional concerns could be reasonably addressed. In part, this could be achieved simply by demonstrating genuine respect and support for actions to strengthen and privilege local mechanisms of redress. In addition, the operation of any such extra-territorial systems of redress should be grounded on international human rights standards that have already been recognised by local constituencies through relevant constitutional, democratic or other legitimate processes.¹⁹⁵

Would The Corporate Responsibility (CORE) Coalition's institutional reform proposal add value to the existing array of local and international mechanisms already in place?

A broad range of important issues regarding the design of a new Commission as proposed by The Corporate Responsibility (CORE)

Coalition have already been canvassed in past discussion papers,¹⁹⁶ and rigorous evaluation of the available options is beyond the scope of the present paper. Rather, the potential value of key features of The Corporate Responsibility (CORE) Coalition's proposal for a new Commission are briefly examined in light of major lessons from the cases documented above regarding existing barriers to redress.

What functions and capabilities could such a Commission contribute to the system of redress as a whole?

First, it seems clear that the UK Government could make an important and relatively uncontroversial contribution by providing greater support for provision of *financial and technical development assistance* for capacity building within systems of redress in host countries. This would directly assist host countries to build the requisite legal and administrative infrastructure and associated human capacity.¹⁹⁷ The UK could strengthen its contribution to such forms of capacity building by way of existing channels of development assistance, even in the absence of a specialised Commission. Indeed, many donor programmes already encompass a range of activities oriented towards capacity building in the justice sector, such as: training programmes for police or judges; provision of logistical resources such as cars or computers; and assistance in the development of longer term strategies for legal sector reform. However, the proposed capacity of the Commission to enter into co-operation agreements with foreign regulatory authorities, along with its potential to feed lessons from its broader research and capacity building activities directly into the design of assistance strategies may enable more effective targeting of available assistance.

Another clear conclusion is the important need for provision of a *forum for redress within the UK* through which dispute resolution and remediation approaches could be pursued where appropriate, with provision also for investigation and adjudication in relation

to claims of extra-territorial human rights abuses by UK companies. Provision of more extensive powers of investigation and enforcement, and a broader range of available remedies than currently available would help to diminish barriers to redress of certain kinds. At least some workers and individuals within Kenya, Bangladesh and Georgia could well have benefited from such an avenue had it been available in the cases documented above.

The proposed Commission would also perform important *co-ordination* functions, disseminating information on existing regulatory and grievance mechanisms, and helping to co-ordinate their implementation.¹⁹⁸ In order to facilitate ownership and participation among stakeholders within host countries, the Commission's activities would benefit from being closely networked with human rights institutions, regulators, NGOs, workers' organisations and other relevant actors at the local level. Such networking would facilitate more cohesive functioning of the existing 'mixed economy' of mechanisms. It could also enable the Commission to contribute to processes of *capacity building, learning* and potentially also *development and dissemination of best practices* among UK businesses and their associates. Such informational and learning roles could also be valuable at the policy level within the UK, helping to build a stronger basis for the development and evaluation of future reforms.

Outreach and networking activities of these kinds may also strengthen local and international alliances between actors committed to prioritising human rights agendas, thereby helping to confront the power relations that so often lead to human rights goals being subordinated to competing social interests and agendas.¹⁹⁹ Regulatory scholars have argued that actively engaging a broad range of networked governmental and non-governmental actors can directly strengthen regulatory processes – both by networking on capacity deficits and by building a stronger alliance of social actors through which to contest the social power imbalances underpinning violations of legal standards.²⁰⁰ To the extent that the Commission's networking activities could contribute to such processes, it might create broader social and institutional conditions conducive to greater rights compliance within host countries as well as within the UK.

Limits to the potential scope of a UK Commission's impact

Despite the important contributions such a Commission could make to strengthening systems of redress, consideration of lessons from the above cases suggests that such a body should not be seen as providing solutions for all the problems identified in this paper.

First, while some rights abuses are influenced in important ways by UK

companies, others have predominantly local causes. For example, excessive working hours of Kenyan flower workers are influenced by UK business decisions to a significant extent – and could feasibly be redressed by a UK Commission. In contrast, locally embedded problems, such as sexual harassment, would be more difficult to address by a UK body, although it could make a marginal contribution to addressing those problems through activities such as outreach, capacity building and dissemination of best practices. Further, many barriers that result from costs, delays or stringent evidentiary requirements would probably also afflict a newly created Commission, at least in relation to its more formal adjudication functions and subject to its level of resourcing.

Clearly, such a Commission would not provide a silver bullet, and would serve as only one player within a much broader institutional universe oriented towards goals of strengthening human rights compliance among business enterprises operating globally. However, the above analysis suggests that it would contribute valuable capabilities and functions to the existing array, and it could also develop a critical co-ordinating function by consolidating both communication and networking capabilities within this institutional universe as a whole.

Conclusions

The activities of transnational enterprises can promote economic development and generate wealth and prosperity, thereby enhancing the realisation of a broad range of economic and social rights. On the other hand, there is no doubt that they can – and do – perpetrate human rights abuses affecting both workers and communities in many of the host countries in which they operate around the world.

When such abuses occur, the duties of governments to protect internationally recognised human rights demand the provision of effective and legitimate mechanisms of redress. While there are many reasons to favour local systems of redress, this report has presented clear evidence of structural barriers to redress at the level of host country governments, which there appears to be limited prospect of overcoming within the terms of existing political and economic arrangements. Strengthened capacity at the local level remains a *necessary* condition for effective human rights protection, and greater UK support for capacity building within host countries can help to promote this. However, the structural nature of many documented barriers suggests that strengthening of local systems of redress can no longer be plausibly seen as *sufficient* if the human rights of workers and communities affected by the business activities of UK companies abroad are to be adequately protected.

The analysis presented in this report suggests that strategies such as the proposed creation of a UK Commission for Business, Human Rights and the Environment could offer a practicable means by which the UK Government could contribute more effectively than at present to protecting internationally recognised human rights affected by the extra-territorial operations of UK business.

In the absence of such a body, hundreds of thousands of workers and communities around the world with whom the UK does business are likely to continue suffering violations of their recognised human rights – without access to redress. Given the UK Government's commitment to corporate and governmental responsibility for internationally recognised human rights, and the foreseeable consequences in terms of ongoing human rights abuse if it *fails* to act when there are structural barriers to redress at the level of host country governments, the case for the UK government to consider seriously such proposals for reform appears clear.

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Endnotes

- 1 (Human Rights Council 2008b)
- 2 (Human Rights Council 2008b)
- 3 (Palmer 2003; Zerk 2008)
- 4 In general, declarations, principles, guidelines, standard rules and recommendations are not binding (though some are considered to now be part of customary international law). However, they have normative force and provide guidance to states regarding their conduct. Covenants, statutes, protocols and conventions are legally binding for those states that ratify them.
- 5 (Human Rights Council 2007)
- 6 (Human Rights Council 2008b; Palmer 2003)
- 7 (Human Rights Council 2008b; Rees 2008)
- 8 (Corporate Social Responsibility Initiative 2008; Rees 2008)
- 9 (Newell 2001)
- 10 (Commonwealth, best practices)
- 11 (Human Rights Council 2008a, p.54)
- 12 The concept of 'access to rights' adopted by the International Council on Human Rights Policy (International Council on Human Rights Policy 2004) is even broader, including not only access to political representation, but also ability to report crimes to the police with the expectation that action will be taken, and to make claims directly on the providers of basic public services.
- 13 (Rees 2008)
- 14 (Human Rights Council 2008b; Palmer 2003)
- 15 It should be noted however that particularly in relation to extra-territorial avenues of redress very little case law has been established, giving rise to a distinct lack of clarity in many respects.
- 16 (Rees 2008)
- 17 (Human Rights Council 2008a)
- 18 In practice, there are often multiple breaches occurring and a number of redress mechanisms being pursued simultaneously by multiple parties. This process simply aims to depict stylistically the process followed in each.
- 19 Such characteristics required for grievance mechanisms to be credible and effective are reviewed by the Special Commissioner on Business and Human Rights and supporting researchers. (Corporate Social Responsibility Initiative 2008; Human Rights Council 2008b, p.24).
- 20 There may be benefits to a diversified approach to grievance handling where multiple pathways contribute to providing remedy and embedding rights in different and complementary ways (Human Rights Council 2008a). However, in many cases either legal or resource barriers compel the victim to select to pursue only one avenue.
- 21 (Newell 2001)
- 22 Such incentives may come by means of external sanctioning and enforcement mechanisms, or may result from recognition of a broader range of commercial or organisational benefits of compliance.
- 23 Although the specific rights at stake vary, generally speaking transnational business activity is able to impact the full range of human rights of affected workers, communities or end users of business products (Human Rights Council 2008b, Addendum 2).
- 24 (War on Want 2007; Dolan et al. 2002; http://www.hcda.or.ke/default2.asp?active_page_id=92)
- 25 (Dolan et al. 2002)
- 26 (War on Want 2007)
- 27 (<http://globalpolicy.igc.org/socecon/inequal/income/2003/0517growers.htm>; War on Want 2007)
- 28 These include the ICCPR and ICESCR, the African Charter on Human and Peoples' Rights, and 49 ILO Conventions, with the notable exception of ILO (no° 87) Freedom of Association and Protection of the Right to Organise Convention, 1948 (Dolan et al. 2002). International standards such as ILO Conventions ratified by Kenya are used by the government and courts as guidelines, but are not binding (http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_facb_ken.pdf).
- 29 Article 23, Universal Declaration of Human Rights.
- 30 (Alston 2005; Zerk 2006, p.81)
- 31 (<http://www.state.gov/e/eeb/ifd/2008/100889.htm>)
- 32 Personal communication, Kenyan Women Workers Organisation.

- 33** Kenyan labour law mandates that the total hours worked in any 2-week period should not exceed 120 hours (144 hours for night workers).
- 34** (Omasa 2006)
- 35** (http://www.labour.go.ke/index.php?option=com_content&task=category&ectionid=18&id=31&Itemid=79)
- 36** (<http://www.state.gov/e/eeb/ifd/2008/100889.htm>)
- 37** (Dolan et al. 2002); (Rees and Vermijs 2008)
- 38** Generally speaking, such codes have been introduced from three different origins: dominant buyers such as supermarkets or importers, trade associations linked to the horticultural sector (both nationally, led by the Kenya Flower Council, and internationally) and independent bodies comprising business and a range of civil society organisations.
- 39** (African Governance Forum 2007; International Federation for Human Rights 2008b)
- 40** Personal communication, Kenyan Women Workers Organisation.
- 41** (International Federation for Human Rights 2008b)
- 42** Personal communication, Kenyan Women Workers Organisation.
- 43** This fear has proved to have some basis, with a number of companies including major European investors such as Sher Agencies, previously one of Kenya's leading flower firms, relocating in recent years to Ethiopia, in response to lower costs, weaker regulations and more extensive government incentives to attract investors (<http://www.addisfortune.com/Sher%20Ethiopia's%20Social%20Seed%20Flowers%20in%20Zeway.htm>; <http://www.ehpea.org.et/News%20Kenya.htm>).
- 44** (<http://www.globalexchange.org/countries/africa/kenya/KenyaCountryReader.pdf>, p.38)
- 45** In 2001 KHRC undertook a study on the working and living conditions for the horticultural workers in Kenya and published a report dubbed "Beauty and the Agony".
- 46** (Dolan et al. 2002)
- 47** (International Federation for Human Rights 2008a)
- 48** Currently, the apparel sector earns 76 % of Bangladesh's export revenue, contributing 9.5 % of GDP and directly employing over 2 million workers (<http://www.farmfoundation.org/projects/documents/Final.Kabir.pdf>).
- 49** (War on Want 2006)
- 50** (International Federation for Human Rights 2008a)
- 51** It is yet to ratify Convention No. 138 on Minimum Age, 1973.
- 52** (International Federation for Human Rights 2008a)
- 53** According to research conducted in the sector based on interviews with 1,225 workers from 43 factories, 62% of workers earned less than this figure (Bangladesh National Garment Workers Federation and War on Want forthcoming).
- 54** 47% of workers report working hours of between 13 to 16 a day (Bangladesh National Garment Workers Federation and War on Want forthcoming).
- 55** (Bangladesh National Garment Workers Federation and War on Want forthcoming)
- 56** (Alternative Movement for Resources and Freedom Society unpublished; Bangladesh National Garment Workers Federation and War on Want forthcoming; International Federation for Human Rights 2008a)
- 57** The Export Processing Zones Workers Association and Industrial Relations Act (2004) provides for the establishment of Workers' Associations inside the zones, which can register only with the Bangladesh Export Processing Zone Authority (BEZPA) and not as trade unions. As such, they have less bargaining power and no right to strike. Moreover, the BEPZA Executive Chairman has almost unlimited authority to deregister a Workers' Association should he determine that the association has committed an "unfair practice", violated any aspect of its own constitution or of the EPZ Law, or failed to submit a report to him. Outside the EPZs, workers' rights to freedom of expression and collective bargaining are undermined by legal provisions which permit the Department of Labour to send details of an application for trade union registration to the management of the relevant factory. These details include a list of the union executives, and in some cases factory management has dismissed the union executives on learning of their involvement in worker organising (Personal communication, Alternative Movement for Resources and Freedom Society).
- 58** (http://www.cleanclothes.org/ftp/CCC%20Briefing%20Bangladesh_Emergency_and_Labour_Rights.pdf)
- 59** (Bangladesh National Garment Workers Federation and War on Want forthcoming; War on Want 2008.) In addition to strict prohibitions on organising activities within factories, management and law enforcement agencies have also allegedly worked together in some cases to intimidate those workers attempting to organise by subjecting them to what workers claim to be false charges of offences such as theft or extortion. In one case, the union president of the "New Modern Garment" factory complex (part of Hameem group) was imprisoned for nearly two months between September and November 2008 because of four charges brought against him by the legal counsel of Hameem Group. In another case, Mehedi Hasan, a workers' rights investigator working for the Washington-based Workers Rights Consortium was held in custody for nine days in January 2008 under emergency rules. (Details provided by War on Want and the Alternative Movement for Resources and Freedom Society, Bangladesh.)
- 60** For a discussion of how the concept of corporate complicity may be understood in practice, see for example (International Commission of Jurists 2008).
- 61** Currently, the total number of inspectors is 111 for the whole country, out of which 63 are dedicated to factories inspections (not only the Ready Made Garment sector), the rest to stores and establishments.
- 62** (Bangladesh Worker Safety Programme 2007; International Federation for Human Rights 2008a)
- 63** (International Federation for Human Rights 2008a)

64 For example, unions or NGOs may seek to press for broader change through participation in the National Social Compliance Forum, the main coordinating authority at policy level on compliance related activities (International Federation for Human Rights 2008a).

65 The OECD Guidelines apply to multinational enterprises that operate in and from the territories of the 30 OECD countries and nine non-member adhering countries. Each participating country establishes a National Contact Point, which is empowered to receive complaints. Provided the parties agree, it plays a mediation role, bringing the parties together to resolve the issue, during what is a confidential procedure. If the parties fail to reach agreement, the NCP releases a statement and makes recommendations on how the guidelines should be implemented (Christian Aid et al. 2004).

66 Personal communication, Alternative Movement for Resources and Freedom Society.

67 (Bangladesh Worker Safety Programme 2007).

68 (www.corporateaccountability.org/press_releases/2007/apr28bangilo.htm)

69 (Bangladesh Worker Safety Programme 2007)

70 Data provided by Alternative Movement for Resources and Freedom Society and War on Want.

71 (Alternative Movement for Resources and Freedom Society unpublished; Bangladesh National Garment Workers Federation and War on Want forthcoming; Barrientos and Smith 2006; War on Want 2008)

72 (International Federation for Human Rights 2008a)

73 This is the World Bank's estimate from 2007.

74 (<http://www.remembersarowiwa.com/pdfs/gasflaringinnigeria.pdf>)

75 (www.treehugger.com/files/2007/09/gas_flaring_satellite.php)

76 The exact amount of flaring in Nigeria is contested, but it is probably in excess of 70% of all associated gas production.

This practice of flaring gas is in contrast to practice in the western world where associated gas is used or re-injected into the ground (Amao 2008, p.108; Climate Justice Programme 2005).

77 The government's joint venture with Shell accounts for more than 40% of Nigeria's total oil production, and is constituted as follows: NNPC (55%), Shell (30%), Elf (10%) and Agip (5%) (<http://www.nnpcgroup.com/jvoperation.htm>). The government therefore retains a majority share and contributes proportionately to the cost of carrying out the oil operations (receiving a share of the production in the same proportion), while Shell and its partners retain managerial control of the enterprise.

78 The constitutions before 1979 concentrated on core natural rights, while the 1979 constitution widened the scope of rights to include a broader range of civil and political rights, as well as certain political, social and economic rights, though the latter have been viewed by the courts as non-justiciable.

79 Under the 1999 Constitution of Nigeria, Article 20 states that: "The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria" and guarantees the fundamental rights to life (Article 33) and to dignity (Article 34). Moreover Nigeria has incorporated into domestic law the African Charter which provides for: "the right to enjoy the best attainable state of physical and mental health" (Article 16); "the right to a general satisfactory environment favourable to their development" (Article 24). The landmark case of *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria* recognised the human rights implications of environmentally damaging practices. This decision is in line with many other decisions of tribunals and constitutional and legal instruments around the world, such as the UN Human Rights Committee, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, the Indian Supreme Court, the Bangladesh Supreme Court, the South African Constitution and the Aarhus Convention.

80 (Emeseh 2006)

81 (Zerk 2006, p.82)

82 (Climate Justice Programme 2005)

83 (Amao 2008)

84 The CO₂ emissions from flaring in Nigeria were estimated at 34 million tons for the year 2002 (Amao 2008, p.107)

85 (Sinden 2008)

86 (Frynas 1999)

87 There is no substantive human right to a clean environment recognised in the Nigerian constitution, meaning that it was necessary to argue that a derivative right exists on the basis of the substantive rights that are recognised in the constitution (namely the rights to life and dignity, supplemented by the African Charter). Both judgments of the Federal High Court (in Benin City and Port Harcourt) have accepted this principle in relation to the constitutional rights.

88 Judicial power of review is available according to Section 6(b) of Nigeria's 1999 Constitution. EIAs are compulsory in a range of cases, including oil and gas field development (Climate Justice Programme 2005; Emeseh 2006).

89 (Frynas 2001)

90 (Amao 2008)

91 (Ebeku 2003; Frynas 2001)

92 (Emeseh 2006)

93 This argument was canvassed in a suit brought by a community in the oil producing area against Mobil and its parent company in the US. This distinction was also employed by the Court of Appeal in granting an oil community a stay of execution of a judgement against Shell for gas flaring in Shell Petroleum Development Company (SPDC) of Nigeria v Dr Pere Ajuwa and Honourable Ingo Mac-Etteli Court of Appeal, Abuja division, no CA/A/209/06, 27th May 2007 (Amao 2008).

94 (Climate Justice Programme 2005) This inter-departmental relationship has been in place since Nigeria's environmental regulatory regime was first established in 1988, when the oil industry was the only sector whose sectoral regulatory body,

the Department of Petroleum Resources, was given supervisory roles over the new lead agency the Federal Environmental Protection Agency, a move that many viewed as a calculated attempt to impede effective enforcement against the industry. This is more so, as until 1988, the Department of Petroleum Resources was a part of the state oil company, NNPC, which operates joint ventures with the companies it is supposed to monitor, further intensifying the conflicts of interest.

95 The Economic and Financial Crimes Commission of Nigeria estimates that 45% of Nigeria's oil revenues are wasted, stolen or siphoned away by corrupt officials (BBC newsreport, 5th April 2005, available from: news.bbc.co.uk/1/hi/world/Africa/4410109.stm).

96 While either the NNPC or the companies could choose to make these documents public, very rarely have they been willing to do so.

97 (Amao 2008)

98 A certificate can only be lawfully issued for a particular field or fields on the basis of the Minister being satisfied that utilization or re-injection is not appropriate or feasible in that particular field(s), and after the company has submitted detailed programs and plans for the implementation of re-injection programs or schemes for viable AG utilization.

99 (Emeseh 2006.) The Benin City court accepted that the plaintiff could bring the case on behalf of himself and on behalf of the community, the Port Harcourt court did not.

100 Seven cases have been filed in various local divisions of the federal court system. In each one, the members of the local community, as a class, have sued the oil companies engaged in gas flaring in their locality. Four cases name Shell as a defendant. Each suit also names as defendants the Attorney General of Nigeria and the Nigerian National Petroleum Corporation (Sinden 2008).

101 The judgment is here: <http://climatelaw.org/cases/case-documents/nigeria/ni-shell-nov05-judgment.pdf>.

102 The judgment of the Port Harcourt court is here: <http://climatelaw.org/cases/country/nigeria/gasflares/22092006>.

103 (<http://www.climatelaw.org/media/2007May2/>)

104 In addition to widespread resource constraints that afflict the Nigerian judicial system, it is widely believed that the Nigerian judiciary is also vulnerable to instances of corruption and political interference. Nigeria ranks 121 out of 180 countries in Transparency International's 2008 Corruption Perceptions Index (compared with equal 152 out of 159 in 2005).

105 (Sinden 2008, p.7)

106 The company, Vedanta Resources, launched on the London Stock Exchange in 2003 by incorporating the key assets of a thirty-year old Indian enterprise called Sterlite. With current share capital of just under £5 billion, the company is currently ruled by its London-based founder and 54% shareholder, Anil Agarwal. The company is primarily concerned with mining and producing copper, aluminium and zinc, and its main operations are in India (<http://www.indiarelief.org/issues/globalization/2008/serialoffender.html>).

107 Bauxite is the raw mineral used to produce aluminium.

108 Orissa State suffers high levels of poverty, with the highest percentage of the population living below the poverty line of all India's states, and its government suffers high levels of public debt, with almost 73% of the state's revenues going to servicing of this debt in 2001. The state is also extremely mineral rich, possessing 97% of India's chromite reserves, 95% of its nickel, 50% of its bauxite, and 24% of its coal (Khatua and Stanley 2006).

109 The company is now the third largest supplier of aluminium in India, claiming a 24% share of the market.

110 (Norwegian Council on Ethics 2007)

111 The Indian Government has not ratified the ILO Convention 169 which protects identity and land rights of indigenous people.

112 (Central Empowered Committee 2005.) Responsibility for abuses of this kind

can be properly attributed to companies to the extent that the company is directly involved as the primary agent of the abuse, or where the company can be considered to be 'complicit' in abuses by other parties (International Commission of Jurists 2008).

113 In January 2008, the Orissa Pollution Control Board reported having detected "alarming" pollution at the site.

114 The Commission was established on 12 October 1993 under the legislative mandate of the Protection of Human Rights Act 1993. For the purposes of the Act, 'human rights' is defined to mean 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India'.

115 (Central Empowered Committee 2005)

116 (Norwegian Council on Ethics 2007, p.29)

117 Clearly illustrating such linkages, the refinery site was inaugurated by a foundation stone laid by Orissa's Chief Minister, who came by helicopter along with Anil Agarwal, another senior Vedanta executive, representatives of the leading investment bank JP Morgan which played a crucial role in arranging funding for the Lanjigarh project, and other senior foreign figures (Padel and Das 2007).

118 (Padel and Das 2007, p.234)

119 (<http://www.minesandcommunities.org//article.php?a=8755>)

120 Reported by www.newindpress.com on 27 October 2004

121 The NHRC is empowered to take actions that include initiating prosecutions, making recommendations, or approaching the Supreme Court or High Courts for directions on a given matter (Oxford Pro Bono Publico 2008).

122 (Norwegian Council on Ethics 2007, p.31)

123 The Supreme Court's Central Empowered Committee report concluded that the Lanjigarh refinery had been built in "blatant violation" of planning and environmental regulations (Central Empowered Committee 2005), while the Norwegian Council on Ethics concluded

in its report on Vedanta, presented to the Norwegian Ministry of Finance, that “The company has attempted to bend laws and rules [and] it has provided misleading information...these factors contribute to an enhanced risk that the company will cause severe environmental and health damage.” (Norwegian Council on Ethics 2007)

124 Both the Wildlife Society of Orissa and Academy and Mountain Environics filed petitions towards the end of 2004. A third petition was filed by a local activist, Prafulla Samantara. Individual testimonies (in the form of legal affidavits) were filed by the affected communities (Dongaria, Kutia and Jharania). More than 700 such affidavits were sent to the Supreme Court.

125 The Central Empowered Committee (CEC) was set up in 2002 by the Supreme Court of India with the approval of the Ministry of Environment and Forests, and the Solicitor General of India. The Committee is made up of former judges and civil servants with special competence in the environmental field. Its task is to monitor and ensure countrywide compliance of the orders of the Supreme Court on forest conservation issues, investigating complaints relating to the Indian Forest Conservation Act and the Environmental Protection Act.

126 (Oxford Pro Bono Publico 2008, p.167)

127 This represents BP, SOCAR, Unocal, Statoil, TPAO, AGIP, TFE, Itochu, Inpex, Delta Hess and Conoco Philips.

128 The total amount of loans provided for the BTC project is 2.6 billion USD. In addition to the IFC and EBRD, funds have been provided by export credit agencies and political risk insurance companies from 6 countries including UK, USA, Germany, Japan, France and Italy, and 15 commercial banks led by ABN Amro, Citigroup, Mizuho and Société Générale. In addition, the companies BP, Statoil and Conoco Phillips provided loans as main sponsors (UNDP 2006).

129 (UNDP 2006)

130 These Agreements involve detailed contractual agreements between each participating government and BTC Co.

131 One particularly controversial provision within HGAs was their inclusion of compensation clauses in the event of new laws being introduced for human rights or environmental protections. In addition, the terms of the HGAs provided BTC Co. with exemptions from a range of social and environmental laws at the national level, the HGAs stating that “in no event shall the Project be subject to any such standards to the extent they are different from or more stringent than the standards and practices generally prevailing in the international petroleum pipeline industry for comparable projects” (Amnesty International 2003; Foley Hoag LLP 2007). In the BTC Co.’s document “Human Rights Undertaking: Citizens’ Guide on BTC/SPC Pipelines” it stated that it would not invoke the compensation clauses in the HGA in the event of new laws being introduced for human rights or environmental rights. However, specific amendments to the IGA and HGAs to make this commitment binding were not enacted (Green Alternatives et al. 2005).

132 The Prevailing Legal Regime was the legal framework that governed the construction and operation of the BTC pipeline. It was founded on an intergovernmental agreement between the Republic of Azerbaijan, the Republic of Georgia, and the Republic of Turkey IGA, and incorporated the HGAs, the Environmental and Social Impact Assessments, the Joint Statement issued by BTC Co. and representatives of the host governments, the BTC Human Rights Undertaking, the Security Protocol, existing national law, applicable public international law, BP policies, certain lender institution policies, and additional documents entered into between BTC Co. and the host governments.

133 See www.voluntaryprinciples.org.

134 For example, Article 1 of Protocol I of the European Convention on Human Rights states that “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”.

135 Villagers of Dgvari quoted Georgi Gvaladze (BTC Co./BP’s Assistant to External Affairs Manager) as telling them in early September, “Go ahead and demonstrate, it won’t cause us any problems. We will call the local police and they will batter you.” Indeed, several members of local communities alleged that beatings took place following demonstrations in communities such as Tkemlana (Green Alternatives et al. 2005). As discussed in relation to previous cases, responsibility for abuses of this kind can be properly attributed to companies to the extent that the company is directly involved as the primary agent of the abuse, or where the company can be considered to be ‘complicit’ in abuses by the state and/or by other parties (International Commission of Jurists 2008).

136 This obstacle would be diminished to the extent that provision for class or group actions may be available within the home state’s legal system.

137 Officially, the objectives of the process were to: (i) provide affected people with straightforward and accessible avenues for making a complaint or resolving any dispute that might arise during the course of the project; (ii) ensure that appropriate and mutually acceptable corrective actions were identified and implemented; and (iii) verify that complainants were satisfied with outcomes of corrective actions.

138 The EBRD established the Independent Recourse Mechanism to assess and review complaints regarding EBRD-financed projects. It is designed to give local groups that may be directly and adversely affected by an EBRD project a means of raising complaints or grievances with the Bank, independently from banking operations.

139 This position was established in 1997. The Defender is elected for a term of 5 years by a majority of the total members of the Parliament of Georgia.

140 (<http://www.humanrights.ge/index.php?a=news&id=2236&lang=en>)

141 Letter of 26 November 2002 from Nino Chkhabadze, Georgian Minister for the Environment, to BP CEO John Browne.

142 <http://www.platformlondon.org/carbonweb/showitem.asp?article=38&parent=5&link=Y&gp=3>; <http://www.bakuceyhan.org.uk/>

143 A recent public survey suggested that the courts enjoyed the trust of 16% of those surveyed, parliament 8% and the public defender 56%.

144 In July 2006 the schedule of court fees was increased by up to 2% of the value of the subject of the dispute, the maximum at which fees were capped being raised from 5,000 GEL (2,500 USD) to 50,000 GEL (25,000 USD). The BTC Co. declared several times that it would take responsibility for the paying of court duties relating to cases associated with the construction process; this promise has not been realized.

145 The ability of affected communities to seek compensation for damage to houses located very close to roads or construction sites, was also impeded by barriers to the collection of adequate documentation on violations, as a result of the non-existence of background data related to the state of the houses prior to the construction activities.

146 It has been suggested that the real number was even higher. Some within the lenders group monitoring panel (created by IFC, EBRD and other lenders to oversee BTC performance) suggested that BTC Co. community liaison officers were not putting all complaints into the log.

147 Such a problem arose for example in a compensation claim brought by Naokhrebi villagers, in which the court recognised the property of the villagers, but the company succeeded in delaying the procedure so that the ruling on compensation was not able to take place.

148 General barriers that hinder the independent and unbiased functioning of the courts include: insufficient constitutional and legislative guarantees for the independence of judges; selection criteria for the judges that make it possible to select the candidates based on subjective attitudes and political reliability; disciplinary norms that make it possible to prosecute judges for the rulings they make; and weak social guarantees for the judges.

149 One external fact-finding mission to review the operation of these processes commented that: "when the villages of Tsemi, Dgvari and Tetritskaro presented BTC Co. and its subcontractors with demands for reasonable compensation, the companies responded with intransigence and legal pedantry." (Green Alternatives et al. 2005)

150 The IFC-CAO has received 31 complaints regarding the BTC Main Export Pipeline project since March 2004, and IFC-CAO teams have made a number of site visits to Georgia to attempt to help parties resolve disputes.

151 Outcomes in the complete list of cases can be found here: http://www.cao-ombudsman.org/html-english/complaint_btc.htm

152 In May 2004, the IFC-CAO recommended that Geotech assess damage to homes from blasting in Tetritskaro and assist in repairs. Geotech responded that the recommendations were non-binding, and that they would only pay after a court judgement (Green Alternatives et al. 2005). In another case, a complaint was filed on behalf of villagers in Naokhrebi, Akhalsikhe District, seeking assistance in negotiating a settlement to a long-running dispute over registration of lands and implementation of a purchase agreement. However, it was not able to be resolved following BTC Co.'s refusal in April 2008 to pursue a negotiated settlement through the IFC-CAO (http://www.cao-ombudsman.org/html-english/compliance_naokhrebi.htm), and the case has now been closed.

153 (Green Alternatives et al. 2005) similarly concludes that BTC Co. and IFC-CAO grievance mechanisms have not provided adequate means to seek redress.

154 The case claimed that the consortium, including BP: exerted undue influence on the regulatory framework; sought or accepted exemptions related to social, labour, tax and environmental laws; failed to operate in a manner contributing to the wider goals of sustainable development; failed to consult adequately project-affected communities on pertinent matters; and undermined the host governments' ability to mitigate serious threats to the environment,

human health and safety (Friends of the Earth 2003).

155 (OECD Watch 2008)

156 (<http://www.berr.gov.uk/whatwedo/sectors/sustainability/nationalcontactpoint/page45873.html>)

157 The International Commission of Jurists has gone some way to developing a practicable working definition of business complicity in human rights abuse. See (International Commission of Jurists 2008).

158 (Garvey and Newell 2008; Human Rights Council 2008b; Newell 2001)

159 (International Council on Human Rights Policy 2004)

160 (Garvey and Newell 2008)

161 (Woods and Graham 2006; Oxford Pro Bono Publico 2008; Braithwaite 2006)

162 See for example: http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatisDecentWork/lang--en/index.htm.

163 That is, workers are paid a living wage, can access universally agreed labour rights and benefits and are able to access forms of social protection such as healthcare and pensions that many citizens in the developed world take for granted. See www.decentwork.org.

164 (<http://www.realizingrights.org/?option=content&task=view&id=361&Itemid=104>.) See also the Ministerial declaration of the 2007 high-level segment of ECOSOC, as adopted on 10 July 2007.

165 (Garvey and Newell 2008)

166 (Oxford Pro Bono Publico 2008)

167 (Zerk 2007)

168 (Garvey and Newell 2008)

169 (Garvey and Newell 2008)

170 For a more detailed discussion of the ways in which non-state enforcement mechanisms can facilitate effective remedy, even in the absence of formal enforcement powers, see for example (Haufler 2003; Macdonald 2007; Vogel 2005; Woods and Graham 2006).

- 171 (Human Rights Council 2008a, b; OECD Watch 2007; Rights and Accountability in Development et al. 2008; Zerk 2008)
- 172 (Rights and Accountability in Development et al. 2008)
- 173 (Elliott 2000)
- 174 One exception is the United States, in which the Alien Tort Claims Act provides for federal jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US. This provision is unusual in that it requires plaintiffs to found their cause of action in international law rather than the national law of either the US or the state where the injury occurred. In practice this means the grounds for bringing a tort under the Act are very narrow, and have been restricted mainly to serious violations of human rights (Anderson 2002).
- 175 (International Law Association Human Rights Committee 2001)
- 176 Tort law (the area of civil law which addresses wrongful harm caused by one person to another outside the contractual context) is most relevant to the cases considered here, though in other contexts contract and consumer protection laws have also been utilised. Internationally, including in the UK, a number of cases have been brought under national laws of civil liability by workers and communities with grievances against MNE activities, involving claims relating to death, personal injury, environmental damage or other human rights violations (Anderson 2002; Badge 2006; Newell 2001).
- 177 (Oxford Pro Bono Publico 2008)
- 178 Even in these cases, torts relating to trade/livelihoods tend to require that the defendant must intend to injure the claimant, which would likely be difficult to satisfy in most cases (Badge 2006).
- 179 (Badge 2006)
- 180 Forum non conveniens is a discretionary doctrine common law courts apply when declining to exercise jurisdiction and dismissing judicial proceedings in favour of an alternative forum where the forum chosen by the plaintiff can be shown to create undue hardship (Business and Human Rights Resource Centre 2006; Human Rights Council 2008b; Newell 2005; Sahni 2006; Schutter 2006; Zerk 2007). This doctrine has been subject to different interpretations in the various common law jurisdictions. Although *forum non conveniens* is not the only method of declining jurisdiction in private international law, it has attracted the most criticism (Anderson 2002).
- 181 (International Council on Human Rights Policy 2004.) See also discussion of this point at: <http://www.minesandcommunities.org//article.php?a=503>.
- 182 (Badge 2006)
- 183 (European Coalition for Corporate Justice 2008)
- 184 For example, it may be difficult for communities to marshal evidence to demonstrate which units within a transnational enterprise were responsible for making key decisions, or to demonstrate causal connections between corporate activities and harm caused in cases involving health and environmental damage (Newell 2001; Oxford Pro Bono Publico 2008; Palmer 2003; Zerk 2007).
- 185 (Business and Human Rights Resource Centre 2006; Oxford Pro Bono Publico 2008)
- 186 While structural barriers of the first two kinds could at least in theory be overcome as a result of institutional and socio-economic change at the local level, this third source of structural constraint is more intractable for any institutional system operating within national boundaries.
- 187 (Badge 2006)
- 188 (Zerk 2007, 2008)
- 189 These distinct functions would need to be separated within the organisation to enable the different levels of procedural formality and transparency appropriate for these different functions to be appropriately distinguished.
- 190 (Human Rights Council 2008b)
- 191 (Human Rights Council 2008b); (Coomans 2004)
- 192 (Human Rights Council 2008b); (Schutter 2006, p.29) concludes that there exists no general obligation imposed on states under international human rights law to exercise extra-territorial jurisdiction (adjudicative and prescriptive jurisdiction) in order to contribute to the protection and promotion of internationally recognised human rights outside their national territory. However, “the limits which public international law is generally considered to impose on States in the exercise of prescriptive extraterritorial jurisdiction generally will not constitute an obstacle to the use of this tool in order to impose that transnational corporations comply with internationally recognised human rights in their operations abroad.”
- 193 According to (Palmer 2003, p.13) “If developed and administered fairly, national laws and legal infrastructure are more likely to address local priorities and interests.” See also (Human Rights Council 2008a)
- 194 (Corporate Social Responsibility Initiative 2008; Rees 2008)
- 195 (Zerk 2008.) The major difficulty would be defining either substantive criteria for defining such standards in each case, and/or defining the associated processes through which such acceptance could be legitimately signalled. The proposed Commission could approach this problem in a number of ways. For example, it could work with a ‘lowest common denominator’ approach, referring simply to the ‘International Bill of Rights’ and perhaps also core ILO conventions. Alternatively, it could begin with a more expansive definition, (such as that proposed by (European Coalition for Corporate Justice 2008), which refers to the relevant cluster of core human and labour rights laid out in Annex III of the EU Generalised System of Preferences), and then adopt a negative list approach in which arguments could be made in favour of certain standards being excluded in particular contexts. Or, the standards of reference could simply be prevailing host country law, and/or international human rights norms ratified by national governments (where these differ).
- 196 The range of potential options that could be explored is vast. In particular:

relevant standards would need to be agreed; the nature of the complaints procedure would need to be determined; the question of the enforcement powers of the institution would need to be resolved; and the types of available remedies such as compensation and remediation of damage would need to be defined. Many such options have been canvassed elsewhere; see for example (Palmer 2003; Zerk 2007, 2008)

197 (Palmer 2003)

198 (Human Rights Council 2008b; Rees 2008)

199 Such a role would, however, require striking a delicate balance between being open to strategic alliances with other actors, while also remaining independent to sustain credibility and authority (International Council on Human Rights Policy 2004).

200 (Braithwaite 2006)

Abuses of human rights by UK companies operating abroad are well-documented. What is less well understood is why those workers and communities affected have so little access to justice.

This publication uncovers the reasons why existing redress mechanisms are inadequate. It draws on five case studies of UK companies doing business in different parts of the world, identifying some common barriers to redress in the countries where the abuses occur. In the light of the findings, the report explores the potential for the UK government to enhance its contribution to the protection of international human rights standards. A key recommendation is for the UK to establish a *Commission for Business, Human Rights and the Environment* – equipped to support processes and capacity-building within host countries, and to provide new avenues for investigation, mediation and adjudication within the UK.

The Reality of Rights is aimed at all those who view access to justice as a fundamental pillar of corporate responsibility, and who want the UK government to be doing more to advance this.



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