UK Businesses and Access to Justice for Human Rights Violations

A submission of written evidence to the UK Parliament's Joint Committee and Human Rights by EarthRights International

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Introduction and Summary

In this submission, EarthRights International (ERI)[1] addresses Questions 1, 6, 7 and 8 in the Joint Committee on Human Rights' 6 March 2009 Call for Evidence.

In Part I, we briefly address the universality of human rights obligations under international and domestic law. In Part II, we describe the human rights impacts of the activities of the UK's Shell Transport and Trading Co. in Nigeria in the 1990s, which have led to litigation in the US. In Part III, we address potential obstacles to the legal accountability of UK business entities for human rights abuses. In preparing this submission, ERI consulted UK human rights and public interest lawyers. In light of their comments, we draw both positive and negative comparisons to our experiences with US litigation. Finally, in Part IV, we suggest ways to enhance the ability of individuals to seek appropriate remedies for human rights claims against corporations in UK courts.

The United Nations Special Representative on Human Rights and Transnational Corporations, John Ruggie, has identified access to remedies as a crucial prong of his mandate. We strongly believe that "host countries" – the jurisdictions in which abuses typically take place – should provide a forum in which people with human rights claims against companies could seek appropriate remedies. Nonetheless, abuses often occur in countries with repressive regimes. The governments of such countries may be involved in the abuses, or their legal systems may be

[1] EarthRights International (ERI) is a nonprofit, nongovernmental organization working for the defense of human rights and the environment. ERI was counsel in the landmark case *Doe v. Unocal*, charging the California company with complicity in abuses on its pipeline project in Burma, and currently represent victims of environmental and human rights violations in lawsuits against Chevron, Shell, Chiquita, Union Carbide, and Occidental Petroleum.

insufficiently independent or otherwise inadequate to provide a fair forum. Thus, "home countries" – the nations in which multinational corporations are headquartered or otherwise subject to the jurisdiction of courts – have a key role in ensuring legal accountability for human rights abuses. We therefore express our support and offer our future assistance to the Committee in its efforts to provide effective access to remedies for individuals and groups with human rights claims against UK businesses.

I. UK businesses' universal responsibility to respect human rights

Businesses' human rights obligations do not and should not vary depending on where they operate. This universality principle arises from the facts that fundamental human rights principles are part of international law recognized by the community of nations, and that private actors like businesses are liable for complicity in human rights violations and, in some cases, for their direct commission of such violations.

In the UK, this principle also applies to UK corporations by virtue of statutes like the International Criminal Court Act and the Human Rights Act, which attach criminal liability to UK residents no matter where in the world they commit prohibited acts, and European Community and common law principles of jurisdiction, venue, and choice of law, which may allow UK courts to hear cases against UK corporations for claims arising abroad, under UK domestic law.[2]

[2] *See* FAFO, "United Kingdom: Survey Responses and Questions (2004) – A Comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions". Available at http://www.fafo.no/liabilities/UK%20Survey%20standardized%20Nov%202004.pdf.

II. The negative impacts of UK corporate activities abroad

The activities of UK companies can have grave negative effects on populations abroad, and serious implications for the reputation of those companies at home. On May 26, 2009, the UK's Shell Transport and Trading Co. will stand trial, along with its partner Royal Dutch Petroleum, in a US federal court in New York in the case of *Wiwa v. Royal Dutch Petroleum Co.* Shell is facing claims that it partnered with the Nigerian military in violently suppressing community opposition to Shell oil extraction in territory belonging to the Ogoni tribe in the mid-1990s. The abuses for which plaintiffs claim Shell is responsible include the torture, maiming, and violent death of innocent civilians, as well as the arbitrary detention and extrajudicial execution of local leaders, including Ken Saro-Wiwa. ERI is co-counsel for the plaintiffs in this case.

III. Barriers and opportunities for access to remedies

a. Civil litigation against corporations under the US Alien Tort Statute (ATS)

In the US, lawyers have invoked the Alien Tort Statute (ATS) as a jurisdictional and substantive basis for holding individuals and corporations civilly liable for violations of internationally recognized human rights. The obstacles to successful litigation should not be underestimated – to date, not a single suit has resulted in a jury verdict against a corporate defendant on human rights claims. Regardless, specific accomplishments include:

- In several cases, settlements have provided compensation to individual victims.
- US courts have asserted the authority to hold corporations liable for their direct participation or complicity in a number of human rights abuses, including torture, forced labor,

extrajudicial execution, denationalization, cruel, inhuman, or degrading treatment, non-consensual medical testing, and arbitrary detention.

- Those alleging human rights abuses have told their story, presented evidence in open court, and confronted powerful interests whom they accuse of causing harm.

These developments have already put a financial and reputational cost on abusive behavior by businesses abroad; the possibility of facing ATS lawsuits has led companies to conduct human rights trainings and impact assessments, implement codes of conduct, and devise grievance mechanisms for identifying and remedying potential human rights abuses before they lead to judicial proceedings.[3]

b. Lessons for corporate liability for human rights abuses in the UK

Inadequately defined rules of liability

In many corporate human rights abuses cases, as in *Wiwa*, the corporation is accused of having controlled, requested, or substantially assisted the commission of human rights by military or paramilitary groups. Typically, such corporations attempt to cloak their involvement through the corporate form. Thus, without legal doctrines allowing the attribution of tort liability to one party for the acts of another, businesses and individuals may not be held accountable for abuses for which they properly should be considered responsible.

US courts have announced that principles like aiding and abetting apply in the civil context, and that they may be used for human rights torts arising under customary international law.[4] They have drawn on international legal instruments and the common law to elaborate the substantive

[3] *See, e.g.,* Jonathan Drimmer, "Five Tips to Avoid the Human Rights Litigation Trap", March 26, 2009. Available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202429383515.

[4] *See, e.g., Khulumani v. Barclays Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007).

elements and *mens rea* standards for these principles.[5] In cases like *Wiwa*, human rights claims have proceeded on other theories of liability, including conspiracy and agency. Whether a court looks to the common law or to international law for authority, theories like aiding and abetting, conspiracy, and agency are available to attribute liability to third parties who are responsibile for the commission of grave human rights abuses.[6]

Because the UK relies on the same common-law principles and references the same international law sources as US courts, these principles may be applicable in UK courts. For example, in *Lubbe v. Cape PLC*, a UK company was held liable for failure to oversee the acts of its South African subsidiaries. Some UK lawyers, however, have suggested that the application of these principles may be uncertain. Articulating principles of corporate and secondary liability is critical to the provision of an effective remedy for human rights abuses in UK courts.

Class action suits

UK lawyers have suggested that limitations on class action suits frustrate the ability of human rights plaintiffs to seek justice against UK companies. In a US class action suit, named plaintiffs who are representative of a group of people whose claims share common elements can sue on behalf of the "class."[7] While the US class action system is far from perfect, it can be a powerful tool to seek justice for people for whom it would otherwise be too dangerous, expensive, or simply impracticable to pursue redress in foreign courts.

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[5] *See, e.g., In re South African Apartheid Litigation*, No. 02 MDL 1499 (SAS) at 45-53 (S.D.N.Y. April 8, 2009).
[6] *See, e.g., Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998) (relying on the "general common law" of agency); *Prosecutor v. Blaskic*, No. IT-95-14-A at ¶50 (ICTY Appeals Chamber, July 29, 2004) (citing knowledge standard for aiding and abetting); *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 at 1220 (1952) (approving theory of constructive knowledge for aiding and abetting).
[7] Other models for class action lawsuits exist in Portugal, Italy, and Australia, among others. In a different context, the International Criminal Court allows victims to appear in court on a class representative basis.

One important aspect of class action suits in the US for human rights litigation is the "opt-out" model, which has also been adopted by the Australian federal courts and the courts of the Canadian Province of Ontario. Neither the named plaintiffs nor their lawyers need receive approval from all members of the class to bring the lawsuit; instead, they must convince a court that class treatment is appropriate and then publicize the fact of the lawsuit through a court-approved notice plan. Any person who falls within the class is included in the action unless he or she expressly declines. For all class members who do not opt out, the disposition of the class action is binding. The victims benefit, as they are automatically included in the proceedings as class members and bear no up-front legal costs or personal risks. And as the number of people who opt out is generally minimal, the system makes it much easier for defendants to settle cases out of court because their liability for the underlying incident is capped once the class action suit is resolved.

In human rights cases in the US, however, the class certification system has sometimes proved an insuperable barrier. To proceed with a class action lawsuit, a court typically must be satisfied that the class members' common issues predominate over any individualized issues. This showing can be difficult to make in the case of gross human rights abuses, which often involve a pattern of violations over a period of time, featuring important common factors but widely varied claims and experiences between plaintiffs. Thus, class certification has been difficult in ATS litigation, resulting in individual lawsuits that exclude large numbers of potential claimants and that do not resolve the defendant's overall liability.

In the UK, plaintiffs whose claims represent similar fact patterns may obtain a group litigation order, which allows them to litigate the common aspects of their cases jointly, on an opt-in basis.

For human rights plaintiffs, this approach presents some advantages over the US model, as it allows for joint litigation whenever the interests of justice and judicial economy support it. Furthermore, UK group litigations move much more quickly through the judicial system than US class actions. However, we are concerned that the opt-in system can involve prohibitive up-front costs, particularly in the international context. It often entails a low participation rate, most likely excluding disadvantaged and difficult-to-reach individuals. Furthermore, the lack of a system by which class representatives or advocacy groups can litigate private grievances on behalf of large groups discourages litigation on more risky or experimental claims.[8]

Financial barriers

Some UK lawyers have expressed concerns that the strict application of the loser-pays system, prohibition on contingency fee arrangements, and difficulty of obtaining exemplary damages have had a chilling effect on human rights lawsuits. We do not question the general logic of these rules, but there may be good public policy reasons to make exceptions in cases involving egregious human rights abuses in order to provide financial incentives for lawyers to take such cases.

Perhaps the most striking example we can provide to illustrate this point is the case around which ERI was founded, *Doe v. Unocal*. In *Unocal*, which eventually settled out of court, public interest lawyers with few financial resources filed suit on behalf of Burmese refugees who had been subject to torture, forced labor, rape, and other gross violations. It was the first case to use the ATS against a corporation successfully; as such it was completely novel and its prospects for success deeply uncertain. Plaintiffs were protected, however, by the well-established doctrine

[8] *See generally*, Rachel Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need*. Civil Justice Council: London (2008).

that courts will exempt claimants bringing non-frivolous suits with a significant public interest – especially those seeking to vindicate civil rights – from paying the costs of their opposing party, and the general American rule against payment of the opposing party's legal fees. Furthermore, cases like *Unocal* generally could not be brought without the involvement of experienced private attorneys, who are attracted by the ability to enter into contingency fee arrangements with their clients and the possibility of sharing in an award of punitive damages.

It would have been more difficult to bring a case like *Unocal* in the UK because financial incentives are skewed against human rights claimants. In the UK, protective cost orders are available in the public sphere to prevent parties from inflating the costs the losing party may be forced to bear. This benefit is not available in private litigation, however. Furthermore, it is difficult for public interest plaintiffs to obtain after-the-event insurance on high-risk claims – a prerequisite for conditional fee arrangements. Thus, to bring a case like *Unocal* in the UK, plaintiffs would have risked liability for the enormous costs and fees of the other side. Nor could they easily have attracted private sector legal assistance; without contingency fees and punitive damages, the potential reward for winning was unlikely to outweigh the financial risk.

IV. Recommendations

The legal and financial issues identified above may obstruct access to civil justice for victims of human rights abuses by UK corporations operating abroad. We therefore recommend that the Government:

a. Provide explicit guidance to UK courts on the theories of liability by which corporations may be held liable for the acts of subsidiaries and third parties. Amend existing statutes incorporating international crimes into UK domestic law to allow the use of international legal sources as interpretive guides for liability.

b. Adopt the recommendations of the UK Civil Justice Council on implementing the opt-out model for group litigation in human rights cases, at least where the affected group is large and difficult to treach, and where individual notice is impracticable.

c. Review the UK's loser-pays rules, restrictions on punitive damages, and prohibition on contingency fee arrangements, with the aim of carving out exceptions or otherwise easing the financial burden on international human rights plaintiffs from whom the danger of abuse of the system is low and the value to the public of permitting litigation is high.

Respectfully submitted on this 1st day of May, 2009,

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