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BRIEFING TO THE UN COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

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AMNESTY INTERNATIONAL

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Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

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EXECUTIVE SUMMARY

Amnesty International presents the following information to the UN Committee on the Elimination of Racial Discrimination (the Committee) in advance of its consideration of the 18th and 19th periodic reports of the United Kingdom (UK), submitted under Article 9 of the Convention on the Elimination of All Forms of Racial Discrimination (the Convention). This briefing summarises Amnesty International's concerns under Article 2(1)(d) of the Convention, with a focus on the UK's policy with respect to the impact of UK corporations on the human rights of Indigenous Peoples in other countries.

Research by Amnesty International and others has shown that the activities of UK companies outside the UK, largely through subsidiaries and contractors, have been responsible for, or have contributed to, human rights abuses in many countries and contexts. These human rights abuses have included violations of the rights of Indigenous Peoples. This is illustrated, in this submission, by a case study of a mining and refinery project in South-West Orissa, in Eastern India. The companies involved are members of a UK-based corporate group, the parent company of which is Vedanta Resources plc, a company registered in the UK.

Amnesty International believes there are a number of deficiencies in the UK government's framework of laws and policies that regulate the human rights performance of UK companies abroad. These deficiencies also adversely affect the ability of victims of corporate abuses to gain access to justice in the UK via judicial and non-judicial mechanisms. This raises questions and concerns as to whether the UK is observing its obligations under Article 2(1)(d). These deficiencies appear to arise from: (a) incorrect legal analysis underlying UK policy which underestimates the UK's international obligations with respect to the foreign behaviour of UK companies and members of UK-based corporate groups; (b) gaps and deficiencies in the UK's regulatory framework (c) an overemphasis on voluntary approaches in relation to business and human rights; (d) a lack of policy coherence on business and human rights between government departments; and (e) a lack of willingness to implement "by all appropriate means" measures to improve the human rights performance of UK companies operating outside the UK with regard to respect for Indigenous Peoples rights.

1. BACKGROUND

The activities of some UK companies outside the UK have had, and continue to have, adverse impacts on the ability of Indigenous Peoples to enjoy the rights recognised in the Convention and other relevant international human rights instruments, particularly the UN Declaration on the rights of Indigenous Peoples (endorsed by the UK in 2007). These activities have occurred in the context of a regulatory framework that fails to ensure that the rights in the Convention are respected by companies subject to the jurisdiction of the UK. These include rights:-

- to security of person;[1]
- to health;[2]
- to self-determination;[3]
- not to be subject to destruction of culture;[4]
- to own, use, develop and control traditional lands (as well as lands that have been otherwise acquired);[5]
- not to be forcibly removed from lands or territories without free, prior and informed consent[6] and the payment of just and fair compensation;[7]

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[1] The Convention, Article 5(b); *UN Declaration on the Rights of Indigenous Peoples,* adopted by UNGA Resolution 61/295 on 13 September 2007 ("UNDRIP"), Article 7.

[2] UNDRIP, Article 24(2), which refers to the right of Indigenous Peoples to equal enjoyment of "the highest attainable standard of physical and mental health". See also Article 29(3). See also the 1997 General Recommendation 23 (1997 General Recommendation), paragraph 4(c).

[3] See the 1997 General Recommendation which calls on States parties to "*recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources*", at paragraph 5. See also UNDRIP, Articles 3, 4 and 5.

[4] 1997 General Recommendation, paragraph 4(a); UNDRIP, Article 8, and see also Article 31 in relation to preservation of cultural heritage and traditional knowledge.

[5] UNDRIP, Article 26 and Article 32(1).

[6] UNDRIP, Article 10 and Article 32(2). See also Articles 25 and 26 in relation to rights of access to traditionally-owned lands. See also 1997 General Recommendation, paragraph 4(d). See also UN Committee on Economic, Social and Cultural Rights ("CESCR"), *General Comment No. 21: Right of Everyone to Take Part in Cultural Life*, 21 December 2009, paragraph 37.

[7] UNDRIP, Article 10, 11 and 28.

- to conservation of the environment and the productive capacity of territories and resources;[8]
- to be able to participate in, develop and pass on cultural and religious customs;[9]
- to participate in decision-making in matters that would affect their rights.[10]

The case study below gives an example of a recent case in which, in Amnesty International's view, the policies and practices of a UK-based corporate group have had very grave repercussions for the human rights of members of an Indigenous community outside the UK, and even threaten the continued existence of this Indigenous community. See Box 1.

BOX 1: CASE STUDY: VEDANTA AND THE DONGRIA KONDH IN SOUTH-WEST ORISSA

In December 2008, India's Ministry of Environment and Forests approved, in principle, a project to mine bauxite in the Niyamgiri Hills in south-west Orissa, a region in eastern India. Environmental clearance was granted in April 2009. Although the Minister of Environment and Forests has subsequently revoked this clearance, his decision is currently the subject of an appeal before India's Supreme Court by Orissa Mining Corporation, a joint venture partner of Vedanta. The mining project is sought to be located in the traditional lands of the Dongria Kondh, an Indigenous community. The Niyamgiri Hills have special religious significance for the Dongria Kondh who also rely on the forest resources for water, food, and income from handicrafts. The Dongria Kondh lands and forests are protected as per Schedule 5 of India's Constitution, but this would be undermined if the mining project goes ahead.

The mining project, if approved, will be operated by the South-west Orissa Bauxite Mining Company (SWOBMC). SWOBMC is a joint venture between Sterlite Industries India Limited (Sterlite) and the Orissa Mining Corporation, an Indian company wholly owned by the State of Orissa. Sterlite is a subsidiary of Vedanta Resources plc, a UK domiciled company that is listed on the London Stock Exchange.

In the same region, Vedanta Aluminium Limited (another member of the Vedanta Resources plc group), is planning a six-fold capacity expansion of its existing alumina refinery at Lanjigarh. This refinery is located in a predominantly rural area and is beside one of the main rivers in Orissa, the Vamsadhara. Between 4,000-5,000 people live in the 12 villages that surround the refinery, a population that includes Indigenous communities. The land on which the refinery now stands was formerly used for farming.

Investigations by Indian authorities, and by Amnesty International itself, have revealed serious flaws in the decision-making process relating to the mining project so far. Legal checks have been further undermined by the companies' apparent willingness to exploit weaknesses in the system. For instance, construction of certain aspects of the mining project, and some forest clearances, had been done before the regulatory

[8] UNDRIP, Article 29. See also Article 20 (right to security in the enjoyment of "means of subsistence and development").

[9] CERD, Article 5(e)(vi); UNDRIP, Articles 11, 12 and 13.

[10] UNDRIP, Articles 18, 19 and Article 32(2); CERD, Article 5(c) ("political rights").

clearances were given. Environmental impact assessments (EIAs) for the mining project were deficient in many areas, including in relation to the possible effects on the water supply relied upon by the Dongria Kondh.

No proper assessment was done to identify possible human rights impacts of the proposed mining project, including impacts on livelihoods, health, the security of Indigenous inhabitants, the ability of the Dongria Kondh to continue to practice their religion, and their ability to maintain their culture and their traditional way of life. As far as Amnesty International is aware, none of the Dongria Kondh living closest to the proposed mine site were consulted or interviewed as part of the assessment process. Neither, it appears, has there been any meaningful effort on the part of the State authorities or the companies concerned to provide information to, or engage with, local communities in the context of regulatory applications or project planning, let alone attempt to seek their consent.

The Dongria Kondh people remain extremely concerned about the potential impacts of the mine on their traditional way of life should permission to proceed be granted. Many experts believe that there is a serious risk that the proposed project could disrupt water supplies in the area, which has implications for the health and well-being of inhabitants, their crops and livelihoods, biodiversity and ultimately, the ability of the Dongria Kondh to remain in the region long term. Furthermore, the likely destruction of and lack of access to sites of special significance has serious implications for the ability of the Dongria Kondh to sustain their culture, religious beliefs and distinctive identity. Possible noise emissions and dust from infrastructure pose additional threats to human health.

The process by which regulatory approvals were sought and obtained for the refinery project was similarly flawed. Although an agreement had been signed in relation to the original refinery project in 1997, affected residents only became aware of the plans in 2002 when some received notices of compulsory acquisition. Two public meetings were held in June 2002 with no Dongria Kondh participation, and the compulsory acquisition took place two weeks later. Some villagers have complained that compensation options were not properly explained. Landless labourers whose livelihoods were affected were not consulted at all. No detailed information on the nature and scale of the refinery project, or the processes that would be carried out there, was given to the local people. The proposals resulted in some protests by local people. However, some activists have claimed that, during the period 2002-2004 there were cases of intimidation of protestors, including some police beatings and arrests and, in one case, forced removal of individuals from the area. The only process used to assess the likely impacts of the refinery project was three EIAs, focusing on environmental impacts. These were inadequate as a means of assessing the likely impacts of the refinery on the human rights of local communities. The loss of shared community resources (such as communal land and forest land) has undermined livelihoods and disrupted traditional community practices, with particularly negative impacts on landless people.

During the period 2006-2008, construction of the original refinery project was completed and an application was submitted for a six-fold expansion of the refinery's capacity. The refinery is located in an environmentally sensitive area, and has been subject to regular inspections by the Orissa State Pollution Control Board (OSPCB). However, inspections and correspondence between Vedanta Aluminium Limited and the OSPCB do not suggest a good environmental management record. On the contrary, when OSPCB's findings during 2006-2009 are taken as a whole, they point to a pattern of repeated failures of Vedanta Aluminium to meet the requirements of its license and to operate and discharge its responsibility to prevent pollution. In April and May 2011 unseasonal downpours in the region resulted in two leaks into surrounding areas from the refinery's red mud pond facility, containing toxic wastes, presenting a severe threat to the health, livelihoods and safety of nearby communities.

Local residents have continued to express grave concerns about using the water from the river, which they believe to have been polluted by the refinery. They say that the company has provided almost no information to the communities that live in the vicinity of the refinery about the possible risks, and what action should be taken in relation to them. This has created considerable uncertainty and fear, which is exacerbated by reports of people becoming ill, or having skin problems, or cattle dying, after contact with the river water. In addition, local residents have complained of noise pollution, and respiratory problems and irritation to eyes, nose and throat which they say is a result of exposure to air pollution from the refinery. Given the problems that have arisen so far, there are very real fears among local inhabitants for their health, well-being and way of life should the refinery expansion project go ahead.

Source: Amnesty International: *Don't Mine Us Out of Existence: Bauxite Mine and Refinery Devastate Lives in India*, Amnesty International Publications, 2010. On-line copy available at http://www.amnesty.org/en/library/asset/ASA20/001/2010/en/0a81a1bc-f50c-4426-9505-7fde6b3382ed/asa200012010en.pdf.

2. THE OBLIGATIONS OF HOME STATES WITH RESPECT TO THE REGULATION OF TRANSNATIONAL CORPORATIONS

The human rights obligations of States under international law include the taking of effective measures to prevent human rights abuses by third parties, including private companies, which a State is entitled to regulate or otherwise influence under international law.[11] Should abuses occur, States must also ensure that effective redress is available as required under Article 6 of the Convention. The failure to regulate private actors to prevent human rights abuses by them, and the failure to provide effective redress for harm, is a breach of that State's international law obligations towards affected individuals.

This has been recognised by the Committee in various Concluding Observations, including those on Australia, Canada, Norway and USA, in which concerns have been expressed about lack of appropriate action by these home States[12] with regard to the adverse effects of activities by their transnational corporations operating in other countries. The extraterritorial application of the Convention has also been affirmed by the International Court of Justice in its decision on *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures*. The Court observed that there is no restriction of a general nature in the Convention relating to its territorial application; and that neither Article 2 nor Article 5 of the Convention contained a specific territorial limitation. The Court consequently found that "*these provisions of CERD generally appear to apply, like other provisions of instruments of that nature, to the actions of*

[11] As reflected in the substantive provisions of various treaties, which are reinforced by treaty monitoring bodies through their interpretative General Comments, and through their Concluding Observations on State compliance.

[12] In this submission, 'home State' refers to the State where the parent company of a multinational corporate group is registered or domiciled.

a State party when it acts beyond its territory."[13]

There are other statements of international treaty bodies that provide useful guidance on extraterritorial obligations. In its General Comment No. 3, the UN Committee on Economic, Social and Cultural Rights ("CESCR") drew attention to the obligation of all States parties under Article 2(1) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR") to "*take steps, individually and through international assistance and cooperation, especially economic and technical … with a view to achieving progressively the full realization of rights*" under the Covenant.[14] The language of the provision itself, and the interpretative comments, clearly point to the existence of State responsibilities for the realisation of human rights that extend beyond responsibilities purely towards their own inhabitants and territories.

The CESCR has stated that States parties should "take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant."[15] In elaborating States' duties in relation to the right to health, the CESCR stated that to comply with their international obligations, States parties "have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law".[16]

Similarly, in relation to the rights to water and social security, the CESCR has stated that steps should be taken by States parties to this treaty to prevent their own citizens and companies from violating these rights in other countries, and that "*[w]here States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law*".[17] The CESCR has raised this issue in the periodic reporting

[13]Order of 15 October 2008, I.C.J. Reports 2008, p. 353, para. 109.

[14] UN CESCR, *General Comment No. 3: The Nature of States Parties Obligations (Art. 2, par.1)*, 14 December 1990, paras 13-14.

[15] UN CESCR, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, 20 May 2011, UN Doc. E/C.12/2011/1, para. 5.

[16] UN CESCR, *General Comment No.14: the Right to the Highest Attainable Standard to Health*, 11 August 2000, para 39. The imperative language used in this General Comment ('have to') contradicts the view of Professor Ruggie that "Current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction." See also *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises,* UN Doc. A/HRC/11/13, 22 April 2009 ("The Ruggie 2009 Report"), para. 15.

[17] UN CESCR, *General Comment No.15: the Right to Water*, 12 January 2003, para 33. See also UN CESCR, *General Comment No 19: The Right to Social Security*, 4 February 2008, para. 54.

process, for example, calling on Germany "*to ensure that its policies on investments by German companies abroad serve the economic, social and cultural rights in the host countries.*"[18]

3. THE UK GOVERNMENT'S APPROACH TO ITS DUTIES UNDER THE CONVENTION

The UK government has taken a number of positive steps in relation to the human rights performance of UK companies operating overseas. For instance, the UK government's "Business and Human Rights Toolkit", initiated by the Foreign and Commonwealth Office ("FCO") and published in October 2009 (the "FCO Toolkit"),[19] helped to raise awareness of the potential impacts of UK companies abroad, and how UK overseas missions can help promote improved business practices. The UK government has also engaged with, and has made public statements in support of, the mandate and work of the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie.[20]

3.2 However, the UK's stance with respect to its obligations to regulate UK-based companies, with regard to their overseas operations, indicates that it neither recognises nor intends to observe its duties to ensure UK companies and members of UK-based corporate groups respect the rights of Indigenous Peoples contained in the Convention when operating abroad. According to the FCO Toolkit:

"The UK takes a more nuanced view than John Ruggie about the State's duty to ensure that companies act compatibly with the States' human rights obligations. The UK's view is that this is not a blanket obligation but depends on the wording of the treaty obligation in question. To the extent that there is a legal duty to protect, it only applies in respect of a States' own inhabitants. The UK does not owe legal obligations to ensure that UK companies comply with UK human rights standards overseas".[21]

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[18] UN CESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany*, 20 May 2011, UN Doc. E/C.12/DEU/CO/5, para. 10.

[19] HM Government, *Business and Human Rights Toolkit: How UK overseas missions can promote good conduct by UK companies", October 2009. Copy available at http://www.fco.gov.uk/en/global-issues/human-rights/international-framework/business/#*.

[20] Hereafter referred to variously as John Ruggie, Professor Ruggie, or the UN Special Representative on Business and Human Rights.

[21] HM Government, *Business and Human Rights Toolkit: How UK overseas missions can promote good conduct by UK companies", October 2009,* p. 4. The first part of this extract was the subject of a public exchange of letters between Mr D. Bethlehem QC, Legal advisor to the FCO, and Professor Ruggie. See letter from Mr D. Bethlehem QC, dated 9 July 2009. Copy of letter available at http://www.reports-and-materials.org/UK-Foreign-Office-letter-to-Ruggie-9-Jul-2009.pdf. Professor Ruggie's response of 14 July 2009 is available at http://www.reports-and-materials.org/Ruggie-letter-to-UK-Foreign-Office-14-Jul-2009.pdf.

4. DEFICIENCIES IN THE UK GOVERNMENT'S LAWS AND POLICIES WITH RESPECT TO THE HUMAN RIGHTS PERFORMANCE OF UK COMPANIES ABROAD

4.1 INCORRECT LEGAL ANALYSIS:

The second part of the extract reproduced in para. 3.2 above is inaccurate, as the legal duty to protect does not apply only to a State's own inhabitants. Extraterritorial obligations that relate to inhabitants of other States are well entrenched in international human rights instruments, as illustrated in Section 2 above.

The third and final sentence contains an over-simplification. The UK does owe legal obligations to regulate third parties, including companies registered in the UK, relating to their impacts abroad. UN treaty bodies have confirmed on a number of occasions, including in relation to the Convention, the extraterritorial application of treaty obligations.[22] This includes obligations to effectively regulate those third parties such as companies over whom they are entitled to exercise jurisdiction under international law.[23]

4.2 GAPS AND DEFICIENCIES IN THE UK'S REGULATORY FRAMEWORK

Amnesty International is concerned about the lack of appropriate legislative, administrative or other regulatory measures in the UK aimed at preventing conduct of UK companies or members of UK-based multinational corporate groups that negatively impact on the enjoyment of human rights, or the rights of Indigenous Peoples in particular, outside the UK.

Amnesty International is concerned about the weaknesses of existing UK institutional mechanisms for addressing the gaps in accountability of UK companies for their extra-territorial impacts on human rights. Existing requirements on business in respect of health and safety, equality and the environment, some of which are relevant to the protection of human rights, do not extend to their operations outside of the UK. The UK Equality and Human Rights Commission (EHRC), the Health and Safety Executive, and the Environment Agency are severely restricted in their ability to consider the adverse impacts of UK companies overseas and have rarely done so. For example, the EHRC does not have a mandate to investigate suspected breaches of human rights law in other countries. Its powers of investigation only extend to suspected breaches of specific UK "equality and human rights enactments".[24]

The UK Export Credits Guarantee Department (ECGD) provides a prime example of where the UK has failed to protect human rights in the context of business activity abroad. The ECGD is a governmental body accountable to the Department for Business, Innovation and Skills (BIS). While it does not operate projects itself, it has facilitated corporate activities that have

[22] See text under heading 2, above.

[23] See text under heading 2, above.

[24] See list of "Equality and human right enactments" in Section 33 of the Equality Act 2006: http://www.legislation.gov.uk/ukpga/2006/3/section/33

contributed to human rights abuses abroad through the provision of financial guarantees.[25] Currently the ECGD's screening procedures for consideration of human rights are insufficient to prevent such breaches. The same limitations apply to the CDC,[26] the UK's development finance institution run by the Department for International Development (DfID). It provides capital to invest in businesses abroad with a particular emphasis on sub-Saharan Africa and South Asia.

There are also failings in the provision of mechanisms to provide access to remedy for victims of human rights abuse by UK companies abroad. Foreign claimants considering or seeking to enforce their rights in the UK courts face huge obstacles – legal, financial and practical[27] - even where the acts or omissions of the UK parent company may have contributed directly to the breach. The UK puts a strong onus on the complaints procedure that it has instituted under the OECD Guidelines for Multinational Enterprises. This mechanism, known as the National Contact Point (NCP), handles complaints relating to specific instances of alleged corporate misconduct. It has structural weaknesses in so far as the NCP has limited investigatory capacity and is unable to impose penalties that would deter future breaches by the same company, while also serving as a deterrent to other companies, and lacks the capacity to order reparations. These inherent problems are compounded by the lack of independence of the NCP from the UK government, and in particular from the department promoting UK trade and investment, where the NCP is located. Amnesty International takes the view these flaws mean that the NCP mechanism is not fit for the purpose of providing a non-judicial remedy that will benefit victims of abuse and meet the obligations under the

[25] Amnesty International reports relating to investment projects and transactions supported by ECGD, where human rights abuses have been documented, include:

Amnesty International, *India: The "Enron Project" in Maharashtra: protests suppressed in the name of development*; Index ASA 20/031/1997; http://www.amnesty.org/en/library/asset/ASA20/031/1997/en/1459e360-ea3e-11dd-8810-c1f7ccd3559e/asa200311997en.pdf

Amnesty International UK, *Human Rights on the Line- the Baku-Tbilisi-Ceylan pipeline project*; 2003, http://www.amnesty.org.uk/uploads/documents/doc_14538.pdf

Amnesty International, *Urgent Action 228/96: Excessive use of force / Fear for safety (Lesotho),* Index: AFR 33/02/96, http://www.amnesty.org/en/library/asset/AFR33/002/1996/en/65bd804c-eade-11dd-b22b-3f24cef8f6d8/afr330021996en.html

Amnesty International, *UK and EU Arms Used in East Timor as Review of Arms Exports Code Begins in Secret,* Index: IOR 61/01/99,

http://www.amnesty.org/en/library/asset/IOR61/001/1999/en/1c034d51-e01b-11dd-adf6-a1bae6c1ea26/ior610011999en.html

[26] CDC Group plc is the official name for the institution previously known as the Commonwealth Development Corporation.

[27] See UK Joint Committee on Human Rights, *Any of Our Business?, Human Rights and the UK Private Sector: Report and Formal Minutes,* 16 December 2009, p86. Copy available at http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf.

Convention.

4.3 OVER-EMPHASIS ON VOLUNTARY APPROACHES

Amnesty International believes the UK does not differentiate sufficiently between a human rights framework and a corporate social responsibility (CSR) framework. A CSR framework is determined by commitments that companies agree to enter into voluntarily, and does not typically seek to enforce these commitments, or provide remedies to individuals whose rights have been breached. In contrast, protection of human rights requires the State to institute mandatory standards to ensure that human rights are respected, protected and promoted, that abuses are remedied, that violations are identified through investigation and that reparations are available to victims.

The FCO Toolkit reflects the general emphasis of the UK government on *voluntary* over *legal/mandatory* approaches to business and human rights-related problems. For instance, it cites with approval the idea that the "corporate responsibility to respect" (a pillar of Professor Ruggie's framework[28]) derives from social expectations rather than legal obligations[29], but almost entirely overlooks the regulatory role of the UK government in ensuring that those social expectations are fulfilled. Instead, the UK government's role is seen as "promoting responsible corporate behaviour" by UK companies abroad.[30] This is to be done, to a large extent, by promoting the OECD Guidelines for Multinational Enterprises - an explicitly non-binding instrument.[31]

A recent UK Parliamentary Select Committee Inquiry into UK companies and human rights came to a similar conclusion. Reviewing a 2009 UK government policy document on "corporate social responsibility", the Committee commented:-

"The language of 'encouragement' found in the Corporate Responsibility Report, while positive, seems out of kilter with the conclusion of Professor Ruggie that many of the steps

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[28] According to the UN Special Representative on Business and Human Rights, business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. His view of this responsibility is set out in his report to the Seventeenth Session of the Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011, p13-31:

http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf

[29] See FCO Toolkit, HM Government, *Business and Human Rights Toolkit: How UK overseas missions can promote good conduct by UK companies", October 2009, p4*

[30] See FCO Toolkit, HM Government, *Business and Human Rights Toolkit: How UK overseas missions can promote good conduct by UK companies", October 2009,* p4

[31]See FCO Toolkit, HM Government, *Business and Human Rights Toolkit: How UK overseas missions can promote good conduct by UK companies", October 2009,* p5-9, p16-17

taken by business to address their human rights impacts are incorrectly viewed as purely voluntary measures. Equally, the Report does not clearly identify that existing compliance and regulatory steps required of business – for example in respect of health and safety, the environment and equality – are designed to meet the human rights obligations of the UK. This suggests that the Government's corporate responsibility strategy is unduly focused on voluntary measures and underestimates the extent to which businesses have human rights responsibilities" (emphasis added).[32]

4.4 LACK OF POLICY COHERENCE

There is no overarching UK government strategy on business and human rights. Individual government departments have their own separate CSR strategies that lack coherence with each other in the sphere of human rights, and with the UK's international obligations.[33] Responsibilities are fragmented in a way that hinders effectiveness. Professor John Ruggie refers to this problem as "horizontal incoherence".[34]

It is this lack of policy coherence that means that the UK National Contact Point (or "NCP") under the OECD Guidelines for Multinational Enterprises, a function within the Department of Business, Innovation and Skills (BIS), can criticise Vedanta Resources (see case study in Box 1 above) for:

"fail[ing] to engage the Dongria Kondh in adequate and timely consultations about construction of the mine or to use other mechanisms to assess the implications of its activities on the community such as indigenous or human rights impact assessment."[35] while at the same time, the UK's Export Credits Guarantee Department (ECGD), which is also located within BIS, continues to facilitate corporate activities outside the UK without adequate due diligence mechanisms to guard against the kind of breaches that Vedanta was

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[32] UK Joint Committee on Human Rights, *Any of Our Business?, Human Rights and the UK Private Sector: Report and Formal Minutes,* 16 December 2009. Copy available at http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf.

[33] See *Corporate Social Responsibility (CSR): An FCO Strategy*, 2007-08:

http://www.fco.gov.uk/resources/en/pdf/pdf16/fco_csr_strategy_papers

See DFID's *Private Sector Development Strategy Prosperity for all: making markets work*, 2009:

http://www.epsds.org/Uploads/Documents/Strategy_Private%20Sector%20Development_2008_20090921030753.pdf

See BIS Corporate Responsibility Report, 2008:

http://www.bis.gov.uk/files/file50312.pdf

[34] See *John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31, 21 March 2011, Guiding Principle 8, p12.

[35] See Final Statement by the UK NCP for the OECD Guidelines for Multinational Enterprises on the complaint from Survival International against Vedanta Resources plc, 25 September 2009. Copy available at http://www.oecd.org/dataoecd/49/16/43884129.pdf.

cited for.

4.4 LACK OF WILLINGNESS TO IMPLEMENT BY "ALL APPROPRIATE MEANS" TO PREVENT ABUSES OF RIGHTS OF INDIGENOUS PEOPLES BY PRIVATE COMPANIES.

As discussed above, the wording "all appropriate means", which appears in Article 2(1)(d) of the Convention, potentially encompasses a wide range of regulatory initiatives. In Professor Ruggie's terminology, these are described as ranging from "domestic measures with extraterritorial implications" to "direct extraterritorial legislation and enforcement".[36]

Research by Amnesty International and others shows that UK companies have committed or contributed to human rights abuses in many countries and contexts.[37] The case study above (see Box 1) sets out just one example of a case in which, as a result of the policies and practices of a UK-based group of companies, Indigenous Peoples' rights, including under the Convention, have been seriously impaired.

The UK, by virtue of its jurisdiction over UK-domiciled parent companies of multinational groups, could legitimately take a number of regulatory steps that could have a real impact on the human rights impacts of subsidiaries and contractors of UK companies operating abroad. In his final report to the Human Rights Council, which contains a set of "Guiding Principles" for business and human rights,[38] Professor Ruggie notes that home States of multinationals have a variety of options available to them when it comes to influencing the human rights performance of their companies overseas. These can range from "parent-based" measures (which rely on the jurisdiction of a home State over the parent company of the multinational group) to more direct assertions of extraterritorial jurisdiction.[39] However, the UK has, to date, made virtually no use of these kinds of "parent-based" initiatives to influence and improve the human rights performance of UK companies abroad. This is in stark contrast to other regulatory areas such as anti-corruption, money laundering, and counter-terrorism, where extraterritorial regulatory measures ranging from direct assertions of extraterritorial

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[36] See *John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31, 21 March 2011, Commentary to Principle I(A)(2),p7.

[37] *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, Amnesty International, 2009; *Don't Mine us Out of Existence: Bauxite Mine and Refinery Devastates lives in India*, Amnesty International, 2010. Five case studies of UK companies were published by the Corporate Responsibility (CORE) Coalition and the LSE in *The reality of rights: Barriers to accessing remedies when business operates beyond borders*, 2009.

[38] *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31, 21 March 2011 ("Ruggie Guiding Principles").

[39] Professor Ruggie refers to these as "domestic measures with extraterritorial implications". See *John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31, 21 March 2011, Commentary to Principle I(A)(2), p7.

jurisdiction to "parent-based" regulatory measures are fairly commonplace.[40]

Amnesty International believes that the UK could be doing far more than it is at present to provide remedies for those outside the UK whose human rights have been abused by subsidiaries and contractors under the control of UK parent companies. Not only do those seeking to enforce their rights in the UK face huge obstacles currently, but the UK government has introduced a legislative Bill that, if passed, would place further obstacles in the path of foreign claimants seeking access to judicial remedies in the UK.[41]

Amnesty International believes there is a clear need in the UK for a specialised mechanism capable of promulgating and enforcing standards to ensure respect for human rights, including Indigenous Peoples' rights, by UK companies or members of UK-based corporate groups abroad, investigating complaints and ordering remedial action. Amnesty International therefore supports the proposal put forward by the UK-based Corporate Responsibility (CORE) Coalition for a UK Commission on Business, Human Rights and the Environment.[42]

In Amnesty International's view, the unwillingness of the UK government to address the different ways it might be able to use its jurisdiction over parent companies to improve the human rights performance of UK-based multinationals abroad falls far short of the standard of conduct required of it under Article 2(1)(d). This is a reflection of the refusal of the UK government to accept that the human rights impacts of UK companies abroad give rise to any international obligations. This does not give any cause for optimism that the UK government will become more proactive in future.

5. AMNESTY INTERNATIONAL'S RECOMMENDATIONS TO THE UK WITH REGARD TO THE OPERATIONS OF UK COMPANIES ABROAD

The following recommendations to the UK are indicative of the kind of measures that the UK

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[40] See *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, June 2010. This paper written by Jennifer Zerk for the Harvard Corporate Social Responsibility Initiative was submitted to the UN Special Representative on Business and Human Rights.

[41] The Legal Aid, Sentencing and Punishment of Offenders Bill received its first reading in Parliament on 21 June 2011. Non-Governmental organisations, including Amnesty International, and Professor Ruggie, have drawn attention to the consequences of the proposed Bill which would change the basis of civil litigation costs in a way that would make it practically impossible for any law firm to take on human rights related cases against multinational enterprises.

[42] See The Corporate Responsibility (CORE) Coalition, *CORE Values: Why the UK needs a Commission for Business, Human Rights and the Environment*, April 2008. Copy available at http://corporate-responsibility.org/wp/wp-content/uploads/2011/04/COREvalues.pdf. Note that this proposal received some support from the UK Parliamentary Joint Committee on Human Rights. See *Any of Our Business?, Human Rights and the UK Private Sector: Report and Formal Minutes,* 16 December 2009, p. 90. The functions of the Commission would include promulgating and enforcing standards, investigating complaints and providing a non-judicial remedy where appropriate.

can and should be taking to ensure respect for human rights with regard to the operations of its companies outside the UK. Amnesty International has made these or similar recommendations to the UK in the past, in the context of the extractive industry in particular[43]:

- Ensure UK companies do not contribute to or cause human rights harm as a consequence of their operations or those of their subsidiaries and joint venture partners, in any country.

- Require by law that companies headquartered or domiciled in the UK undertake human rights due diligence measures in respect of all their overseas operations, with particular attention to high-risk areas. Ensure these measures are reported on publicly. Due diligence measures should be adequate to demonstrate that all reasonable efforts have been taken by the company to become aware of and prevent negative human rights impacts from operations in which the company is involved.

- Ensure that any form of State support to UK companies, such as through export credit guarantees, is contingent on the company, its subsidiaries and its joint venture partners respecting human rights across all their global operations.

- Establish a UK Commission on Business, Human Rights and the Environment, as proposed by the Corporate Responsibility (CORE) Coalition of NGOs, which would have powers to promulgate and enforce standards, investigate complaints and take remedial action, where appropriate.

- Establish parliamentary or similar oversight mechanisms to hear evidence on and review complaints made against UK corporate actors for their alleged involvement in human rights abuses abroad.

- Ensure that people whose human rights are harmed by the overseas operations of UK companies headquartered or domiciled in the UK can access effective remedy in the UK, including access to the courts.

- Engage with and support the host governments of countries in which members of corporate groups headquartered or domiciled in the UK have operations in establishing independent oversight bodies on corporate activities.

- Engage with and support host governments increasing access to effective remedy for people whose rights are affected by operations of members of corporate groups headquartered or domiciled in the UK.

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[43] See Amnesty International: *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta,* AFR 44/017/2009, June 2009, http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/afr440172009en.pdf. See Amnesty International: *Don't Mine Us Out of Existence: Bauxite Mine and Refinery Devastate Lives in India*, ASA 20/001/2010, February 2010. http://www.amnesty.org/en/library/asset/ASA20/001/2010/en/0a81a1bc-f50c-4426-9505-7fde6b3382ed/asa200012010en.pdf

- Review implementation of Section 172 (1) of the UK Companies Act 2006, which requires company directors to give proper consideration to the impact of the company's operations on the community and the environment, and strengthen this provision to ensure that it becomes mandatory for companies to report on their human rights impacts.

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