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30 April 2009

Dear Dr Egan,

Enclosed is a joint submission of academic human rights programs in response to the *Call for Evidence* on business and human rights of 6 March 2009. I hope it proves useful to the Committee's deliberations.

I would be pleased to clarify any of these points or provide further information if useful to the Committee.

Sincerely,

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**Memorandum  
to the  
Joint Committee on Human Rights  
House of Commons, United Kingdom**

**Joint submission of international academic human rights programs  
in response to *Call for Evidence on Business and Human Rights* of  
6 March 2009**

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April 30, 2009

## **Executive Summary**

This memorandum, submitted on behalf of international human rights institutions and academics from around the world, is in response to the *Call for Evidence* on business and human rights. The memorandum deals with the viability and effectiveness of the framework of the UN Special Representative. It seeks to highlight to the Committee three areas in the framework that could receive additional attention and development. The areas are:

- 1) **Community:** the framework does not fully or adequately consider the role of local communities whose rights are affected by the operations of corporations. It is submitted that the Committee be guided by the principle of community engagement when considering application of the framework. In particular, additional efforts should be made to institutionalise community involvement in various processes to ensure participatory principles are effectuated;
- 2) **Obligations:** the division of responsibilities between states and business in the framework could be more robust. It should be applied flexibly in many situations, especially weak governance zones. The submission urges the Committee to require businesses to take on the duty to protect in certain circumstances; and
- 3) **Monitoring:** the framework does not expound on human rights monitoring of corporate activity in local communities. The submission calls on the Committee to require companies to engage in regular monitoring involving independent third parties.

## Introduction

1. This joint submission of international human rights institutions and academics ('Academic Programs') represents years of expertise in the field of business and human rights, building on scholarship, applied research and clinical work on a global scale. In this capacity, it welcomes the decision of the Joint Committee on Human Rights to examine the issue of business and human rights following the framework proposed by Professor John Ruggie, United Nations Special Representative of the Secretary General on human rights and transnational corporations.
2. The Academic Programs support the existing commitment of the British government to deal with the matter, as exemplified by s.172(1)(d) of the Companies Act 2006, and its recognition of the impact that companies can have on communities, societies and stakeholders around them. The Academic Programs would highlight the fact that the British government will be among the first to produce a thorough response to the Ruggie framework, making it an international exemplar. The action taken by the Committee will also help confront the issue of 'vertical incoherence' highlighted by Professor Ruggie.<sup>1</sup> The Academic Programs urge the Committee to bear both of these facts in mind during its deliberations.
3. This submission responds to the call for evidence on the effectiveness and viability of Professor Ruggie's framework. Professor Ruggie has described his framework as the result of 'a principled form of pragmatism'.<sup>2</sup> While the Academic Programs applaud his efforts and the support his framework has received from the business<sup>3</sup> and civil society<sup>4</sup> communities, they believe that the Ruggie framework is only a starting point. The Academic Programs hope that this submission will help the Committee build upon Professor Ruggie's suggestions and provide recommendations that will particularly support the rights of communities affected by the actions of British transnational corporations.
4. This submission highlights three potential lacunae that may arise when operationalising Professor Ruggie's framework. First, the framework provides in-depth analysis of the roles of states and transnational corporations, but the role of local communities receive scant consideration. Second, it divides the responsibilities of the state and transnational corporation up in a formal manner that may be inappropriate to some situations met by British corporations abroad. Third, further detail is required regarding ongoing monitoring of the human rights impact of

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<sup>1</sup> 'The adverse effects of domestic policy incoherence were repeatedly raised at a recent consultation held by the Special Representative: 'vertical' incoherence, where governments take on human rights commitments without regard to implementation', J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, UN Doc. A/HRC/8/5 (7 April 2008), para. 33, p. 11.

<sup>2</sup> J. Ruggie, *Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. E/CN.4/2006/97 (26 February 2006), para. 81, p. 18.

<sup>3</sup> International Organisation of Employers, *et al.*, *Joint initial views to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights* (May 2008), at [http://www.biac.org/statements/investment/08-05\\_IOE-ICC-BIAC\\_letter\\_on\\_Human\\_Rights.pdf](http://www.biac.org/statements/investment/08-05_IOE-ICC-BIAC_letter_on_Human_Rights.pdf) (accessed 12 March 2009).

<sup>4</sup> Action Aid, *et al.*, *Joint NGO statement to the Human Rights Council* (May 2008), at [http://www.business-humanrights.org/Links/Repository/544398/link\\_page\\_view](http://www.business-humanrights.org/Links/Repository/544398/link_page_view) (accessed 12 March 2009).

corporate activity. This submission hopes to provide the Committee with some guidance as to how to deal with these issues.

## Communities

5. The three pillars of Professor Ruggie's framework allocate responsibilities in the following way: protect (states), respect (corporations) and remedy (states and corporations). However, it is submitted that such an allocation must be premised upon the duties owed to a particular community local to a company's activities. Rights derive from the 'inherent dignity'<sup>5</sup> of all people, making the role of rights holders crucial to the Committee's deliberations. The local community, as a key stakeholder in corporate investment and corporate projects, must be the central consideration around which a framework for human rights responsibilities for transnationals is built.
6. The role of local communities has not undergone the same depth of analysis as the roles of businesses and states in Professor Ruggie's report. Professor Ruggie's fact-finding was detailed as regards human rights abuses related to corporations and governments, but less so as regards the impact of these abuses on communities<sup>6</sup> or their involvement in solutions.<sup>7</sup> Communities are referred to briefly and on a handful of occasions.<sup>8</sup> For example, they form part of the 'court[] of public opinion'<sup>9</sup> whose 'perceptions' may be solicited through the medium of Human Rights Impact Assessments.<sup>10</sup> When they are referred to, communities are passive: they are 'exposed' to harm by corporations<sup>11</sup> or are 'impacted' by their activities<sup>12</sup>.
7. As a result, the framework is limited in that communities are not viewed as central actors. This lessens the importance of community engagement for corporations: if states set the legal standards and corporations must abide by these standards, the incentives to consult or engage with communities are decreased. Yet local communities are those most directly affected by the actions of multinational corporations. It follows that corporations should seek their active participation. The Academic Programs would thus urge the Committee to use community engagement as a guiding principle when formulating its final recommendations.
8. As an example of how the Ruggie framework could specifically involve communities and how the Committee can remedy the above limitation, the requirement of due diligence set out in Professor Ruggie's report<sup>13</sup> is illuminating. Due diligence is

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<sup>5</sup> *Universal Declaration of Human Rights*, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), Preamble, at <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx> (accessed 12 March 2009).

<sup>6</sup> *Acción de los Cristianos para la Abolición de la Tortura, et al., Open Letter to John Ruggie endorsed by more than 150 NGOs* (25 October, 2007), 2, at [http://www.fidh.org/IMG/pdf/OpenLetter\\_Ruggie\\_FINAL\\_wOct10Endorsements.pdf](http://www.fidh.org/IMG/pdf/OpenLetter_Ruggie_FINAL_wOct10Endorsements.pdf) (accessed 12 March 2009).

<sup>7</sup> *Joint NGO statement* at 1-2.

<sup>8</sup> *Protect, Respect and Remedy* at paras. 1, 27, 52, 54, 71.

<sup>9</sup> *Id.* at para. 54, p. 16

<sup>10</sup> J. Ruggie, *Human rights impact assessments - resolving key methodological questions*, UN Doc. A/HRC/4/74 (5 February 2007), para. 14, p. 5, considered at [18-21] below.

<sup>11</sup> *Id.* at para. 27, p. 9.

<sup>12</sup> *Id.* at para. 71, p. 20.

<sup>13</sup> *Id.* at paras. 56-64, pp. 17-19.

envisioned as fitting in with ‘[c]omparable processes . . . typically already embedded in companies’;<sup>14</sup> in other words, an internal process. As an internal process, companies are free to avoid direct consultation with communities. Even if they do not go that far, there is an incentive for companies to limit community consultations to the extent that they discharge the responsibility or legal requirement to perform due diligence (presuming that consultations prove financially costly). Further and notwithstanding, as due diligence is an internal matter, companies are able to keep aspects of the process confidential. This would restrict a local community’s ability to examine and respond to companies’ findings, denying them a voice in the continued management of human rights obligations owed to them.

9. This limitation also has implications for the British government’s duty to protect. If the duty is conceived with local communities in mind, the Committee may see fit to recommend that the government provide for a remedy or grievance mechanism for citizens of a host state. Such a remedy would allow communities to pursue a British company for breaches of its human rights responsibilities in a forum under the aegis of the British government and in situations where no such remedy is available in the host state.
10. While Professor Ruggie’s final findings may engage with the issue of communities, the Academic Programs would urge the Committee to apply the same analytical rigor to communities as was applied to states and corporations in Professor Ruggie’s framework. For this reason, the Academic Programs urge the Committee to require a formal mechanism for community engagement rather than forms of informal consultation. They also submit that the Committee suggest formal requirements be placed on companies to engage with communities, act in a transparent and open fashion and act in good faith with the aim of respecting human rights. These requirements would aptly be placed on due diligence, and may prove useful to the Committee’s deliberations on other matters.

### **Corporate Obligations**

11. The Ruggie framework allocates duties in the manner outlined in [5] above. The framework envisions the duty to protect as the responsibility of the state and not business. This duty entails fostering a culture of corporate respect for human rights (by the home state) and setting and enforcing human rights standards (by the host and home states). This submission argues that such a distinction may not be appropriate for many situations in which companies affect human rights. Companies’ obligations go beyond the first-order responsibility to respect. When operationalising the framework and delineating responsibilities of businesses, the Academic Programs would urge the Committee to take a flexible and robust approach, requiring companies to take on more responsibility in some cases (such as corporate engagement with stakeholders in areas of weak governance) and less responsibility in others (such as in some contractual definitions of applicable human rights law).

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<sup>14</sup> *Id.* at para. 56, p. 17.

12. A flexible approach is particularly important in so-called ‘weak governance zones’<sup>15</sup> (WGZs), including conflict zones.<sup>16</sup> These areas are particularly sensitive, as ‘government failures’ lead to ‘heightened risks’ that human rights will be breached or remain unenforced.<sup>17</sup> The mechanisms by which this can happen include ‘widespread solicitation, extortion, endemic crime and violent conflict, abuses by security forces, forced labour and violations of the rule of law.’<sup>18</sup>
13. Professor Ruggie indicates that ‘Home States could identify indicators to trigger alerts with respect to companies in conflict zones’ and then ‘provide or facilitate access to information and advice . . . to help businesses address the heightened human rights risks.’<sup>19</sup> While recognising the important role businesses can play in filling the governance gap in WGZs, he leaves open the subsequent step of placing a responsibility on the corporate entity to do so in these situations. The Academic Programs submit that the Committee should take that step. For example, it is likely that companies will have good information on the ground as regards governance problems in WGZs, especially if they are to conduct due diligence. Given the weak nature of public governance in these countries, it is unlikely that the home state will have as efficient an access to information, even if it has good relations with the host state. This would imply that the process of developing protections for the human rights of communities in WGZs should entail the home state and company working closely together and further that the company has a responsibility to do so. Given a company’s particular knowledge of the local conditions, the Academic Programs would urge the Committee to recommend establishing a duty on British companies to do all they can in good faith to help the British government realise its duty to protect as regards WGZs.
14. Professor Ruggie also indicates that such actions by the home state should not detract from the host state’s duty to protect.<sup>20</sup> The report implies that the duty to protect includes the duty to investigate as the first step in the enforcement of rights.<sup>21</sup> However, given the dearth of public governance in WGZs, such a duty may not be easy to realise; further, it may be that it is only realisable given the support of the company whose operations are affecting the local community. A monopolist firm in a WGZ is close to the community owing to its local operations and its status as sole local employer. The company may thus be better placed than the host government to hear of and respond to allegations of human rights violations such as forced labour. As governance becomes weaker (as indicated by human rights due diligence), heightened scrutiny of their own human rights impact should be required of companies, either directly or indirectly, through funding of a neutral external party to examine grievances. The Academic Programs submit that this supplements a responsibility on the company to conduct preliminary investigations if a *prima facie* valid complaint is brought, as part of monitoring by the company or otherwise (presuming the host state’s judicial mechanisms are insufficient to deal with the

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<sup>15</sup> Organisation for Economic Co-operation and Development, *Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (OECD, June 2006), at <http://www.oecd.org/dataoecd/26/21/36885821.pdf> (accessed 15 March 2009).

<sup>16</sup> *Protect, Respect and Remedy* at paras. 47-49, pp. 13-14.

<sup>17</sup> *Risk Awareness Tool* at 11-12.

<sup>18</sup> *Id.*

<sup>19</sup> *Protect, Respect and Remedy* at para. 49, p. 14.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at para. 82, p. 22.

matter, which can be ascertained by the company as part of the ‘remedies’ aspect of due diligence).

15. Even beyond the confines of WGZs, it may be desirable to hold companies accountable beyond a limited definition of the responsibility to respect. Companies can become involved in defining the human rights standards to which they are accountable, which falls under the duty to protect rather than the responsibility to respect. For example, in the context of defining the terms of an agreement or contract, be it between the host state and company or local community and company,<sup>22</sup> businesses can negotiate the terms of the agreement, including a choice of law clause. This allows them to specify the applicable law and thus the human rights responsibilities that will pertain to their operations pursuant to the contract; in other words, to define their human rights obligations. Stabilization clauses can affect human rights in a similar fashion:<sup>23</sup> companies can use their bargaining power with certain host states to negotiate a contract that freezes the law of the host state in time, meaning changes in the applicable human rights law will have no effect on their operations. Companies, either by negotiating specific agreements or by standardising their contracts (for example, with local communities), may define human rights and thereby impinge on the duty to protect.
16. In order to remedy this, the Academic Programs recommend that the Committee outline clearly defined human rights standards for companies to follow. Further, they suggest that the Committee include in its report a requirement on British companies to have in their contracts *as a minimum standard* these clearly defined human rights, acknowledging that the course of negotiations may require companies to increase this standard.
17. The difference between the duty to protect and responsibility to respect is not simply a matter of terminology. Companies are actors to a greater extent than the passive implications of the ‘responsibility to respect’ may suggest, requiring a flexible approach be developed within the Ruggie framework. The Academic Programs would urge the Committee to consider companies as such and ensure in its recommendations that the British government and British businesses are working together to ensure human rights are protected and respected.

## Monitoring

18. Monitoring is an important mechanism to fortify stakeholder rights, especially those of local communities. The Ruggie framework briefly considers monitoring by companies of their human rights impact.<sup>24</sup> It sees monitoring as a way to ‘create appropriate incentives and disincentives for employees and ensure continuous

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<sup>22</sup> ‘Clauses providing for this kind of recourse would be similar to those that transnational corporations typically include in the agreements they reach with governments of foreign states where they invest (known as Host Government Agreements).’ C. Rees, *Grievance Mechanisms for Business and Human Rights* (Harvard University, January 2008), 29, at <http://www.business-humanrights.org/Links/Repository/725086/jump> (accessed 18 March 2009).

<sup>23</sup> *Protect, Respect and Remedy* at para. 35-38, pp. 11-12.

<sup>24</sup> Professor Ruggie discusses monitoring as part of Human Rights Impact Assessments conducted by companies, in *Human rights impact assessments*.



improvement’<sup>25</sup> in a company’s human rights record. According to Professor Ruggie, monitoring is, in essence, a way of tracking performance. It is discussed separately from the requirement of due diligence.<sup>26</sup> While Professor Ruggie’s current work plan seeks to elaborate upon ‘the scope and nature of corporate due diligence to avoid human rights abuses’,<sup>27</sup> the language of the Ruggie framework in front of the Committee does not stress that due diligence is a continuing and continuous responsibility for companies.

19. Professor Ruggie describes due diligence as a process by which a company can discharge risk by ‘satisfy[ing] a legal requirement or discharg[ing] an obligation.’<sup>28</sup> In a business context, this is congruent with a colloquial understanding of due diligence as a pre-transactional process that discharges legal liability. However, such language may not be appropriate in the context of the need to monitor human rights abuses. The human rights of those affected by corporate activity are an ongoing concern throughout the lifetime of a given project. It should be stressed that due diligence need not be a static risk-allocation measure, but rather a way to ensure the continued enjoyment of fundamental rights by communities affected by companies. The Academic Programs recommend that the Committee ensure that monitoring is not subsumed into a version of due diligence that is pre-transactional; rather, that it require transparent and participatory structures be put in place by British companies for the regular re-examination and reassessment of their human rights policies, their practice and implementation, meaning they can adjust to changing circumstances.
20. The internal capacity of companies to carry out such ongoing due diligence (which is analogous to monitoring) is a further concern. Professor Ruggie assumes that ‘comparable processes [to human rights due diligence] are already embedded in companies. . . .’<sup>29</sup> Yet existing embedded monitoring and due diligence processes that relate to stakeholders often deal with *internal* stakeholders such as employees, such as monitoring processes established in response to the Sex Discrimination Act 1975 (as amended). Human rights monitoring entails engagement with *external* stakeholders, which is substantively different. It bears similarities to embedded due diligence processes only insofar as they are external (such as environmental monitoring). Internal stakeholders have regular contact with the company, while external ones may not. Further, there are cultural, social and political factors that may impede the collection of information, including a lack of trust in the company by the local community.<sup>30</sup>
21. Such difficulties with human rights monitoring indicate that companies should engage third party experts when their internal expertise or capacity is not sufficient, independent or legitimate.<sup>31</sup> Ensuring that external verification is itself sufficient,

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<sup>25</sup> *Protect, Respect and Remedy* at para. 63, pp. 18-19.

<sup>26</sup> *Id.* at para. 63-64, pp. 18-19.

<sup>27</sup> J. Ruggie, *Preliminary Work Plan: 1 September 2008 - 30 June 2011* (10 October 2008), 3., at <http://198.170.85.29/Ruggie-preliminary-work-plan-2008-2011.pdf> (accessed 19 April 2009).

<sup>28</sup> *Id.* at n.22, p. 9.

<sup>29</sup> *Id.* at para. 56, p. 17.

<sup>30</sup> International Finance Corporation, *et al.*, *Guide to Human Rights Impact Assessment and Management* (IFC, June 2008), 59, at [http://www.ifc.org/ifcext/sustainability.nsf/Content/OurStories\\_SocialResponsibility\\_HumanRights\\_Publication](http://www.ifc.org/ifcext/sustainability.nsf/Content/OurStories_SocialResponsibility_HumanRights_Publication) (accessed 18 March 2009).

<sup>31</sup> *Human rights impact assessments* para. 18, p. 5.

independent or legitimate is a difficult issue. However, in order for ongoing human rights due diligence to be effective, the Academic Programs submit that British companies should be required to have fully independent, legitimate and competent third-party assessors either continue to monitor their human rights impact or sign off on and regularly review a sufficient and transparent internal monitoring plan.

## Conclusion and Recommendations

22. The Academic Programs support the Committee's decision to consider the issue of business and human rights and to do so using Professor Ruggie's report as a framework. This submission provides detail on how the Committee could further operationalise community engagement, corporate obligations and human rights monitoring. To that end, the Academic Programs urge the Committee to:

- use community engagement as a guiding principle when formulating its final recommendations;
- require a formal mechanism for community engagement rather than forms of informal consultation;
- suggest formal requirements be placed on companies to engage with communities, act in a transparent and open fashion and act in good faith with the aim of respecting human rights;
- take a flexible approach when delineating responsibilities of states and corporations, especially in weak governance zones;
- recommend establishing a duty on British companies to do all they can in good faith to help the British government realise its duty to protect as regards weak governance zones;
- require British companies to conduct preliminary investigations if a *prima facie* valid complaint is brought and to put in place external audits of grievance mechanisms, as part of monitoring by the company or otherwise;
- outline clearly defined human rights standards for companies to follow and require British companies to have in their contracts *as a minimum standard* these clearly defined human rights, acknowledging that the course of negotiations may require companies to increase this standard;
- require transparent and participatory structures be put in place by British companies for the regular re-examination and reassessment of their human rights policies, their practice and implementation, meaning they can adjust to changing circumstances; and
- require British businesses to have fully independent, legitimate and competent third-party assessors either continue to monitor their human rights impact or sign off on and regularly review a sufficient and transparent internal monitoring plan.

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23. This memorandum was authored by Deval Desai (LL.M. '09), Harvard Law School, in conjunction with Tyler Giannini, Clinical Director, Human Rights Program. Chris Jochnick, Lecturer in Law at Harvard Law School, provided valuable input.

*30 April 2009*

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