



Memorandum of Evidence to the Joint Committee on Human Rights

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About Rights & Accountability in Development

Rights and Accountability in Development (RAID) works to promote human rights and responsible corporate behaviour. RAID has investigated the human rights impacts of the privatisation of Zambia's copper mines and its report *Zambia: Deregulation and the denial of human rights* was published in 2000. RAID participated in the 2000 review of the *OECD Guidelines for Multinational Enterprises* and is a founder of OECD WATCH, an international network of NGOs that works for the effective implementation of the Guidelines. RAID has submitted more than a dozen complaints against companies using the OECD Guidelines' implementation procedures and has submitted recommendations for improving the mechanism to the UK Government and to the OECD.

RAID's 2004 report *Unanswered questions: Companies, conflict and the Democratic Republic of Congo* RAID examined the role of companies in human rights abuses, corruption and in perpetuating the conflict in the Democratic Republic of the Congo (DRC). RAID analysed the companies' reactions to being listed by a UN Panel of Experts set up by the Security Council to investigate the illegal exploitation of the Congo's natural resources. In the report RAID explored the issue of how corporations should conduct business in zones of conflict and whether their behaviour ought to be regulated.

RAID initiated the international campaign for a review of the mining contracts in the DRC; its 2007 report "Key Mining Contracts in Katanga: the economic argument for renegotiation" proposed an economic rationale for renegotiating some of the key copper and cobalt mining contracts in the Democratic Republic of Congo (DRC).

In 2006, in response to the UK Government's consultation on the UK NCP's implementation of the *OECD Guidelines*, RAID with The Corner House submitted detailed proposals many of which, with support from the All Party Parliamentary Group on the Great Lakes' Region, were adopted. RAID has written a number of reports about the *OECD Guidelines* including *Five Years On: a Review of the OECD Guidelines for Multinational Enterprises* (2005), *A Model National Contact Point* (2007) and most recently *Fit for Purpose? A Review of the UK National Contact Point for the OECD Guidelines for Multinational Enterprises* (2008).

RAID is the moderator of the Corporate Accountability Working Group of the International Network on Economic, Social and Cultural Rights (ESCR-Net) and has actively engaged with the Special Representative of the United Nations Secretary General on Business and Human Rights, by drafting joint submissions and attending consultations and expert meetings.

RAID's director is an alternate external member of the Steering Board for the UK NCP.

Business and Human Rights Enquiry - Memorandum of Evidence to the Joint Committee on Human Rights

Introduction

1. Rights & Accountability in Development (RAID) welcomes this opportunity for presenting written evidence to the Committee. This memorandum contains four sections: the first addresses gaps in the *Protect, Respect and Remedy Framework*; the second looks at weaknesses in the regulation of London's secondary market, the Alternative Investment Market (AIM), and the implications for human rights; the third section comments on the government's proposals for the self-regulation of private military companies; the fourth section considers the effectiveness of the *OECD Guidelines for Multinational Enterprises*. Recommendations are listed at the end of the Memorandum. Case studies based on some of RAID's investigations in the Democratic Republic of the Congo (DRC) are included in an annex.

The Protect, Respect and Remedy Framework

2. The framework of the Special Representative of the United Nations Secretary-General on Business and Human Rights (SRSG) was adopted by the Human Rights Council in June 2008. Although they have not endorsed the framework, a number of NGOs have recognized that it provides a useful basis for the continuing business and human rights deliberations. RAID shares that view but, like many other NGOs, remains concerned that the framework and the priorities for further study are not sufficiently informed by the experiences of those negatively affected by the activities of companies – namely workers and communities in developing countries. **It is troubling that the British Government did not support efforts at the Human Rights Council to ensure that in his second term the SRSG was given an explicit mandate to examine situations of corporate-related abuses.** NGOs believe that case studies and an understanding of the particular contexts in which abuses occur should underpin the elaboration of the framework and proposed policy responses.¹ **It is to be hoped that the Committee in the course of its own inquiry can rectify this omission by considering some specific cases in depth.**
3. The Committee should take note of the fact that the text of the Human Rights Council's June 2008 resolution, in acknowledging the need for efforts to bridge governance gaps at the international level, draws attention to the need for transnational solutions to help address corporate abuses, a point also raised in relation to the role of "international cooperation" to help give effect to the state duty to protect.² The Council's resolution recognizes the need to consolidate standards with a view to developing a comprehensive international framework in the future. This is in line with the long-held view among academics and human rights activists that there is a serious gap in the international

¹ Joint NGO Statement to the Eight Session of the Human Rights Council concerning the Third Report of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises available at: <http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council>

² http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf

human rights architecture. With the growing importance of companies based in emerging economies such as China and India a global standard on business and human rights becomes increasingly relevant. **Ultimately there is a need for States to agree global standards by, for example, the adoption of a UN Declaration, to define a common benchmark for business conduct in relation to human rights.**

4. In 2001 the OECD conducted a review of business approaches to corporate responsibility. It noted that voluntary initiatives have a crucial, but necessarily only partial role, to play in the effective control of business conduct.³ Some initiatives have been used by business to deflect calls for formal regulation. The effectiveness of voluntary codes is closely linked to the effectiveness of the broader system of private and public governance from which they emerge - private initiatives cannot work well if other parts of the system work poorly. Nevertheless the British Government continues to insist that voluntary initiatives offer the only solution to the growing problem of corporate abuse of human rights. Yet these mechanisms lack the means to hold companies to account for human rights abuses. As Human Right Watch has pointed out after almost a decade the Voluntary Principles on Security and Human Rights still lack clear rules and an independent means to verify implementation.⁴ The UK Government is an active proponent of corporate responsibility and has advocated various multi-stakeholder initiatives. But its record is less good as regards enforcing existing legislation as a means of correcting corporate misconduct.

The duty of the state to protect human rights

5. The UK Government does have extraterritorial human rights obligations and by amending or tightening existing laws or regulation and adopting more effective policies it could do much more to restrain the harmful human rights impacts of companies abroad. **When public funds are engaged as with the CDC (formerly the Commonwealth Development Corporation) or the Export Credit Guarantees Department (ECGD) these bodies should be required to undertake human rights due diligence checks and where companies in receipt of such funds abuse human rights support should be withheld or withdrawn.**

Tighter Regulation of the Alternative Investment Market

6. There is widespread agreement that business should respect all human rights (economic, social and cultural as well as civil and political). The social and economic development of a country is dependent on how business is regulated. This in turn has an impact on the population's enjoyment of their fundamental human rights including rights to health, education and housing. For over a decade the reckless way in which some extractive industries have negotiated agreements in resource rich developing countries with weak institutions or poor governance has been a major cause of concern for the international community.

³ Organisation of Economic Cooperation and Development (2001) Corporate Responsibility: Private Initiatives and Public Goals. Paris. OECD available at: <http://www.oecd.org/dataoecd/58/54/35315900.pdf>

⁴ Arvind Ganesan, Human Rights Watch (2009) 'Viewpoint: Why Voluntary Initiatives Aren't Enough' in Leading Perspectives – Spring 2009

7. In 2000, the United Nations Security Council appointed a Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo. In its 2002 report the UN Panel listed 85 companies as in violation of the *OECD Guidelines on Multinational Enterprises* for helping to perpetuate the war and of profiteering from it.⁵ The British Government has responded to these concerns by promoting multi-stakeholder initiatives like the Extractive Industries Transparency Initiative (EITI). **But there are more effective means at the government's disposal. It should enforce or strengthen the regulations of the Alternative Investment Market (AIM) as a means of curbing or correcting corporate misconduct overseas.** The time has come for a re-appraisal of AIM's rules and procedures in particular in relation to disclosure, transparency and accountability.
8. AIM's self-regulatory regime has arguably been a significant factor in its success as the leading international growth market. But this success has been achieved not only at the cost of the London Stock Exchange's reputation, but also at the expense of the human rights of communities in developing countries like the Congo. To draw a parallel, the global financial crisis has exposed the dangers of over-reliance on self-regulation as, the Secretary General of the OECD recently observed, "One of the main lessons of this crisis is that companies and markets can't rule themselves. Financial innovation sacrificed business ethics for the sake of extraordinary profit."⁶
9. Although, in the wake of the global economic downturn, the number of companies listed has fallen and the aggregate value of AIM companies has dramatically declined, the case for reform remains compelling.⁷ AIM, with its minimal approach to regulation, remains the index of choice for many mining and natural resources companies. Over a quarter of overseas AIM companies are registered in Bermuda, the British Virgin Islands or the Cayman Islands.⁸ Oil, gas and mining companies, many with assets in the developing world, make up over 30% by market value of international AIM companies.⁹ Many of these resource companies have exploration rights but no proven track record, capital or income.

⁵ Report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 16 October 2002, S/2002/1146.

According to the World Bank many of the Congo's state-owned enterprises entered into mining contracts at a time of distress or without proper evaluation of the assets under the partnership agreement. In 2007, the manifest unfairness of these contracts led the Congolese government to undertake a wholesale revision of mine licences issued during the war or its immediate aftermath.

⁶ Remarks by Angel Gurría, OECD Secretary-General, 22 January 2009 delivered at the [European Business Ethics Forum](#) (EBEF) available at:

http://www.oecd.org/documentprint/0,3455,en_2649_34855_42033219_1_1_1_34529562,00.html

⁷ Richard Wachman Wednesday 4 March 2009 'AIM is way off after downturn slices 64% from share values' The Guardian p. 29. 'Since January 2008 the AIM 100 index has fallen more heavily than the FTSE 100 losing 65% against the FTSE's 43% drop. At the height of the boom, AIM companies had an aggregate value of £107 billion, but by the end of February 2009, that had plummeted to £38 billion, a fall of 64%...'

⁸ Bermuda, the British Virgin Islands and the Cayman Islands account, respectively for 7.8%, 10.4% and 10.1% of international AIM companies by number, as of December 2007. See

http://www.londonstockexchange.com/en-gb/products/companyservices/ourmarkets/aim_new/Trade+and+Investing/statistics.htm (visited 27 March 2008).

⁹ Ibid.

10. Some oil and mining companies operate in highly volatile, unstable and even lawless parts of the world.¹⁰ About a dozen mining companies that are or have been listed on AIM have concessions in the Democratic Republic of the Congo where the true provenance of the assets has not been established and the legitimacy of mine licences continues to be keenly disputed. The Exchange has adopted a permissive attitude towards non-disclosure of information concerning the acquisition of DRC mining concessions, which means that neither investors nor affected peoples have been alerted to the reputation of key individuals associated with AIM-listed companies, who have personally profited from the transactions. In the case of the DRC, such individuals have appeared on UN, EU or US Sanctions lists, or in expert reports to the Security Council as meriting financial or other restrictions. Significant shareholders or key managers have been the subject of legal proceedings or even criminal investigations abroad. Complaints have been filed against some companies for alleged breaches of the *OECD Guidelines for Multinational Enterprises*. **Yet such crucial information is not automatically disclosed under existing AIM rules, especially when a company makes such acquisitions after it has been admitted to the market: the level of due diligence undertaken at admittance is not repeated in the case of most subsequent transactions.**
11. Much of the responsibility for AIM's regulation is delegated to Nominated advisors (finance firms, accountants or brokers). Nominated advisors (known as nomads) are supposed to be independent from the companies they represent and to demonstrate that no conflict of interest exists.¹¹ Since October 2004 the Exchange has taken disciplinary action against a small number of AIM companies and nomads. In only a handful of prominent cases has censure been public. The Exchange has been criticised for neither naming parties found to have breached AIM rules nor for releasing details of these cases and the rationale behind any action taken. This secrecy puts the interests of the company above those of investors and the wider public. (See Annex 1: Oryx Natural Resources Ltd.)

Responsibility of businesses to respect human rights

Private Military and Security Companies

12. The operations of private military and security companies (PMSCs) are unique in that they have the potential to have a direct and negative impact on individuals' human rights. PMSCs are active in a number of highly sensitive areas including security and risk management services for private companies operating in conflict or post-conflict situations; business intelligence, pre-employment screening, counter-surveillance as well as activities previously performed by national militaries, which are now increasingly outsourced to private contractors.¹² Where PMSCs act as agents of the State they may be seen to have positive duties to protect human rights. At the end of April 2009 the

¹⁰ White Nile (now Agriterra) controversially acquired oil concessions in Southern Sudan (which it later lost). The Australian company, Range Resources Limited, has acquired rights to oil blocks in the disputed semi-autonomous region of Puntland in Somalia.

¹¹ RNA, Part Two, 21 - 22. Independence in relation to rule 21 is elaborated in Schedule One.

¹² Andy Bearpark and Sabrina Schulz (2007) 'The future of the market' in Simon Chesterman and, Chia Lehnardt (ed) *From Mercenaries To Market: The Rise And Regulation Of Private Military Companies*. Oxford. Oxford University Press available at: http://www.bapsc.org.uk/key_documents-policy_papers.asp

Foreign and Commonwealth Office (FCO) launched a public consultation on the government's proposals to improve standards across the Private Military and Security (PMSC) industry globally.¹³ The scope of the consultation is limited because the government, after discussions with 'the industry', has ruled out of consideration a national licensing regime and instead favours self-regulation through an industry association. This is despite the fact that the previous consultation on the 2002 Green Paper on Options for Regulation elicited a large number of responses that called for more robust form of regulation.

13. Given the length of time that has lapsed since the Green Paper, the three-month period for the FCO's consultation is extremely short. RAID is concerned that the FCO's proposals seem unduly influenced by the interests and wishes of the British Association of Private Security Companies (BAPSC) which enjoys high level political contacts.¹⁴ Both the UK government and the (BAPSC) are participants in the Swiss Initiative which was launched in 2006.¹⁵ The aim of the Swiss initiative is to develop a Code of Conduct for PMSCs to address 'the normative and accountability gaps' in the sector. While the perils of deregulation in the banking sector have belatedly been recognized, the wider lessons of the failings of self-regulation have not been drawn by the government. **While an international code of conduct for PMSCs may be desirable, self-regulation is not sufficient to control the activities of individuals deploying lethal force or engaged in activities that directly impinge on the human rights of others.**
14. RAID is not convinced that the secretive and unregulated world of PMSCs can be made accountable through market forces alone. In RAID's experience it is often not possible to draw a distinction between reputable and disreputable PMSCs. As BAPSC acknowledges 'Most tenders and bidding processes on the private market happen under severe time constraints'; how therefore would it be possible for PMSCs to vet staff thoroughly or assess the likely impact upon human rights of the contract in question?
15. The FCO proposes that once an international code of conduct has been agreed it should be supported by 'an effective complaints mechanism' (Paragraph 21). An international secretariat would be established paid for by an annual licence fee levied on PMSCs. The right to lodge a formal complaint with the international secretariat against a PMSC for a specific incident would reside primarily with the host state. But such a mechanism would seem to exclude directly affected people from filing a complaint. There are situations where governments in developing countries would be unwilling to lodge a complaint for

¹³ Foreign and Commonwealth Office 'Consultation on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally' available at: www.fco.gov.uk

¹⁴ Sir Malcolm Rifkind, a former Foreign Secretary and Minister of Defence, is the chairman of Armor Group, the biggest private security company operating in Iraq. Andy Bearpark, was the Private Secretary to Prime Minister Margaret Thatcher and Press Secretary to the ODA Minister Baroness Chalker. From 1991 to 1997 he was Head of the Information and Emergency Aid Departments of the Overseas Development Administration (ODA).

¹⁵ On 17 September 2008, 17 States - Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States of America - finalised the so-called "Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict". The Montreux Document is the first international document to describe international law as it applies to the activities of private military and security companies (PMSCs) whenever these are present in the context of an armed conflict. It also contains a compilation of good practices designed to assist states in implementing their obligations under international law through a series of national measures.

example where their security forces are parties to human rights violations involving the private sector. Furthermore, such a mechanism would not apply to PMSCs that are not participants to the scheme. **Without more effective methods of scrutiny, there is a risk that the outsourcing of security functions to PMSCs will continue to be used as a means of shielding governments and their agents from accountability for violations of international law.** (See Annexe 2: Avient Limited)

Access to a Remedy

CDC (formerly the Commonwealth Development Corporation) and human rights

16. The International Commission of Jurists (ICJ) recognises “that civil liability is increasingly important as a means of ensuring legal accountability when a company is complicit in gross human rights”.¹⁶ Nevertheless, victims of human rights abuses continue to face considerable obstacles when seeking an effective remedy. These obstacles are compounded when companies facing allegations of complicity in grave human rights violations are supported by the British government. Investments by the the British publicly owned international development fund, CDC (formerly the Commonwealth Development Corporation) are not subject to the scrutiny or human rights due diligence procedures. CDC does not make its development impact assessments and reports public on the grounds of commercial sensitivity.
17. Anvil Mining, a Canadian-Australian company has been accused of involvement in serious human rights violations and war crimes in the DRC. Despite the gravity of the allegations against the company and some of its employees, and the manifest failure of the Congolese government to investigate the incident properly or to conduct a trial in conformity with international standards, Anvil Mining has received support from the British publicly owned international development fund, CDC (formerly the Commonwealth Development Corporation). The DFID Minister, Gillian Merron, defended CDC’s investment in a letter to RAID and Global Witness.¹⁷ According to DFID the fact that CDC has no direct stake in Anvil Mining and that the investment is made through the Emerging Capital Partners (ECP), which specializes in private equity investing in Africa, there is no cause for concern. In 2005 CDC contributed \$47.5 million to ECP’s second pan-African fund. ECP (a US-based fund) made the investment in Anvil Mining in March 2006, following approval of its Investment Committee. The Minister explained that CDC is not a member of the ECP Investment Committee and does not pre-approve investments by its fund managers. **It is unacceptable that at the time CDC’s investment was made, Anvil’s role in the Kilwa massacre was under investigation by the Australian Federal Police** (see Annex 3: Anvil Mining Limited and the Kilwa Massacre).

¹⁶ International Commission of Jurists (2008) Corporate Complicity & Legal Accountability Volume 3 Geneva p 4.

¹⁷ Gillian Merron, Parliamentary Under-Secretary of State, DFID letter dated 29th September 2008 to Patricia Feeney, Executive Director of RAID and Simon Taylor, Director of Global Witness.

The OECD Guidelines for Multinational Enterprises

18. Given the obstacles to an effective remedy RAID believes that the *OECD Guidelines for Multinational Enterprises* remains an important additional tool for enforcing higher standards of corporate behaviour. It is to date the only corporate accountability instrument that offers a complaints mechanism. Since 2000, the UK National Contact Point (NCP) for the OECD Guidelines has received 25 complaints from unions and trade unions about the alleged misconduct by British companies abroad. It was only after the introduction of major reforms following a consultation (which ended in June 2006) that the UK NCP has started to show some capacity to hold companies to account. In 2008 the UK NCP decided that the activities of two companies (DAS Air and Afrimex) operating in Eastern Democratic Republic of the Congo had contributed to human rights violations. These decisions have set an important precedent in making companies – even when they are not publicly listed – answerable for their actions abroad.
19. The *OECD Guidelines for Multinational Enterprises* cannot of course offer a remedy to the victims of abuse and cannot impose penalties on companies for their misconduct and so are therefore not sufficient. **There is also the important question of what should happen when a company that has been found to have breached the Guidelines, continues to act abusively. If the Guidelines are to act as a credible deterrent some further measures should be taken e.g. delisting if the company is publicly listed; or debarring company directors.** Professor Ruggie has expressed concern at the failure of most export credit agencies to consider explicitly human rights at any stage of their involvement.¹⁸ Where companies have proved themselves unable to adhere to the Guidelines, government support such as export credit guarantees or political risk insurance, should be withheld or withdrawn.
20. For serious human rights abuses the government should consider developing a more effective redress mechanism for victims of corporate abuse. It should have powers to sanction companies and impose penalties. Nonetheless, as the UK NCP has shown, when there is political will to examine complaints fairly the *Guidelines* can contribute towards improvements in company behaviour.¹⁹ But this progress can only be sustained if there are continued adequate levels of staffing and resources as well as oversight by the Steering Board and parliament of the UK NCP.
21. The OECD is poised to review the *Guidelines* in particular the human rights provision in response to the criticisms contained in the reports of the SRSG. It is imperative that the UK offers leadership in these efforts to ensure that the standards are not diluted but strengthened. Despite repeated demands by members of parliament and others, there has been little progress in producing guidance for companies working in areas of conflict and weak governance.

¹⁸ Ruggie, Protect, Respect and Remedy: a Framework for Business and Human Rights, April 2008; A/HRC/8/5, paragraphs 39 and 40.

¹⁹ RAID (2008) Fit for Purpose? A Review of the UK National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises in association with The Corporate Responsibility Coalition and The Trades Union Congress.

Recommendations

- While there is a place for voluntary initiatives and private codes of conduct, these should be balanced by credible means of regulation, sanction and redress.
- The rules and procedures of the Alternative Investment Market (AIM) should be tightened to curb or correct corporate misconduct overseas, particularly that of extractive industries.
- The government's proposals for the self-regulation of private military and security companies are insufficient and need to be complemented by other measures including legislation.
- CDC should be required to conduct human rights due diligence before public money is invested in companies abroad. Given the public interest, its development impact assessments and reports should be made available.
- The government should offer leadership in strengthening the OECD Guidelines for Multinational Enterprises, particularly in relation to its human rights provision and guidance to companies operating in areas of conflict or weak governance.
- The government should consider taking further measures against companies who, having been found in breach of the Guidelines, continue to act abusively such as by withholding or withdrawing export credits; delisting companies or debarring company directors.
- For grave human rights abuses the government should consider developing a more effective redress mechanism such as a Commission for Business, Human Rights and the Environment with powers to sanction companies and impose penalties which has been proposed by the Corporate Responsibility (Core) Coalition.
- The government should acknowledge the need for States to agree global standards by, for example, the adoption of a UN Declaration, to define a common benchmark for business conduct in relation to human rights.