Corporate Justice Coalition

Protecting rights.
Ending corporate abuse.

Bridging the gap

How could a UK Business, Human Rights and Environment Act have made a difference?

The Samarco dam disaster:
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Introduction

Around the world, companies, financial institutions and public bodies are linked to serious human rights abuses, worker exploitation and environmental harm via their own operations, products and services, and across their global value chains.[1] The extent of these abuses is so great, and the chances of securing justice for them so limited, that 'corporate impunity' has become a byword for the power and protection afforded to companies and the way in which they operate.

UK companies, and the public bodies financing projects or procuring products or services linked to human rights abuses or environmental harm, are a fundamental part of this problem. As this report documents, whether at home or abroad, well-known UK companies and public bodies have been and continue to be connected to cases of human rights abuses and environmental destruction.

Abuses are rampant in the value chains of products we rely on in order to provide the goods and services used by people every day, from the clothes we wear, to the food we eat and the vital equipment used by NHS staff in the battle against Covid-19. Many of these abuses take place in the Global South, while a high proportion of profits from corporate operations flow back to the UK. Companies are, quite literally, profiting from abuse. Meanwhile, vulnerable populations and ruptured communities are left in the wake of human rights abuses or environmental catastrophes. Worse still, access to justice for those impacted remains largely unreachable as companies often choose to source from countries with weaker regulation or enforcement and corporate structuring is set up to evade liability.

It is now more than 10 years since the United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs), a set of guidelines for states and companies to prevent, address and remedy human rights abuses. The UNGPs call for a "smart mix" of actions, including mandatory measures, to "identify, prevent, mitigate and account for" how companies address their adverse human rights impacts. In subsequent years there has been a growing understanding of the need to include the environment and climate in due diligence requirements for companies, bolstered in 2022 by a UN resolution recognising the Human Right to a Clean, Healthy and Sustainable Environment.

Three years before their approval, Prof John Ruggie, the widely acknowledged architect of the UNGPs, explained how the "governance gaps" between the "scope and impact" of economic actors and the "capacity of societies" to manage their consequences created a "permissive environment" for the abuses of rights that, to this day, remain prevalent.[2]

Prof John Ruggie, 2008:

> *"The root cause of the business and human rights predicament today lies in the governance gaps created by globalisation – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.*

The UNGPs set out a framework for how to resolve this situation – how to bridge the governance gaps and shut down the permissive environment for abuses. In the years since their approval in 2011, there have been a range of laws tabled or enacted in different jurisdictions that align with the UNGPs' call for a "smart mix" of measures, spanning "national and international, mandatory and voluntary".[3]

The UK was among the first countries to legislate on supply chains and human rights: it was the first country to develop a 'Business and Human Rights National Action Plan' based on the UNGPs and one of the first to pass a domestic supply chain law, in the form of section 54 of the Modern Slavery Act. The section 54 "Transparency in Supply Chains" requirement in the UK Modern Slavery Act was part of the first generation of human rights reporting laws. However, as Parliament's Business, Energy and Industrial Strategy Committee reported in March 2021 with specific reference to forced labour in Xinjiang, it is "out of date, has no teeth, and we do not accept that businesses should be excused from doing basic due diligence to guarantee that their supply chains are fully transparent and free from forced labour and slavery".[4]

The 2021 Environment Act (Schedule 17) introduces a limited due diligence requirement on forest-risk commodities. However, the extent to which human rights compliance is required by Schedule 17 remains unclear and left to be decided through secondary legislation. This is despite the Global Resources Initiative, a multi-stakeholder Government-appointed taskforce, recommending that the legislation include a combined human rights and environmental due diligence approach.[5]

There have been efforts to ensure that the failure to include the finance sector within the remit of the Environment Act is addressed. An amendment to the Financial Services and Markets Act extends the obligations introduced for companies under Schedule 17 of the Environment Act.[6] The amendment requires financial institutions to carry out due diligence when investing in or lending to companies producing "forest risk" commodities such as beef, palm oil and soy.[7]

While positive steps, these laws remain insufficient for solving the problem of corporate human rights abuses and environmental harm. Neither law puts in place obligations for companies to prevent all human rights abuses and environmental harm from happening in the first place, nor do they hold to account those responsible for harms that have occurred.

A number of countries in Europe are now moving ahead of the UK in preparing or passing new laws to address human rights abuses and environmental harm which go far beyond the UK laws in scope and coverage and include liability and sanctions for non-compliance.[8] This includes France, Germany, and the Netherlands.[9]

In June 2023, the European Parliament voted in favour of the EU's Corporate Sustainability Due Diligence Directive (CSDDD), leading to a final negotiation stage with the European Commission and Member States (underway at the time of writing).[10] As it stands, the Directive would require companies in scope to conduct due diligence on human rights abuses and environmental harm throughout their global value chains and provide for civil liability where they fail to do so. Crucially, this would apply to those UK companies operating within the EU market that fall within the CSDDD's remit. The varying level of responsibility that this would create for UK companies would further skew the playing field between those taking action and those that fail to do so. It would also worsen the lack of certainty around legal obligations for UK companies – an issue clearly called out by the many well-known UK businesses and investors that have signed separate statements highlighting the need for the urgent introduction of a new UK law.[11]

While the UK has been failing to keep pace with legislative developments, it has been at the forefront when it comes to jurisprudence. Under English Common Law, UK parent companies can have a duty of care for harms suffered by stakeholders at the hands of subsidiaries. This tort law duty of care has been clarified by the UK Supreme Court in the cases *Vedanta v Lungowe* (2019) and *Okpabi v Shell* (2021),[12] the latter of which is included as a case study in this report.

What role might a regulator play?[13]

Civil liability is an indispensable aspect of any human rights and environmental due diligence law. However, civil liability for human rights and environmental abuses in the English courts would still present significant obstacles for victims due to the costly and lengthy nature of legal proceedings. A dedicated regulatory body could be established to monitor and enforce the law. This approach would be particularly appropriate for the public sector, for which it is in the public interest to apply a different standard to that applied to the private sector, while nonetheless ensuring it is held to account.

However, requiring costly legal battles can greatly delay or, in many cases, altogether deny access to justice, as cases being taken still only involve a fraction of victims affected by UK businesses and the number of law firms that have the time and resources to take cases remains limited. Instead, legislation should ensure prevention in the first place, which would in turn reduce the number of cases needing remediation.

The Corporate Justice Coalition believes that what we refer to as a Business, Human Rights and Environment Act – a new UK due diligence law to hold companies to account when they fail to prevent human rights abuses and environmental harms in their global value chains – must be introduced to address these issues. A new law should be modelled on the ground-breaking 'failure to prevent' liability provisions of section 7 of the 2010 Bribery Act. This model would make a company liable where it had failed to prevent harm unless it had taken all reasonably practicable steps to prevent the harm from happening. Crucially, this model reverses the burden of proof in legal cases – meaning that once the harm has been proven, the responsibility shifts to the company to prove that it took all reasonable steps to ensure that it prevented the harm from happening.

Reversing the burden of proof for claimants would remove significant existing barriers to justice. In *Okpabi v Shell,* the appellants from Nigeria had to rely on whistleblowers in order to gain information about Shell's corporate structure – key to determining the proximity of the relationship between Shell and its Nigerian subsidiary and without which such proof would have been impossible.

The failure to prevent approach was specifically recommended by Parliament's Joint Committee on Human Rights in 2017 and identified as legally feasible by the British Institute of International and Comparative Law (BIICL) in 2020.[14] In 2022, after a submission from the Corporate Justice Coalition and Transform Trade, the Law Commission published its *Options Paper* to the Government on how it could improve the law to ensure that corporations are effectively held to account for committing serious crimes. Again, a failure to prevent approach is suggested, this time as one of a number of options.[15]

In addition to harnessing an existing British legislative model that has been shown to have shifted corporate behaviour away from bribery,[16] one of this model's distinct advantages is the pairing of its liability model with a due diligence defence – which can lead to a greater level of vigilance from companies.[17]

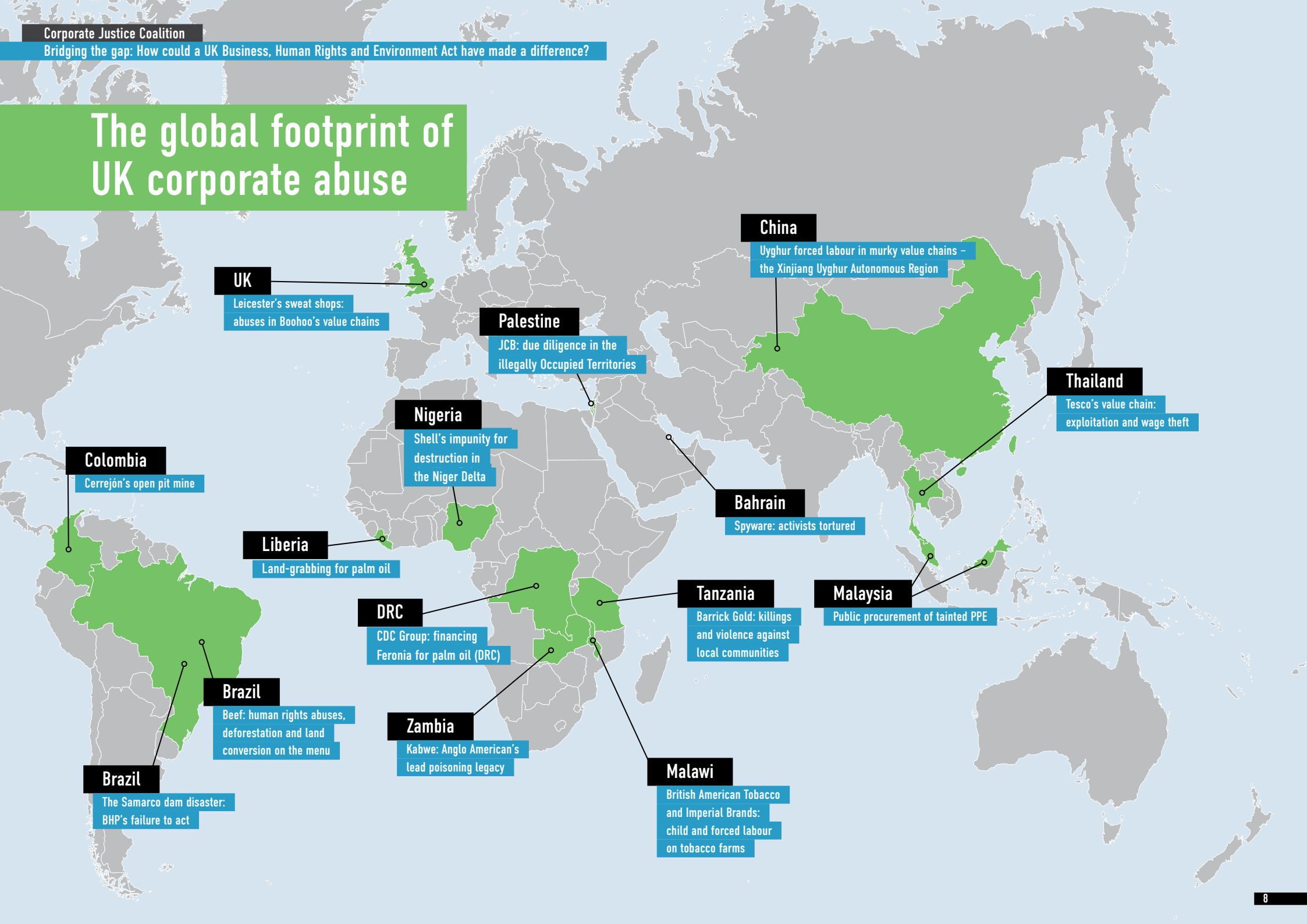
This report contains 15 case studies demonstrating connections between UK companies and public bodies and serious human rights abuses or environmental harms in their value chains, within the UK and overseas. Each case study demonstrates the accountability gap we face and how a UK Business, Human Rights and Environment Act could have made a difference had it been in place. Responses we received from companies can be found in the Annex.

The governance gaps and power imbalances that create and sustain corporate impunity cannot begin to change without robust legislative interventions. The current global context of intersecting economic, environmental and social crises demands bold action. And with civil society groups unified in their call, businesses and investors demanding change, and public opinion[18] showing a clear demand for a new law to tackle exploitation of workers and environmental destruction in supply chains – the time for action is now.

The principal elements of a UK Business, Human Rights and Environment Act – endorsed by the Corporate Justice Coalition and 36 individual UK partner organisations:[19]

1. Commercial and other organisations have a duty to prevent adverse human rights and environmental impacts of their domestic and international operations, products and services including in their supply and value chains.
2. Commercial and other organisations must develop and implement reasonable and appropriate due diligence procedures to identify, prevent and mitigate adverse human rights and environmental impacts.
3. Commercial and other organisations must publish a forward-looking plan describing the procedures to be adopted in the forthcoming financial year, and an assessment of the effectiveness of actions taken in the previous financial year.
4. Commercial and other organisations, and their senior managers shall be subject to a civil penalty if they fail to develop, implement and publish a due diligence plan within a reasonable time, or publish a misleading or inadequate plan.
5. Commercial and other organisations shall be liable for harm, loss and damage arising from their failure to prevent adverse human rights and environmental impacts of their domestic and international operations, products and services including in their supply and value chains.
6. It could be a defence from liability for damage or loss, unless otherwise specified, for commercial and other organisations to prove that they acted with due care to prevent human rights and environmental impacts.
7. Commercial and other organisations, and their senior managers shall be subject to a criminal penalty if they fail to prevent serious human rights or environmental impacts.
8. Commercial and other organisations to be included in this legislation include all businesses, no matter their size, nature or sector. It also includes public sector bodies, including those using public procurement and other public bodies providing financial and other support to businesses, such as export credit agencies, development agencies and development finance institutions.

The global footprint of UK corporate abuse



Uyghur forced labour in murky value chains – the Xinjiang Uyghur Autonomous Region (China)

Uyghurs are the largest Turkic and Muslim-majority group in the Xinjiang Uyghur Autonomous Region of China, which some Uyghurs refer to as East Turkistan.[20] The Chinese Government is estimated to have detained as many as 1.8 million Uyghurs, Kazakhs and other Muslim and Turkic-majority peoples in the region as part of a regime that includes systemic state-imposed forced labour, including in mass internment camps and through broader forced labour programmes.[21] China has been accused of subjecting minority groups to "re-education", persecution based on ethnicity and religion, forced labour, mass surveillance, and subjecting women in these groups to forced sterilisation amounting to genocide.[22] Many Uyghurs and other Turkic and Muslim-majority peoples in the region have been forcibly transferred to factories in other regions of China.[23] In reviewing China's human rights record in 2018, UN experts noted that the treatment of "Uyghur and other predominantly Muslim minorities… may constitute international crimes, in particular crimes against humanity".[24]

Research has shown that dozens of international brands, including UK companies **Marks & Spencer**, **Primark**, **River Island** and **Tesco** are at risk of using cotton that is produced or processed by Uyghur forced labour.[25] Companies have called for stronger laws, and a number of companies, including Marks & Spencer, have signed a "call to action" to remove their value chains from the region.[26]

Automotive parts production has greatly increased in the region in recent years. Research demonstrates that a number of UK automobile companies, including **Daimler**, **Aston Martin** and the **London Electric Vehicle Company** – which supplies EV black cabs in London – are among the many major car brands at high risk of sourcing from companies linked to abuses in the Uyghur region.[27]

The UK Overseas Business Risk guidance notes the risk of Uyghur forced labour being part of cotton supply chains, as well as those of textiles, automobiles, electronics and polysilicon – a key material in the production of solar panels.[28] It has been reported that up to 40% of the UK's solar farms were made using panels made by Chinese solar companies linked to labour camps in the region.[29]

The risk of forced labour in the value chains of cotton products from apparel to home furnishings exists at all production stages, from cotton picking to final manufacturing processes: it is estimated that one in five cotton garments on the global marketplace is connected to forced labour of Uyghur workers at some stage of its production process.[30] Uyghur support groups have noted that it is effectively impossible for companies to carry out due diligence in the region due to restricted access to factories and workers and a lack of relevant documentary proof of actual labour conditions.[31]

The UK Government has acknowledged that "[t]here is compelling evidence of widespread and systematic human rights violations taking place in Xinjiang, including the extrajudicial detention of over a million Uyghurs since 2017".[32] Parliament's BEIS Committee also concluded that it "received evidence from several companies laying out the steps they have taken to deliver transparency in their supply chains and to ensure they are not profiting from human rights abuses in Xinjiang and other parts of the world…". Adding that, "...companies selling to millions of British customers cannot guarantee that their value chains are free from forced labour, and that modern slavery legislation and BEIS Department policy are not fit for purpose in tackling this serious situation".[33]

> *"… I support the call for a new UK law to make sure companies do everything they possibly can to ensure their supply chains are free from abuse and environmental destruction. And that if they aren't doing this properly, they are held to account for profiting from abuse…*
>
> **Rahima Mahmut**
> **UK Director**
> **World Uyghur Congress**

Parliament's Foreign Affairs Committee report, *Never Again: The UK's Responsibility to Act on Atrocities in Xinjiang and Beyond*, calls on the Government to explore a ban on the import of cotton products made in whole or in part in the region and for this to be extended further to other industries. It also recommends the introduction of "new legislation that will create a legal requirement for businesses and public sector bodies to take concrete measures to prevent and remove the use of forced labour in their value chains. This new duty should be backed up by meaningful sanctions and penalties for non-compliance".[34]

Bans on imports of products made in whole or in part using forced labour from the region have been put in place in the USA.[35] However, similar mechanisms have not yet been put in place in the UK.[36] Uyghur activists pursued a case against the UK Government over its inaction on preventing Xinjiang cotton imports which failed on the basis that it was not proven by the claimants that the specific consignment of cotton imported into the UK was the result of unlawful conduct.[37]

There is an urgent need for new legislation which requires companies to address human rights and environmental risks in their value chains, holding companies to account for a failure to prevent abuse. If meaningfully enforced, such legislation would require companies to map and trace the risks of links to Uyghur forced labour throughout value chains and to end sourcing relationships when such links are found – in line with the UNGPs – creating a level playing field.

Photo credit: T. Schneider/ Shutterstock

Leicester's sweat shops: abuses in Boohoo's value chains (UK)

Sector: Garment and textiles

Issues: Worker exploitation, modern slavery, health and safety

The company: **Boohoo** Group PLC (Boohoo), founded in 2006, is a Jersey-registered fashion company with its headquarters in Manchester.[38] Brands falling within its ownership include Oasis, Warehouse, Pretty Little Thing, Karen Millen and Coast. Boohoo sources an estimated 60-70% of its garments from Leicester.[39] During the Covid-19 pandemic, it came to light that Boohoo disregarded the health and safety of workers in its value chains in Leicester.[40] At the same time, the company's profits soared with a 40% increase in revenue during the pandemic.[41]

Affected rights holders: Leicester is the central hub of the UK garment sector housing an estimated 1,000-1,500 factories.[42] Over a number of years, reports of poor conditions for workers in Leicester have repeatedly been highlighted. Research from 2015 revealed evidence of a two tier workforce with UK citizens, many of South Asian heritage, forced to supplement low wages with social security payments and undocumented migrant workers left to work extra shifts in worse conditions.[43]

Reports of the situation of up to 10,000 garment workers in Leicester described that they faced serious labour rights abuses including being paid as little as £3-4 an hour, less than half the legal minimum wage, and worked in conditions that have been described as amounting to modern slavery.[44] In an interview with Homeworkers Worldwide in September 2017, one worker recounted:

> *We're paid in cash… instead of a bank transfer. They give us payslips but they only show 16 hours a week at £7.50 an hour, whereas in fact we're doing many more hours than that… usually we do 40 hours a week from 8am to 6pm and we're paid around £500 a month.*[45]

Details:

In 2017, Parliament's Joint Committee on Human Rights published a report that included an examination of evidence of abuses in the UK garment and textiles industry.[46] It heard "compelling evidence… that labour rights abuses are endemic in the Leicester garment industry", with the most common forms of abuse including "payment of wages below the minimum wage, lack of employment contracts and significant disregard of health and safety regulations".[47]

In February 2019, Parliament's Environmental Audit Committee (EAC) published its report, *Fixing Fashion: clothing consumption and sustainability*.[48] This drew on evidence the EAC considered in 2018 and included the contrast between "a dress on Boohoo that retailed at full price for £5",[49] and "concerns about working conditions and illegally low pay in the garment manufacturing hub of Leicester".[50] It referenced that "the buying practices of some online fashion retailers may be putting UK clothing manufacturers in the position where they can only afford to pay garment workers illegally low wages…".[51]

When Boohoo provided evidence to the EAC, it was pressed on its failure to recognise trade unions.[52] Its statement that there did not appear to be demand for a union from workers in its Burnley warehouse was contradicted by the Union of Shop, Distributive and Allied Workers (USDAW).[53]

On 5 July 2020, the Sunday Times published an investigation that alleged labour exploitation, deplorable working conditions, and illegally low rates of pay – as low as £3.50 an hour in Leicester-based factories making clothes for Boohoo. It noted that at the relevant time, the minimum wage in Britain for people aged 25 and over was £8.72.[54]

As a result of the allegations, Boohoo commissioned Alison Levitt KC to conduct an independent review into whether the allegations were well-founded, the extent of Boohoo's knowledge of the conditions in its supplier factories, whether it was compliant with the law, and to make recommendations for the company's future operation.[55]

The review found that a significant number of Boohoo's Leicester suppliers and sub-contractors within the sample selected for the purposes of the report had poor working conditions and low rates of pay.[56] Boohoo's monitoring of its Leicester value chain was found to be inadequate, and this was attributed to its weak corporate governance. It found that "much of the time, Boohoo simply has no idea where its clothes are being made and thus no chance of monitoring the conditions of the workers who make them".[57]

It determined that since December 2019 at the very latest, senior Boohoo directors had been aware of the allegations associated with its suppliers in Leicester, and while the company put in place a programme intended to remedy the working conditions, it did not act with the haste required. The report also found that Boohoo failed to take responsibility for the worsening conditions and serious risks faced by workers during the lockdown.

The review included an assessment of documents including social audit reports and email correspondence relating to compliance. The document review of the 49 companies in the sample revealed incidents of non-compliance relating to employment contracts, working hour records, payment practices, payment of national minimum wage, health and safety standards including locked fire doors, buildings in disrepair, non-potable drinking water and an absence of a Covid-19 risk assessment.[58] In November and December 2019, ethical audit company, Verisio, carried out an audit of sub-contractors to two of Boohoo's first tier suppliers which led its Managing Director to conclude that one of the factories "has the worst conditions that I have seen in the UK and is not safe for workers".[59]

Spot checks conducted by Verisio on a sample of Boohoo suppliers and sub-contractors in July and August 2020 found non-compliance with regard to working hour records, payment practices and minimum wage payments indicating that workers were paid £3 per hour and suffered delayed payment of wages for up to seven weeks. The review also concluded that many workers did not have proper contracts, were not entitled to paid holidays or sick pay, and that working hours were frequently excessive and inadequately renumerated.[60]

As well as finding inadequate monitoring of the company's value chains, the Review also found systemic failure to act on issues once they were raised or detected. It found that "there were a series of warnings and red flags, both from inside and outside the company, which Boohoo ignored. By the time they began to take notice, it was too late".[61] However, the report found that there was no evidence that the company itself or its officers had committed any criminal offences.

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, Boohoo would have been legally required to actively monitor the working conditions in its Leicester supplier factories, and to take immediate action to remedy instances or patterns of wrongdoing as soon as they were found. It is also arguable that this might have helped prevent much of the suffering endured by factory workers for years.

The Corporate Justice Coalition (CJC) and the Business & Human Rights Resource Centre (BHRRC) commissioned Tim Otty KC and Naina Patel of Blackstone Chambers to assess whether Boohoo could have been held liable under a new UK mandatory human rights and environmental due diligence law.[62]

Without Boohoo taking action to mitigate potential harms, it seems likely that liability would have been established as a result of a determination that the harms were directly linked to its products. In their view, it seems arguable that Boohoo could have been said to have caused or contributed to those harms through its activities (both its actions and omissions), i.e., its weak corporate governance, inadequate monitoring of its value chains at the relevant time, exploitative purchasing practices and permitting sub-contracting to further decrease its oversight.

Workers affected by abusive labour practices in Leicester factories would likely have had access to justice before the UK courts.

The legal opinion concludes:

> *Of course, it is difficult to speculate as to whether Boohoo might have behaved differently had such legislation been in place. However, Boohoo's story is a compelling example of a situation in which such legislation might have made a difference, either by encouraging appropriate action to be taken earlier or by providing a means of redress for those affected by the allegations found to be substantially true.*[63]

Photo credit: PhotobyTawat/ Shutterstock

Public procurement of tainted PPE (Malaysia)

Sector: Personal protective equipment (PPE)

Issues: Worker exploitation, forced labour, recruitment fee payment and debt bondage

The companies: **Supermax Healthcare Limited** is a UK-based subsidiary of the Malaysian **Supermax Corporation** (Supermax), a latex gloves conglomerate that supplies medical gloves manufactured in its 11 Malaysian plants to over 160 countries worldwide.[64] Given the huge global demand for its PPE during the Covid-19 pandemic, the company's earnings surged 627 per cent in the 12 months between June 2020 and June 2021.[65]

In 2015, Supermax was awarded part of a contract worth £320-375m to supply PPE to the NHS.[66] In April 2020, the UK Government purchased the entire inventory of Aurelia Gloves, a Supermax Healthcare brand, worth an additional £311m, without tender due to emergency pandemic regulations.[67] In December 2021, Supermax was named an approved supplier, enabling it to pitch for contracts under a new framework agreement worth £6bn with **NHS Supply Chain**, a dedicated procurement arm of the NHS.[68]

Affected rights holders: Malaysia's economy is highly reliant on migrant workers from countries including Bangladesh, Nepal and Myanmar.[69] In Malaysia, freedom of association and collective bargaining are restricted by law for migrant workers.[70] Such restrictions, coupled with systemic union busting throughout the country, create a situation in which abuses can thrive.[71] Unscrupulous recruitment agents and employers exploit these gaps in worker protection by confiscating workers' passports, charging exorbitant recruitment fees which force workers to seek high-rate loans to repay their debts, and failing to ensure adequate working conditions.[72]

Details:

Many migrant workers end up working in Supermax PPE manufacturing plants under these conditions. The company has been accused of worker exploitation and forced labour in its manufacturing operations in Malaysia.[73] Workers reported facing poor working and living conditions, abuse, detention, salary deductions and passport confiscation.[74] Supermax announced that it had put in place a new migrant worker policy, raised wages and that it had begun reimbursing workers for recruitment fees in September 2021.[75]

Wilson Solicitors' judicial review application asserts that in September 2021, "NHS Supply Chain received a detailed summary of evidence underpinning growing concerns about Supermax".[76] Following the decision of the US Government in October 2021 to put in place import bans on Supermax products based on its finding of forced labour, concerns relating to the company were raised yet again in the House of Lords, leading the Department for Business, Energy and Industrial Strategy (BEIS) to initiate an inquiry into the company.[77]

Despite the serious red flags concerning Supermax's labour practices and ongoing investigations, NHS Supply Chain named it an approved supplier in December 2021.[78] While the company, in response to the US decision to ban imports from Supermax, had given assurances to the public sector body that "three audits of its factories were under way and that the results could be provided", it did not wait to receive the results, awarding Supermax the contract before the assessments were finalised.[79]

In January 2022, judicial review proceedings were issued by Wilson Solicitors LLP on behalf of a group of former and current Supermax workers and non-profit organisation, The Citizens, relating to NHS Supply Chain's decision to allow Supermax Healthcare Limited to enter a new tender for a £6bn framework deal to supply PPE to the NHS.[80]

The High Court claim challenging the public sector's procurement processes was settled and the authorities agreed to ensure that no orders will be placed with Supermax under the disputed agreement decision. They will also change how they assess the risk profile of potential suppliers in sourcing for the NHS.[81]

Abuses endemic to the sector

Medical gloves sourced by the UK Government from a number of other Malaysian companies, including **Top Glove** and **Brightway,** have also been linked with labour rights violations.[82]

The failures of social auditing are also clear from these cases.[83] Top Glove had been audited 28 times in the two years before a US Government investigation revealed that its products were made using forced labour.[84]

How could a UK Business, Human Rights and Environment Act have made a difference?

An independent regulator may be an appropriate mechanism to ensure that the public sector addresses risks in its procurement practices. In our assessment, this mechanism might have ensured that the public sector body's procurement processes addressed risks of forced labour in the NHS supply chain or provided a sanction if it failed to take reasonable steps to conduct due diligence including having proper procedures in place.

In our assessment, under a UK Business, Human Rights and Environment Act, the NHS procurement body might have ensured that its procurement processes were capable of detecting and reacting swiftly to credible allegations of abusive labour practices at its supplier's Malaysian plants. Considering the inherent risk in sourcing from Malaysia, a reasonable process might have included ensuring that the company had in place policies and processes addressing risks faced by migrant workers and a means to demonstrate to the NHS procurement body that these measures were meeting their objectives in practice. This might have included, for example, evidence that Supermax, rather than workers, proactively paid any recruitment fees. Strong procurement processes as mandated by the law might have helped protect vulnerable migrant workers from abusive practices in Malaysian plants.

In practice, NHS Supply Chain's procurement processes proved incapable of detecting or responding adequately to allegations of abuse. As these allegations appear to be substantiated, it seems likely that the affected migrant workers might have had access to justice resulting from the failure to avoid sourcing goods linked to labour rights abuses in Malaysia.

Supermax was named an approved supplier even after an import ban had been imposed on the company in the USA, and the procurement body failed to wait until the BEIS Committee's investigation into the company was complete and to obtain the results of social audits from the company prior to this decision.[85] As this absence of oversight undermined its own due diligence process, it seems likely that the public sector's processes would not be deemed reasonable or effective in the circumstances.

Union busting in NHS value chains

An ongoing dispute between the Australian medical glove manufacturer, **Ansell**, and workers in its Sri Lankan operations is enmeshed in **NHS** value chains.[86] A Freedom of Information request made by Unison in 2022 revealed that NHS trusts spent £14m procuring medical gloves from Ansell between 2019-2022.

In 2013, when representatives of the Sri Lankan union, the Free Trade Zone and General Services Employees Union (FTZ&GSE) tried to organise workers at an Ansell factory, the company fired almost 300 workers involved.[87] While part of the eventual resolution led 200 workers to either be reinstated or receive retirement packages, the 11 workers who led the organising efforts were never reinstated or compensated and they have taken legal proceedings forward in the local courts.[88] An arbitration process in 2019 found against Ansell, however, the company has appealed this decision and the case is ongoing.[89]

Ansell refuses to recognise FTZ&GSE and to ensure that workers' rights to freedom of association and collective bargaining are protected.[90] The company has also refused to adhere to the decision of the Commissioner General of Labour instructing it to pay workers in its Sri Lankan operations who work overtime on Saturdays and Sundays, denying workers their legal rights and payments due.[91]

In our assessment, an independent regulator may also be an appropriate mechanism to ensure that the public sector's procurement practices address risks relating to workers' rights to freedom of association and collective bargaining and prevent union busting from taking place in public sector value chains.

Photo credit: Evgeny_V / Shutterstock

Cerrejón's open pit mine (Colombia)

Sector: Mining

Issues: Indigenous peoples' rights, rights to health, water, and an adequate standard of living

The companies: **BHP Group**, **Anglo American** and **Glencore** which are all listed on the London Stock exchange, were the joint owners of the Cerrejón coal mine in La Guajira, Colombia, the largest in Latin America and one of the largest in the world.[92] The trio became sole concessioners of the mine in 2002 when they acquired the remaining 50% of shares from Intercor (ExxonMobil).[93] In early 2022, BHP and Anglo American transferred their ownership to Glencore, which is now the sole owner.[94]

Affected rights holders: The mining operations have led to the dispossession and displacement of 35 Wayúu Indigenous and Afro-descendant communities from their ancestral land, at times by brutal police evictions.[95] The Wayúu communities, who have deep affinities with their land and water, are deeply impacted by the environmental harms caused.[96]

Details:

The companies have been continuously expanding the mining operations and diverting streams used by the local communities throughout its operation. In 2005, Cerrejón extended its rail line and expanded its port and area of operation without conducting any environmental impact assessments.[97]

More than 17 streams have been redirected or polluted due to mining operations and Arroyo Bruno, a sacred water source of the nearby communities, has been diverted so that the land above its natural source can be mined for coal.[98] The communities suffer with air pollution, noise pollution and an estimated 40% of the region's water sources have been lost as a result of the mining activities.[99]

Local communities have criticised the companies for failing to heed calls for the mine's operations to be suspended from a number of UN human rights experts.[100] The UN Special Rapporteur on human rights and the environment called on the Colombian Government to suspend some of the operations at Cerrejón due to its serious damage of the environment and health of the country's largest indigenous community.[101]

In 2017, Colombia's Constitutional Court decided to suspend a project to further expand the mine and held that those responsible for operations at Cerrejón had failed to properly assess the impacts of its diversion of the Arroyo Bruno which is of spiritual and cultural importance for local people and an essential water source.[102]

In 2021, Glencore and Anglo American filed arbitration claims against Colombia for the suspension of this project under the terms of the Swiss and UK Bilateral Investment Treaties with Colombia, using investor-state dispute settlement (ISDS) mechanisms in those treaties. Anglo American withdrew its suit against Colombia on 1 July 2022 after it sold its portion of Cerrejón to Glencore.[103]

In January 2021, a group of NGOs filed simultaneous complaints to the OECD National Contact Points (NCPs) in Australia, Ireland, the UK and Switzerland alleging "serious human rights abuses and devastating environmental pollution" at Cerrejón.[104] The complaints against BHP and Anglo American were transferred to the Swiss NCP to consider joint remediation with Glencore. However, in December 2022, the Swiss NCP issued its final statement to close the process, citing the view of the submitting NGOs that negotiations on the terms of reference for the mediation had irrevocably failed.[105] In addition, NCPs do not have the power to hold the accused companies accountable or to ensure that they provide remedy to affected communities.[106]

In April 2022 a technical working group, chaired by the Ministry of the Environment, was established to address issues at the Cerrejón mine.[107] The group published a study favourable to the company which approved diversions from the natural course of the Arroyo Bruno. This report was criticised by Colombian civil society organisations as it disregarded guidelines from the 2017 Constitutional Court decision and failed to take into consideration participation of the Wayúu communities.

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, **BHP Group**, **Anglo American** and **Glencore** would have been expected to engage with the communities potentially affected by the mining operations. This would have included seeking their free, prior and informed consent (FPIC) as part of environmental impact assessments before interfering with the land on which they live.
An adequate consultation process would have taken into account the communities' concerns and recommendations, which arguably might have led to an outcome whereby the rights of indigenous peoples and other local communities were fully respected. In the absence of satisfactory engagement, and in light of the negative impacts on communities' human rights to health, water and an adequate standard of living, among others, UK courts would likely have held the companies liable for causing harm to the communities.

Civil liability might have led to remedy for the communities, as well as environmental rehabilitation, ensuring that the closure of the mine were done responsibly and that full and effective remedy was delivered.[108] Such a process should include engagement with affected communities to ensure that any remedies provided are satisfactory in the circumstances.

Photo credit: Chayakorn Buntharaksa / Shutterstock

Beef: human rights abuses, deforestation and land conversion on the menu (Brazil)

Sector: Cattle

Issues: Deforestation, land-grabbing, slave labour

The companies: **JBS** is a Brazilian company and the biggest meat producer in the world.[109] The company receives funding in the form of loans and investment from many global banks, including UK banks. UK financial institutions including **Barclays** and **HSBC** are amongst a cohort of investment companies holding shares worth more than £230m in JBS. In 2021, Barclays facilitated a bond deal for JBS worth over £800m.[110] JBS is also a supplier to many UK supermarkets, including **Asda**, **Iceland**, **Morrisons** and **Sainsbury's**.[111] JBS is also linked to the value chain of the British Armed Forces through long-standing Ministry of Defence supplier, **Vestey Foods**, and its use of JBS canned beef in ration packs and tonnes of JBS Brazilian beef in military meals.[112]

Affected rights holders: Indigenous communities in the Amazon are continuously battling for land ownership and land use rights.[113] The Amazon is the ancestral home of many indigenous communities, and the root of societies and cultural practices, yet communities are left to fight for ownership and against the exploitation of their land and natural resources.

Workers at cattle ranches linked to JBS were forced to work 17 hours a day and were left to live in deplorable conditions. They were not provided with toilets, had only dirty water from pools filled with cow manure to drink, bathe, and clean utensils, and were forced to sleep among farmyard animals.[114]

Land-grabbing, the illegal practice of occupying public land, is ubiquitous in Brazil and has accounted for an estimated 2.6 million hectares of Amazon deforestation.[115] Research shows that 70% of the felled Amazon is now occupied by cattle.[116] Land-grabbing and industrialised agricultural expansion through deforestation is a major cause of biodiversity loss in the Amazon as forested areas are cleared for agricultural uses including cattle grazing.[117] Illegal commercial cattle ranching has led to the dispossession of indigenous lands as well as threats, violence and killings of environmental and human rights defenders.[118] Indigenous communities, including the Uru-Eu-Wau-Wau people live in areas which are hotspots for deforestation and attempts to expand commercial cattle ranching, including through threats of violence and intimidation.[119]

Details:

JBS meat has been linked to deforestation, land-grabbing and slave labour, also linking UK banks and supermarkets to the same issues by funding and stocking products from JBS.[120]

Brazil's federal prosecutors carried out an official audit of JBS's cattle buying in Pará between 2018 and mid 2019 which revealed that 43.69% of JBS' cattle purchases in the region were "irregular".[121] As a result of its audit failures, it agreed with prosecutors to pay £800,000 to the state of Pará to improve ranchers' compliance with Brazil's laws relating to deforestation. This agreement also obliged JBS to adopt more stringent controls.[122] JBS announced in 2020 that it planned to introduce a new system to monitor its direct and indirect cattle suppliers by 2025.[123]

Brazil's Ministry of Work carried out inspections in 2006, 2018 and 2021 on two ranches in the Amazon state of Pará belonging to JBS suppliers, Sergio Xavier Luis Seronni and his son, Sergio Seronni.[124] In each case, the authority detected cases of slave labour.[125] The Seronnis have at different stages been added to the Ministry of Work's list of employers involved in slave labour. Most recently, a case which stemmed from a January 2021 inspection of one of the Seronnis ranches was taken to court by the Ministry of Work's prosecutor in which the ranchers were fined over £200,000 for breaching labour laws and the prosecutors are seeking to confiscate the ranch from the family.[126]

Global Witness has evidence which also shows that these ranchers destroyed vast areas of Amazon forest and were involved with land-grabbing and cattle laundering while supplying JBS.[127] Land titles obtained as part of the investigation showed that in 2010, part of the ranch claimed by the Seronnis was confiscated from them after a legal case ruled that it was land-grabbed.[128] However, 12 years later it is still declared by the Seronnis on the database as belonging to them.[129]

Global Witness exposed direct links between JBS and 327 ranches on illegally deforested land, contrary to its legal obligations and agreements with Brazilian prosecutors.[130] Despite these obligations, and the signing of high-level no deforestation commitments at COP26, claiming it has a zero-tolerance policy for deforestation, JBS continued to be linked with deforestation. Another investigation by Global Witness published in 2022 connected JBS to 144 ranches in the Amazon state of Pará covering vast stretches of illegal clearance. [131] It also concluded that the company had failed to monitor an additional 470 ranches in its value chains, a commitment it had undertaken with prosecutors as part of its legal agreement.[132]

JBS denied the claim that all of the 144 direct supply ranches were non-compliant with its no-deforestation policy.[133] By virtue of their funding or sourcing, both financial institutions that provide general funding to JBS, or funding that directly supports its problematic beef sourcing, and supermarkets that buy its meat products for their stores are, at a minimum, directly linked to the human rights abuses and environmental harms associated with JBS's beef.

In response to the Global Witness investigation, Morrisons said that it would stop sourcing the JBS product for its stores, while Sainsbury's and Iceland claimed that they engage with suppliers to ensure that their beef is responsibly sourced.[134] Asda did not provide a comment in response to the allegations.[135]

HSBC responded to questions over whether the allegations against JBS would affect its financial interests in the company by saying that the shares it held as part of its asset management were held on behalf of others and that it did not have any influence over the decision to invest in JBS.[136] Barclays simply responded by commenting that it was committed to supporting its "corporate clients to achieve zero net deforestation".

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, **Barclays** and **HSBC** would likely have sought to identify any potential links between JBS and deforestation, land-grabbing and labour rights abuses in Brazil. They might have denied or withdrawn any funding to, or investment into the company until it was capable of demonstrating that such links did not exist, that it had appropriate processes in place to detect such links, and that any links actually found had been addressed, including through remediation.

Similarly, **Asda**, **Iceland**, **Morrisons** and **Sainsbury's** might have sought to identify any potential links between JBS's beef and deforestation, land-grabbing or labour rights abuses and might have refrained from purchasing the beef if it was found to be connected to deforestation. Considering the high risk of deforestation in Brazil and the likelihood that Brazilian beef is connected to illegal land clearance and deforestation, both the financial institutions and supermarkets would have been expected to follow a rigorous due diligence process which included disclosure of all due diligence steps taken and evidence that they were neither contributing nor linked to such impacts by virtue of their lending, investing, or sourcing activities.

The companies would have been incentivised to ensure that their due diligence processes included engagement with the potentially affected communities which arguably might have prevented violations from taking place.

The UK Environment Act

The UK Environment Act became law in 2021 and includes restrictions on forest risk commodities that are produced illegally under the laws of the producer country.[137] This will help to root out certain types of deforestation from the UK's beef and other supply chains but leaves significant gaps in relation to abuse of indigenous peoples' rights where legal protections to indigenous land and the rights of indigenous peoples have been eroded by national governments. The extent to which human rights compliance is required by Schedule 17 remains unclear and left to be decided through secondary legislation. A **UK Business, Human Rights and Environment Act** would help to fill the critical gaps in protection offered by the Environment Act.

Chicken in supermarkets and fast-food chains linked to deforestation in Brazil (UK)

Brazil's Cerrado is a tropical biome, wildlife habitat and a globally important carbon sink, critical for tackling climate change.[138] Biologists estimate that the Cerrado area stores the equivalent of 13.7bn tonnes of carbon dioxide – more than China's annual emissions.[139] It is the source of so many rivers that it is known as the "birthplace of rivers" and is the natural habitat of thousands of birds, reptiles and mammals. Almost half of its 10,000 plant species are nowhere else on the planet.

It is estimated that 50-80% of the original biome has been replaced with cattle ranches and soya farms.[140] Cargill, which supplies UK farms with soya feed for chickens which are sold in UK supermarkets and fast food restaurants, sources soya from suppliers that have been linked to recent land clearance spanning at least 300 square miles in the Cerrado.[141] Cargill states that it has neither broken rules nor its own policies and that it does not source from illegally deforested land.[142]

The Brazilian Government's relaxation of controls on deforestation, including the Forest Code in 2012, to bolster international trade, has left an accountability gap. While the recently enacted **UK Environment Act 2021** aims to address deforestation in the value chains connected to UK companies, making it illegal for companies to import food products linked to illegal environmental destruction, this fails to address situations in which national legislation does not include certain environments within its definition of protected areas.[143] Despite the importance of conserving the Cerrado, it is not recognised as a protected area in Brazil, indicating that deforestation in the Cerrado may not be described as 'illegal' under the Environment Act. Where the Environment Act falls short of protecting areas such as the Cerrado from deforestation, a UK Business, Human Rights and Environment Act might have ensured that companies' approaches to due diligence considered risks such as deforestation, biodiversity loss and climate change, and aligned with international standards of protection.

Photo credit: Grafissimo/Friends of the Earth

Photo credit: Transform Trade

Land-grabbing for palm oil (Liberia)

Sector: Palm oil

Issue: Land-grabbing

The company: UK agri-business company **Equatorial Palm Oil** (EPO) was established in 2005 with its headquarters in London.[144] It was registered on AIM, a sub-market of the London Stock Exchange. In 2020, EPO disposed of its 50 per cent interest in Liberian Palm Developments (LPD) through Kuala Lumpur Kepong Berhad (KLK), a Malaysian palm oil corporation, and has since changed its name to Capital Metals PLC which produces mineral sands in Sri Lanka.[145]

Affected rights holders: Communities in Liberia claim that EPO's oil palm plantations have encroached on their land, which was illegally cleared for plantation, and that activities went ahead without their consent. As a result, they have lost their livelihoods, and community members who protested faced violence and intimidation. Benefits promised by EPO to the community, including compensation payments, employment opportunities and a health clinic, have not materialised.[146]

Details:

Forty percent of Liberians live on land that has been transferred to foreign investors for mining or agri-business.[147] Liberia considers palm oil crucial to its economic development and has granted "concession agreements" to four international palm oil companies, one of which was made with EPO for the purpose of operating two large oil palm plantations: Palm Bay and Butaw. This process was undertaken without seeking the FPIC of the communities who had owned and used that land for generations.[148]

The land in question had been used for oil palm cultivation before falling into disuse during the wars in the 1990s. As a result of the agreement with the Government, EPO took up these areas for use, replanting them and expanding its plantations by annexing adjacent areas. These adjacent areas, traditionally owned by local communities, were used for farming and to generate a source of income.[149]

Five villages gave their land to EPO in what they were told would be part of an exchange agreement with the promise of compensation, employment and investment in infrastructure such as roads, schools and clinics. No contracts or memoranda of understanding were signed with the company, and the communities never saw any of the promised benefits.[150]

Communities reported being subjected to violence and intimidation when they resisted EPO's attempts to grab their land which began in 2013 when the company came to survey the land as it prepared for expanding the plantation, bringing armed men along with the surveyor.[151] When members of the community marched peacefully on the capital to protest this encroachment onto their land, they were intercepted by EPO security guards and armed Liberian police and reported being flogged and kicked.[152]

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, EPO might have ensured that the rights of traditional communities were protected. This includes ensuring the right to the ownership and possession of their ancestral domains – the rights to develop, control and use lands and natural resources, to stay in the territories and not to be removed – were protected.

A reasonable process might have compelled EPO to map overlapping land rights or claims to understand the nature and status of the land concerned which might have permitted it to identify the existence of indigenous peoples with active claims over the land. This would arguably have compelled the company to conduct or participate in a consultation and FPIC process (led by or jointly with the host government).

As in the present case, if the company failed to properly consult with and gain meaningful consent from the communities, resulting in their loss of livelihood, it is likely that the affected communities could take a civil claim forward.

The conflict between the affected communities and the armed police resulting from the situation of land-grabbing should have been a foreseeable risk in the context of a post-conflict society. An adequate due diligence process would have included a rigorous risk assessment capable of identifying these risks, and a plan of action to mitigate these risks. If these risks had not been identified or adequately mitigated it is likely that under the UK Business, Human Rights and Environment Act a UK court would not have considered the company's approach to have been reasonable.

Photo credit: Jonathan Yee/ Shutterstock

CDC Group: financing Feronia for palm oil (DRC)

Sector: Palm oil

Issues: Environmental harm, poor working conditions, low pay, exposure to health hazards, extreme violence

The companies: **CDC Group**, rebranded as British International Investment in 2021, is the UK's 'development finance institution' (DFI).[153] It invests in private companies in the Global South through direct investment and private equity funds. CDC is wholly owned by the Foreign, Commonwealth and Development Office (FCDO). Prior to this it was, until September 2020, owned by the former Department for International Development. It is accountable to the UK Government but maintains independent management and board structures.[154]

Feronia Inc. is a Canadian agriculture multinational which owns palm oil concessions across the Democratic Republic of Congo (DRC) that were acquired under Belgian colonial rule.[155] Feronia was 38% owned by CDC having exited its equity stake in 2020 and remained as a lender to PHC until 2022.[156] Its subsidiary in DRC, **Plantations et Huileries du Congo, S.A.** (PHC), operates on land which is disputed by local communities. The company met serious financial difficulties while CDC granted it numerous loans to keep it afloat.

Affected rights holders: An estimated 100,000 people live on or within five kilometres of three oil palm plantations, Boteka, Lokutu, and Yaligimba, operated by PHC in northern Congo.[157] Local communities claim that part of the plantations sit on land that was taken from them by the Belgian colonial administration. Land rights defenders and members of the Yalifombo community were arrested and are facing charges under the belief that they are being targeted for protesting against the violation of an agreement signed with Feronia and PHC in November 2018.[158]

PHC workers have been forced to work with toxic chemicals across the plantations. The local communities' source of drinking water is also reportedly contaminated as a result of PHC dumping untreated industrial waste.[159]

Details:

The communities claim the land occupied by Feronia PHC's Lokutu plantation was taken from them by the Belgian colonial administration in the early 20th Century and given to Lever Brothers, which later joined with the Dutch company Margarine Unie to form Unilever.[160] Unilever sold the plantations to Feronia in 2009 and the communities claim that Feronia is illegally occupying their land.

Feronia and PHC have been accused of violence, serious environmental harm by dumping industrial waste into waterways that supply drinking water, exposing workers to serious health impacts from dangerous pesticides, and abusive employment practices.[161] Land rights activists and villagers have reported being harassed and intimidated by employees at Feronia.[162]

An investigation undertaken in 2019 by Human Rights Watch (HRW) revealed severe health and safety and labour rights abuses faced by PHC workers, including more than 200 workers being exposed to toxic pesticides without adequate protection.[163] HRW also found that the company failed to provide workers exposed to hazardous chemicals with the results of medical examinations, that it paid poverty wages and discharged untreated industrial waste directly into waterways used as a source of drinking water by local communities.[164]

On 25 November 2019, CDC issued a public statement in response to a report by HRW on the poor working conditions and environmental impacts caused by the company. It stated that since 2013 all revenues have been reinvested into rehabilitating the company.[165]

On 12 and 13 September 2019, five land rights defenders and members of the Yalifombo community were arrested by Congolese national police driving a Feronia PHC jeep and accompanied by Feronia PHC security guards, according to the Congolese group Réseau d'Information et d'appui aux ONG (RIAO-RDC).[166] They believe that they are being charged in retaliation for protesting against Feronia-PHC's violation of an agreement signed in November 2018 which committed the company to build a school, healthcare centre and water borehole before exploiting the land used by the community.[167]

It is reported that in 2019, Joël Imbangola Lunea, who worked for RIAO-RDC, was killed at one of the plantations.[168] While a PHC security guard was charged with his murder, he was subsequently acquitted. In addition, "[s]everal people connected with Joël Imbangola have died since his killing. These include his wife, father and sister along with her six children and his former boss".[169] More recently, in February 2021 two villagers, Blaise Mokwe and Efolafola Nisoni Manu, were allegedly killed by Congolese security forces and plantation security guards working for the company.[170]

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, the required due diligence process would likely have alerted CDC and the UK's then Department for International Development to major risks concerning land rights, workers' health and safety, and security practices in the country. CDC and the Department for International Development would likely have decided not to provide funding in the first place. Had they decided to still go ahead and provide funding, this would have been attached to many conditions to safeguard the rights of the workers and local communities. CDC would then have had to monitor compliance with those conditions and respond swiftly to any breaches or allegations of abuse, including by demanding adequate remediation.

Had proper due diligence been conducted, CDC may also have reached the decision to engage with Feronia and PHC more robustly at an earlier stage, preventing damage to the environment, conflict with the community, health problems for workers and other labour rights abuses.

Under a UK Business, Human Rights and Environment Act, FCDO and CDC might have been held liable in a UK court for failing to put in place effective measures to prevent the harms. Rather than the claimants having to find evidence to prove the inadequacy of CDC's processes, the onus would have been on CDC and the UK Government to show that appropriate preventive action had been taken.

Photo credit: Ryan Rodrick Beiler / Shutterstock

JCB: due diligence in the illegally Occupied Territories (Palestine)

Sector: Heavy machinery

Issues: Forced displacement of protected populations, pillage, and other war crimes

The companies: UK company **JCB** is a key supplier of heavy machinery for the construction and agriculture industries as well as after-sales services. JCB's sole dealer in Israel is the Israeli company **Comasco** which holds contracts with Israel's Ministry of Defence for the maintenance of the same model of JCB machines used in the demolition of Palestinian homes and property, and the construction of Israeli settlements.[171]

Affected rights holders: Israel's policy of appropriating land and establishing Israeli settlements in the Occupied Palestinian Territories (OPT) has led to the destruction of Palestinian homes, agricultural land and other property for over 50 years.[172] Israel's building of Israeli settlements and transfer of parts of its civilian population into the OPT is illegal under international law and a war crime, thereby linking JCB's downstream value chain to breaches of international humanitarian law.[173]

Details:

The Hague Regulations of 1907 and the Fourth Geneva Convention of 1949 govern the obligations of occupying states under international humanitarian law in relation to the protection of civilians in occupied territories in times of war. Companies also have an obligation to respect specific provisions of international humanitarian law when operating in occupied territories.

Since 1967, Israel has demolished tens of thousands of Palestinian homes and buildings, displacing Palestinians and settling its own population on the land, in breach of international humanitarian law.[174] Israel's occupation has amounted to a war crime through its destruction and appropriation of property not justified by military necessity and its transfer of its own civilian population and displacement of the occupied population into the OPT.[175] In addition, the unlawful appropriation of property by an occupying power or by a company amounts to "pillage" and is also a war crime under the Hague Regulations and the Fourth Geneva Convention.

JCB lists Comasco as its exclusive dealer in Israel.[176] Multiple organisations have documented the use of JCB machinery by Israeli authorities and private contractors in demolitions and construction. Al-Haq noted that JCB machinery was used for at least 70 out of 281 demolitions in the OPT recorded between 1 January 2019 and 31 October 2019.[177]

On 10 December 2019, Lawyers for Palestinian Human Rights (LPHR) made a submission to the UK NCP regarding the involvement of JCB in breaches of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) in the occupied West Bank, including East Jerusalem.[178] It submitted that JCB failed to take the actions necessary to identify, prevent, mitigate, and address the use of its heavy machinery in the demolition of Palestinian homes and destruction of property and settlement construction on occupied lands.

In a response from JCB to the authors of this report dated 27 February 2023, the company referred to details it submitted to the UK NCP for its initial assessment in which it confirmed that all products it supplies to Israel are via a third-party independent distributor, Comasco. It also stated that there is an established second-hand market in Israel for its products and that it is not possible to confirm whether machinery originated from Comasco or whether it was acquired second-hand (see Annex for further details).

On 12 November 2021, the UK NCP issued its final statement (relevant sections of which are replicated in the Annex below). The NCP concluded that while the alleged adverse human rights activities could not be conclusively linked to JCB because of its business relationship with Comasco, it found that JCB failed to carry out human rights due diligence to assess actual and potential impacts. It also stated that JCB should set out a plan on how it would integrate and act upon the findings of its due diligence process, including how the impacts would be addressed, if identified in its supply chains.[179]

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, JCB would have been legally required to conduct an adequate due diligence process on its downstream value chain to identify the risk of its products being used to abuse human rights or, in a context such as the OPT, to commit war crimes. In the present case, as Comasco was its sole trader in Israel, it may have been aware of the use of its products by this company, and of Comasco's contracts with Israel's Ministry of Defence.

Particular risks in the case of occupation include transferring or facilitating the transfer of civilians into an occupied territory.[180] In this context, the risk that JCB's products were used for demolitions and to build settlements in breach of international humanitarian law, and to facilitate human rights violations, should have been foreseeable and apparent. JCB's pre-existing services include its "Live-Link" technology which can show the location of its machinery when being used in high-risk areas, including occupied territories.[181]

Under this law, there would be a positive obligation on the company to carry out all reasonable steps to ensure that human rights risks in both its upstream and downstream value chains were prevented. JCB's "Live-Link" technology has the capacity to locate machinery. However, currently, JCB's customer owns and controls this data (see letter in Annex for further statements from JCB).

Had a UK court determined that JCB's due diligence failed to identify potential risks to Palestinians, or to respond appropriately to these risks if identified, it may have established liability for failing to prevent foreseeable violations.

The displaced or otherwise affected Palestinians may have had access to justice in the UK courts to seek remedy for the harm suffered. A finding of liability may have led to financial compensation and the imposition of court orders to ensure that JCB began to take measures to ensure that its machinery did not continue to be used to facilitate violations in the OPT. This may have included an order to impose contractual restrictions on Comasco in relation to the onward sale of JCB products and to consider ending its business relationship with Comasco if it is unwilling to adhere to such provisions.

Photo credit: max ku / Shutterstock

Spyware: activists tortured (Bahrain)

Sector: Surveillance software and technology

Issues: Targeting human rights defenders, surveillance leading to serious human rights abuses

The companies: **Gamma Group** is an Anglo-German company, registered in the UK, which produces surveillance technology including FinFisher software.[182] This software can access documents, emails and messages stored in computers and other devices, view web browsing history and access a computer's camera and microphone.[183] **Trovicor** is a German company which sells internet monitoring and mass surveillance products.[184]

Affected rights holders: Surveillance technologies such as FinFisher have been used as a means to exercise political control and to spy on activists, human rights defenders, journalists and dissidents to stifle political opposition and undermine democratic development.[185]

Details:

The development of the global private surveillance industry has precipitated a range of human rights abuses as it supplies advanced surveillance technologies to countries around the world without adequate safeguards for their use.[186] Surveillance technologies inhibit freedom of expression and have a chilling effect on freedom of assembly and association.[187]

On 1 February 2013, Privacy International and a number of other organisations filed complaints with the German and UK NCPs against Gamma and Trovicor.[188] The complaints alleged that Gamma and Trovicor sold intrusive surveillance technology and provided training to the Bahraini Government which used it to target human rights activists. Allegations against the companies included aiding and abetting the Bahraini Government in perpetrating human rights abuses including violations of the rights to privacy, freedom of expression, freedom of association, and arbitrary arrest and torture.

The German NCP offered mediation relating to Trovicor's management system but held that the allegations were unsubstantiated and closed the case. The UK NCP accepted the complaint, and although it found that the complainants had failed to provide evidence of Gamma's supply of surveillance technology within the timeframe during which the OECD Guidelines for Multinational Enterprises applied, it confirmed many of the allegations raised [189]

In its final statement of December 2014, it found that the company did not have human rights policies and due diligence processes in place that would prevent abusive use of its products, while acknowledging the company's response on the development of a code of conduct relevant to human rights obligations.[190] The NCP concluded that Gamma's approach was not consistent with its general obligations to respect human rights under the OECD Guidelines and criticised the company for its failure to engage properly with the process.

In February 2023, the UK High Court ruled that the Kingdom of Bahrain does not have immunity in relation to its alleged use of FinFisher surveillance software to infiltrate the computers of two Bahraini dissidents who now live in the UK.[191]

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, Gamma would have been legally required to conduct an adequate due diligence process on its downstream value chain to identify the risk of its products being used to abuse human rights.

Given the nature and profile of its client in this case, an adequate risk identification process would likely have concluded that the risk of human rights violations was both foreseeable and high. Gamma might have decided not to supply surveillance technology and training to the Bahraini Government. Had the sale gone ahead without any credible and effective safeguards to prevent illegitimate or abusive use of its products by the Bahraini Government, a UK court would likely have found Gamma liable for failing to prevent foreseeable violations.

Unlike the NCP procedure, Gamma would have had to respond to a legal claim against it before a UK court. Under the UK Business, Human Rights and Environment Act, Gamma would have had to provide evidence to demonstrate the adequacy of its due diligence policies and procedures, including the nature of its contractual relationship with the Bahraini Government and the existence of any conditions, safeguards or restrictions on the use of its products. This would have significantly alleviated the burden on the claimants to come up with evidence typically in the hands of the defendant to substantiate their claim.

Cases currently before the courts

Photo credit: Amnesty

Shell's impunity for destruction in the Niger Delta (Nigeria)

Sector: Oil

Issues: Environmental destruction, right to health

The companies: **Shell PLC** (Shell) is one of the world's largest oil and gas companies and Europe's largest public company.[192] It is both registered and, since January 2022, headquartered in London. Shell established a joint venture in Nigeria in 1936 along with the precursor company of BP PLC, with its first shipment of oil leaving Nigeria in 1958.[193] In 1973, the Nigerian Government joined this venture and over a period of years, increased its stake as BP exited. The **Shell Petroleum Development Company of Nigeria** (SPDC) was established in 1979, incorporating assets of the preceding consortium. Shell is now in the process of exiting Nigeria.[194]

Affected rights holders: The **Ogale** and **Bille** communities are fishing and farming communities in the Niger Delta. Over a number of decades, oil spills from Shell's operations led to devastating environmental impacts with disastrous consequences for the local residents. The spills contaminated the communities' land and waterways which they relied on for farming, drinking, and washing. They destroyed vast swathes of mangrove swamp and killed the fish of the waterways on which the communities relied

as a source of food. [195] Shell has maintained that it may only be responsible where spills are caused by operational failure of its pipelines and not in the case of spills caused by oil theft, also known as bunkering.[196]

Ogoni is a region in the Niger Delta and the name of the ethnic group that lives there.[197] The case of the **Ogoni Nine** is one infamous example of Shell's legacy of environmental destruction and complicity in corruption and human rights abuses, involving the arbitrary execution of nine men by the Nigerian state in 1995. Following years of legal battles, the widows of the Ogoni Nine who took their case against the company in the Netherlands for complicity in the unlawful arrest, detention, and execution of their husbands withdrew legal proceedings.[198]

Nigeria's military led a brutal campaign to suppress the protests of the Movement for the Survival of the Ogoni People (MOSOP) confronting the Anglo-Dutch giant for its impact in the region. This campaign against the movement, led by author and activist, Ken Saro-Wiwa, culminated in his execution along with eight other men.[199] The military's campaign led to widespread human rights abuses, including the unlawful killing of hundreds of Ogoni people, rape, torture, and the destruction of homes and livelihoods.[200] A review of thousands of pages of documents including Shell's internal documents, government reports and witness statements revealed Shell's knowledge of and complicity in the grave human rights abuses committed by the Nigerian Government.[201]

Details:

In 2015, claims were filed by the Ogale and Bille communities in the Niger Delta against Shell in the English courts.[202] In 2017, the High Court held that Shell is merely a holding company which does not exercise control over the operations of SPDC and owes no duty of care towards communities affected by foreseeable harm caused by the operations of this subsidiary.[203] In 2018, the Court of Appeal upheld the decision of the High Court but allowed its appeal to the Supreme Court.[204]

It was for the Supreme Court to decide on the circumstances under which the UK-domiciled parent company may owe a common law duty of care to the affected communities that suffer serious harm as a result of failings of one of its overseas subsidiaries as part of a joint venture operation.[205]

The Corporate Justice Coalition (then CORE) and the International Commission of Jurists were given permission to intervene in the Supreme Court case as representatives of civil society and both urged the court to reconsider the judgment of the lower courts on a number of points.[206] The submission included a request that the court resolve inconsistencies between the lower courts' ruling on Okpabi, and the recent *Vedanta* ruling.[207] In *Vedanta* it was decided that the English courts should take jurisdiction over the claim because substantial justice was not obtainable for the claimants in Zambia.

The Supreme Court held that the judgment of the Court of Appeal had erred by conducting a "mini-trial" prior to disclosure without witness evidence being properly tested.[208] It also held that the Court of Appeal had erred in its decision that a parent company's enactment of group-wide policies and guidelines could not lead to liability for the acts of a subsidiary. Citing Vedanta, the court reaffirmed that there were numerous ways by which a parent company could adopt responsibility for the impacts of a subsidiary including through management, issuing defective advice or policies, implementing group-wide policies, or exercising supervision or control over a subsidiary.

This decision opened up the route for the communities to proceed with their claims against both Shell and SPDC. However, Shell refused to disclose documents central to the case. Instead, the claimants were forced to rely on evidence disclosed by whistleblowers – including former Shell staff members – revealing it held centralised control, including "mandatory rules" that must be followed by its subsidiaries.[209]

In early 2023, an Ogale group claim register was filed at the High Court in London, confirming that 11,317 people and 17 institutions, including churches and schools, from Ogale are seeking compensation for loss of livelihoods and damage against Shell.[210] This is in addition to the 2,335 individual claims which were issued at the High Court in 2015.

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, the company may have carried out appropriate due diligence in the first place. Such due diligence should reasonably include a human rights and environmental impact assessment including consultation with the communities whose land they had planned to use.

If carried out, this consultation may have indicated that such work could not be carried out without infringing on the communities' rights. If potential impacts arose in an impact assessment, the provisions of such a law might compel Shell to put measures in place to mitigate and prevent any future impacts and show that it had acted on risks discovered.

Had the communities proceeded to file a claim, they would likely not have faced hurdles related to Shell's alleged lack of control over, and therefore of liability for, the harm caused by its subsidiary. This is because the UK law would make clear that a parent company has a duty to prevent harm resulting from operations of subsidiaries, and this would not have been subject to debate within the court proceedings.

Once the harm was established, the burden of proof would have fallen on Shell to prove that it had taken all reasonable steps to prevent the harm. This would significantly have alleviated the difficulty for the communities to access internal company documents to prove their claim, including the need to rely on whistleblowers for evidence.

If a UK court found that Shell had caused, contributed to, or failed to take all reasonable due diligence steps to prevent the oil spills, Shell would likely have been held liable and ordered to pay compensation to the Ogale and Bille claimants, as well as to comply with any ancillary orders deemed appropriate.

The Samarco dam disaster: BHP's failure to take sufficient action (Brazil)

The companies: **BHP** was, at the time of the catastrophic failure of the Fundão iron ore tailings dam, an Anglo-Australian mining company with a dual-listing on both the London Stock Exchange and the Australian Stock Exchange.[211] It has since delisted itself from the London Stock Exchange.[212] **Samarco** is a non-operated joint venture owned by BHP Billiton Brasil Ltda and Brazilian mining company, **Vale,** operating an open pit mine for iron ore in the Brazilian state of Minas Gerais.[213]

Affected rights holders: Indigenous and non-indigenous communities living along the River Doce, the main waterway through which waste emanating from the ruptured tailings dam flowed, have been severely impacted by the disaster. It is reported that as many as 1.4 million people inhabiting the area along the River Doce are seeking action to remediate ecosystems and restore livelihoods. [214] Communities can no longer rely on the river for fishing, bathing and generating a source of income. For Krenak Indigenous communities, the River Doce was sacred and the pollution of the river was seen as its death, causing a loss of identity within the community.[215]

> *"We know that we are dealing with one of the biggest companies in the world. We know the power [they] have. But I wanted to ask them to have a little more humanity, because we didn't ask to be in this situation.*
>
> **Monica Santos**

Details:

The Fundão Dam was a holding structure for waste material from Samarco's processing of iron ore.[216] On 15 November 2015 the dam collapsed, releasing 45 million cubic metres of mining waste into the River Doce, killing 19 people, which community members allege included a woman who was heavily pregnant, burying villages, leaving thousands homeless and killing fish and wildlife.[217]

A broad range of human rights affecting hundreds of thousands of people in surrounding communities were impacted by the disaster, including the human rights to life, health, water, food, adequate housing, work and education. The rights to land, territory and resources, as well as the cultural rights of the Krenak peoples were also particularly impacted. Their environment was adversely and potentially irreversibly affected by pollution, the killing of fish and plant species and disruption of entire ecosystems.

More than 700,000 victims, including representatives of Krenak Indigenous communities are taking their case to the UK courts in the largest group claim in English legal history.[218] The claimants allege that BHP was aware of the safety concerns associated with the tailings dam and failed to act on numerous warnings from independent safety experts, increasing its outputs despite concerns.[219]

Samarco signed an agreement worth £216mn with the Brazilian Government to fund mitigation and remedial measures for the environmental disaster and later reached a heavily criticised settlement worth almost £5bn to restore the environment and indemnify affected communities.[220]

On 25 June 2018, Vale and BHP Billiton announced that they signed a deal with the Brazilian authorities that settles a £4.3bn lawsuit related to the dam collapse, setting a two-year timeline to reach settlement in a separate lawsuit. On 2 October 2018, Brazilian prosecutors reached a final compensation deal for an undisclosed amount with Samarco, Vale and BHP including compensation payments for relatives of those killed by the dam collapse and those who lost their property. In October 2020, Brazilian state and federal prosecutors requested the court to reopen the civil action lawsuit against Samarco, Vale and BHP for damages caused by the dam collapse, alleging that the companies were failing to meet their obligations under the previous settlement agreement in a timely fashion.[221]

The High Court denied jurisdiction for English courts to hear the case on the basis that it was an "abuse of the process of the court" to allow parallel cases to proceed in Brazil and England.[222] However, the Court of Appeal allowed the case to proceed on the basis that the compensation being paid in Brazil did not seem adequate.[223]

While Samarco faced sanctions, compensation negotiations involving Vale and BHP were, at the time of this report, still ongoing and the communities continue to wait to receive meaningful reparations.[224] BHP commented in July 2022 that it considered the legal action being taken against it in the UK unnecessary "as it duplicates matters already covered by the existing and ongoing work… under the supervision of the Brazilian courts and legal proceedings in Brazil".[225]

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, had a UK Business, Human Rights and Environment Act been in place, BHP would have been under an obligation to take all reasonable steps to make sure Samarco complied with all applicable laws and international standards concerning dam safety, paid heed to expert advice, disclosed and acted swiftly on any findings of risk, and worked with the authorities, workers and local communities to avert a disaster.

Had a claim been brought before UK courts in reliance on such a law, the High Court would likely not have made its initial decision preventing access to justice for the victims. This would have saved the claimants considerable time and resources, and they could have seen their claim move more quickly to an examination of its merits.

Once the harm was established, the burden of proof would have fallen on BHP to prove that it had taken all reasonable steps to prevent the dam collapse. Had a UK court found, under this law, that BHP had contributed to, or failed to take all reasonable due diligence steps to prevent the dam collapse, it would likely have held it liable and ordered it to pay compensation to the claimants and to take other remedial action, such as providing funds for environmental rehabilitation.

Photo credit: Lawrence Thompson

Kabwe: Anglo American's lead poisoning legacy (Zambia)

Sector: Mining

Issues: Right to health, right to life

The companies: **Anglo-American** is a London-based mining company. Its South African subsidiary, **Anglo American South Africa**, operated a lead mine in Kabwe, Northern Zambia, from 1924 to 1974, when it transferred the operations to the state-owned body ZCCM.[226] The company is facing a class action lawsuit in the South African High Court as over 100,000 children and women of childbearing age in Kabwe claim to have suffered lead poisoning as a result of pollution allegedly caused by the company.[227]

Affected rights holders: For decades, the Kabwe mine was operated without adequate environmental safeguards, leading to lead contamination of the soil. Children in Kabwe are especially at risk as they are more likely to ingest and inhale lead dust when playing in the soil, they are still developing and can ingest four to five times as much lead as adults.[228] Medical studies conducted over the past 45 years have shown extreme levels of lead in young children which has affected generations with lead encephalopathy and fatal lead poisoning.[229]

Details:

In March 2022, an estimated 140,000 Zambian children and women of childbearing age filed a class action against Anglo America South Africa Limited before the South African High Court.[230] The class action is seeking compensation for children who are especially vulnerable to the effects of lead poisoning, and women who have or may become pregnant in the future.[231] They are also seeking blood lead screening for children and pregnant women in Kabwe and clean up and remediation of the area in which contaminated soil remains a risk.[232]

Anglo American denies responsibility, arguing instead that ZCCM, the state-owned body to which the mine was transferred in 1974, is responsible for the pollution. This is despite documents showing that Anglo American was aware of the lead poisoning and the deaths of eight Kabwe children from suspected lead poisoning prior to the transfer.[233]

In March 2022, Zambia's President established a technical committee to address extreme levels of lead pollution in Kabwe and to propose a plan to address the harms the lead poisoning is causing.[234] The UN Special Rapporteur on the Environment and the UN Special Rapporteur on Toxics have described Kabwe as being treated as a "sacrifice zone" and as one of "the most polluted places on Earth" suffering a "severe environmental health crisis".[235]

The High Court permitted a number of UN Special Rapporteurs and Working Groups to intervene in the hearing on behalf of the victims – the agencies had noted that the class action was the claimants' only route to access justice.[236] They also pointed to Anglo American's public endorsement of the UN Guiding Principles on Business and argued that this public endorsement must be a consideration in the court's decision to allow the case to proceed.[237]

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, a UK Business, Human Rights and Environment Act, would have placed a responsibility on the parent company to prevent the widespread impacts of its operations on the local communities and ensure that any harm done was addressed. Such measures would likely include a clean-up of the environment and providing the requisite screening and healthcare to the impacted communities.

The law would clarify what duties exist between parent companies and their subsidiaries, avoiding protracted litigation on preliminary issues of parent-subsidiary liability and allowing claims to proceed more quickly into their merits.

Once the harm suffered by the communities was established in the courts, the burden of proof would have been reversed and it would have been the parent company's responsibility to then disprove its negligence.

Photo credit: catastrophe_OU/ Shutterstock

Tesco's value chain: exploitation and wage theft (Thailand)

Sector: Garments

Issues: Labour rights abuses, wage theft

The companies: **Tesco** is a multinational retailer headquartered in England and is the third largest retailer in the world by gross revenue.[238] Tesco supplier **VK Garment Factory** (VKG) produced F&F jeans for Tesco at its Thai factory in Mae Sot, a city at the Myanmar border, between 2017 and 2020.[239] Tesco is facing a landmark lawsuit in the UK which is being taken by 130 former workers at VKG for alleged negligence and unjust enrichment. The case is also being taken against Tesco's auditor, **Intertek**.[240]

Affected rights holders: Workers in Mae Sot face a weak rule of law, substandard wages and labour conditions, as well as employers denying workers the rights to join unions and exercise their rights to freedom of association and collective bargaining.[241]

Details:

Wage theft

Wage theft is the illegal practice of withholding wages or benefits from workers, forcing garment workers further into economic precarity, building on the pre-existing conditions of insecure work and poverty wages already in existence in the garment sector.[242]

A Guardian investigation into allegations made by workers revealed that Intertek Thailand inspected the VKG factory regularly but did not identify serious issues until July 2020.[243] It notes that while Tesco received the audit pack in August 2020, VKG remained a supplier until it sold its Thai subsidiary, Ek-Chai, in December 2020.

In August 2020, 136 workers at VKG were dismissed after asking for better pay and conditions.[244] After attempting to seek compensation from the factory directly, they filed a case with the Thai department of labour protection and welfare, claiming that they were entitled to unpaid wages for two years' full wages, pay for working on holidays, overtime pay, holiday pay and weekly rest day pay. The case eventually went to the Thai courts which ordered only the payment of severance pay and notice pay which they were already legally due. No amount has yet been paid and the workers are expected to lodge an appeal.

Legal proceedings were issued on behalf of 130 claimants in the UK courts in December 2022.[245] The claim is being brought against Tesco PLC, Ek-Chai Distribution System Company Limited, which was owned by Tesco PLC until 2020, and the UK headquartered auditing companies Intertek Group PLC and Intertek Testing Services (Thailand) Limited which audited and certified the working conditions and practices of VK Garments.[246] Tesco and Ek-Chai are accused of negligence for permitting, facilitating or failing to prevent unlawful working and living conditions which led to injury and loss, as well as being unjustly enriched at the expense of workers and are liable to make restitution of that enrichment under Thai law.[247]

Intertek conducted social audits at VKG between 2017 and 2020 and failed to accurately identify or report on the working and living conditions faced by workers.[248] Intertek is accused of negligence for failing to identify or report on the working and living conditions which led to injury to the workers.

The adult claimants are all Burmese migrant workers who worked at the VK Garments factory in Mae Sot between 2017 and 2020. Factory workers at VKG reported conditions amounting to effective forced labour, working 99-hour weeks with just one day off a month. They reported being paid well below legal limits in exploitative conditions.[249] They also reported having to work a 24-hour shift at least once a month so that F&F orders were met on time. Workers described unfit living conditions, suffering serious injuries, facing threats and emotional abuse and confiscation of travel documents, while the factory maintained falsified accounts of payments to workers.

The 130 claimants include a seven year old girl who was raped in insecure factory accommodation while her mother was forced to work unpaid overtime.[250] Her mother reported that an assistant manager had told her not to call an ambulance because medical staff might call the police.

In response to the Guardian investigation into the allegations relating to working conditions at VKG, Tesco commented that had it identified such serious issues at the time, it would have immediately ended its relationship with the supplier.[251] However, it has failed to ensure that remedy has been provided to affected workers.

Tesco responded to state that that the allegations detailed in the letter before action did not include any arguable claims against the company and that it does not accept that the claims should be brought in England.[252] It also commented that under Thai law, it was not legally bound to protect the claimants as regards the alleged negligence.[253]

Intertek responded to the allegations denying any liability on the basis that they do not have a contractual relationship with Ex-Chai, VKG or the claimants and that it conducted social audits in accordance with industry standards and by auditors who were pre-approved by Tesco.[254] Ex-Chai, which was Tesco's subsidiary until 2020 denies liability, stating that they are not involved in the working conditions at VKG.[255]

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, had a UK Business, Human Rights and Environment Act been in place, Tesco would have been expected to adopt a reasonable due diligence process to address any risks of labour rights abuses by its suppliers. A reasonable due diligence process would have entailed screening prospective suppliers and refraining from making any purchases before being fully satisfied that robust labour protections were in place, monitoring labour practices closely and working with suppliers to address any problems. In the case of VKG, this would have required paying all overdue wages immediately and engaging with workers directly to ensure all other abuses were remediated to their satisfaction, while working closely with the supplier to improve standards and ensure non-repetition.

While the legal action is ongoing and none of the above has so far been either proven or disproven, in our view, the UK Business, Human Rights and Environment Act could have facilitated access to justice by placing the onus on Tesco and its auditor to demonstrate that they met their duty to prevent harm once the claimants proved the harm suffered.

A reasonable due diligence process would focus on improving standards with the supplier and ensuring remedy for affected workers before disengaging from the supplier as a last resort.

Photo by Shashank Verma on Unsplash

Photo credit: Raid

Barrick Gold: killings and violence against local communities (Tanzania)

Sector: Gold mining

Issues: Right to life, violence and unlawful killings

The companies: **Barrick Gold** is one of the largest gold mining companies in the world. It is headquartered in Canada. **Barrick Tz Ltd** is a fully owned UK subsidiary of Barrick Gold. Barrick Tz, previously known as Acacia Mining, operates three mines in Tanzania and is the country's largest gold producer.[256] One of these mines is the North Mara mine, located in the Tarime district.

Affected rights holders: The **Kurya** or **Kuria** people are the majority ethnic group of Tarime district.[257] Before the arrival of the mine, they lived on agriculture, livestock and artisanal mining. For the development of the mine, some of the Kurya people were forced to sell their land below value. Others who were able to remain were cut off from their traditional farming land or suffered from the environmental impacts of mining due to insufficient buffer zones between residential areas and mine property.[258]

Details:

In 2020, ten Tanzanians brought a claim against Barrick Tz Ltd to the UK High Court for serious human rights violations by security forces and the local police at the North Mara mine.[259] The local Tanzanian police force has a written agreement with the mine to provide security in and around the mine in exchange for payment, equipment and accommodation. Together with the mine's own security guards, they have allegedly been responsible for the deaths of at least 77 people and wounding another 304 since 2006.[260]

The claim alleges three killings and multiple assaults through beatings and shootings by the security forces and police. One of these instances occurred when some of the claimants were gathered around the body of a nine year old girl who was crushed in a road accident with a mine vehicle. The crowd was dispersed by security forces and/or the police allegedly opening fire without warning.[261]

In 2022, a total of 21 Tanzanian claimants also filed a case against the parent company Barrick Gold in Canada. Moreover, in 2022 a claim was filed in the High Court in London against the London Bullion Market Association (LBMA), which certifies gold as free from human rights abuses, for wrongly certifying the North Mara gold mine. Both cases are ongoing.[262]

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, Barrick Tz Ltd would have been obliged to ensure that both private guards and public forces employed or contracted to provide security at the North Mara mine acted in full compliance with international human rights standards. This includes those relating to security and human rights. This would have included clear contractual clauses making respect for human rights a condition for the provision of security services, effective monitoring and complaints mechanisms, and severe consequences for non-compliance, including termination of the agreement.

While the legal action is ongoing and liability is yet to be determined, in our view, the UK Business, Human Rights and Environment Act could have facilitated access to justice for the Kurya claimants. Once they proved the harm, the onus would have been placed on Barrick Tz to demonstrate that it met its duty to prevent. Under the UK law, it is possible that a court might have also considered criminal liability.

Photo credit: Marcel Crozet (ILO)

British American Tobacco and Imperial Brands: child and forced labour on tobacco farms (Malawi)

Sector: Tobacco

Issues: Child labour, forced labour, hazardous working conditions

The companies: **British American Tobacco** (BAT) and **Imperial Brands** (Imperial) are British tobacco companies and both are among the top four tobacco companies worldwide by market share. In 2021, BAT made £10.2bn profit, while Imperial Brands made £2.9bn.[263]

Affected rights holders: Malawi is one of the top five tobacco leaf-producing countries in Africa.[264] It has nearly 800,000 tobacco farmers.[265] Farmers often work under exploitative and hazardous conditions.[266] In certain tobacco producing regions, 57% of children are engaged in child labour on tobacco farms.[267] UN experts have urged the Malawi Government and tobacco companies to take action to prevent the risk of child labour from persisting.[268]

Details:

In 2020, more than 7,000 Malawian tobacco farmers – comprised of more than 4,000 adults and more than 3,000 children – brought a claim against BAT and Imperial in the UK High Court. They allege that BAT and Imperial facilitate human trafficking and dangerous working conditions amounting to forced labour in Malawian plantations. After being trafficked, the farmers have to build themselves new homes, get insufficient food and work extreme hours for seven days a week.[269] They are also exposed to industrial accidents, injuries and diseases.[270] They often do not get paid at the end of the season. [271] Children as young as three years old allegedly worked on the farms.[272] The claimants argue that BAT and Imperial allegedly knew, or otherwise ought to have known, that the exploitative conditions faced by the farmers left them with no choice but to rely on their children to work.[273]

The tobacco value chain is opaque. Companies such as BAT and Imperial purchase the leaves through third-party dealers who buy from farms.[274] They argue that the farmers have no evidence that their tobacco farms supply BAT or Imperial and applied to the High Court to strike out the claim based on insufficient evidence. While BAT and Imperial both claim that they can trace the leaves to farm level, it was explained in the subsequent hearing that these records are only held by the leaf supplier.[275] The High Court subsequently allowed the case to proceed.[276]

How could a UK Business, Human Rights and Environment Act have made a difference?

In our assessment, under a UK Business, Human Rights and Environment Act, BAT and Imperial would likely have been expected to hold records of the farmers they sourced from and to have checked them thoroughly for potential human rights abuses. They would have had to engage with the dealers and the farmers to find solutions to the risk of child labour, hazardous working conditions and trafficking.

The companies may have published supplier lists, as well as details on their risk assessments, including risks identified and measures taken to prevent or minimise them. This increased transparency would have made it easier for both parties to show where BAT or Imperial sourced their tobacco leaves from, making it possible to assess the appropriateness of their due diligence measures.

While the legal action is ongoing and liability is yet to be determined, the UK Business, Human Rights and Environment Act could have facilitated access to justice for the Malawian farmers by placing the onus on BAT and Imperial to show that they took all reasonable measures to prevent child labour and forced labour in their Malawian suppliers.

Photo by Rusty Watson on Unsplash

Drying tobacco leaves

Annex

Primark's response:

"Primark does not source from anyone or anywhere where it is not possible to conduct human rights due diligence to an acceptable level. Specifically, our suppliers are under clear instructions not to use any materials, labour or products originating in any way from the Xinjiang region and as a result, none of our products are made in Xinjiang.

Our Code of Conduct, which is based on the ETI Base Code and the conventions of the ILO, outlines clear, non-negotiable, ethical standards that we expect our suppliers to follow in their factories, including a strict zero tolerance towards forced labour anywhere in our supply chain. Compliance with the Code is audited through our Ethical Trade team of more than 130 experts based throughout our key sourcing countries who are a fundamental part of our operating model, in partnership with third party auditing partners."

BHP's response:

"… Since 2015, BHP Brasil has been fully committed to supporting the work of Samarco and the Renova Foundation to ensure that full and fair reparation and remediation is available to those impacted by the dam collapse. The Renova Foundation is a significant organisation with a workforce in the thousands and substantial funding. As at the end of 2022, Renova had funded over BRL 28 billion in financial compensation and reparation work. More than 409,000 people in Brazil have received around BRL 13.57 billion in indemnification and emergency financial aid, in addition to the extensive works of the Renova Foundation to remediate environmental damage. By that point, 70% of resettlement cases has been completed with a further 15% in progress. You will find extensive and detailed information about the ongoing reparation process at Repair Data – Renova Foundation (fundacaorenova.org) *and we invite you to review this information further.*

In relation to the UK group action relating to the dam failure, it would have been (and still is) faster, cheaper and easier for the vast majority of UK claimants to resolve their claims in Brazil. This is why BHP's position remains that the case is unnecessary. The UK action also duplicates matters already covered by the existing and ongoing work of the Renova Foundation under the supervision of the Brazilian Courts and legal proceedings in Brazil. Also, while we are not able to provide detailed comments, we believe that your assumptions relating to how the UK Courts would treat the claims had a UK Business, Human Rights and Environment Act been in place are highly speculative.

Overall, we would request that you reconsider whether this is an example of where a UK Business, Human Rights and Environment Act would have made a difference. We can understand why you believe that the UK Courts have a role to play if a UK company is responsible for an incident and refuses to accept accountability or provide any remedy, but this is certainly not an example of that scenario. As set out above, Samarco (the Brazilian entity that operated the dam) agreed to repair the damage and compensate individuals. An extensive amount of work and resources have been put towards this repair work pursuant to an agreement with all key Brazilian governments and authorities, with the support of BHP Brasil and the involvement of community representatives, and under the supervision of the Brazilian courts. It is very hard to imagine what (if any) difference a UK Business, Human Rights and Environment Act would have made in this scenario…"

JCB's response:

"…The Report does not acknowledge the UK NCP's primary finding: that there was no connection between JCB's business operations and the alleged human rights abuses in the Occupied Palestinain Territories, and rejected the suggestion that JCB had failed to prevent or mitigate such adverse human rights impacts.

In particular, the NCP found that:

1. *JCB did not breach its obligation under paragraph 3 of Chapter IV of the OECD Guidelines for Multinational Enterprises, which states that Enterprises should "seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts".*
2. *Relevant to the Report, the NCP also accepted that once JCB's products are passed onto the independent retailer Comasco, JCB has no control over Comasco's customers or the use of JCB's products, and the products used in the demolitions could have come from any source…*

Live Link…

1. *Live Link is purchased with the machine by the customer. It is an innovative software system that enables end users to monitor their machines remotely, online. It provides information that may be useful to the end user, including machine alerts, utilisation levels, fuel usage, idle time, location, machine health and service warnings. The purpose of LiveLink is to collect information about the machine itself which can support customers to improve efficiency, safety, security, and sustainability of their operations.*
2. *LiveLink is not implemented, operated, or controlled in any way by JCB. JCB simply host the technology centrally and fit the hardware during the machine manufacturing process. The implementation and use of LiveLink technology is solely within the customer's control.*
3. *The data produced is owned by the customer. Some of this data can be shared with their respective dealer and JCB for the purposes of obtaining support from them, however the owner authorises what data is or is not reported.*
4. *While LiveLink can show the location of a machine (if the owner has not turned off the geolocation element), LiveLink cannot show what work the machine is actually doing nor can it allow JCB to take control over the machine.*
5. *JCB does not have the ability to remotely control or disable a machine in the field via LiveLink. There would be considerable safety concerns if JCB could remotely control or disable a machine, given its inability to determine what the machine is doing at any given point.*
6. *JCB would also be in breach of Article 8 of the European Convention on Human Rights and data protection laws if it were able to covertly track the owners of the machines without their consent.*

It is clear from the above that JCB does not consider it legally or practically possible for its Live-Link technology (or indeed any other technology) to be used in the way that you suggest in the Report. It is difficult to assess the possible impact that a theoretical and undefined "UK Business, Human Rights and Environment Act" may have on the position, but on the basis that JCB's products would continue to remain outside its control once they pass to third parties, it seems highly unlikely that the new theoretical legislation you are referring to would change that…"

Extract from the UK NCP's Initial Assessment: Lawyers for Palestinian Human Rights complaint to the UK NCP about JCB, published on 12 October 2020

"19. In their response, JCB confirmed that all of the products they supply to Israel are via a third-party independent distributor, Comasco. They state that they have not sold any machinery directly to the Israeli authorities. They state that once products have been sold to Comasco, JCB has no legal ownership of them and they claim, therefore, they cannot stipulate to whom their products can or cannot be sold to.

20. In their response JCB notes, and provides information, that there is an established second-hand market in Israel for their products. They therefore challenge the complainant's assertation that the only route for Israeli authorities, or privately contracted companies, to obtain JCB machinery is through purchasing it directly from Comasco. JCB also highlights they sell products throughout neighbouring countries, which could subsequently be transported into Israel.

21. JCB claims that without knowing the serial numbers of the machinery in question it is not possible to confirm their origin and whether or not they originated from Comasco or whether they were purchased second hand or provided via a lease.

22. In light of all the above, JCB maintains that no meaningful link can be made between JCB and the alleged adverse impacts. JCB state that any link between the two, by virtue of machines manufactured by JCB being used, is minor...

25. JCB claims from the information provided that their products are only associated with a small number of the incidents of demolitions that LPHR raise in the complaint. They also note that the complainant's information shows equipment from other providers being used in demolitions. JCB therefore argues that if they were to cease supplying their machinery as the complainant request, the demolitions would not be affected in any way. JCB also argues that any attempt to stop the supply of their machinery to Israel would also prevent such machinery being used for entirely peaceful purposes, for example the construction of hospitals, roads and schools and to restrict the sale of machines in Israel would impact the peoples' ability to build essential amenities which would promote their human rights. The complainant states that JCB have been silent in their response on the issue of their involvement in settlement-related construction."[277]

Extract from the UK NCP's Final Statement: Lawyers for Palestinian Human Rights complaint to the UK NCP about JCB, published on 12 November 2021

9.2 UK NCP's assessment

"…The UK NCP does not accept JCB's argument that it has only an arms-length relationship with Comasco as indicated above.

The UK NCP's assessment suggests that there is a clear business relationship between JCB and Comasco. JCB sells its products to Comasco and even if – as JCB has argued – JCB has no influence over Comasco's management and the ownership of products once sold to Comasco, JCB does have a clear, contractual business relationship with Comasco, which meets the definition of 'business relationship' set out by the OECD Guidelines.

However, once the products are passed on to Comasco, as JCB has claimed, Comasco is free to sell to anyone and it has no control over Comasco's customers. Comasco's website indicates that it 'imports

hundreds of different models of mechanical engineering tools and equipment and provides service to over 5,000 customers in Israel and to a significant number of Israeli contractors abroad.'

The UK NCP notes that Comasco is the sole dealer of JCB products in Israel, but the link between the JCB products used for demolitions and Comasco cannot be clearly established.

The UK NCP understands that Comasco could have sold JCB products to third parties, individuals, small dealers, construction companies, or the Israeli Government (or its public authorities). The JCB products being used to demolish Palestinian properties in the OPT may be owned by those who have commissioned the demolition, be on hire, or be equipment owned by contractors employed to do the work. This creates a complex web of supply chain which goes beyond the business relationship between JCB and Comasco.

UK NCP also notes that JCB products are also used for routine construction business purposes and humanitarian activities like construction of hospitals, roads and schools.

UK NCP also accepts that the JCB products depicted in the photographs could have also come from the second-hand market, as identified by JCB. Products purchased from this route will have no connection with either Comasco or JCB.

This effectively means that the products used for alleged adverse human rights impacts as depicted in the photographs and videos could have come from multiple sources.

The UK NCP cannot verify whether the JCB products used in demolition as depicted in photographs and videos were directly bought from Comasco, unless a clear business relationship can be evidenced between Comasco and those operating JCB products in the OPT to demolish Palestinian properties.

LPHR has alleged that these demolitions are directly run by the Israeli authorities or third parties under the instructions of the Israeli authorities. This is outside the scope of this complaint, but even if these allegations are true, there is no evidence to suggest that the Israeli authorities or third parties operating on the instructions of Israeli authorities have purchased the JCB products depicted in demolition directly from Comasco.

Assessing the question about leverage, the UK NCP accepts that JCB does have some leverage over Comasco due to its business relationship. Yet, the UK NCP could not determine how this leverage could influence those operating JCB products causing alleged human rights impacts in the OPT. Had there been evidence that those products were directly purchased from Comasco, it might have been possible to establish the link between JCB products used in the alleged human rights violations and JCB.

The complex web of supply chain, and the nature of the business relationship between JCB and Comasco, as indicated above, means that JCB does not have any leverage over suppliers and customers beyond the first tier of its business relationship with Comasco. The UK NCP cannot decisively establish the source of the JCB products used in the alleged adverse human rights impacts; therefore, has not found that JCB can influence those who sold the products to those committing the alleged human rights impacts in the Occupied Palestinian Territories.

UK NCP concludes that the alleged adverse human rights activities as depicted in the photographs and videos cannot be conclusively linked to JCB because of their business relationship with Comasco. Therefore, UK NCP did not find JCB in breach of its obligations under article 3 of Chapter IV...

9.3 UK NCP's assessment

JCB's response suggests that their approach is primarily based on the premise that as the adverse human rights impacts cannot be attributed to the company, any human rights due diligence checks will not be necessary. Also, the Supplier Code of Conduct and the Dealer's Charter are not human rights due diligence documents as set out by the OECD Guidelines and the Due Diligence guidance.

UK NCP believes that this approach is not in line with the aspirations set out in the OECD Guidelines and other international instruments on responsible business conduct. The scale of alleged adverse human rights impact and the evidence of JCB products used in demolition of houses in OPT are sufficient reasons to carry out an assessment of actual and potential human rights risks and impacts, even if JCB believed that those human rights impacts cannot be linked to the company.

Even in the absence of any adverse human rights impacts, an enterprise is expected to act responsibly and regularly conduct human rights due diligence as the OECD Due Diligence guidance notes 'human rights risks may change over time as the enterprise's operations and operating context evolve.'

For these reasons, the UK NCP's conclusion under paragraph 52 above does not mean that JCB should ignore the use of their products in demolitions in the OPT and cannot dismiss JCB from its responsibilities to ensure it implements OECD Guidelines in letter and spirit and play a greater role in adopting responsible business practices.

It is unfortunate that JCB, which is a leading British manufacturer of world-class products, did not take any steps to conduct human rights due diligence of any kind despite being aware of alleged adverse human rights impacts and that its products are potentially contributing to those impacts.

In its response submitted on 16 April, JCB acknowledged that they were aware of the photographic and video depiction of JCB products being used in demolitions.

Since February 2020, JCB is also aware of the UN Office of High Commissioner for Human Rights (UN OHCHR)'s database which has put JCB on the list of business enterprises involved in listed activities in the OPT that may have 'raised particular human rights impacts.' JCB has informed UK NCP that they are challenging its inclusion in the UN OHCHR database.

Given these allegations and as part of its responsible business practices in line with the Guidelines, JCB should have undertaken a comprehensive due diligence exercise to identify opportunities for it to engage with companies with whom it has a business relationship on their human rights policies, uncover any potential human rights issues and ensure there is no risk of adverse human rights impacts in its supply chain.

JCB's response that as it has no control over its products once they have been sold to Comasco and that they are not responsible for the adverse human rights impact caused by their products does not reflect the spirit of the OECD Guidelines on Responsible Business Conduct…

UK NCP therefore concludes that JCB did not observe paragraph 5 of Chapter IV of the Guidelines.

UK NCP recommends that JCB carry out human rights due diligence to assess actual and potential human rights impacts. In line with the OECD Guidelines and Due Diligence Guidance, JCB should also set out a plan on how it will integrate and act upon the findings of its due diligence – including how impacts will be addressed – if adverse human rights impacts are identified in its supply chain. This process should go beyond simply identifying and managing material risks to the enterprise. As the human rights risks may change over time, due diligence should be a regular, on-going exercise, which should be part of JCB's policy statement on human rights…

9.6 UK NCP's assessment

…In light of the evidence provided by JCB in response to the complaint made by LPHR, the UK NCP concludes that JCB did not fully observe paragraph 4 of Chapter IV of the Guidelines.

UK NCP recommends that JCB draft a statement of policy which should expressly state its commitment to respect human rights as stated in paragraphs 74 and 75 above. This statement should be separate from its statement on Modern Slavery, Supplier's Code of Conduct and the Dealer's Charter…"[278]

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