

	 UNIVERSITY OF GOTHENBURG	

Extractive Industries and Human Rights Abuse – The Role of a Home State in Protecting Human Rights Abroad

By

Ketevani Kukava

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*School of Global Studies, University of Gothenburg
School of Business and Social Sciences, Roehampton University
Department of Archaeology and Social Anthropology, University of Tromsø*

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Declaration Form

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work, has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed: Ketevani Kukava

Date: 21 May 2015

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Abstract

When international soft law framework and host states fail to ensure effective protection of human rights from business-related harm, the involvement of a home state can be considered as the best solution. The research aims to explore the role of a developed home state in protecting human rights from violations by extractive industries abroad. The major focus of the study is the example of the UK – a developed state where a number of corporations operating in extractive industries are domiciled.

This study explores legally binding and non-binding measures taken by the UK, considers how business development policy intersects with human rights protection, and analyses to what extent access to judicial and non-judicial remedies for business-related harm are ensured in the UK.

Case study has been conducted in the light of two different theoretical perspectives, and has tried to find out whether the UK gives priority to business development over human rights protection or considers that responsible corporate behaviour is conducive to economic development. Controversial issues such as home state responsibility, jurisdiction and extraterritoriality, home state regulation of corporate conduct, which have attracted wide attention in academic literature, have been explored in a particular local context.

The research has revealed that the UK has taken number of initiatives with the aim of protecting human rights from business-related harm and has declared that business development and human rights protection should go hand in hand. However, certain challenges still exist, which need to be addressed in order to enhance the role of a home state in protecting human rights abroad.

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Abbreviations

CSR – Corporate Social Responsibility

ECHR – European Convention on Human Rights

EGAC – Export Guarantees Advisory Council

FCO – Foreign and Commonwealth Office

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

MNC - Multinational Corporation

NCP –National Contact Point for the Organization for Economic Co-operation and Development
Guidelines for Multinational Enterprises

OECD – Organization for Economic Co-operation and Development

OECD Guidelines - Organization for Economic Co-operation and Development Guidelines for
Multinational Enterprises

TNC – Trans-National Corporation

UKEF – UK Export Finance

UN – United Nations

UN Guiding Principles – United Nations Guiding Principles on Business and Human Rights

1. Introduction

Activities of the corporations operating in extractive industries - oil and gas extractions and mining might affect livelihoods of people as well as water resources and land. Under certain circumstances such activities result in violations of human rights of the individuals living in a particular area. In different parts of the world there are many serious conflicts between mining companies, workers and communities as well as between oil companies and communities about pollution, contaminated water and land, the safety situation, etc (Tieneke Lambooy, Aikaterini Argyrou, Mary Varner, 2013, p. 330). The focus of the research on extractive industries is determined by the frequent incidence of the relationship between natural resource extraction and the violation of human rights, which has also led to the emergence of the term “resource curse” (Muchlinksi P. , 2009, p. 125).

At present there is no legally binding international framework which holds corporations accountable for human rights violations. Moreover, efficiency of soft law and voluntary codes of conduct adopted by companies is questionable, because enforcement of these norms depends primarily on the good will of the corporations and no legal sanctions are available in case of non-compliance. Enforcement of human rights norms against corporations by host states can also be problematic: certain host states may be unwilling or incapable of ensuring effective human rights protection and prevention of violations. As a result, individuals whose human rights have been violated may not be able to seek redress.

Against this background, home states can be considered important actors which are capable of playing a significant role in protecting human rights abroad from violations by corporations. Developed states, where many multinational corporations (MNCs) are domiciled, might have more effective means to regulate and monitor corporate activities compared to developing host states (Jagers, 2002, p. 166). Exploration of such capacity of a developed home state is the primary focus of the research.

Significant document related to the issue of business activities and human rights is “the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect

and Remedy” Framework”,¹ which deals with the state’s duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy (Ruggie J. , 2011). These principles do not create new international obligations or limit state’s obligation under international law. They aim to enhance standards with regard to business and human rights and are applicable to all states and all business enterprises. They recognise state’s obligations to respect, protect and fulfil human rights; corporate responsibility of business enterprises, which means that they should act with due diligence to avoid human rights violations and to address adverse impacts with which they are involved; and the need of effective remedies (judicial and non-judicial) in case of business-related human rights harm (Ruggie J. , 2011). The research explores how these principles are implemented at the home state level, and what policy and legal implications they have in a local context.

In academic literature there is no consensus regarding the effectiveness of home state regulation of corporate conduct abroad. Political and economic considerations, such as sovereignty, foreign policy interests, jurisdiction, interference in domestic affairs, and free market considerations are major factors which can diminish the role of a home state in protecting human rights norms abroad. These issues are further discussed in literature review section.

The major focus of the research is the example of the UK – a developed state where a number of corporations operating in extractive industries are domiciled.

1.1 Purpose of the Research

The research aims to explore the role of a developed home state – the UK in protecting human rights from violations by extractive industries abroad, as when international soft law framework and host states fail to ensure effective protection, the involvement of a home state can be considered as the best solution. The purpose of the research is to find out how the UK’s economic considerations intersect with human rights protection abroad. In the end the research aims to provide certain recommendations how the role of a home state in protecting and promoting human rights abroad can be enhanced.

¹For further information about the UN guiding principles see Appendix II.

1.2 Research Questions

This thesis tries to answer the following research questions:

1. How do the UK policies and legislation ensure the protection of human rights abroad from violating by extractive companies domiciled in its territory?
2. How does the UK government business development policy intersect with human rights protection?
3. How does the UK ensure access to remedy (both judicial and non-judicial) for human rights violations committed abroad by extractive companies domiciled in its territory?

Chapter 2 of this thesis states two distinct theoretical approaches, which serve as points of departure for exploring the issue area, and reviews existing literature which provides insight into the topic. Chapter 3 describes methods used during the research and explains how the collected data is related to research questions and theoretical framework. Chapter 4 presents findings of the research and discusses the UK's duty to protect human rights by looking into its legally binding and non-binding measures. Chapter 5 deals with the intersection between UK's business development policy and human rights protection. Chapter 6 explores to what extent access to judicial and non-judicial remedies for business-related human rights harm is ensured in the UK. These findings are followed by conclusion and recommendations. The latter suggests certain steps the UK can take in order to enhance its role in protecting human rights from violations by extractive industries abroad.

2. Theoretical Framework

The issue of human rights violations by trans-national corporations (TNCs) has attracted wide attention in academic literature. Several authors have made considerable contribution to the discussion of the role of home states in protecting human rights abroad. The literature reviewed below belongs to the recent period and provides in-depth insight in matters related to the issue area, such as: Economic interests and human rights considerations; home state responsibility in case of failure to protect human rights abroad; the issues of jurisdiction and extraterritoriality; the relationship between extractive operations and human rights abuse; and the opportunities and

limitations of home states with regard to regulating corporate conduct abroad. Against this background, the research explores the approach of a particular developed home state and discusses how economic considerations of a home state intersect with human rights protection abroad.

The choice of literature was determined by their relevance to the research topic, authors' coherent discussion of the issue area as well as their critical analysis and sound argumentation. The literature reviewed below provides insight into distinct theoretical approaches and creates a big picture about the role of a home state in regulating corporate conduct with the aim of protecting human rights abroad.

2.1 “Market Discipline” vs. “Business Case of CSR”

The regulation of corporate activities by home states is closely associated with economic considerations. One theoretical approach towards this issue is the concept of “market discipline” considered as a “counter-law”, which provides that for governments economic development, the free market and deregulation are central policy objectives and are strongly favoured over the protection of human rights (Evans, *International Human Rights Law as Power/Knowledge*, 2005, p. 1056;1062). According to this approach, market discipline considers human rights as the freedoms essential to legitimate particular forms of production and exchange; it pursues only those rights which are necessary to sustain claims for liberal freedoms, such as the rights associated with liberty, security and property (Evans, 2005, pp. 43-44). Evans also stresses that although current international human rights law formally recognises indivisibility of human rights, in practice only those rights are promoted which support market discipline, and economic and social rights are considered to be less important (Evans, 2005, p. 48).

According to Evans (2005, p. 45), the primacy of market discipline is illustrated in the changing role of the state – it can no longer be considered as a guardian of human rights, rather its mission is to ensure the efficient functioning of the global economy.

Similar to this approach, McCorquodale and Simons suggest (2007, pp. 598-599) that for most of the industrialized states main priority is to assist their corporations to enter foreign markets and lobby against regulatory barriers, which may contribute to the situation in which companies violate human rights.

On the other hand, another approach, which considers “business case of CSR” as a point of departure, suggests that taking into consideration the positive impact of CSR on the productivity of corporations, home states have economic interest in its promotion both locally and internationally (Zerk, 2006, p. 153). Business case of CSR implies the following meaning: Corporations “can perform better financially by attending not only to its core business operations, but also to its responsibilities toward creating a better society” (Elizabeth C. Kurucz et al., 2008, p. 84).

Similar to this approach, Mares (2008, p. 106) has pointed out that taking into consideration human rights risks and opportunities is beneficial for TNCs and these benefits can be divided into two categories: Firstly, it ensures operational efficiency by avoiding disruptions and by adopting efficient and environment-friendly technologies. Secondly, it results in reputational gains associated with being considered as a good corporate citizen. Therefore, according to this approach, CSR can be deemed as an investment rather than the cost, because it is in the self-interest of business and produces long-term benefits (Mares, 2008, p. 106).

Elizabeth C. Kurucz et al. (2008, pp. 85-92) describes four major types of CSR business cases: 1. Cost and risk reduction perspective suggests that a threshold level of social and environmental performance is in the economic interests of the company as it mitigates the risk to its viability posed by the demands of stakeholders. 2. Adaptive approach provides that CSR initiatives confer competitive advantage on the company. 3. Aligning perspective connects CSR to the reputation and legitimacy of the company. 4. Synergistic value creation approach is focused on win-win outcomes by synthesizing the interests of different stakeholders.

Therefore, in contrast to the approach of “market discipline”, another view which focuses on business case of CSR considers that introducing human rights considerations within the realm of business activities is in the interests of the states and can be considered as an economically beneficial measure, rather than a burden which hinders business development.

The research looks into the example of the UK in the light of the above mentioned different perspectives and tests the applicability of these theoretical approaches to a particular industrialized home state. The research explores how industrialized state’s focus on economic gain and free market objectives can be reconciled with regulating corporate activities and

protecting human rights abroad. This can be detected from the measures the UK has taken, from the policy the government has adopted, and the extent to which access to remedy is ensured for business-related harm inflicted abroad. Based on the above mentioned theoretical approaches, the thesis investigates whether the UK diminishes the value of human rights due to free market and economic considerations or considers their protection as conducive to business and economic development.

2.2 Home State Responsibility under International Law

Different views have been expressed on the question of whether home states might incur international responsibility when the corporations incorporated within their territories or their subsidiaries violate human rights abroad. For example, drawing parallels to the developments in the field of environmental protection, corruption and the exploitation of children, Jagers (2002, p. 174) suggests that international law is moving towards obligating home states to adopt legislation which regulates activities of corporations abroad. However, currently there is no legally binding international norm which explicitly obliges home states to hold corporations accountable for human rights violations committed abroad.

Jagers also lists certain political obstacles that might arise in this regard: Host states might oppose regulation by the home state and object to interference in their domestic jurisdiction. On the other hand, home states might be reluctant to hold corporations accountable, as it can be considered as the interference with the free market economy, which might lead to a competitive disadvantage (Jagers, 2002, p. 175). The latter argument about the intersection between free market economy and protection of human rights abroad requires further exploration and needs to be strengthened by evidence. It is necessary to explore the issue in a particular local context and determine to what extent free market considerations constitute an obstacle to protecting human rights abroad.

Basing their arguments on the statements made by the Inter-American Commission on Human Rights, the European Court of Human Rights and the Human Rights Committee, McCorquodale and Simons (2007, pp. 602-603) argue that state's obligations under international law is not confined to its territory. They suggest that the activities of the corporation and its subsidiaries

operating abroad can be attributed to the state in the following circumstances: When the company is exercising elements of government authority or acting under the instruction, directions or control of the state; if the home state knowingly provides assistance to internationally wrongful acts; in case of failure by the home state to exercise due diligence by regulating and monitoring the activities of corporations in conflict zones and in those states with which the home state has signed a bilateral investment treaty (Robert McCorquodale; Penelope Simons, 2007, p. 624). Therefore, according to this view, home states can incur international responsibility for human rights violations committed abroad by companies incorporated within their territory provided that such activities are attributable to the state.

Zerk has approached this issue from different perspective. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Zerk compares the above mentioned article to article 2 of the International Covenant on Civil and Political Rights (ICCPR) which sets forth that each state party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” She argues that while the ICCPR places explicit limitations on the territorial scope of human rights obligations, the provision of the ICESCR is more ambiguous with regard to territorial dimension and can imply to “improve the realization of these rights on a wider scale” (Zerk, 2006, pp. 86-87). However, such interpretation of the above mentioned article can be problematic, as it is not clear-cut whether states intended to extend human rights obligations abroad while not explicitly acknowledging extraterritorial application of the ICESCR.

Olivier De Schutter (2006, p. 52) suggests that parent-based extraterritorial regulation is a possible solution to the impunity of corporations. He states that the home state of the TNC should be imposed a subsidiary responsibility to control the activities of TNCs.

Above mentioned review suggests that although there is no legally binding international rule which explicitly imposes obligation on home states to regulate corporate activities abroad and to prevent human rights violations beyond their territories, certain authors still assume that implicit responsibility exists in this regard. However, it should be noted that the enforcement of such responsibility remains questionable in practice.

2.3 Jurisdiction

The regulation of corporate activities abroad is closely associated with the issue of jurisdiction. According to the basic principle of international law, known as “territorial principle”, each state has exclusive jurisdiction within the limits of its territory (Zerk, 2006, p. 105).

While discussing the issue of jurisdiction under public international law, Muchlinksy states that based on the nationality principle, the home state can justify jurisdiction over the activities of an overseas unit in the following circumstances: First, the managers of a foreign subsidiary can be subject to home country legislation due to their nationality. Secondly, the home state can require the parent company, which is the principal shareholder in the foreign subsidiary, to order its overseas subsidiaries to act in accordance with home country laws due to the fact that the parent company has the nationality of the home country. Thirdly, when the parent company is operating abroad through unincorporated branches, they will retain the nationality of the parent and be subject to the direct jurisdiction of the home country (Muchlinksy P. T., 2007, pp. 126-127).

According to the “universal principle”, all states are given criminal jurisdiction with regard to those offences which have serious implications for international peace and stability, such as: piracy, war crimes, terrorism, slavery, genocide, torture, crimes against humanity (Zerk, 2006, p. 111). Therefore, universal jurisdiction can only be exercised over foreign subsidiaries when their activities amount to gross violations of human rights law.

Zerk (2006, pp. 112-113) concludes that extraterritorial social and environmental regulation cannot be justified based on the principles mentioned above and home states may not be able to directly impose standards on foreign subsidiaries. However, she suggests that they still maintain significant regulatory influence based on their jurisdiction over parent companies. This view

corresponds to the second option of exercising jurisdiction based on nationality principle discussed by Muchlinski and mentioned above.

Furthermore, Zerk (2006, p. 132) argues that based on the jurisdiction derived from domestic law, national courts may exercise jurisdiction over foreign companies with regard to private law dispute and may apply domestic law, notwithstanding that activities have occurred in another state. This point is of particular importance while dealing with the issue of bringing legal claims and seeking remedies by foreign individuals in a judicial body of a home state.

Zerk (2006, p. 135) also touches upon the issue of sovereignty and points out that it should not automatically be regarded that the host state's sovereignty is infringed when a home state regulates extraterritorially through the parent company with the aim that international human rights are respected by a MNC. She discusses home states' CSR initiatives and concludes that they have avoided "foreign-prescriptive" legislation and have adopted "parent-based methods of control" (Zerk, 2006, p. 195).

While discussing the issue of jurisdiction, it is of particular importance to gain insight into the common law doctrine of *forum non conveniens*. The essence of this doctrine is that the court has the power to dismiss the lawsuit, even when it has formal jurisdiction over the case (based on the principles discussed above), when the defendant demonstrates that, taking into considerations certain public and private convenience factors, an alternative court is more appropriate forum for adjudication (Jagers, 2002, pp. 196-197). The research explores how the UK, which belongs to the common law system, addresses this issue, and whether the doctrine of *forum non conveniens* constitutes an obstacle when foreign individuals bring lawsuits in UK courts.

In light of the above, the existing literature about the issue of jurisdiction provides an important point of departure upon which the research is based. As mentioned above, regulation of foreign subsidiary's activities through the parent company and the adjudication in the court of a home state does not come into conflict with the major principles of jurisdiction and sovereignty.

2.4 Extraterritoriality

In order to explore the role of a home state in protecting human rights abroad, it is of utmost importance to discuss whether current international human rights law gives rise to the extraterritorial application of human rights norms. In academic literature it is widely accepted that international human rights treaties neither explicitly provide for extraterritorial application of human rights norms, nor rule out the possibility of such application.

Article 29 of the Vienna Convention on the Law of Treaties provides: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.” Milanovic (2011, p. 10) considers that this wording cannot be deemed as a presumption against extraterritoriality, because this article deals with a specific issue – presumption in favour of the applicability of the treaty to the whole territory of the state when the treaty is signed by federal states or states with overseas dependencies. Similar opinion is expressed by Kunnemann (2004, p. 201) who argues that the aim of the above mentioned article is to prevent states from declaring that the treaty does not have binding effect on certain part of the territory and this article does not establish that the ICESCR would automatically not be binding beyond a particular state’s territory. Milanovic (2011, p. 10) concludes that according to international law, there is no presumption against extraterritoriality as well as no presumption in favour of extraterritoriality and the text, object and purpose should be the only guidance in this regard.

The issue of extraterritoriality with regard to economic, social and cultural rights is further discussed by Coomans (2004, p. 190) who makes reference to Article 24 of the Charter of Economic Rights and Duties of States which provides that:

All States have the duty to conduct their mutual economic relations in a manner which takes into account the interest of other countries. In particular, all States should avoid prejudicing the interests of developing countries.

Further, he refers to the general duty to cooperate as enshrined in the UN Charter and Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations and concludes that international human rights can be considered as overarching international norms to be respected by all states and these norms may give rise to positive and negative obligations (Coomans, 2004, pp. 190-192).

Notably, the issue of extraterritoriality is closely associated with sovereignty and jurisdiction. Skogly (2006) provides in-depth analysis with regard to their intersection. He makes explicit reference to the Westphalian legacy – sovereign equality among states and states’ internal sovereignty – and argues that extraterritoriality does not come into conflict with these principles. He suggests that states are allowed to make decisions with regard to extending international cooperation, even altering the nature of international law and enacting extraterritorial obligations, provided that such decisions do not contradict *jus cogens* norms and do not breach already existing obligations (Skogly, 2006, pp. 24-27).

Important conclusion regarding the issue of extraterritoriality was made by Ruggie, who pointed out that although there is increasing encouragement for home states to prevent human rights abuses by their companies abroad, international human rights treaties do not require states to exercise extraterritorial jurisdiction (Knox, 2012, p. 78). Knox explains Ruggie’s position by political constraints and points out that developed countries have generally opposed extending human rights obligations extraterritorially (Knox, 2012, p. 82).

Against this background, extraterritorial protection of human rights from business-related harm is left to the discretion of a home state, as no explicit international legal obligation exists in this regard. States are granted considerable leeway while making decision with regard to ensuring human rights protection abroad. Current international law does not restrict state’s capacity to ensure human rights protection abroad and extraterritoriality does not automatically contradict the principle of sovereignty. The research explores how the UK approaches this issue.

2.5 “Resource Curse”

The issue of extractive industries and human rights abuse has also attracted wide attention in academic literature, because of the frequent violation of human rights as a result of extractive operations.

Muchlinski (2009, p. 125) suggests that frequent abuse of human rights in the extractive sector is determined by the fact that many natural resource deposits are found in countries with weak governance regime and/or with major political, social and economic problems. Moreover, in many cases the host states are less economically powerful than the corporations operating in their

territory, and the latter is capable of exerting significant influence over the government, which can result in adverse impact on human rights (McCorquodale, 2009, p. 387).

Muchlinski identifies four major categories of human rights abuse by TNCs operating in extractive industries: 1. Companies may assist government forces or forces of opposition in the violations of human rights, when there is a conflict resulting from the local competition for control over natural resources; 2. companies may be complicit in human rights violations committed by repressive governments; 3. companies may violate human rights as a result of industrial pollution or other environmental damage; 4. personnel of security forces commit illegal assaults or killings of individuals who may pose threat to the investment (Muchlinski P. , 2009, pp. 126-127).

Human rights challenges associated with extractive industries are further identified by Mares. He lists several reasons why human right issues arise in such situations: natural resources are often located in weak and undemocratic states where human rights are frequently violated; investment has a long-term character; extractive operations might lead to adverse environmental impact or disruption of traditional ways of living for local population; corporations use weapons as protection which can result in clashes with protestors (Mares, 2008, p. 100).

In light of the above, the risk of human rights violations as a result of extractive operations is considerably high compared to other business sectors. Therefore, this issue requires particular attention and regulatory measures by the home state which is explored during the research.

2.6 Home State Regulation of Corporate Activities

This section discusses several arguments with regard to the opportunities and limitations of home state regulation of corporate activities.

Zerk suggests that richer home states, such as the UK and the USA, do acknowledge their role in promoting CSR abroad and provides several reasons to explain such attitude: 1. Political self-interest – poor CSR standards of MNCs might negatively affect the international standing of the home state. 2. Economic self-interest – CSR has positive impact on the “long-term productivity and sustainability of companies”. Therefore, home states are interested in its promotion. 3. Development goals – corporations play important role in reducing poverty and promoting

sustainable development. 4. Ethical concerns – home states might have certain moral obligation as they are the key “beneficiaries of globalization”. 5. Legal case – the legal obligation to prevent damage to the environment beyond national territory (Zerk, 2006, pp. 151-160).

Somewhat similar approach is taken by Mujih, who sets forth economic, moral and legal arguments to support home state regulation of the activities of the MNC operating abroad: First of all, it is in the economic self-interest of the home states to promote CSR, because it affects the productivity of corporations. As the activities of a MNC benefit its home state’s economy, the moral argument suggests that such benefits should not be attained at the expense of causing injury to other states. Moreover, according to international law, every state has a general duty not to act in such way as to cause harm outside its territory, which can also be extended to international human rights law, and home states may be expected to regulate companies if they knew that their activities were going to cause harm and they were in the position to control the activities leading to harm (Mujih, 2012, pp. 125-126).

Although the role of non-binding measures and policies in terms of regulating corporate activities should not be underestimated, binding legislation still plays an important role. Muchlinski (2007, pp. 525-531) focuses on the issue of monitoring and enforcing human rights responsibilities of multinational enterprises and discusses the role of formal legal regulation and litigation at the national level in ensuring that human rights obligations of corporations are upheld. With a major focus on the litigation under US Alien Tort Claims Act, he concludes that although direct responsibility of multinational enterprises for human rights violations is as yet unprecedented, there is some support for establishing the indirect responsibility on the part of the state (Muchlinski P. T., 2007, pp. 526-531).

Similarly, the importance of regulation at the legislative level is also stressed by McCorquodale (2009, p. 389) who argues that a state must ensure protection of human rights from business-related harm and provide effective sanctions against companies in case of human rights violations, and this obligation should not be restricted only to the state’s territory, but should extend over the activities of corporations abroad. He points out:”Regulation without law and legal compliance mechanisms is rarely effective as a means of long-term social, economic or public behavioural change” (McCorquodale, 2009, p. 385).

His focus on legally binding mechanisms and legal enforceability of human rights claims against corporations is well-founded, as soft law framework and non-binding measures are not always capable of preventing human rights violations and providing efficient remedies. Regulation of corporate activities abroad by legally binding norms and the enforcement of such norms by judicial bodies can be hindered by certain obstacles in practice which need further exploration and analysis.

While analyzing several cases in the UK court, Meeran (2014) discusses the possibility of holding MNCs accountable for harm resulting from their activities in developing countries. He also considers the issues of jurisdiction and the “corporate veil” – parent company liability. He concludes that the approach of the UK courts is in stark contrast with that of the UK government which has shown much commitment in protecting the interests of MNCs (Meeran, 2014, pp. 401-402).

The reluctance of a home state towards holding corporations accountable at legislative level for human rights harm committed abroad requires further investigation. Apart from court judgments and legislation, general government policy, non-binding measures and non-judicial grievance mechanisms are also worth exploring in order to get a big picture about the role of a home state in this regard.

The factors affecting the approach of the government towards regulating corporate activities are discussed by Simons and Macklin (2014) who consider human rights impact of transnational extractive corporations in zones of weak governance. They have identified four major factors related to unwillingness of home states to use their regulatory power: 1. Political disincentives. 2. Fears of violating sovereignty of the host state. 3. The related justificatory policy of constructive engagement; 4. The question of efficacy of any regulatory regime (Penelope Simons, Audrey Macklin, 2014, p. 19). They consider that the home states play a critical role in addressing extraterritorial corporate behaviour, but they also admit its limitations in various respects (Penelope Simons, Audrey Macklin, 2014, p. 78).

The abovementioned literature provides justification for protection of human rights abroad by means of home state involvement and discusses existing obstacles in this regard. Deeper exploration of this issue in a particular local context is of paramount importance in order to find

out the approach of a particular home state, and to explore how economic considerations are reconciled with human rights protection abroad. Also, it is significant to look into the lawsuits and non-judicial complaints in order to evaluate the effectiveness of available remedies in a home state.

Although literature reviewed in this chapter discusses major aspects related to the role of a home state in protecting human rights abroad, there is no comprehensive study which explores how such role is assumed from a particular home state perspective. Academic literature focuses on interpreting international law with regard to home state responsibility, sets forth certain political, economic or legal factors which may be considered as limitations of the role of a home state. My research tries to explore the issue in a particular local context and aims to determine how different measures taken by a developed home state work together, how economic considerations intersect with human rights protection and in general, how the role in protecting human rights abroad is approached by a particular state. Therefore, the major contribution of this thesis is that it explores the role of a home state in protecting human rights as assumed by a particular developed state, and tries to find out to what extent economic considerations influence the government's approach.

3. Methods

The research aims to explore the role of a developed home state – the UK in protecting human rights from violations by UK extractive industries abroad and explain the impact of economic considerations in this regard. Therefore, it constitutes an applied research (Neuman, 2014, p. 27).

The major methods used during the research are case study and interviews. Case study is a suitable method to explore the issue in one particular state – the UK and to provide in-depth analysis to what extent “protect, respect and remedy” framework is implemented in a particular home state with regard to extractive industries and human rights. Case study method has closely been connected with interviews, which have assisted me in further understanding the UK's approach and allowed me to incorporate legal and business perspectives in the research. In

particular, interviews at FCO and at a mining company have allowed me to incorporate government and business perspectives respectively, while the interview with a PhD candidate has provided insight how the issue is perceived by a third party who does not have a direct economic interest and who approaches the issue from legal perspective.

Documents and interviews have been analysed in the light of the theoretical framework reviewed in chapter 2. In particular, the data collected during the research tries to determine whether the case of the UK corresponds the theoretical approach based on “market discipline” or the one based on “business case of CSR”. Moreover, the research has focused on obtaining the information on UK’s approach towards jurisdiction, extraterritoriality, extractive industry, and economic considerations of a home state – the controversial issues covered in chapter 2.

In the end, the combination of a case study and the interviews has assisted me in achieving my research aim and in exploring the role of the UK in protecting human rights abroad from violating by extractive industries and in understanding the intersection between economic considerations and human rights protection abroad.

3.1 Case study

The major research method used to explore the issue is studying a case – a spatially delimited unit observed at a single point in time (Gerring, 2007, p. 19). In particular, my study has focused on a single home state – a unit which has identifiable spatial boundaries (Gerring, 2007, p. 19).

The choice has been made from the OECD countries as they are adherents to the OECD Guidelines for Multinational Enterprises² and therefore, officially support responsible business conduct. The selection has been made from the countries where the significant majority of TNCs

² The OECD Guidelines for Multinational Enterprises are the most comprehensive set of government-backed recommendations on responsible business conduct in existence today. They provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. The Guidelines were first adopted in 1976 and have been reviewed 5 times since then. Governments adhering to the Guidelines adopted the updated text of the Guidelines at the 2011 50th Anniversary Ministerial Meeting. At present 44 governments are adherents to the guidelines. Retrieved from: www.oecd.org

are domiciled: USA, Canada, France, Germany, the UK, the Switzerland and the Netherlands (Gwynne Skinner et al., 2013, p. 4).

The selection process was guided by nine types of cases identified by Gerring (2007, pp. 89-144) from which extreme case was chosen – a case which has an extreme or an unusual value or is prototypical of some phenomena. The UK case can be considered as an extreme case according to the definition provided by Gerring, as it is, on the one hand, a rich and industrialized state with a number of extractive companies domiciled in its territory; on the other hand, it has declared strong commitment in terms of protecting human rights from violating by business actors. Against this background, intersection between economic considerations and human rights protection at home state level can be best defined by its ideal type (Gerring, 2007, p. 101).

The UK is an example of a state where both objectives – business development and human rights protection are declared to be valuable. This is further evidenced by the fact that the UK is the member of the OECD and the contributor to the adoption of the OECD guidelines as well as the first country to publish a national action plan to implement the UN guiding principles. Furthermore, it is a state party to core human rights treaties, including the ICESCR. Moreover, the choice of the UK was also determined by the fact that a number of lawsuits have been brought in UK courts with regard to extractive industries and human rights abuse. Analysis of court judgments have been essential to answer my third research question and to find out what legal obstacles exist in the UK in terms of human rights enforcement.

Taking into consideration the commitment of the UK with regard to protecting human rights from business sector abuse and its various initiatives in this regard, it can be considered as the “unusual case” (Gerring, 2007, p. 102) against a backdrop of other states with relatively few initiatives regarding business and human rights. Although the case study of the UK does not provide the findings which can be generalized across a larger set of cases (Gerring, 2007, p. 65), it can generate a big picture how human rights protection from business-related harm can be reconciled with economic agenda of the state and what challenges might exist in practice.

Moreover, the choice of this method was determined by the fact that case study offers a rich picture and ensures insights from different angles (Thomas, 2011, p. 21). While focusing on the case of the UK, particular units of analysis (Yin, 2009, p. 29) have been government policy

related to extractive industries and human rights, legislation, the implementation process of the first and the third pillar of the “protect, respect, remedy” framework at the national level, business development policy, lawsuits brought in court and the complaints brought to the UK National Contact Point (NCP). In particular, analysis of government non-binding measures and legally binding documents has been essential to answer my first research question and to find out what measures the UK has taken in order to protect human rights from violations by extractive industries. This corresponds to the first pillar of the UN guiding principles.

UK business development policy has been explored in order to find out how the UK approaches the issue of strengthening human rights protection from business-related harm at policy level, considers it as interference with free market economy and as politically disadvantageous step, or deems it conducive to business development and beneficial from economic point of view.

Discussion of business-related lawsuits brought in UK courts and complaints brought under the OECD guidelines complaint mechanism has shed light on access to judicial and non-judicial remedies for human rights violations committed abroad and existing obstacles in this regard. Therefore, it was useful to answer my third research question as well as reflected how the third pillar of the UN framework has been implemented in the UK.

Therefore, the different angles from which the issue has been addressed are the following: government approach and its policy, legislation enshrining the approach of a legislative body, and judicial and non-judicial grievance mechanisms.

The major source of evidence has been documents, as they play an explicit role during data collection (Yin, 2009, p. 103). The documents have provided useful information about the measures taken by the UK as well as about its overall business and human rights agenda. In order to get further information about lawsuits and complaints, resources available on the websites of certain organisations have been used, such as: Business and Human Rights Resource Centre, Institute of Human Rights and Business, CORE and Global Witness. They have been chosen based on their focus on business and human rights issues and wide range of work done in this regard. In order to get further information about the facts of the cases, news articles published by International Business Times and the Guardian have been used.

In conclusion, case study has served as a useful method to provide an in-depth understanding of the issue, as in-depth knowledge of an individual case can be more useful than superficial knowledge about lots of examples, because it is more likely to gain better understanding of the whole by focusing on a key part (Gerring, 2007, p. 1).

3.2 Interviews

Another important source of information during the research has been interviews. Semi-structured interviews are advantageous, as they give a great deal of leeway in how to reply as well as ensure flexibility of interview process (Bryman, 2008, p. 438). This type of interview has proved to be useful in terms of obtaining relevant information and giving interviewees the opportunity to respond freely. I have used interview guides in order to cover certain topics as well as picked up on things said by interviewees. I have remained neutral during the interview and avoided leading questions. All the interviews have been audio-recorded and transcribed with the consent of interviewees.

Interviewees have been chosen based on their actual involvement in business and human rights issues and their knowledge in this regard. In total three interviews have been conducted. The number of interviews was determined by the fact that the major data has been obtained through documentary study, as the research has mainly focused on exploring documents, lawsuits and complaints. The evidence obtained through interviews has been used as additional information in order to incorporate standpoints of different sectors. Certain non-governmental organisations have refused to participate due to the lack of capacity to respond to the large amount of requests for interviews they receive on a regular basis. Therefore, civil society perspective is not well represented in the study.

Interview has been conducted at Foreign and Commonwealth Office (FCO) – the body which bears significant responsibility for business and human rights within the UK government. Information provided by FCO has been useful to approach the issue from government perspective.

In order to approach the issue from business perspective, I have conducted interview at a mining company headquartered in the UK. The choice was determined by the sector in which the company is operating as well as by its willingness to participate in the research. Information

obtained through interview has shed light on company's approach towards the issue of business and human rights. The representative of a mining company has not explicitly given written consent to be identified by name in thesis. Therefore, in order to follow ethical standards, the name of the interviewee and the company are not disclosed.

Furthermore, I have conducted interview with the PhD candidate in law - Rachel Chambers, who has experience in business and human rights, and is interested in accountability of corporate actors and the issue of extraterritoriality. She has provided significant secondary data about business and human rights from legal perspective. The importance of her approach is further determined by the fact that she is not connected either with government or with business sector. Therefore, she does not have a direct economic interest in the issue area.

In light of the above, information obtained through interviews has shed further light on the role of the UK in protecting human rights abroad as perceived from government, business and a third party perspective.

3.3 Data Material

Documents, lawsuits, complaints and information obtained through interviews have been the major sources of evidence during the research. Major advantage of documents is that they reflect the official position of the UK, and they are reliable and publicly available.

All national legislative acts and non-binding measures which have practical implications from business and human rights perspective have been explored during the study. As for the business development policy, those publicly available documents have been analysed which contain information about UK economic agenda and also refer to human rights considerations. With regard to access to remedy, only those lawsuits and complaints have been explored which involved extractive industries.

Major advantage of interviews is that they are targeted and focused directly on research area (Yin, 2009, p. 102). Data obtained through interviews have provided further explanations and have been beneficial to approach the issue from government, business and a third party perspectives.

Therefore, the list of the data used during the research is the following:

1. Legally binding documents which are relevant from business and human rights perspective.
2. Government non-binding measures – publicly available documents which enshrine the policy related to extractive industry, and business and human rights in general.
3. Business development policy – publicly available documents which encompass government priorities and its approach towards business development.
4. Lawsuits – legal claims related to human rights abuse by extractive industries abroad and their outcomes.
5. Complaints related to extractive industry and human rights violations abroad brought under the OECD guidelines complaint mechanism and final statements of the UK NCP.
6. Approaches and opinions of FCO, a mining company and a PhD candidate obtained through interviews.

4. The UK's Duty to Protect Human Rights

This chapter discusses the findings of the research with regard to the measures taken by the UK in order to ensure responsible extraterritorial corporate behaviour in extractive sector. The data material is discussed in the light of two different theoretical approaches: the one based on “market discipline”, and another based on “business case of CSR”. Moreover, the results provide insight in the UK's approach towards the issues of jurisdiction and extraterritoriality.

4.1 Legally Binding Measures

Legislative acts play a significant role in protecting human rights as they prescribe legally binding norms which are characterized by higher degree of enforceability compared to soft law framework. In the absence of the international rule obliging states to ensure human rights protection extraterritorially, states are able to adopt different measures at their own discretion with the aim of protecting human rights abroad from business-related harm.

Mandatory requirement of reporting on human rights issues can be considered as one of the important mechanisms to ensure corporate accountability. In 2012 the UK introduced new regulations with regard to non-financial reporting which requires companies to produce a strategic report. The aim of these new regulations is to increase companies' accountability towards shareholders and the public by requiring quoted companies to report on human rights issues. These regulations which made amendments to *the Companies Act 2006* came into force in October 2013.

According to Section 414C inserted in the *Companies Act 2006* by its amendment *the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013* the primary objective of the strategic report is to enable members of the company to evaluate how the directors have performed their duty to promote success of the company. Notably, in this context integrating human rights considerations in the strategic report is considered conducive to company's success which corresponds to "business case of CSR" approach in the sense that taking human rights issue into account while doing business is deemed beneficial for a company itself.

As explained by Financial Reporting Council (2014, p. 4), the strategic report is a "medium of communication between a company's directors and its shareholders". While it is addressed to shareholders and primarily serves their interests, other stakeholders might be interested in it as well.

The new regulations were considered as a "modest change to the pre-existing legal requirements" by Financial Reporting Council (2014, p. 3). However, it also acknowledged that this change could serve as a catalyst for companies to prepare concise and clear reports (Financial Reporting Council, 2014, p. 3).

Rachel Chambers (Interview, 2015) has pointed out that it is not clear how efficient this reporting requirement can be. According to her, it is not clear-cut whether it makes companies truly report on human rights, because a lot of reporting can become a marketing tool: Companies might disclose information that they want to tell rather than engaging with difficult issues.

In light of the above, although guaranteeing corporate reporting on human rights issues at legislative level is an important step in the right direction, its efficiency can still be questionable.

Moreover, according to Section 414C (7) information about environmental matters, social, community and human rights issues are included in strategic report “to the extent necessary for an understanding of the development, performance or position of the company’s business.” Such formulation leaves considerable leeway to directors with regard to the content and form of human rights reporting. However, this legislative requirement can still serve an important function of increasing the awareness of companies about what is expected from them. Ultimately, it can be capable of producing efficient results in the long-term perspective.

The adoption of *Corporate Manslaughter and Corporate Homicide Act 2007* was an important step towards holding corporations accountable for manslaughter resulting from a gross breach of relevant duty of care (Section 1). Notably, this was the first act which envisaged the criminal liability of corporations. However, the major drawback of this act is that its territorial application is restricted only to the UK and it does not have extraterritorial implications (Section 28). This indicates that the UK is reluctant to exercise criminal jurisdiction over its corporations for acts committed abroad.

Modern Slavery Act 2015 which has recently been adopted is a significant legislative act which is “the first of its kind in Europe, and one of the first in the world” (UK Home Office, 2015). It deals with slavery, servitude, forced or compulsory labour and human trafficking. The significance of this act from business and human rights perspective is that it requires commercial organisations with specified amount of turnover to prepare slavery and human trafficking statement for each financial year (Section 54). The statement must include the information about what steps the organisation has taken in order to ensure that slavery and human trafficking is not taking place in any part of its business and supply chains (Subsection (4) of Section 54). Moreover, this duty is legally enforceable by the Secretary of State through civil proceedings (Subsection 11 of Section 54). Although this is an important initiative from business and human rights perspective, it is not clear-cut how efficient it will be, taking into consideration the general drawbacks of reporting requirements which were mentioned above.

There has been an attempt to effectively regulate activities of UK corporations within the UK territory as well as abroad. However, this initiative lacked political will and was eventually rejected. *Corporate Responsibility Bill* presented by Linda Perham obliged companies to prepare

and publish reports on environmental, social and economic impacts, guaranteed consultations with stakeholders, enshrined parent company liability, set forth duties and responsibilities of directors, and ensured remedies for aggrieved persons. However, eventually it was not adopted.

In general, the UK does not support the idea of enacting legally binding instrument in this regard because it is not good for business (Interview, FCO, 2015).

According to the mining company (Interview, 2015), certain challenges might arise in terms of regulating extraterritorial corporate behaviour by legislation: in particular, one such challenge can be the overlap between the UK law and the domestic law of the country where the company is operating. The interview with a company representative revealed that the importance of compliance with the domestic law of a country where the company operates is determined by the necessity of obtaining formal licenses, for example, a mining license. Apart from formal licenses, social license is also of a significant importance for a company. If the host community does not accept the company as part of their local economy and protests against its operations, it might cause adverse impact for a company from reputational and operational perspective (Interview, 2015). Therefore, the standpoint of a mining company corresponds to the approach of "business case of CSR" in the sense that neglect of human rights considerations in a country where the company operates can negatively affect its viability by causing delays, disruptions, costs, etc.

On the other hand, it is not clear-cut whether legally binding norms can offer efficient solution in this regard. The mining company has identified certain obstacles which might hinder effective protection of human rights while operating abroad. One such obstacle can be resourcing: It is of significant importance to have right people in place, who not only understand the subject matter technically, but also make a linkage from human rights perspective. Engineers' approach tends to be linear and technical. Furthermore, extractive companies are operating in less developed parts of the world where human rights of people are often not protected by their government. The mining company considers that the ideal way is to address potential human rights issues before they actually emerge and take mitigation measures to avoid adverse impacts. For example, one of such measures is having resettlement working groups that start negotiating with local community

years in advance of any kind of resettlement that is necessary for new operations or for the extension of existing operations (Interview, 2015).

On the other hand, Chambers (Interview, 2015) has pointed out that the positive outcome of enacting legislation in this regard will be that human rights standards elsewhere become equivalent or close to standards which exist in the UK. She also considers that human rights standards are minimum standards and would require companies to do their business in a way that respects human rights without imposing excessive burdens on them. She also considers that it would be better to ensure human rights protection from business-related harm on international level and rather than only in the UK (Interview, Rachel Chambers, 2015).

In light of the above, there have been certain legislative developments from business and human rights perspective in the UK, which are primarily focused on reporting requirements. However, there is no legally binding act which effectively regulates corporate conduct and ensures respect for human rights abroad.

4.2 Non-Binding Measures

The UK has demonstrated more willingness with regard to ensuring protection from business-related human rights harm abroad through non-binding measures compared to legally binding ones. This is illustrated by certain initiatives it has adopted with the aim of tackling the issue of business and human rights.

4.2.1 Voluntary Principles on Security and Human Rights

The Voluntary Principles on Security and Human Rights established in 2000 is an important multi-stakeholder initiative related to extractive industries and human rights with UK being one of its founding members. As mentioned by Ruggie, this initiative is an important step and can be seen as complementing the UN guiding principles (Ruggie J. G., 2013, p. 5). This multi-stakeholder initiative is aimed at preventing human rights violations by security forces.

Participants of this initiative take dynamic approach and keep under review these principles. Continuing dialogue is of particular significance as these rules should be adapted to particular contexts and circumstances in order to be efficient.

This document acknowledges the fact that governments are primary duty holders by stressing that they have “the primary role of maintaining law and order, security and respect for human rights”, while companies “have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights” (The Voluntary Principles on Security and Human Rights, 2000). This distinction reflects the approach of current international law, which considers states as primary duty holders and does not impose direct human rights obligations on corporations.

Under this initiative the role of the companies are formulated in the following way: companies should consult regularly with other companies, host and home governments, and civil society to discuss security and human rights, record and report any credible allegations of human rights abuses by public security in their areas of operation to appropriate host government authorities, use their influence to promote the principles with public security (The Voluntary Principles on Security and Human Rights, 2000). Therefore, no stringent responsibility is imposed upon corporations under these principles and no consequences are foreseen if companies fail to fulfil their role.

The voluntary principles specifically refer to the following international human rights documents: the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work. No reference is made to legally binding human rights instruments.

Moreover, within the scope of this initiative the following responsibilities are envisaged for governments: attending plenary meetings, submitting annual reports on efforts to implement or assist in the implementation, etc (Voluntary Principles Initiative – Guidance on Certain Roles and Responsibilities of Governments). These activities are the ones states are “expected to” carry out rather than obliged. On the other hand, the same document provides:

Government participants should take appropriate steps to prevent, investigate, punish and redress human rights abuses within their territories and/or jurisdiction by third parties, including extractive companies and public and private security providers, through policies, legislation, regulations, and adjudication.

In this section emphasis is made on legally binding rules and a formal legal enforcement. However, this enforcement is restricted to territories and/or jurisdiction and does not apply to extractive companies committing human rights violations abroad.

In contrast to the theoretical approach of “market discipline”, this initiative explicitly supports the idea that the promotion of human rights is conducive to other policy objectives. This document acknowledges that these voluntary principles benefit investing countries themselves because they ensure lower company risks, the safeguarding of the reputation of the industry and demonstrate that the country is a responsible destination for investment. Therefore, it can be inferred that this initiative is not deemed as a burden for participating governments, rather it is considered beneficial from economic point of view.

As for the implementation of these principles, the 2013 report on Human Rights and Democracy states that the UK takes active steps to encourage other governments to join voluntary principles on security and human rights, in particular, those countries with significant oil, gas and mineral resources as well as takes measures to encourage UK extractive companies to join the initiative (Foreign and Commonwealth Office, 2014, p. 113).

The commitment of the UK to encourage the implementation of these principles and to promote dialogue on security and human rights challenges in extractive sector is further illustrated by the fact that the British Embassy supported the first round table seminar discussion in Angola on voluntary principles in October 2014. The Embassy stressed the role of voluntary principles in reducing “the operational, legal and reputational risks” which would encourage investment in the country (British Embassy Luanda, 2014).

The major drawback of this initiative is that the rules it sets forth are only principles without any binding force. Participation in this initiative is voluntary and no sanctions are available in case of non-adherence to these principles. On the other hand, the role of these principles in standard setting should not be underestimated. They can still contribute to improving human rights records and can produce positive outcomes in long-term perspective.

In conclusion, this initiative enshrines important principles with regard to extractive industries and human rights protection, places human rights protection on business agenda, acknowledges

the significant role of governments in pursuing human rights protection and reaffirms that states are primary duty holders. Further, it asserts that protection of human rights is beneficial for the development of business as well as for international standing of a particular country; therefore, does not come into conflict with free market and business considerations. However, this initiative is a “platform for mutual learning, joint problem solving, and building best practices” (Fact Sheet - General) – but not the platform for effective protection and enforcement of human rights.

4.2.2 UK National Action Plan Implementing the UN Guiding Principles

The UK has widely acknowledged its commitment to protect human rights in business sector. It was the first country to publish a national action plan to implement the UN guiding principles in 2013 (Foreign and Commonwealth Office, 2013). This can be considered as an indication that the UK is taking business and human rights seriously, taking into consideration the fact that only four states have developed national action plans three and a half years after the endorsement of the UN guiding principles, as provided by UN guiding principles researcher (Horvath, 2015).

In the introduction of the action plan the issue of jurisdiction attracts particular attention: government obligation to protect human rights is restricted to the UK jurisdiction and effective remedy for victims of human rights abuse involving business enterprises is supported within the UK jurisdiction. While in terms of business responsibility to respect human rights both at home and abroad, the less stringent wording is used: “support, motivate and incentivize” (Secretary of State for Foreign and Commonwealth Affairs, 2013).

The UK explicitly acknowledges that there is no general requirement for states to regulate extraterritorial activities of business enterprises domiciled in its territory, but it may choose as a matter of policy to regulate overseas conduct of British businesses. Such regulation lacks binding force and is primarily dependent on the discretion of the government. This document cautiously refers to the extraterritorial reach and commitment of the action plan: “It sends a clear message of our expectation about business behaviour, both in the UK and overseas.” This wording corresponds to the UN guiding principles, which provide: “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations” (Ruggie J. , 2011).

The interview conducted at the FCO revealed that the UK government has held a workshop with civil society and companies, has reviewed the national action plan, considered where it is progressing and where they could do more (Interview, 2015). This is an indication that the national action plan is developing progressively as well as takes into consideration the interests of different stakeholders. This is further illustrated by the fact that the mining company, as mentioned by its representative during the interview, has regular communications with the departments of the UK government which are responsible for the national action plan. Also, national action plan is deemed as a guiding document, because it does not lay out detailed steps which the company has to take (Interview, 2015).

In general, national action plan can be considered as an important document, which identifies the measures taken by the UK government and the new actions planned with the aim of implementing the UN guiding principles. It is a clear demonstration of the government will to ensure protection of human rights alongside business development. However, the issue of jurisdiction and extraterritorial implications of the UK policy remains still problematic and this document lacks commitment on the part of the UK to effectively protect human right abroad, although, as discussed in chapter 2, it is not prohibited under international law to do so.

4.2.3 Business and Human Rights Toolkit

Business and Human Rights Toolkit is an important document which aims to ensure good conduct by UK companies with the involvement of UK overseas missions. This document acknowledges the fact that the UK is "committed to promoting responsible corporate behaviour amongst UK companies operating (or considering potential opportunities for operating) overseas" (HM Government, 2011, p. 4). This is the document which is expressly concerned with the corporate operations carried out abroad.

The toolkit explicitly mentions that "UK registered companies and individuals are breaking UK law if they commit acts of bribery overseas, even if no part of the alleged act took place in the UK" (HM Government, 2011, p. 5). This is a classic example of extending the scope of national legislation extraterritorially. However, no similar provision exists in terms of human rights abuse, which can be considered as a further indication that the UK is reluctant to hold corporations accountable in a home state for violations committed abroad. Furthermore, this

document explicitly mentions that operations of the UK companies overseas may not be challenged in the UK. Therefore, promotional activities are increasingly important (HM Government, 2011, p. 6).

Business and Human Rights Toolkit envisages several measures with the aim of promoting human rights by overseas missions, such as: being aware of allegations arising from company's operations; facilitating and lobbying for discussion and resolution of issues; being aware of the vulnerabilities of indigenous communities and encourage companies to consider this (HM Government, 2011).

Business and Human Rights Toolkit is a significant document as it ensures that the UK overseas missions contribute to the protection of human rights in the territory beyond the jurisdiction of the UK by certain non-binding measures, by having communications with the companies, government and civil society. It explicitly mentions that the UK government does not condone activities of multinational companies or host state inaction which has an adverse impact on human rights. Although this document does not have a legally binding character and does not envisage extraterritorial jurisdiction, it demonstrates the approach of the UK government in terms of promoting responsible behaviour of the companies abroad in compliance with the OECD guidelines.

5. Intersection between Business Development Policy and Human Rights Protection

This chapter discusses the findings of the research with regard to the intersection of the UK business development policy and human rights protection. The results have been derived from exploring government policy, as enshrined in its priority outcomes, national action plan, a charter for business, white paper on its trade strategy, the approach of UK Export Finance (UKEF) and overseas business risks guides. The data material has been analyzed in the light of different theoretical approaches: the one which considers that free market considerations outweigh human rights protection in a home state and another which provides that respect for human rights by corporations are essential in order to avoid financial and reputational risks.

Building Britain's prosperity by increasing exports and investment, ensuring access to resources and promoting sustainable global growth is one of the UK's priority outcomes for 2014-2015. On the other hand, the same document also mentions promoting democratic values and human rights, contributing to the welfare of developing countries and their citizens amongst the purposes of FCO (Foreign and Commonwealth Office, 2014).

Moreover, the UK is striving towards "more liberal market environments internationally in which commerce can flourish which are stable and sustainable over the long term and where transparency, good governance and the rule of law prevail" (Secretary of State for Foreign and Commonwealth Affairs, 2013). This goal encompasses the significance of free market considerations for business development as well as importance of long-term sustainability and the rule of law, which cannot be achieved without having due regard to human rights.

A Charter for Business further articulates the UK government's support to UK business internationally. This document acknowledges that business is considered as one of the means to build the UK's prosperity, and commercial and economic interests constitute one of the major priorities of the government (Foreign and Commonwealth Office, 2011, pp. 1-3). Notably, the Charter explicitly refers to human rights considerations and states that FCO ministers and staff will provide information to UK business and trade associations on developments in foreign policy, including business and human rights (Foreign and Commonwealth Office, 2011, p. 9). This can be considered as an indication that business development is the cornerstone of the government economic policy and the protection of human rights is an indispensable part of this process.

The significance of business development for UK economy is further articulated in its policy regarding strengthening the UK relationships in Asia, Latin America and Africa to support Britain's prosperity and security. FCO teams have provided assistance in securing major business wins in many countries, including for Shell in Korea and Premier oil in Indonesia (Department for Business, Innovations & Skills, 2012, p. 6).

Despite the fact that the government is striving towards reducing regulation and removing unnecessary burden (Department for Business Innovation & Skills, 2013, pp. 2-4), the UK can still be considered as a leader in terms of promoting human rights in business sector at policy

level. The research has revealed that the UK government explicitly supports the approach that development of business and respect for human rights are complementary and not contradictory. For example, acknowledgment of such indivisibility can be found in the ministerial foreword of the national action plan implementing the UN guiding principles, which provides that “the promotion of business and respect for human rights should go hand in hand” (Secretary of State for Foreign and Commonwealth Affairs, 2013). The same commitment is enshrined in the 2013 report on Human Rights and Democracy (Foreign and Commonwealth Office, 2014, p. 112). Furthermore, foreign office Minister with responsibility for conflict issues speaking on behalf of the UK in his speech about UK’s chairmanship of the voluntary principles on security and human rights states that “promotion of business and respect for human rights are indivisible” (Simmonds, 2014).

The significance of Simmonds’ speech is twofold: First, he explicitly acknowledges the importance of oil and gas, which reflects the approach of the government towards economic interests in extractive sector. On the other hand, he provides that the protection of human rights is not only morally justified, “it makes business sense too” and it should be extended not only to extractive sector, but every business sector (Simmonds, 2014).

Further, we can draw parallel to the national action plan where human rights protection is also portrayed as conducive to business development, market’s sustainability and its “potential to generate long-term growth” (Secretary of State for Foreign and Commonwealth Affairs, 2013). This action plan aims to ensure that the “companies operate to the same high standards everywhere without unfair costs or unnecessary regulatory burden” – which clearly indicates the UK’s approach towards extraterritorial reach of these standards, and reconciling protection of human rights with free market and deregulation policy.

The willingness of the UK government to integrate human rights considerations into business development agenda is further illustrated by the fact that UKEF, which provides help to businesses of any size, is unusual among other Export Credit Agencies as it has Export Guarantees Advisory Council (EGAC) - a statutory body which comprises 8 members. EGAC provides advice to UKEF and its ministers on the policies UKEF applies when doing business, including environmental impacts and human rights (Export Guarantees Advisory Council).

While assessing applications, UKEF abides by the OECD documents and takes into consideration whether the environmental, social and human rights impacts of the project are acceptable. If the project does not meet those standards, UKEF can consult with the applicant and project sponsor with regard to improving the standards as well as can at its absolute discretion reject support for an export to a project which is deficient in these respects (UK Export Finance, 2014, pp. 1-3). The guidance to applicants cites UN framework and acknowledges that states should take additional steps to protect against human rights abuses by business enterprises that receive substantial support from state agencies, such as export credit agencies (UK Export Finance, 2014, p. 12). More importantly,

Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State (UK Export Finance, 2014, p. 12).

Such wording is consistent with the theoretical approach discussed in chapter 2 which considers that it is in the economic interest of the state to ensure that human rights are protected from business-related harm.

The commitment of the government to promote respect for human rights amongst UK companies operating abroad is further illustrated by the Overseas Business Risks guides, which contain useful information related to human rights issues. For example, "Overseas Business Risk Angola" explicitly mentions that the UK government stands ready to "help British firms with advice on their political and reputational risk management" (Foreign and Commonwealth Office, 2014).

In light of the above, the UK's business development agenda reveals that economic and commercial interests are of paramount importance for Britain's prosperity. The official approach of the UK towards business and human rights issue is that they are equally valuable and complementary with each other. Protection and promotion of human rights in business sector is considered not as an impediment to business development, on the contrary, having due regard to human rights considerations is deemed necessary for avoiding reputational and financial risks,

and for ensuring long-term economic growth. It can be concluded that prevention of business-related human rights harm is seen to be in the self-interest of UK businesses and the government.

6. Access to Remedy for Business-related Human Rights Harm

It is of paramount importance that appropriate remedies are ensured for victims of human rights abuse, without which human rights norms can be considered aimless. Access to remedy constitutes the third pillar of the UN guiding principles and covers judicial as well as non-judicial remedies. This chapter discusses the findings of the research with regard to access to judicial and non-judicial remedies in the UK for business-related human rights harm. The results have been derived from exploring lawsuits brought in UK courts as well as complaints brought under the OECD guidelines complaint mechanism. These findings provide insight how the issue of jurisdiction and parent company liability is addressed in the UK.

6.1 Access to Judicial Remedies

A number of lawsuits have been brought in British courts with the aim of seeking redress for human rights violations committed by extractive companies outside the territory of the UK. Evaluation of the court judgments provides answer to what extent access to judicial remedies is ensured in the UK.

The major legal obstacle which is often referred to while discussing access to judicial remedies in a home state is the issue of jurisdiction and the common law doctrine of *forum non conveniens* explained in chapter 2. As the research has revealed, under certain circumstances *forum non conveniens* doctrine does not constitute an obstacle for bringing lawsuits in the UK.

Connelly (A.P) v. R.T.Z Corporation Plc and others is an important case which deals with the issue of human rights violation by a foreign subsidiary of an English company. It produced a landmark decision with regard to exercising jurisdiction over the acts committed abroad. The plaintiff was Edward Connelly, who for a period of about five and a half years was employed by Rossing Uranium Ltd. ("R.U.L."), which carried on the business of mining uranium at Rossing in

Namibia. The plaintiff was diagnosed cancer of the larynx which was claimed to be attributed to inhaling silica uranium and its radioactive decay products at the mine. The House of Lords accepted this case because the local forum in Namibia would not provide the plaintiff the required financial assistance, whereas such financial assistance would be available to him in England, which was exceptionally relevant factor in this context. House of Lords ruled that substantial justice could not be done in the appropriate forum, but could be done in that jurisdiction where the resources were available. As the case required highly professional representation, by both lawyers and scientific experts, and such representation could not be achieved in Namibia, the Namibian forum was not one in which the case could be tried more suitably for the interests of all the parties and for the ends of justice (*Connelly (A.P) v. R.T.Z Corporation Plc and others*, 1997).

The approach of the court towards the doctrine of *forum non conveniens* is of particular significance in this case. This is an important ruling in which non-availability of financial assistance in Namibia was considered as an exceptionally relevant and decisive factor for asserting English court jurisdiction.

Another important case related to the issue of jurisdiction and *forum non conveniens* doctrine is *Lubbe v. Cape Plc*. In this case over 3000 plaintiffs brought lawsuit for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos and its related products in South Africa. The defendant was a public limited company incorporated in England. The House of Lords held that the plaintiffs would have no means of obtaining the professional representation and the expert evidence in South Africa, which was essential for deciding the claims justly, and dismissal of the case in England would constitute a denial of justice. Taking into consideration the special and unusual circumstances in this case and unavailability of funding and legal representation in South Africa, the proceedings should continue in England (*Schalk Willem Burger Lubbe (Suing as Administrator of the Estate of Rachel Jacoba Lubbe) and 4 Others and Cape Plc. and Related Appeals*, 2000).

Such interpretation of the doctrine of *forum non conveniens* in both landmark cases prove the legal possibility of bringing lawsuits in UK courts when human rights violations occur abroad.

The most recent case related to extractive industry and human rights abuse is the lawsuit brought by members of Bodo community in London High Court. In this case 15000 plaintiffs sued Shell in order to seek compensation for oil spills. The 2014 preliminary ruling stated that Shell could be held responsible for spills from their pipelines if the company failed to take reasonable measures to protect them from malfunction or from oil theft (Business and Human Rights Resource Center, 2015).

Eventually, in January 2015 Shell agreed to an out of court settlement of £55 million with the Bodo community. As a result the Nigerian victims will receive compensation (Business and Human Rights Resource Center, 2015). As pointed out by legal researcher of Business and Human Rights Resource Centre, the court decision in this case “could have potentially set an important legal precedent and clarified the position of English courts for future corporate human rights lawsuits” (Aba, 2015).

According to the Institute for Human Rights and Business, a legal action against Shell produced much more important consequences than a ground breaking UN report, which found serious health risks derived from oil pollution, but did not result in any real progress (Frankental, 2015). As Frankental (2015) concluded, while getting compensation is of great importance for the affected community, the wider ramifications of this case is much more significant as it can contribute to greater accountability of companies.

The lawsuit against Shell demonstrates the advantage of a legal action over non-binding mechanisms. Apart from the possibility of getting compensation, lawsuits are also capable of preventing other companies from human rights abuse because of its adverse impact on their reputation.

One more important case is a lawsuit brought by a group of Columbian farmers against British Oil Company BP alleging that an oil pipeline caused serious damage to their land and crops. According to International Business Times, it is the first time BP faces legal proceedings in UK court for its actions overseas (Lee, 2014). Although the proceedings are on-going and the outcome of the lawsuit is still unknown, this case might still have a significant international implication. It reaffirms the possibility of bringing claims in UK court against TNCs for their activities abroad.

On 25 April 2012 the Court of Appeal in London delivered a landmark judgment with regard to an employee's claim which alleged health injury due to exposure to asbestos during employment. The court found that the parent company Cape plc owed duty of care to employees of its overseas subsidiary and identified the circumstances when the parent company can be responsible for health and safety of its subsidiary's employees: "(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection" (David Chandler v. Cape Plc, 2012). This is a groundbreaking judgment which ensures the possibility of holding parent company responsible for harm inflicted upon subsidiary's employee and can serve as a significant precedent for lawsuits of a similar nature.

2014 conference "transnational corporate human rights abuses: delivering access to justice" held at the Law Society in London suggested that there have been important developments in the last two decades in UK towards access to remedy for victims of corporate harm, principally through civil claims (Filip Gregor et al., 2014, p. 26). Evidence disclosure procedures and group actions available in UK law were considered to contribute to practical and legal feasibility of such claims (Filip Gregor et al., 2014, p. 26). However, they have identified certain setbacks as well, such as stringent proportionality requirement, which requires that the expense incurred in running the case should be proportionate to its value, which in combination with Rome II Regulations has affected financial viability of running these cases (Filip Gregor et al., 2014, pp. 26-27).

According to the report "the Third Pillar – Access to Judicial Remedies for Human Rights Violations by Transnational Businesses", earliest cases related to human rights violations committed abroad were funded by legal aid. However, this provision has been greatly limited by government policies which reduced legal aid funding generally in the UK (Gwynne Skinner et al., 2013, pp. 9-10). Another significant drawback in terms of access to judicial remedies is the absence of a specific statute which deals with criminal liability of companies for human rights

violations outside the UK. All the cases which have been brought so far were civil claims (Gwynne Skinner et al., 2013, p. 7).

In light of the above, UK judicial bodies play significant role in ensuring access to judicial remedies for the victims of business-related harm abroad. Advantage of legal proceedings is that they are capable of preventing further violations due to its adverse impact on the reputation of corporations. However, certain drawbacks still persist which need to be addressed in order to ensure access to effective remedy for all victims abroad.

6.2 Non-judicial Grievance Mechanism – the OECD Guidelines Complaint Mechanism

Each adhering country to the OECD guidelines is obliged to set up a NCP, who among other responsibilities is implementing the OECD guidelines complaint mechanism. The complaint can be brought by any interested party: community affected by company's activities, non-governmental organisations, employees or trade unions (Department for Business, Innovation & Skills, 2014, pp. 6-7). The role of the NCP is limited to facilitating mediation between the parties. If the agreement cannot be reached, the NCP in its final statement determines whether the OECD guidelines have been violated and, if necessary, provides recommendations to the company. Therefore, this complaint mechanism does not have a legally binding character and the final statements issued by the NCP are not subject to formal enforcement.

This complaint mechanism has a number of advantages: the procedures are not lengthy and are completed within a year of receiving a complaint (Department for Business, Innovation & Skills, 2014, p. 6); the issue of jurisdiction and *forum non conveniens* does not emerge while considering a complaint; it does not require financial costs as opposed to trials; mediation ensures that none of the parties are winners or losers and the outcome of the case is mutually acceptable.

Evaluation of the complaints brought against extractive industries is essential to explore the role of the UK NCP in ensuring access to non-judicial remedies.

The UK NCP considered the complaint brought by Global witness in 2007, which alleged that Afrimex had breached the OECD guidelines by paying taxes to rebel forces in the Democratic

Republic of Congo (DRC), sourced minerals from mine that used child and forced labour, who worked under unacceptable health and safety practices. After Afrimex withdrew from mediation, the NCP issued its final statement concluding that Afrimex failed to meet the requirements of the OECD guidelines enshrined in Chapter II (General Policies) and Chapter IV (Employment and Industrial Relations) (UK NCP, 2008). However, according to Global Witness, six months after issuing its final statement, the NCP had not received information from Afrimex with regard to implementing recommendations. Moreover, Global Witness urged the UK government to take measures to verify that Afrimex ceased trading in minerals as well as expressed concerns regarding the limitations of voluntary guidelines and the absence of legal powers to enforce the NCP decisions (Global Witness, 2009, p. 69).

This case illustrates the major drawback of the OECD complaint mechanism: adherence to the recommendations is primarily based on the good will of the company and the government does not have any effective tool to ensure that the activities amounting to the breach of the OECD guidelines are terminated.

Successful mediation was conducted between WWF International and SOCO International plc, after the UK NCP considered the complaint alleging that the company conducted oil exploration operations within Virunga National Park in the Democratic Republic of Congo, which risked negative impact on the local communities and the environment. The parties reached an agreement in which SOCO declared its commitment not to conduct any operations in any other World Heritage Site as well as acknowledged that while undertaking environmental impacts assessment and human rights due diligence the processes would be “in full compliance with international norms and standards and industry best practice, including appropriate levels of community consultation and engagement on the basis of publicly available documents” (UK NCP, 2014, p. 7).

In this case the UK NCP played an important role not only in terminating operations which adversely affected human rights, but provided a basis for company’s future compliance to international standards.

Another important complaint was filed by Survival International on behalf of indigenous group – Dongria Kondh against UK registered mining company - Vedanta Resources in relation to the

company's operations in the Niyamgiri Hills (UK NCP, 2009). Vedanta denied that it had breached the Guidelines and rejected the offer of conciliation/mediation. The UK NCP upheld the allegations of Survival International and made the following conclusions: the project had an environmental, and health and safety impact on the DongriaKondh; Vedanta failed to assess the impact of the construction of the mine and did not ensure an adequate and timely consultation with indigenous peoples. The UK NCP provided recommendations to Vedanta to bring its activities in compliance with the OECD guidelines (UK NCP, 2009). According to Survival International's findings, Vedanta failed to follow the UK NCP recommendations. The UK NCP in its follow-up statement encouraged the parties "to engage with each other in order to achieve a mutually satisfactory outcome" (UK NCP, 2010, p. 1).

This case further illustrates that the NCP complaint mechanism lacks efficiency and does not ensure effective remedy when the corporation fails to follow the recommendations set forth in the final statement. Notably, according to the information published by the Guardian, the final victory of Dongria Kondh was achieved after the Supreme Court of India in its landmark decision ruled that before the project could continue the affected communities had to be consulted. Vedanta's proposal was unanimously rejected at the "country's first environmental referendum" which marked a major human rights' victory over the interests of industry (Woodman, 2014).

Two significant conclusions can be drawn from the above mentioned case: 1. the final and effective solution of the human rights issue was achieved only through court litigation and the non-judicial grievance mechanism failed to offer appropriate remedy to the victims; 2. neglect of human rights and environmental considerations produced adverse financial implications for the corporation itself and adversely affected company's reputation.

In light of the above, although the OECD Guidelines complaint mechanism has a number of advantages, it cannot be considered as an effective grievance mechanism due to the absence of enforcement mechanism which ensures company's adherence to the recommendations issued by the NCP.

7. Conclusion

The research aimed to explore the role of the UK in protecting human rights abroad from violations by extractive industries. Case study has been conducted in the light of two different theoretical perspectives, and has tried to find out whether the UK gives priority to business development over human rights protection or considers that responsible corporate behaviour is conducive to economic development. Controversial issues such as home state responsibility, jurisdiction and extraterritoriality, home state regulation of corporate conduct, which have attracted wide attention in academic literature, have been explored in a particular local context.

The findings provide that the UK does not assume legal responsibility for human rights violations committed by its corporations abroad. It opposes the idea of extending human rights obligations which it has undertaken by a number of international treaties beyond its territory. There have been important legislative developments in the UK which have practical implications from business and human rights perspective. However, there is no legislative act which effectively regulates corporate behaviour abroad, although it is not prohibited under international law to do so.

The strategy chosen by the UK is the evidence of its commitment to avoid business-related human rights harm. As the research has revealed, the UK's role in protecting human rights abroad is assumed to be prevention of violations through standard-setting, promotional activities, dialogue, encouragement, and convincing business entities that respect for human rights is essential in order to avoid financial and reputational risks. Therefore, at the home state level, priority is given to preventive measures and incentivising business entities to avoid adverse impact on human rights, rather than imposing legally binding human rights obligations on corporations.

Contrary to the approach of "market discipline", the UK supports the standpoint that ensuring responsible corporate behaviour is in the economic interests of a state. It has taken certain non-binding measures in order to implement the UN guiding principles, and has officially declared that promotion of business and respect for human rights should go hand in hand. Moreover, the official position of the UK, as enshrined in different government documents, is that protection of human rights from business-related harm is necessary for ensuring long-term economic growth.

The UK business development policy can be considered as an example of how business interests can be reconciled with human rights considerations.

Victims of human rights abuse abroad can access UK courts in order to seek remedy, but certain obstacles still exist in this regard, such as costs of legal proceedings. Moreover, all the lawsuits that have been brought so far have been civil lawsuits, and there is no legal act which envisages criminal liability of corporations for their activities abroad. As for the non-judicial grievance mechanism – the OECD guidelines complaint mechanism, although under certain circumstances it can result in successful mediation, its major drawback is the absence of enforcement mechanism which ensures company's adherence to the recommendations issued by the NCP.

In conclusion, the UK has taken number of initiatives with the aim of protecting human rights from business-related harm. However, certain challenges still exist which need to be addressed in order to enhance the role of a home state in protecting human rights and to hold extractive companies accountable for violations committed abroad.

8. Recommendations

Taking into consideration the findings of the research, the following recommendations are given to the UK in order to enhance its role in protecting human rights abroad:

1. As the extractive sector is characterized by high risk of human rights violations, it is advisable to adopt an overarching policy with regard to extractive industry and human rights, which covers not only security issues (covered by the Voluntary Principles on Security and Human Rights) but wide range of issues, such as: pollution, resettlement, indigenous rights, etc. As the resources are mainly located in undemocratic states, which do not often take measures to ensure effective protection of human rights, the involvement of home states is of utmost importance in this regard.
2. It is recommended to extend the scope of *Corporate Manslaughter and Corporate Homicide Act 2007* extraterritorially in order to envisage responsibility of UK Corporations for a gross breach of relevant duty of care, when it occurs beyond the territory of the UK. This will ensure that the companies maintain the standards existing in

the UK while operating abroad. Legally binding norms will serve a preventive function and will hold corporations accountable when their activities amount to crime.

3. Take measures to remove financial obstacles when victims of human rights abuse abroad bring civil lawsuits in UK courts. This is of utmost importance in order to ensure access to effective remedy. When challenging human rights violations is difficult or impossible in a host state, adjudication at home state level can be the best solution. Therefore, it is advisable to remove the barriers which might hinder access to remedies in the UK.
4. Strengthen the OECD guidelines complaint mechanism in order to ensure adherence to the recommendations issued by the NCP. Although this mechanism was intended to be non-binding, stricter follow-up measures can still be introduced in order to ensure meaningful outcomes from human rights perspective.

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Charter of Economic Rights and Duties of States

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Vienna Convention on the Law of Treaties

Appendix I

Interviews

Interviewee	Sector	Type of Interview	Date
Foreign and Commonwealth Office	Government	Semi-structured, face-to-face	25 March 2015
Rachel Chambers, PhD Candidate in Law	–	Semi-structured, via Skype	15 April 2015
Mining Company	Business	Semi-structured, face-to-face	20 April 2015

Appendix II

Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework³

Endorsed by the UN Human Rights Council in June 2011

The State Duty to Protect Human Rights	The Corporate Responsibility to Respect Human Rights	Access to Remedy
States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.	Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.	As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.
States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.	The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.	States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.
In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;	The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;	States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

³ Retrieved from: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

<p>(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;</p> <p>(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;</p> <p>(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.</p>	<p>(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.</p>	
<p>States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.</p>	<p>The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.</p>	<p>States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms.</p>
<p>States should exercise adequate oversight in order to meet their International human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.</p>	<p>In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:</p> <p>(a) A policy commitment to meet their responsibility to respect human rights;</p> <p>(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;</p> <p>(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.</p>	<p>To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.</p>
<p>States should promote respect for human rights by business</p>	<p>As the basis for embedding their responsibility to respect human</p>	<p>Industry, multi-stakeholder and other collaborative initiatives that</p>

<p>enterprises with which they conduct commercial transactions.</p>	<p>rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:</p> <ul style="list-style-type: none"> (a) Is approved at the most senior level of the business enterprise; (b) Is informed by relevant internal and/or external expertise; (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise. 	<p>are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.</p>
<p>Because the risk of gross human rights abuses is heightened in conflict affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:</p> <ul style="list-style-type: none"> (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships; (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence; (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; (d) Ensuring that their current 	<p>In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:</p> <ul style="list-style-type: none"> (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations; (c) Should be ongoing, 	<p>In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:</p> <ul style="list-style-type: none"> (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes; (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access; (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation; (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a

<p>policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.</p>	<p>recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.</p>	<p>grievance process on fair, informed and respectful terms; (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake; (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights; (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; Operational-level mechanisms should also be: (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.</p>
<p>States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.</p>	<p>In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should: (a) Draw on internal and/or independent external human rights expertise; (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.</p>	
<p>States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related</p>	<p>In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their</p>	

<p>policy objectives with other States or business enterprises, for instance through investment treaties or contracts.</p>	<p>impact assessments across relevant internal functions and processes, and take appropriate action.</p> <p>(a) Effective integration requires that:</p> <p>(i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;</p> <p>(ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.</p> <p>(b) Appropriate action will vary according to:</p> <p>(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;</p> <p>(ii) The extent of its leverage in addressing the adverse impact.</p>	
<p>10. States, when acting as members of multilateral institutions that deal with business-related issues, should:</p> <p>(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;</p> <p>(b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;</p> <p>(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and</p>	<p>In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:</p> <p>(a) Be based on appropriate qualitative and quantitative indicators;</p> <p>(b) Draw on feedback from both internal and external sources, including affected stakeholders.</p>	

human rights challenges.		
	<p>In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:</p> <ul style="list-style-type: none"> (a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences; (b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved; (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality. 	
	<p>Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.</p>	
	<p>In all contexts, business enterprises should:</p> <ul style="list-style-type: none"> (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements; (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they 	

	operate.	
	Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.	