

Human rights and conflict

1 *Human Rights, Natural Law Reasoning and Christian ethics*

- 1.1 Human rights can be defined as inalienable fundamental rights to which every person is entitled simply by virtue of being human. Many would claim that the concept of rights is strong within the scriptures. God's endowing of human beings with his image means that humans have worth and this is a source of rights.¹ It can be discerned from the biblical narrative that God is wronged by injustice and has the right to hold humans accountable for injustice. Thus, for example, in Isaiah 1:17, the prophet says:

"Seek justice, rescue the oppressed, defend the orphan, and plead for the widow".

We can see that the poor and those left helpless or abandoned are wronged by their destitution implying that certain protections pertain to all human beings. Therefore Wolterstorff² among others insists there is an essential 'recipient-dimension' (as opposed to an 'agent-dimension') in the scriptural perspective of the moral order.³

- 1.2 However we cannot read from the Bible an unequivocal endorsement for human rights as the scriptures originate from a time long before the development of a concept of intrinsic individual rights. Indeed it is suggested that there are no means of expression in Hebrew, Greek, Latin or Arabic for 'a subjective right' until about 1400 AD. Some would argue that, being a 'modern' concept, human rights theory is essentially secular and owes little to a biblical or religious heritage. A French interpretation of human rights can be explained as stemming from rationalistic anti-clericalism, where human rights are opposed to the alleged 'divine' rights of monarchs and popes⁴. While the concept of rights may well be a modern concept, there are diverse influences on rights discourse over the ages. 'Natural law' reasoning (binding rules of morality contributing to the common good that can be determined by a study of human nature and which therefore are intrinsically 'universal') has been a strong influence. 'Natural law' can be traced back to Aristotle and the ancient Greeks, and some would argue that the concept of an inalienable 'right' originates from natural law reasoning.
- 1.3 The emphasis in Jewish and Christian traditions on the unique significance of the individual before God was a significant foundation for the development of modern formulation of human rights theory.⁵ Diverse Christian influences before and during the 1940s played a prominent role as the institution of the United Nations was being created and the Universal Declaration of Human Rights (UNDHR) drafted.⁶ Since 1948, Roman Catholic teaching has remained consistent in holding that natural law has inspired and continues to give vitality to rights-talk especially the UNDHR.⁷ Protestant theologians including Bonhoeffer have frequently appealed to a more immediate Christological basis⁸, yet Reed notes that different doctrinal routes frequently converge on shared conceptions on human rights.⁹

¹ For example Genesis 9:6; Duet. 15:9; Lev 25:42-43; Col 3:11

² Nicholas Wolterstorff, *Justice: Rights and Wrongs*, Princeton University Press, 2008 p. 91

³ Reed, E. D. (2009), *Justice: Rights and Wrongs – By Nicholas Wolterstorff*. Conversations in Religion & Theology, Vol 7: 63–70. May 2009

⁴ Perišić, V. Interpretation of human rights in the light of the church fathers, (Conference of European Churches, Church and Society Commission, - CEC CSC -

http://csc.ceceurope.org/fileadmin/filer/csc/Human_Rights/Human_Rights_Training_Manual/HRTM_Interpretation_of_Human_Rights.pdf)

⁵ For a sustained argument in support of using human rights in a theological context, see Reed, E: *The Ethics of Human Rights: Contested Doctrinal and Moral Issues* (Waco, TX: Baylor University Press, 2007).

⁶ See John Nurser, *For all Peoples and all Nations: The Ecumenical Church and Human Rights* (Washington DC: Georgetown University Press, 2005), esp. ch. 5.

⁷ H.E. Msgr. Celestino Migliore, *Intervention by the Holy See at the 58th Session of the General Assembly of the United Nations Organization on the Occasion of the Fifty-Fifth Anniversary of the Universal Declaration of Human Rights* (Wednesday, 10 December 2003) available at <http://www.vatican.va/roman_curia/secretariat_state/2003/documents/rc_seg-st_20031210_human-rights_en.html> (date accessed: 12 Nov 2012).

⁸ A Christologically-focused theology may well embrace a 'natural law' perspective.

⁹ Christianity and Human Rights, in Cushman T (eds) *Routledge Encyclopedia of Human Rights*, NY: Routledge, 2011

- 1.4 The recognition of natural human rights from contemporary Christian statements in declarations in the twentieth century can be traced back to the political philosophy of the secular Enlightenment in the eighteenth century, Suarez's thought in the late sixteenth/early seventeenth century and Ockham's thought in the early fourteenth century, through the canon lawyers of the twelfth century and Church Fathers of the first millennium.¹⁰
- 1.5 Of concern to some Christian theologians is a modern discourse of human rights emerging from the enlightenment period that, at its extreme, might offer an over-optimistic vision whereby through legally enforced protection, each person would relate to others as a self-sufficient individual. In contrast the Jewish/Christian tradition offers a distinctive although not unique imperative that rejects the notion that each individual exists apart from God. Human freedom does not imply that I am free to define 'my rights'. Rather, it is argued, the deepest mystery of human dignity is not achieved by human intellect, but is revealed by God's revelation, achieving its fulfilment in Christ's incarnation. This perspective implies that we treat with caution ideologies that place emphasis on an inherent social value of individual freedom such as may be evident within neo-liberal economic theory or liberal political thought. The challenge is to work with human rights as useful moral concepts capable of informing legal or quasi-legal instruments in such a way that is not integral to a particular political ideology.
- 1.6 Partly with this in mind, we might note that significant divergence of opinion can be found in many aspects of both secular and religious human rights discourse notably with respect to: -
- The balance between civil and political rights on the one hand and social, cultural and economic rights on the other.
 - The nature and role of the nation state in protecting rights
 - Limitations placed on the freedom of speech to address hate speech and incitement to violence
 - Right authority for the use of force to protect rights particularly with respect to military intervention in sovereign states¹¹
 - Individual and/or communal rights to natural capital
 - Whether or how to acknowledge the rights of future generations

2. *The Methodist Church in Britain, Human Rights and Peacemaking*

- 2.1 While Methodist Conference has been vocal on matters of justice and abuse of rights, the theological basis underpinning human rights is rather brief. The last significant report on this subject came to Conference in 1985¹². This report acknowledges a Christian basis for a concern for human rights (as set out by the then British Council of Churches) pointing for example to concepts of "covenant"¹³, "the image of God" and "concern for the least"¹⁴.
- 2.2 In Methodist discourse, rights language becomes particularly meaningful and useful in the context of the strengthening of relationships in community. For example, in March 2012, Methodist Council received a draft theological Statement that underpins the work of the Church in the area of Equalities and Diversity¹⁵. The Statement finds a good basis in Arminian theology¹⁶ for addressing issues of discrimination, abuse and marginalisation. The intrinsic worth of every human being is affirmed through recognition that all are valued to God and are an object of God's love and grace. Yet the Equality and Diversities Statement does not use a language of individual rights to examine issues of racism or abuse,

¹⁰ Perišić, V (CEC CSC)

¹¹ See *Peacemaking: A Christian Vocation* (Methodist and United Reformed Church) for a perspective on this subject.

<http://www.methodist.org.uk/mission/public-issues/peacemaking/peacemaking-a-christian-vocation> Also Clough D and Stiltner B *Faith and Force* (Georgetown University Press, 2007)

¹² Methodist Conference 1985 Agenda, pages 48-60

¹³ "The claim to human dignity is a direct consequence of this tie between humanity and God" *ibid.*

¹⁴ "God has always been on the side of the poor" *ibid.*

¹⁵ <http://www.methodist.org.uk/downloads/coun-MC1245-E&D-070312.doc>

¹⁶ Arminian theology was a significant influence on John Wesley and has been influential in the Methodist movement since. It contrasts Calvinist thinking placing emphasis on the bountiful grace of God through which salvation is made available to every individual. Racism, discrimination, abuse and marginalisation thus represent a sinful denial of God's purposes.

nor does it make judicial or human resource policy remedies a primary focus (although the Methodist Church in Britain has implemented such policies in recent years). Instead the Statement describes a journey to which we are all called to commit together¹⁷.

- 2.3 While official documents of the Methodist Church in Britain might suggest a nuanced position on the theological underpinnings for intrinsic human rights, we can detect from the actions and statements of the Methodist Church a consistent desire for strengthened human rights protections. For example we might note statements relating to the rights of Palestinians and Jewish Israelis in the Middle East, detainees at Guantanamo Bay and water as a basic human right. In the UK context the Church has been vocal on the right to employment for asylum seekers, campaigned against the detention of children of asylum seekers, responded to proposals for extensive new anti-terror legislation proposed by the Cabinet Office in the immediate aftermath of the London 7 July 2005 bombings,¹⁸ appealed for housing and other benefits to continue to be determined on the basis of need¹⁹ and advocated the right to vote for prisoners serving sentence for criminal offences. In 2008, the Joint Public Issues Team of the Methodist, Baptist and United Reformed Church, published a study/prayer resource to celebrate the 60th anniversary of the UN Universal Declaration of Human Rights.
- 2.4 In common with some other Christian traditions in Britain the Methodist Church has sought to be a strong witness to peace. In 2006, the Methodist Church in conjunction with the United Reformed Church published *Peacemaking: A Christian Vocation*. Written during the aftermath of the Iraq intervention this study urged members of churches to be active peacemakers in their varied contexts, working to overcome discord and conflict. This is often difficult, even costly but we note that peacemaking is at the heart of the teaching of Jesus, not an optional extra. The report proposes that our responsibility as Christian people is always to find non-violent solutions to conflict wherever possible. But this perspective has a significant implication. The challenge to find non-violent solutions that assist in establishing security is not then confined to politicians, police and military commanders but faces us all and extends potentially to company executives. The report acknowledges that some church members may be called to fulfil particular roles in conflict transformation, for example in overcoming industrial disputes or in mediating between tense and divided communities threatened by violence at home or abroad. Techniques for conflict transformation are increasingly sophisticated and specialist agencies offer training to resource practitioners in this work.

3. Human rights in practice – Guiding frameworks for business

3.1 Although an international human rights framework has been in place for decades, most companies do not have systems in place that would enable them to demonstrate their support of human rights with any degree of confidence.²⁰ Meanwhile governance gaps leave those whose rights have been violated with no means of redress. The International Bill of Human Rights outlines civil and political rights as well as social, economic and cultural rights. These cover rights in relation to: -

- Political violence, security and conflict (freedom from torture, cruel or degrading treatment, right to political expression and peaceful assembly)
- Self-determination and freedom of movement
- Labour (including right to organise and partake in collective bargaining, non-discrimination, rest and leisure, safe work environment)
- Discrimination, (gender, caste, race, etc)

¹⁷ The Statement reflects on the brokenness of our society and of the human condition; it affirms the diversity of human experience and develops themes of hospitality, inclusion and mutuality. "There is rich diversity in the way human beings are created, and this can give rise to fear, marginalisation and prejudice. Responsibility for such painful reactions lies not with the Creator but the created order, for problems arise when society is not inclusive. It is in this sense that we may say that the divine image we reflect is a broken one and moreover one which finds wholeness of salvation through Christ's own brokenness."

¹⁸ www.methodist.org.uk/index.cfm?fuseaction=opentogod.archiveDetail&year=2005&newsid=12

¹⁹ www.methodist.org.uk/news-and-events/news-releases/church-leaders-say-benefit-cap-will-make-uk-a-darker-less-humane-place-for-us-all

²⁰ Ruggie, J. "Protect, Respect and Remedy: a Framework for Business and Human Rights

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises", Para 25

- Land/property rights
- The right to an adequate standard of living
- Physical and mental health and right of access to health services
- Access to water
- The rights of the child

3.2 Economic development and the promotion of human rights can be mutually reinforcing. Business has been a major source of investment and employment for local communities in the developing world. The formal business sector generates tax revenue which in turn provides the State with resources to help realise the social and economic rights of its citizens. Citizens entering formal employment develop a greater stake and capacity (through their payment of income tax and membership of trade unions, for example) to hold governments to account in the provision of basic services and social provision.

3.3 But the dramatic expansion of capital investment in new markets in recent decades also poses many challenges. There is widespread acknowledgement that in many instances State legislation and institutional capacity for protecting human rights are ineffective. In his report to the UN Human Rights Council, Special Representative to the UN Secretary General, John Ruggie warns that we are living in challenging times: -

“History teaches us that markets pose the greatest risks - to society and business itself - when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability. This is such a time and escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well”.

How the international and business community might best address the governance gaps is a key and contentious issue in the current debate.

4. Protect, Respect, Remedy: The Ruggie Report

4.1 The UN Global Compact www.unglobalcompact.org is a voluntary mechanism which came into being against the backdrop of an international community that was unwilling to agree to international measures for arbitration around specific instances of human rights abuse. It judged this to be the preserve of the national sovereign State. The Ruggie framework www.business-humanrights.org comprises the three pillars of ‘Protect, Respect and Remedy’. Ruggie re-asserts that the primary protection role lies with nation States. Companies have an obligation to respect human rights (the second pillar) and are expected to abide by international standards and to uphold these standards even when national law or government capacity for the protection of rights is ineffective. With respect to the third pillar, remedy, Ruggie outlines the joint responsibilities of States and business. Building on this framework the Ruggie report outlines 29 guiding principles on human rights. This was endorsed by the United Nations Human Rights Council in June 2011 and is now referred to as the UN Guiding Principles.²¹ They are likely to become the norm by which investors and others will examine the management of human rights issues by companies.²²

4.2 There has been much debate around the extent to which it is feasible to oblige businesses to conform to common standards with respect and remedy. Voluntary adherence to international standards is fraught with difficulties, not least as there has often been a tendency to deny any contest between the interests of a company’s business model and the flourishing of local host communities. When such denial permeates corporate culture companies might quite naturally guard their own privileges above the rights of local communities in the interests of a perceived ‘greater good’. In this context companies have often

²¹ United Nations Guiding Principles, www.business-humanrights.org/Documents/UNGGuidingPrinciples

²² See for example James Featherby (Chair, C of E Ethical Investment Advisory Group) in the Foreword to Standard Life’s Business and Human Rights Report 2011.

resorted to the State as the only arbiter in disputes, even in instances where the national legislation is weak or non-existent or where State authorities are conflicted interested parties in a dispute.

- 4.3 Consequently human rights groups and NGOs continue to appeal for companies to be obliged to undertake human rights due diligence. Amnesty International suggests that Ruggie's guiding principles in some aspects do not go as far as standards already adopted at an international level. In the absence of a stronger obligation for companies to assess the wider impact of their operations on human rights Amnesty International (while welcoming many of the Ruggie recommendations) has suggested that the second pillar of the report could constitute little more than a "framework for the willing".

5. Dealing with conflict

- 5.1 Gross human rights abuses are not limited to conflict zones. However in the context of conflict, civil and political rights are particularly threatened. Belligerent parties to conflict (whether State parties or militia) frequently develop business interests or seek to control private enterprise in order to fund their political or military campaign. Conflict today all too frequently envelops local communities and innocent parties through conscription, as hostages, direct targets or as a result of the activities of criminal gangs. When violent conflict comes to an end the parties to conflict may well retain significant influence in their communities. Companies need to be aware of conflict dynamics even after peace has been declared.

5.2 Case Study

Conflict sensitive areas: Sri Lanka

One example of this difficult dynamic can be seen in the context of Sri Lanka following the defeat of the Tamil Tigers (LTTE) in 2009. National elections have returned President Rajapaksa who has since declared that he will be President for life. Meanwhile Tamil politicians have been won over to the ruling party (faced with the choice of a role in government or exile in a political wilderness). Tamil areas of the depressed north and east of the country have seen dramatic increase in new private sector investment. The communities in the north now experience a heavy army presence which has taken over land and resources. Much of the new capital investment in the area is backed by powerful Sinhalese interests, including those of the family and friends of the President. The killing of an estimated 30,000 civilians in the military's final onslaught in 2009 goes barely acknowledged, while political violence is still rife and the politically marginalised Tamil population have struggled to make their grievances heard. In this context private enterprise has the potential to promote economic development, raise incomes and contribute to reconciliation but equally has the potential to perpetuate dispute, conflict and marginalisation. There is much optimism within Sri Lanka over the potential for the economy to continue to expand. Whether this will offer a peace dividend remains to be seen and may depend much on the implementation by companies of conflict sensitive practices particularly with respect to new investment in the north and east of the country.²³

- 5.3 The intention to 'do no harm', has sometimes been interpreted in the passive sense i.e. that business activities should ideally be seen as divorced from the dynamics of conflict. While the intention to 'do no harm' may be laudable it is a misconception to assume that a company can, simply through the nature of the way it operates, remain neutral to conflict. Experience has demonstrated that even apparently benign investment activities are likely to have both positive and negative influences on the varied aspects of a conflict. This is a lesson that was learned some time ago by the humanitarian relief sector; it is certainly no less relevant to business enterprise. In conflict sensitive areas significant private sector investments should be subject to a broad assessment of their impact on conflict.

5.4 Case study

Conflict impact analysis: Nigeria

The Movement for the Survival of the Ogoni People (MOSOP) State that a root cause for Shell's loss of social licence to operate in Ogoniland stems from the fact that in the early stages of the project in the 1960s, Shell did not strive to understand the customs of the Delta communities²⁴. Shell was perceived

²³ International companies such as Nestle, Cargill, Chevron have significant interests in Sri Lanka.

²⁴ *Shell in the Niger Delta: A Framework for Change* page 20 (ECCR, www.eccr.org.uk, 2010)

as imposing its own 'civilised' values, and failed to show respect for community leaders and indigenous customs and practices. When communities lost control of their environment they protested leading to the arrest of community leaders, with which Shell appeared to have colluded. The trial and hanging of Ken Sarowiva and his colleagues prompted international outrage and, after a court case was brought in the US in 1996, Shell settled out of court with the families of those killed with a sum of \$15.5 million. In 2005, the parent company Royal Dutch Shell commissioned a conflict impact analysis to examine how its relationships with communities, and a complex web of other stakeholders across the Niger Delta, could be improved. The study was undertaken by WAC Global Services and sought to examine corporate policies, practices and culture and made specific recommendations for Peace and Security Strategies that the company might undertake. The report identified the need for reconciliation:

- within and among communities;
- between oil companies and communities; and
- between government and communities.

It observed that most causes of conflict between the company and communities could be addressed not by providing more money and resources to communities (which were often in themselves a source of conflict) but by doing things differently. The report made recommendations for a multi-stakeholder approach bringing together Shell, local government NGOs and community leaders.²⁵

- 5.5 Enterprise based around the utilisation of local resources such as land, water, minerals, oil or gas have significant potential to impact conflict or indeed may be a primary source of conflict. Conflict impact analysis enables a company to understand better the direct and indirect impacts of its activities on the dynamics of conflict and helps inform strategies that will maximise the potential for positive outcomes and reduce the risk of direct or indirect negative influences on conflict. Such assessment is valuable not only in the context of conflict but also in the context of post-conflict or in situations of contested governance where grievances have the potential to become violent. In conflict sensitive areas there is a strong argument for utilising conflict impact analysis in the context of a due diligence process, undertaking such analysis before proposals for investment are agreed.

6. Freedom of religion in the context of conflict

- 6.1 The Universal Declaration of Human Rights defines the right to freedom of thought, conscience and religion, yet Christian responsibility must go well beyond promotion of tolerance as enshrined in the Universal Declaration of Human Rights. We recognise that people of faith have a responsibility to promote opportunities for encounter and understanding across faiths and actively to oppose all forms of discrimination. A right to freedom of practice and worship offers only a minimal ethical standard.
- 6.2 Denials of the right to freedom of thought, conscience and religion can take on a disturbing dynamic in the context of conflict where minority groups may find themselves subject to persecution. The exodus of Christians from parts of the Middle East (especially Iraq, Lebanon, Egypt, Pakistan and Palestine) is painful for all communities in the Middle East as well as for the Christian community beyond. We also observe regions where Muslim, Jews and people of other faiths are subject to persecution. Persecution may be manifest as 'religious persecution' when in fact religion is used as an indicator of a cultural or ethnic identity rather than being seen a threat in its own right.
- 6.3 Companies operating in the context of ethnic or religious tension might be encouraged to reflect on issues of religious or ethnic discrimination beyond the area of employment practice. As a faith-based investor the Methodist Church in Britain is well placed to highlight the 'faith dynamic' in situations of conflict or contested rights, drawing on the experience of our local partner churches and other faith groups. Companies might examine whether their investors and other influential stakeholders within the national context draw strength from a dominant cultural, religious or ethnic group. If so, an assessment

²⁵ Shell Petroleum Development Corporation (SDPC) disputed some of the headline conclusions and it is unclear as to whether the report has been used to help inform alternative approaches.

might be made to determine whether business activities might indirectly support the marginalisation or even persecution of minorities (for example, through encouraging or forcing the displacement and resettlement of communities). Such assessment might also be used to highlight opportunities for commercial activity to build relationships across faith groups or ethnic divisions in society.

7. Complicity, due diligence and supply chains

7.1 In addition to the manifest moral repugnance, complicity with human rights abuses entails both reputational and legal risks for companies. A charge of complicity need not rest on demonstrating that a company or its management knew about abuses to which its operations are linked but only that it 'should have known' about such abuses or risks. John Ruggie suggests that the test here is 'that which a company could reasonably be expected to know under the circumstances'.

7.2 Case study

Responsibility to assess risk: Guatemala

In 2010, consultants were commissioned by Goldcorp to carry out a human rights impact assessment of the Marlin mine in Guatemala.²⁶ (Goldcorp had been encouraged by a group of responsible investors to commission a Human Rights Impact Assessment.) The Marline mine operates in a context of endemic violence in which the security forces have a record of human rights abuses. Community members in dispute with the mine operators had been killed and injured following disputes with mine operators. In this high risk context (and because the company does not have the ability to control the actions of public security forces) the company has an additional responsibility to subject operational decisions to an assessment of human rights risk. It failed to do so in 2009 when drilling on a property in which there was a known dispute related to entitlement to land through inheritance. By not allowing time for community members to resolve the dispute the company failed to de-escalate tension and this led to the take-over of the site, burning of a drill rig and truck, leading to the risky involvement of public security forces. The dangers should have been known. Interviews suggested that senior managers may have intended to deal with protests through legal means and that responsibility for managing human rights risks were not sufficiently high on the agendas of those undertaking operational decisions. The assessment judged that given the poor human rights record of the security forces, Montana the operating company, could be considered to have been complicit in human right abuses by not having in place adequate procedures to safeguard people's rights. Subsequently investors have called for the suspension of land acquisition given the local opposition to mining operations and the risk of further conflict.²⁷

7.3 There is now an expectation, reinforced by Ruggie that companies will be pro-active in assessing the potential human rights risk of their operations and key business relationships, rather than waiting for problems to occur and responding reactively. Companies cannot be expected to assume responsibility for every entity over which they have some influence. However, in relationships where companies have leverage there is an expectation that the company will have knowledge as to how that leverage can be used to prevent human rights abuses. The OECD Guideline for Multinational Enterprises www.oecd.org offers some guidance in this respect. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.

7.4 Failure to exercise leverage will increasingly be considered an act of omission. This requires that human rights risk assessment is extended to supply chains, or at least to those entities in the supply chain where companies either operating independently or in conjunction with others can exercise leverage.

8. Transparency and accountability

8.1 It has been argued that there is a clear relationship between the enjoyment of human rights and transparency of revenue payments to foreign governments. If payments are undeclared, the income from those payments is less likely to end up contributing to the satisfaction of economic, social and

²⁶ www.hria-guatemala.com/en/docs/Human%20Rights/OCG_HRA_Marlin_Mine_May_17.pdf

²⁷ www.share.ca/shareholderdb/proposal/suspend-operations-at-the-marlin-mine/1643

cultural rights such as the right to an adequate standard of living.²⁸ Secrecy around payments to local and national government entities breeds mistrust potentially contributing to conflict. The Bribery Act www.legislation.gov.uk/ukpga/2010/23/contents is a significant development in UK legislation enabling allegations of bribery involving UK companies or UK nationals operating abroad to be pursued in the UK courts.

- 8.2 But even disclosure of legitimate financial payments or other information may be resisted by companies on the basis that such information is commercially sensitive. There is clearly a balance to be achieved between the reasonable expectations of companies and the interests of wider stakeholders. In general however we should be concerned if commercial confidentiality is used to ‘trump’ the reasonable interests of communities for transparency in a company’s relationships with the State and other parties. Jody Kollapen of the South African Human Rights Commission observes: -

*“In the context in which power is distributed we cannot simply say that the State has the role of protecting Human Rights and that companies only have a role to comply with national standards. For example, if you say that the intellectual property rights will always be upheld then you give in to the rights of power over the power of rights”.*²⁹

- 8.3 Disclosure of legal payments to host governments has been encouraged through the Extractive Industries Transparency Initiative (EITI), www.eiti.org to which the CFB is an investor signatory, and the ‘publish what you pay’ campaign. The trend now is towards making disclosure a legal requirement. The Dodd Frank Wall Street Reform and Consumer Protection Act, enacted in the United States in July 2010, www.cftc.gov/LawRegulation/DoddFrankAct requires that extractive industry companies publicly report payments to foreign governments on a country and project specific basis. Disclosure on a project basis (enabling local communities to better understand the relationships between companies and local government entities) is highly controversial. Intensive lobbying by oil and gas companies has so far prevented the issuing of disclosure guidelines that would define the level of detail required. Nevertheless the trend is towards more detailed disclosure with, in April 2012, the European Council debating the implementation of legislation to require country by country reporting by business entities based within the EU³⁰.

9. Extra-territorial regulation of corporate practice and due diligence

- 9.1 How to address the governance gaps referred to earlier is perhaps the most pressing challenge in improving human rights observance. The role of voluntary initiatives verses legislation remains a source of controversy. The UN Global Compact has been instrumental in encouraging companies voluntarily to put more resource and effort into improving human rights policy and practice. The encouragement of voluntary initiatives on the part of companies is maybe the surest path to achieving widespread buy-in and changes to the culture and practice of a corporate entity. However voluntary standards will inevitably be applied by some and resisted by others.
- 9.2 Ruggie states that “*current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognized jurisdictional basis and that an overall test of reasonableness is met*”.
- 9.3 Amnesty International and five other human rights organisations publically disagreed arguing that this interpretation of international law is regressive and that there is indeed a sound basis in international law

²⁸ Tyler K, *Rights, Regulation and Remedy: The Extractive Sector and Development* (A4ID, London)

²⁹ Jody Kollapen, South African Human Rights Commission; (from a presentation given at a conference titled *Human Rights and Business: South Africa and Beyond* at Friends Meeting House, London, 2 December 2008)

³⁰ <http://www.cidse.org/content/articles/business-a-human-rights/country-by-country-reporting/new-eu-transparency-laws-could-turn-natural-resource-curse-into-blessing.html>

that encourages States to carry out extraterritorial jurisdiction of corporate entities. They point out that human rights treaties and other instruments exist to oblige States in areas such as complicity in torture, enforced disappearance, the sale of children, child prostitution, child pornography, or apartheid, wherever in the world the abuse (and the act constituting complicity) are committed.

- 9.4 The Ruggie recommendations state that in order for a company to know whether or not it is complying with human rights standards a due diligence process is necessary. Therefore, Amnesty argues, there is a sufficient basis in internationally agreed human rights instruments for States to legislate a requirement for due diligence on the part of companies rather than simply encourage due diligence as Ruggie proposes.

10. Mechanisms for extra-territorial judicial or non-judicial remedy

- 10.1 Another facet of the disagreement around extra-territorial jurisdiction surrounds access to remedy. It is argued by human rights groups that international human rights norms require that home states (i.e. in which the corporate entity is domiciled) should ensure access to remedies for those who have been subject to human rights abuses. If barriers have prevented access to remedies in the state in which abuses have taken place then home states, should make such remedies available. These could be either mediation/adjudication (as is offered by OECD National Control Points) or through judicial processes.
- 10.2 OECD National Contact of Points (NCPs) enable complaints against a company's non-compliance with OECD Guidelines for Multinational Enterprises. The NCP in the state in which the company is incorporated will carry out an initial evaluation of the complaint to determine whether it falls within the remit of the NCP and then seek agreement on terms of a mediation process from both the complainant and the company. The aim is for both parties to agree a resolution. In the event that the company declines the offer of mediation, or that a resolution is not achievable, the NCP will issue a final Statement with their judgement on the alleged breach of OECD Guidelines.
- 10.3 In several instances mediation through an OECD NCP has not been achievable as the complainant (or third party) has filed a lawsuit against the company for the incident in question. Arguably facilitated mediation is the preferable route to resolution. However in the instances when one or both parties have no confidence in intentions of the other and therefore decline mediation complainants need access to judicial remedies. It is widely acknowledged that barriers to access to judicial remedies are commonplace. These barriers include companies influence on governments and legislative change to prevent potential claims against them; lack of access by victims to information held by companies or governments; disparity of resources available to victims to pursue a case; direct influence of companies on judiciary. Investors should expect integrity on the part of companies contesting allegations of human rights abuses with the overall objective being to uphold and support a fair judicial process.
- 10.4 Only a handful of countries have established legislation that enables prosecution of companies for abuse, including human rights abuse, carried out elsewhere³¹. However Ruggie also proposes that States should strengthen the judicial capacity to hear complaints from foreign plaintiffs against corporations based in their territory and to enforce remedies.
- 10.5 **Case Study**
Court proceedings in the 'home' country: Nigeria
The Nigerian court system is perceived as pliant and easily influenced by elites and major companies. In 2009 a massive oil spill (equivalent to around one quarter of the oil spill in the Deepwater Horizon disaster) devastated communities in the Bodo area of Ogoniland. Claims for compensation in Nigerian courts can take years, even decades to reach a conclusion. Representatives of 12,000 people affected by the spill took out a class action against Royal Dutch Shell (RDS) in the High Court in London. RDS

³¹ For example, universal jurisdiction statutes in countries such as the United Kingdom, Canada, France and Norway theoretically make it possible for some business entities to be prosecuted for war crimes or crimes against humanity although there are significant political and legal obstacles to bring cases to court.

had admitted liability for the spill. While Shell Petroleum Development Corporation (SPDC) has a reputation for contesting and delaying claims brought through Nigerian Courts, RDS agreed not to contest the adjudication of this case by a UK court. Action in the High Court in London should result in a swifter resolution, to the benefit of both the company and the communities involved. If compensation is awarded by the court it is likely to run to hundreds of millions of pounds, much more than might be expected of a Nigerian court award for compensation. Recourse to the UK High Court could set a useful precedent for the future but exposes the deficiencies of the Nigerian judicial processes.

11. Our expectations of companies

As this topic is broad it is not easy to arrive at very specific expectations of companies with respect to their performance on human rights. However we have the following reasonable expectations of companies, particularly those operating in conflict zones, with respect to their performance on human rights.

- 11.1 The company should identify the international human rights instruments to which it subscribes and should be able to demonstrate how these are reflected in its policies and practice. (A list of applicable multilateral human rights instruments are provided as an Appendix).
- 11.2 Guidelines for human rights due diligence procedures should be made publically available by companies.
- 11.3 Information should be made available by companies on what might constitute a 'material' human rights risk requiring disclosure to shareholders in financial reports.
- 11.4 Specific attention should be paid to conflict sensitive areas (or nations) where there is a consistent record of egregious human rights abuse and special measures should be considered in such circumstances. These should include ensuring conformity with any home state government's advice for commercial activity in the specific conflict. An independently facilitated human right impact assessment or conflict impact assessment should be commissioned when appropriate, and undertaken at an early stage of project development. Such appraisals should be undertaken with the intention of informing the approval, or otherwise, of projects and to define the approach to communities and other stakeholders.
- 11.5 There should be a willingness to learn from past experience and to share that learning with shareholders. The learning should inform corporate policy and practice, such that companies should be able to enter into dialogue in general or hypothetical terms around future contracts, business relationships or practices that they would consider ethical or unethical in a specific context and in the light of past experience.
- 11.6 Joint Venture partners or subsidiaries are expected to conform to a comparable standard of human rights policy and practice. Business relationships should be reviewed, and potentially suspended, when this is not the case.
- 11.7 The human rights policies of a company should detail the expectations of partners within the supply chain or other strategic business partners (including state owned enterprises).
- 11.8 Contexts in which human rights are particularly challenging, and where it is deemed to be too difficult to avoid complicity in human rights abuses, the company should suspend its operations. Exceptionally an alternative course could be justified if a company can demonstrate that through its presence it is influential in bringing about change.
- 11.9 In the context of conflict, if it is assessed that the business is having an overall adverse impact on the dynamics of the conflict and that this cannot be remedied, the company should suspend its operations.

- 11.10 Policies should be in place for providing access to remedies. Prompt action should be taken to hear and consider complaints of human rights abuses and to involve external mediation where necessary.
- 11.11 There should be transparency over a company's lobbying (either in national or international forums) on legislative matters in relation to human rights. Companies should endeavour to support reasonable legislation designed to help close the governance gaps that prevent many from achieving a full realisation of their human rights.

12. Conclusion

- 12.1. As concerned investors the CFB and the Methodist Church would seek open dialogue and engagement with companies on human rights policy and performance; the Joint Advisory Committee on the Ethics of Investment (JACEI) might consider how maintaining a distinctly Christian view of human rights can be brought to bear when engaging with companies on human rights.
- 12.2. In instances where there are concerns we might wish to evaluate the extent to which the specific concern is indicative of a systemic failure on the part of the corporation concerned, the extent to which the company is able to mitigate and improve, and the quality of risk management when entering or continuing operations in territories with acute human rights challenges.
- 12.3. Engagement would seek to bring about an improvement in a company's policies and practice. If a company was unwilling to enter into serious dialogue, or to address concerns, then JACEI might be asked to take a view on the acceptability of the investment.
- 12.4 This might depend on the severity of the concerns in question. Failure to be responsive to a significant issue falling within points 11.5, 6, 8 or 9 above, could give sufficient cause for concern to lead to a decision to recommend dis-investment

APPENDIX

Key Human Rights Principles

- International Bill of Right comprising: -
- Universal Declaration of Human Rights
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- Additional Protocols such as;
- Convention on the Rights of the Child
- Convention on Torture
- Conventions on landmines, cluster munitions etc.
- UN Guiding Principles
- UN Global Compact
- Equator Principles
- European Parliament code of conduct
- Extractive Industries Transparency Initiative (EITI)
- Geneva Conventions / Humanitarian law
- Global Reporting Initiative
- ILO Declaration on fundamental principles & rights at work
- ILO Tripartite Declaration
- Kimberley Process
- OECD Guidelines for International Enterprises
- UN Millennium Development Goals
- UN Norms on business & human rights
- UN Principles for Responsible Investment
- Voluntary Principles on Security and Human Rights (US and UK)