

Allegations of sexual harassment and abuse in Unilever's Kericho plantation, Kenya:

A case study of due diligence and certification processes

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Introduction

Labor and human rights violations have been extensively documented in the global tea sector.¹ Unilever is the world's largest tea company, and also the largest producer in Kenya,² which in turn is the world's second largest tea exporting country.³ Recently, Unilever has come under sustained allegations of human rights abuses taking place on its Kenyan Kericho tea plantation, including allegations of sexual harassment and abuse experienced by its female workers.^{4,5,6}

This paper examines Unilever's management of alleged sexual harassment and abuse on their Kericho tea plantation in Kenya, and argues that on many dimensions the company took a defensive rather than proactive approach to the allegations, thereby falling short of its own commitments to due diligence. Section I provides brief background on the global tea industry and Unilever's tea production. Section II presents the allegations made against Unilever regarding human rights violations on the Kericho plantation in Kenya. Although Unilever has been the subject of accusations regarding its employment practices and working conditions in Kenya in the past, this paper focuses on those allegations made by the Center for Research on

¹ A. Morser (2010). "A bitter cup: The exploitation of tea workers in India and Kenya supplying British supermarkets." War on Want. Unite the Union. July 2010.

² Oxfam (2002). "The tea market: A background study." Draft for comments 26/06/02. Final version unavailable.

³ V. Largo (2011). "PG Tips and Lipton tea estates hit by allegations of sexual harassment and poor conditions." What's in your cuppa? *Ecologist*. April 2011.

⁴ Kenya Human Rights Commission (2008). "A comparative study of the tea sector in Kenya: A case study of large scale tea estates." KHRC: 2008.

⁵ S. van der Waal (2008). "Sustainability issues in the tea sector: A comparative analysis of six leading producing countries." Amsterdam: June 2008.

⁶ S. van der Waal (2011). "Certified Unilever Tea: Small cup, big difference?" Amsterdam: October 2011.

Multinational Corporations (SOMO) in 2010 and 2011 specifically regarding sexual abuse on the Kericho plantation.

Section III examines Unilever's response to these allegations and the corresponding response by Rainforest Alliance, the sustainability certification agency that certified the Kericho plantation both before and after SOMO's allegations. Section IV analyzes this case through the lens of the United Nations' Guiding Principles on Business and Human Rights. Specific attention is given to the challenges of the oft-neglected gender components of business and human rights, including allegations of sexual harassment and abuse. Expanding on the issues highlighted in Section IV, Section V raises some exploratory questions for further consideration. Section VI concludes with a brief summary of a similar case of allegations of sexual abuse in a factory in Jordan, highlighting the relevance of these issues and their implications for business and human rights more generally. Preliminary recommendations are identified moving forward.

Section I: Unilever—The world's largest supplier of tea

The global tea industry is expansive, with over 3.5 million tons of tea⁷ being grown in over 45 countries around the world.⁸ Kenya exports around 20% of the world's tea, putting it behind only Sri Lanka in both volumes of tea exported and value of tea exports.⁹ The sheer volume of the tea industry in Kenya means that it plays a vital role in the national economy. Tea has been Kenya's leading export business for years, consistently outperforming tourism, coffee

⁷ "The Tea Industry." War on Want. <http://www.waronwant.org/campaigns/fighting-supermarket-power/tea-industry>

⁸ W. McLennan (2011). "Environmental damage and human rights abuses blight global tea sector." What's in your cuppa? *Ecologist*. April 2011.

⁹ S. van der Waal (2008). "Sustainability issues in the tea sector: A comparative analysis of six leading producing countries." Amsterdam: June 2008.

and horticulture.¹⁰ The tea industry workforce in Kenya is distinctly gendered: around 60% of Kenyan tea farm workers are women,¹¹ while most supervisors and managers are men.¹²

Unilever is the world's largest supplier of tea, with approximately 15% of the world market share.¹³ As an indication of its capacity and scale, Unilever is the only global tea company with its own tea plantations.¹⁴ In Kenya—where all of its operations are certified by the Ethical Tea Partnership¹⁵—Unilever is the country's largest producer.¹⁶

Unilever's Kericho plantation is one of two major plantations in Kenya. It employs around 15,000 workers and is home to approximately 75,000 workers and their families. Per industry best practice, Unilever has built around 12,500 homes to house these employees and their families.¹⁷ Unilever also provides some basic services to its employees and their dependents. Permanent employees, their families, and casual workers in Kericho have access to Unilever's health care system, including the Brooke Bond Central Hospital in Kericho, four medical centers, a network of dispensaries, and a community-based HIV/AIDS program.¹⁸ The families of both permanent and casual workers have access to 20 primary schools, secondary

¹⁰ J. Mulama "Women produce most of the tea grown in Kenya." Inter Press Service News Agency.

http://ipsnews.net/africa/Focus/religion/note_34.shtml

¹¹ J. Mulama "Women produce most of the tea grown in Kenya." Inter Press Service News Agency.

http://ipsnews.net/africa/Focus/religion/note_34.shtml

¹² S. van der Waal (2008). "Sustainability issues in the tea sector: A comparative analysis of six leading producing countries." Amsterdam: June 2008.

¹³ Oxfam (2002). "The tea market: A background study." Draft for comments 26/06/02. Final version unavailable.

¹⁴ Oxfam (2002). "The tea market: A background study." Draft for comments 26/06/02. Final version unavailable.

¹⁵ Kenya Human Rights Commission (2008). "A comparative study of the tea sector in Kenya: A case study of large scale tea estates." KHRC: 2008.

¹⁶ Oxfam (2002). "The tea market: A background study." Draft for comments 26/06/02. Final version unavailable.

¹⁷ Kenya Human Rights Commission (2008). "A comparative study of the tea sector in Kenya: A case study of large scale tea estates." KHRC: 2008.

¹⁸ Kenya Human Rights Commission (2008). "A comparative study of the tea sector in Kenya: A case study of large scale tea estates." KHRC: 2008.

schools and nurseries on Unilever's Kericho plantation; the company also has a full scholarship program for university applicants in neighboring communities and for children of employees.¹⁹

The Kericho plantation is certified by the Rainforest Alliance in compliance with the Sustainable Agriculture Network (SAN) standards, which are considered some of the best in the industry for evaluating fair labor and agricultural practices.²⁰ As an indication of its commitment to these standards, Unilever has pledged to source all of its Lipton and PG Tips tea bags from farms that have been certified by the Rainforest Alliance by 2015.

Unilever's initiatives in Kericho reflect a wider commitment to corporate social responsibility that is apparent in the company's programs and policies—both local and global. In Kenya, for example, Unilever and the United Kingdom's Department for International Development (DFID) have implemented a program to improve the sustainability of the smallholder tea sector, strengthening the local economy.²¹

On a broader scale, Unilever was one of the first signatories to the UN Global Compact in 2000—a non-binding global agreement designed to engage the business community in a commitment to sustainability and human rights that now has over 8,000 participants.²² The company also worked closely with Professor John Ruggie in his follow-up research on companies' implementation of the Global Compact (research which led to the Guiding Principles on Business and Human Rights), and has since partnered with the Danish Institute for

¹⁹ Kenya Human Rights Commission (2008). "A comparative study of the tea sector in Kenya: A case study of large scale tea estates." KHRC: 2008.

²⁰ SOMO 2011. <http://somo.nl/news-en/precarious-work-in-certified-tea-production-for-unilever>

²¹ "Top buyer to help Kenya improve tea productivity", Business Daily (Nairobi), 9 June 2007, <http://www.bdafrica.com/index.php?option=com_content&task=view&id=1685> (18 May 2008)

²² J. Kahn (2000). "Multinationals sign UN pact on rights and environment." *The New York Times*. July 27, 2000.

Human Rights to develop guidelines for corporations seeking to integrate human rights into their business strategies.²³

Unilever's commitment to human rights has been expressed internally through a company-wide human rights policy that is articulated in its Code of Business Principles. In the Code the company states that it is committed to "a working environment where there is mutual trust and respect" and "respect [for] the dignity of the individual."²⁴ To ensure implementation of the principles, Unilever has developed a clearer, streamlined set of principles and distributed this document to all global senior management; following an internal review of its human rights approach, Unilever also planned to communicate these principles to key managers within their supply chains by the end of 2011. Compliance with Unilever's own Code of Business Principles is tracked through a global and regional monitoring process; violations are catalogued through various mechanisms, including internal and external audits, as well as anonymous hotlines available for reporting violations in all countries where Unilever works.²⁵

Section II: Allegations of human rights violations and 'rampant' sexual abuse

Though, as outlined above, Unilever has in many senses been a leader and model in its approach to business practices and human rights, it has also drawn some criticism related to its operations in the tea sector—and in Kericho, specifically. Questions regarding work conditions in the Kericho plantation were first raised by the Center for Research on Multinational

²³ Unilever "Respecting rights: Taking Action." <http://www.unilever.com/sustainability/employees/rights/>

²⁴ Unilever Code of Business Principles. <http://www.unilever.com/aboutus/purposeandprinciples/ourprinciples/>

²⁵ Unilever "Respecting Rights." <http://www.unilever.com/sustainability/employees/rights/>

Corporations (SOMO)—a Dutch non-profit research and advisory organization that investigates multinational companies’ policies with an emphasis on sustainable development.

Following investigations in 2007, SOMO reported discriminatory practices on the plantation, including sexual coercion and forced pregnancy tests.²⁶ These concerns were reiterated in a related publication by SOMO which summarized trends in the tea sector through a six country case study. The report made note of sexual discrimination and abuse in both Kenya and Malawi, while also highlighting other global human rights violations in the tea sector, including poor housing conditions and limited access to water for employees and the casualization of labor.²⁷

In mid-2007, the Rainforest Alliance certified Unilever’s Kericho plantation, making Unilever the first tea producer to receive sustainability certification from the alliance, which had previously focused its efforts coffee, cocoa, forestry, and tourism industries.²⁸ Two years later, the Kenyan Human Rights Commission (KHRC)—which has consistently partnered with SOMO in its investigations—conducted site visits to Unilever’s and James Finlay’s plantations in Kericho with the intent of documenting whether working conditions had improved since those plantations had been certified by the Rainforest Alliance in 2007 and 2008.²⁹

²⁶ S. van der Wal and R. van Os (2008). “Unilever: Overview of controversial business practices in 2007.” Amsterdam: May 2008

²⁷ S. van der Waal (2008). “Sustainability issues in the tea sector: A comparative analysis of six leading producing countries.” Amsterdam: June 2008.

²⁸ Rainforest Alliance (2007). “Unilever, the world’s largest tea company, commits to Rainforest Alliance Certification.” May 25, 2007. <http://www.rainforest-alliance.org/newsroom/news/unilever>

²⁹ Kenya Human Rights Commission (2008). “A comparative study of the tea sector in Kenya: A case study of large scale tea estates.” KHRC: 2008.

KHRC investigators conducted a total of 30 individual interviews and one focus group discussion with 14 participants. Interview respondents—irrespective of sex—unanimously reported that women on the plantations face discrimination and threats of sexual coercion.

One worker noted:

“Sexual harassment is a serious problem because all the supervisors are men, some of them want you to go beyond your work obligations and satisfy their sexual needs and if you don’t do that, they fake other charges on you or give you too much work or allocate you lonely or dangerous plucking zones.”³⁰

The KHRC report described sexual harassment as “rampant” and embedded in a culture of corruption and impunity. When KHRC investigators spoke with Unilever’s management about the issue, the management responded that while they did receive many reported cases of harassment and coercion, their own investigations found that most of these accusations were unfounded cases of “spurious malice.”³¹

Motivated by KHRC’s findings, SOMO partnered with KHRC for another round of investigations in January 2010, during which investigators conducted a total of 32 in-depth interviews and one focus group discussion at Unilever’s Kericho plantation. The findings echoed those of previous investigations, confirming the persistence of labor rights violations including a manipulation of Kenyan labor laws that require companies such as Unilever to hire employees permanently if they work more than two months.³²

³⁰ Kenya Human Rights Commission (2008). “A comparative study of the tea sector in Kenya: A case study of large scale tea estates.” KHRC: 2008: p 12.

³¹ Ibid.

³² S. van der Waal (2011). “Certified Unilever Tea: Small cup, big difference?” Amsterdam: October 2011.

Interviews again documented the prevalence of coerced sex as a tool used by management in hiring, job allocation, and threats of firing.³³ SOMO released a draft report of these findings in 2010. The final report—which went beyond the specific allegations and expressed broader and hard-hitting “doubts regarding the reliability of Rainforest Alliance certification”—was released at the end of 2011.³⁴

A 2011 journalistic investigation that set out to explore what would ultimately be contradictory stories put forth by SOMO and Unilever uncovered more instances of corruption and forced sex. One female tea worker stopped working for Unilever at the Kericho plantation after watching both of her sisters die from HIV that she claimed they had contracted because of regular forced sex with managers:

“Sexual harassment and coercive sex [are] absolutely standard for all women under forty...I just couldn’t stay as a tea picker. I couldn’t risk having unprotected sex just to keep my job.”³⁵

The allegations made by SOMO and KHRC and the attendant reaction by activists and the press constituted a considerable threat to Unilever’s reputation as a responsible actor in the global economy.

Section III: Unilever and Rainforest Alliance’s response

³³ Ibid.

³⁴ Ibid.

³⁵ V. Largo (2011). “PG Tips and Lipton tea estates hit by allegations of sexual harassment and poor conditions.” What’s in your cuppa? *Ecologist*. April 2011.

Unilever's first public statement regarding allegations of sexual abuse came in 2009, in a published response to a report by FNV Mondiaal (an international organization of unions) that included reference to KHRC's findings.³⁶ Regarding these allegations, Unilever responded that:

"No substantive evidence of sexual harassment has ever been tabled to us. During our meetings with KHRC, they did not give us any concrete examples of their findings, only references to one or two estates. These estates were fully investigated by our General Management and nothing untoward was discovered."³⁷

After SOMO released the draft findings from its 2010 investigations with KHRC, Rainforest Alliance joined Unilever in responding. In November 2010, the Rainforest Alliance conducted an unannounced audit of Unilever's Kericho plantation and reported that "violations with the certification requirements were not found in these audits."³⁸ In September 2011, Rainforest Alliance recertified the Kericho plantation.³⁹

Following the official release of SOMO's report in October 2011, Unilever and Rainforest Alliance released separate statements.⁴⁰⁴¹ Both Rainforest Alliance and Unilever insisted that they needed "specific evidence" (including names of alleged victims or respondents) from SOMO in order to address allegations and that they themselves had found no evidence of "systematic" violations. Importantly, neither statements by Unilever or Rainforest Alliance

³⁶ FNV Mondiaal (2008). "Adding insecurity to life: Erratum to the Unilever Annual Report and Accounts 2008." Amsterdam: 2008.

³⁷ Unilever (2009). "Labour rights and working practices: A summary of stakeholder concerns and our response." Unilever: July 2009. <http://www.unilever.com/sustainability/introduction/stakeholders/responding/>

³⁸ Rainforest Alliance 2011. "Statement in response to the SOMO report from the Rainforest Alliance." October 29, 2011. <http://rainforest-alliance.org/agriculture/somo-statement>

³⁹ Unilever (2011). "Unilever statement: October 2011." Unilever: October 2011. <http://www.business-humanrights.org/media/documents/unilever-statement-somo-oct-2011.pdf>

⁴⁰ Both of these responses can be found on Unilever's website in the "Responding to stakeholder's concerns" section. <http://www.unilever.com/sustainability/introduction/stakeholders/responding/>

⁴¹ Rainforest Alliance 2011. "Statement in response to the SOMO report from the Rainforest Alliance." October 29, 2011. <http://rainforest-alliance.org/agriculture/somo-statement>

specifically mentioned sexual harassment or abuse. Instead, both responses referred broadly to allegations and “inappropriate behavior” and cited a lack of evidence as a barrier to effective response or mitigation.

Section IV: The Unilever Kericho case through the lens of the Guiding Principles

Though this case is recent and documentation limited, it is instructive to begin preliminary analysis of Unilever’s response through the lens of the Guiding Principles on Business and Human Rights, which provide a framework for implementing the United Nations “Protect, Respect, Remedy” framework. The Guiding Principles were endorsed by the United Nations Human Rights Council in 2011.⁴²

Absence of state protection

A company’s approach to human rights issues is inherently linked to the environment within which it operates and the cues it receives from the host government. The first pillar of the framework—which was conceptualized as a “complementary whole” for “achieving sustainable progress”⁴³—elaborates the duty of the State to protect the rights of citizens against abuse by businesses and other third party actors.⁴⁴ These duties include the obligation to prevent, investigate and punish abuses.

⁴² J. Ruggie (2011). “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. March 2011.

⁴³ J. Ruggie (2008). “Protect, respect and remedy: A framework for business and human rights.” Report of the UN Special Representative on Business and Human Rights to the Human Rights Council. April 2008: p5.

⁴⁴ J. Ruggie (2008). “Protect, respect and remedy: A framework for business and human rights.” Report of the UN Special Representative on Business and Human Rights to the Human Rights Council. April 2008: p 7.

Though the purpose of this paper is to explore Unilever's management of allegations of sexual harassment and abuse, the state's duty to protect is tightly linked to corporate practices. The Guiding Principles focused on this interaction between state and business, noting that the state's duty to protect includes providing effective guidance to businesses on how to comply with human rights and encouraging or requiring businesses to be transparent with regards to human rights issues related to their operations.

In the Unilever Kericho case, the government of Kenya has been notably absent; in fact dialogue around the case has been dominated by SOMO, Unilever and the Rainforest Alliance. At the same time, the policy environment in Kenya does not provide clear support and enforcement of human rights standards.

Typically, the ministry of labor in a given country possesses a unique responsibility in upholding the duty to protect. Kenya's Ministry of Labour, however, seems to operate under conflicting mandates that provide inconsistent guidance on its own duty to protect workers. On the one hand, the Ministry articulates its obligation as a signatory to ILO conventions and recommendations (as well as a number of national laws) to enforce labor laws and promote the health and safety of employees.⁴⁵ Through its "Vision, mission and mandate," however, the Ministry implies a different mandate that is oriented toward serving the private sector: that is, "Undertaking research to develop a national human resource data base, develop guidelines on skills development and maintain a national skills inventory."⁴⁶ Not surprisingly given this

⁴⁵ Ministry of Labour. "Our mandate." About us. Government of Kenya Ministry of Labour. http://www.labour.go.ke/index.php?option=com_content&view=article&id=119&Itemid=212 Accessed Dec 11, 2011.

⁴⁶ Ministry of Labour. "Vision and mission." About us. Government of Kenya Ministry of Labour. http://www.labour.go.ke/index.php?option=com_content&view=article&id=119&Itemid=212 Accessed Dec 11, 2011.

commitment “to putting the customer first,”⁴⁷ the Ministry of Labour’s site does not make any reference to the Unilever Kericho case, or even to tea workers generally, despite the importance of the tea sector in Kenya’s economy.

Outside of the Ministry of Labour, an alternative body that might be well positioned to monitor and protect the rights of tea workers specifically is the Tea Board of Kenya (TBK). TBK is a statutory body under the Ministry of Agriculture whose functions include the regulation and control of the cultivation and processing of tea.⁴⁸ As the tea industry is Kenya’s largest export industry,⁴⁹ the Tea Board would seem an appropriate body to specifically monitor all aspects of the industry, including protections for workers. In the Board’s statement on corporate social responsibility, however, their approach to human rights issues appears to be somewhat superficial, with reference to infrastructure projects, community relations, and “philanthropic and community service issues.”⁵⁰ The Board’s site has no mention of labour standards, worker protections, or the Guiding Principles. Perhaps even more surprisingly, there is no reference to the ongoing allegations concerning Unilever, SOMO, the Rainforest Alliance and the Kenya Human Rights Commission.

This inattention to the Unilever case and the specific needs and rights of tea workers constitutes what the Guiding Principles have termed “vertical incoherence”—or a state’s failure to fully implement its own human rights commitments through its own policies and organs of

⁴⁷ Ministry of Labour. “Core values.” About us. Government of Kenya Ministry of Labour. http://www.labour.go.ke/index.php?option=com_content&view=article&id=72&Itemid=211 Accessed Dec 11, 2011.

⁴⁸ The Tea Board of Kenya. “Tea Act and Other Legislations” and “Functions.” <http://www.teaboard.or.ke/> Accessed Dec 11, 2011.

⁴⁹ J. Mulama “Women produce most of the tea grown in Kenya.” Inter Press Service News Agency. http://ipsnews.net/africa/Focus/religion/note_34.shtml

⁵⁰ The Tea Board of Kenya. “Corporate Social Responsibility.” <http://www.teaboard.or.ke/about/csr.html> Accessed Dec 11, 2011.

government.⁵¹ In this respect it is clear that the Government of Kenya has not fulfilled its responsibility to protect the rights of its tea workers—despite the fact that they comprise 10% of the population and are a vital asset to the country’s largest export industry.⁵² This, in turn, creates an environment that permits and enables inadequate responsibility on the part of businesses for their own human rights impacts.

Selective respect and inadequate access to remedy

Unilever has been an active participant to the UN’s Global Compact since 2000,⁵³ through which it is committed to respect human rights in its business operations. This responsibility to respect is reflected in the second of the Guiding Principles, which proposes three key indicators of a business’ approach to respecting human rights: a human rights policy, a due diligence process, and a process to enable remediation.⁵⁴

Policy commitment

Unilever does have a human rights policy, which is articulated through its Code of Business Principles. The Code focuses on four components of human rights, including—most relevant to the Kericho case—the expectation that there shall be “respect for human rights, and

⁵¹ J. Ruggie (2008). “Protect, respect and remedy: A framework for business and human rights.” Report of the UN Special Representative on Business and Human Rights to the Human Rights Council. April 2008: p 11.

⁵² Kenya Human Rights Commission (2008). “A comparative study of the tea sector in Kenya: A case study of large scale tea estates.” KHRC: 2008.

⁵³ UN Global Compact. “Participants & Stakeholders.” United Nations Global Compact. <http://www.unglobalcompact.org/participant/9643-Unilever> Accessed Dec 14, 2011.

⁵⁴ J. Ruggie (2011). “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. March 2011.

no employee shall suffer harassment, physical or mental punishment, or other forms of abuse.”⁵⁵

According to the Guiding Principles, a business should not only have a human rights policy but should follow certain guidelines to make the policy effective, including communicating the policy clearly both internally and externally. Unilever has made steps toward this. Seeking to make its policy accessible and comprehensible to those who implement it, Unilever developed a streamlined version of its Code of Business Principles, and declared its intention to communicate this version to all internal managers as well as all key managers in its supply chain by the end of 2011.⁵⁶ Though this plan indicates a positive step toward fulfillment of the Guiding Principles’ recommendations on human rights policies, no statement confirming the completion of this plan has been made to date.

After SOMO’s draft findings were shared in 2010, Unilever took specific action to ensure that its human rights policy was understood and appropriately implemented in Kericho. According to official statements, the company conducted a human rights training for managers in partnership with the KHRC in 2011.⁵⁷

Due diligence

The Guiding Principles also make clear that the corporate responsibility to respect human rights requires verification—rather than assumption—of fulfillment through a process of due diligence. Due diligence “should include assessing actual and potential human rights

⁵⁵ Unilever “Respecting Rights: Human rights & our business practices.”

<http://www.unilever.com/sustainability/employees/rights/>

⁵⁶ Unilever “Respecting Rights.” <http://www.unilever.com/sustainability/employees/rights/>

⁵⁷ Unilever (2011). “Unilever statement: October 2011.” Unilever: October 2011. <http://www.business-humanrights.org/media/documents/unilever-statement-somo-oct-2011.pdf>

impacts, integrating and acting upon these findings, tracking responses, and communicating how impacts are addressed.”⁵⁸ Though at the time that Unilever began its operations in Kericho the Guiding Principles were not yet developed to provide appropriate guidance—and thus the recommendation for preliminary assessment of potential impacts is less relevant—risk assessment is an ongoing process, and the allegations of violations against tea workers at Unilever’s Kericho plant coincided with the development of the Guiding Principles. The following section describes Unilever’s response as it corresponds to the elements of due diligence described in the Guiding Principles.

The Guiding Principles provide further detail on the elements and process of due diligence. Among the recommendations is that the processes to identify and assess human rights violations should “involve meaningful consultation with potentially affected groups and other relevant stakeholders.”⁵⁹ While both Unilever and Rainforest Alliance explained in statements following SOMO’s report that internal and external audits were conducted to investigate alleged abuses, the extent to which these involved “meaningful consultation” with representative groups of female tea workers (and whether investigations were conducted in ways that guaranteed confidentiality and job security) is unclear. Rainforest Alliance does provide some general information on its audit processes,⁶⁰ but Unilever’s statements do not give any insight into the quality and content of their due diligence processes.

⁵⁸ J. Ruggie (2011). “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: p 16. March 2011.

⁵⁹ J. Ruggie (2011). “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: p 17. March 2011.

⁶⁰ Rainforest Alliance (2011). “Statement in response to the SOMO report from the Rainforest Alliance.” October 29, 2011. <http://rainforest-alliance.org/agriculture/somo-statement>

Unilever did have some mechanisms in place for identifying human rights violations before allegations were made by KHRC and SOMO, such as a hotline for workers to register complaints. Confidential hotlines are in fact one specific example of due diligence mechanisms that are suggested in the 2008 UN Protect, Respect and Remedy Framework.⁶¹ Such mechanisms only work, however, if workers are aware of and willing to use them.

There is insufficient evidence to assess the efficacy of these mechanisms on the Kericho plantation, but preliminary evidence suggests that they were not implemented in a way that would have permitted them to effectively identify violations. A reporting investigation to Unilever's Kericho plantation following the SOMO report interviewed five women tea workers, and found that none had heard of the hotline that Unilever had put in place for its workers.

When the same reporter asked Unilever management about measures to address workers' grievances, they reported that anonymous suggestion boxes were also available for workers to make complaints. Discussions with workers, however, revealed that many of them had been discouraged against using the boxes by their managers, and that they had been asked by their managers to include their name and identification number so that they could be contacted regarding any suggestion.⁶² Though Unilever management may have felt that the hotline and the suggestion boxes were effective in preventing and identifying violations, further evidence evaluating the accessibility and acceptability of these measures to workers would be necessary in order to conclude that these measures were effective in practice.

⁶¹ J. Ruggie (2008). "Protect, respect and remedy: A framework for business and human rights." Report of the UN Special Representative on Business and Human Rights to the Human Rights Council. April 2008: p 25.

⁶² J. Clarke (2011). "The real price of a cup of tea." *The Irish Times*. June 11, 2011.

After SOMO's draft findings were shared in 2010, Unilever also installed a welfare manager on the Kericho plantation who was made available to respond to any complaints of workplace violations.⁶³ In their formal response to SOMO's report in 2011, Unilever offered the hotline, human rights training for its workers, and the implementation of the welfare officer as evidence of appropriate measures to address the rights of workers. Their response does not indicate that any follow-up evaluations have been made to assess the efficacy of these measures, however.

The inadequacy of Unilever's due diligence actions is especially apparent in light of the Guiding Principles' recommendation that special attention should be given to violations that may differentially impact already vulnerable or marginalized populations. Female tea workers are at heightened risk for human rights violations in a setting like Kenya, where tea workers are predominately female,⁶⁴ managers are primarily male,⁶⁵ and where research has shown sexual harassment and abuse to be a widespread.⁶⁶ What's more, research in rural Kenya has shown that women victims of coercive sex are often blamed, leading to low rates of reporting and legal resolution; this presents unique challenges to efforts aimed at identifying violations—such as the hotline and complain boxes—that rely on self-reporting by workers.⁶⁷ The specific vulnerability of women workers to human rights violations in this setting draws into relief the

⁶³ Unilever (2011). "Unilever statement: October 2011." Unilever: October 2011. <http://www.business-humanrights.org/media/documents/unilever-statement-somo-oct-2011.pdf>

⁶⁴ J. Mulama "Women produce most of the tea grown in Kenya." Inter Press Service News Agency. http://ipsnews.net/africa/Focus/religion/note_34.shtml

⁶⁵ S. van der Waal (2008). "Sustainability issues in the tea sector: A comparative analysis of six leading producing countries." Amsterdam: June 2008.

⁶⁶ A. Erulkar (2004). "The experience of sexual coercion among young people in Kenya." *International Family Planning Perspectives*. December 2004. Vol 30 (4).

⁶⁷ P. Tavrow, A. Obbuyi, and V. Omollo. "Who is to blame? Community attitudes about coerced sex in rural Kenya." Presentation at American Public Health Association (APHA) 134th Annual Meeting and Exposition. November 4-8, 2006. Boston, MA. Accessed at http://apha.confex.com/apha/134am/techprogram/paper_139879.htm. Accessed Dec 14, 2011.

shortcomings of Unilever’s actions in fulfilling due diligence to respect the rights of its female tea workers

Access to remedy

Remediation is the third pillar of the UN “Protect, Respect, Remedy” Framework and the third component of a businesses’ commitment to respect the rights of its workers. Again, the Guiding Principles emphasize that the effectiveness of remediation measures must be demonstrated rather than assumed, and companies “should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be heightened risk of vulnerability or marginalization.”⁶⁸ Unilever’s inadequate investigations and inattention to the specific vulnerabilities and rights of female workers have already been reviewed. Remediation, however, first requires admission of violations. Neither Unilever nor Rainforest Alliance accepted allegations of sexual harassment and abuse; as a result, remediation was never addressed and will not be discussed here.

Section V: Discussion

The Unilever Kericho case raises a number of important questions about due diligence and certification processes in assessing business impacts on human rights—particularly in cases of alleged sexual harassment and abuse in cultural contexts where women experience excess vulnerability to rights violations. Several of these issues are discussed here.

⁶⁸ J. Ruggie (2011). “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: p 19. March 2011.

Stakeholder conflicts: Business, independent certifiers, and NGOs

The Guiding Principles—and the framework that they build upon—clearly describe the roles of the state and the private sector in the realm of business and human rights. The Unilever Kericho case is more complex in that it involves other stakeholders—Rainforest Alliance as the certifying agency and SOMO as the activist INGO—who played key roles. SOMO and KHRC’s investigative work constituted the bulk of the claims against Unilever; in response to these allegations, Unilever relied heavily on the validity of the Rainforest Alliance certification and audit processes as evidence against the allegations. The importance of both of these actors in this case raises questions about who holds responsibility—to identify and address allegations—in cases of human rights abuses.

In Unilever’s response to SOMO’s report, the company rejected SOMO’s allegations of sexual abuse and harassment on the estate. In fact, Unilever went further and, in what appeared an attempt to deflect attention from their own culpability, accused SOMO of being unproductive and inflammatory by releasing the report:

“We are disappointed by SOMO’s attempt to undermine public trust in this scheme [certification]. If SOMO intends to improve the living and working conditions in the tea industry, we believe publishing this report will have a counter-productive effect.”⁶⁹

The Rainforest Alliance took a similar stance, also accusing SOMO of playing a problematic role:

⁶⁹ Unilever (2011). “Unilever statement October 2011.” Accessed at <http://www.business-humanrights.org/media/documents/unilever-statement-somo-oct-2011.pdf>

“Unfortunately we consider the SOMO report to be undermining rather than constructive, and we are disappointed by their approach and publication.”⁷⁰

Both Unilever and Rainforest Alliance described SOMO’s approach as being destructive, rather than constructive. Though their statements offered no further explanation of how they believed that the report might hurt workers, Unilever and Rainforest Alliance made it clear that they felt SOMO’s report only went halfway: making claims about human rights violations without providing specific and actionable evidence.

Unilever and Rainforest Alliance stressed that they needed specific evidence from SOMO in order to be able to act up on the findings presented in the report:

“We are not aware of any current problems of inappropriate behavior which SOMO allege to be happening at our tea estate in Kericho...We have met with SOMO twice to ask them to provide substantiated evidence to back up their claims so we can take immediate appropriate action. Regrettably, they refuse to do so, which makes it difficult for us to act.” (Unilever)⁷¹

“After receiving unpublished reports on India and Kenya in September 2010, we asked SOMO to provide the names of the workers who articulated the allegations in order to perform Research Audits to investigate the complaints. SOMO let us know they could not send us a list of people they interviewed because the research was carried out guaranteeing the workers’ anonymity.” (Rainforest Alliance)⁷²

The Rainforest Alliance, in fact, sought to clarify that it did not actually deny allegations of sexual harassment or abuse, but that it needed “evidence and specifics so that independent

⁷⁰ Rainforest Alliance (2011). “Statement in response to the SOMO report from the Rainforest Alliance.” October 29, 2011. <http://rainforest-alliance.org/agriculture/somo-statement>

⁷¹ Unilever (2011). “Unilever statement October 2011.” Accessed at <http://www.business-humanrights.org/media/documents/unilever-statement-somo-oct-2011.pdf>

⁷² Rainforest Alliance (2011). “Statement in response to the SOMO report from the Rainforest Alliance.” October 29, 2011. <http://rainforest-alliance.org/agriculture/somo-statement>

auditors can follow up the allegations.”⁷³ The implications that SOMO should be held responsible for providing evidence raises questions about who has primary responsibility to investigate human rights abuses.

In the Kericho case, SOMO and KHRC’s first obligation was and should have been to the confidentiality of the tea workers—not to Unilever and Rainforest Alliance’s demands for evidence. What’s more, Unilever’s response implies that as a company was incapable of acting independently without SOMO’s findings. The Guiding Principles, however, clearly state that it should be the responsibility of the business to investigate impacts. While Unilever did report that general management investigated the allegations, the extent of these investigations is unknown and the possibility for bias troubling. When Unilever’s management investigated claims in Kericho, they deemed that most cases were false and motivated by “spurious malice”⁷⁴—a conclusion that can be taken at face value given the management’s own stake in finding negative conclusions.

After Unilever’s general management investigated the allegations and found no evidence to substantiate them, Rainforest Alliance commissioned an independent audit of the plantation and also concluded that there was no evidence of violations. Unilever cited this audit as proof of its due diligence in responding to the allegations. Rainforest Alliance, however, also had its own reputation to protect, as SOMO’s report had directly called into question the validity of Rainforest Alliance’s certification process (recall also that Unilever’s Kericho

⁷³ Response included in revision to V. Largo (2011). “PG Tips and Lipton tea estates hit by allegations of sexual harassment and poor conditions.” What’s in your cuppa? *Ecologist*. April 2011.

⁷⁴ Kenya Human Rights Commission (2008). “A comparative study of the tea sector in Kenya: A case study of large scale tea estates.” KHRC: 2008: p 12.

plantation was the first tea plantation to be certified by Rainforest Alliance and signaled an important expansion of its activities beyond the coffee and tourism industries). In this case, then, was it sufficient for Unilever to rely on the audit commissioned by Rainforest Alliance? Or, in fulfillment of due diligence, should Unilever have commissioned its own third party audit?

Finding evidence of sexual harassment and abuse

Unilever, Rainforest Alliance and SOMO each made and defended their claims about sexual harassment and abuse in Kericho on the basis of evidence (its existence or lack). Evidence of sexual harassment and abuse, however, is distinctly challenging to collect—particularly when potential victims face further sexual abuse or job insecurity for speaking with investigators. Further still, as discussed above, coerced sex in Kenya is prevalent but is often stigmatized such that those women who have experienced it might not be willing to disclose it.

In their responses to SOMO, both Unilever and Rainforest Alliance demanded “substantiated evidence” and names of victims in order to proceed with investigations. Such evidence, however, would jeopardize the relationship of all parties with women tea workers; if SOMO were to provide the names of the workers it had interviewed, this would in itself represent a violation of women’s self-respect and dignity and rights to confidentiality

Can comprehensive “sustainability” certification adequately address component issues, including sexual harassment and abuse?

SOMO’s report went beyond alleging Unilever’s culpability in human rights violations on its Kericho plantation; it also raised fundamental questions about Rainforest Alliance’s

certification processes. Rainforest Alliance certification is built on three pillars of sustainability: environmental protection, social equity and economic viability.⁷⁵ The comprehensive nature of this mandate, however, may come at a cost to specific—and complex—issues such as sexual harassment and abuse.

The SAN standards that Rainforest Alliance follows indicate that “The farm and supervisors must not threaten, sexually abuse or harass, or verbally, physically or psychologically mistreat workers for any reason. The farm must encourage the respectful treatment of workers and have a formal mechanism to act upon workers’ claims of mistreatment.”⁷⁶ Though stipulations are made toward issues of sexual harassment and abuse, it cannot be taken for granted that auditors with extensive experience in farming and agriculture and trained in agronomy, ecology, labor rights and rural development⁷⁷ can provide a sufficiently appropriate level of detail to complex issues of gender dynamics and sexual harassment. Even if evidence of harassment and abuse were found, this is just one component of a broader certification rubric and therefore might not jeopardize overall certification. As noted by FNV Mondiaal in its statement on the Unilever case, “Rain Forest Alliance certification does not necessarily mean that Unilever complies fully with the social component of the certification requirements.”⁷⁸

⁷⁵ Rainforest Alliance. “Certify your farm.” Accessed at <http://www.rainforest-alliance.org/agriculture/certification>.

⁷⁶ Sustainable Agriculture Network. “Sustainable Agriculture Standard.” July 2010.

⁷⁷ Rainforest Alliance (2011). “Statement in response to the SOMO report from the Rainforest Alliance.” October 29, 2011. <http://rainforest-alliance.org/agriculture/somo-statement>

⁷⁸ FNV Mondiaal (2008). “Adding insecurity to life: Erratum to the Unilever Annual Report and Accounts 2008.” Amsterdam: 2008: p 5.

Unilever's Kericho plantation is also certified by the Ethical Tea Partnership (ETP).

Though the ETP certification includes a non-discrimination standard, the KHRC has also described this standard as vague and representing an "unclear commitment to social standards."⁷⁹ The standards included no reference to sexual harassment or abuse.

Though Unilever cited certification and re-certification by Rainforest Alliance as evidence against the allegations, in fact overall certification by Rainforest Alliance is not best suited to directly address the question of whether sexual harassment and abuse was taking place on Unilever's Kericho plantation. Even the surprise audit conducted by Rainforest Alliance was committed within the framework of the SAN standards. This case calls attention to the inadequacies of such certification schemes for addressing allegations of human rights violations.

How much sexual abuse is too much?

In its response to SOMO's allegations and general critiques of the certification process, Rainforest Alliance also made very clear that certification hinged on the extent of the problem documented through evidence:

"It is possible to find complaints and violations of a comprehensive standard on any large farming operation that involves thousands of hectares and workers. The SAN auditors are trained to discern isolated incidences from systemic problems."⁸⁰

⁷⁹ Kenya Human Rights Commission (2008). "A comparative study of the tea sector in Kenya: A case study of large scale tea estates." KHRC: 2008: p 33.

⁸⁰ Rainforest Alliance (2011). "Statement in response to the SOMO report from the Rainforest Alliance." October 29, 2011. <http://rainforest-alliance.org/agriculture/somo-statement>

This begs the question, “At what point to human rights violations become ‘systemic?’” This question is particularly pertinent with respect to phenomena such as sexual harassment and abuse, which are often hidden and stigmatized. Given the challenges of collecting evidence of such incidents, then, at what point can the “tip of the iceberg” be recognized as an indication of a more systemic problem?

The implications of this approach are also problematic with respect to provision of remedy. In this case, Unilever denied the widespread nature of the alleged violations and therefore took no action to provide adequate remedy for women workers who may have experienced sexual harassment or abuse. Even if there are only a handful of isolated cases that gave rise to these broader evaluations, do they not merit remedy?

Section VI: Addressing harassment and sexual abuse—a challenge for business and human rights

By looking specifically at Unilever and Rainforest Alliance’s responses to allegations of sexual abuse in Kericho, this paper sought to explore some of the challenges inherent to audits and certification processes that have been noted by others,^{81,82} giving specific attention to the complexities of issues of sexual harassment and abuse in distinctly gendered settings. Some of these questions include: What constitutes “evidence” of sexual harassment and abuse? Is it feasible to collect such evidence given workers’ concerns about job insecurity and the stigma around such experiences? How much evidence of sexual harassment and abuse do corporations

⁸¹ FNV Mondiaal (2008). “Adding insecurity to life: Erratum to the Unilever Annual Report and Accounts 2008.” Amsterdam: 2008: p 5.

⁸² S. van der Waal (2011). “Certified Unilever Tea: Small cup, big difference?” Amsterdam: October 2011.

need before they are compelled to act? Do NGOs have a responsibility to provide evidence when they make claims about human rights violations? Or when allegations have been made, do corporations have an obligation to commission third party and un-biased investigations?

The issues highlighted in this case are not distinct to Unilever's business operations in Kericho, and they have implications for business and human rights in other settings. A recent case in Jordan in fact raised similar questions about the challenges related to evidence, due diligence, and sexual abuse at the workplace.

After a 27 year old Bangladeshi seamstress accused her Sri Lankan manager of raping her three times in the Classic Fashion factory in Jordan, the international watchdog agency Institute for Global Labour and Human Rights took up the case and reported that in fact sexual abuse was widespread in the factory. The group claims that over 300 women workers in the factory had been raped by their managers between 2007 and 2011.⁸³

When the Government of Jordan's National Center for Human Rights investigated the allegations, however, they found "no clear evidence to support allegations of rape."⁸⁴ The Jordanian Labor Ministry also conducted "surprise inspections" of the Classic Fashion factory and other factories and found no evidence of abuses. Their findings beg familiar questions, however, about the challenges of documenting sexual abuse in circumstances where disempowered female workers face further abuse and threats to their job security for reporting violations. This was the case in Jordan, where visiting investigators to the factory described a

⁸³ Associated Press. "Rape case turns focus to Jordan's factory problems" September 7, 2011. Accessed from Institute for Global Labour and Human Rights. <http://www.globallabourrights.org/press?id=0378> Accessed on December 14, 2011.

⁸⁴ Associated Press. "Jordan rights group: No proof of rape at factory." September 8, 2011. Accessed from Institute for Global Labour and Human Rights. <http://www.globallabourrights.org/press?id=0379>. Accessed on December 14, 2011.

pervading sense of fear and distrust in the Classic Fashion factory; ultimately, women workers' lack of faith in the confidentiality surrounding the inquiry limited their willingness to speak with outside reporters.⁸⁵ Such fear also likely compromised the ability to discover "evidence" by internal and government auditors, casting doubt on the validity of the auditors' findings.

This case provides another illustration of the challenges underlying auditing processes for investigating sexual abuse, or other workplace rights violations, for that matter. Even John Ruggie, the author of the Guiding Principles, has himself confessed that "Just about everybody, at least off the record, will tell you that monitoring doesn't work and auditing of supplier factories doesn't work, because people cheat."⁸⁶

Though Ruggie's statements were specifically made in reference to factory production, similar criticisms have been voiced regarding the validity of auditing processes generally in monitoring labor and human rights. Sanne van der Wal, the lead author behind SOMO's reports, was not surprised by the results of the Rainforest Alliance audits:

"What they see is like a theatre; it is not the real situation...This is really common, not just in tea production but also in the textile and garment industry."

The Classic Fashion case in Jordan complements this analysis of the Unilever case in Kenya.

Both examples highlight the challenges inherent to respecting the rights of women in distinctly gendered work environments and addressing allegations of sexual harassment and abuse.

These challenges have been described above.

⁸⁵ Associated Press. "Rape case turns focus to Jordan's factory problems" September 7, 2011. Accessed from Institute for Global Labour and Human Rights. <http://www.globallabourrights.org/press?id=0378> Accessed on December 14, 2011.

⁸⁶J. Zarcostas (2009). "UN expert expressed doubts on monitoring." Women's Wear Daily. June 4 2009. Accessed at <http://www.globallabourrights.org/alerts?id=0352>. Access on December 14, 2011.

Though this analysis is preliminary and the case still developing, a number of possibilities can be identified for moving forward. The first is recognizing opportunities for corporations like Unilever to better fulfill their responsibility to respect rights and offer non-judicial remedy mechanisms. In the Unilever case, this specifically would require improved monitoring and evaluation in support of a more comprehensive approach to due diligence. A complaint hotline is insufficient if a culture of fear and mistrust is pervasive. Unilever's implementation of a social welfare officer on the plantation may be a positive step toward genuine remedy, but an evaluation will be necessary to document the efficacy of this measure and additional steps may be necessary to complement it.

In cases such as Unilever in Kericho where serious allegations have been made against a corporation, corporations would profit from a more proactive and cooperative approach than a defensive and accusatory one. Hiring independent consultants or auditors with specific experience in gender mainstreaming and sexual harassment in the workplace to conduct comprehensive research and provide recommendations is one apparent option. This is particularly appropriate for Kenya, where the World Bank has recommended specific measures to address the gendered nature of the workforce there.⁸⁷

Such an approach more appropriately fulfills a businesses' responsibility to respect the rights of its workers by performing adequate due diligence into potential and actual rights violations. In the Kericho case, rather than demanding SOMO's evidence, Unilever would have done better to fulfill its due diligence requirements by commission an independent audit

⁸⁷ A. Ellis, J. Cutura, N. Dione, I. Gillson, C. Manuel, and J. Thongori (2007). "Gender and economic growth in Kenya: unleashing the power of women." *Directions in development: Private sector development*. World Bank. Washing DC: 2007.

conducted by a team trained in research and monitoring related to gender and sexual harassment and abuse—difficult subjects that demand delicate and targeted approaches.

These recommendations are similar to those given by SOMO in their 2011 report. While this paper focused on Unilever’s actions in the Kericho case, SOMO’s recommendations emphasized the reforms necessary to improve standards systems such as the Rainforest Alliance’s certification process. Both analyses, however, highlight the need to improve due diligence processes and for actors—including Unilever and Rainforest Alliance—to be more open to allegations of violations and to pursue and investigate these allegations comprehensively.

The Unilever Kericho case is important in that it demonstrates the complex accountability mechanisms in issues of business and human rights where responsibility overlaps between governments, corporations, NGOs, and auditors or certification bodies. The case also makes abundantly clear the need for further reflection on the particularities of allegations of sexual harassment and abuse. Such allegations demand heightened sensitivity to cultural context and gender relations, and also require comprehensive and earnest investigation in fulfillment of due diligence because of the covert and stigmatized nature of the allegations. The Kericho case makes this clear, and demonstrates that there is ample scope for improving the protection of the rights of women workers in the tea industry in Kenya.