
Submission to the United Nations Working Group on Business and Human Rights

Policy Coherence in Government Action to Protect Against Business-Related Human Rights Abuses

17 June 2019

This submission responds to the call of the United Nations Working Group on Business and Human Rights (the Working Group) for inputs to inform its 2019 report to the UN General Assembly on “policy coherence in government action to protect against business-related human rights abuses”.

IHRB supports very much the focus of the Working Group on the implementation of the first pillar of the UN Guiding Principles on Business and Human Rights (UNGPs) and giving particular attention to coherence. We stand ready to provide further support on this issue upon request.

Incentives and Disincentives for Greater Policy Coherence

IHRB’s 2014 report, *State of Play: Human Rights in the Political Economy of States*¹ notes numerous motivations, incentives, and disincentives that can complicate or reinforce government approaches to protecting human rights in the context of business activity. These incentives and disincentives relate to the behaviour of government departments themselves (including local and regional government) as well as government actions that can affect the behaviour of business. An updated summary of these factors follows.

Disincentives for governments include:

- lack of political will with little voter interest in the subject;
- conflicts of interest with the political–business nexus (in some countries a very high percentage of parliamentarians and government ministers have business interests);
- Short-termism in terms of economic policy, and the perception that human rights are a constraint on national competitiveness;

¹ Available at: <https://www.ihrb.org/other/featured/state-of-play-human-rights-political-economy-states>

- challenges in ensuring policy coherence between different government ministries with varying priorities, cultures, and political leadership;
- allegations of protectionism raised when measures to protect rights are considered.

Incentives for governments include:

- coherence, which can better meet international legal obligations to protect human rights and the leverage available to governments;
- building a more accountable trade–development nexus, where trade and investment can advance human rights at home and abroad and not undermine them;
- lowering the environmental, social, and governance (ESG) risks of a State’s economic relationships - in particular trade finance and export credit, development aid, public procurement, state-owned enterprises, and the investment portfolios of sovereign wealth funds.

Similarly for business, complex factors can enable or hinder internal alignment and operationalisation of policy intentions.

Government-related disincentives for business to act on human rights issues include:

- red tape and anti-competitiveness arguments advanced by business associations and lobbying;
- absence of a level playing-field internationally if the human rights are enforced by some companies’ home governments but not by the home governments of business competitors;
- lack of clarity from States in terms of expectations of business performance - political speeches do not always translate into policy and policies are not always enforced. Some government ministries might prioritise human rights whilst others might dismiss or undermine them;
- limited rewards or financial incentives to business for undertaking human rights due diligence or transparency;
- lack of leverage over suppliers particularly where capacity at a supplier is low and beyond tier one suppliers;
- complexity of human rights language and difficulties in translating into business action.

Government-related incentives for business to act on human rights issues include:

- public procurement opportunities where human rights are part of the bidding requirements;
- access to cheaper and more sustainable finance through export credit (state-backed insurance and trade finance);
- participation in trade missions or discretionary embassy assistance where human rights due diligence is a requirement (such as a business’ participation in the mediation process of the country’s National Contact Point for adherence to the OECD Guidelines for Multinational Enterprises);
- to help shape future national legislation relating to business and human rights.

Some Specific Examples from IHRB’s Work

IHRB’s work engaging businesses, governments, and civil society across a range of issues and sectors reinforces the continued relevance of these factors. We have therefore restricted the remainder of our inputs to those areas where we have demonstrated experience and expertise in order to concentrate the focus of this submission. These specific examples of IHRB’s work are highlighted in six sections laid out below.

1. Migrant Workers and Modern Slavery

A key issue impacting on the rights of migrant workers is the payment of large recruitment fees to secure employment abroad. These fees frequently trap migrant workers in situations of debt bondage and can lead to further exploitations including forced labour and trafficking. This issue is gaining increased attention globally, and IHRB and other stakeholders including governments, businesses, and NGOs are promoting a model of recruitment based on the Employer Pays Principle²: *No worker should pay for a job – the costs of recruitment should be borne not by the worker but by the employer.*

The *Global Compact for Migration*³ calls on all governments to create an enabling environment which facilitates business compliance with responsible recruitment in line with the International Labour Organization (ILO)'s *General Principles and Operational Guidelines for Fair Recruitment*.⁴ A range of actions can be taken to support implementation of a coherent and smart mix of measures in this area, including effective supervision and regulation of recruitment intermediaries. Many of the following examples are UK-centric due to recent developments and IHRB's advocacy to a government leading in legislative terms, but offer insights toward replicable approaches in any country.

Supervision and Regulation of the Recruitment Industry

In the UK, the Gangmasters and Labour Abuse Authority (GLAA, formerly Gangmasters Licensing Authority) has proved an effective mechanism for better enforcement of labour laws relating to the use of agency workers in the agricultural, horticultural, and food processing sectors that fall under the licensing regime. The GLAA remit was recently extended to include other sectors, but IHRB has advocated for high risk sectors to be included as well, including construction, hospitality, and care.

The experience from the GLAA-licensed sectors is that compliance with the licensing regime is not onerous and has delivered a clear operating threshold that protects all law-abiding businesses and prevents exploitation of workers, including from risks of modern slavery. Indeed, targeting proven salient risks common in certain sectors helps to prevent abuse and exploitation, supports greater compliance with the law, supports a level playing field for law-abiding businesses, and helps to combat and prevent tax fraud.

Commissioners

The establishment of the position of an independent Anti-Slavery Commissioner has been an important factor in the success of the UK's Modern Slavery Act. The Commissioner has a UK-wide remit to encourage good practice in the prevention, detection, investigation, and prosecution of modern slavery offences and the identification of victims. In both the UK and abroad the Commissioner has served to champion the Act and the wider modern slavery agenda to a range of stakeholders, overseeing and coordinating the response to the Act by government, business, and civil society, which has catalysed engagement and change within a number of industry sectors. In particular, the work of the UK Commissioner in engaging with the private sector has played a critical role in encouraging greater supply chain transparency. Similar approaches by other governments would be welcomed, prioritising the independence of the position and its integral relationship to the effectiveness of any modern slavery related legislation.

2 www.employerpays.org

3 See further: <https://refugeesmigrants.un.org/migration-compact>

4 See further: https://www.ilo.org/global/topics/fair-recruitment/WCMS_536755/lang--en/index.htm

Public Procurement

Businesses often suggest that they would take further steps to address modern slavery if governments would lead by example, not least because many smaller companies sit in the supply chain of governments, meaning additional measures would significantly increase the impact of any related modern slavery legislation or commitments. With central and local government supply chains representing about 20% of GDP for most developed economies, not requiring public bodies themselves to address their practices results in a significant gap in coverage and effectiveness of any forced labour measures. It also inhibits a free market for government contracts where law-abiding businesses may compete fairly within the law. Common requirements of businesses to report on efforts to address forced labour and trafficking in supply chains should apply not only to businesses, but also to public bodies procuring goods and services.

The United States 2012 *Executive Order Strengthening Protections to Prevent Trafficking in Persons in Federal Contracts* expressly prohibits the charging of recruitment fees to workers.⁵ Conversely, the 2018 *Sancroft-Tussell Report: Eliminating Modern Slavery in Public Procurement* suggests that 40% of all UK government contracts are currently awarded to companies who have failed to produce a modern slavery statement that complies with the UK Modern Slavery Act.⁶

It is therefore encouraging to note developments around five governments that have been working together to prevent forced labour with a particular focus on government contracts. The UK, US, Canada, New Zealand and Australia have established a set of principles for nations to adopt in order to tackle modern slavery in global supply chains. By working together, these governments hope to use their \$600 billion of purchasing power as a lever to prevent forced labour in both the public and private sector. Announced at the UN General Assembly 2018, the four principles are:⁷

1. Governments should take steps to prevent and address human trafficking in government procurement practices.
2. Governments should encourage the private sector to prevent and address human trafficking in their supply chains.
3. Governments should advance responsible recruitment policies and practices.
4. Governments should strive for harmonisation.

Advocacy from Corporates

Political leaders are often surprised when their own companies call for clearer and more effective legislation to ensure a more level playing field on rights-related standards. At the time of IHRB's 2014 *State of Play* report, there were only a select number of companies around the world willing to speak openly about the need for greater corporate responsibility, including an openness to the adoption of requirements from governments. Moreover, this was rarely being reflected by national business associations and other business interest groups. Five years on there has been an uptake in the number of individual companies advocating publicly for human rights due diligence requirements on various issues and sectors, as well as some associations.⁸

5 See further: IHRB, "Progress since the Introduction of the UK Modern Slavery Act" (September 2018) at: <https://www.ihrb.org/focus-areas/migrant-workers/submission-progress-since-introduction-of-uk-modern-slavery-act>

6 See further: <https://sancroft.com/2018/03/22/the-sancroft-tussell-report-eliminating-modern-slavery-in-public-procurement-2/>

7 See further: <https://www.gov.uk/government/news/uk-agrees-principles-for-tackling-modern-slavery-in-supply-chains>

8 See for example, Business & Human Rights Resource Centre "List of large businesses & as-

Businesses and their associations can play a constructive role by demanding greater clarity about state expectations of them regarding human rights. This is becoming an increasing area of focus within IHRB's work supporting the Leadership Group for Responsible Recruitment,⁹ a group of currently 14 global companies committed to the *Employer Pays Principle*. Strategic dialogues between Leadership Group companies and governments in key origin or destination countries for migrant workers has become a core part of national outreach to drive governmental uptake of the Employer Pays Principle. Dialogues are being undertaken between Leadership Group company members and the Governments of Malaysia, Myanmar,¹⁰ the United States, United Kingdom, Vietnam and Thailand.

2. Collective Action

There is increasing evidence that companies committed to respecting human rights understand that they need to be proactive on the question of leverage. Perhaps the most important way this is done is through collective action.

Examples of collective action are emerging across a number of commodities, business sectors, high-risk countries, and national multi-stakeholder covenants. For example, the Dutch Banking Sector Agreement involves not just the leading Dutch commercial banks but also the Dutch development finance institution, government, and civil society.¹¹ The initiative's joint mapping of high-risk commodity value chains (such as cocoa, palm oil, and gold) will help ensure banks are aligned on prioritisation and collective responses to managing risks. A shared database is being developed for these sectors which will aid bank decision making. The role and potential leverage of each financial actor will be carefully observed and learned from.

IHRB is responsible for initiating a number of collective approaches to complex business and human rights challenges. These include initiatives in specific countries, such as Myanmar, Qatar, and Colombia, and also globally on thematic issues including responsible recruitment, commodity trading, and the open source ranking of companies for investors. IHRB's most recent example of catalysing collective action involves the global sports industry and the development of the Centre for Sport and Human Rights.¹²

At the day-to-day and grassroots level of sport, the Commonwealth has been a particularly significant leader in exploring how best to align national policy to protect human rights in and through sport. Ahead of the Games in Gold Coast, the 9th Commonwealth Sports Ministers Meeting (9CSMM), chaired and hosted by the Government of Australia, saw delegations from 45 Commonwealth nations and territories meet under the theme of 'strengthening policy coherence to maximise the benefits of investing in sport'. This provided an opportunity to speak directly to Ministers on the recommendations of the Commonwealth Advisory

sociations that support human rights due diligence regulation" (ongoing), at: https://www.business-humanrights.org/en/list-of-large-businesses-associations-that-support-human-rights-due-diligence-regulation?utm_source=Business+%26+Human+Rights+Resource+Centre+Updates&utm_campaign=8562ec42e9-EMAIL_CAMPAIGN_2019_06_10_12_56&utm_medium=email&utm_term=0_c0049647eb-8562ec42e9-182114457&mc_cid=8562ec42e9&mc_eid=a1efbe2456

9 See further: <https://www.ihrb.org/employerpays/leadership-group-for-responsible-recruitment>

10 See further: IHRB, "Meeting Report: Responsible Recruitment of Myanmar Migrant Workers" (June 2019) at: <https://www.ihrb.org/focus-areas/migrant-workers/meeting-report-responsible-recruitment-of-myanmar-migrant-workers>

11 See further: IHRB, "How Can the Finance Sector Best Use its Leverage for Human Rights?" (May 2019), at: <https://www.ihrb.org/focus-areas/finance/how-can-the-finance-sector-best-use-its-leverage-for-human-rights>

12 Available at: <https://www.ihrb.org/focus-areas/mega-sporting-events/report-striving-for-excellence-mega-sporting-events-human-rights>

Board on Sport (CABOS)¹³ and to the new Commonwealth Secretariat publication, *States' Obligations Under International Human Rights Conventions: The Implications for Government Sport Policy*.¹⁴ This report examines how human rights can be protected in sport and through sport, in particular in those areas in which sport can advance the 2030 UN Development Agenda, and sets out in detail the status of ratification of human rights treaties by Commonwealth States. It tabulates the human rights obligations that are relevant to realisation of the UN Sustainable Development Goals identified by the Commonwealth as relevant to sport, or where sport can assist realisation.¹⁵

3. Built Environment

A new area IHRB is exploring concerns the built environment – the places where we live, work, and interact with others. The built environment has a defining influence over our ability to lead healthy, fulfilling lives. By 2050, two thirds of the world's population will live in urban areas. Efforts to address the world's major challenges such as inequality, mass migration, and climate change hinge in many ways on what we build, how, and for whom.

National governments' multiple areas of influence in the built environment include setting and enforcing the national regulatory framework, and committing to and following international human rights standards. National governments should also play an effective co-ordinating role, ensuring cohesion of policies and outcomes across agencies (environment, labour, housing, immigration, disaster relief), and between rural, semi-urban and urban areas. National government is also an important source of financing for urban development and infrastructure.

At an even more local level, the leadership of mayors and local government is critical to the realisation of rights. Indeed, many countries have recently seen cities serving as a powerful counterpoint to rising nationalism, and to the roll-back of human rights and environmental protection at the national level. Among its many functions, municipal government sets and enforces the local regulatory framework, ensures effective processes for citizen participation, makes zoning and land-use decisions, establishes economic development programmes and oversees building codes and permits.

Municipal governments themselves are also significant landowners, with a duty to protect access to public goods and areas such as parks and public housing. In addition, they have significant leverage to promote respect for human rights through the procurement process, in determining which companies receive contracts as well as the provisions of those contracts.

Local municipalities from all regions have emphasised the need for adequate autonomy and access to finance in order to make progress at the local level towards the UN Sustainable Development Goals.¹⁶

13 See further: <http://thecommonwealth.org/cabos-membership>

14 Available at: <http://thecommonwealth.org/sites/default/files/inline/States%20Obligations%20Under%20International%20Human%20Rights%20Conventions.pdf>

15 See further, David Rutherford "Progress on Embedding Human Rights within Commonwealth Sports Policy" (May 2018) at: <https://www.ihrb.org/megasportingevents/resource-view/commentary-embedding-human-rights-in-commonwealth-sports-policy>

16 For example see "Strategic Priorities 2016-2022", United Cities and Local Governments, at: https://www.uclg.org/sites/default/files/strategic_priorities_2016-2022.pdf; "Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee", UN General Assembly (August 2015), at: https://www.uclg.org/sites/default/files/2015_report_en_role_of_local_government_in_the_promotion_and_protection_of_human_rights.pdf (para 22); and for a country-specific example, "Urban Governance in India", Isher Judge Ahluwalia, *Journal of Urban Affairs* (February 2017), at: www.tandfonline.com/doi/full/10.1080/07352166.2016.1271614

4. Trade and Investment

Increasingly, countries are relying on trade agreements to advance foreign policy goals, which can include promotion and protection of human rights. Recent studies have shown that countries including the United States, Canada, New Zealand, Australia, Chile, Japan, and the European Union have incorporated clauses and sections in their trade agreements with many countries that support specific goals, in particular implementation of adequate labour conditions and protection of labour rights, transparency and anti-corruption measures, environmental standards, and in some instances, standards with respect to specific commodities whose trade bears an impact on human rights.¹⁷

A key mechanism for supporting effective implementation of such conditionality is through oversight exercised by national legislatures. Trade agreements are often devised by technical staff focused on specific issues relevant to trade, with limited regard to broader national commitments on human rights, transparency, and the environment. Objectives of companies and industry associations may not always align with broader human rights goals of a government. Consulting with specialised civil society groups, the academic community, and human rights groups through open consultations to develop policies is essential, and where appropriate, public hearings are critical. An existing, or new, parliamentary or legislative committee should be tasked in all governments to take up this role – one enjoying protective privilege with sufficient resources and convening power to undertake the work.

IHRB encourages States to include business and human rights experts in key government departments and in expert advisory groups. IHRB is aware that two Export Credit Agencies have recently added human rights experts to their respective advisory committees as have a number of international financial institutions. The UK Government, for example, has two business experts on the human rights advisory council of its foreign minister.

5. Data, Evidence Gathering, and Standards Harmonisation

An often raised argument against any mandatory measures around business and human rights is that accurate numbers do not exist to know how many businesses are aware of, have adopted, and are implementing standards such as the UNGPs or the OECD Guidelines for Multinational Enterprises. There has as yet been no notable or sustained effort by governments to measure the effectiveness of the international business and human rights standards they are adopting.

There is also a serious lack of investigative capacity. National regulators of labour markets or environmental authorities rarely if ever investigate the global value chains of their domiciled companies. Even criminal prosecutions for human rights crimes committed abroad are few and far between.¹⁸ Policy makers often claim to rely on civil society and investigative journalists¹⁹ to be the ‘watchdogs’ of corporate behaviour, yet governments are typically not funding that work, and NGO and media accounts are not always the most useful basis for a systematic assessment across sectors and countries.²⁰

17 See further: IHRB, “IHRB Submission to the UK Parliament Joint Committee on Human Rights: The Case for a New UK Facility on Responsible Trade with a Corresponding Parliamentary Mechanism” (January 2019), at: <https://www.ihrb.org/other/governments-role/submission-jchr-uk-facility-on-responsible-trade>

18 See further: <http://www.commercecrimehumanrights.org/>

19 See further: Mark Taylor, “Killing Investigators Blinds Us All” (April 2017) at: <https://www.ihrb.org/other/high-risk-zones/killing-investigators-blinds-us-all>

20 See further: Mark Taylor, “Regulate First. Ask Questions Later.” (February 2018) at: <https://www.ihrb.org/other/governments-role/commentary-regulate-first-ask-questions-later>

Governments have a critical role in creating a level playing field for business by providing greater clarity on expectations relating to human rights due diligence, including how much “knowledge” can reasonably be expected of business in proactively understanding their human right risks and actual impacts. This can only be done well by having reliable data and evidence to inform their thresholds. There is ample evidence of the problem, but measurements of what works and what does not are sorely lacking.

IHRB has often made the point about standards harmonisation and the way this lack of harmonisation can conflict with coherence and better human rights outcomes. One way of achieving this harmonisation is through national law and national action plans,²¹ but action at the international level is also required.

One example of the issue would be the discrepancies between the human rights requirements of the global finance system and those developed within the wider UN system. Financial institutions, including those such as international development banks and export credit agencies in which States are the shareholders or owners, align with the Performance Standards of the International Finance Corporation (IFC). These were last updated in 2011, the same year as the UNGPs were agreed by consensus at the UN Human Rights Council. Even then, in 2011, the IFC Performance Standards were not aligned with the UNGPs in several important respects. This non-alignment has only become more apparent through time. From the finance side, this has partly been addressed by the further development of the Equator Principles for project finance and the OECD “common approaches” for Export Credit Agencies. But this patchwork does not represent coherence and the inconsistencies prevent the full value of the work of the due diligence guidance developed at the UN, OECD, and other bodies gaining application within international finance.

6. Human Rights Defenders

In June 2019, IHRB organised an international meeting on the role of business in relation to human rights defenders hosted by Wilton Park (an agency of the UK Government). Several governments attended this meeting and the role of the state received particular attention. We would recommend that all states include reference to human rights defenders when developing coherence in relation to business and human rights and the report from the meeting (due to be published in July) will offer a number of examples of how this might be achieved.

21 For example, in the Swiss context, the NAP did seem to play some role in encouraging cooperation between FDFA and SECO in the context of developing and consulting on guidance for commodities trading sector. The final guidance includes a reference to the NAP in the context of the Swiss Governments expectations for all businesses to operate responsibly. See further: IHRB, “The Commodity Trading Sector Guidance on Implementing the UN Guiding Principles on Business and Human Rights” (Nov. 2018) at: <https://www.ihrb.org/focus-areas/commodities/the-commodity-trading-sector-guidance-on-implementing-the-ungps> See also IHRB’s recent comments on the draft Thai NAP at: <https://www.ihrb.org/focus-areas/migrant-workers/submission-thai-national-action-plan>