

**Submission to the United Nations Human Rights Council
Universal Periodic Review Session 13: United Kingdom
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As a means of encouraging constructive dialogue on private sector-related issues in the United Nations (UN) Human Rights Council Universal Periodic Review process, this submission addresses aspects of the United Kingdom (UK) Government's record of protecting against human rights abuses by or involving business.

This submission by the Institute for Human Rights and Businessⁱ (IHRB) was prepared in consultation with a group of over 20 UK-based stakeholders (including businesses, NGOs, trade unions and others) who provided feedback on an initial draft as well as comments at a workshop held in London on 17 November 2011. IHRB thanks participants for invaluable insights to the issues raised and recommendations made in this submission. The views expressed here are those of IHRB alone. The Institute takes full responsibility for all content.

Summary of submission

Overall UK policy with respect to business and human rights would benefit from greater clarity, a national strategy on this issue and institutional coordination such as through the creation of a focal point for implementation (Part I). The current financial crisis has raised significant concerns over UK policy decisions detrimental to human rights protections, such as budget restraints to UK national human rights institutions (NHRIs), changes to export credit funding priorities, the potential closure of the *Gangmasters Licensing Authority*, and cost-cutting disincentives to UK civil litigation for victims of human rights abuses by or involving UK companies abroad (Part II). The UK Government has shown significant leadership on many business and human rights initiatives, one of which, its OECD National Contact Point (NCP), could be further enhanced to investigate human rights abuses and enforce recommendations to companies. Responding to UN treaty body concerns regarding its extraterritorial obligations, and supporting uptake of new proposals for increased transparency of international corporate operations, non-financial reporting and strengthening of Director's duties, would further demonstrate the UK's commitment to human rights around the world (Part III). The submission offers recommendations for consideration by the UK Government and UN Human Rights Council (Part IV).

PART I: CONTEXT

In 2008 the UN Human Rights Council adopted the *Protect, Respect and Remedy* Framework on business and human rights, consisting of three distinct but complementary pillars: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for greater access to effective judicial and non-judicial remedies for victims. In June 2011, the Council unanimously adopted the Framework's implementing instrument, *The Guiding Principles on Business and Human Rights*, creating the first authoritative global standard for preventing and addressing risks of negative human rights impacts linked to businesses, and created a new UN Working Group on Business and Human Rights to operationalise these tools. *Guiding Principle IA1* calls on States to "protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."ⁱⁱ

UK Policy Coherence

Over the past six years, the work of the *UN Special Representative* on business and human rights has dramatically raised the profile of this important policy agenda, including in the United Kingdom. Various UK Government departments have produced guidance and reports exploring domestic and international business and human rights relationships, such as: the *Private Sector Development Strategy*ⁱⁱⁱ (DfID); *Corporate Responsibility Report*^{iv} (BERR); *The Private Sector and Human Rights Project*^v (MoJ); *Business & Human Rights Toolkit*^{vi} for overseas missions (FCO/UKTI/BIS/DfID); and *The Engine of Development: The private sector and prosperity for poor people*^{vii} (DfID).

A 2009 Parliamentary inquiry by the *UK Joint Committee on Human Rights* undertaken to review the Government's approach to a range of business and human rights relevant contexts identified a strong need for greater policy coherence and integration between UK Government departments, and recommended the creation of a national business and human rights strategy.^{viii} The Joint Inquiry also requested clarification of the responsibilities of private providers of public services under the Human Rights Act 1998^{ix}, in particular what the definition of 'public authority' encompasses. Such clarification would improve consistency of standards under which businesses in the UK are expected to operate, including with respect to growing reliance on private contracting for public services. If undertaken as part of an overall approach to developing further engagement with UK businesses on human rights generally and their efforts to demonstrate and express, often for the first time, steps taken to ensure respect for human rights, a substantial contribution would be made to demystifying human rights language and impacts throughout the UK as a whole.

As IHRB's submission^{xi} to the 2009 Inquiry pointed out, the greatest need in the UK is for a more strategic approach to business and human rights. This involves increased focus and clarity within the UK and in terms of overseas policy (regarding development, trade, investment and diplomatic missions), encompassing a smart mix of incentives, human rights education, guidance and support for UK business domestically, capacity support for host countries and UK businesses abroad, and where needed, better regulation to safeguard human rights and the longer-term interests of UK business. Greater leadership in this area by the Foreign and Commonwealth Office (FCO) internationally and as an issue of concern for the UK Foreign Secretary's human rights advisory group is a welcome development. The UK Government has looked to the *Equality and Human Rights Commission* (EHRC) to develop its strategy on the private sector and human rights, taking forward recent work from the Ministry of Justice, the 2009 Inquiry and the work of the *UN Special Representative*.^{xii} An EHRC business and human rights working group has been created, but its ability to prioritize this stream of work while facing staff and budget reductions is uncertain.

PART II: HUMAN RIGHTS IN TIMES OF FINANCIAL CRISIS

UK export credit funding principles

The recent *Export Credit Guarantee Department* (ECGD) name change to *UK Export Finance* (UKEF) signals the Government's emphasis on small and medium sized enterprises (SMEs) in driving economic recovery. The information and communications technology (ICT) industry has been further identified as an important growth engine, particularly for SMEs. Encouragement by the Government for businesses to defend freedom of expression and the right to privacy on the Internet and via mobile phones, such as that currently being demonstrated by Sweden and the Netherlands, will be vital in securing robust human rights protections as well as progressive business opportunities worldwide.

The current international economic environment has only strengthened the need for adherence to a common framework of universal social values, good governance and accountability in relation to business activity. However, on the basis of levelling the playing field with other OECD countries, the UK Government in 2010 eliminated requirements for environmental and social impact assessments on

projects with less than 2 year repayment periods or involving less than a roughly £10million UK exporter stake prior to approval of ECGD/UKKEF project funding.^{xiii} As a result, applicants falling under this threshold are no longer informed as a matter of course of the nominal ban on funding of projects involving ‘harmful’ child or forced labour and their projects are no longer screened for compliance. The new policy has been a matter of particular concern to many organizations working to promote respect for human rights, particularly because ECGD/UKKEF has stated it has no human rights (or other obligations) to anyone outside of the UK.^{xiv} Concern has also been expressed at ECGD’s/UKKEF’s lack of transparency, among several other Export Credit Agencies (ECAs), regarding project screening.

Protecting UK and migrant workers

Another UK Government austerity decision could gravely impact the rights of many UK workers and the Government’s ability to enforce rights within the UK recruitment and labour supply sectors. The *Gangmasters Licensing Authority* (GLA) has been a highly effective enforcement body of the rights of vulnerable workers within its five industry sectors since 2005. There are reports that the GLA faces one of two futures, either severe funding cuts or its closure altogether. Either decision would compound the already missed opportunity by the Government in failing to include the construction sector within its responsible procurement guidelines for London 2012 Olympics labour brokers, and further jeopardize the protection of migrant labourers serving the Games. IHRB believes the GLA’s remit should be enhanced, not reduced or diluted through, for example, removal of investigative powers prior to licensing. Dissolution of the GLA’s targeted, intelligence-led and risk-based presence would severely call into question the Government’s commitment to protect the rights and wellbeing of some of the most vulnerable within the UK workforce.

Access to justice in the UK

One facet of the UK’s duty to protect human rights lies in the responsibility to provide access to effective remedies for human rights claims against UK companies when no such option is available in host countries. The UK does not provide legal assistance for such cases, and proposed reforms to UK civil litigation would effectively render as too costly the ‘no win/no fee’ agreements between claimants and their legal representatives needed to bring cases against major companies. The *UN Special Representative* warned that the proposed reforms represent a ‘real disincentive’ for the small number of UK legal firms currently taking these cases.^{xv} The proposals are also a major point of concern for the UN Committee monitoring state compliance with the *Convention on the Elimination of Racial Discrimination* (CERD) in its recent Concluding Observations on the UK.^{xvi}

PART III: THE INTERNATIONAL IMPACTS OF UK BASED BUSINESSES

The UK OECD National Contact Point

The UK has a strong history of international leadership and support for business and human rights initiatives, such as around the recent development of an International Code of Conduct for Private Security Service Providers.^{xvii} The UK also strongly supported the recent update of the *OECD Guidelines for Multinational Enterprises* and the inclusion of a new human rights chapter aligned with the *UN Guiding Principles*. Though the cross-departmental approach of the UK National Contact Point as a non-judicial mechanism for responding to individual complaints of breaches of the Guidelines by UK companies has been significantly enhanced in recent years, IHRB would welcome further improvements. Namely, empowering the NCP fully to investigate reported breaches and establishing a formal Government response to negative NCP findings, including relevant departmental responses, such as conditional provision of future ECGD support upon satisfaction of all NCP recommendations.

Extraterritorial impacts of UK companies

During the term of the *UN Special Representative*, the UK Government refuted any general international state obligation to protect against extraterritorial human rights abuses by non-state

actors.^{xviii} The *UN Special Representative* saw ‘little difference’ between the UK’s treaty-by-treaty view and the often express or implied duty within many international human rights treaties^{xix}, with the UK’s position further scrutinised in the *2009 Joint Inquiry report*.^{xx} The international community expects countries like the UK to show leadership in this regard, as seen in the recent encouragement from the *UN Committee on Economic, Social and Cultural Rights* (CESCR) calling upon companies’ home states to support host states’ capacity in addressing corporate human rights responsibilities.^{xxi} More recently, the above-mentioned Concluding Observation from *CERD* expressed concern at reports of UK registered companies adversely affecting the rights of indigenous peoples to land, health, environment and an adequate standard of living, as well as the prospective introduction of legislative obstacles to UK judicial redress for victims of human rights abuses. It should be noted that the UK Government has introduced welcome stringent legal liabilities for UK businesses operating internationally with regard to corruption in its Bribery Act 2010^{xxii}, showcasing what is possible regarding appropriate legislative and administrative measures to ensure companies operating internationally are not permitted to act without due regard for their social, cultural and environmental impacts, adequate community consultation, and their responsibilities to respect human rights.

Strengthening UK corporate financial and non-financial reporting and governance

The extractive, forestry and hydroelectric sectors have recently been analysed by the UN Special Rapporteur on the Rights of Indigenous Peoples, who noted the need for tangible benefits to host communities.^{xxiii} The European Commission recently introduced welcome reforms of its *Transparency and Accounting Directives*^{xxiv} as part of its renewed strategy on *Corporate Social Responsibility (CSR) 2011-2014*^{xxv}, requiring country-by-country reporting of financial information relating to companies’ extractive and logging operations, which will outline the exact tangible benefit received by host countries. The UK has strongly supported similar plans within the OECD.

IHRB agrees with the *UN Special Representative’s* suggestion^{xxvi} that reforms of the *Companies Act 2006*^{xxvii} allowing unrestricted purpose for UK companies could therefore include social and environmental purposes and human rights commitments within UK company constitutive documents, (which would also dovetail nicely with the UK’s planned narrative reporting reforms^{xxviii}). *Companies Act* reforms also state within s. 172 that a Director’s duty is to ensure their company’s success, and include accounting for community and environmental impacts as factors relevant to discharging this duty. In line with the Government’s support of the *UN Guiding Principles* and closely aligned human rights chapter of the *OECD Guidelines*, Director duties within the UK could be further strengthened by including express reference to human rights impacts and the need for directors to oversee human rights due diligence as part of discharging their duties.

PART IV: RECOMMENDATIONS

The following recommendations are made to the UK Government in relation to the above concerns:

- Report on progress in implementing the *2009 Joint Inquiry* recommendations since the Government’s 2010 response, particularly regarding adopting a national strategy on business and human rights. In line with recommendations by the *UN Special Representative* and the European Commission’s *CSR strategy 2011-2014*, any national strategy on business and human rights should:
 - Clarify the scope of ‘public authority’ under the Human Rights Act.
 - Raise awareness and provide effective guidance on businesses’ human rights impacts and responsibilities domestically, hold a high level stakeholder summit on UK implementation of the *UN Guiding Principles*, and augment diplomatic capacity to integrate business issues in bilateral human rights dialogues with foreign governments, offering technical human rights support to UK companies investing in the country and monitoring for issues of concern.

- Ensure the EHRC's ability to prioritize business and human rights in its work streams, learn from best practice of National Human Rights Institutions globally, and support coordination and cooperation between the UK's three human rights commissions to increase focused effectiveness and coherence of their business and human rights engagement strategies across the UK; if the extra-territorial accountability of UK business to all internationally-recognised human rights – not just those under the European Convention – is deemed to fall outside the remits of the UK's human rights commissions, then a new body should be created to ensure UK businesses abroad operate consistent with international standards.
- Reinststate environmental and social impact assessments for all ECGD/UKEF applications regardless of repayment terms or the proportion of UK exporters' stake and introduce dedicated human rights assessments for all applications, without which the UK's ban on funding of projects involving any child labour is ineffective; lobby for greater transparency globally in the area of environmental, social and human rights impact assessments for ECA supported projects; and encourage business, especially SMEs, to defend freedom of expression and the right to privacy.
- Ensure the *Gangmasters Licensing Authority* is maintained at current levels and give serious consideration to extending its effective methods of targeted enforcement of employment and other rights into additional industry sectors such as construction, hospitality and social care.^{xxix}
- Report on any change to UK Government plans and policy regarding its extraterritorial obligations, including proposed civil litigation costs reforms, in light of UN CERD's Concluding Observations on the UK's report under Article 9 of the Convention.
- Empower the UK NCP fully to investigate reported breaches of the OECD Guidelines for Multinational Enterprises and establish a Governmental response to negative findings, including appropriate departmental responses.
- Support the successful passage and risk-assessed implementation of the European Commission's country-by-country reporting initiative through the Council of Ministers and within the European Parliament.
- Encourage incorporation of social purposes and commitments within UK company constitutive documents, and consider including express reference to human rights impact and human rights due diligence as part of discharging director duties under s. 172 of the *Companies Act 2006*.
- Engage in further dialogue concerning the CESCR 'Statement on the obligation of States parties regarding the corporate sector and economic, social and cultural rights', with respect to challenges faced and measures taken.
- Increase business and human rights expertise in key Government policy making processes, for example by engaging and including relevant experts in the human rights advisory group of the UK Secretary of State for Foreign Affairs.
- Support the operationalisation of the *UN Framework* and *Guiding Principles* on business and human rights regarding the rights of indigenous peoples in the context of extractive operations affecting indigenous territories.

- ⁱ IHRB (www.ihrb.org) was established in 2009 to provide a trusted, impartial space for dialogue and independent analysis to deepen understanding of human rights challenges and the appropriate roles and responsibilities of business.
- ⁱⁱ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc. A/HRC/17/31 (21 March 2011).
- ⁱⁱⁱ Department for International Development (DfID), *Private Sector Development Strategy – Prosperity for all: making markets work* (2008).
- ^{iv} Department for Business, Enterprise and Regulatory Reform (BERR), *Corporate Responsibility Report* (2009).
- ^v Ministry of Justice (MoJ) and TwentyFifty, *The Private Sector and Human Rights in the UK* (2009).
- ^{vi} Her Majesty's Government (HMG), *Business and Human Rights Toolkit: How UK overseas missions can promote good conduct by UK companies* (2009).
- ^{vii} DfID, *The engine of development: The private sector and prosperity for poor people* (2011).
- ^{viii} Joint Committee on Human Rights, *Any of our business? Human rights and the UK private sector* (16 December 2009), p. 10.
- ^{ix} *The Human Rights Act 1998* (c. 42)
- ^x See above, Joint Committee Inquiry (2009), p. 42-47.
- ^{xi} IHRB, Submission of Evidence to the Joint Committee on Human Rights (30 April 2009) at: <http://www.reports-and-materials.org/Institute-for-Human-Rights-and-Business-submission-to-UK-Joint-Committee-30-Apr-2009.doc>
- ^{xii} Joint Committee on Human Rights, *Any of our business? Human rights and the UK private sector: Government Response to the Committee's First Report of Session 2009-10*, p. 47.
- ^{xiii} ECGD, 'Guidance to applicants: Processes and Factors in ECGD Consideration of Applications' (16 April 2010).
- ^{xiv} *Corner House Research, Samata and Secretary of State for Business, Innovation and Skills, 'Defendant's Summary Grounds*, (High Court of Justice Administrative Court 1 June 2010) Claim No. CO/5231/2010, at: <http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/ECGD%20acknowledgement%20of%20service.pdf>
- ^{xv} Special Representative, Letter to Mr. Jonathan Djanogly MP (16 May 2011), at: <http://www.business-humanrights.org/Links/Repository/1006965/jump>
- ^{xvi} CERD, Concluding observations of the Committee, United Kingdom of Great Britain and Northern Ireland (14 September 2011), UN Doc. CERD/C/GBR/CO/18-20.
- ^{xvii} Government of Switzerland, International Code of Conduct for Private Security Service Providers (November 2010) at: <http://www.icoc-psp.org/>
- ^{xviii} Daniel Bethlehem, QC, Letter to the Special Representative (FCO 9 July 2009), at: <http://www.reports-and-materials.org/UK-Foreign-Office-letter-to-Ruggie-9-Jul-2009.pdf>
- ^{xix} Special Representative, Response to the UK FCO (14 July 2009) at: <http://www.business-humanrights.org/Links/Repository/122786/jump>
- ^{xx} See above Joint Committee Inquiry (2009), p. 12.
- ^{xxi} CESCR, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights* (20 May 2011), UN Doc. E/C.12/2011/1.
- ^{xxii} The Bribery Act 2010 (c.23).
- ^{xxiii} Special Rapporteur on the Rights of Indigenous Peoples, *Report to the Human Rights Council (Summary of activities. Extractive industries operating within or near indigenous territories)* (11 July 2011), UN Doc. A/HRC/18/35.
- ^{xxiv} European Commission, Disclosure of payments to governments (or the so-called country-by-country reporting) (25 October 2011), at: http://ec.europa.eu/internal_market/accounting/other_en.htm
- ^{xxv} European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility* (25 October 2011), at: http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf
- ^{xxvi} Report of the Special Representative, *Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative* (23 May 2011), UN Doc. A/HRC/17/31/Add.2.
- ^{xxvii} *The Companies Act 2006* (c. 46).
- ^{xxviii} Department for Business, Innovation and Skills (BIS), *The Plan for Growth* (March 2011).
- ^{xxix} See 'The future of the GLA and the Employment Agencies Standards Inspectorate' (12 January 2011) at: http://www.ihrb.org/pdf/Proposal-Future_of_the_Gangmasters_Licensing_Authority.pdf