

# BUSINESS AND HUMAN RIGHTS



**A handbook  
for legal practitioners**

Claire Methven O'Brien

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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## About the author

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**C**laire Methven O'Brien is Strategic Adviser, Human Rights and Business at the Danish Institute for Human Rights, Honorary Lecturer at the University of St. Andrews School of Management and a Visiting Fellow at the Department of International Law at the University of Groningen. She is co-author of *Business and Human Rights* (Cambridge University Press, forthcoming 2019) and co-editor (with Olga Martin-Ortega) of *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar, forthcoming 2019).

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# Abbreviations and acronyms

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## Legal instruments

CFEU	Charter of Fundamental Rights of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ESC	European Social Charter
ESC(r)	European Social Charter (revised)
ICAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
ICCPR	International Covenant on Civil and Political Rights
ICEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	Convention on the Rights of the Child
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRPD	Convention on the Rights of Persons with Disabilities
UDHR	Universal Declaration of Human Rights
UNCJITP	UN Convention on Jurisdictional Immunities and Their Property
UNDRIP	UN Declaration on the Rights of Indigenous People



## International bodies

CAT	UN Committee Against Torture
CCPR	UN Human Rights Committee
CED	UN Committee on Enforced Disappearances
CEDAW	UN Committee on the Elimination of Discrimination against Women
CERD	UN Committee on the Elimination of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CMW	UN Committee on Migrant Workers
CRPD	UN Committee on the Rights of Persons with Disabilities
ECJ	Court of Justice (European Court of Justice)
ECSR	European Committee of Social Rights
EU	European Union
The European Court	European Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILC	International Law Commission
ILO	International Labour Organization
ISO	International Standards Organisation
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the United Nations Commissioner for Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNWG	United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises

## Other

ADR	Alternative Dispute Resolution
BHRRC	Business and Human Rights Resource Centre
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DIHR	Danish Institute for Human Rights
DRC	Democratic Republic of Congo
EBRD	European Bank for Reconstruction and Development
ECA	Export Credit Agency
ECFR	European Council on Foreign Relations
EIA	Environmental impact assessment
EIB	European Investment Bank
EKN	Swedish Export Guarantee Board
FIDH	Fédération International des Droits de l'Homme
GRI	Global Reporting Initiative
ICAR	International Corporate Accountability Roundtable
ICMM	International Council on Mining and Minerals
ICTU	Irish Congress of Trade Unions
IFC	International Finance Corporation
IHREC	Irish Human Rights and Equality Commission
ISDS	Investor-State Dispute Settlement
MIGA	Multilateral Investment Guarantee Agency
MNE	Multinational enterprise
NAP	National action plan on business and human rights
NBIM	Norwegian Bank Investment Management
NCP	National Contact Point under the OECD Guidelines for Multinational Enterprises
NEB	National Equality Body

NGO	Non-governmental organisation
NHRI	National Institutions for the Promotion and Protection of Human Rights
OECD Guidelines	Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development
RDS	Royal Dutch Shell
SME	Small and medium-sized enterprise
SOE	State-owned enterprise
SPDC	Shell Petroleum Development Company of Nigeria
SRSO	Special Representative of the UN Secretary-General on human rights and transnational corporations and other business enterprises
TNC	Transnational corporation
UNCTAD	United Nations Conference on Trade and Development
UNGC	UN Global Compact
UNGP	UN Guiding Principles on Business and Human Rights

# Introduction

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## **Business and human rights: an emerging agenda**

Businesses contribute positively towards the realisation of human rights in diverse ways. Companies provide opportunities for employment and skills development, for example, which can help fulfil the right to work for fair remuneration and achieve a decent standard of living. Business contributions to state revenues via taxation support the achievement of general government functions, for instance, in the areas of health, education and housing that support enjoyment of human rights.

However, businesses can also impact on human rights adversely, for instance, where they rely on forced or trafficked labour, discriminate against workers on unlawful grounds, interfere with the privacy of those using their services or where their activities produce environmental contaminants that are damaging to health.

Such abuses may occur in the context of a company's own activities. But businesses may also be linked to abuses via relationships with their suppliers, service-providers, or joint-venture partners, for example. Consequently, companies may impact not only on their employees' human rights, but also those of workers in their supply chains, as well as of people residing in neighbouring communities, whether nearby or in other countries.

Traditionally, as non-state actors, businesses have not been regarded as duty-bearers under international human rights law. Despite this, because respect for fundamental rights is often embodied in national and regional legislation regulating business activities, the European legal order already offers a relatively high standard of protection against business actors.

Yet, alongside globalisation, which has seen companies grow in size as well as the scale of their operations, scope for businesses to impact on human rights has increased. As a result, it has become widely accepted that norms and mechanisms of human rights protection should further evolve and adapt to ensure the continuing effective enjoyment of human rights, and remediation and accountability for abuses, in the business context.

Reflecting this, in 2011, the United Nations Human Rights Council (UNHRC) endorsed the Guiding Principles on Business and Human Rights (UNGPs). The UNGPs rest on three “pillars”: first, that states have a duty to protect rights-holders against abuses by businesses within their territory or jurisdiction; second, that all businesses have a responsibility to respect human rights; and third, the right of victims to access an effective remedy for business-related human rights abuses. While each of these pillars derives from existing principles and norms of international human rights law, including under European regional instruments such as the ECHR and the European Social Charter (ESC), the UNGPs’ unique value lies in clearly spelling out their implications, in terms of the respective duties and responsibilities of governments and of the private sector, in relation to contemporary threats to human rights posed by business actors.

Though a soft law instrument without automatic legal implications, the UNGPs have attracted wide support from governments, businesses, civil society and international organisations, including the Council of Europe.

In 2014 the Council of Europe’s Committee of Ministers adopted [Declaration supporting the UN Guiding Principles](#) and urging their implementation by member states. This was followed in 2016 by the adoption of a [Recommendation of the Committee of Ministers to member states on human rights and business](#) (CM/Rec(2016)3) that aims to promote effective implementation of the UNGPs across the Council of Europe region.

The Recommendation CM/Rec(2016)3, and its accompanying [Explanatory Memorandum](#), provide guidance on measures that states should take to make human rights effective in the business sphere, and across relevant areas of government activity, such as company regulation, state-owned enterprises and procurement, the court system, trade agreements and investment promotion. Last, but not least, the Recommendation CM/Rec(2016)3 addresses measures to facilitate access to justice for victims of business-related abuses via judicial and non-judicial remedy mechanisms. It further highlights additional steps required to protect the rights of specific groups including workers, human rights defenders and children.

Set in that context, this handbook provides an introduction to the regional and international standards and mechanisms relevant to addressing business and human rights issues in Europe. It is intended to serve as a resource for legal practitioners, and others, across government, business, civil society, the media and in independent bodies, such as ombudsmen and national human rights institutions. Given this broad audience, it does not assume extensive prior knowledge of business and human rights as a specific field

within human rights law. Neither, given the breadth of its subject-matter does it purport to provide a comprehensive analysis of any topic contemplated or legal advice.

While the handbook's primary focus is on Council of Europe instruments applicable across all the organisation's 47 member states, where pertinent it draws also on materials concerning international and other European regional standards, for instance, those of the European Union (EU).

The handbook follows the "three-pillar" structure of the UNGPs. Accordingly it is organised into three main sections. Chapter 1 addresses the state duty to protect against business-related human rights abuses. Chapter 2 concerns corporations' responsibility to respect human rights. Finally, chapter 3 considers access to remedy for business-related human rights violations or abuses. For ease of reference, key business and human rights legal and policy developments, instruments and initiatives at global and European regional levels are summarised in an Annex of this handbook.

In the interests of readability, where the European Court cases are cited in the text, reference is made only to the title of the case. The title of the case, date and section, if relevant, are cited in footnotes while full references are compiled in the Index of Cases. All the European Court's judgments are published in the HUDOC database, accessible at: <http://hudoc.echr.coe.int/>. Judgments marked with an asterisk (\*) were not yet final at the time of writing.



## Chapter 1

# The state duty to protect against business-related human rights abuses

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**C**hapter 1 of this handbook outlines the legal basis, scope and content of states' obligations to prevent and address risks to human rights in the context of business activities, as reflected in the first "pillar" of the UN Framework, the "State Duty to Protect Human Rights", and UNGPs.

Section 1.1 summarises the general framework of principles and concepts deriving from international human rights law relevant to the state duty to protect. These include the doctrine of positive obligations, which requires states to secure the human rights of individuals and groups against infringements by non-state actors, including businesses. The section also highlights some international and domestic legal instruments which already give effect to this aspect of "the state duty to protect", for instance, in the area of labour rights.

Sections 1.2 relates to additional guidance that has now been provided, by the UNGPs and the Council of Europe Recommendation respectively, on how states should implement their "duty to protect" against business-related human rights abuses. On this basis, it considers, in greater detail, specific measures states should take in relation to: their general regulatory and policy functions (Section 1.2.2); situations where the state itself behaves as a commercial actor (Section 1.2.3); conflict-affected areas (Section 1.2.4); and in pursuit of domestic and international policy coherence (Section 1.2.5). National Action Plans (NAPs) on business and human rights and their role in supporting states in fulfilling their "duty to protect" are considered in Section 1.3. Lastly Section 1.4 considers how the issue of extraterritoriality, and the question of whether states have obligations in relation to business-related abuses occurring beyond their territorial jurisdiction, are approached under the UNGPs and European regional human rights instruments. Examples of relevant practices drawn from Council of Europe member states are included throughout.



Given the introductory character of Section 1.1, readers with human rights expertise may wish to pass directly to Section 1.2. On the other hand, given space constraints, Section 1.1 cannot provide a full primer on relevant general principles of human rights law. Readers who require this should refer to the additional materials identified in the References section.

## 1.1. General framework of international human rights law relevant to the “state duty to protect”

The Universal Declaration of Human Rights (UDHR), adopted in 1948, together with two international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), are usually considered to be international human rights law’s foundational instruments. Together they are often referred to as the “International Bill of Human Rights”.

The ICCPR and ICESCR, as well additional thematic and regional human rights treaties, such as the ECHR, define the main contours of states’ international human rights law duties. States are further bound by relevant customary international law principles, such as those deriving from the UDHR which, as a declaratory instrument, does not in itself give rise to legal obligations.

States’ obligations under the above instruments may be characterised as falling into three main types, namely to “respect”, to “protect” and to “fulfil” human rights:

- ▶ *Respect*: A state must itself refrain from acts or measures which breach human rights. This duty applies to any state body, whether it exercises legislative, executive, judicial or other functions;
- ▶ *Protect*: The state is required to protect individuals and groups against breaches of their human rights perpetrated by other actors;
- ▶ *Fulfil*: Specific human rights may require programmatic measures by states to facilitate their practical enjoyment by individuals or groups.

Historically, human rights were usually viewed as guaranteeing the dignity and fundamental freedoms of the individual against the power of states rather than private actors. Public international law generally recognises only states as its subjects (cf. Higgins 1995). As a result, human rights treaties do not typically impose direct obligations or liabilities on non-state actors, with few exceptions. Under the Genocide Convention, for instance, “Persons

committing genocide...shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>1</sup>

Likewise the ECHR in formal terms applies only to violations of human rights by states. Every member state of the Council of Europe is required to “accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”<sup>2</sup>. This is further reflected by the obligation on states under Article 1 ECHR “... to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention”. Article 34 ECHR however restricts the jurisdiction of the European Court to applications received from persons, Non-Governmental Organisations (NGO) or groups of individuals “claiming to be the victim of a violation by one of the High Contracting Parties”<sup>3</sup>. The European Court lacks jurisdiction *ratione personae* over applications lodged against individuals or companies. Similarly the UN Human Rights Committee (HR Committee) has stated that obligations under the ICCPR “do not...have direct horizontal effect as a matter of international law” so that it cannot consider claims between private parties.<sup>4</sup>

Yet appreciation of non-state actors’ influence on human rights has steadily grown. Consequently, international human rights bodies have gradually defined in more detail the duties of states to control the conduct of non-state actors so as to avoid interference with human rights, giving rise to the notion of “indirect” obligations.

In addition, while originally other kinds of non-state actors, such as paramilitary groups, represented the chief concern in this area, as the size and power of corporations has increased under globalisation, the mismatch between corporate impacts on human rights, and the limited mechanisms for their legal accountability, has lately come to be seen as weakening the effective enjoyment of human rights envisaged by the international legal order.

Thus, broader principles developed by human rights bodies, including the European Court, concerning states’ duties to prevent and respond to abuses by non-state actors more generally, as discussed in the following sections, provide the legal foundation on which the UNGPs, the Council of Europe

- 
1. Convention on the Prevention and Punishment of the Crime of Genocide, UN Treaty Series, Vol.78, p.277, Art.IV.
  2. Council of Europe, Statute of the Council of Europe, ETS No. 1 (1949), Article 3.
  3. Inter-state applications are permitted under Article 33 ECHR. See further Risini (2018).
  4. Human Rights Committee, “General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (2004), CCPR/C/21/Rev.1/Add.1326, paragraph8.

Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on human rights and business and other recent standards have begun to detail states' specific duties over business-related human rights abuses as well as the implicit responsibilities of business actors themselves to respect, and not to harm, human rights (discussed further in chapter 2 of this handbook).

### 1.1.1. State obligations to protect against human rights abuses by non-state actors

Once it has ratified a treaty, a state has an obligation to give effect to it at the national level and failure to do so will engage its international legal responsibility.<sup>5</sup> In some human rights treaties this duty is made explicit. For example, according to Article 2(2) ICCPR:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Convention.

Under the ESC, similarly, states parties "accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the [rights and principles contained in the ESC] may be effectively realised" (Part I, ESC Revised).

Such obligations provide the basis of the state's duty to take effective domestic measures to prevent human rights abuses by non-state actors. Within the Council of Europe's system of human rights protection, and particularly in the jurisprudence of the European Court, this has also led to a distinction between "negative" and "positive" obligations of states.

#### *Negative obligations*

Akin to the duty to "respect" mentioned in the previous section, "negative obligations" refer to the state's duty itself not to abridge the enjoyment of human rights through its actions or those of its organs or agents. A state will thus violate a substantive human right provided for by the ECHR where it

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5. Human Rights Committee, "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (2004), CCPR/C/21/Rev.1/Add.1326, paragraph 13, and International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts", Report of the International Law Commission on the Work of its 53<sup>rd</sup> Session, A/56/10, August 2001, UNGAOR. 56<sup>th</sup> Sess. Supp. No. 10, UN Doc A/56/10(SUPP), Article 2.

prevents or unduly limits the exercise of that right through actions that can be attributed to it.

In the business and human rights context, a state may breach this “negative obligation” where human rights abuses by a business are attributable to the state. This could occur, for instance, where:

- ▶ A business is owned or controlled by the state;
- ▶ A corporation that is acting as an agent of the state abuses human rights.

Section 1.3 below gives further consideration to these two scenarios.

### *Positive obligations*

Developed by the European Court in line with the principle of the effectiveness of human rights,<sup>6</sup> under the doctrine of “positive obligations”, a state’s duties are not restricted to abstaining, itself, from interfering with human rights.<sup>7</sup> Rather states may also be obliged to adopt protective or preventive measures to avert human rights abuses by third parties. Thus intervention may be required by states to secure human rights under the ECHR, “even in the sphere of the relations of individuals between themselves”.<sup>8</sup>

This doctrine has been widely applied by the European Court in holding states responsible for abuses perpetrated by non-state actors.<sup>9</sup> The Court has found that effective deterrence of third-party abuses by the state may require, depending on circumstances, the criminalisation of private actors’ conduct, the adoption of other legislation or policies, or the deployment of operational measures in the case of known threats, for example. A state’s acquiescence or complicity with the acts of private individuals breaching human rights can, in addition, engage its responsibility under the ECHR,<sup>10</sup> even where such action is *ultra vires* or contrary to instructions.<sup>11</sup> In principle the doctrine of positive obligations is generally applicable to substantive

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6. *Soering v. the United Kingdom*, 7 July 1989, § 87; and *Artico v. Italy*, 13 May 1980, § 33.

7. Case “*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*” v. *Belgium* (*Belgian linguistic case*) [GC], 23 July 1968; *Marckx v. Belgium* [GC], 13 June 1979.

8. *X and Y v. The Netherlands*, 26 March 1985, §23; see also *Moldovan and Others v. Romania* (Judgment No. 2) 30 November 2005, §93 and *Ouranio Toxo and Others v. Greece* [GC], §37, 20 January 2006.

9. For example, see *Osman v. the United Kingdom*, 28 October 1998 (relating to Article 2); *Ireland v. the United Kingdom*, 18 January 1978 (relating to Article 3); *Siliadin v. France*, 26 July 2005 (relating to Article 4); *Storck v. Germany*, 16 June 2005 (relating to Article 5); *Wilson and Others v. the United Kingdom*, 2 July 2002.

10. *Ireland v. the United Kingdom*, 18 January 1978, §159.

11. *Cyprus v. Turkey*, 10 May 2001, §81.

rights protected by the ECHR and its Additional Protocols, although the exact scope and content of state duties arising varies according to the specific right in question, as well as the factual context.

Moreover, the European Court has regularly applied the doctrine in relation to states' failures to prevent harms to human rights by corporations, and in this context the European Court has identified a positive duty "to regulate private industry". In *Fadeyeva v. Russia* (Judgment of 9 June 2005), the applicant complained that the operation of a steel plant endangered her health and well-being. The European Court found that

at the material time, the...steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be said to have directly interfered with the applicant's private life or home. At the same time, the Court points out that the State's responsibility in environmental cases may arise from a failure to regulate private industry (...). Accordingly, the applicant's complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under article 8(1) of the Convention.<sup>12</sup>

Similarly:

- ▶ States have been held responsible for abuses resulting from their failure to protect residents from environmental and health problems linked to a nearby waste treatment facility<sup>13</sup> and with regard to pollution caused by a private gold mining company.<sup>14</sup>
- ▶ Failure to inform the local population about the potential for accidents at a chemical factory resulted in state liability. In *Guerra and Others v. Italy*, the applicants lived beside a privately-owned fertiliser factory that was classified as "high-risk" due to the danger of chemical explosions. The European Court found that,

[while] the object of article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in the effective respect for private or family life.<sup>15</sup>

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12. *Fadeyeva v. Russia*, 9 June 2005, §89.

13. *Lopez Ostra v. Spain*, 9 December 1994. Notably in this case the plant was built on state property and funded via state subsidies.

14. *Taşkin and Others v. Turkey*, 30 March 2005.

15. *Guerra and Others v. Italy* [GC], 19 February 1998, §58.

- ▶ A breach resulted from long-term pollution from a private steel plant which had damaged the health of the applicant, on grounds that the state was “in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them,” creating a “sufficient nexus” between the harmful emissions and the state.<sup>16</sup>

Beyond the realm of environmental cases, European Court decisions concerning violations allegedly arising in connection with business activities and relying on positive obligations have concerned, for example:

- ▶ Interference with freedom of expression and privacy by media companies;<sup>17</sup>
- ▶ Abuses occurring in private hospitals<sup>18</sup> and schools;<sup>19</sup>
- ▶ Interference by employers with the right to form and join trade unions encompassed by the right to freedom of association;<sup>20</sup>
- ▶ Restrictions imposed by employers on employees’ workplace dress, allegedly interfering with the right to manifest religion;<sup>21</sup>
- ▶ Legislation and other regulatory measures required of states to tackle human trafficking;<sup>22</sup>
- ▶ The provision of information required by workers to assess occupational health and safety risks.<sup>23</sup>

A further important dimension of positive obligations is that they may give rise to a duty on the part of the state to conduct an effective investigation into alleged breaches of human rights by non-state actors, for example, in relation to Article 2<sup>24</sup> and Article 3 ECHR,<sup>25</sup> as discussed further in chapter 3 of this handbook.

On the other hand, the scope of positive obligations is restricted by the requirement that the actions or defaults of the state, or those who acts are attributed to it, should have “sufficiently direct repercussions” on the human

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16. *Fadeyeva v. Russia*, 9 June 2005 §89 and §92.

17. *Axel Springer AG v. Germany* [GC] 7 February 2012 and *Von Hannover v. Germany* [No. 2] [GC], 7 February 2012.

18. *Storck v. Germany*, 16 June 2005.

19. *Costello-Roberts v. the United Kingdom*, 25 March 1993.

20. *Wilson, the National Union of Journalists and Others v. the United Kingdom*, 2 July 2002.

21. *Eweida and Others v. the United Kingdom*, 27 May 2013.

22. *Rantsev v Cyprus and Russia*, 10 May 2010.

23. *Vilnes and Others v. Norway*, 24 March 2014.

24. *Öneryıldız v. Turkey* [GC], 30 November 2004; *Ergi v. Turkey*, 28 July 1998.

25. *M.C. v. Bulgaria*, 4 March 2004, where it was noted that the duty to investigate was not restricted to alleged breaches by state agents (§151).

rights of the victims in question.<sup>26</sup> Hence not every failure to prevent abuses by the state will breach its ECHR obligations, and it may be required to show that the abuse would definitely have been prevented had the state taken measures that could reasonably have been expected of it in the situation at hand.<sup>27</sup>

Additionally, in determining whether to impose positive obligations, due regard will be given to proportionality, in other words, the imposition of a positive duty on the state must strike a “fair balance...between the general interests of the community and the interests of the individual”,<sup>28</sup> including with reference to public resource considerations.

### 1.1.2. International and regional standards on business and human rights

As already observed, human rights treaties do not contain explicit general state duties to prevent human rights abuses by businesses, nor do they address human rights obligations to businesses directly. In spite of this, some human rights instruments do refer to business activities, either in specific areas, or in an indirect manner. Accordingly they are relevant in the interpretation of the scope of the “state duty to protect” against business-related human rights abuses and should be treated as such by domestic courts and international human rights tribunals.

#### *International standards*

Standards adopted by the International Labour Organisation (ILO) define basic rights for workers and corresponding obligations of states and requirements for employers, in various areas. As detailed further in the Annex to this handbook, under the ILO [Declaration on Fundamental Principles and Rights at Work](#), all ILO member states must respect workers’ rights to freedom of association and the right to collective bargaining, as well as rights to freedom from compulsory labour, child labour and discrimination in respect of employment and occupation (ILO 1998). Individual states are also bound to respect rights recognised by other ILO Conventions that they have ratified.

Besides this, references to state obligations to protect against particular types of human rights infringements by businesses are included in UN human rights treaties that address specific groups of rights-holders. For

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26. *Moldovan and Others v Romania*, 30 November 2005, § 95.

27. *E. and Others v. the United Kingdom*, 15 January 2003 (a case concerning private psychiatric care).

28. *Cossey v. the United Kingdom*, 27 September 1990, §37.

example, the International Convention on the Rights of Persons with Disabilities (ICPRD) requires states parties “[t]o take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise” (Article 4(e)), whereas International Convention on the Elimination of all forms of Discrimination Against Women (ICEDAW) provides that states parties undertake “[t]o take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise” (Article 2(e)).

Meanwhile, the HR Committee has recognised that states have obligations of both a positive and negative character under the ICCPR, in so far as the rights protected are “amenable to application between private persons or entities”. Accordingly, the HR Committee has counselled that “In fields affecting basic aspects of ordinary life such as work or housing” individuals are to be protected by states from discrimination within the meaning of Article 26 ICCPR by “private persons or entities”.<sup>29</sup>

### *Council of Europe standards*

Implied protections against human rights abuses by businesses under the ECHR, as described above, are supplemented by rights established by the Revised European Social Charter (ESC(r)). The ESC(r) seeks to guarantee economic and social rights and has been ratified by more than 30 of the Council of Europe’s 47 member states.

An [Additional Protocol Providing for a System of Collective Complaints](#), adopted in 1995, establishes a mechanism that allows social partners and some NGOs to file collective complaints alleging the failure of a state party to comply with its obligations under the ESC(r), through the European Committee of Social Rights (ECSR; see further chapter 3 of this handbook). As with the European Court, however, complaints to the ECSR may be brought only against states in relation to breaches of their Charter obligations, and not against businesses directly.

Nonetheless, the ESC(r) includes many rights, especially for workers, which carry implications for businesses, while it also recognises both negative and positive duties of states to secure them. Article 3 ESC(r), for example, establishes that “All workers have the right to safe and healthy working conditions”. Under Part II ESC(r), it is further elaborated that, in order to ensure

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29. UN Human Rights Committee, “General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, 26 May 2004, CCPR/C/21/Rev.1/Add. 13.



the “effective exercise” of this right, states parties undertake, “in consultation with employers’ and workers’ organisations”

1. to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment...;
2. to issue safety and health regulations;
3. to provide for the enforcement of such regulations by measures of supervision;
4. to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.

Various articles of the ESC, in addition, allude to the possibility that states may cooperate with “private organisations” to ensure the effective exercise of rights, such as the right to social and medical assistance (Article 13), and the rights of persons with disabilities to independence, social integration and participation in the life of the community (Article 15).

It should also be emphasised that the ECHR and ESC(r) are intended to operate as complementary and interdependent systems of protection, with the ESC(r) providing a more expansive articulation of rights referred to in generic terms by the ECHR, as well as a closer definition of the scope and content of states’ positive obligations to protect these. For instance, whereas trade union rights are generally encompassed by the right to freedom of assembly and association under Article 11 ECHR, Part II ESC(r), relating to Articles 5, 6 and 28, enumerates specific means, such as measures to promote joint consultation and negotiations between workers and employers, by which these rights are to be supported.

Such normative connections are reflected in decision-making by the European Court and the ECSR. Illustrating this, the European Court has referred in decisions relating to Article 11 ECHR to the views of the ECSR on obstacles to freedom of association in the respondent state.<sup>30</sup> Vice versa, the ECSR has highlighted that the right of every worker to a safe and healthy working environment, which “applies to the whole economy, covering both the public and private sectors”, serves to support the right to life under Article 2 ECHR.<sup>31</sup>

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30. For example, *Wilson, the National Union of Journalists and Others v. the United Kingdom*, 2 July 2002, §48.

31. ECSR, “Statement of interpretation on article 3”, Digest of the Case Law of the European Committee of Social Rights, 1 September 2008, p. 33, available at: <https://rm.coe.int/168049159f>.

### *Other Council of Europe instruments*

A number of other Council of Europe instruments which address issues such as human trafficking, children's rights, the processing of personal data, cyber-crime and corruption entail further obligations for states and businesses (see Annex to this handbook).

## **1.2. The “state duty to protect” under the UNGPs and Council of Europe Recommendation**

The principles and standards outlined above provide a limited measure of protection against abuses by businesses or connected to their activities. Yet the persistence of such abuses, particularly in jurisdictions where business regulations or their enforcement are weak, has suggested the need to find ways to strengthen human rights protections in the business context.

Various conceptual, doctrinal and procedural obstacles oppose the formulation of direct human rights obligations for corporations, as earlier alluded to. As a result, the approach of international human rights bodies, embodied in the UNGPs (UNHRC 2011) has been further to elaborate states' own direct duties and “positive obligations” to protect against corporate human rights abuses, while also unfolding the logical implications of these state duties for business actors.

The next section outlines the main features of the state “duty to protect” against business-related human rights abuses both as described by the UNGPs and as further articulated by the Council of Europe Recommendation on Human Rights and Business. Chapter 1's remaining sections then consider the more specific guidance provided by the UNGPs and the Council of Europe Recommendation on the various aspects of the state duty to protect addressed by UNGPs 3 through 10, under the headings of *General State Regulatory and Policy Functions*; the *State-Business Nexus*; *Supporting business respect for human rights in conflict-affected areas*; and *Policy Coherence*.

### **1.2.1. “Foundational” principles: UNGPs 1 and 2**

The UNGPs' specific provisions addressing the first “pillar” of the UN Framework are divided into two categories: “foundational” principles (UNGPs 1 and 2) and “operational” principles (UNGPs 3 to 10).

As the first “foundational” principle, UNGP1 provides an overarching description of the state duty to protect, according to which:

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

The *Commentary* to UNGP 1 elaborates that the state duty to protect thus represents

a “standard of conduct”. Therefore, States are not *per se* responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse.

While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency (UNHRC 2011: 3).

UNGP1, it will be observed, on this basis echoes the doctrine of positive obligations of the European Court which, as alluded to above, requires states to take “reasonable and appropriate measures”<sup>32</sup> to control third party conduct breaching human rights and which may entail state liability for harms to human rights resulting from failures adequately to regulate private industries. Thus:

- ▶ In relation to dangerous industrial activities, implicating Article 2, it has been held that adopting “a legislative and administrative framework designed to provide effective deterrence against threats to the right to life” is a substantive duty of the state. Regulations must govern the “licensing, setting up, operation, security and supervision” of such activities and must make it compulsory for all those concerned to take practical measures to ensure the “effective protection of citizens whose lives might be endangered by the inherent risk”. Further, “special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives.”<sup>33</sup>
- ▶ In *Tătar v. Romania*, the European Court observed that water pollution with cyanide from a gold mine could interfere with the right to private and family life by harming human well-being. As a result the state had a duty to regulate the authorising, setting-up, operating, safety and

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32. *Fadeyeva v. Russia*, 9 June 2005, §89.

33. *Öneryıldız v. Turkey* [GC], 30 November 2004, §§89-90. See also *Budayeva and Others v. Russia*, 29 September 2008, §132, relating to the risks of man-made mudslide.

monitoring of industrial activities, especially those dangerous to the environment and human health.<sup>34</sup>

- ▶ Similarly, in *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, where a private mining corporation in which the state was the largest shareholder was alleged to be responsible for environmental pollution in breach of rights under the ESC, the ECSR found that the obligations of national authorities included developing and regularly updating sufficiently comprehensive environmental legislation and regulations.<sup>35</sup>

This position can be seen as leading logically to the requirement, under UNGP2, that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.” How governments could be assessed to have taken reasonable measures to control business conduct affecting human rights without such an assertion of the “corporate responsibility to respect” is hard to see.

Yet the Commentary reveals that, aside from reiterating a point already made by UNGP1, UNGP 2 aims to highlight the need for states to consider, and address, impacts on human rights that its companies may have in other countries, as well as domestically.

While states “are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction”, nevertheless, the Commentary suggests,

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State’s own reputation (UNHRC 2011: 4).

The UNGPs thus distinguish “extraterritoriality” as a legal issue, from prudential considerations which ought to weigh in favour of measures by states to control, where possible and without infringing other states’ sovereignty, the behaviour of their corporate nationals operating abroad. The legal dimensions of extraterritoriality under the ECHR are considered further in Section 1.4 below.

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34. *Tătar v. Romania*. 6 July 2009.

35. *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Decision of the ECSR of 6 December 2006, §203.

## *Council of Europe Recommendation on Human Rights and Business*

Provisions of the Council of Europe Recommendation that support UNGPs 1 and 2 are spread across chapter 1 (Implementation of the UN Guiding Principles on Business and Human Rights) and II (General Measures) of the Appendix to the Recommendation CM/Rec(2016)3 (“the Appendix”). Part I of the Recommendation provides that

Member States should effectively implement the [UNGPs] as the current globally agreed baseline in the field of business and human rights.

This is because, it indicates, the “three-pillar” framework, including the “state duty to protect”, rests on “States’ existing obligation to respect, protect and fulfil human rights and fundamental freedoms” (Appendix, paragraph 1).

More specifically, paragraph 15 of the Appendix recalls states’ positive obligations under the ECHR,<sup>36</sup> while paragraph 16 highlights states’ duties arising under the ESC and ESC(r),<sup>37</sup> and paragraph 17 underlines the need for states to implement such international commitments through domestic legislation that is effectively implemented. States’ duties in relation to non-discrimination, noted with particular reference to gender, the employment context and vulnerable groups, are also highlighted (paragraphs 2, 17 and 19 respectively).<sup>38</sup>

In general, the Recommendation encourages states to “take into account the full spectrum of human rights”, giving “due consideration” to their interpretation by competent regional and international treaty bodies. On this basis, determinations of the European Court and relating to the ESC would appear to represent a floor, rather than a ceiling, in interpreting rights, duties and responsibilities in the business and human rights area.

UNGP 2 is recapitulated by paragraph 5 of the Appendix to the Recommendation, according to which,

In addition to their own implementation of the [UNGPs], member States should set out clearly the expectation that all business enterprises which *are domiciled or operate within their jurisdiction* should likewise implement these principles throughout their operations.

Notably, however the phrasing of this paragraph (“domiciled or operate within”) is not identical to that employed by UNGP2 (“domiciled in their territory and/or jurisdiction”), embracing in addition the activities and impacts

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36. See further Explanatory Memorandum to Recommendation CM/Rec(20016)3 of the Committee of Ministers to member states on human rights and business, CM(2016)18-addfinal, 2 March 2016 (Explanatory Memorandum), paragraphs 30 and 31.

37. Further elaborated at paragraph 32, Explanatory Memorandum.

38. See further, Explanatory Memorandum, paragraph 13.

inside Europe of foreign-domiciled companies, matters of increasing prominence and popular concern.

As regards “jurisdiction”, according to the Explanatory Memorandum (paragraph 8), in the context of the Recommendation this term is to be understood as having the “same meaning as in Article 1 [ECHR] ... as applied and interpreted by the European Court of Human Rights”. Paragraph 13 of the Appendix to the Recommendation, offering some further nuance, provides that Council of Europe member states are thus called on to:

- ▶ apply such measures as may be necessary to require business enterprises *operating within their territorial jurisdiction* to respect human rights;
- ▶ apply such measures as may be necessary to require, as appropriate, business enterprises *domiciled in their jurisdiction* to respect human rights throughout their operations abroad [emphasis added].

Finally, according to the Explanatory Memorandum (paragraph 8), while “jurisdiction” in this context has the same meaning as under Article 1 ECHR (for further discussion, see section 1.4 below), “domicile” should be interpreted in line with the Brussels and Rome Regulations.<sup>39</sup>

In line with its aim to “fill gaps” in the UNGPs, the Appendix to the Recommendation provides some further orientation for Council of Europe member states on how to promote the effectiveness of the UNGPs, in particular, suggesting that they should support:

- ▶ the translation of the UNGPs into local languages, and their dissemination to high-risk business sectors;<sup>40</sup>
- ▶ advice to third countries on the establishment of effective remedies for business-related abuses, as well as partnerships;<sup>41</sup>
- ▶ the UN Working Group on Business and Human Rights;<sup>42</sup>
- ▶ access to information on human rights and business, and in particular concerning remedy mechanisms, in relevant languages.<sup>43</sup>

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39. That is, as referring to the “statutory seat”, “central administration” or “principle place of business”: EU Brussels I (EU Regulation No. 1215/2012) and Rome II (EU Regulation No. 864/2007).

40. Paragraph 6; see further Explanatory Memorandum, paragraph 21.

41. Paragraphs 7 and 8.

42. Paragraph 9; see further Annex to this handbook.

43. Paragraph 14; Explanatory Memorandum, paragraph 29.

## 1.2.2. General state regulatory and policy functions: UNGP 3

According to UNGP 3,

In meeting their duty to protect, States should:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and on-going operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

These recommendations under UNGP3 align closely with established principles under the ECHR and their application in relation to business activities, as discussed in Section 1.1 above. Provisions of the Council of Europe Recommendation CM/Rec(2016)3 addressing them are distributed across both Parts II and III of the Appendix to the Recommendation. For instance:

- ▶ Paragraph 18 calls for Council of Europe member states to review their existing laws and assess new legislation for consistency with the corporate responsibility to respect human rights and effective access to remedy for business-related human rights abuses;<sup>44</sup>
- ▶ Paragraph 21 suggests such states should “encourage, and where appropriate, require businesses [domiciled or conducting substantial activities within their jurisdiction] to provide regularly, or as needed, information on their efforts on corporate responsibility to respect human rights”;
- ▶ Member states are urged to “adopt effective enforcement measures with respect to business and human rights standards” (paragraph 30).

With reference to sub-paragraph a) of UNGP3 above, it may be useful to recall that there are two principal modalities, indirect and direct, by which national regulations may have the effect of requiring businesses to respect human rights.

Indirect regulation is by far the most common means by which states fulfil their obligations to control the human rights impacts of business actors. Indirect measures may, firstly, have the effect of commanding businesses to

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44. Paragraph 18; see further Explanatory Memorandum, paragraph 33

respect human rights, by requiring of them certain standards of conduct or performance in areas such as labour, environment, health and safety, product safety, anti-corruption or privacy, where failure to meet such standards might lead to violations of rights of workers, consumers or others (for instance, the rights to life, health, freedom of association and equal treatment). Of further though perhaps less obvious relevance in this context are also:

- ▶ Corporate and securities law, including directors' duties and reporting requirements;
- ▶ Stock exchange listing requirements;
- ▶ Tax law.

A second form of indirect measure is legislation that penalises certain behaviour by corporations or their personnel, through criminal, civil or administrative sanctions. Some international instruments explicitly require states to legislate for such penalties, for example:

- ▶ Article 3(4) of the [Optional Protocol to the Convention on the Rights of the Child \(CRC\) on the Sale of Children, Child Prostitution and Child Pornography](#) requires that state parties "establish the liability of legal persons for offences established in paragraph 1 of the present Article" and that "such liability of legal persons may be criminal, civil or administrative";<sup>45</sup>
- ▶ Under the [Criminal Law Convention on Corruption](#) (CETS 183, 1999) states are required to adopt legislative and other measures to establish criminal liability for relevant offences under domestic law.<sup>46</sup>

Alternatively, a state may adopt a direct approach by explicitly requiring businesses to respect human rights as such. Whereas, until 2011, there were few if any examples of such measures, since then, a small number of countries have enacted legislation requiring companies to undertake a process of "due diligence" whereby they identify and respond to actual or potential impacts on human rights. The concept of human rights due diligence, the corporate responsibility to undertake it, under Pillar II of the UN Framework, and examples of new laws requiring it are discussed further in chapter 2 of this handbook.

Finally, it should be noted that UNGP3 (especially sub-paragraphs a) to c)), in calling for periodic review of regulatory frameworks for business and their

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45. UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001, A/RES/54/263.

46. Paragraph I.3 (a) of the Annex to the Recommendation.



effectiveness, justifies the further request to states to develop business and human rights National Action Plans (NAP) (see further Section 1.3 below).

Guidance for business on how to respect human rights (UNGP3, sub-paragraph c), and state measures requiring or encouraging businesses to communicate how they address their human rights impacts (UNGP3, sub-paragraph d) are addressed in chapter 2 of this handbook.

### 1.2.3. The “state-business nexus”: UNGPs 4 to 6

Aside from its role as regulator, the state is linked to business activities in many ways. One such medium is its own commercial activities. Some states produce goods or services of one kind or another for market, while all enter contracts with businesses to supply public entities with the goods and services that they need to fulfil their functions. Under the heading of the “state-business nexus”, UNGPs 4-6 describe the duties of states in this context and address in turn the following topics: state-owned or controlled enterprises; state support to businesses; privatisation and contracting-out of public services to the business sector; and public procurement.

Mirroring the UNGPs, the Council of Europe Recommendation CM/Rec(2016)3 likewise treats these issues *en bloc*, providing in the Appendix that:

Member States should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence, that may be integrated into existing due diligence procedures, when member States:

- own or control business enterprises;
- grant substantial support and deliver services through agencies, such as export credit agencies (ECAs) and official investment insurance or guarantee agencies, to business enterprises;
- grant export licenses to business enterprises;
- conduct commercial transactions with business enterprises, including through the conclusion of public procurement contracts;
- privatise the delivery of services that may impact upon the enjoyment of human rights.<sup>47</sup>

Importantly, the Recommendation further adds, in this context, that:

Member States should evaluate the measures taken and respond to any deficiencies, as necessary. They should provide for adequate consequences if such respect for human rights is not honoured (Appendix, paragraph 22).

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47. Appendix, paragraph 22. See further, Explanatory Memorandum, paragraphs 39-40.

### 1.2.3.1. *State-owned or controlled enterprises and state support to businesses*

According to UNGP 4,

States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

#### *State-owned or controlled enterprises*

In many countries, state-owned or controlled enterprises (SOEs) represent a significant component of the business sector. The energy, natural resource extraction, agriculture, transportation and communications sectors, for example, are sometimes dominated by such entities. In addition, with the extension of market liberalisation, many such enterprises have evolved from national into global corporations. Worldwide by 2014 there were over 550 state-owned transnational corporations (TNCs) with more than 15,000 foreign affiliates and which own foreign assets of over USD 2 trillion (United Nations Conference on Trade and Development (UNCTAD) 2014). By 2015, SOEs accounted for 70 per cent of China's total investment in the EU (Hanemann and Huotari 2016).

#### *Defining "state-owned enterprise"*

The UN Working Group on Business and Human Rights has observed that "Countries differ greatly with respect to the range of entities that they consider as state-owned enterprises"<sup>48</sup> According to the *Organisation for Economic Cooperation and Development (OECD) Guidelines on Corporate Governance of State-owned Enterprises*:

Any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership, should be considered as a state-owned enterprise. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as state-owned enterprises if their purpose and activities, or parts of their activities, are of a largely economic nature (OECD 2015: 15).

The OECD further proposes that, as regard state control of enterprises, the test should be that the state is either "the ultimate beneficiary owner of the

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48. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/32/45, 4 May 2016, paragraph 9.

majority of voting shares or otherwise exercising an equivalent degree of control”, which would be exemplified, for example, in cases where “legal stipulations or corporate articles of association ensure continued state control over an enterprise or its board of directors in which it holds a minority stake”. Hence, the UN Working Group observes, a state might exercise effective control over an enterprise even as minority shareholder”.<sup>49</sup>

As highlighted by the *Commentary* to UNGP4, human rights abuses by such businesses may result in breaches of the state’s own human rights obligations. Under international law, as is also true for private companies, states are not generally directly responsible for the acts or omissions of state-owned or state-controlled companies. This is because, as observed by the International Law Commission (ILC), in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts:

International law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion. The fact that the state initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the state of the subsequent conduct of that entity (ILC 2001:48, Article 8, Commentary, paragraph 6).

Rather, in general, it is required that such entities are “empowered by the law of that state to exercise elements of the governmental authority” before their conduct may be attributable to the state in question (ILC 2001, Article 5).

On the other hand, a state may be responsible for acts or omissions of state-owned or controlled enterprises that lack formal governmental powers where some alternative basis for attribution is made out, such as that the business in question acted under the instructions, direction or control of the state in carrying out the conduct alleged to result in a violation of human rights (ILC 2001, Articles 6-11).

Turning to the position under the ECHR, alleged abuses by state-owned or controlled enterprises have been confronted by the European Court in many instances. In cases of this kind, it is first determined whether the body in question is a public authority for which the state is responsible which, as noted (Section 1.1 above), is prerequisite to the European Court’s jurisdiction under Article 34 ECHR. Alternatively, put in the negative, it is to be considered whether a business “enjoyed sufficient institutional and operational independence from the state to absolve the [state] from its responsibility

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49. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/32/45, 4 May 2016, paragraph 10.

under the Convention for [the business's] acts and omissions".<sup>50</sup> Factors that may be referred to by the European Court, in reaching a determination on this issue, include:

- ▶ the business' legal status (for example, whether the entity is constituted under public law or as a separate legal entity under private law);
- ▶ the rights conferred upon the business by virtue of its legal status (that is, whether those rights are normally reserved for public authorities);
- ▶ the nature of the business' activity (whether the business exercises a "public function" operates as a "typical business");
- ▶ the context in which the business activity is carried out (e.g. how relevant or important the business activity is for the public sector, and whether alleged human rights abuses are linked to a privatised state industry with a monopoly position in the market or to an otherwise heavily regulated sector);
- ▶ institutional independence (to which the issue of state ownership is relevant); and
- ▶ operational independence (e.g. is the business subject to *de lege* or *de facto* state supervision and control?).

Notably, in line with the position formulated by the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, mentioned above, a company's legal status under domestic law, in particular its constitution as a separate or private entity, is not determinative of its status for the purposes of the ECHR.

Thus, for example, in *Yershova v. Russia*, the applicant, who worked for a municipal company incorporated under domestic law as a separate legal entity claimed that the company had failed to pay her money awarded in judgment following dismissal.<sup>51</sup> Finding that the company's domestic legal status as a separate legal entity was not decisive, the European Court held the state to be responsible, with reference to the following factors:

- ▶ the municipality owned the company, as well as the company's property, under domestic law;
- ▶ the company provided a public service of vital importance to the city's population, as one of the main heating suppliers in the city;

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50. *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* [GC], 16 July 2014 §114; *Mykhaylenko and Others v. Ukraine*, 6 June 2005, §44; and *Liseyeva and Maslov v. Russia*, 9 January 2015, §§ 187-190.

51. *Yershova v. Russia*, 8 April 2010.

- ▶ the company had limited independence owing to the existence of strong institutional links with the municipality and constraints on its use of its assets; and
- ▶ the town council approved all transactions related to the company's property, controlled its management and decided whether it should continue to operate or be liquidated.<sup>52</sup>

Equally, on some occasions the European Court has been required to assess the status of SOEs under the ECHR when such companies have themselves lodged applications before the European Court, on this point observing that:

the term "governmental organisations" as opposed to "non-governmental organisations" under article 34 [ECHR], applies not only to central organs of the State, but also to decentralised authorities that exercise "public functions", regardless of their autonomy vis-à-vis the central organs; likewise it applies to local and regional authorities.<sup>53</sup>

Consequently, for example:

- ▶ Spain's national railway company, which was under government control and enjoyed an operating monopoly was found to be a state entity;<sup>54</sup>
- ▶ Radio France, although a wholly-state owned national radio broadcaster entrusted with public-service missions and largely dependent on state financing, was also held to be a private entity, with reference to factors including its control by an independent regulator, the composition of its board, its lack of monopoly over radio broadcasting, and its governance by ordinary company law;<sup>55</sup>
- ▶ A shipping company, wholly owned by the state, and a majority of whose board were appointed by the state, was determined to be a non-governmental entity, on grounds that it was still legally and financially independent from the state.<sup>56</sup>

Finally, it should be recalled that, even where it is determined that a state is not directly responsible for the wrongful conduct of an enterprise breaching human rights, such conduct may still be attributable to the state on the basis of positive obligations (Section 1.1.1).

Given the above, Council of Europe member states should ensure that appropriate and relevant measures such as human rights due diligence (see

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52. *Yershova v. Russia*, 8 April 2010, §§56-58.

53. *Radio France and Others v. France*, 30 March 2004, §26.

54. *RENFE v. Spain*, 8 September 1997 (Commission).

55. *Radio France and Others v. France*. 30 March 2004.

56. *Islamic Republic of Iran Shipping Lines v. Turkey*. 13 March 2008.

further chapter 2 of this handbook) are established and in effective operation in SOEs to prevent human rights abuses. In the context of NAP on business and human rights, a number of Council of Europe member states have recently announced such measures, for example:

- ▶ The [Swedish] Government has held seminars for the chairs of boards and managing directors of all state-owned companies on the Government's expectations regarding the companies' application of the [UNGPs]...A business analysis tool...has been developed for state-owned companies... The analysis increases the owner's awareness of the companies' risks and opportunities and how these can be managed. The result of the analysis is integrated in corporate governance and taken into account in the Government's regular dialogue with the company, in monitoring the company's development, and in the recruitment and nomination of board members.<sup>57</sup>
- ▶ In State ownership steering, companies are required to observe human rights responsibly and transparently both within their own organisations and in subcontractor chains, in full accordance with the [UNGPs]. The State uses a separate accountability mechanism for dealing with human rights violations committed by State-owned companies. Companies with a controlling interest held by the State assess the human rights risks of their own operations and those of their subcontractor chains, reporting on them and their own tax procedures.<sup>58</sup>
- ▶ Norway's NAP provides that there is a need to focus more strongly on the responsibility of the boards also of enterprises in which the state has an ownership interest and their approach to Corporate Social Responsibility (CSR), including human rights... The follow-up of CSR and human rights performance is conducted through the owner dialogue in quarterly and/or annual meetings on CSR. In special cases it may be necessary to follow the company's activities more closely. The work of companies and boards on CSR, including human rights, is taken into account in the election of board members.<sup>59</sup>

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57. Government Offices of Sweden, *Action Plan for Business and Human Rights* (2015), p.23, available at: <http://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf> .

58. Ministry of Employment and the Economy (Finland), *National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights* (2014), available at: <https://tem.fi/documents/1410877/3437254/National+Action+Plan+for+the+implementation+of+the+UN+guiding+principles+21102014.pdf> , p.5.

59. Norwegian Ministry of Foreign Affairs, *National Action Plan for the Implementation of the UN Guiding Principles*, [https://www.regjeringen.no/globalassets/departmentene/ud/vedlegg/mr/business\\_hr\\_b.pdf](https://www.regjeringen.no/globalassets/departmentene/ud/vedlegg/mr/business_hr_b.pdf), p.21.

Further examples and discussion of human rights due diligence measures relevant to SOEs may be found in the UN Working Group's recent report on this topic (UN Working Group 2016). The issue of state immunity in connection with abuses by SOEs is discussed in chapter 3 of this handbook.

### *State agencies supporting or facilitating business activities*

A further area where states should take "additional measures" in line with UNGP 4 is that of support and services, such as export credits, investment insurance or guarantees, grants and loans provided by states and their agencies to businesses. According to one UN human rights mechanism,

A significant number of the projects supported by export credit agencies, particularly large dams, oil pipelines, greenhouse gas-emitting coal and nuclear power plants, chemical facilities, mining projects and forestry and plantation schemes, have severe environmental, social and human rights impacts (United Nation General Assembly (UNGA) 2011: 3).

Allegations that such abuses have arisen from projects or activities funded by Council of Europe member states' export credit and similar agencies have been advanced by Civil Society Organisations (CSO) in various cases (see, for example, Halifax Initiative *et al.* 2015).

The OECD has developed guidance for ECAs on how to address environmental and social aspects of officially supported export credits, which applies to ECAs based in OECD countries (OECD 2016). This provides, for instance, that ECAs should screen all applications for export support falling within the scope of the Common Approaches for severe human rights risks (OECD 2016, paragraph 6). A "human rights risk" may be severe due to the gravity of the potential harm, its widespread nature or the extent to which any impacts can be remediated, for example (OECD 2016: 9, footnote 2). Where screening identifies a high likelihood of such risks, ECAs should further assess these, for example, by supplementing existing environmental and social assessment procedures with human rights due diligence (OECD 2016, paragraphs 8 and 14).

Against this background, certain Council of Europe member states have indicated the introduction of measures to support human rights due diligence by ECAs and similar agencies:

- ▶ The Swedish Export Credit Corporation (SEK) is "required to take account of conditions such as the environment, corruption, human rights and working conditions in its credit assessments". In parallel, "the Swedish Export Credits Guarantee Board (EKN) has been instructed... to pursue continuous development of its work on human rights, working conditions, the environment, corruption and internet freedom, based on OECD

recommendations in these areas ('Common Approaches' and 'Bribery and Officially Supported Export Credits'). EKN also has instructions to ensure that its activities comply with...the OECD Guidelines for Multinational Enterprises, the principles of the UN Global Compact and the UN Guiding Principles on Business and Human Rights." Beyond projects and sectors covered by the Common Approaches, "the EKN has requirements and processes in place for conducting due diligence with respect to the environment and human rights in all other business transactions. The EKN also produces country risk analyses for many countries ([www.ekn.se](http://www.ekn.se)). The due diligence and any more in-depth review proceed from the potential seriousness of the impact of a business transaction and depends on the size of the transaction".<sup>60</sup>

- ▶ As part of its approval process for business finance, Denmark's international development agency, DANIDA "analyses potential human rights related risks" and "Access to finance is based on buyer's and exporter's compliance with ILO principles on human and workers' rights". In addition, "A description of...how [the applicant] will comply with... the principles of the UN Global Compact during implementation are requested from pre-qualified tenderers and form part of the tender evaluation".<sup>61</sup>

### 1.2.3.2. Public services

Public services such as education, healthcare, housing and social services (for example, residential care or personal care and support services for the elderly, persons with disabilities and children) as well as utilities such as water, energy and communications are essential for the enjoyment of human rights. Some human rights, such as the right to education, that are recognised by international instruments establish entitlements to such services directly.<sup>62</sup> Others imply the need for such public services. Under the ECHR the right to private and family life, for instance, may entail a positive obligation on the state in relation to the provision of housing for individuals under certain circumstances,<sup>63</sup> even if it does not as such confer any general right to be provided with a home.<sup>64</sup>

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60. Government Offices of Sweden, *Action Plan for Business and Human Rights* (2015), available at: <http://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf>, p.24.

61. The Danish Government, *Danish National Action Plan*, available at: <http://em.dk/publikationer/2014/31-03-14-danish-national-action-plan>, p.28.

62. See e.g. ICESCR, Article 13 and ECHR, Article 2, Protocol 1.

63. *Marzari v. Italy*, 4 May 1999 (Admissibility decision).

64. *Chapman v. the United Kingdom*, 18 January 2001. See further Mowbray (2004), Ch.6.



Governments increasingly rely on private companies to deliver public services. Many states have “privatised” formerly public industries, utilities or services. Alongside, in the context of services that, overall, remain in the public sector, central government or municipal authorities may subject the delivery of certain of their elements to “contracting-out” or compulsory competitive tendering. Hence certain components of core state functions are today frequently delivered by private companies, even if other aspects remain with the state. Companies providing such services have been allegedly implicated in human rights abuses, for example, in relation to health and social care for the elderly,<sup>65</sup> immigration detention and removals<sup>66</sup> and prison management.<sup>67</sup> Given that businesses generally lack direct obligations under human rights standards (Section 1.1.1 above) this may result in gaps in human rights protection where the scope of domestic or international redress mechanisms is restricted to reviewing the conduct of public authorities, undermining the effective enjoyment of rights by individuals.<sup>68</sup>

A further consequence is the need to ensure that the specific terms of service contracts concluded between public bodies and private companies embody operational standards that are fully aligned with the human rights of service users, as well as adequate arrangements for monitoring and enforcement of contractual compliance. Hence, for example:

When inspecting places of detention operated by private companies in the Netherlands, Norway and the UK, the Council of Europe Committee for the Prevention of Torture (CPT) has highlighted *inter alia*

- All security staff in places of detention, whether employed by the state or private companies, should meet the same standards;
- The need for effective oversight of relevant private sector contracts;
- The requirement for specialised training and adequate supervision of private sector staff (Hallo de Wolf 2012: 411-413).

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65. Northern Ireland Human Rights Commission, *In Defence of Dignity: The Human Rights of Older People in Nursing Homes* (Belfast: 2012), <http://www.nihrc.org/documents/research-and-investigations/older-people/in-defence-of-dignity-investigation-report-March-2012.pdf>.

66. O. Petitjean, “La détention des migrants, un business en pleine expansion” *Observatoire des Multinationales* (11 January 2017), <http://multinationales.org/La-detention-des-migrants-un-business-en-pleine-expansion>.

67. S. Read, “G4S faces fury over human rights abuses”, *The Independent*, 5 June 2014.

68. See e.g. UK Parliament Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, Seventh Report of Session 2003-4, available at: <https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/3902.htm> and UK Parliament Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, Ninth Report of Session 2006-7, available at: <https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/77.pdf>.

### *International standards*

Consequently, and with the aim of avoiding or at least mitigating such gaps, international human rights bodies have held that the state retains its duty to protect human rights when it undertakes privatisation, as well as when it contracts with private actors to deliver public services.<sup>69</sup> Thus in addressing alleged abuses occurring at a privately-operated prison facility, the HR Committee found that a state party to the ICCPR “is not relieved of its obligations when some of its functions are delegated to other autonomous organs”, so that the respondent state remained accountable for any breaches, at least in connection with “activities that involve the use of force and the detention of persons”.<sup>70</sup> Besides, it remains the case that the acts of private companies fulfilling state functions may be attributable to the state where a business exercises government authority or acts on government instructions or under its direction or control (ILC 2001, Article 5 and Commentary and Article 8). On the other hand, international bodies have not been called on to assess directly whether privatisation or contracting out *per se* have given rise to human rights violation in any specific instance (Hallor de Wolf: 246).

### *Council of Europe standards*

Even if the general rule under the ECHR is that the state “cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals”,<sup>71</sup> the above is also true in the Council of Europe setting: the European Court has not yet adjudicated any direct challenge to privatisation as a breach of human rights *per se*. Moreover, were any such challenge to be advanced, it has been suggested, the European Court would afford the respondent state a wide margin of appreciation, given its approach to the review of other general policies of an economic nature. Still, closer scrutiny might be expected in relation to privatisation policies with impacts on non-derogable rights (for example, Articles 2 and 3) and also in circumstances where states fail to provide adequate procedural safeguards to avoid, mitigate or remedy even qualified Convention rights (Hallo de Wolf 2012, Ch.3).

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69. E.g. CRC, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, paragraphs 43-44; CEDAW, *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1, chap. I, §17.

70. *Cabal and Pasini Bertran v. Australia*, Comm. 1020/2001, U.N. Doc. A/58/40, Vol. II, at 346 (HRC 2003).

71. *Costello-Roberts v. the United Kingdom* [GC], 25 March 1993, §§27-28 (concerning alleged abuses in a private school) and *Storck v. Germany*, 16 September 2005, §103 (holding that the state remained under a duty to exercise supervision and control over private psychiatric institutions where patients could be held against their will).

Turning to “contracting-out”, as already observed, private actors are not directly subject to human rights obligations, even where they perform activities or functions typically of a public nature. Albeit the ECHR does not exclude the state’s transfer of competences to bodies operating under private law, and such a transfer does not in itself incur a state’s responsibility, the manner of exercise of such powers by the relevant private entities may do so.<sup>72</sup> As the European Court has held, “the exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law.”<sup>73</sup>

As to the position under the ESC(r), the implications of privatisation and contracting-out for protected rights have been considered in the context of states’ periodic reporting on a number of occasions, with similar conclusions. In this setting the ESCR has found, for instance, that

- ▶ prisoners’ deployment, without their consent, to work for private companies was inconsistent with the right against forced labour;<sup>74</sup>
- ▶ municipal authorities retain overall responsibility where they contract out elderly care to the private sector and are required to supervise the services provided<sup>75</sup> while also ensuring the delivery of an equivalent level of care.<sup>76</sup>

### *UNGPs and Council of Europe Recommendation CM/Rec(2016)3*

Reflecting the above, UNGP 5 provides that:

States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

Likewise, according to the Appendix to the Council of Europe Recommendation CM/Rec(2016)3, states should “apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence” when they “privatise the delivery of services that may impact upon the enjoyment of human rights” (paragraph 22).

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72. *Woś v. Poland*, 8 September 2006.

73. *Sychev v. Ukraine*, 11 January 2006, §54.

74. Conclusions concerning Articles 1, 5, 6, 12, 13, 16 and 19 of the Charter in respect of Germany, ECSR Conclusions XV1-1 vol.1 (2002), Ch.7.

75. Sweden 01/01/1996-31/12/1998 Conclusion, ECSR Conclusions XV-2 Volume 2, Article 4AP, Section 151/168 (2001), pp. 578-582.

76. Finland 01/01/1996-31/12/1998 Conclusion, ECSR Conclusions XV-2 Volume 1, Article 4AP, Section 83/173 (2001), pp. 182-185.

Given the standards and materials reviewed above, this provision of the Recommendation should be interpreted broadly as applicable to contracting-out of public services and elements thereof, in addition to privatisation *per se*, and as highlighting the duty of governments and other public bodies to provide for adequate service standards, contractual terms, monitoring and accountability mechanisms, and sufficient human rights due diligence in the context of public-private partnerships and privatisations.

Examples:

- ▶ Following a number of court decisions to the contrary, the UK Parliament enacted legislation to designate residential care homes operated by private and voluntary organisations as bodies with a duty to act compatibly with ECHR rights, where such care was publicly funded ([section 145 Health and Social Care Act 2008](#)).
- ▶ The Scottish Human Rights Commission observed in a report that contracting-out of social care services by municipal authorities may jeopardise human rights due to:
  - lack of consultation and participation with service users on the terms and standards of care under private-sector contracts;
  - lack of staffing continuity, because re-tendering upon expiry of contracts may act as a disincentive to companies to invest and develop their workforce;
  - downward pressure on pay and conditions of staff, impacting negatively on service quality.

According to the Commission, however, subsequent Guidance on Social Care Procurement published by the Scottish Government and Convention of Scottish Local Authorities highlights how provisions protecting human rights can be incorporated into social care service specifications; selection and award criteria; and contractual clauses (Scottish Human Rights Commission 2012: 54).

### *1.2.3.3. Public procurement*

Public procurement refers to the purchase by the public sector of the goods and services it needs to carry out its functions (Arrowsmith and Kunzlik 2009: 9). Government purchasing comprises a significant share of the total economy, accounting for an average of 12% of Gross Domestic Product (GDP) across OECD countries, for example (OECD 2017). Government buying practices within specific sectors such as healthcare, electronics, food, military equipment and infrastructure can have substantial influence on suppliers and their conduct. Public procurement thus has the capacity to affect conditions in global supply chains, given governments' status as "mega-consumers" (Methven O'Brien et al 2016).

UNGP 6 provides that “States should promote respect for human rights by business enterprises with which they conduct commercial transactions”. This is echoed by the Council of Europe Recommendation CM/Rec(2016)3 according to which

22. Member States should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence, that may be integrated into existing due diligence procedures, when member States:

- conduct commercial transactions with business enterprises, including through the conclusion of public procurement contracts (Appendix, paragraph 22).

Yet suppliers of goods to governments inside the Council of Europe region have been implicated, for instance, in the use of child labour, forced labour and interference with the right to freedom of association and to form trade unions, by suppliers or their sub-contractors, outside Europe:

- ▶ It has been documented by NGOs and professional associations in Sweden and the UK that simple surgical instruments and basic hospital supplies produced in Asia and used by European public healthcare providers are manufactured under hazardous working conditions (Swedwatch 2015, Danwatch 2015).
- ▶ An NGO has alleged the systematic use of forced labour at Chinese electronics factories producing servers for universities in Denmark (Danwatch and GoodElectronics 2015).
- ▶ It has been alleged that military uniforms supplied to European governments are sourced from manufacturers situated in Export Processing Zones where trade unions are prohibited (Danwatch 2015b).

In addition, public bodies are implicated in breaches of labour regulations affecting workers inside Council of Europe member states. For example:

- ▶ In Poland, public institutions represent respectively 60% and 40% of market share in the cleaning and private security services, yet workers in such sectors [may work up to 350-400 hours per month](#), while their employers often fail to provide paid holidays, proper and safe working conditions or social insurance (Piskalski 2015).
- ▶ An investigation by the UK Equality and Human Rights Commission (EHRC) revealed various breaches of legal requirements relating to workers engaged by commercial cleaning companies operating in the public health, transportation and leisure sectors (EHRC 2014).

- ▶ In the UK, tax authorities launched an investigation into the six largest employers in the social care sector for alleged failures to comply with minimum wage requirements.<sup>77</sup>

It should be observed that in general, government contracts are subject to the ordinary private or administrative law of the state concerned (as is the case, for example, in the UK and France, respectively). At the same time public authorities should comply with their obligations under domestic rules during public contracting, for instance, in the areas of environment and anti-corruption. In addition, depending on jurisdiction, public buyers may be subject to national constitutional or statutory human rights duties, sometimes giving effect to the ECHR that are applicable in the procurement context.<sup>78</sup>

At the same time, depending on factors such as the money value and subject matter of the contract, a public tender may be required to comply with additional rules, for instance, the EU's procurement Directives or the Agreement on Government Procurement of the World Trade Organisation. Such rules are not, though, at present fully aligned with international or regional human rights standards (Methven O'Brien et al. 2016, Martin-Ortega and Methven O'Brien 2019).

Given the above, it is likely that measures to integrate respect for human in the context of procurement laws, policies and practices are required across all Council of Europe member states, if the "state duty to protect" is to be met. Such measures might include, for instance:

- Purchasing authorities at national and subordinate levels adopting a policy that clearly commits to respect for human rights in public procurement, and supporting guidance.

Example:

- ▶ The Netherlands' national sustainable procurement policy requires companies supplying goods and services to respect human rights as part of the "social conditions" applicable to all central government EU contract award procedures since 1 January 2013.<sup>79</sup>

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77. The Guardian, "HMRC investigates 100 social care firms over 'failure to pay minimum wage'", <https://www.theguardian.com/society/2015/feb/24/hmrc-investigates-100-social-care-companies-alleged-failure-pay-minimum-wage>.

78. As for example in the UK under the Human Rights Act 1998: Northern Ireland Human Rights Commission, *Public Procurement and Human Rights in Northern Ireland*, available at: [http://www.nicshumanrightsguide.com/uploads/files/NIHRC\\_Public\\_Procurement\\_and\\_Human\\_Rights.pdf](http://www.nicshumanrightsguide.com/uploads/files/NIHRC_Public_Procurement_and_Human_Rights.pdf)

79. Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights 5 (April 2014), available at: <https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>.

- Undertaking risk analysis to identify product and service categories purchased by government bodies that carry the highest risk of human rights abuses.

Examples:

- ▶ The Scottish Government has developed a Sustainable Procurement Prioritisation Tool for public buyers to support the structured assessment of spend categories according to social and environmental sustainability parameters.<sup>80</sup>
  - ▶ In 2010, Sweden's City of Malmö conducted a risk analysis, segmenting spending categories by high, medium and low risk for abuses relating to supply chain working conditions. Three product groups were identified as high-risk: electronic equipment, furniture and office materials. Follow-up measures, such as implementing a Code of Conduct to be signed by suppliers of goods, were based on this assessment (Landmark Consortium 2012: 7).
- Introducing technical specifications and award criteria that reflect respect for human rights by immediate suppliers, as well as other business entities in the value chain.

Examples:

- ▶ In Spain, the city of San Sebastian included social clauses referring to compliance with ILO standards and its verification in technical specifications for a clothing and footwear tender. Bidders for the contract were excluded from the process unless they could demonstrate compliance with the technical specifications, including by disclosing subcontractors and suppliers (Landmark Consortium 2012: 17).
  - ▶ Under the Netherlands' "social conditions" policy, award criteria are based on price and quality linked to sustainability so that companies undertaking measures to protect labour rights in the supply chain should have an advantage over other bidders in the tender process (Swedwatch 2015: 45).
- Applying contract clauses that require successful bidders to ensure respect for human rights in service delivery or during the production or manufacturing process.

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80. Scottish Government, The Sustainable Public Procurement Prioritisation Tool, available at: <http://www.gov.scot/Topics/Government/Procurement/policy/corporate-responsibility/Sustainability/ScottishProcess/SustainableProcurementTools/SustainablePublicProcurementPrioritisationTool>.

## Examples:

- ▶ In Sweden, as part of their cooperation on sustainable procurement of healthcare, dental care and public transportation, 21 County Councils include contract clauses relating to international human rights standards. These require that all goods and services under relevant contracts are delivered in line with ILO Core Labour Standards (Health Care Without Harm 2014: 8-9).
  - ▶ In the Netherlands, since 2013, “social conditions” must be included in all government tenders, above certain thresholds, for supplies and services. The social conditions are introduced as a contract performance clause and are divided into “generic” and “additional” social conditions. “Generic” conditions apply to all product groups and are based on the [ILO’s Core Labour Standards](#). “Additional” social conditions, including working hours, health and safety in the workplace and adequate wages are applicable for [specific product groups: coffee and tea, cocoa, textiles and flowers](#). For these product groups various [certification schemes have been developed which are recognised by the Dutch government](#). Suppliers can comply with the social conditions by following one of the following three “regimes”: 1) Participating in an approved supply chain initiative; 2) Making a declaration that no risk of violations of the social conditions is foreseen; or 3) Making a ‘reasonable effort’ to ensure that the social conditions are respected (European Commission 2015).
- Establishing arrangements for monitoring of supplier performance in relation to human rights.
- ▶ In Norway public authorities are obliged to advance contract clauses on wages and decent working conditions when purchasing services such as construction, facility management, and cleaning services. Public authorities are also required to follow up with suppliers on performance of such clauses, for instance by requiring the supplier to make a self-declaration (Methven O’Brien et al 2016: 28).
  - ▶ Electronics Watch is an EU-wide collaboration of public bodies seeking to address human rights abuses in ICT supply chains. Electronics Watch provides template contract performance clauses that meet procurement law requirements while also including a Code of Labour Practices for suppliers containing human rights and labour standards safeguards. Electronics Watch produces country profiles, thematic research, factory surveys, and investigative reports to evaluate whether the Code is being met (Electronics Watch 2017).



- Excluding bidders from public tenders on grounds of involvement in human rights abuses.

Example:

- ▶ [EU Directive 2014/24/EU](#) on public procurement provides that “contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established (...) or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for” child labour and other forms of trafficking in human beings as well as corruption, money laundering or terrorist offences (Article 57, Exclusion grounds).
- Allocating resources for guidance and training of procurement officers to strengthen knowledge and capacity in relation to relevant human rights risks and how to manage them effectively throughout the procurement cycle.

Examples:

- ▶ The Dutch government has developed a number of tools to support procurers in implementing the “social conditions”, for example, a “[Toolkit for Child-Labour-Free Procurement](#)” (Heyl 2016).
- ▶ In Finland, the NAP proposes a number of measures to integrate human rights into procurement, including updating the State procurement manual’s “responsibility themes,” and developing a report on “product groups that pose the highest risk for human rights violations.”<sup>81</sup>

As noted earlier, according to the Explanatory Memorandum, member states should “evaluate the measures taken...and respond to any deficiencies” in the public procurement context, and provide for “consequences if the respect for human rights is not honoured, such as, for example, the termination of public procurement contracts as a measure of last resort” (paragraph 39).

Example:

The company G4S was contracted to a UK public authority to manage a secure training centre for young offenders. After a report by the Office for Standards in Education, Children’s Services and Skills found that poor behaviour by G4S led to some detained persons being subjected to degrading treatment and racist comments, G4S was replaced by another service provider (The Guardian 2015).

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81. Ministry of Employment and the Economy (Finland), *National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights* (2014), available at: <https://tem.fi/documents/1410877/3437254/National+Action+Plan+for+the+implementation+of+the+UN+guiding+principles+21102014.pdf>, pp. 20-21.

### 1.2.4. Conflict-affected areas: UNGP 7

Businesses operating in conflict-affected areas are at heightened risk of becoming involved in human rights abuses committed, for instance, by security forces charged with protecting company personnel or property, armed non-state actors or *de facto* governmental authorities. Business activities in conflict and post-conflict zones have increasingly been identified as a factor in causing, prolonging, re-igniting or exacerbating conflicts in many parts of the world, in spite of their potential peace-building role (Lundsgaard 2014, Ford 2015).

Abuses that frequently occur in conflict-affected, post-conflict or weak rule of law environments and which may implicate businesses operating there include:

- ▶ Appropriation by government or non-state actors of land belonging to persons displaced by conflict and its transfer to businesses;
- ▶ Pillage of natural resources or their sale to businesses by agents without the required ownership to authorise their purchase;
- ▶ Unlawful use of force by government or private military or security personnel, including against minority groups and human rights defenders, and sexual or physical violence against women.

In situations of armed conflict, besides human rights norms, rules of humanitarian law become relevant. Comprising both treaty and customary rules that regulate the means and methods of warfare to protect civilians, including against war crimes, crimes against humanity and genocide, the latter can apply to non-state actors, including business (International committee of the Red Cross (ICRC) 2006).

According to UNGP 7, states should pre-empt risks associated with business activities linked to conflict zones by:

- (a) Engaging...with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
- (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
- (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
- (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

These requirements apply to the state or states in which the conflict is occurring, which should, in addition, investigate, prosecute and provide redress to victims for crimes committed within their jurisdiction. However, they apply also to states in which any business implicated in conflict-related human rights abuses is domiciled or incorporated. Such states should likewise exercise jurisdiction, to the extent required, to ensure that relevant crimes are effectively investigated and prosecuted.

Examples:

- ▶ In 2017, a Dutch timber trader was convicted by a court in the Netherlands of being an accessory to war crimes and arms trafficking. Guus Kouwenhoven sold weapons through his business, the Oriental Timber Company, to the former president of Liberia, Charles Taylor, who used them in civil wars that involved mass atrocities, the use of child soldiers and sexual slavery. Oriental Timber Company shipments carried caches of hidden arms into Liberia between 2000 and 2003 (The Guardian, 22 April 2017).
- ▶ In 2017, French prosecutors opened a preliminary inquiry into alleged dealings between the Swiss-French cement company LafargeHolcim and sanctioned militant groups in Syria, including Isis, in response to a complaint by the French finance ministry. In parallel French human rights groups filed a lawsuit alleging that LafargeHolcim had “business relations” with Isis and may have taken part in financing the group. According to an internal investigation undertaken by the company, its local subsidiary in Syria “provided funds to third parties... in order to maintain operations and ensure safe passage of employees and supplies to and from the plant” during the Syrian conflict in 2013 and 2014. Payments were allegedly made for safe passage at checkpoints, for the release of kidnapped employees and in protection money. Following its internal investigation, finding breaches of its Code of Conduct, the company’s CEO resigned (Financial Times, 24 April 2017).

The *Commentary* to UNGP7 underlines the need for states to “attach appropriate consequences” to failures by enterprises in the context of conflicts, “including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision” (UNGP 9).

Echoing UNGP 7, the Council of Europe Recommendation CM/Rec(2016)3 counsels that:

Member States should be in a position to inform business enterprises [that are domiciled or conduct substantial activities in their jurisdiction]...on the potential human rights consequences of carrying out operations in conflict-affected

areas, and in other sectors or areas that involve a high risk of a negative impact on human rights, and provide assistance to these business enterprises (Appendix, paragraph 27; see further, Explanatory Memorandum, paragraph 46).

It further highlights, in this context, a number of relevant standards and tools, and that states should facilitate companies' adherence to them, in particular:

- ▶ The OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones, which "provides detailed recommendations to help companies respect human rights, avoid contributing to conflict through their mineral purchasing decisions and practices, and assists them to meet their due-diligence reporting requirements" (paragraph 46, Explanatory Memorandum);<sup>82</sup>
- ▶ The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas;<sup>83</sup>

and, in relation to businesses that enter contracts for the provision on security services, whether of a public or private nature, as well as businesses that themselves are security service providers:

- ▶ The Voluntary Principles on Security and Human Rights;<sup>84</sup>
- ▶ The International Code of Conduct for Private Security Providers.<sup>85</sup>

Example:

- ▶ The UK Government published a *Business and Human Rights Toolkit* providing advice to its diplomatic missions on how to "promote good conduct by UK companies" abroad. According to the Toolkit, UK embassies located in conflict zones should "be aware of / inform UK companies of applicable UN Security Council sanctions and UN expert panel reports (which often contain references to companies)". It also identifies relevant guidance on conflict sensitive business practice for the extractive industries.<sup>86</sup>

## 1.2.5. Ensuring policy coherence: UNGPs 8-10

Given the regulatory and institutional complexity of contemporary states, and the volume of rule-making that goes on bilaterally between them, as

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82. Available at: <http://www.oecd.org/corporate/mne/weakgovernancezones-riskawarenesstoolformultinationalenterprises-oecd.htm>

83. Available at: <http://www.oecd.org/daf/inv/mne/mining.htm>

84. Available at: <http://www.voluntaryprinciples.org> .

85. Available at: <https://icoca.ch/>.

86. HM Government (2017), *Business and Human Rights Toolkit*, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/35451/business-toolkit.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35451/business-toolkit.pdf), p.8, accessed 1 September 2017.

well as at regional and international levels, ensuring the consistency of states' other legal and policy commitments with their human rights obligations across all policy areas is a major challenge. Indeed, various analyses have highlighted that international trade and bilateral investment agreements, for example, can have negative impacts on human rights, besides their positive influence through promoting economic development and commerce.<sup>87</sup>

The UNGPs accordingly call for states to promote business respect for human rights via state entities that influence business practices (GP8); agreements concluded with other states or businesses (GP9); and through their membership of multilateral institutions (GP10). This gives rise to the ideas of "horizontal" coherence, in other words, consistency with the state's human rights obligations of policies and practices across functional areas of national and sub-national government, such as corporate law and securities regulation; export credit and insurance; industrial and labour regulations. "Vertical" coherence, on the other hand, refers to consistency between international policies and obligations, and enjoyment of human rights "on the ground".

The Council of Europe *Recommendation CM/Rec(2016)3* affirms this approach, providing that,

In their implementation of the [UNGPs], member States should...ensure consistency and coherence at all levels of government (Appendix, paragraph 3).

This general provision is then elaborated more fully in the Appendix in relation to the subject-matter addressed by UNGPs 8 through 10, as described in the following sections.

### *1.2.5.1. Influencing business practices: UNGP 8*

According to UNGP 8:

States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the state's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

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87. E.g. OHCHR, Report of the High Commissioner on Human Rights, Trade and Investment, 2 July 2003, E/CN.4/Sub.2/2003/9 (Report on Investment) at paragraph 12; OHCHR, Report of the Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, 27 June 2001, E/CN.4/Sub.2/2001/13 (Report on TRIPS) at paragraph 61; OHCHR, Globalisation and its Impact on the Full Enjoyment of Human Rights, 15 January 2002, E/CN.4/2002/54 (Report on AoA) at paras 46 and 49; and OHCHR, Liberalisation of Trade and Services and Human Rights, 25 June 2002, E/CN.4/Sub.2/2002/9 (Report on GATS) at 12, 67 and 72.

The intention behind this provision is to ensure that all organs of government act in concert in support of the goal of business respect for human rights. Sometimes, within state bureaucracies, human rights matters are formally defined or informally understood as the exclusive domain of foreign affairs or justice ministries, for instance, while ministries or agencies responsible for business regulation, trade or investment promotion may be thought to have little or no mandate to address them. This can lead to situations where one arm of government makes legal, policy or other public commitments to uphold human rights, while its other limbs are unaware of such commitments or act in contravention of them.

Examples:

- ▶ NGOs and trade unions criticised the Irish Government's failure to raise human rights issues while on a trade mission to Qatar, following the publication of research documenting a range of abuses affecting migrant workers there. Poor health and safety standards at work had led to more than 1,000 workers being admitted to hospital in 2012 having fallen from height at work, with 10 per cent disabled as a result and a significant mortality rate (Amnesty International 2014; Irish Congress of Trade Unions (ICTU) 2014; Irish Times 2014).
- ▶ Minority investments made by the Norwegian Bank Investment Management (NBIM) in relation to a proposed iron mine, steel plant and associated infrastructure in India were found to have breached the OECD Guidelines for Multinational Enterprises on human rights grounds. Norway's National Contact Point (NCP) held that, because NBIM lacked a policy on how to address human rights risks related to companies in which it invests, it failed to meet the Guidelines' human rights due diligence requirements.<sup>88</sup>
- ▶ In 2016, an investment agreement worth up to £10billion between the Scottish Government and Chinese companies SinoFortune Group and China Railway No. 3 Engineering Group was reportedly cancelled following expressions of concern by opposition parties and NGOs that the companies in question had been linked to human rights abuses and corruption (BBC 2016).

As UNGP 8 recognises, it is therefore important that governments take active steps to address the risk of such inconsistencies. As will be recalled, the need for such measures can readily be traced back to the duty of the state to take domestic measures to give effect to obligations arising under

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88. <https://www.oecdwatch.org/news-en/norwegian-ncp-publishes-final-statement-in-posco-nbim-case>

international treaties, whose default may constitute a breach of such obligations (Section 1.1.1 above).

In their NAPs, various Council of Europe member states acknowledge this need and identify policy instruments designed to strengthen convergence and consistency between commitments to human rights and the UNGPs in particular functional areas.

Examples:

- ▶ Switzerland's NAP states that "In view of the rapidly changing environment and the variety of ways in which State action affects and is affected by the business and human rights domain, constant vigilance is required to ensure that government policy remains consistent." It then highlights the role of the following measures in supporting this aim: an "inclusive, on-going process of drafting, reviewing and renewing" its NAP; its ability to call on the Swiss Centre of Expertise in Human Rights for an expert review of legislative proposals for consistency with the UNGPs; the incorporation of the UNGPs into its Sustainable Development Strategy; and its International Human Rights Policy Core Group, a mechanism intended to promote coordination and consultation between federal agencies on human rights matters (Swiss Federal Council 2016: 29).
- ▶ Poland's NAP provides that the Council of Europe Recommendation CM/Rec(2016)3 "will be analysed to assess the compatibility of the law and practice in Poland and to formulate proposals for possible actions to be taken to implement such compatibility", allocating responsibility for this exercise to the Ministry of Economic Development in tandem with a number of other ministries (Polish Council of Ministers, 2017:26)

Besides thus generally indicating a need for policy coherence, the Council of Europe Recommendation CM/Rec(2016)3 addresses a number of specific scenarios. Paragraph 25 of the Appendix refers to trade missions to other member states and third countries, providing that, when businesses participate in such missions,

Member States should address and discuss possible adverse effects future operations might have on the human rights situation in those countries and require participating companies to respect the [UNGP or OECD Guidelines].

Relatedly, at paragraph 26, it is indicated that governments should support businesses operating abroad by providing advice on human rights matters:

Member States should advise, for example, through their competent ministries or diplomatic or consular missions, business enterprises which intend to operate or are operating in a third country on human rights issues, including

challenges faced by individuals from groups or populations that may be at a heightened risk of becoming vulnerable or marginalised, and with due regard to gender-related risks.

Linked to this, the Recommendation further suggests that Member States should,

offer training on business and human rights to government officials whose tasks are relevant to the issue of corporate responsibility, for example diplomatic and consular staff assigned to third countries with a sensitive human rights situation (Appendix, paragraph 29).

Similar training should be provided, where appropriate, for “business enterprises and their local training partners, including on human rights due diligence”, and may involve, for instance, business associations, National Institutions for the Promotion and Protection of Human Rights (NHRI), trade unions and NGOs (Appendix, paragraph 28).<sup>89</sup> Finally, in order to promote policy coherence in particular with regard to the issues of capital punishment and torture, each of which are explicitly prohibited by Council of Europe standards, the Recommendation CM/Rec(2016)3 provides,

In order not to facilitate the administration of capital punishment or torture in third countries by providing goods which could be used to carry out such acts, member States should ensure that business enterprises domiciled within their jurisdiction do not trade in goods which have no practical use other than for the purpose of capital punishment, torture, or other cruel, inhuman or degrading treatment or punishment (Appendix, paragraph 24).

Across the Council of Europe, various member states have embarked on measures of the kinds contemplated by these provisions of the Recommendation.

Examples:

#### *Trade missions*

- ▶ In its NAP, the Dutch government states that it “expects companies represented in a trade mission to look into the possible adverse effects of their operations on communities, including on human rights, in the country in question, and to pursue policies to mitigate them” (Netherlands Ministry of Foreign Affairs 2014: 15).

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89. In either case, the Appendix notes (paragraph 49), member states may avail of the human rights and business course established under the European Programme for Human Rights Education for Legal Professionals (HELP), available via: <http://help.elearning.ext.coe.int/>.



### *Training for diplomatic and consular staff*

- ▶ The Swiss federal government “offers a block course on business and human rights as part of annual human rights training for employees of the Federal Administration, and as part of general human rights training for future diplomats. It also offers targeted training to further the expertise of employees at Swiss representations abroad, especially in conflict-affected and high risk regions (Swiss Federal Council 2016: 30).

### *Advice and training for business*

- ▶ The EU and its member states have agreed to issue advisory notices warning businesses of the risks attaching to commercial dealings with Israeli settlement entities. According to a commonly agreed text publicised in 18 European countries, typically via government websites, “Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognised as a legitimate part of Israel’s territory. This may result in disputed titles to the land, water, mineral or other natural resources which might be the subject of purchase or investment. Possible violations of international humanitarian law and human rights law should also be borne in mind” (European Council on Foreign Relations (ECFR) 2016).
- ▶ France’s NAP provides for establishing online resource platforms gathering information relating to human rights alongside other CSR issues to increase accessibility of relevant documentation for enterprises (French NAP: 33).
- ▶ According to the UK NAP, specific country human rights information and links to the UNGPs and other relevant tools and guidance are included in the Foreign and Commonwealth Office’s UK Trade and Investment Overseas Business Risk service (UK NAP: 14).

### *Goods linked to torture or capital punishment*

- ▶ Regulation (EC) No 1236/2005 concerns “trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment”. A list of goods subject to export controls was extended in 2011 to include substances used in lethal injections in countries where the death penalty is still applied. According to the European Commission, “In response the European pharmaceutical industry has begun to apply their own measures to ensure that medicinal products, including non-listed ones, will not

be used for the death penalty. These measures have made it difficult for the authorities of third countries to procure medicinal products for capital punishment.” In addition, the Commission extended lists of goods subject to trade restrictions and broadened descriptions, so that, for instance, businesses are prohibited from importing or exporting bar fetters, restraint chairs, certain whips and cage and net beds, as well as equipment for the dissemination of incapacitating or irritating chemical agents covering a wide area.<sup>90</sup>

### *1.2.5.2. Domestic policy space and multilateral organisations – UNGPs 9 and 10*

It is as true for Europe as for other world regions that the extent, as well as the economic, political and social significance of international and transnational rules relating to the flow of capital, goods, services and labour has greatly increased in tandem with globalisation. This has focused attention on the human rights impacts of trade agreements entered into by states and investment agreements between states and companies. In summary,

Free trade and investment agreements contain obligations of States concerning trade restrictions and the treatment of foreign investors. Trade agreements prohibit tariffs above an agreed level, quantitative restrictions for goods such as import bans or quotas...They may also oblige countries to open their markets for foreign services and service providers...Most modern trade agreements also...require the opening of public procurement markets.

Investment agreements...require States to treat investors in a fair and equitable manner and to pay compensation for direct and indirect expropriation. In addition, they prohibit discriminatory measures distinguishing between foreign investors and local business entities... (Krajewski 2017: 9).

Such agreements can in practice limit the scope for states signing them to meet their obligation under human rights treaties, via a range of more or less direct mechanisms. By diminishing state tax revenues, reduced tariffs or preferential tax regimes for investors can undermine a government's ability to safeguard the rights to health, education, housing or other rights to which its population are entitled under the ECHR or ESC(r), for example. Stabilisation clauses, under which investors stand to be compensated from losses resulting in changes to a host state's legislative or policy framework during the lifetime of an investment project may yield the same effect (Shemberg 2009). Arbitration of disputes under state-investor agreements has led to controversial outcomes in cases where states have faced substantial penalties for enacting measures protective of human rights (Mann 2008, Simma 2011).

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90. [http://europa.eu/rapid/press-release\\_MEMO-16-3287\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-3287_en.htm)

Multilateral organisations, though their members comprise states, each of whom is subject to obligations of its own under human rights treaties, are not all subject to explicit legal duties to uphold human rights themselves. Given their role in originating trade agreements and other legal instruments that regulate business activities in Council of Europe member states, in one way or another, this lacuna is potentially problematic: states may be bound under one international instrument to engage in or alternatively refrain from conduct that falls foul of human rights established by another.

Responding to these issues, UNGP 9 provides that:

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

According to UNGP 10:

States, when acting as members of multilateral institutions that deal with business-related issues, should:

(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

(b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;

(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Notwithstanding a lack of explicit provisions in Council of Europe instruments or ECHR jurisprudence addressing such matters, presumably on the basis of the general principles of effectiveness and positive obligations described above (Section 1.1.1) the Council of Europe Recommendation provides in similar terms to UNGP 9 that:

When concluding and during the term of trade and investment agreements or other relevant conventions, member States should consider possible human rights impacts of such agreements and take appropriate steps, including through the incorporation of human rights clauses, to mitigate and address identified risks of adverse human rights impacts (Appendix, paragraph 23).

Mostly in the context of NAPs, Council of Europe member states have highlighted a range of measures that can be taken to address risks to human rights in these areas.

### 1.3. National Action Plans on Business and Human Rights

A National Action Plan (NAP) is a policy document formulated by a state which identifies priorities and actions it will adopt to support the implementation of international, regional or national obligations and commitments in a particular policy area or topic (Methven O'Brien et al 2014: 8).

One of the concrete steps Council of Europe member states should take to promote policy coherence in the business and human rights area, in line with UNGPs 8-10, is to develop a NAP on business and human rights. In its 2014 Declaration on the UNGPs, the Council of Europe Committee of Ministers called on member states to develop such NAPs (paragraph 10(d)). Building on this, the 2016 Committee of Ministers' Recommendation urges Council of Europe member states to:

share plans on the national implementation of the [UNGP]s ...and best practice concerning the development and review of [NAP]s in a shared information system, to be established and maintained by the Council of Europe, which is to be accessible to the public...(Recommendation, paragraph 4).

The Appendix and Explanatory Memorandum to the 2016 Recommendation subsequently emphasise that Council of Europe member states should

- ▶ Develop and adopt NAPs that address all three pillars of the UNGPs, as well as the Council of Europe Recommendation;
- ▶ Publish and widely distribute their business and human rights NAPs;
- ▶ Refer to guidance, such as that provided by the UN Working Group on Business and Human Rights<sup>91</sup> and the Danish Institute for Human Rights (DIHR)/International Corporate Accountability Roundtable (ICAR) NAPs Toolkit,<sup>92</sup> and involve all stakeholders "including business organisations and enterprises, national human rights institutions, trade unions and non-governmental organisations" when developing NAPs;
- ▶ Continuously monitor, and periodically evaluate and update implementation of their NAPs, with the participation of all stakeholders;

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91. [http://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf)

92. <https://www.humanrights.dk/publications/national-action-plans-business-human-rights>. The Toolkit is available in English, Russian, Spanish and Arabic.

- ▶ Share best practices on the development and review of NAPs with each other, third countries and stakeholders (Appendix, paragraphs 10-12; Explanatory Memorandum, paragraphs 24-27).

Likewise states have been requested to devise business and human rights NAPs by the UNHRC,<sup>93</sup> the European Commission<sup>94</sup> and European Council.<sup>95</sup>

To date, governments of 19 European countries have published business and human rights NAPs (Belgium, Czech Republic, Denmark, Finland, France, Georgia, Germany, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Norway, Poland, Slovenia, Spain, Sweden, Switzerland and the UK) while NAPs are currently under development in 3 others (Scotland, Greece and Portugal; DIHR nd, OHCHR nd).

A range of European business and human rights stakeholders, both from the business sector<sup>96</sup> and civil society,<sup>97</sup> have advanced recommendations to states on the processes by which they should develop NAPs as well as their content, while also calling for the Council of Europe to institute a process of peer dialogue based on member states' NAPs as a mechanism for monitoring and review of implementation of the 2016 Recommendation.<sup>98</sup>

According to the UN Working Group on Business and Human Rights, NAPs and the process of developing a NAP can be valuable for states as providing:

- ▶ Greater coordination and coherence within Government on the range of public policy areas that relate to business and human rights;
- ▶ An inclusive process to identify national priorities and concrete policy measures and action;
- ▶ Transparency and predictability for interested domestic and international stakeholders;
- ▶ A process of continuous monitoring, measuring and evaluation of implementation;

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93. Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/RES/26/22 (15 July 2014), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/083/82/PDF/G1408382.pdf?OpenElement>.

94. A renewed EU strategy 2011-14 for Corporate Social Responsibility.

95. Council of the European Union, "EU Strategic Framework on Human Rights and Democracy" (25 June 2012), [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/foraff/131181.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/131181.pdf).

96. <http://www.global-business-initiative.org/wp-content/uploads/2016/11/NAPs-Statement-Nov-2016.pdf>

97. <http://corporatejustice.org/news/15-new-recommendations-published-on-national-action-plans-on-business-human-rights>

98. <https://www.humanrights.dk/projects/business-human-rights-council-europe>

- ▶ A platform for on-going multi-stakeholder dialogue; and
- ▶ A flexible yet common format that facilitates international cooperation, coordination, and exchanges of good practices and lessons learned (UNWG, *Guidance on National Action Plans on Business and Human Rights*, Version 1.0 December 2014)

## 1.4. Extraterritoriality

Increasingly the ownership and activities of businesses are transnational. Some large companies have presence in almost every country of the world, for instance, via locally incorporated subsidiaries, investment or cross-ownership relations. Multinational enterprises have been important in triggering human rights concerns given the scale of their environmental and social impacts, their ability to influence business regulations nationally, as well as at regional and global level, and the difficulties frequently experienced by victims in securing effective remedies in relation to abuses for which such enterprises have allegedly been responsible.

This has led to calls for “home” states of TNCs to exercise greater control over the activities of their subsidiaries and activities in other countries where they operate, or “host” states. Based on the state duty to protect human rights and the doctrine of positive obligations, for instance, the UN Committee on Economic, Social and Cultural Rights (CESCR) has indicated that states should

take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.<sup>99</sup>

As regards the position taken by the UN Framework on this issue, as noted above in Section 1.2.1, UNGP2 provides that:

States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

To this the *Commentary* to UNGP 2 adds:

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis (UNGPs: 3-4)

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<sup>99</sup> UN CESCR, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, E/C.12/2011/1, paragraph 5.

At first appearance, this statement might seem to be a self-contradiction. However, its meaning becomes clear once a distinction has been drawn between two broad concepts of jurisdiction. In public international law, jurisdiction generally refers to a state's authority or right to regulate the conduct of persons, both natural and legal, by means of its own domestic law (Shaw 2003: 572; Lowe 2006: 335; Milanovic 2008: 411). This right is limited by the equal rights and sovereignty of other states (Mann 1984: 20), and remains primarily territorial (Higgins 1995: Chapters 4-5).

As a result, one state may not exercise jurisdiction on the territory of another without consent, invitation or acquiescence, bar the circumstance of occupation. A state's right to regulate the activity of corporations abroad is thus exceptional. This rule applies to the three dimensions of public international law jurisdiction: legislative (or "prescriptive"), executive (or "enforcement") and judicial ("adjudicatory").

Accordingly, states may:

enact rules affecting the rights and duties of parties beyond their borders without consent from other states, only where there is some "connecting factor" between the state and the target of its regulatory efforts. Such a link may be provided, for example, by nationality, whereby a state is allowed to attempt to control the conduct of its nationals ("active personality") or to protect them ("passive personality") even when abroad; by damage to the vital interests of the state ("protective principle"); or by damage to the international community as a whole, implicitly affecting the state as one of its members ("universality") (Methven O'Brien 2017:53).

A second broad concept of jurisdiction can be identified under international human rights treaties where it functions to define the scope of states parties' obligations (Milanovic 2008: 416). While this type of jurisdiction likewise remains primarily territorial, it may exceptionally be proven to exist in other circumstances where a state exercises factual control over people. This can be where a state enjoys "effective overall control" of some geographical area beyond its borders, typically via military occupation, or where it "exercises authority or control over an individual" outside its territory, for instance via state agents such as military or police personnel (Milanovic 2012: 122).

These rules are reflected in the ECHR and the jurisprudence of the European Court. "Jurisdiction" under Article 1 ECHR generally refers to the territory of contracting states. Only exceptionally have states been held liable for acts or omissions performed or producing effects outside a state's territory,<sup>100</sup> for instance,

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100. *Al Skeini and Others v. the United Kingdom* [GC], 7 July 2011, §131 *et seq*; *Issa and Others v. Turkey*, 16 November 2004, §§68 and 71; *Isaak v. Turkey* 28 September 2006 (Admissibility Decision); *Ilaşcu and Others v. Moldova and Russia* [GC], 8 July 2004, §§314 and 318.

where the state in question exercises effective overall control over a given area, typically foreign territory or parts of it; or where it exercises authority and physical control over individuals outside its own territory. Even then, the responsibility of a state under the ECHR as regards the conduct of non-state actors, as noted earlier, will be circumscribed by the limits of the doctrine of positive obligations (Section 1.1.1 above; cf. Section 1.2.3.1 above regarding state-owned enterprises).

As a result, the ECHR, as interpreted by the European Court, does not in general provide a basis for state liability for failure to exercise control over the conduct abroad of business enterprises incorporated under states parties' laws or having their headquarters in their territories, even when such conduct leads to human rights abuses (Polakiewicz 2012: 31).

Yet, there is every reason, in terms of policy coherence (Section 1.2.5 above), and given the responsibility of corporations themselves to respect human rights (see chapter 2 of this handbook) for states to adopt domestic regulatory measures that promote the prevention and remediation of human rights abuses in the context of business activities abroad.

This is indeed the position taken by UNGP 2, cited above, and also reflected by the Council of Europe Recommendation CM/Rec(2016)3, which provides that Member States should:

- ▶ apply such measures as may be necessary to require businesses operating *within their territorial jurisdiction* to respect human rights;
- ▶ apply such measures as may be necessary to require, as appropriate, business enterprises *domiciled within their jurisdiction* to respect human rights *throughout their operations abroad*;
- ▶ encourage and support these business enterprises by other means so that they respect human rights throughout their operations (Appendix, paragraph 13, emphasis added; see also Explanatory Memorandum, paragraph 28).

This interpretation is confirmed by the Explanatory Memorandum to the Recommendation CM/Rec(2016)3, which states that,

whenever [the Recommendation] refers to the term “jurisdiction”, that term shall have the same meaning as in Article 1 [ECHR] as applied and interpreted by the European Court of Human Rights (paragraph 8).

The meaning of “domicile” within the Recommendation, as well as measures that can be taken by states to encourage or require business enterprises to respect human rights, whether operating domestically or abroad, are addressed in chapter 2 of this handbook, while the topic of duties of states



parties to the ECHR to provide an effective remedy in relation to abuses by corporations occurring outside the territory of a Council of Europe member state is considered in Part III.<sup>101</sup>

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101. ECHR Article 13.

## Chapter 2

# The corporate responsibility to respect human rights

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If states retain the primary duty to respect, protect and fulfil human rights, related but discrete responsibilities of businesses for human rights have now been recognised by the Council of Europe, the UN and many other international and business organisations, through soft law instruments, political commitments and national policies and other measures. The so-called “corporate responsibility to respect” human rights is elaborated under the second “Pillar” of the UN Framework and by Guiding Principles 11 through 24.

Though the corporate responsibility to respect human rights is identified by the UNGPs as a social expectation rather than a legal duty,<sup>102</sup> it also has foundations in international law. This chapter of the handbook considers these, with reference to international as well as Council of Europe instruments, rather than focusing on the corporate responsibility to respect’s ethical or social dimensions. At the same time it refers to the guidance offered by the UNGPs and the Council of Europe Recommendation on Human Rights and Business on the scope, and key issues arising in the context of the “corporate responsibility to respect” human rights. Human rights due diligence, the process by which the UNGPs envisage businesses should operationalise their responsibilities for human rights in practice, is addressed in Section 2.4. Whereas guidance on human rights due diligence practices for companies operating in particular industry sectors or geographies, as well as on human rights impact assessment in particular has now been advanced by state, business and civil society actors, such detailed material is beyond the scope of this chapter. Readers are instead directed to additional resources through References.

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102. *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/HRC/17/31, 21 March 2011, paragraph 6.*

Lastly, this part aims to highlight how the corporate responsibility to respect human rights may be supported by duties imposed on businesses via state regulation. Some such measures pre-date the UNGPs, for instance, whereas others in the area of corporate human rights reporting and legislation specifically requiring companies to undertake human rights due diligence, have followed in their wake. Chapter 2 concludes by briefly considering some relevant examples.

## **2.1. Basis in international human rights law**

As a general rule, human rights instruments recognise only states as duty-bearers, and not private actors, such as businesses. Consequently international human rights law does not impose direct obligations on corporate actors, with limited exceptions (see further section 2.1.6 below). Most businesses, under most circumstances, therefore, do not have human rights obligations that may be enforced via international human rights law mechanisms, such as the European Court. The ECHR, in particular, applies to violations of rights by a state and does not usually have direct effect between private parties. Moreover, under Article 34 ECHR, individual applications may only be received by the European Court from a person, non-governmental organisation or group of individuals “claiming to be the victim of a violation by one of the High Contracting Parties”, while Articles 1 and 2 of the additional Protocol to the ESC have similar effect (see further chapter 3, Section 3.2 below). As a result, individuals cannot rely upon these instruments to raise complaints against business enterprises directly before Council of Europe supervisory mechanisms, even if they may initiate proceedings against states for business-related abuses (see Section 3.1.2 below).

Besides, for the most part, human rights treaties do not expressly oblige states to protect human rights against infringements by businesses via specific measures. Rather, states retain significant discretion as to the means by which to implement their treaty obligations at national level. On the other hand, there are significant exceptions to this rule some of which are highlighted later in this chapter (Section 2.1.5).

Nonetheless, a consensus appears to be emerging amongst states, social actors and, not least, businesses themselves that companies have a responsibility to respect human rights, understood as a duty to refrain from interfering with human rights, and to take measures needed to ensure that they do not restrict human rights in practice. Despite the restrictions already noted, such a responsibility can be viewed as finding an origin and basis in human rights, principles and standards. Though a comprehensive analysis is beyond the scope of this handbook, some significant examples of these are highlighted.

### 2.1.1. Responsibility of social actors to promote human rights

The UDHR has been interpreted as containing rights and freedoms that not only states, but also businesses, should strive to promote and secure. Its Preamble,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Acknowledgement in similar terms, of the right and responsibility of “individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels” can be found in the UN *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*.<sup>103</sup>

Example:

- ▶ The French oil company Total has adopted a Code of Conduct according to which it adheres to the principles set out in the UDHR, as well as the UNGPs, ILO Core Labour Standards, UN Global Compact, Voluntary Principles on Security and Human Rights and OECD Guidelines for Multinational Enterprises (Total, 2015).

### 2.1.2. Prohibition on destruction of human rights by non-state actors

In addition, Article 30 UDHR provides that,

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Article 17 ECHR is formulated in similar terms.

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103. UNGA, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, 8 March 1999, A/RES/53/144.

### 2.1.3. Positive obligations of states to prevent abuses by non-state actors

Jurisprudence of the European Court and the European Committee of Social Rights (ECSR), particularly surrounding states' positive obligations to prevent abuses against corporate actors (see chapter 1, Section 1.1.1 above) is also informative in identifying areas where human rights bodies have recognised business actions as interfering with human rights. Indirectly, this may be seen as signalling areas in which a corporate responsibility to respect human rights is or could be recognised under these instruments.

Since the adoption of the UNGPs, some amongst the UN's treaty monitoring bodies have elaborated views on the scope and content of states' positive obligations to address corporate conduct under specific human rights instruments (CRC 2013, CESCR 2017).

### 2.1.4. Enterprises owned or controlled by states

Under certain circumstances, states may be responsible, and liable, for breaches of human rights caused by state-owned or state-controlled enterprises (see further Section 1.2.3.1 above).

### 2.1.5. Specific state duties relating to corporations under human rights or other treaties

Several human rights treaties contain specific provisions that implicate corporations and their conduct. For example, as the Council of Europe Recommendation CM/Rec(2016)3 points out:

- ▶ The Convention against Trafficking in Human beings Article 22, paragraph 2 and Article 26, paragraph 2 of the Convention on the protection of Children against Sexual exploitation and Sexual Abuse oblige states to ensure corporate liability for certain crimes, and...to introduce domestic "measures...to ensure that a legal person can be held liable where the lack of supervision or control ... has made possible the commission of a criminal offence ... for the benefit of that legal person by a natural person acting under its authority" (Explanatory Memorandum, paragraph 36).

If such instruments establish obligations for states, rather than enacting obligations for businesses directly, they may still be viewed as supplying the corporate responsibility to respect expressed by the UN Framework and UNGPs with an implicit normative basis. Additional examples include the following:

- ▶ Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), Article 2(e) obliges states "To take all appropriate

measures to eliminate discrimination against women by any person, organisation or enterprise". Under Article 13(b), States Parties are required to "take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits; (b) The right to bank loans, mortgages and other forms of financial credit..."

- ▶ International Convention on the Elimination of Racial Discrimination (ICERD), Article 2(d) obliges states to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination "by any persons, group or organisation".
- ▶ CRC, Article 32(1) requires that states parties "recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development".
- ▶ Convention on the Rights of Persons with Disabilities (CRPD), under Article 27(1), requires that states parties "shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation" *inter alia* to "Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures" (Article 27(1)(h)) and "Ensure that reasonable accommodation is provided to persons with disabilities in the workplace" (Article 27(1)(i)).

ILO Conventions likewise establish duties on states to protect individuals against harmful corporate behaviour in the workplace. For example:

- ▶ The Forced Labour Convention prohibits the granting of concessions to "private individuals, companies or associations" that involve "any form of forced or compulsory labour for the production or the collection of products which such private individuals, companies or associations utilise or in which they trade"<sup>104</sup>
- ▶ The Worst Forms of Child Labour Convention obliges states to "design and implement programmes of action to eliminate...the worst forms

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104. Convention concerning Forced or Compulsory Labour (ILO Convention No. 29, 1930), Article 5.

of child labour” and to do so “in consultation with relevant government institutions and employers’ and workers’ organisations...”<sup>105</sup>

International as well as Council of Europe anti-corruption instruments, in addition, require states to adopt legislation criminalising certain types of corporate conduct, such as bribery of foreign governments or their officials.<sup>106</sup>

Example:

- ▶ Proceedings were initiated in Italy against the country’s state-controlled oil company Eni in relation to alleged corrupt practices in Algeria. In 2018, the Milan prosecutor sought the imposition of custodial sentences for Eni’s Chief Upstream Officer and former Chief Executive Officer, as well as fines of EUR 900 000 against Eni and a subsidiary company, in the event they are found guilty of paying bribes of approximately EUR 200 million via intermediaries to the Algerian state-owned company Sonatrach, in order to secure contracts with approximately EUR11billion. Under relevant legislation, companies are responsible for the actions of their managers (Financial Times 2012, Oilprice.com 2016, Reuters 2018).

Finally, some environmental treaties provide for the establishment of domestic civil liabilities to address specific forms of corporate misconduct, such as oil pollution.<sup>107</sup>

## 2.1.6 International humanitarian and criminal law

As mentioned in chapter 1 (Section 1.2.4), prohibitions arising under international humanitarian law that become relevant in situations of armed conflict can apply to non-state actors, including business (ICRC 2006).

Example:

- ▶ Twenty-three company directors of a German chemicals conglomerate that manufactured and supplied Zyklon B gas to Nazi extermination camps were prosecuted for crimes including war crimes and crimes against humanity in the *IG Farben* trial.<sup>108</sup>

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105. Worst Forms of Child Labour Convention (ILO Convention No. 182, 1999), Article 6.

106. E.g. UN Convention against Corruption (2003), UNTS Vol. 2349, p. 41, [Doc. A/58/422](#); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); Council of Europe, Criminal Law Convention on Corruption, ETS No. 173 (1999), Civil Law Convention on Corruption, ETS No. 174 (1999) and Additional Protocol to the Criminal Law Convention on Corruption, ETS No. 191 (2003).

107. For example, International Convention on Civil Liability for Oil Pollution Damage (1969) and Protocols thereto; Brussels Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (1971), UNTS Vol.974, p.255.

108. *Law Reports of Trials of War Criminals*, Vol. X (London: HMSO, 1949).

The Rome Statute of the International Criminal Court (ICC) provides for jurisdiction over natural, not legal, persons, albeit the establishment of international criminal liability for companies was proposed during negotiations.<sup>109</sup> Consequently, it is not a forum in which corporations may currently be prosecuted. There are some indications, moreover, that greater attention may be paid to pursuing businesses involved in international crimes in future (ICC Office of the Prosecutor 2016: paragraph 41). Meanwhile many states have enacted legislation permitting the domestic prosecution of international crimes, in line with the complementarity principle.<sup>110</sup> In jurisdictions that do not distinguish natural and legal persons, business enterprises may already be subject to prosecution for war crimes, genocide or crimes against humanity, based on perpetrator or accomplice liability.

Example:

- ▶ In 2017, a judicial inquiry was launched against BNP Paribas to investigate its alleged “complicity in genocide and complicity in crimes against humanity” after NGOs accused the French bank of financing the purchase of arms to benefit the Hutu militia during the 1994 genocide in Rwanda (AFP and Le Monde 2017).

## 2.2. UN Framework, UNGPs and Council of Europe Recommendation CM/Rec(2016)3

Measures such as those just described have historically provided a degree of protection against human rights abuses by or linked to corporations. Encouraged by growing awareness and understanding of the scope, on one hand, of businesses impacts on human rights, and on the other, of weaknesses in existing regulations, however, most states are gradually accepting that there is a need further to develop legal and policy frameworks to strengthen safeguards against corporate human rights abuses.

The UN Framework and UNGPs, endorsed unanimously by the UNHRC in 2011, provide important guidance in this context.<sup>111</sup> Although these new

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109. Rome Statute Art. 25§1. See further Clapham (2000) and Kremnitzer (2010).

110. UNGA, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 17.

111. *Report of the Special Representative of the Secretary-General, Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5, 7 April 2008, <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>; *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Annex, UN Doc. A/HRC/17/31, 21 March 2011, <http://business-humanrights.org/en/un-guiding-principles/text-of-the-un-guiding-principles>.



standards do not create new legal obligations for states or corporations, they describe in greater detail the implications for companies of states' legal duties arising under human rights treaties as discussed above in chapter 1. The UN Framework and UNGPs have been given further effect in Council of Europe member states via the Committee of Ministers' 2014 Declaration and 2016 Recommendation on Human Rights and Business.

The rest of this section outlines the general approach taken by the UNGPs and the Council of Europe Recommendation to the corporate responsibility to respect human rights. Subsequent sections in this chapter consider the guidance ventured by the UNGPs and Council of Europe Recommendation, along with other relevant standards, on how companies should operationalise this responsibility in practice.

### 2.2.1. Corporate respect for human rights under the UN framework

Echoing the UDHR, the UN Framework recognises the role of business enterprises as "organs of society", albeit they are specialised to perform "economic functions". Self-evidently, businesses are not public bodies, and cannot be fixed with a set of human rights obligations identical to those of governments, given their different constitutional and legal status, resources and competences (UNHRC 2008: 16).

The UN Framework also acknowledges that the diversity of businesses, including in terms of size, industry sector, corporate structure and operating location, poses a challenge for articulating or indeed legislating a single standard of responsibility for human rights for all companies. Taking this into account, the UNGPs counsel a procedural approach to implementation of the corporate responsibility to respect human rights. This takes the form of "human rights due diligence", a process encompassing "the steps a company must take to become aware of, prevent and address adverse human rights impacts" (UNHRC 2008: 17) that can be adapted to all types of business irrespective of their specific characteristics (see further Section 2.4 below).

### 2.2.2. Corporate respect for human rights under the UNGPs

Within these broad contours, the UNGPs relating to the corporate responsibility to respect human rights fall into two categories:

- ▶ "Foundational Principles" addressing the definition, scope and extent of the corporate responsibility to respect human rights (UNGPs 11-15); and
- ▶ "Operational Principles" that articulate in greater depth the policies and procedures that businesses need to adopt to ensure that they respect human rights in practice, in particular by implementing a process of "human rights due diligence" (UNGPs 16-24).

As foreseen by the earlier UN Framework, the baseline responsibility of all companies is “to comply with all applicable laws and to respect human rights” (UNGPs: 1). Respecting human rights entails that businesses “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved” (UNHRC 2011: 4; UNGP 11).

A clear expectation is expressed that businesses will take proactive and practical steps to prevent, mitigate or remediate any negative impacts on human rights. Claims by companies that they respect human rights cannot be sustained by reference to corporate values or “paper policies” alone: in addition to a policy commitment, they must be able to demonstrate a human rights due diligence process, together with a remediation procedure (UNGP 15).

### 2.2.3. Council of Europe Declaration and Recommendation on Human Rights and Business

Reiterating observations expressed in the Committee of Ministers’ Declaration on the UNGPs (paragraphs 3 and 9), the Council of Europe Recommendation on Human Rights and Business recognises “that business enterprises have a responsibility to respect human rights”. It adds that “effective implementation [of the UNGPs], by both States and business enterprises, is essential to ensure respect for human rights in the business context” (Preamble, paragraphs 5 and 8; see also Explanatory Memorandum, paragraph 34).

Part III of the Appendix to the Recommendation calls on Council of Europe member states to “enable” corporate respect for human rights. In particular, Council of Europe member states are requested to “apply such measures as may be necessary to encourage or, where appropriate, require” that:

- ▶ business enterprises domiciled within their jurisdiction apply human rights due diligence throughout their operations;
- ▶ business enterprises conducting substantial activities within their jurisdiction carry out human rights due diligence in respect of such activities (Appendix, paragraph 20).

A company’s human rights due diligence process, it is noted, should include “project-specific human rights impact assessments, as appropriate to the size of the business enterprise and the nature and context of the operation” (Appendix, paragraph 20; see also Explanatory Memorandum paragraph 35). Council of Europe member states are additionally called on to promote corporate reporting on human rights impacts and due diligence measures (Appendix, paragraph 21).

## 2.2.4. Other soft law instruments

Acknowledgement of the corporate responsibility to respect human rights as expressed in the UNGPs has subsequently been incorporated into several other international instruments of a non-binding or “soft law” nature. These include:

- ▶ The ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO 2017: paragraph 10);
- ▶ The OECD Guidelines for Multinational Enterprises (OECD 2011: Ch. IV);
- ▶ The International Organisation for Standardization’s Guidance on Social Responsibility (ISO 26000:2010) and Sustainable Procurement Guidance (ISO 20400:2017);
- ▶ The UN Global Compact’s Ten Principles (UNGC 2000).

## 2.2.5. Distinguishing corporate responsibility to respect human rights from Corporate Social Responsibility

As noted in the Introduction to this handbook, businesses may, and many businesses do, contribute to conditions in which human rights can be fulfilled, for instance, via job creation, infrastructure development, activities that facilitate the free exchange of information in society, and scientific research and development. Businesses may also promote social well-being or environmental sustainability through “corporate social responsibility” (CSR) or philanthropic activities.

The latter are frequently valuable for the specific individuals, groups or local communities which they benefit. Nonetheless, according to the UNGPs, any positive contributions a business makes to realising human rights through CSR initiatives or philanthropy cannot be off-set against adverse human rights impacts in other areas, nor should they be seen as a substitute for undertaking human rights due diligence (UNGP 11).

For example, if a mining company supports community development projects, such as building or funding a health clinic or school, this does not reduce the company’s responsibility for any negative impacts on human rights associated with local environmental damage resulting from its operations. Likewise, positive contributions to the local economy through job creation would not mitigate the company’s responsibility for discriminatory hiring processes or for failing to provide site workers with safe working conditions, sanitary accommodation or a living wage.

Equally, community development projects and other CSR activities undertaken by companies should in themselves be human rights-based in their

planning and implementation to avoid negative human rights impacts. It should also be ensured that development activities, especially in conflict-affected, remote or weak governance regions, reinforce the institutional and operational capacities of local actors, including government agencies, rather than substitute for them, so that the company's withdrawal does not destabilise local delivery of essential services, such as healthcare, necessary for the fulfilment of human rights.

## 2.3. Key issues and concepts

### 2.3.1. Scope

In principle, it would appear that business activities may interfere with almost any specific human right. Consequently the UNGPs hold that the corporate "responsibility to respect" applies, "at a minimum" to all "internationally recognised" rights. According to UNGP 12, these comprise rights enumerated by the UDHR, ICCPR, ICESCR, and the Core Labour Standards encompassed by the ILO's Declaration on Fundamental Principles and Rights at Work (i.e. freedom of association and the right to collective bargaining, the elimination of compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation),

In line with their individual circumstances, however, businesses should refer to additional standards (UNGP 12, Commentary). These include standards addressing the human rights of groups and populations at risk of vulnerability or marginalisation, for instance:

- ▶ indigenous peoples (UN Declaration on the Rights of Indigenous People (UNDRIP));
- ▶ women (CEDAW);
- ▶ national or ethnic, religious and linguistic minorities;
- ▶ children (CRC);
- ▶ persons with disabilities (CRPD);
- ▶ Migrant workers and their families (International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW)).

Companies with operations in or linked to conflict zones, and their personnel, may be bound by rules of international humanitarian law prohibiting involvement, for instance, in forced displacements, forced labour, unlawful exploitation or destruction of natural resources (UNGP 12, Commentary; see further ICRC 2006, UNGC 2010). The Council of Europe Recommendation

CM/Rec(2016)3 highlights, as additional guidance for companies to consult in this scenario (Appendix, paragraph 27), the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones (OECD 2006) and OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016).

Companies operating, purchasing or relying on security services should additionally refer to the Voluntary Principles on Security and Human Rights and International Code of Conduct for Private Security Providers (Voluntary Principles 2018, ICOCA 2018).

### *2.3.1.1. Council of Europe human rights standards*

Mirroring the UNGPs, the Council of Europe Recommendation CM/Rec(2016)3 indicates that the “full spectrum of international human rights standards” are relevant to states’ UNGPs implementation efforts (Appendix, paragraph 3). Equally, the Recommendation and Explanatory Memorandum align with the UNGPs’ approach in directing states and businesses to additional international standards applicable to workers, children, indigenous peoples and human rights defenders (Council of Europe Recommendation: Parts V-VIII; Explanatory Memorandum: Parts V-VIII).

Of course, the ECHR and ESC themselves protect many rights that are included in the International Bill of Rights and ILO Core Conventions or which are referred to by other specialised instruments enacted by the UN to protect the rights of specific groups.

Nevertheless, in context of the Council of Europe and its member states, special attention should be paid to the specific formulation of human rights contained in the ECHR, ESC and other Council of Europe human rights instruments, as well as their judicial interpretation, in determining the scope of the corporate responsibility to respect human rights and its implications for company conduct. As recalled by the Council of Europe Declaration, before the UNGPs were formulated, the Council of Europe had concluded numerous “standards and activities in which the relationship between human rights and the role and responsibility of business enterprises ha[d] already been articulated” (paragraph 6). The precise definition and implications of rights in the context of European regional standards sometimes differs from those resulting from their expression in international or other regional human rights instruments.

Examples:

- ▶ Under Article 8§1 ESC, states must ensure that employed women are adequately compensated for loss of earnings during maternity leave, the duration of which shall be not less than 14 weeks under ESC(r)

and 12 weeks under ESC. The CESR has additionally held that ESC Article 8§1 entails certain conditions regarding the modality and level of compensation during maternity leave, for instance holding that where compensation proceeds via continued payment of wages or earnings-related benefits, these shall be: equal to the previous salary or close to its value; not be less than 70% of the previous wage; and in case shall not fall below the poverty threshold defined as 50% of median equivalised income, calculated on the basis of the Eurostat at-risk-of-poverty threshold value (ECSR 2015: 6).

- ▶ Like the ESC(r), the ILO Maternity Protection Convention No. 183 (2000) guarantees 14 weeks of maternity benefit, but as regards level of compensation expresses the entitlement arising in terms of “a cash benefit which ensures that they can maintain themselves and their child in proper conditions of health and with a suitable standard of living and which shall be no less than two-thirds of her previous earnings or a comparable amount” (Article 6).

### 2.3.1.2. *Human rights of corporations*

Finally, it can be remarked that corporations, as juridical persons, are entitled to seek redress for violations of their rights under the ECHR (see generally Emberland 2006). This should not be understood as diminishing corporations’ responsibility to respect the human rights of real individuals in any way. Indeed, to the contrary, it may also be read as entailing that the corporate responsibility to respect human rights extends, within the jurisdiction of Council of Europe member states, and insofar as relevant, also to respecting the human rights of other corporate actors.

### 2.3.2. **Causing, contributing to and being “directly linked” to human rights impacts**

An adverse human rights impact may be said to occur when an action removes or reduces the ability of an individual to enjoy his or her human rights. The UNGPs illuminate that businesses can be involved in adverse human rights impacts in three different ways (UNGP 13):

- (a) They can *cause* adverse human rights impacts through their own activities (for example, a company adopts discriminatory practices);
- (b) They can *contribute* to adverse human rights impacts through their own activities — where impacts result from the actions of another entity, such as a public body or another business (for example, a business authorises a private security company to use physical force against protesters or to interfere with their right to privacy);

(c) They may neither cause nor contribute to adverse impacts but still be indirectly involved in such impacts because they are *directly linked* to the business' operations, products or services through relationships with business partners or other entities in the value chain (for example, a product manufactured or sold by a business is used by a third party in unintended but foreseeable ways to abuse human rights).

Each of these types of involvement lies within the scope of the corporate responsibility to respect human rights as envisaged by the UNGPs. However, the specific content of the responsibility to respect human rights, or in other words, the demands its places on corporations, varies between them:

- ▶ Where a business causes or contributes to an adverse impact, it should either cease or change the activities in question to prevent any impact or recurrence. If the abuse cannot be prevented, the enterprise should engage actively in its remediation either directly or in cooperation with others;
- ▶ Where the business contributes to the impact, the enterprise should also use its leverage to mitigate the impact;
- ▶ Where the business is directly linked to the impact, it should use any leverage to encourage the entity directly responsible for the abuse to prevent or mitigate its recurrence, including by working with the entity or with others who can assist or exert influence to this end (UNGPs 13, 19).

### 2.3.3. The concept of “leverage”

Leverage, as defined by the UNGPs, refers to the ability of a business “...to effect change in the wrongful practices of the party that is causing or contributing to the impact (UNGP 19, Commentary). Where risks or impacts derive from a company's business relationships, rather than from its own activities, the UNGPs require it to consider what leverage it has over the entity in question.

In a situation where one of a company's business partners or another entity to which it is linked is causing adverse impacts on human rights, the company should refer to factors including the following in assessing how to respond:

- ▶ Its degree of direct control over the entity;
- ▶ The terms of any contract between it and the entity;
- ▶ The proportion of the total business it represents for the entity;
- ▶ Whether it can incentivise the entity to improve its human rights performance, for instance, through measures relating to future business, or capacity building assistance;

- ▶ The benefits to the entity's reputation of remediating adverse impacts and, conversely, the harm to the entity's reputation of terminating the relationship;
- ▶ Whether it can cooperate with public bodies or civil society organisations to improve human rights performance by the entity, for instance, by supporting better implementation of existing regulations, or alternatively through enhanced monitoring or sanctions (OHCHR 2012: 21; see further SHIFT 2013).

Where a business has leverage over an entity to which it is linked, it is expected to exercise it. If, on the other hand, the company lacks leverage, it is expected to seek ways to increase it, for example, collaborating with others to influence its behaviour (UNGP19, Commentary).

If a company is unable to increase its leverage, it should consider ending the business relationship. This is particularly salient where the human rights abuses in question are severe. If ending the business relationship is deemed not to be possible because it is crucial, or because terminating the relationship would itself have serious human rights consequences, a business should demonstrate a continuing effort to mitigate adverse impacts and be prepared to accept the consequences of maintaining the relationship (UNGP 19, Commentary; OHCHR 2012: 18).

It should be noted that, prior to the advent of the UNGPs, it was sometimes considered that the scope of a corporation's responsibility to respect human rights was determined by its "sphere of influence". Thus the responsibility of the company decreased in line with its influence, even for impacts that it directly caused (UNGA 2008: 4-5).

Today, however, leverage is no longer considered as determinative of the scope of corporate responsibility for human rights. Even in a situation where a company lacks any leverage over abuses by a business partner, its responsibility to respect human rights is sustained. As a result, it should either try to increase its leverage or, if this fails, it should end the business relationship.

Example:

- ▶ Various drugs that have been developed for other medical purposes may also be used to administer capital punishment. Following pressure from civil society groups and investors, pharmaceutical companies who manufacture such medicines have recently taken steps to avoid such their use in this manner.

In 2011, via a letter published in the medical journal *The Lancet*, doctors urged the Danish company Lundbeck to ensure that its drug



pentobarbital would no longer be supplied to buyers in the United States for use in performing executions. Subsequently, Lundbeck worked with the NGO Reprieve to “simplify its distribution model” allowing it to achieve greater transparency over the identity of end-users and screen out orders from states applying the death penalty. Within months, Lundbeck sold its rights to the drug to a U.S.-based company but on condition that the new distribution restrictions would continue to be applied.

In 2015, the Dutch employees’ pension fund ABP divested EUR25 million from the pharmaceutical company Mylan when a nine-month dialogue with the company addressing similar issues failed to achieve a satisfactory result.

In 2017, U.S. company McKesson launched civil proceedings against the US state of Arkansas and obtained a stay of execution for eight prisoners, on grounds it had been misled by the authorities about their intended use of its drug Midazolam.

(TIME 2013, Reuters 2015, The Guardian 2017).

#### 2.3.4. Conflicting national and international standards

Because the corporate responsibility to respect human rights is a norm based on human rights principles and social and political expectations, rather than a specific legal standard, it pertains across all jurisdictions. Accordingly, companies should heed the international instruments mentioned (see Section 2.3.1 above) wherever they operate (UNGP 23). Businesses should not, then, seek to exploit gaps in domestic protections of human rights, or weaknesses in their local enforcement. Indeed, when businesses operate in countries where national laws are not aligned with international human rights standards, they must use their best efforts to respect internationally recognised human rights. This might involve, for example, providing targeted trainings for staff or engaging in dialogue with public authorities or other stakeholders such as labour unions, civil society organisations or the country’s NHRI, where one exists. Undertaking human right due diligence is the most reliable way to identify such situations and to adequate measures to prevent or mitigate associated risks (OHCHR 2012: 77). Such measures might include:

- ▶ Contractual clauses that detail and require business partners’ compliance with a standard of conduct consistent with specific international human rights standards;
- ▶ Engaging the support of third party organisations, such as local trade associations;

- ▶ Using parallel means of worker representation that are consistent with international standards in contexts where freedom of association is restricted by national laws;
- ▶ Transparency and reporting: companies can voluntarily disclose information related to human rights issues (UNGC 2010).

At minimum, companies facing such dilemmas should be able to demonstrate their best efforts in this regard (UNGP 23, Commentary).

Example:

- ▶ The UN Global Compact *Human Rights and Business Dilemmas Forum* is an online platform that presents good practice responses by companies to 26 different dilemmas, including various scenarios where national laws affecting companies conflict with internationally recognised human rights (UNGC 2018). The Forum incorporates numerous case studies of measures adopted by companies in real situations, to address with issues arising in areas such as privacy, gender equality and freedom of association (UNGC 2018).

### 2.3.5. Complicity

Overlapping with the corporate responsibility to respect human rights, though distinct from it, is the concept of complicity. In criminal law, complicity is defined as aiding and abetting crimes committed by third parties. A finding of complicity requires evidence of substantial contribution to a crime, for instance, by knowingly providing practical assistance or encouragement (UNGP 17, Commentary).

Some types of human rights abuses also constitute crimes under international or domestic laws. For instance, in conflict zones, forced displacements, forced labour, unlawful exploitation or destruction of natural resources are crimes under international humanitarian law (ICRC 2006).

Even if companies do not in general have direct human rights obligations, in jurisdictions where corporations can be charged with crimes as juridical persons, companies involved in human rights abuses which also constitute crimes may be liable to prosecution and conviction. Enterprises may also be pursued via civil actions for damages based on their alleged contribution to harms suffered by victims. Businesses should therefore treat the risk of causing or contributing to gross human rights abuses as a matter of legal compliance (UNGP 23, Commentary).

Example:

- ▶ In France a judicial investigation was opened in 2017 into alleged complicity by the information and communications company Nexa Technologies (formerly Amesys) with torture and enforced disappearances in Egypt. The investigation followed a complaint by NGOs based on a contract between the company and the Egyptian state for the sale of “dual-use” surveillance equipment (Télérama, 2017, International Federation for Human Rights (FIDH) 2017).

Besides, even in situations where they cannot be pursued through legal means, companies may be publicly criticised for complicity (UNGP 17, Commentary). A business that has knowingly benefited from human rights violations committed by a state can thus be said to be guilty of “beneficial complicity”. “Silent complicity” refers to corporate culpability where a business has failed to exercise influence in circumstances where it could have acted or drawn attention to systematic or continuous human rights abuses (Clapham and Jerbi 2000).

In this context, human rights due diligence should be a useful tool in supporting companies to avoid being the target of such legal or moral claims: by reporting publicly on its due diligence process, a company may show that it took all reasonable steps to avoid involvement with human rights abuses (UNGP 17, Commentary).

### 2.3.6. Operational context and the corporate responsibility to respect

The UNGPs provide that the corporate responsibility to respect human rights applies equally to all businesses wherever they are based or operate (UNGP 14). However, the type and scale of the impacts of any particular business are highly context-dependent and variable. They may be influenced, for example, by its size – the potential impact of a large multinational enterprise (MNE) employing hundreds of thousands of workers at operational sites in many countries worldwide will contrast markedly with that of a local family-owned business where the owners are the only employees. Impacts are also influenced, for example, by the company’s industry sector; by the social, political, cultural, economic and environmental context of its activities; and the strength of regulation and respect for the rule of law in countries where it operates or from which purchases.

Consequently the means through which enterprises meet their responsibility will vary (UNGP14). Such means should be proportional to the company’s size, sector, operational context, ownership and structure (UNGP 14,

Commentary). They should also vary with the severity of potential adverse human rights impacts (OHCHR 2012: 19). How to assess the severity of business impacts on human rights is considered further in Section 2.4.2 below.

Examples:

- ▶ The European Commission has published guidance addressing the specific risks faced by companies operating in the oil and gas sector, in the information technology sector, and for employment and recruitment agencies (EC n.d.).
- ▶ Guidance on human rights especially tailored to the needs of small and medium-sized enterprises (SMEs) has been developed by the European Commission, as well as the UK's Equality and Human Rights Commission (EC n.d.; EHRC 2013).
- ▶ The Business and Human Rights Resource Centre provides links to a range of sector-specific human rights guidance, including tools addressing companies in clothing and textiles, mining, pharmaceutical, finance and banking and tourism sectors (BHRRC 2018).

## **2.4. Human rights due diligence**

Human rights due diligence is the process through which business enterprises should identify, prevent, mitigate and account for their potential and actual human rights impacts (UNGP 15 and 17). Within the framework of the UNGPs, it is the core requirement of business in meeting its responsibility to respect human rights.

A business' first step in undertaking due diligence should be to adopt and publish a policy commitment to respect human rights (see Section 2.4.1 below). Thereafter, the process comprises four steps (UNHRC 2011, UNGP 17-20):

### **1. Human rights risk and impact assessment**

This step involves assessing potential and actual adverse human rights impacts with which a business enterprise may be involved either as a result of its own activities or through business relationships (UNGPs 17 and 18; see further Section 2.4.2 below).

### **2. Integrating human rights impact assessment findings and taking appropriate action**

Secondly companies should act on the findings of a human rights impact assessment by devising measures to prevent or mitigate adverse human rights impacts identified in step one. Such measures should respond to the company's manner of involvement in any abuses uncovered, as well as the

extent of its leverage, as discussed above in Section 2.3.3 (UNGP 17 and 19). Such measures may affect any area of the business, including human resources, health, safety and environment, security, legal and compliance, marketing and procurement. Changes to company policies will usually require to be supported by strengthening its own capacity on human rights, for instance, via training or recruitment of staff, as well as that of its main suppliers and other important business partners. Job descriptions and key performance indicators may require revision to ensure clear accountability for human rights at an appropriate level of seniority within the organisation. Such changes, in turn, will usually require the allocation of new financial and other resources. In light of the “third pillar” of the UN Framework, access to remedy (see further Part III of this handbook), companies should also take steps to remediate adverse impacts of their activities on rights-holders (UNHRC 2011, GP22). Hence, budgetary and other provision should be made to support monitoring and management of human rights impacts on a continuous basis.

### 3. Monitoring effectiveness of company responses

The next stage is monitoring or “tracking” the effectiveness of measures a company has taken under step two. Verification activity should be based on information from appropriate sources, both inside and outside the company, and should draw on qualitative and quantitative indicators that allow consistent measurement over time (UNGP 20). Rights-holders or their representatives, as well as other stakeholders should be involved in evaluating impact mitigation efforts, for example, through establishment of joint community-company monitoring initiatives. Outcomes revealed by monitoring should then be reflected, for example, in further changes to company policies, operational management approaches, and performance reviews with relevant staff and suppliers.

Example:

- ▶ The *Bangladesh Accord on Fire and Building Safety* was established following the Rana Plaza building collapse in which more than 3000 people were killed or injured. It is an initiative that involves global clothing retailers, clothing manufacturers, trade unions and NGOs. The Accord arranges factory inspections against building and other standards by qualified and independent safety engineers. Inspection reports are shared with factory owners, signatory companies and union representatives. Factory owners and buyers subsequently develop a Corrective Action Plan detailing remedial steps for deficiencies identified during inspections. The Accord aims to induce clothing brands to negotiate commercial terms with supplier factories that allow them

to operate safe workplace in practice, and to fix safety issues when required without undue commercial penalties. The Accord also aims to promote supply chain transparency, for instance, by publishing inspection reports on its website (Accord on Fire and Building Safety in Bangladesh n.d., Outhwaite and Martin-Ortega 2017).

#### 4. Communicating and reporting

Finally, businesses should provide an account of the means by which they address their human rights impacts as well as ultimate outcomes. This aspect of the corporate responsibility to respect human rights extends to communicating with directly affected rights-holders as well as formal public corporate reporting. Besides, company communications on human rights should meet the following criteria (UNGP 21):

- a) Information should be published in a format and with a frequency that corresponds to the scope and severity of the company's human rights impacts. It should also be accessible to intended audiences, for instance, in terms of language, culture and, where relevant, technical complexity;
- b) The information provided should be sufficient to allow rights-holders, regulators and other stakeholders to evaluate, in a meaningful way, the adequacy of the company's response to any specific impact on human rights; and
- c) The business should ensure that information it publishes does not pose risks, for instance, to local communities, human rights defenders, journalists or other rights-holders, or its own personnel, whereas legitimate commercial confidentiality requirements should also be respected.

The UNGPs acknowledge that reporting on human rights may take a variety of forms. This may include, for instance, in-person meetings, online dialogues, consultation meetings or correspondence with affected rights-holders, besides information contained in annual company reports. Nevertheless, formal corporate human rights reporting is required or recommended in a growing number of European jurisdictions (see further Section 2.4.5 below).

Human rights due diligence should be an on-going, rather than a "one-off" process (UNGP 17). Fresh assessments should be undertaken, for instance, before a company embarks on a new business activity, enters into significant commercial relationships or takes other major business decisions (UNGP 18, Commentary).

Equally, all four steps of the human rights due diligence process should refer to the full scope of the corporate responsibility to respect human rights (UNGP 12; see also Section 2.2.1 above). On the other hand, this should not entail a lack of practicability. Accordingly, companies should prioritise due diligence activities to focus on the most significant human rights risks (UNGP 17, Commentary; OHCHR 2012: 42). They should also adjust their scale and intensity to reflect characteristics such as size, industry sector, and the severity of potential human rights impacts associated with their own activities or those of business partners (UNGP14).

In further support of this aspect of the UNGPs, the Council of Europe Recommendation CM/Rec(2016)3 advises that Council of Europe member states “should consider performing a sector-risk analysis in order to identify the sectors in which activities are most at risk of having a negative impact on human rights” (Appendix, paragraph 27), an exercise already initiated by governments in some Council of Europe countries.

Example:

- ▶ The Dutch government undertook a Sector Risk Analysis “to identify the sectors that present the greatest risk of adverse social impacts and where priority should be given to strengthening company policy...” On this basis, the government engaged in dialogue with stakeholders, including business and civil society, from the sectors identified, leading to the adoption of a number of sector-specific voluntary human rights agreements, for example, for the banking and textiles sectors (Dutch Ministry of Foreign Affairs (MFA)) 2014: 24-25; Government of the Netherlands 2016a and 2016b).

### 2.4.1. Policy commitment

As mentioned in Section 2.2.2, Pillar II of the UN Framework requires that companies should have an explicit policy embodying a commitment to respect human rights. This will provide the necessary normative foundation for measures inside the company to operationalise respect for human rights, while also providing a visible commitment to which external stakeholders can hold it accountable. According to UNGP 16, a company’s human rights policy should:

- ▶ Be approved at a high-level of the business enterprise;
- ▶ Be informed by relevant expertise;
- ▶ Stipulate the enterprise’s expectations of personnel, business partners and other parties directly linked to its operations, products or services;
- ▶ Be public and internally as well as externally communicated;

- ▶ Be reflected in operational policies and procedures to embed it throughout the business enterprise.

In addition, a company human rights policy should set out the commitment of its management to respect all internationally recognised human rights as well as the expectation that all parts and employees of the business, as well as those with whom the business works, will do the same. It should also highlight the most salient human rights, i.e. those upon which the enterprise is most likely to have an impact (UNGC 2011, OHCHR 2012: 27-28).

Example:

- ▶ The (BHRRC) maintains a list of over 350 companies that have adopted formal policy commitments to respect human rights (BHRRC 2018b).

### 2.4.2. Human rights impact assessment

An adverse human rights impact occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights. As discussed in Section 2.3.2 above, according to the UNGPs, a company can be responsible for adverse impacts that result from its own activities (direct impacts) but also from those of suppliers or business partners (indirect impacts). Whether an impact is direct or indirect, three factors should be taken into account in evaluating its severity:

- ▶ The scale of the impact, meaning its gravity;
- ▶ The scope of the impact, meaning the number of affected persons;
- ▶ Whether the impact is irremediable, in other words, whether those aggrieved can be restored to their situation as it was before the impact occurred (OHCHR 2012: 19).

The practice of human rights impact assessment is a relatively recent development. As such, and given the diverse character of businesses and their operating settings, the UNGPs do not specify any single human rights impact assessment process or assessment exercise that companies must use. Informed by its particular context, a business may consequently select from a range of human rights impact assessment methods:

- ▶ integrating consideration of human rights impacts into environmental (EIA) or social impact assessment (SIA);
- ▶ undertaking or commissioning a stand-alone human rights impact assessment;
- ▶ evaluating human rights impacts in the course of thematic assessments, for instance, on security or labour rights.



Whichever model is adopted, the principles of a human-rights based approach to development should set the parameters with respect to the methodology and scope of the human rights impact assessment exercise as well as follow-up actions (OHCHR 2006, DIHR 2016). In this vein, the UNGPs indicate that companies should, in the course of performing a human right impact assessment:

- ▶ draw on internal or independent human rights expertise;
- ▶ undertake meaningful consultation with potentially affected rights-holders and other relevant stakeholders;
- ▶ consider human rights impacts on individuals from groups that may be at heightened risk of vulnerability or marginalization, and gender issues (UNGP18).

**Criteria for Human rights impact assessment  
(adapted from Danish Institute for Human Rights 2016)**

Participation	Meaningful participation of affected or potentially affected rights-holders during all stages of the process, including scoping, assessment of impacts, design and monitoring of mitigation measures.
Non-discrimination	Engagement and consultation processes are inclusive, gender-sensitive and take into account the needs of individuals and groups at risk of vulnerability or marginalisation.
Empowerment	Capacity development of individuals and groups at risk of vulnerability or marginalisation is undertaken to ensure their meaningful participation.
Transparency	The impact assessment process should be as transparent as possible to affected or potentially affected rights-holders, without causing any risk to security and well-being of rights-holders or other participants, such as NGOs. Impact assessment findings are publicly communicated.
Accountability	The impact assessment team is supported by human rights expertise. Roles and responsibilities for impact assessment, mitigation and monitoring are assigned and adequately resourced. The impact assessment identifies the entitlements of rights-holders and the duties and responsibilities of relevant duty-bearers, for example the company, contractors and suppliers and local government authorities.

Benchmark	Assessment of impacts and severity and mitigation measures are evaluated against relevant international, regional and national human rights standards.
Scope of impacts	The assessment includes actual and potential impacts caused or contributed to by the company.
Assessing impact severity	Impacts are addressed according to the severity of their human rights consequences. This includes considering their scope, scale and irremediability; taking into account the views of rights-holders and/or their legitimate representatives.
Impact mitigation measures	All human rights impacts are addressed. Where it is necessary to prioritise actions to address impacts, severity is the core criterion. Addressing impacts follows the mitigation hierarchy of “avoid-reduce-restore-remediate”.
Access to remedy	Impacted rights-holders have avenues to raise concerns or complaints regarding the impact assessment process and outcomes. The project provides for or cooperates in access to remedy for impacted rights-holders.

Various tools to support companies in performing human rights due diligence and human rights impact assessment in particular have been developed in the wake of the UNGPs. Businesses should refer insofar as relevant to such resources, some of which offer guidance tailored to specific industry sectors (see further Section 2.3.6 above). A number of other human rights impact assessment tools are included in the References section of this handbook.

### 2.4.3. Corporate human rights reporting: legislation and supporting frameworks

As mentioned in the previous section, the UNGPs envisage that business communication on human rights impacts and due diligence processes can take a variety of forms. However, UNGP 21 provides that “Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them”. As to the reasons for this requirement, the Commentary to UNGP 21 explains:

Formal reporting is itself evolving from traditional annual reports and corporate responsibility/sustainability reports to include on-line updates and integrated financial and non-financial reports. Formal reporting by enterprises is

expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts. The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights. Independent verification of human rights reporting can strengthen its content and credibility. Sector-specific indicators can provide helpful additional detail.

By turns, the Council of Europe Recommendation CM/Rec(2016)3 requests that Council of Europe member states “apply such measures as may be necessary to encourage or, where appropriate, require” business enterprises to be more transparent and regularly provide information about human rights impacts and due diligence efforts (Appendix, paragraph 21). Some European states have indeed enacted legislation or adopted other measures along these lines. For example:

- ▶ France: Publicly-listed companies are required to report according to a set of qualitative and quantitative indicators on issues such as employee contracts, working hours, pay, industrial relations, health and safety, disability policies, community relations and environmental reporting while integration of a “human rights dimension” in non-financial reporting has been required via transposition of the EU Non-Financial Reporting Directive 2014/95/EU (see further below, this section).<sup>112</sup>
- ▶ Denmark: A duty to report specifically on respect for human rights and climate change for the largest 1,100 companies and Danish State-owned enterprises was established in 2012, building on an existing duty for the same class of companies to report on social responsibility policies; how these are translated into action; and what has been achieved through them during the financial year. In fulfilling the reporting requirement, companies may refer to separately-published corporate sustainability reports, information on a company website or a UN Global Compact *Communication on Progress*. Reports are subject to a statutory consistency check by auditors.<sup>113</sup>
- ▶ Germany: From 2018, the German Federal Government’s annual report on its holdings will identify all internationally active enterprises with more than 500 employees in which has a majority shareholding that apply the German Sustainability Code or a comparable framework with compulsory reporting on human rights, and those that do not (German Federal Foreign Office 2017).

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112. Grenelle I Act 2009, Grenelle II Act 2010, Commercial Code and Decree n° 2012-557 of 24 April 2012.

113. Kingdom of Denmark, Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct, Act No. 546, 18 June 2012, <http://businessconduct.dk/file/298159/act-on-mediation.pdf>.

- ▶ Finland: The Prime Minister's Office has set a CSR reporting requirement for unlisted companies that are either majority of wholly state-owned which includes human rights. Such companies must submit reports in accordance with relevant best practices and, at minimum, adopt standards corresponding to those of their central competitors (Finland Ministry of Employment and the Economy 2014).
- ▶ UK: A 2013 revision of the Companies Act 2006 requires directors of quoted companies to report on human rights as part of their duty to provide a strategic non-financial report on an annual basis where it is necessary for an understanding of the business. This information should mention any human rights policy and its effectiveness (UK Foreign & Commonwealth Office 2016).<sup>114</sup>
- ▶ The Modern Slavery Act 2015 requires commercial organisations that carry on a business or part of a business in the UK over an annual turnover of a minimum threshold to prepare a slavery and human trafficking statement for each financial year and to report on the steps, or absence of steps, taken to ensure that slavery or human trafficking offences do not take place in their business or their supply chains. The Act further suggests that the slavery and human trafficking statement include:
  - a brief description of the organisation's business model and supply chain relationships;
  - its policies relating to modern slavery, including due diligence processes and the training available and provided to those in supply chain management and the rest of the organisation;
  - the parts of the business and supply chain most at risk and how the organisation evaluates and manages those risks; and
  - relevant key performance indicators which would allow a reader to assess the effectiveness of the activities described in the Statement.

Another related development, the EU Non-Financial Reporting Directive is expected to affect about 6,000 companies in the European region. This obliges all EU member states to implement measures relating to certain large companies with more than 500 employees. Such entities should be required to disclose information on policies, risks and outcomes relating to

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114. The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, available at: [http://www.legislation.gov.uk/ukxi/2013/1970/pdfs/ukxi\\_20131970\\_en.pdf](http://www.legislation.gov.uk/ukxi/2013/1970/pdfs/ukxi_20131970_en.pdf).

environmental, anti-corruption social and employee-related matters, and human rights, in annual reporting.<sup>115</sup>

Example:

- ▶ Poland: Since 2017, some 300 enterprises, mainly in the financial, insurance and securities sectors have been required to disclose non-financial data under Polish legislation transposing the EU Non-Financial Reporting Directive. Relevant provisions aim “to increase the transparency of information with respect to CSR presented in the activity report (in the form of a statement) or in a separate report on environmental, social, and occupational issues, respect for human rights, and anti-corruption measures”.<sup>116</sup>

Various tools and guidance have been developed to support companies and their advisors in meeting the above and similar reporting requirements as regards human rights. For example:

- ▶ The *UNGPs Reporting Framework* provides guidance for companies to report on how they respect human rights in line with the UNGPs, as well as guidance for internal auditors and external providers of assurance for company non-financial reports. It aims to help companies in identifying and managing “salient” human rights issues (SHIFT and Mazars 2018).
- ▶ The *Corporate Human Rights Benchmark* assesses 98 of the largest publicly traded companies in the world on 100 human rights indicators relating to company policies, processes, practices and responses to serious allegations regarding human rights (Corporate Human Rights Benchmark Ltd. 2018).
- ▶ The Global Reporting Initiative (GRI) is undertaking a review to align and update GRI Standards that relate to the topic of human rights with the UNGPs and other relevant human rights frameworks (GRI 2018).

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115. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, amending the [Accounting Directive 2013/34/EU](#) (Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance).

116. Act of 15 December 2016 amending the Accounting Act (Journal of Laws 2017, Item 61, 11 January 2017, entering into force 26 January 2017).

## 2.4.4. Remediation

Even if a company undertakes to respect human rights and follows through on this commitment by implementing an adequate due diligence process, it may not escape involvement in human rights abuses entirely. Not all business-related human rights abuses can be foreseen in advance, or avoided entirely even if they are foreseen.

This gives great importance to the final dimension of the corporate responsibility to respect, the duty of remediation. In the context of Pillar II, remediation may be understood as restoring a person whose human rights have been diminished to their situation as it was before the impact occurred (OHCHR 2012: 19; Section 2.3.2 above). Where this is not possible, an alternative form of remedy is called for. The range of measures envisaged by human rights law as providing reparation for human rights violations is discussed further in Part III of this handbook (Section 3.1).

UNGP 22 calls for businesses to provide or cooperate in the remediation of any adverse human rights impacts to which they have caused or contributed. The most severe or irremediable adverse impacts on human rights should be prioritised (UNGP 24; see further Section 2.4.2 above).

Facilitating remediation may entail cooperating with judicial or non-judicial state-based remedy mechanisms. In addition, companies may establish or participate in an operational-level grievance mechanism whereby affected communities can raise complaints regarding company operations and activities directly. These are considered further in Part III. In any event, companies should ensure that any remediation measures supported or implemented are sustainable and devised with due respect for the human rights of those involved.

Example:

- ▶ NGOs alleged that the Swiss company LafargeHolcim and its supplier in Uganda relied on hazardous child labour in the mining of a rock used in the manufacture of cement. Following the NGOs' intervention, the companies ceased sourcing the rock from artisanal miners and substituted a supply based on mechanised production where child labour was absent. However, the NGOs later claimed, the companies failed to take measures to safeguard the human rights of the children who had previously been working as miners in the cement supply chain. In particular, it was suggested, the companies, should provide for measures to enable these children to return to school or alternatively receive vocational training allowing them to generate

an alternative income. In the absence of such measures, the companies were alleged to have failed in their responsibility to remediate abuses under the UNGPs (Twerwaneho Listeners' Club and Bread for All 2017; BHRRC n.d.).

#### 2.4.5. National measures to promote or require due diligence

As noted earlier, human rights due diligence is the core requirement of business in meeting its responsibility to respect human rights under the UNGPs. Equally, it will be recalled that under the Council of Europe Recommendation CM/Rec(2016)3, Council of Europe member states “should apply such measures as may be necessary to encourage or, where appropriate, require that:

- ▶ business enterprises domiciled within their jurisdiction apply human rights due diligence throughout their operations; and
- ▶ business enterprises conducting substantial activities within their jurisdiction carry out human rights due diligence in respect of such activities,

including project-specific human rights impact assessments, as appropriate to the size of the business enterprise and the nature and context of the operation” (Appendix, paragraph 20; see further Explanatory Memorandum paragraphs 34-36).<sup>117</sup> While the Recommendation does not specify the character of measures to be taken by member states in promoting human rights due diligence, it does indicate that legal due diligence requirements may be appropriate for high-risk sectors (Explanatory Memorandum, paragraph 36) as well as in the various scenarios identified under the “state-business nexus” (see Section 1.2.3 above).

In line with this, a number of Council of Europe member states have already enacted or are discussing measures to establish human rights due diligence as a legal requirement.

Examples:

- ▶ France: Legislation establishes a duty of due diligence (*devoir de vigilance*) for large French companies to develop, disclose and implement a “vigilance plan” (*plan de vigilance*) which should include “reasonable

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117. As regards the definition of the term “domiciled” the Explanatory Memorandum clarifies that this should be understood as being the “statutory seat”, “central administration” or “principle place of business” of the business in line with the EU Brussels I (No. 1215/2012) and Rome II (No. 864/2007) Regulations, while “jurisdiction” has the same meaning as in Article 1 ECHR, as applied and interpreted by the European Court of Human Rights (Explanatory Memorandum, paragraph 8).

vigilance measures adequately to identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment” (Cossart, Chaplier and Beau de Lomenie 2017; *Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*; see further Section 3.5.1).

- ▶ Netherlands: The “Child Labour Due Diligence Law” (“Wet Zorgplicht Kinderarbeid”) of 2017 requires companies that are either registered in the Netherlands or registered elsewhere if they deliver products or services to the Dutch market twice or more a year to determine whether child labour exists in their supply chains and, if it does, to establish a plan of action to address it (MVO Platform 2017).





## Chapter 3

# Access to remedy

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### 3.1. The right to an effective remedy in international law and international human rights law

#### 3.1.1. General

The right to an effective remedy for a violation of human rights derives from the broader norm of redress of wrongs in international law, which has been recognised as a general principle of law and a customary rule of law accepted and applied in all legal systems (Bassiouni 2006: 206-207). International human rights law recognises both:

- ▶ A substantive right to a remedy for a violation, where a remedy may comprise, for example: adequate reparations, such as restitution, rehabilitation, compensation, satisfaction, public apologies, changes in relevant laws and practices, guarantees of non-repetition or the bringing of perpetrators to justice; and
- ▶ Procedural rights that support access to remedy, for example: the right to an effective investigation; the right to information; and the right to legal and other assistance necessary to claim a remedy.

As recognised by Article 8 UDHR,

Everyone has the right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law.

This provision has been reinforced and expanded by several subsequent treaties including the ICCPR, under Article 2(3) of which:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

The HR Committee has stated that the right to an effective remedy under Article 2(3) ICCPR entails for states parties the obligation to bring to justice perpetrators of human rights abuses, and to provide appropriate reparation to victims. Where such a duty exists, investigations should be carried out promptly, thoroughly and effectively through independent and impartial bodies and failure by a state party to investigate allegations can give rise to a separate breach of the state's human rights obligations. The mechanism for obtaining a remedy can take a variety of forms, as provided in Article 2(3)(b) ICCPR.<sup>118</sup>

The right to an effective remedy is further recognised *inter alia* by Article 6 ICERD, Article 14 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 39 CRC. The ICESCR and the ICEDAW do not explicitly provide for a right of remedy. It may be argued, however, that a right to remedy is implicit in these instruments since human rights treaties presume national implementation and require this for the effectiveness of the rights they articulate, or alternatively based on a norm of customary international law to provide a remedy for human rights violations. Moreover, optional Protocols to both ICESCR and ICEDAW which are now in force permit rights-holders to bring complaints before these instruments' respective treaty bodies. In some cases, UN treaty bodies have recommended that states parties should provide access to redress for victims of abuses perpetrated by legal persons including corporations (see further Section 3.7.2.2 *Regional or international human rights bodies*).

While domestic legal remedies should always be available, these may vary in their details as between national legal systems.<sup>119</sup> Moreover, the nature of the right in question may affect the types of remedies that should be available: likewise, remedies should be "appropriately adapted" to take account of the characteristics of victims, in particular vulnerable categories of person, such as children.<sup>120</sup>

The right to remedy is also provided for by international humanitarian and criminal law standards. For example, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International*

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118. HR Committee, "General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (2004), CCPR/C/21/Rev.1/Add. 1326.

119. For example, in its "General Comment 4: The right to adequate housing" (1991) the CESCR describes a range of possible remedies in relation to the right to housing under Article 11 ICESCR (paragraph 17.)

120. HR Committee General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (2004), CCPR/C/21/Rev.1/Add. 1326 (paragraph 15).

*Human Rights Law and Serious Violations of International Humanitarian Law* affirm a victim's rights to:

- ▶ Equal and effective access to justice;
- ▶ Adequate, effective and prompt reparation for harm suffered;
- ▶ Access to relevant information concerning violations and reparation mechanisms.<sup>121</sup>

In addition, under this instrument, it is further elaborated that "reparation" includes:

- ▶ Restitution, which can take the form, for instance, of restoration of the enjoyment of human rights, or return to one's place of residence;
- ▶ Compensation for any economically assessable damage;
- ▶ Rehabilitation, including medical, psychological, legal and social services;
- ▶ Satisfaction, for instance, cessation of violations, judicial and administrative sanctions against perpetrators;
- ▶ Guarantees of non-repetition, for example, investigation, prosecution and sanctioning of perpetrators, human rights education.

In summary, according to international human rights instruments, states are required to provide remedies for human rights violations that should be capable of leading to a prompt, thorough and impartial investigation; the cessation of violations; and adequate reparation, including restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. In addition, where abusive activity is on-going, states should ensure interim measures to prevent any irreparable harm, and victims have a right to a truthful account of the facts and circumstances surrounding human rights violations. Unless it causes further harm to the victim, public access and transparency to this information should be guaranteed.

### 3.1.2. The right to remedy in international human rights law and business-related human rights violations or abuses

In general, states will not be held legally responsible for the acts or omissions of non-state actors, including corporations or other business entities. Exceptionally, a state may be responsible under international law for acts of

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121. UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 21 March 2006, A/RES/60/14.

individuals, for example, to the extent that the state has urged the individuals to commit to the acts in question, has given its consent to them or, in violation of its international obligations, has neglected to prevent the acts, to punish the perpetrators, or to impose an obligation to redress the injury caused (ILC 2001, Chapter II).

Applications to international human rights supervisory mechanisms are required to be based on alleged violations by a contracting state. Correspondingly, victims will lack a right to a remedy against the state in international law for harms suffered as a result of the conduct of non-state actors, absent sufficient indication of control or approval of the conduct in question by the state or its agents.

Conversely, a state may be obliged to provide a remedy, and a victim may have a right to access a remedy, in relation to harms resulting from the conduct of business entities where:

- ▶ State personnel acting under legal authority are directly responsible for the violation of a human right or other obligation that is protected under international law through custom or treaty, which may be the case where e.g. the business entity is a state-owned or controlled enterprise (see above Section 1.2.3.1 *State-owned or controlled enterprises and state support to businesses*);
- ▶ Harm amounting to human rights abuses is suffered by victims as a result of failures by the state to fulfil positive obligations, arising in the specific circumstances of the case, to protect the human rights of the victims against non-state actors through preventive measures (see above Section 1.1.1 *State obligations to protect against human rights abuses by non-state actors*);
- ▶ The state was not directly implicated in the harm suffered by victims, but failed to meet its procedural obligation to take steps to respond appropriately (e.g. through a failure to investigate and prosecute a crime to the required standard of due diligence), leading to a breach of the right to remedy (see above Section 1.1.1 *State obligations to protect against human rights abuses by non-state actors*);
- ▶ A customary rule or treaty requires the state to provide a remedy for a specific wrong. If such a rule does apply, then failure of the state to provide the remedy in question may be an independent breach of that instrument.

## 3.2. The right to an effective remedy under the European Convention on Human Rights

The ECHR establishes the right to an effective remedy under Article 13, which provides that:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 13 is an essential component of the ECHR's human rights protection system, along with the requirements of Article 1 regarding the obligation of states parties to respect human rights, and Article 46 on the execution of judgments of the European Court. Also closely connected is the right, under Article 6 of the ECHR, to a fair and public hearing, which is an important element in securing a remedy for violations at national level.

As mentioned in Section 1.1 above, Article 34 ECHR provides that individual applications may be received by the European Court from "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties". Applications lodged with the European Court against individuals or companies are therefore inadmissible as incompatible with the ECHR *ratione personae*, and the ECHR does not in general have direct effect between private parties. Consequently, applications to the European Court under Article 13, like other ECHR rights, should identify alleged breaches of the right to remedy, as well as of a substantive ECHR right (see further Section 3.2.1 *Ancillary character* below) by the state or states in question, rather than by a business entity. Support for this position is also found in the fact that the closing words of Article 13 ("notwithstanding that the violation has been committed by persons acting in an official capacity") has remained "without significance" in European Court jurisprudence and should not be viewed as sustaining any third-party effect as regard businesses or other third parties (Explanatory Memorandum, paragraph 53).

### 3.2.1. Ancillary character

Article 13 aims to ensure recourse to redress for individuals who wish to complain about an alleged violation of their human rights at the domestic level. Article 13 therefore gives effect to subsidiarity, a foundational principle of the ECHR system. Domestic authorities of high contracting parties to the ECHR have the primary duty to guarantee ECHR rights and freedoms, while the European Court serves as a secondary "safety net". Article 13 therefore has a "close affinity" with Article 35(1) of the ECHR, which provides that:

The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

Thus a respondent state must first have an opportunity to redress the situation complained of by its own means and within the framework of its own domestic legal system, before the right to seek redress via the supervisory mechanism provided for by the European Court is activated. The European Court can only deal with a complaint after a complainant has exhausted all domestic remedies, although Article 35(1) requires exhaustion only in relation those remedies that relate to the breach alleged and are available and sufficient.

Moreover, the text of Article 13 makes clear that its intention is to ensure a remedy only for a violation of an ECHR right. As a result, Article 13 can only be invoked in conjunction with one or more substantive rights protected by the ECHR and its Protocols, and its applicability assumes that the victim has an arguable complaint lying within the scope of such substantive rights. This requirement has implications for applications based on alleged violations occurring outside either the formal jurisdiction or effective authority and control of a state party to the ECHR, for instance, where transnational corporations based in a member state of the Council of Europe are alleged to be responsible for breaches abroad (see above *Section 1.4 Extraterritoriality*).

### 3.2.2. Scope and inherent limitations

The ECHR requires that a “remedy” should be such as to allow the competent domestic authorities both to deal with the substance of the relevant ECHR complaint and to grant appropriate relief.<sup>122</sup> On the other hand, the absence of a limitation clause within Article 13 does not mean that the right to remedy is absolute.<sup>123</sup> Under Article 13, a state is required only to provide “a remedy that is effective as can be having regard to the restricted scope for recourse inherent in [the particular context]”.<sup>124</sup> This may be understood on the basis that the state’s obligations under Article 13 are of a “positive” nature, and as such their scope will depend on the nature of the substantive rights that an applicant argues have been breached, with a more expansive content, for example, where violations of fundamental, non-derogable rights, such as under Articles 2 and 3, are alleged.

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122. *M.S.S. v. Belgium and Greece*, 21 January 2011, §288; *Halford v. the United Kingdom*, 25 June 1997, §64.

123. *Leander v. Sweden*, 26 March 1987, §79.

124. *Klass and Others v. Germany*, 6 September 1978, §§31 and 69; also *Kudla v. Poland*, 4 May 1988, §51.

Furthermore, Article 13 does not require a domestic remedy in respect of every supposed grievance, no matter how unmeritorious; the claim must be an arguable one. The European Court has adopted various approaches in assessing the arguability of claims under Article 13. Following the case of *Powell and Rayner v. the United Kingdom*, the test for arguability in relation to Article 13 has aligned with that of admissibility: if a complaint is found to be manifestly ill-founded under Article 35(3) (former Article 27(2)), it will generally be held inadmissible under Article 13, so that Article 13 will fail to apply. In addition, for applications relating to Article 13, all other requirements of admissibility of the application must be met, such as timeliness and the victim requirement.<sup>125</sup>

### 3.2.3. Meaning of remedy under Article 13 of the European Convention on Human Rights

#### 3.2.3.1. *What form should an effective remedy take?*

As interpreted by the European Court, Article 13 does not require a particular form of remedy: states have a margin of discretion in how to comply with their obligation. However, the nature of the right or rights at stake has implications for the type of remedy the state is required to provide.<sup>126</sup>

#### 3.2.3.2. *What makes a remedy “effective”?*

Effectiveness requires either the prevention of an alleged violation or the provision of adequate redress for the victim, including compensation.<sup>127</sup> While a remedy is only effective if it is available and sufficient, it must also be certain, not only in law but also in practice,<sup>128</sup> and having regard to the individual circumstances of the case.<sup>129</sup>

In assessing effectiveness, consideration must be given not only to any formal remedies available, but also to the legal and political context in which they operate, as well as the personal circumstances of the applicant<sup>130</sup>; the exercise of domestic remedies must not be unjustifiably hindered by acts or omissions of the authorities of the respondent state.<sup>131</sup>

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125. *Powell and Rayner v. the United Kingdom*, 21 February 1990, §33.

126. *Budayeva and Others v. Russia*, 20 March 2008, §§190-191.

127. *Kudla v. Poland*, 26 October 2000, §158.

128. *McFarlane v. Ireland*, 10 September 2010, §114; *Riccardi Pizzati v. Italy*, 29 March 2006, §38.

129. *El-Masri v. The former Yugoslav Republic of Macedonia*, 13 December 2012, §255; *Kudla v. Poland*, 26 October 2000, §152.

130. *Dorđević v. Croatia*, 24 October 2012, §101; *Van Oosterwijck v. Belgium*, 6 November 1980, §§36-40.

131. See, for example, *Aksoy v. Turkey*, 18 December 1996, §95.



A remedy's effectiveness, however, does not depend on the certainty of a favourable outcome for the applicant.<sup>132</sup> Finally, in line with the basis of Article 13 in the state's "positive obligations", the European Court has identified specific procedural and investigative requirements on the state in relation to Article 13 when raised in connection with alleged violations of Articles 2 and 3 ECHR.

### 3.2.3.3. *Who is a "national authority"?*

The "national authority" referred to in Article 13 does not necessarily have to be a judicial authority, but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.<sup>133</sup> In addition, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so.<sup>134</sup>

### 3.2.4. Article 13 of the European Convention on Human Rights and business-related abuses by non-state actors

Applicants may rely on Article 13 in connection with abuses by non-state actors occurring within the jurisdiction of a member state of the Council of Europe in certain circumstances. This possibility derives from the European Court's doctrine of positive obligations (see above Section 1.1.1 *State obligations to protect against human rights abuses by non-state actors*) which requires *inter alia* that states establish effective criminal and civil remedy mechanisms for human rights abuses by non-state actors. This doctrine has been applied by the European Court in relation to breaches of human rights caused by corporations.<sup>135</sup>

- ▶ In connection with environmental damage caused by a steel plant, the European Court held that a state's responsibility may arise from a failure to regulate private industry, or from failing to fulfil the positive duty "to take reasonable and appropriate measures" to secure rights.<sup>136</sup> Thus Article 13 could potentially give rise to a complaint concerning the lack of avenues effectively to review a governmental law or policy, or of enforcement thereof, leading to a breach of human rights by business actors.

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132. *Kudla v. Poland*, 26 October 2000, §157.

133. *Klass and Others v. Germany*, 6 September 1978, §67; *Case of Silver and Others v. the United Kingdom*, 25 March 1983, §113.

134. *De Souza Ribeiro v. France*, 13 December 2012, §79; *Kudla v. Poland*, 26 October 2000, §157.

135. See, for example, *Lopez Ostra v. Spain*, 9 December 1994; *Taşkın and Others v. Turkey*, 10 November 2004; *Guerra and Others v. Italy*, 19 February 1998.

136. *Fadeyeva v. Russia*, 9 June 2005, §§89 and 92; see also *Powell and Rayner v. the United Kingdom*, 21 February 1990.

There may be challenges, however, for claims under Article 13 that are based on the lack of a legal remedy, enforceable between private parties at national level, for human rights abuses perpetrated by business actors. Firstly, it has been observed that *Drittwirkung* or third-party effect of the ECHR rights between citizens is restricted by the principle of subsidiarity to cases of serious violations, typically arising under Articles 2 or 3 (Van Dijk *et al* 2006: 1014). In practice this could exclude many cases of alleged abuses by businesses that fall, for instance, in the areas of environmental damage, workplace rights, privacy, consumer rights, or discrimination.

Secondly, precise and generally accepted models or standards with regard to regimes of civil or criminal liability that should be adopted at national level to secure the redress of corporate human rights abuses are lacking. This scenario could make it difficult for the European Court to assess the “effectiveness” of criminal and civil remedy mechanisms in any given state, especially in light of the subsidiary nature of Article 13 and other factors, such as the margin of appreciation.

With regard to human rights abuses occurring outside the territory of a contracting state, the challenges appear to be still greater. The scope of the state’s responsibility under the ECHR extends to securing the rights of persons within its territorial jurisdiction, and the European Court has identified few exceptions to this rule, where the state exercises effective control or authority beyond its territorial jurisdiction. Moreover such exceptions have not, to date, been applied in relation to any alleged abuses by business actors (see above Section 1.4 *Extraterritoriality*).

As a consequence, victims of human rights abuses that are perpetrated outside the territorial jurisdiction of a member state of the Council of Europe are not generally entitled to a remedy before a national authority under Article 13 of the ECHR, due to the lack of an alleged violation of a substantive ECHR right. On the other hand, victims of abuses outside Council of Europe member states will be entitled to an effective remedy before a national authority in the state where the abuses in question allegedly took place, in line with that state’s own human rights obligations. Besides, there are other grounds on which Council of Europe member states’ courts may decide to assume jurisdiction over business-related claims arising elsewhere, for instance, with reference to *forum necessitatis*, as considered in Section 3.5.1.2 below.

Finally it can be recalled that, corporations, as juridical persons, are entitled to seek redress for any violation by a state of their rights under the ECHR, a discrepancy on which the Parliamentary Assembly of the Council of Europe has remarked as giving cause for concern (Parliamentary Assembly of the Council of Europe (PACE)) 2010, Article 4; see generally Emberland 2006).

### 3.2.5. Connection to Article 6 of the European Convention on Human Rights, the right to a fair trial

Article 6(1) ECHR provides that:

In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

As noted by the Appendix to the 2016 Council of Europe Recommendation CM/Rec(2016)3, similar guarantees of access to court appear in other human rights instruments, including the UDHR (Article 10), ICCPR (Article 14) and CFEU (Article 47) (Explanatory Memorandum, paragraph 51).

In general, the European Court holds that Article 6 is to be regarded as *lex specialis* in relation to Article 13, so that a claim under Article 13 may be “absorbed” into a successful claim under Article 6. In other words, the European Court may not proceed to consider an Article 13 claim if the applicant’s Article 6 claim succeeds, where both are raised. On the other hand, if a claim under Article 6 fails, the European Court may or may not proceed to investigate a claim under Article 13.

On this basis, Article 6, the right to a fair hearing, can be relevant to the issue of remedy for business-related human rights abuses in a number of ways. For instance, in some jurisdictions, victims of business-related human rights abuses have sought a remedy for these via civil actions brought against corporations (see below Section 3.5.1 *Civil Law*). Where this is not possible under domestic private law, the question can be asked, does this “gap” pose a breach of the right to a fair trial under Article 6? Where victims face procedural or other “obstacles” to access to justice for business-related human rights abuses, it may additionally be asked whether these could provide the basis of a successful claim under Article 6, alone, or under Article 6 in combination with Article 13. It is therefore relevant to recapitulate key principles relating to the scope and content of Article 6 ECHR.

#### 3.2.5.1. What is the meaning of “civil rights and obligations” under Article 6?

Under Article 6, the notion of “civil rights and obligations” is an “autonomous” concept that cannot be interpreted solely by reference to the respondent state’s domestic law. Where Article 6(1) applies, it also does so irrespective of the parties’ status; the character of the legislation that governs the “dispute”; and the authority with jurisdiction in the matter.<sup>137</sup> If, on the one hand,

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137. *Georgiadis v. Greece*, 29 May 1997, §34.

and as the Council of Europe Recommendation CM/Rec(2016)3 highlights, Article 6 does not extend to bringing criminal proceedings against third persons, including corporations (Appendix, paragraph 52), and the various protections Article 6 provides for as regards criminal proceedings apply only in relation to charges brought against a person,<sup>138</sup> on the other hand, it may afford protection where the outcome of criminal proceedings is decisive of a third party's related civil claim.<sup>139</sup>

### 3.2.5.2. *What pre-conditions are there for the application of Article 6?*

The applicability of Article 6(1) in civil matters firstly depends on the existence of a substantive "dispute"<sup>140</sup> of a genuine and serious nature.<sup>141</sup> Secondly, the dispute must relate to "rights and obligations" which can arguably be said to be recognised under domestic law.<sup>142</sup> However, whether a person has an actionable domestic claim may depend not only on substantive provisions of national law but also on procedural bars preventing or limiting the possibilities of bringing potential claims to court. In this situation, Article 6(1) of the ECHR may apply.<sup>143</sup>

Still, Article 6 cannot apply to substantive limitations on a right existing under domestic law. In other words, the European Court may not create, through the operation of Article 6(1), a substantive civil right that has no legal basis in the state concerned.<sup>144</sup> Cases where Article 6 has been held by the European Court to apply include:

- ▶ *Gorraiz Lizarraga and Others v. Spain*, regarding the building of a dam which would have flooded the applicants' village;<sup>145</sup>
- ▶ *Taşkın and Others v. Turkey*, concerning the operating permit for a gold mine using cyanidation leaching near the applicants' villages;<sup>146</sup>
- ▶ *L'Erablière A.S.B.L. v. Belgium*, regarding an application submitted by a local environmental protection association for judicial review of the

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138. *Rékási v. Hungary* (no. 31506/96), Commission decision of 25 November 1996, 171.

139. *Tomasi v. France*, 27 August 1992, §121.

140. *Le Compte, Van Leuven and De Meyere v. Belgium*, 23 June 1981, §45.

141. *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §81.

142. *Szücs v. Austria*, 24 November 1987, §33.

143. *Al-Adsani v. the United Kingdom*, 21 November 2001, §47; *McElhinney v. Ireland*, 21 November 2001, §25.

144. *Roche v. the United Kingdom*, 19 October 2005, §§119, 117.

145. *Gorraiz Lizarraga and Others v. Spain*, 10 November 2004, §46.

146. *Taşkın and Others v. Turkey*, 30 March 2005, §133; *Zander v. Sweden*, 25 November 1993, §§24-25.

grant of planning permission. The European Court found there was a sufficient link between the dispute and the right claimed;<sup>147</sup>

- ▶ *Al-Adsani v. the United Kingdom*, concerning the application of sovereign immunity as a bar to a civil claim brought in the UK by a victim of alleged torture that took place in Kuwait.<sup>148</sup>

However, in the following cases Article 6 was held inapplicable on the basis that proceedings were not sufficiently decisive for the right in question:

- ▶ *Balmer-Schafroth and Others v. Switzerland* and *Athanassoglou and Others v. Switzerland*: Here the European Court found that proceedings challenging the legality of extending a nuclear power station's operating licence were outside the scope of Article 6(1) because the connection between the extension decision and the right to protection of life, physical integrity and property was "too tenuous and remote", the applicants having failed to show that they personally were exposed to a danger that was not only specific but above all imminent;<sup>149</sup>
- ▶ *Sdruzeni Jihoceske Matky v. the Czech Republic*, concerning construction of a nuclear power plant;<sup>150</sup>
- ▶ *Ivan Atanasov v. Bulgaria*, where the environmental impact of a mining waste treatment plant was hypothetical.<sup>151</sup>

### 3.2.5.3. *What guarantees does Article 6 provide with regard to access to a court?*

Article 6, and the rule of law, require that litigants should have a practical and effective judicial remedy enabling them to assert their civil rights.<sup>152</sup> However, the right of access to a court may be subject to legitimate restrictions, such as those imposed via statutory limitation periods,<sup>153</sup> security for costs orders,<sup>154</sup> or a legal representation requirement.<sup>155</sup> On the other hand, any limitations applied must not restrict or reduce court access to such an extent that the very essence of the right is impaired. Furthermore, limitations must

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147. *L'Erablière A.S.B.L. v. Belgium*, 24 February 2009, §§28-30.

148. *Al-Adsani v. the United Kingdom*, 21 November 2001

149. *Balmer-Schafroth and Others v. Switzerland*, 26 August 1997, §40; *Athanassoglou and Others v. Switzerland*, 6 April 2000, §§46-55.

150. *Sdruzeni Jihoceske Matky v. the Czech Republic* [Admissibility Decision], 10 July 2006.

151. *Ivan Atanasov v. Bulgaria*, 2 December 2010, §§90-95.

152. *Bellet v. France*, 4 December 1995, §38; *Beles and Others v. the Czech Republic*, 12 November 2002, §49.

153. *Stubbings and Others v. the United Kingdom*, 22 October 1996, §§51-52.

154. *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, §§62-67.

155. *R.P. and Others v. the United Kingdom*, 9 October 2012, §§63-67.

pursue a “legitimate aim” and have a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.<sup>156</sup> Thus the European Court has held that the following factors can, depending on the circumstances, impair the practical and effective nature of the right to access to a court under Article 6:

- ▶ Costs of proceedings that are prohibitive (e.g. due to excessive court fees<sup>157</sup>) taking into account an individual’s financial capacity;<sup>158</sup>
- ▶ Issues relating to the duration of proceedings (e.g. the time taken to hear an appeal<sup>159</sup>) and time limits;
- ▶ Procedural bars preventing or limiting the possibilities of applying to a court (e.g. strict interpretation by domestic courts of a procedural rule depriving applicants of access to a court<sup>160</sup>);
- ▶ State immunity from jurisdiction. In cases where the application of this principle restricts the exercise of the right of access to a court, the restriction must pursue, and be proportionate to, a legitimate aim.<sup>161</sup>

#### 3.2.5.4. *Does Article 6 entail a right to legal aid?*

Article 6(1) does not imply that the state must provide free legal aid for every dispute relating to a “civil right”.<sup>162</sup> There is a clear distinction between Article 6(3)(c), which guarantees the right to free legal aid in criminal proceedings, subject to certain conditions, and Article 6(1), which makes no reference to legal aid.<sup>163</sup>

Still, since Article 6(1) is intended to protect a right of court access that is practical and effective, it may sometimes require the state to provide for the assistance of a lawyer when this is indispensable for effective access to court,

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156. *Ashingdane v. the United Kingdom*, 28 May 1985, §57; *Fayed v. the United Kingdom*, 21 September 1990, §65; *Markovic and Others v. Italy*, 14 December 2006, §99.

157. *Kreuz v. Poland (No. 1)*, 19 June 2001, §§60-67; *Podbielski and PPU PolPure v. Poland*, 26 July 2005, §§65-66; *Weissman and Others v. Romania*, 4 May 2006, §42; conversely, *Reuther v. Germany* [Admissibility Decision], 5 June 2003.

158. *Aït-Mouhoub v. France* 28 October 1998, §§57-58; *Garcia Manibardo v. Spain*, 15 February 2000, §§38-45.

159. *Melnyk v. Ukraine* [Admissibility Decision], 2 October 2007, §26.

160. *Perez de Rada Cavanilles v. Spain* 28 October 1998, §49; *Miragall Escolano v. Spain*, 25 April 2000, §38; *Société anonyme Sotiris and Nikos Koutras ATTEE v. Greece*, 16 November 2000, §20; *Beles and Others v. the Czech Republic*, 12 November 2002, §50; *RTBF v. Belgium*, 15 September 2011, §§71, 72 and 74.

161. *Cudak v. Lithuania*, 23 March 2010, §59; *Sabeh El Leil v. France*, 29 June 2011, §§51-54.

162. *Airey v. Ireland*, 9 October 1979, §26.

163. *Essaadi v. France*, 4 September 2002, §30.

depending upon the specific circumstances of the case.<sup>164</sup> What has to be ascertained is whether, in the light of all the circumstances, the lack of legal aid would deprive the applicant of a fair hearing.<sup>165</sup> Relevant factors in this context may include:

- ▶ The importance of what is at stake for the applicant;<sup>166</sup>
- ▶ The complexity of the relevant law or procedure;<sup>167</sup>
- ▶ The applicant's capacity to represent him or herself effectively;<sup>168</sup>
- ▶ The existence of a statutory requirement to have legal representation.<sup>169</sup>

Yet it remains that the right of court access is not absolute. Accordingly, it may be permissible to impose conditions on the grant of legal aid, for instance with regard to:

- ▶ The financial situation of the litigant;<sup>170</sup>
- ▶ His or her prospects of success in the proceedings.<sup>171</sup>

Hence, a legal aid system may exist which selects the cases that qualify for it. However, any system established by the legislature must offer individuals substantial guarantees to protect them from arbitrariness.<sup>172</sup> It is therefore important to have due regard to the quality of a legal aid scheme within a state<sup>173</sup> and to verify whether the method chosen by the authorities for selection of cases is compatible with the ECHR, in the business and human rights context as in any other. These principles need to be borne in mind when reading the Council of Europe Recommendation's various comments concerning legal aid (see also Section 3.6.2.3 below). Moreover, it should be recalled that, consistent with general threshold rules applicable to claims under the ECHR, including those relating to jurisdiction, it should be expected that victims will be required to be within the jurisdiction of a Council of Europe member state before their entitlement to protection under Article 6 arises.

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164. *Airey v. Ireland*, 9 October 1979, §26; *McVicar v. the United Kingdom*, 7 August 2002, §48; *Steel and Morris v. the United Kingdom*, 15 February 2005, §61.

165. *McVicar v. the United Kingdom*, 7 August 2002, §51.

166. *Steel and Morris v. the United Kingdom*, 15 February 2005, §61.

167. *Airey v. Ireland*, 9 October 1979, §24.

168. *McVicar v. the United Kingdom*, 7 August 2002, §§48-62; *Steel and Morris v. the United Kingdom*, 15 February 2005, §61; *P, C and S v. United Kingdom*, 16 July 2002, §100.

169. *Airey v. Ireland*, 9 October 1979, §26; *Gnahoré v. France*, 17 January 2001, §41.

170. *Steel and Morris v. the United Kingdom*, 15 February 2005, §62.

171. *Steel and Morris v. the United Kingdom*, 15 February 2005, §62.

172. *Gnahoré v. France*, 17 January 2001, § 41; *Essaadi v. France*, 4 September 2002, §36; *Del Sol v. France*, 6 May 2002, §26.

173. *Essaadi v. France*, 4 September 2002, §35.

### 3.3. Access to remedy and the European Social Charter/ European Social Charter (revised)

The 1995 Additional Protocol to the ESC Providing for a System of Collective Complaints provides for a mechanism that allows social partners and certain NGOs to file collective complaints alleging the failure by a state to comply with its obligations under the ESC/ESC(r). The [European Committee of Social Rights](#) (ECSR), which also monitors compliance with the ESC/ESC(r) based on reports submitted by states, on which it adopts conclusions, decides on such collective complaints. Notably, there is no provision for the making of individual complaints, and the complaint must pertain to a general situation, rather than one affecting only an individual. The social partners include the [European Trade Union Confederation](#), the [International Organisation of Employers](#), international NGOs with participatory status in the Council of Europe, and social partners at national level (Additional Protocol, Article 1). Any state can give national NGOs the right to bring complaints before the ESCR.

The ECSR also makes statements of interpretation related to individual articles of the ESC/ESC(r). The ECSR's "case-law" is composed of all the sources in which it sets out its interpretation of the ESC's provisions and its case-law relating to businesses is quite extensive given the numerous provisions in the ESC concerning employment and labour rights. Neither the ESC/ESC(r) nor the Additional Protocol however provide for a right to a remedy as such for individuals for any non-compliance by a state with provisions of the ESC/ESC(r).

If a complaint is admissible, and the ECSR makes a decision on the merits, the ECSR's decision proceeds to the Committee of Ministers of the Council of Europe, which must adopt a resolution closing the procedure. The resolution may include a recommendation to a state found in default, calling on it to take certain action. Such resolutions are not legally binding (Harris 2009: 3-4).

Notably, most rights under the ESC/ESC(r) apply to persons who are not citizens of state parties "only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned" (*Appendix* to the ESC(r)). In addition, the ESC/ESC(r) only applies to the metropolitan territory of each state party. Currently, therefore, it has limited relevance with regard to human rights abuses perpetrated by European-domiciled companies beyond the territorial jurisdiction of states parties.



Example:

- ▶ In *Marangopoulos Foundation for Human Rights v. Greece*,<sup>174</sup> the complainant alleged a breach of Article 11 of the ESC, guaranteeing the right to health, claiming that Greece had taken insufficient steps to counter the adverse environmental effects and risks to public health resulting from lignite mining on its territory. Greece argued that lignite mining was justified in the general interest as enabling the country to maintain energy independence and providing electricity at reasonable cost for industry and the private consumer.

The ECSR found a breach of Article 11. It held that the ESC was a “living instrument” that now includes the right to a “healthy environment,” given the link made by state and international human rights treaty bodies between protection of health and a healthy environment. Consequently, it found that Article 11(1) ESC required States “to remove as far as possible the causes of ill health”, including a requirement to reduce air and other pollution. States, in the Committee’s view, should further strive to meet this requirement within a reasonable time, by showing measurable progress and making the best possible use of resources at their disposal. Greece had failed to demonstrate its commitment to meeting this obligation. For example, it had only recently introduced an inspectorate to monitor operator compliance with environmental regulations; inspectors were few in number; and fines for non-compliance were limited. In conclusion, Greece had failed to strike a reasonable balance between the right to health of persons in the lignite mining area and the general interest.

### **3.4. Remedy under the UN Framework, UNGPs and Council of Europe Recommendation: General overview**

This section outlines the main aspects of the right to access an effective remedy for business-related human rights abuses highlighted by the UN Framework and UNGPs, and as further articulated by the Council of Europe Recommendation on Human Rights and Business. The subsequent sections of chapter 3 consider the more specific guidance provided by the UNGPs and the Council of Europe Recommendation on the various dimensions of remedy addressed by UNGPs 25 to 31.

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174. Decision of the ECSR of 6 December 2006.

### 3.4.1. Remedy under the UN Framework

Access to remedy is one of the three core principles of the UN *Protect, Respect and Remedy* Framework. According to the Special Representative of the UN Secretary-General on human rights and transnational corporations and other business enterprises (SRS), remedy comprises the “Third Pillar” of the UN Framework because:

Even where institutions operate optimally, disputes over the human rights impact of companies are likely to occur. Currently, access to formal judicial systems is often most difficult where the need is greatest. And non-judicial mechanisms are seriously underdeveloped - from the company level up through national and international levels.<sup>175</sup>

Further:

Effective grievance mechanisms play an important role in the State duty to protect, in both its legal and policy dimensions, as well as in the corporate responsibility to respect. State regulation proscribing certain corporate conduct will have little impact without accompanying mechanisms to investigate, punish, and redress abuses. Equally, the corporate responsibility to respect requires a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available.<sup>176</sup>

### 3.4.2. Remedy under the UNGPs

The UNGPs further elaborate on the roles of states and companies in facilitating access to remedy. With reference to their obligations under the First Pillar, states should ensure access for victims of business-related human rights abuses to an effective remedy, while businesses are expected to remediate impacts they have caused or contributed to, in line with the corporate responsibility to respect human rights describe under the Second Pillar.

UNGP 1 affirms the duty of states “to take appropriate steps to prevent, investigate, punish and redress abuses, recognising that without such measures... the State duty to protect can be rendered weak or even meaningless.” With regard to the corporate responsibility to respect human rights under the

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175. John Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Protect, Respect, Remedy: A Framework for Business and Human Rights, UN Doc A/HRC/8/5 (7 April 2008) (µProtect, Respect, Remedy Report’), adopted by the Human Rights Council: Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, HRC Res 8/7, UN GAOR, 8th sess, 28th mtg, UN Doc A/HRC/RES/8/7 (18 June 2008), paragraph 26.

176. *Ibid.*, paragraph 82.

Second Pillar of the UN Framework, UNGP 13 states the necessity for businesses to remediate adverse human rights impacts, while UNGP 20 provides that, where a company is responsible for adverse impacts, it should provide for or cooperate in their remediation through legitimate processes. However, access to remedy is primarily addressed under UNGPs 25 to 31. Reaffirming the state duty arising under human rights instruments to take appropriate steps to ensure access to effective remedy, UNGP 25 provides that:

States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

Three categories of mechanism that may facilitate access to remedy for victims in connection with human rights abuses linked to business activities are identified:

- ▶ State-based judicial mechanisms;
- ▶ State-based non-judicial mechanisms;
- ▶ Non-state-based grievance mechanisms, including mechanisms provided by businesses, industry associations, multi-stakeholder groups and international bodies.

In line with the principles and standards contained in international human rights treaties regarding the right to remedy (see above Section 3.1 *The right to an effective remedy in international law and international human rights law* and Section 3.2 *The right to an effective remedy under the ECHR*), the UNGPs affirm that access to an effective remedy has both substantive and procedural aspects. It is also reiterated that “Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions, or guarantees of non-repetition” (UNGP 25, Commentary).

The notions of “grievance” and “grievance mechanism” are also introduced:

[A] grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.

The term grievance mechanism is used to refer to any routinised, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought (UNGP 25, Commentary).

The definition of “grievance” is thus substantially broader in its scope than the meanings of “human rights violation” or “human rights abuse”, respectively. In particular, its scope exceeds that of a “violation” in the context of Article 13 ECHR, as well as that of Article 6 ECHR (see above Section 3.2.5 *Connection to Article 6 ECHR, the right to a fair trial*). In addition, a grievance may arise before human rights abuse or a violation does. Thus, the Third Pillar of the UN Framework addresses issues going beyond those that engage the right to remedy under the ECHR. Not all business-related human rights “grievances” will provide grounds for claims based on the ECHR, whether domestically or before the European Court. This point should be borne in mind when considering the remaining UNGPs under the Third Pillar, which set out the duties of states and responsibilities of businesses to facilitate access to remedy, via the three categories of grievance mechanisms listed above.

### 3.4.3. Remedy in the Council of Europe Recommendation

In line with the original mandate provided by the Council of Ministers for its development, and in light of the Council of Europe’s expertise in the area of access to justice through specialised bodies such as the European Court and ECSR, remedy receives “particular emphasis” in the Council of Europe Recommendation (Explanatory Memorandum, paragraphs 11 and 12).

The Council of Europe Recommendation, as noted earlier with regard to Pillar I, generally calls on member states to “review their national legislation and practice to ensure that they comply with the recommendations, principles and further guidance set out in the appendix [to the Recommendation], and evaluate the effectiveness of the measures taken at regular intervals” (paragraph 1). The preamble to the Recommendation specifically recalls Council of Europe member states’ obligations,

to secure to everyone within their jurisdiction the rights and freedoms defined in the European Convention on Human Rights (ETS No. 5) and the protocols thereto, including *providing an effective remedy* before a national authority for violation of those rights and freedoms, and where relevant their obligations arising from the [ESC, ESC(R)] and from other European and international human rights instruments (Council of Europe Recommendation, preambular paragraph 3, emphasis added).

On this basis, the Recommendation urges Council of Europe member states to “effectively implement the [UNGPs] as the current globally agreed baseline in the field of business and human rights” with specific reference to “the need for rights and obligations *to be matched to appropriate and effective remedies when breached* (‘access to remedy’)” (Appendix, paragraph 1).

Part II of the Appendix (The State duty to protect human rights) draws attention to states' duty not to “create barriers to effective accountability and remedy for business-related human rights abuses” and to “pay particular attention” in this context to the rights and needs of groups at risk of vulnerability or marginalisation (Appendix, paragraphs 18 and 19, emphasis added).

In Part IV it is additionally suggested that member states should intensify judicial cooperation including *inter alia* criminal investigations, mutual legal assistance, recognition and enforcement of judgments, as well as through development of training for legal professionals to “improve access to remedies for victims” to an extent “going beyond their existing obligations” which, it is observed, may stem from specific legal instruments but also from the ECHR (Appendix, paragraphs 55 and 56; see also paragraph 8; Explanatory Memorandum, paragraph 83).

Example:

- ▶ In a case concerning alleged human trafficking, the European Court has stated that member states have an obligation to cooperate effectively with relevant authorities of other states in investigating events which occurred outside their territories, in addition to their obligations to conduct an effective domestic investigation.<sup>177</sup>

However, Part IV of the Appendix provides the principal focus on remedy within the Council of Europe Recommendation, addressing, in turn, access to civil, criminal and administrative judicial mechanisms and, later, non-judicial mechanisms. Its detailed guidance in relation to each of these is considered through the following sections, alongside the content of the corresponding UNGPs.

### 3.5. Judicial grievance mechanisms

As indicated by UNGP 26:

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy...

Whilst all three categories of grievance mechanism mentioned above have a role to play, the UNGPs suggest that judicial mechanisms are “at the core” of ensuring access to effective remedy for business-related human rights abuses, with non-judicial mechanisms playing a complementary and supporting function (UNGP 26, Commentary).

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177. *Rantsev v. Cyprus and Russia*, 10 May 2010, §289.

Turning to the Council of Europe Recommendation, this specifically links access to judicial mechanisms to rights arising under the ECHR as discussed above (Section 3.2), encouraging Member States to:

ensure the effective implementation of their obligations under Articles 6 and 13 [ECHR] and other international and European human rights instruments, to grant to everyone access to a court in the determination of their civil rights, as well as to everyone whose rights have been violated under these instruments, an effective remedy before a national authority, including where such violation arises from business activity (Appendix, paragraph 31).

As mentioned earlier, while Article 6 ECHR primarily confers protection in relation to access to civil proceedings, Article 13 may be satisfied through recourse alternatively, or in addition, to criminal, administrative or constitutional courts, all of which should be considered by governments, by victims and their representatives, in connection with Pillar III.

### 3.5.1. Civil law

It may be questioned how civil law actions, which do not refer to human rights *per se*, are relevant to the pursuit of redress for victims of business-related human rights abuses. Civil or private law causes of action may be brought against businesses for harm or loss, and for failing to act with due care exists in most jurisdictions. Claimants relying on these in relation to alleged human rights abuses, therefore, must adapt their claims to fit private law concepts, substituting, for example, “assault”, “false imprisonment”, or “wrongful death”, for “torture”, “slavery” or “genocide”. For claims brought in negligence, plaintiffs must show that a company owed them a “duty of care,” that was breached by either the company itself or the conduct of individuals for whom it was vicariously liable, and that this breach resulted in harm. An advantage of tort-based claims is that they may reinstate victims to a position that they would have been in, at least in financial terms, had the negligence not occurred. They can also create a deterrent against future wrongdoing.

To establish whether a corporation can be held liable in civil law, it may be necessary to determine *inter alia*:

- ▶ The applicable law, particularly in abuses with a transnational dimension;
- ▶ The basis of liability, by reference to tort law, human rights law, or otherwise;
- ▶ Whether a parent corporation can be held liable, under the applicable law, for any relevant acts or omissions of its subsidiaries, suppliers or subcontractors;

- ▶ The relationship between the liability of the corporation and the liability of the individuals within that corporation who may be directly responsible for injury or damages suffered;
- ▶ The conditions under which a domestic court's jurisdiction may extend to foreign subsidiaries, agents or contractors; and
- ▶ The applicability of any immunities, in the case, for instance, of state-owned or controlled enterprises.

Example:

- ▶ Under English common law, whether or not a duty of care arises is dependent on a three-stage test, which asks: (a) was the harm suffered foreseeable; (b) was there sufficient proximity between the parties; and (c) is it fair, just and reasonable to impose a duty of care? (Meeran 2011: 1).
- ▶ In France, legislation was adopted in 2017 establishing a duty of due diligence (*devoir de vigilance*) on companies incorporated or registered in France for two consecutive fiscal years, and which
  - employ at least 5,000 people themselves and through their French subsidiaries, or
  - employ at least 10,000 people themselves and through their subsidiaries located in France and abroad.

Such companies are required to develop, disclose and implement a “vigilance plan” (*plan de vigilance*) which should include “reasonable vigilance measures to adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment”.

Under the law, a company may be liable under the French Civil Code Articles 1240 and 1241 if its failure to comply with its obligations can be linked to actual harm to fundamental freedoms, health and safety or the environment. Here the burden of proof lies on the injured party, who must prove that the company's breach of the statutory duty led to the harm suffered; if this is done, the victim may seek damages in negligence (Cossart, Chaplier and Beau de Lomenie 2017; *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*).

The Appendix to the Council of Europe Recommendation CM/Rec(2016)3 calls on member states to “apply such legislative or other measures as may be necessary” to ensure that, in general:

- ▶ human rights abuses caused by business enterprises within their jurisdiction give rise to civil liability (paragraph 32); here the Explanatory

Memorandum encourages member states in particular to consider creating civil causes of action for abuses caused by business failures “to carry out adequate due diligence” (paragraph 54; see Part II of this handbook); and that

- ▶ their domestic courts
  - have jurisdiction over civil claims concerning business-related human rights abuses against business enterprises domiciled within their jurisdiction (paragraph 34; for discussion of the meaning of “jurisdiction” under the ECHR, see also Section 1.4 Extraterritoriality above);
  - refrain from applying laws that are incompatible with human rights and other international obligations (paragraph 40);
  - can address civil claims in connection with human rights abuses by state-owned or controlled enterprises (see above Section 1.2.3.1) or linked to public service contracts (see above Section 1.2.3.2).

Example:

- ▶ *Chandler v. Cape plc* [2012] 1 WLR 3111

In 2012, a UK court held a parent company liable in negligence for harm to the employees of one of its South African-based affiliates in the area of health and safety. The claimant was employed by a wholly-owned subsidiary company of Cape plc between 1959 and 1962. In 2007, he discovered that, as a result of exposure to asbestos during that period, he had developed asbestosis. The subsidiary no longer existed and had no insurance policy covering claims for damages for asbestosis. Mr Chandler brought a claim against Cape plc, alleging it had owed, and breached, a duty of care to him. Cape plc denied that it owed a duty of care to the employees of its subsidiary company.

The Court of Appeal held that Cape plc assumed responsibility for Mr Chandler and owed him a direct duty which it had breached. In judgment it stated that the duty of care from a parent company to the employees of its subsidiary did not exist automatically, and only arose in particular circumstances. Albeit, as a general rule, it ought not be possible to “pierce the corporate veil,” here parallel duties of care between the parent company and subsidiary employees and the subsidiary company and its employees could be identified.

This was because: (i) the parent company and subsidiary had relatively similar businesses; (ii) the parent company knew (or ought to have known) that the subsidiary’s system of work was unsafe; and



(iii) the parent company knew (or ought to have foreseen) that the subsidiary or its employees would rely on its using that superior knowledge to ensure the employee's protection.

Consistently with the weight attached by the Committee of Ministers to the Third Pillar, both the Appendix to the Council of Europe Recommendation (paragraphs 33-43) and the corresponding passages of the Explanatory Memorandum provide extensive additional guidance for member states to support them in extending and enhancing access to remedy via civil actions, as detailed in the following sections. While the Explanatory Memorandum (paragraph 55) suggests that this guidance primarily addresses obstacles to remedy faced by victims outside Europe in seeking remedies against European companies, in practice, it is suggested, it is also highly relevant in identifying and addressing obstacles to effective redress for rights-holders within Council of Europe member states.

### *3.5.1.1. Rules on jurisdiction*

For EU and European Free Trade Area (EFTA) member states, the Brussels I Regulation<sup>178</sup> and Lugano Convention<sup>179</sup> allow companies domiciled in one state party to be sued in that same state for damages caused by harms occurring in another state covered by either instrument. States parties to these instruments must also recognise and enforce judgments for civil damages entered by other states. The Council of Europe Recommendation urges non-EU Council of Europe member states, if they have not already done so, to accede to the Lugano Convention (Appendix, paragraph 33).

The Brussels I Regulation and Lugano Convention do not confer jurisdiction on states parties' courts over claims lodged against subsidiaries and contractors, situated in third countries, of European domiciled-corporations. Nonetheless, the laws of some European states do allow victims of abuses in third countries to sue such companies in Europe, if such victims can be considered a necessary or proper party to another claim. This is reflected later in the Council of Europe Recommendation, which counsels member states to "consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses against subsidiaries, wherever they are based, of business enterprises domiciled within their jurisdiction if such claims are closely connected with civil claims against the

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178. Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351, 20.12.2012.

179. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007.

latter enterprises” (Appendix, paragraph 35). Such rules have provided a platform for a small but growing number of cases involving transnational corporations, for example:

- ▶ UK: The foreign subsidiary of a UK-based mining company was joined as a co-defendant to a claim brought in the UK courts by Peruvian nationals. The claimants alleged that personnel from both companies, as well as personnel from a private security company employed by Rio Blanco, were directly involved in unlawful violence against protesters against a proposed mining development by the Peruvian police. In addition they alleged the companies provided material support to the police, and failed to prevent or react to the abuse which, it was alleged, included unlawful detention, hooding, beating with sticks, whipping, sexual assaults and threats of rape, and serious injuries. The company later settled the case out of court, making compensation payments without admitting liability.<sup>180</sup>
- ▶ Netherlands: A Dutch court accepted jurisdiction over cases in which Nigerian fisherman and farmers claimed that Royal Dutch Shell (RDS) had been negligent in overseeing oil production by its Nigerian subsidiary (SPDC), on the grounds *inter alia* that there was such a connection between the claims lodged against RDS, on the one hand, and the claims lodged against SPDC, on the other, that reasons of efficiency justify a joint hearing...<sup>181</sup>
- ▶ Germany: § 23(1) of the Code of Civil Procedure confers on civil courts jurisdiction over monetary claims if the defendant’s assets are located within Germany.

### 3.5.1.2. *Forum non conveniens and forum necessitatis*

The doctrine of *forum non conveniens* allows a court to decline jurisdiction on the ground that the courts of another state provide the more appropriate forum to adjudicate the claim in question. This might be, for instance, due to:

- ▶ The location of the parties to the claim, whether defendant, plaintiff, or both;
- ▶ The location of witnesses or evidence; or

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180. *Guerrero v. Monterrico Metals Plc* [2009] EWHC (QB) 2475 as discussed by Business and Human Rights Resource Centre, *Monterrico Metals Lawsuit (re Peru)*, <https://business-humanrights.org/en/monterrico-metals-lawsuit-re-peru-0>.

181. *Oguru, Efanga & Milieudéfensie v. Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd.*, District Court of the Hague, Docket Number C/09/330891 / HA ZA 09-579 (30 January 2013), paragraph 4.2.

- ▶ Because the courts of the other forum (usually the host state for a transnational corporation) are more familiar with the applicable law.

In some jurisdictions, claimants may need to exhaust remedies in their local jurisdiction before initiating proceedings in another state. Studies of claims relating to business-related human rights abuses that are dismissed by courts in home-states of TNCs on the basis of *forum non conveniens* have found that such claims are rarely re-filed in the host-state or any other alternate forum. This might be because:

- ▶ The host state may not have a judicial system that is as independent, functional, or as stable as the forum state;
- ▶ The host state may not have remedies that sufficiently compensate the victims for the harm they have suffered;
- ▶ The government may be unwilling or unable to allow the case to proceed, for instance, due to corruption or complicity;
- ▶ Victims or witnesses may be at greater personal risk of reprisals by filing cases in the home state, by perpetrators or their associates;
- ▶ Lack of legal representation for victims in the host state, for instance, due to lack of funding arrangements to support legal representation, such as contingency fees;
- ▶ Rules on allocation of costs between the parties if a claim is unsuccessful that are less favourable to claimants and can deter victims or their lawyers.

Hence, the Council of Europe Recommendation provides that:

Member States should apply such legislative or other measures as may be necessary to ensure that their domestic courts have jurisdiction over civil claims concerning business-related human rights abuses against business enterprises domiciled within their jurisdiction. The doctrine of *forum non conveniens* should not be applied in these cases (paragraph 34).

In EU member states, applying the doctrine of *forum non conveniens* would contradict the requirements of the Brussels I Regulation (Section 3.5.1.1 above), whose rationale is that it is easier for a defendant to raise a defence in the place it is domiciled. As the European Court of Justice (ECJ) observed in 2000:

The system of common rules on conferment of jurisdiction established in... the Convention is based on the general rule... that persons domiciled in a Contracting State are to be sued in the courts of that State, irrespective [either] of the nationality of the parties, or of the plaintiff's domicile or seat.<sup>182</sup>

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182. Case C-412/98, *Group Josi Reinsurance Co. SA v. Universal Gen. Ins. Co.* (UGIC), 2000 E.C.R. I-05925.

If EU member states are precluded from applying the doctrine *inter se* on this basis,<sup>183</sup> *forum non conveniens* still remains a significant potential barrier to access to justice elsewhere within the European region and beyond. It might also obstruct access to an effective remedy for victims from Council of Europe member states where the perpetrator of business-related human rights abuses taking place inside Europe is domiciled outside the continent.

By contrast, the doctrine of *forum of necessity* or *forum necessitatis* allows a court to assert jurisdiction over a case when there is no other forum in which the plaintiff could reasonably seek relief, even if an alternative jurisdictional base is lacking. Forum of necessity is a jurisdictional doctrine, and thus courts rule on it before ruling on *forum non conveniens*.

*Forum necessitatis* is available in some European jurisdictions, such as the Netherlands and Switzerland.

Example:

- ▶ Under the Swiss Law on Private International Law, *forum necessitatis* can ensure access to justice for victims where there is no other forum that is competent, or where it would be unreasonable to demand from victims that they file their claim before another forum, provided the claim presents some relationship to Switzerland.<sup>184</sup>

The Council of Europe Recommendation thus encourages member states to, consider allowing their domestic courts to exercise jurisdiction over civil claims concerning business-related human rights abuses... if no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the member State concerned (Appendix, paragraph 36; see also Explanatory Memorandum, paragraph 59).

For the present, however, whether ECHR Article 6(1) obliges Council of Europe member states to extend civil jurisdiction to prevent a denial of justice to claimants situated outside their territory remains open to question (Roorda and Rynjaert 2016).

### 3.5.1.3. Immunities and non-justiciability

Generally speaking, immunities exempt defendants from legal consequences in relation to a given action. Sovereign immunity, for instance, usually permits states to avoid suit in the courts of other states. Individuals may be immune from prosecution on specific grounds, such as diplomatic status. Immunity has

183. *Owusu v Jackson and Others* Case C-281/0 (Judgement of 1 March 2005).

184. *Loi fédérale sur le droit international privé* [LDIP] Dec. 18, 1987 (Switz.).

posed barriers for victims, for example, in the United States, especially where businesses responsible for harm are contractors to the Federal Government.

Example:

- ▶ *Al Shimari v. CACI et al* (4th Cir. Oct. 29, 2012): A US Federal District Court dismissed common law claims arising out of the four plaintiffs' alleged torture at Abu Ghraib prison in Iraq. The plaintiffs alleged that employees of CACI, a security firm that had contracted with the US Government to perform interrogation, conspired with the US Government in their torture. The court found CACI immune from legal action on the grounds that Iraqi law governed the claims. Because Iraqi law at the time of the torture precluded liability for actions of the contractors related to terms of CACI's contract, and for injuries related to military combat operations, CACI was immune from liability (Skinner, McCorquodale and DeSchutter 2013: 58).

The Council of Europe Recommendation encourages member states to “refrain from invoking any domestic privileges or immunities” in cases before their own domestic courts involving state-owned or controlled enterprises, or where a state contracts with a business enterprise to provide public services. States should, it indicates, ensure that civil claims in connection with human rights abuses by such enterprises may be brought before domestic courts (Appendix, paragraph 37). These principles would also apply to enterprises in which states are significant shareholders.

Relevant instruments in this context are the UN Convention on Jurisdictional Immunities and Their Property (UNCJITP) and the [European Convention on State Immunity \(ETS No. 74, 'Basel Convention'\)](#). The latter codifies customary international law on the conditions under which states may claim immunity before national courts. Though not yet in force, and applicable only to the eight Council of Europe member states that have ratified it (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland, and the United Kingdom) it may be persuasive beyond those states. The Convention defines exceptions to the principle of the jurisdictional immunity of states, providing that such immunity cannot be claimed in relation to commercial transactions, or in other words, if:

- ▶ the state participates with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the state of the forum; and
- ▶ the proceedings concern the relationship, in matters arising out of that participation, between the state, on the one hand, and the entity or any other participant, on the other hand (Article 6, Basel Convention; see also UNCJITP, Article 10(1)).

This exception does not however apply where a victim files a claim against a state as owner of a public enterprise having participated in a human rights violation. In addition, immunity cannot be claimed,

- ▶ Where a state has, on the territory of the state of the forum, an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment (Article 7).

Generally, on this basis, the doctrine of state immunity should not block claims lodged against public businesses (state-owned entities) or against the state acting in a private capacity. Still, as the Council of Europe Recommendation points out, in some cases, courts may grant state immunity without breaching either international law or Article 6(1) ECHR, because neither yet recognises an exception for serious human rights violations.<sup>185</sup> This might be the case where, for example:

- ▶ a foreign state-owned company contributes to human rights abuses that do not qualify as “commercial acts” (Article 2(1)(b) UNCJITP); or
- ▶ The “act of state” or “political question” doctrines are applied.

According to the Council of Europe Recommendation, such devices should be entertained only sparingly (Appendix, paragraph 38; Explanatory Memorandum, paragraph 61).

Example:

- ▶ Chinese state-owned companies have pleaded sovereign immunity before United States courts. For example, China National Building Materials Group Co (CNBM), a state-owned building products company, was granted immunity from suit in a case where claimants alleged that Chinese-made drywall led to health problems for U.S. homeowners. The State-owned Assets Supervision and Administration Commission (SASAC) argued in a diplomatic note that U.S. courts have no jurisdiction over suits against a country’s “state-owned properties” (Miller and Martina/Reuters 2016).

#### 3.5.1.4. *Representative and collective actions*

Collective redress has been described as a “...concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation

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185. *Al-Adsani v. the United Kingdom*, 21 November 2001; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 3 February 2012, ICJ Reports 2012, p. 99.

for the harm caused by such practices”.<sup>186</sup> Civil procedure rules that permit aggregate claims for a large group of similarly positioned claimants through a single set of court proceedings are one such mechanism. Likewise, in representative proceedings or “class actions,” one victim’s claim is heard on a test basis for a wider group. A further possibility is that rules of standing allow parties such as NGOs to lodge claims on behalf of a group of victims on a “public interest” basis. Such forms of action may be efficient, in terms of legal costs, and court resources, when a remedy is sought with regard to a large number of victims. On the other hand, litigation in pursuit of collective redress can be highly complex, and such proceedings may lengthy in duration.

The Council of Europe Recommendation encourages member states to consider adopting measures to facilitate both representative and collective actions, providing that:

- ▶ Member States should consider adopting measures that allow entities such as foundations, associations, trade unions and other organisations to bring claims on behalf of alleged victims (Appendix, paragraph 39)
- ▶ Member States should consider possible solutions for the collective determination of similar cases in respect of business-related human rights abuses (Appendix, paragraph 42).

As yet, though, most European jurisdictions do not permit collective redress. Amongst those that do are the following (Skinner, McCorquodale and DeSchutter 2013: 76):

- ▶ *France*: The *action en représentation conjointe*, or action in joint representation, allows a consumers’ organisation, if mandated by at least two individual consumers who have been aggrieved by the same conduct, to file a claim in their name, in effect endorsing their claim as its own. A similar action can be brought by designated NGOs in the areas of environment, finance and health. However, to date such claims have met with very limited success due to restrictive conditions. For example, NGOs are required to obtain a special authorisation from the state to bring cases, and the law prevents advertising the action or contacting victims.
- ▶ *Germany*: A claimant may, under certain conditions, transfer the claim to another party for that party to litigate before courts via *gewillkürte Prozessstandschaft* or “arranged standing”.
- ▶ *UK*: A representative can act where more than one person has the same interest in a claim, with the court deciding if its orders apply to

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186. European Parliament, Directorate-General for Internal Policies, *Overview of Collective Redress Schemes in EU Member States* §1.2, IP/A/IMCO/NT/2011-16 (2011).

all claimants. Alternatively, a Group Litigation Order may allow a court official, with a senior judge's approval, to decide if management of a case would be assisted by bringing together cases involving common legal or factual issues. "Lead cases" are then selected by reference to which common issues are resolved for all relevant claims.

Where plaintiffs seek to rely on rights arising under the ECHR as a basis for domestic civil proceedings, it should however be recalled, Article 34 subjects claims to a victim requirement, so that representative actions by third parties, as envisaged by the Council of Europe Recommendation, may nonetheless require an affected individual in order to proceed: there is no *actio popularis* under the Convention.<sup>187</sup>

### 3.5.2. Criminal law

Statutory rules in areas such as labour, equal opportunities or consumer protection contribute to promoting corporate respect for human rights and deterring abuses by businesses. Criminal prosecutions, brought against either corporations or their personnel may nevertheless be required in realising victims' right to an effective remedy under Article 13 ECHR on occasion.

Some European states, though by no means all, recognise the concept of corporate criminal liability. Amongst jurisdictions where corporate criminal liability is recognised, its scope and conditions vary considerably. Some states provide a list of offences to which corporate criminal liability applies. Others, by contrast, identify situations where corporate criminal liability does not apply (e.g. France). Sometimes, corporate criminal liability turns on a company's failure to act with due diligence to prevent certain crimes. Available sanctions can include confiscation of proceeds and fines. Alternatively, in some jurisdictions, individual corporate officers may be subject to prosecution for offences linked, for example, to negligence leading to death or serious injury, or corrupt practices.

To date it remains relatively uncommon in practice for companies or their personnel to be prosecuted for crimes connected to human rights abuses. Within the European region, a growing number of exceptions however include the following:

- ▶ **Switzerland:** A gold refiner suspected of money laundering was prosecuted in connection with alleged war crimes in the Democratic Republic of Congo (DRC).

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187. *Aksu v. Turkey*, 15 March 2012, §50; *Burden v. the United Kingdom*, 29 April 2008, §33.



- ▶ **France:** The sale of a surveillance system to the Gaddafi regime in Libya was subject to a judicial investigation.
- ▶ **France:** A prosecutor launched investigations into the conduct of three executives working for a Swiss-French cement company alleged to have provided financing to terrorists via payments made as part of security arrangements to protect a plant in Syria.
- ▶ **Germany:** A complaint was initiated against a timber manufacturer's senior manager regarding abuses by its contracted security forces against a community in the DRC.
- ▶ **The Netherlands:** Government policy discourages Dutch companies from investing in settlements in the Israeli-occupied West Bank, viewed as illegal under international law, and the Dutch public prosecutor has confirmed that it considers such business activity to be a potential war crime.

In addition:

- ▶ The United States' Sentencing Guidelines provide that companies can be put on probation. This requires proof of compliance with the law, combined with implementation of an ethics programme and periodic reporting on its progress in implementing the designated reform programme (*US Sentencing Guidelines Manual*, paragraph 8 D1.4, p. 527).

According to the Council of Europe Recommendation, member states should work towards ensuring, within their domestic legal orders, that businesses, or their officers, can be held liable in criminal, civil or administrative law, for causing, or participating in, as relevant:

- ▶ crimes under international law, i.e. genocide, crimes against humanity and war crimes;
- ▶ specific offences referred to by Council of Europe and other international treaties, in areas such as corruption, human trafficking, cyber-crime, domestic violence, child prostitution;
- ▶ other offences constituting serious human rights abuses, such as forced evictions (paragraphs 44 and 45; see further, Explanatory Memorandum, paragraphs 67-73).

Example:

- ▶ In 2013, Korea's High Court ruled that Nippon Steel & Sumitomo Corporation were liable to pay compensation of Won 100 million (USD 88,000) to each of four South Korean workers for "crimes against humanity" and forced labour during Japan's colonisation of Korea from 1910-1945. The court held that the originating company, Japan

Iron and Steel, had committed acts that were against international law and the constitutions of both Korea and Japan (The Japan Daily Press, July 10, 2013).

The Rome Statute of the ICC restricts the Court's jurisdiction to natural legal persons (Article 25(1)). However, where a state recognises corporate criminal liability and has ratified the Rome Statute, it has been suggested that corporations may still be prosecuted for international crimes. This could apply, for example, in the case of France, Belgium, Germany, the Netherlands, Spain, and the United Kingdom, where genocide, crimes against humanity, and war crimes are actionable under national law (ICJ 2008).

One notable recent development, in this context, is that the ICC Office of the Prosecutor announced an intention to increase its greater focus in future on crimes or practices that lead to "the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land", where these inflict social, economic and environmental damage on affected communities (ICC Office of the Prosecutor, 2016: 14).

Genocide, war crimes and crimes against humanity, it may be further remarked, are not subject to statutory limitations under the ICC Statute (Art.29, ICC Statute). Other human rights instruments besides provide for the non- or conditional application of statutes of limitations on these and other international crimes (Explanatory Memorandum, paragraphs 75 and 76).

Example:

- ▶ In the *IG Farben Trial*, twenty-three company directors of a German chemicals conglomerate that manufactured and supplied Zyklon B gas to Nazi extermination camps were prosecuted for crimes, including war crimes and crimes against humanity.<sup>188</sup>

Finally, any criminal investigation undertaken by state authorities, the Council of Europe Recommendation CM/Rec(2016)3 notes, needs to be effective, while decisions based on such investigations, for instance, to charge, prosecute or on the contrary not to do so, must be sufficiently reasoned (Appendix, paragraph 46). Where alleged abuses by or with the involvement of businesses have led to a loss of life within the meaning of Article 2 ECHR, the investigation must furthermore meet the criteria identified by the European Court of adequacy, thoroughness, independence and impartiality, promptness and publicity (Council of Europe Recommendation, paragraph 45; Explanatory Memorandum, paragraph 74).

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188. *Law Reports of Trials of War Criminals*, Vol. X, (London: HMSO, 1949).

### 3.5.3. Administrative law

In many Council of Europe member states, administrative law sanctions are used to penalise companies for breaching regulations, for example, relating to environmental or health and safety matters. Penalties may include fines, restricting company operations in specific economic areas, exclusion from public procurement, publicising convictions and penalties, and confiscation of property.

Example:

- ▶ Under France's law on the duty of care of parent and subcontracting companies, a person with *locus standi* can require, following an unsuccessful formal notice, a competent court to order a company, to establish a vigilance plan, ensure its publication and account for its effective implementation, on pain of a penalty (*astreinte*) (*Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*; Cossart, Chaplier and Beau de Lomenie 2017: 321).

Whether such administrative or other sanctions comprise an adequate remedy for victims should be assessed case by case, taking into account, for example, the gravity of the abuse suffered or threatened, and which human rights are engaged, with reference to the relevant standards and jurisprudence on the right to remedy under the ECHR and other Council of Europe instruments signposted earlier (Sections 3.1 and 3.2; see also Council of Europe 2013, Part II). It should not be forgotten, where administrative measures such as fines prove ineffective in securing the prevention of harmful business conduct, that member states have a general obligation to solve problems underlying violations (Council of Europe Council of Ministers 2004).

Example:

- ▶ In countries such as Ukraine, Moldova, Armenia, Russia and Georgia, administrative fines can be imposed by a government authority or by a court. While a fine is the only penalty available to government agencies, courts can also suspend an activity and confiscate property. Apart from state environmental inspectorates or equivalent bodies, administrative sanctions against certain types of environmental violations can be applied by sanitary, technological, or fire inspectorates. In some countries, the higher the position of the enforcement official imposing a penalty, the larger the size of the penalty he/she is authorised to apply (up to the legal limit). Some serious offences, as well as those contested by the offender, can be enforced only judicially. The design and application of administrative fines in these countries

does not however ensure effective deterrence against violations (OECD 2009: 5).

Protections arising under Article 6 ECHR may, or may not, apply to administrative proceedings, as discussed earlier (Section 3.2.5).

### 3.5.4. Constitutional law

Constitutional rights typically protect freedoms against the abuse of state rather than private power. Albeit not discussed by the Council of Europe Recommendation CM/Rec(2016)3 explicitly, a constitutional rights claim may however sometimes be available in connection with business activities, for example, if:

- ▶ The constitution provides that legal persons, including corporations, are bound by constitutional rights provisions;
- ▶ It is recognised judicially or in legislation that non-state actors must respect some or all of the rights guaranteed in the constitution; or
- ▶ A relevant court recognises that:
  - A non-state actor, when serving as an agent of the state; because its activities amount to “state action”; or because it is carrying out “functions of a public nature, must respect some or all rights recognised in the constitution;
  - Rights require states to protect rights-holders against third party interferences with their rights; or
  - The court has a duty to uphold constitutional rights, or at least to apply constitutional values in deciding cases, even if the parties are private (e.g. under the German constitutional law doctrine known as *Mittelbare Drittwirkung*; Dhanarajan and Methven O’Brien 2014: 59-60).

To date, the application of constitutional rights to the private sphere remains restricted in many Council of Europe jurisdictions, especially as regards business-related abuses, with successful cases limited to areas such as environmental rights, defamation, privacy or labour disputes. One obstacle can be *locus standi*, if victims are reliant upon public interest groups to pursue cases on their behalf but where only individuals are recognised for the purpose of constitutional claims.<sup>189</sup>

Nonetheless, particularly in the area of environmental rights, the availability of redress for victims via constitutional courts is gradually increasing.

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189. Cf. UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”), 25 June 1998, Art. 9.

Examples:

- ▶ *Constitutional Court of Hungary*, Judgment 28, V. 20 AB, p.1919 (1994): In this decision, Hungary's Constitutional Court rejected an attempt to privatise publicly owned forests because weaker environmental standards governed private land.
- ▶ *Jacobs v. Flemish Region* (1999), Council of State No. 80.018, 29 April 1999. *Venter* (1999) Council of State No. 82.130, 20 August 1999: A proposal to accommodate motor racing by weakening standards for air and noise pollution was rejected by Belgium's Constitutional Court, under the "standstill principle": the Belgian Constitution precludes authorities from weakening levels of environmental protection except in limited circumstances where there is a compelling public interest.
- ▶ *Pavel Ocepek, Breg pri Komendi* (1999) Up-344/96, 04/01/1999 (Constitutional Court): The Slovenian Constitutional Court upheld a tax on water pollution based on the constitutional interest in environmental protection and the constitutional right to a healthy environment.

Where a member state constitution does envisage complaints to a constitutional court or tribunal as a mechanism for vindicating ECHR rights, it should be noted, the exhaustion of such a remedy may be a precondition of the admissibility of a complaint before the European Court, at least where it is effective (Council of Europe 2013: 47-51).<sup>190</sup>

### 3.6. Obstacles to accessing an effective judicial remedy

The UNGPs emphasise that victims of business-related human rights abuses should not encounter legal or practical barriers to judicial remedy, where this is "an essential part of accessing remedy or alternative sources of effective remedy are unavailable..." (UNGP 26, Commentary). Yet such barriers exist and frequently preclude access to remedy for victims, as demonstrated, for instance, by the discrepancy between reported business-related human rights abuses and cases reaching courts or tribunals.

Duty-bearers and stakeholders should therefore consider ways to reduce legal, practical and other relevant barriers that victims may face when securing a judicial remedy. Although national contexts vary in their particulars, the kinds of obstacles described in the rest of this Section are pervasive in most or all jurisdictions. While the UNGPs emphasise obstacles to judicial remedies, moreover, many of the same or similar challenges also operate so

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190. See e.g. *Vinčić and Others v. Serbia*, 1 December 2009, §51.

as to restrict or deny victims access to the non-judicial redress mechanisms described below in Section 3.7.

### 3.6.1. Legal obstacles to accessing an effective remedy

#### *3.6.1.1. Lack of direct applicability of human rights law to businesses*

As discussed earlier, international human rights law generally recognises only states and their emanations as duty bearers (Section 1.1, cf. Section 2.1.6). Accordingly, victims of abuse perpetrated by corporations typically lack any direct remedy in human rights law, either at national level or before regional supervisory mechanisms such as the European Court (see Section 3.2.4 above). In most jurisdictions, in addition, human rights still lack horizontal and third-party effect so that they may not be raised in proceedings between private parties.

Victims must thus show a default by the state in whose jurisdiction the abuses occurred, with reference to that state's human rights obligations. Such a claim might be formulated, for instance, citing Articles 1, 6 or 13 ECHR, subject to the various restrictions already noted in this chapter. Inherently this situation entails restrictions upon the type of remedy available to victims of human rights abuses by businesses.

Where a remedy is sought before the Strasbourg court, victims must, moreover, satisfy the general conditions of admissibility of claims before the European Court, including exhaustion of domestic remedies. On some perspectives, this situation may be viewed as an obstacle to the availability of judicial remedies. On the other hand, it can be seen to stem from and align with the principle of subsidiarity, according to which domestic authorities of states parties to the ECHR have the primary duty to guarantee ECHR rights and freedoms, and the European Court serves as a secondary "safety net" (see further Section 3.2.1 above).

#### *3.6.1.2. Doctrine of separate corporate personality and corporate groups*

The doctrine of separate corporate personality is applied in many, if not all, jurisdictions. It means that the ownership or control by a parent company of its subsidiary company may not constitute a sufficient basis for a court to hold the parent company liable for the acts of the subsidiary. Rather, a claimant must show either that there is a legally recognised reason to overturn the presumption against "piercing the corporate veil," or that the parent company should be held responsible in its own right.

As regards the latter of these two conditions, in a criminal case, this would mean that the claimant would need to show that the parent company aided and abetted, incited or conspired in, the unlawful acts of the subsidiary. In civil proceedings, for instance, in tort, the claimant would need to show that the parent company was negligent in its own right, on the basis that it owed a separate duty of care to those affected by the activities of its subsidiaries and failed to discharge that duty, thereby avoiding the need to pierce the corporate veil.

It can however be difficult to establish a parent company's duty of care where its subsidiary is more directly involved in harmful conduct. Few courts to date have recognised parent company liability, albeit with limited exceptions, some of which are described below.

Moreover, the complex structures of cross-ownership and control often employed within corporate groups, and lack of public transparency regarding these, can render difficult the identification of the appropriate entity or entities against which to lodge a claim, whether criminal or civil. For example, a business may be owned by a number of other foreign businesses, none of which has majority control, while its corporate shareholders, parents or investors may be domiciled across a number of other different countries. Difficulties in this area may be exacerbated by the use of intermediary holding companies, joint ventures, agency arrangements and confidentiality arrangements. Exceptionally, though, a parent company may be held liable for acts or omissions of a subsidiary leading to actionable harm:

- ▶ Where the parent company is particularly involved in the activities of the subsidiary, to an extent greater than normally expected in a parent/subsidiary relationship; or
- ▶ Where the company is a “sham”, or where there has been “abuse of the corporate form” to evade a legal liability. However, using the corporate form as a way of managing and allocating commercial risk is regarded as legitimate and is not viewed as grounds for “piercing the corporate veil” in itself.

### 3.6.1.3. *Applicable law*

If a court decides it has jurisdiction to hear a case regarding harm occurring outside its territorial jurisdiction, it must decide which state's law applies. In general, courts apply their own jurisdiction's “choice of law” rules to decide on the applicable law in the case.

For EU member states, the [Rome II Regulation \(No. 864/2007\)](#) applies to tortious (non-contractual civil) claims. The Regulation provides that the law of the state in which the harm occurred (*lex loci delicti*) is the applicable law for

such claims. However, the Rome II Regulation also provides grounds for certain exceptions, for example:

- ▶ **Mandatory laws:** Provisions of the law of the forum state may be applied, “where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation” (Article 16). On this basis, German courts have held that the right to maternity leave, to sick pay, and possibly the rights also to form unions and against discrimination are “mandatory”;<sup>191</sup>
- ▶ **Public policy:** The law of the state where the harm occurred may not apply “if such application is manifestly incompatible with the public policy (*ordre public*) of the forum” (Article 26). This could apply if the laws of the state where the harm occurred are considered to be contrary to the protection of human rights ;<sup>192</sup>
- ▶ **Safety and conduct rules:** The Rome II Regulation states that “[i]n assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability (Article 17)”.

In determining choice of law questions, the Council of Europe Recommendation CM/Rec(2016)3 recalls, member states are obliged to apply domestic laws in ways that comply with obligations arising under international human rights instruments, including but not limited to the ECHR (Explanatory Memorandum, paragraph 63).

Example:

- ▶ Proceedings were brought in the United States by the family of a garment worker killed in the Rana Plaza factory collapse in Bangladesh and another worker who was injured. The claimants alleged that the defendant companies, who were clothing retailers in the U.S., were under a duty of care to ensure safe working conditions, breach of which had caused them harm. The Delaware court held that Bangladeshi law applied, so that the claims were subject to a 1-year limitation period. Though the plaintiffs had filed proceedings within the 2-year limitation period applicable under Delaware law, their claims were accordingly time-barred.<sup>193</sup>

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191. Bundesarbeitsgerichts [BAG] [Federal Labour Court] Dec. 12, 2001, Entscheidungen des Bundesarbeitsgerichts [BAGE] 100,130 to § 14 I MuSchG and § 3 EFZG

192. *Kuwait Airways Corporation v. Iraqi Airways Company and Others.*, [2002] 2 A.C. 883 § 18 (Eng)

193. *Abdur Rahaman et al. v. J.C. Penney Co. Inc., The Children's Place and Wal-Mart Stores Inc.* 4 May 2016.



#### 3.6.1.4. Rules on limitation of actions

Statutes of limitations and associated rules define the time period after the occurrence of harmful conduct within which legal claims can be brought. Rules on limitation of actions exist in all jurisdictions and apply to many types of claim. Such rules can pose an obstacle to remedy for human rights claims, especially given difficulties in investigating and gathering evidence frequently affecting them. Short limitation periods may, given this, prevent victims from being able to secure redress and accountability, at all.

In the EU, the limitation period for non-contractual civil claims is governed by the Rome II Regulation. This is set according to the applicable national law which, under the Regulation, is likely to be that of the state where the harm occurred (see above Section 3.6.1.3).

National rules may allow the prolongation of limitation periods or exemptions from statutes of limitation in certain circumstances or for specific categories of cases, for instance, if the application of the usual rules would result in a denial of justice. Where limitation is an issue, counsel for victims should explore whether any such *caveats* apply.

Guidance provided by the Council of Europe Recommendation CM/Rec(2016)3 focuses on rules of limitation for criminal proceedings, as discussed earlier (Section 3.5.2).

Examples:

- ▶ In Italy, two directors of the company Eternit were prosecuted for negligence over periods during the 1960s, 1970s and 1980s, leading to the deaths of 3000 people as a result of exposure to asbestos, either as workers at Eternit plants in Northern Italy or as members of workers' families or residents in local communities contaminated by asbestos fibres. In 2012, the directors were both found guilty and sentenced to 16 years imprisonment. In 2014, however, the Italian Supreme Court overturned the guilty verdict on grounds that the statute of limitations had passed ([Business and Human Rights Resource Centre 2017a](#)).
- ▶ Proceedings were brought in 2002 against IBM on behalf of five Roma orphaned in the Holocaust. The claimants alleged IBM assisted the Nazis in Holocaust killings during World War II by providing the Nazis with punch card machines and computer technology that resulted in the coding, tracking and killing of Gypsies. In 2006, the Swiss Supreme Court affirmed that the statute of limitations applied so that the claims were time-barred ([Business and Human Rights Resource Centre 2017b](#)).

### 3.6.1.5. Rules of evidence

In criminal proceedings, the prosecution, rather than the defendant, bears the evidentiary burden of establishing guilt. In civil proceedings, a claimant, rather than the defendant, typically bears the evidentiary burden of establishing his or her claim.

In Europe, the determination of what counts as admissible evidence before a court, and what information the parties to civil proceedings may be required to deliver up to each other or the court (“rules of discovery”) are defined by national legal rules. In many European jurisdictions, however, there are no discovery or disclosure rules that oblige a party to proceedings to share information in its possession, or such rules apply on a restricted basis. On the other hand, in some European states, where specific conduct counts both as a criminal offence and as a tort, a victim may claim civil damages in the course of a criminal trial, where the burden of gathering evidence is on the prosecutor, and hence benefit from evidence already gathered.

As regards evidence, the Council of Europe Recommendation CM/Rec(2016)3 focus on civil proceedings, urging member states to,

consider revising their civil procedures where the applicable rules impede access to information in the possession of the defendant or a third party if such information is relevant to substantiating victims’ claims of business-related human rights abuses, with due regard for confidentiality considerations (paragraph 43; see also Explanatory Memorandum, paragraph 66).

Rules of evidence applied by national courts, it should be recalled, may engage Article 6 ECHR in criminal and administrative or civil proceedings. The European Court has held that the principle of a fair hearing under Article 6 entails that “each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent”.<sup>194</sup> Relevant Strasbourg and domestic case law should therefore be explored by counsel in any business and human rights proceedings where evidentiary rules appear to present an obstacle to securing accountability or redress.<sup>195</sup>

Example:

- ▶ In 2017, the widows of four environmental activists executed by the Nigerian Government in 1995 commenced proceedings in the Netherlands alleging that the Anglo-Dutch oil company Shell was complicit in their unlawful arrest, detention and execution. The claimants

194. *Dombo Beheer B.V. v. the Netherlands*, 27 October 1993, § 33).

195. See further van Dijk *et al* (2006), pp. 578 *et seq.*

sought and obtained an order from the New York Federal District Court for the disclosure of 100,000 internal company documents held by Shell's legal advisors, relating to earlier proceedings, which they argued were necessary to facilitate the bringing of their Dutch claim (EarthRights International 2017).

### 3.6.2. Practical obstacles to accessing an effective judicial remedy

In addition to formal legal obstacles, victims may encounter practical barriers that can prevent them from launching claims for judicial remedy or from seeing legal proceedings through to completion.

#### 3.6.2.1. Poverty, social exclusion and discrimination

Persons affected by business-related human rights abuses, as for human rights abuses in general, are frequently from social groups at risk of vulnerability, discrimination or marginalisation. Navigating the legal system can be difficult for victims who lack the specialist knowledge and skills needed to formulate harms suffered in legal terms and are deprived of the funds needed to purchase the services of lawyers who can do this on their behalf. Many poor people moreover live in illegality and avoid the legal system for fear of exposure; they may mistrust courts, or be unable or unwilling to use legal vernacular to frame injurious experiences (Dhanarajan and Methven O'Brien 2014:84). Large corporate defendants, on the other hand, are typically unaffected by resource constraints and enjoy the ready support of experienced in-house or external counsel; frequently, they also enjoy close relations with influence over political and judicial decision-makers. Such factors, operating in concert, undoubtedly diminish the likelihood that victims of business-related abuses are able to secure redress.

Amongst others, provisions of the Council of Europe Recommendation CM/Rec(2016)3 addressing equality of arms (Section 3.6.2.2); those requiring that member states provide access to information for alleged victims in their jurisdiction on human rights and about existing judicial and non-judicial remedies in relevant languages (Appendix, paragraph 57); and those detailing additional protection for specific groups of rights holders (Appendix Sections V-VIII) are relevant in this context. For instance, it is provided that member states should *inter alia*:

“implement measures to remove social, economic and juridical barriers so that children can have access to effective judicial and State-based non-judicial mechanisms without discrimination of any kind, in accordance with the

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice” (paragraph 64 (b)).

In the same vein, member states should be mindful of rights and duties arising under the ESC/ESC(r), and other instruments such as CDESCR, CRC, CRPD and CEDAW when reviewing and developing measures to ensure access to justice for victims of business-related abuses.

### 3.6.2.2. *Costs and legal representation*

Judicial proceedings entail a variety of costs for claimants, for example, legal representation, court fees, translation or interpretation and travel. These may deter victims of business-related human rights abuses, who typically lack access to means of paying lawyers and to defray other costs of bringing a case. On the other hand, lawyers with the requisite skills may be reluctant to take such cases on, due to legal uncertainty, financial risks, political sensitivity or risks to personal security.

The Council of Europe Recommendation CM/Rec(2016)3 highlights the need for member states to give effect to equality of arms within the meaning of Article 6 ECHR, in particular via legal aid schemes, and by ensuring that legal aid is “obtainable in a manner that is practical and effective” for claims concerning business-related abuses (Appendix, paragraph 41). This is important given the typical disparity of resources between claimants and defendants, particularly where the defendant is a large corporation (Appendix, paragraph 65). However, as mentioned (above Section 3.2.5.4) states’ duties here are not unlimited: whereas each side to proceedings must have reasonable opportunity to present her case without substantial disadvantage, the state is not required to use public funds to ensure a total equality of the parties.<sup>196</sup>

Example:

- ▶ In the “McLibel” case, the McDonalds corporation filed proceedings against two environmental activists, alleging it suffered damage as a result of statements made in a factsheet they had produced criticising the company. Proceedings before the UK courts, which lasted ten years, concluded in the award of £40,000 in the company’s favour. However, the European Court held that the disparity of legal assistance arising from the denial of legal aid had deprived the activists of the opportunity to present their case effectively before UK courts, breaching the right to a fair trial under Article 6 ECHR. Taking into account the means available to the activists, it held that “the inequality of arms could not have been greater,”

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196. *Steel and Morris v. the United Kingdom*, 15 February 2005, §62.

notwithstanding that, in civil proceedings this would not ordinarily be a relevant consideration whereas damages are meant to compensate, not to punish (*Steel and Morris v. the United Kingdom*, 15 February 2005).

### 3.6.2.3. *Delay*

Where a court system is under-resourced; proceedings inefficiently conducted by counsel or judges; where defendants seek to prolong a claim's progress for tactical reasons; or where evidence is difficult and time-consuming to gather, for example, delays in proceedings can pose a significant barrier to justice and the securing of an effective and timely remedy for victims.

In this context it should be recalled that Article 6(1) ECHR stipulates that the hearing of a case by a court, whether civil or criminal, must be "within a reasonable time". The European Court has identified a number of factors relevant to determining whether this requirement is met, in the individual circumstances of each case, such as its complexity, the conduct respectively of claimant and defendants, and the importance of the claim to the claimant. The detailed jurisprudence of the European Court should therefore be consulted where delay is an issue (see further, for example, van Dijk et al. (2013), Ch. 10.7).

### 3.6.2.4. *Corruption, political factors and risks to human rights defenders*

While the UNGPs identify judicial mechanisms as fundamental to access to remedy, at the same time they note that their effectiveness depends on the impartiality and integrity of judicial systems and due process (UNGP26, Commentary). Yet both state and business actors may be implicated in corruption or exercise political pressure on claimants or their lawyers, prosecutors and judges involved in hearing business and human rights-related cases. This may trigger fear of reprisal against victims of business-related human rights abuses, or their representatives.

Acknowledging such phenomena, the Council of Europe Recommendation CM/Rec(2016)3 urges member states to ensure human rights defenders within their jurisdiction are not obstructed by "political pressure, harassment, politically motivated or economic compulsion," while support should be extended to human rights defenders abroad via diplomatic and consular missions (Appendix, paragraphs 69-70). The Explanatory Memorandum enumerates relevant Council of Europe and international standards in this regard (paragraphs 95-97).

### 3.7. Non-judicial grievance mechanisms

Earlier it was noted that under the ECHR, vindication of a victim's rights under Article 13 does not necessarily require access to a court, so long as the remedy or remedies available for any abuses at national level can otherwise be assessed as "effective" (see above Section 3.2.3.2). In this spirit, UNGP 27 calls on states,

to provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

As the Commentary to UNGP 27 emphasises, non-judicial forms should complement, rather than supplant, replace or undermine judicial mechanisms, for the reason that:

Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favoured approach for all claimants.

Hence, as the SRSO observed, non-judicial avenues for addressing business-related grievances remain important also "in societies with well-functioning rule of law institutions, where they may provide a more immediate, accessible, affordable, and adaptable point of initial recourse" (UNGA 2008, paragraph 84).

On this basis, non-judicial grievance mechanisms should be seen as highly relevant to victims of business-related human rights abuses in European states, and their counsel or representatives, as well as to victims beyond Europe. Indeed, on-going challenges in managing the European Court's caseload give this dimension particular salience in the European context (Committee of Ministers 2004, 2012 and 2013).

The Council of Europe Recommendation CM/Rec(2016)3 aligns itself fully with this view. Under it, Council of Europe member states are urged to provide for, raise awareness of and facilitate access to non-judicial grievance mechanisms and to facilitate the implementation of their decisions (Appendix, paragraphs 49 and 50); more specific guidance is then provided in relation to the two main types of non-judicial grievance mechanisms identified by the UNGPs, as described in the following sections.

#### 3.7.1. State-based non-judicial grievance mechanisms

Amongst state-based non-judicial grievance mechanisms, the Council of Europe Recommendation highlights "labour inspectorates, consumer protection authorities and environmental agencies, national human rights institutions, ombudsperson institutions and national equality bodies" (Appendix,

paragraph 51). Member states should, it suggests, “evaluate the adequacy and availability” of such mechanisms and the remedies they provide for, with reference to the UNGPs’ effectiveness criteria (Appendix, paragraph 50; see further Section 3.7.2 below). In line with the UNGPs, member states are further encouraged to consider, where needed, “extending the mandate of existing State-based non-judicial bodies or creating new ones with the capacity to receive and adjudicate complaints of business-related human rights abuses and afford reparation to the victims” (Appendix, paragraph 51; cf. UNGP 17, Commentary).

Evidently, the range of specific bodies with an actual or potential role to play in this setting will vary widely European states, since these embody diverse models in their institutional arrangements for hearing complaints from individuals and groups, or addressing allegations of regulatory infractions, across different policy areas, including consumer protection, environmental standards, labour, health and safety, privacy and data protection, discrimination, children’s rights, advertising and marketing standards and practices, and privatised public service delivery in areas such as health, water, energy and telecommunications.

Advisers to victims should therefore carefully review non-judicial avenues of recourse that may be available, according to the jurisdiction(s) and subject-matter of the complaint in question. In Council of Europe member states, this will usually include at least some of those considered below.

### *3.7.1.1. National Human rights Institutions (NHRI)*

(NHRIs) are independent bodies established by national law or constitutions to promote and protect human rights *inter alia* through monitoring, formal investigations, advice to governments, reporting to international and regional human rights supervisory mechanisms, research and human rights education. Such institutions are subject to periodic re-accreditation with reference to the [UN Paris Principles](#), to assure their independence and objectivity, amongst other criteria (UNGA 1993). The Human Rights Committee has recognised the role of NHRIs with appropriate powers in contributing to remediation through investigations.<sup>197</sup>

The Human Rights Council has recognised that NHRIs’ mandate as provided for by the UN Paris Principles includes business and human rights within its scope (UNHRC 2011), a position signalled earlier by NHRIs themselves in the [2010 Edinburgh Declaration \(ICC 2010\)](#). NHRIs are increasingly putting this

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197. HR Committee, “General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (2004), CCPR/C/21/Rev.1/Add. 1326, §15.

human rights and business mandate into action in Europe in ways that may contribute to non-judicial redress for victims.

Examples:

- ▶ The [Danish Institute for Human Rights](#), [German Institute for Human Rights](#) and [Scottish Human Rights Commission](#) have established Human Rights and Business Programmes
- ▶ France's Commission nationale consultative des droits de l'homme (CNCDH) published an [opinion on the issues associated with the application by France of the United Nations' Guiding Principles](#)
- ▶ The Netherlands Institute for Human Rights published a [report on issues affecting Polish migrant workers](#)
- ▶ The [Northern Ireland Human Rights Commission](#) established a multi-stakeholder forum as a platform for dialogue between government, business, and civil society on business and human rights
- ▶ The UK Equality and Human Rights Commission undertook investigations into human rights issues affecting workers in the [meat packing and poultry processing sectors](#) and [employment practices in the commercial cleaning sector](#)
- ▶ In 2012, the [European Network of NHRIs \(ENNHRI\)](#), which includes NHRIs from across Council of Europe member states, adopted the Berlin Action Plan on business and human rights.

Some NHRIs, though not all, have a mandate to handle complaints, which may allow them to receive or adjudicate allegations of business-related human rights abuses (EU Agency for Fundamental Rights 2010; McGregor *et al.* 2017). If they lack the power to adjudicate individual cases, they may nonetheless have other powers permitting them to support victims in seeking judicial or other remedies.

Example:

- ▶ Irish Human Rights and Equality Commission [IHREC](#)

Under its statutory mandate as provided by [the Irish Human Rights and Equality Commission Act 2014](#), the Irish Human Rights and Equality Commission (IHREC) can:

- Provide legal assistance to claimants in human rights or equality cases at national level
- Initiate legal proceedings at national level
- Appear as *amicus curiae* and "friend of the court" before the Irish High Court and Supreme Court in cases concerning human rights and equality



- Make third party interventions before the European Court of Human Rights.

The IHREC's predecessor, the Irish Human Rights Commission (IHRC), made five interventions before the European Court, both concerning applications against Ireland and against other States, where the IHRC intervened on behalf of the ENNHRI. The IHRC also appeared as *amicus curiae* before the High Court in a case concerning retention of telecommunications data by service providers for access and use by State authorities for a period of up to three years. The case challenged the EU [Directive 2006/24/EC](#) and domestic law data retention mechanisms (including the [Criminal Justice \(Terrorist Offences\) Act 2005](#)) in connection with Articles 8 and 10 ECHR.

With regard to human rights abuses perpetrated outside by TNCs, victims may consider referring complaints to NHRIs in the TNC's home country or its host country.

Examples:

- ▶ Villagers from Cambodia and Thailand delivered a complaint to Malaysia's NHRI [SUHAKAM](#), raising human rights and environmental concerns about the work of Malaysian company, Mega First, on the Don Sahong Dam project in Laos (Earthrights International 2017)).
- ▶ In 2016, [SUHAKAM](#) received 80 complaints from a single indigenous community in Malaysia concerning encroachment on native customary land by logging, mining, and farming activities without respect for the principle of free, prior and informed consent, as well as alleged pollution of rivers and rapid deforestation due to logging (SUHAKAM 2016).
- ▶ In 2017, Thailand's NHRI investigated the human rights impacts on local inhabitants of environmental damage resulting from the activities of Thai companies operating mines on behalf of state-run businesses in Myanmar (Myanmar Times 2017).

### 3.7.1.2. National equality bodies

In the EU, equal treatment legislation requires member states to set up National Equality Bodies (NEBs). [NEBs](#) are required to provide independent assistance to victims of discrimination. This may involve, for example:

- ▶ Providing information about anti-discrimination laws, legal remedies or compensation;
- ▶ Directing victims to other organisations that can help them;
- ▶ Assisting victims in mediating, i.e. reaching amicable settlements or mutual agreements with alleged perpetrators;

- ▶ Providing legal advice and representation to victims.

NEBs can also:

- ▶ Conduct independent surveys on discrimination;
- ▶ Publish independent reports and make recommendations on any issue relating to discrimination (Equinet 2017).

NEBs may be legally required to promote equality and combat discrimination in relation to one, some, or all of the grounds of discrimination covered by EU law – gender, race and ethnicity, age, sexual orientation, religion or belief and disability. Although EU law only requires that NEBs are set up in the fields of race and ethnic origin and gender, many countries have bodies that deal with other kinds of unlawful discrimination as well.

Examples:

- ▶ [Serbia's Commissioner for Protection of Equality](#) has investigated age discrimination in consumer banking.
- ▶ [Hungary's Equal Treatment Authority](#) receives around 1000 complaints each year most of which relate to employment discrimination.

Further information on NEBs in Council of Europe member states can be accessed via Equinet, the European Network for Equality Bodies (Equinet 2017).

### *3.7.1.3. Ombudsman institutions*

The institution of ombudsman originated to protect individuals against the state. Gradually, however, their mandates and activities have broadened to encompass the private sector. As well as considering complaints about public services, ombudsman schemes may exist at national or regional level to consider disputes between consumers and companies or between universities and students, for example. Ombudsman institutions may be established by statute or result from voluntary schemes within a given industry sector, where their main role may be to provide an informal alternative to civil courts for the resolution of disputes.

#### *“The Role of an Ombudsman*

- ▶ Ombudsmen offer their services free of charge, and are thus accessible to individuals who could not afford to pursue their complaints through the courts.
- ▶ They are committed to achieving redress for the individual, but also, where they identify systemic failings, to seek changes in the work of the bodies in their jurisdiction, both individually and collectively.

- ▶ They can generally undertake a single investigation into multiple complaints about the same topic, thus avoiding duplication and excessive cost.
- ▶ They are neutral arbiters and not advocates nor ‘consumer champions’.
- ▶ They normally ask the body concerned and the complainant to try to resolve complaints before commencing an investigation.
- ▶ They usually seek to resolve disputes without resort to formal investigations where this is possible and desirable” (The Ombudsman Association 2017).

Four categories of ombudsman institution may be identified, each with potential relevance in supporting access to remedy for victims of business-related human rights grievances:

1) The “classical” ombudsman: Such entities are typically appointed by a legislative body to deal with complaints from the public regarding decisions, actions or omissions of public administration. Their role is to protect against rights violations, abuse of powers, error, negligence, unfair decisions and maladministration and to improve public administration while improving public accountability and transparency. There are more than 150 such institutions worldwide ([International Ombudsman Association 2017](#)). They may be able to address business-related human rights abuses, for instance, where the alleged perpetrator is a government body that has failed adequately to regulate business activities, or a state-owned enterprise.

Example:

- ▶ In 2012, Poland’s Human Rights Defender filed requests for clarification to the Supreme Court regarding the interpretation of laws on trade union recognition and on the employment law dimensions of termination of membership of the board of a corporation.

2) Advocate Ombudsman: These bodies function as “[advocates on behalf of a designated population, such as patients in long-term care facilities](#)” ([International Ombudsman Association 2017](#)). Their legal powers and duties, for example, to initiate formal investigations, make recommendations to government and receive complaints about individual cases, may contribute to remediation of business-related human rights abuses.

Example:

- ▶ Children’s Ombudsman Institutions or Children’s Commissioners
 

There are over 40 Children’s ombudsman institutions worldwide, with mandates to promote and protect the human rights of children

established in line with recommendations of the CRC and Council of Europe. These bodies may be able

- To give advice to children or their families about services they receive
- To litigate in court on behalf of children to promote or protect their rights
- Launch formal investigations.

While some such institutions may lack a mandate to act on complaints about private organisations or individuals, they should be able to address general threats to children's rights linked to business activities, such as human trafficking, online safety and conditions experienced by children in privately-provided detention or residential care.

3) Organisational or internal ombudsman: Public or private organisations may provide for the appointment or employment of neutral or independent office-holders to facilitate informal resolution of concerns of employees, managers, students or external clients. On occasion the mandate of such bodies may refer to human rights, for instance, where this is provided for by a company ethics code or code of conduct that refers to international human rights standards.

Example:

- ▶ **Coca-Cola Enterprises Ombudsman:** "Coca-Cola Enterprises strives to create a work environment that ensures everyone is treated with dignity, respect, honesty and fairness. The company believes in putting people first and in resolving issues and concerns at the earliest possible stage. The Ombuds Office was created as an alternate channel of communication for employees to discuss or seek guidance about workplace concerns. The Ombuds office has specially trained neutral professionals who are designated to help employees with work-related issues. These skilled conflict resolution specialists are available to all employees of Coca-Cola Enterprises. Ombuds are confidential, neutral and independent. They help employees in many ways, including listening, coaching and acting as a go-between should a workplace dispute arise. The primary goal of this professional is to enhance the employee's ability to deal effectively with the situation and seek timely, fair and equitable resolution. No formal written records ensure confidentiality and Ombuds report directly to the Chief Executive Officer so employees can raise issues without fear of workplace retaliation (Coca-Cola Enterprises 2017).

4) Industry-level ombudsman schemes: In some countries, Ombudsmen schemes are established by law to provide redress for consumers of products or services from a particular sector. These may have power to issue binding decisions. Typically the cost of the Ombudsman's services is met through fees paid by bodies in their jurisdiction. If so, participants from the relevant industry or sector may be obliged to support the scheme.

Example:

- ▶ **UK Financial Services Ombudsman:** The Financial Ombudsman Service was established by the [Financial Services and Markets Act 2000](#) to help settle disputes between consumers and UK-based businesses providing financial services. It can address complaints relating to banking, insurance, mortgages, pensions, savings and investments, credit cards and store cards, loans and credit, hire purchase and pawn-broking, financial advice, stocks, shares, unit trusts and bonds.

Before the ombudsman can step in, a business has a maximum of 8 weeks to resolve a consumer's complaint. If they do not resolve it within 8 weeks or the consumer is not happy with the response, she can refer the complaint to the Ombudsman service. The Ombudsman decides cases based on what is "fair and reasonable" in the particular circumstances of a case, and must base its decision on relevant law and regulations; regulator's rules, guidance and standards; codes of practice; and, if appropriate, what she considers to have been good industry practice at the relevant time.

Around 90% of disputes are settled without a formal decision by the ombudsman. If the consumer accepts a final ombudsman decision, it is binding on both parties and enforceable in court. If the consumer is not satisfied with the decision, her legal rights remain unaffected and, where relevant, she may attempt to litigate the matter through the courts (Financial Ombudsman Service 2017).

In the UK, other private ombudsman schemes include:

- ▶ A Legal Ombudsman for complaints about lawyers or claims management companies (Legal Ombudsman 2017)
- ▶ An Energy Ombudsman for complaints about gas or electricity companies supplying consumers (Energy Ombudsman 2017)
- ▶ The Housing Ombudsman for complaints about landlords and agents (Housing Ombudsman Service 2017).

A European Ombudsman has also been established within the EU (see below Section 3.7.2.2 Regional or International Human Rights Bodies).

### *3.7.1.4. National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises*

The Council of Europe Recommendation calls for all member states to implement the OECD Guidelines for Multinational Enterprises (Appendix, paragraph 52). The Guidelines are recommendations to all entities of multinational enterprises based or operating in an adhering country, as well as the business partners of such enterprises, including suppliers, sub-contractors and franchisees. The OECD Guidelines also apply to state-owned enterprises of adhering countries whether operating at home or abroad. During their 2011 revision, the Guidelines were aligned with the UNGPs.

Victims of abuses by multinational enterprises in an adhering country, or alternatively in a non-adhering country if the abuse is perpetrated by an OECD-based MNE or business-partner, can make complaints under the Guidelines: All adhering states are required to have a National Contact Point (NCP) to promote awareness and respect for the Guidelines, and to handle complaints about their breach, through a process called the “specific instances” procedure (see box below). Importantly, NGOs and trade unions can also make complaints to NCPs on behalf of victims or in their own right, as can other stakeholders: complaints can be initiated by anyone who can demonstrate an “interest”, a concept that is broadly defined, in an alleged abuse.

The Council of Europe Recommendation CM/(Rec(2016)3 counsels member states to ensure their NCPs’ effectiveness by: providing them with the necessary human and financial resources; ensuring that NCPs are visible, accessible, transparent, accountable and impartial; promoting dialogue-based approaches; considering whether to make public the recommendations of NCPs; and ensuring that such recommendations are taken into account by governmental authorities in their decisions on public procurement, export credits or investment guarantees. Of particular note is its emphasis on linking the outcomes of NCP proceedings to public procurement, export credits and investment guarantees (Appendix, paragraph 53; see further Explanatory Memorandum, paragraphs 80-82).

Since 2011, NCPs have gradually begun to consider human rights issues, for example:

- ▶ Italy’s NCP, together with the OECD Secretariat, has taken steps to promote responsible conduct amongst OECD-registered companies operating in Myanmar (PCN 2014).

- ▶ Norway's NCP investigated alleged abuses of indigenous peoples' human rights by a Norwegian mining company in the Philippines ([Royal Ministry of Foreign Affairs 2013](#)).

It should be noted that the NCP mechanism does not guarantee an effective remedy for victims of human rights abuses, even if these are established. The outcome of the "specific instance" procedure, which may proceed via mediation or conciliation, depends on the voluntary cooperation of the alleged perpetrator, as well as the attitude, actions and resources of the NCP itself.

#### Specific instances procedure: outline

- ▶ Phase 1: Initial assessment. This starts when a complaint is submitted to an NCP. At this stage the NCP must conduct a preliminary investigation to determine if the case merits further examination.
- ▶ Phase 2: Mediation. The NCP decides whether, in its view, the case merits further examination. At this stage, the NCP should try to bring complainants and alleged perpetrator together to resolve the case through a process focused on mediation and conciliation.
- ▶ Phase 3: NCP's final statement. This should outline the alleged breaches and how the NCP dealt with the case. It may include recommendations on the implementation of the OECD Guidelines, as well as a determination as to whether a breach occurred. In cases where either party refuses to participate in the mediation process, or if mediation fails, the NCP should still issue a final statement disclosing these circumstances.

The [OECD Watch Case Check](#) is a tool that aims to help victims and their representatives identify whether a situation may give rise to a complaint under the OECD Guidelines. It provides advice and orientation about which provisions of the Guidelines could be cited in a complaint; which NCP or NCPs the complaint could be filed with; and on process and case handling considerations to take into account before initiating the specific instance procedure (OECD Watch 2017).

Examples:

- ▶ Netherlands/Argentina: As part of a specific instance procedure managed by the Dutch NCP, four NGOs (CEDHA, INCASUR, Oxfam Novib and SOMO) reached agreement with the Netherlands-based agricultural MNE Nidera regarding the company's human rights policies and practices. As part of the agreement, Nidera agreed to strengthen its human rights policy, implement formalised human rights due diligence procedures for temporary rural workers, and allowed the NGOs to monitor its Argentine corn seed operations through field visits ([OECD Watch 2012](#)).

- ▶ UK/Germany/Bahrain: A complaint was brought by 5 NGOs alleging that the companies Gamma and Trovicor were selling intrusive surveillance technology and training to the Bahraini government where this technology is allegedly used to target human rights activists. Mediation did not result in agreement. However, in its final statement, the UK NCP found that Gamma's actions were inconsistent with provisions of the OECD Guidelines and criticised Gamma for failing to put in place a due diligence process and commit to any binding standards for the observance of human rights. The NCP recommended *inter alia* that Gamma should co-operate with official remedy processes used by victims where it identifies that its products may have been misused (OECD Watch 2015).
- ▶ France/Canada/Benin: The International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) brought a complaint before the French NCP in 2010 alleging breaches of ILO Core Labour Standards of workers, in particular anti-union practices, at Novotel hotels in Canada and Benin owned by Accor Group. In 2015, the NCP reported at conclusion of its monitoring of follow-up actions in the case, that the Accor Group had introduced due diligence measures and that the NCP had recommended to safeguard freedom of association and the right to collective bargaining, particularly through a close monitoring structure led by the Human Resource Department and the Corporate Social Responsibility and Labour Relations Department, with support from the Group's executive management. In addition, worker and employer representatives signed a collective agreement including a wage scale and establishment of a health and safety committee in Benin (France National Contact Point 2015).

Further information on NCPs and the specific instances process is available via the following resources and organisations:

- ▶ OECD Database of Specific Instances: <https://mneguidelines.oecd.org/database/>
- ▶ OECD National Contact Points website: <http://www.oecd.org/corporate/mne/ncps.htm>
- ▶ OECD Watch: <https://www.oecdwatch.org/>
- ▶ OECD Trade Union Advisory Committee (TUAC): <http://www.tuac-oecd-mneguidelines.org/Home.asp>
- ▶ OECD Business and Industry Advisory Committee: <http://biac.org/wp-content/uploads/2015/06/FIN-15-06-GUIDELINES-BROCHURE.pdf>



### 3.7.1.5. *Alternative dispute resolution*

Alternative dispute resolution (ADR) refers to a range of processes by which parties may be able to resolve disputes without a judicial determination. ADR mechanisms can be connected to judicial proceedings. In some jurisdictions, for example, a court may have power in certain circumstances to compel the parties to resolve their dispute via mediation. On the other hand, ADR mechanisms may be available to parties to a dispute without court involvement, or indeed any involvement on the part of the state. ADR mechanisms thus cut across the UNGPs' classification of 'state-based' and 'non-state-based' grievance mechanisms. ADR may contribute to securing an effective remedy for victims in a range of situations where human rights issues are at stake. Some of the main types of ADR are as follows:

#### *i) Arbitration*

Parties to a contract may resort to arbitration if their dispute is governed by an arbitration agreement concluded before the dispute arises. An arbitrator's decision is binding on both parties. In the human rights and business context, controversy has arisen regarding the use and role of arbitration in resolving disputes under host state-investor agreements, through "investor-state dispute settlement" mechanisms (ISDS). ISDS grants an investor the right to use arbitral proceedings against a foreign government in relation to the terms and implementation of international investment and trade agreements. ISDS may thus take place under the [International Centre for Settlement of Investment Disputes](#) of the [World Bank](#), or international [arbitral tribunals](#) governed by their own rules and/or institutions, such as the [London Court of International Arbitration](#), the [International Chamber of Commerce](#), the [Hong Kong International Arbitration Centre](#) or the [UNCITRAL Arbitration Rules](#).

#### *ii) Conciliation*

This less formal process does not presume the existence of an arbitration clause or agreement between the parties. Any party can request the other party to appoint a conciliator. A conciliator typically meets with the parties to the dispute both separately and together in attempting to resolve their differences. Conciliation aims to lower tensions, improve communications, encourage parties to explore potential solutions and assist them in finding a mutually acceptable outcome. Conciliation differs from arbitration in that the conciliation process *per se* has no legal standing, while the conciliator does not usually make a written determination or award. It differs from mediation in that a conciliator is usually mandated to propose a non-binding recommendation for settlement. Conciliation may be relied on where the

parties need to restore or repair their relationship, for instance, in employment context, where the employee seeks to return to his or her job following resolution of the dispute.

### *iii) Mediation*

In this case, a neutral third party, the mediator, assists the parties to reach a settlement, which may be legally binding, by facilitating negotiation in a confidential process. Mediation has a structure and timetable that “ordinary” negotiation lacks. Mediators may use various techniques to open, or improve, dialogue and empathy between disputants, aiming to help the parties reach an agreement; many receive professional training to this end.

### *iv) Non-State-based grievance mechanisms*

The UNGPs identify two categories of non-state-based grievance mechanisms:

- ▶ Those administered “by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group” (below referred to as “business-related grievance mechanisms”), and
- ▶ Regional and international human rights bodies (UNGP 28, Commentary).

Under UNGP 30, effective business-related grievance mechanisms should also be made available as part of “industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards”.

#### *3.7.2.1. Business-related grievance mechanisms*

The UNGPs promote such mechanisms on the basis that they may offer certain advantages to victims over legal forms of redress. Depending on the circumstances of the case, these benefits might include:

- ▶ Providing solutions where grievances do not raise actionable matters of law
- ▶ Securing a remedy more quickly than legal action
- ▶ Costing less than legal proceedings
- ▶ Providing an “early warning system” about abuses before situations escalate
- ▶ Enabling companies to improve stakeholder relationships whilst empowering communities to engage effectively with companies.

On the other hand, such mechanisms "...must not undermine the strengthening of State institutions, particularly judicial mechanisms".<sup>198</sup> Within this sub-category of non-state-based grievance mechanisms, the UNGPs distinguish two further types.

*i) Operational level grievance mechanisms*

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted (UNGP 29).

Operational level grievance mechanisms typically intend to facilitate the raising of complaints against a company or development project by members of local communities or others directly affected by company operations or the project. Such mechanisms may be designed and administered either by an individual company; by the company in collaboration with its stakeholders, such as donors; or by an industry association or a multi-stakeholder group. Participation in operational-level grievance mechanisms is considered an integral part of a company's human rights due diligence process. Businesses should after all provide for, or cooperate in, the remediation of any adverse impacts to which they have caused or contributed (UNGP 22).

Operational-level mechanisms may, as noted, have a dual role in resolving complaints as well as enhancing community-company dialogue with a view to identifying and addressing points of contention before they escalate to conflict. They may also provide a link to mechanisms capable of providing a remedy in the sense required under human rights instruments. For example:

- ▶ The operational-level grievance mechanism of a multi-national company's mine in Ghana has an escalation procedure that links first to the Ghana Commission for Human Rights and the Administration of Justice, Ghana's NHRI, and then to the judicial system (NANHRI 2013).
- ▶ A farm-level labour grievance mechanisms in a supermarket's fruit supply chain in South Africa includes recourse to the Commission for Conciliation, Mediation and Arbitration (CCMA), a government labour relations body, when the farm-level mechanism is unable to produce resolution (SHIFT 2014).

Usually, it is considered appropriate to provide separate channels for remedy for employees and impacted communities, although some companies

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198. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, [A/HRC/8/5](#), 7 April 2008, §86.

choose to combine these in one mechanism. However, the UNGPs require more than a mere “complaints hotline”: there must be a process by which it can engage parties in dialogue in order to resolve disputes and grievances.

Operational-level grievance mechanisms can provide a complement to stakeholder engagement processes, collective bargaining processes and other judicial and non-judicial mechanisms, but must not undermine or preclude access to these. This point is underlined by both the UNGPs and the Council of Europe Recommendation (UNGP 29; Appendix, paragraph 54).

### *ii) Industry-associated grievance mechanisms*

A number of industry sector-level initiatives or organisations have associated complaints-handling mechanisms. Applicability of such a mechanism is usually based on voluntary company participation or through a contractual requirement to implement certain standards (e.g. a company is required to implement a supply chain standard, including participation in a grievance mechanism for workers, by a buyer). For example:

- ▶ Netherlands: The Dutch Social and Economic Council has led the establishment of six “International Responsible Business Conduct” multi-stakeholder agreements for Dutch businesses, trade unions, CSOs and government addressing human rights as well as environmental impacts in the garments and textile; banking; gold; forestry; vegetable protein and natural stone sectors. Parties to the agreements commit to collaborate to address abuses and report annually on progress. Participating companies agree to “investigate problems and risks across their entire supply chain” and “draft an annual improvement plan with specific goals that they must have reached within manageable periods of three and five years”.

In addition, each agreement provides for a complaint mechanism by which stakeholders can raise an issue “of material significance to the stakeholder individually or to the group to which he belongs and one which he can substantiate in relation to the enterprise concerned on the basis of the contents of the Agreement, including the OECD Guidelines and the UNGP.” A detailed complaint-handling process is furthermore described (SER 2017).

Complaints mechanisms may also be attached to:

- ▶ Private banks, pension funds and financial services providers supporting projects or activities alleged to impact negatively on human rights, through loans, insurance or other investment vehicles;
- ▶ ECAs or export insurance agencies (see Section 1.2.3.1 above).

In the past, however, such mechanisms have often exhibited weaknesses in delivering remedies for victims. If national laws are inconsistent with human rights standards, remedies provided under them may likewise fall short. Victims may be offered, and often accept, compensation that does not reflect the damage caused or their entitlement to restitution, other human rights or cultural preferences. Confidentiality may hinder the deterrent effect of successful claims against duty-bearers and, overall, non-judicial mechanisms may be ill-equipped to address gross and systemic human rights abuses (Dhanarajan and Methven O'Brien, 2014: 67).

Example:

- ▶ The International Council on Mining and Minerals (ICMM) has 20 national, regional and global mining associations and 19 companies as its members, who are required to commit to implementing the ICMM Sustainable Development Framework. The Sustainable Development Framework includes ten fundamental principles, including respect for human rights. Any person who believes that a company is in breach of their ICMM membership commitments, and wishes to make representations may do so in writing. The ICMM may forward a complaint for resolution by the company concerned. If the matter is not resolved in this way, and if ICMM deems it appropriate and in its interests, it may decide to investigate and request further information from the parties. Information is not available, however, as to whether and if so which complaints have been filed by ICMM or about their outcome (ICMM 2017).

Hence the Council of Europe Recommendation CM/Rec(2016)3 emphasises that business-related grievance mechanisms should be established and operate in line with the effectiveness criteria set down by UNGP 31. Highlighted for specific comment, moreover, is that such mechanisms should not “impede the alleged victim’s access to the regular court system or State-based non-judicial mechanisms” (Appendix, paragraph 54).

### *3.7.2.2. Regional or international human rights bodies*

The UNGPs identify regional and international human rights bodies as a second category of non-state-based grievance mechanisms (UNGP 28, Commentary).

#### **Regional level**

The European Court and ECSR clearly constitute such bodies and the scope, and limits, of remedies they may provide for victims of business-related human rights abuses inside, and outside, Europe have been discussed earlier in Part III. Other relevant bodies at the European regional level include the following:

### *European Investment Bank (EIB) Complaints Mechanism*

Who may complain? Individuals, organisations or corporations affected by EIB activities can complain. Complainants do not need to be directly affected by the EIB decision, action or omission and are not required to identify the applicable rule, regulation or policy that may have been breached.

Subject of complaints: Complaints can be made about actions or decisions that stakeholders feel the EIB Group has carried out incorrectly, unfairly or unlawfully. These may concern: project preparation processes; the social and environmental impacts of a project; arrangements for involvement of affected communities, minorities and vulnerable groups; project implementation; access to information; procurement procedures; human resources issues; customer relations; any other aspect of the planning, implementation or impact of EIB projects (EIB 2017).

### *European Bank for Reconstruction and Development (EBRD) Project Complaint Mechanism*

The Project Complaint Mechanism (PCM) was established to assess and review complaints about EBRD-financed projects. It is intended to provide individuals and local groups adversely affected by an EBRD project with a means of raising complaints or grievances (EBRD 2017).

Example:

- ▶ In reports reviewing decisions to finance three hydropower plants in Macedonia, Croatia and Georgia the PCM found that the EBRD had violated its own policies by improperly assessing the projects' impact on biodiversity and failing to implement procedures that would ensure meaningful public participation decision-making about the projects (SOMO 2017).

### *European Ombudsman*

Persons who are citizens of or reside in an EU member state can make a complaint to the European Ombudsman about maladministration in EU bodies or institutions. Businesses, associations or other bodies with a registered office in the Union may also complain to the Ombudsman (European Ombudsman 2017).

Example:

- ▶ The EU Ombudsperson assessed a complaint filed by two NGOs following the European Commission's refusal to take human rights into account in negotiations for trade and investment agreements with Vietnam. In the documents they submitted, the NGOs recalled that EU policies require that a Human Rights Impact Assessment be

conducted before a Free Trade Agreement can be signed. The European Commission has refused to conduct the obligatory Human Rights Impact Assessment with regard to Vietnam on the basis that a partial assessment was made in 2009. In her decision, the Ombudsperson concluded that the EU institutions and bodies must always consider the compliance of their actions and the possible impact of their actions on fundamental rights and that the EU should “not only ensure that the envisaged agreements comply with existing human rights obligations and do not lower the existing standards of human rights protection, but it should also aim at furthering the cause of human rights in the partner countries” (FIDH 2014 and 2015; European Ombudsman 2017).

#### *Council of Europe Development Bank*

The Council of Europe Development Bank does not publish information regarding a complaint mechanism (Council of Europe Development Bank 2017).

### **International level**

At international level, various UN and other human rights mechanisms should be relevant in seeking redress for business-related abuses.

#### *UN Treaty Bodies*

UN human rights treaty bodies monitor implementation of the core international human rights treaties (OHCHR 2017a). There are ten human rights treaty bodies composed of independent experts of recognised competence in human rights, who are nominated and elected for fixed renewable terms of four years by state parties (OHCHR 2017b).

There are three main procedures for bringing complaints of violations of the provisions of the human rights treaties before the human rights treaty bodies: individual communications; state-to-state complaints; and inquiries (OHCHR 2017c).

### **Individual communications**

Currently, eight of the human rights treaty bodies (the CCPR, CERD, CAT, CEDAW, CRPD, CED, CESC and CRC) may, under certain conditions, receive and consider individual complaints or communications from individuals. The individual complaint mechanism for the Committee on Migrant Workers (CMW) has not yet entered into force.

Who can complain? Anyone can lodge a complaint with a committee against a state that is party to the treaty in question (through ratification or accession) providing for the rights which have allegedly been violated; that accepted the committee's competence to examine individual complaints, either through ratification or accession to an optional protocol (in the case of ICCPR, ICEDAW, ICRPD, ICESCR and ICRC) or by making a declaration to that effect under a specific article of the convention (in the case of ICERD, ICAT, ICED and ICRMW).

Complaints may also be brought by third parties on behalf of individuals, provided they have given their written consent. In certain cases, a third party may bring a case without such consent, for example, where a person is in prison without access to the outside world or is a victim of an enforced disappearance. In such cases, the author of the complaint should state clearly why such consent cannot be provided (OHCHR 2017c).

In some cases, UN treaty bodies have contributed to redress for victims of abuses perpetrated by corporations through their individual communications procedures.

Examples:

#### *UN Human Rights Committee*

- ▶ In *Länsman et al v. Finland*, reindeer breeders of Sami ethnic origin challenged the decision of Finland's Central Forestry Board to conclude a contract with a private company that would allow the quarrying of stone and its transportation through their reindeer herding territory. This, they alleged, would have violated their rights under Article 27 ICCPR, in particular the right to enjoy their own culture, which is traditionally based on reindeer husbandry. The CCPR recalled that the freedom of states to pursue their economic development is limited by their obligations under Article 27 ICCPR but concluded that there was no violation, because the applicants were consulted and their interests considered during the proceedings leading to the issue of the quarrying permit, and that reindeer herding had not been adversely affected. The CCPR however warned that Finland would be under a duty to consider the cultural rights of minorities in relation to any extension of existing contracts or grant of new ones.<sup>199</sup>
- ▶ In *Ángela Poma Poma v. Peru*, the CCPR found Article 27 ICCPR was violated by the construction of wells that entailed the applicant was unable to continue traditional economic activity owing to the drying

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199. Communication No. 511/1992, 8 November 1992.



out of the land and loss of her livestock, on grounds *inter alia* that: neither the applicant nor her community were consulted concerning the development in question; the state did not require studies to be undertaken by a competent independent body to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimise the negative consequences and repair the harm done. The CCPR found that the state had substantively compromised the applicant's way of life and culture under Article 27 ICCPR.<sup>200</sup>

### *UN Committee on the Elimination of Racial Discrimination (CERD)*

- ▶ CERD has used its Early Warning and Urgent Action procedure in addressing complaints raised by indigenous representatives of the Western Shoshones concerning privatisation of their ancestral lands. First, it sent the US government a list of questions. On the basis of information received, CERD then adopted a series of recommendations. In particular, it urged the US government to establish a dialogue with the Western Shoshone representatives to reach an acceptable solution. Pending a resolution, CERD called for the adoption of interim measures, including freezing "any plan to privatise Western Shoshone ancestral lands for transfer to multi-national extractive industries and energy developers".<sup>201</sup>

It can however be remarked that UN treaty bodies' individual complaints procedures have rarely been used in connection with business-related human rights abuses. In addition, treaty bodies' decisions on individual complaints are of a quasi-judicial nature and not legally binding, albeit states are considered to have a good faith obligation to take their opinions into consideration and to implement recommendations.

### **Inquiries by treaty monitoring bodies**

The CAT, CEDAW and CRPD (and also the CESC and CED when the relevant procedures enter into force) can initiate inquiries or visits to the territory of a state party if they receive information on serious and systematic human rights violations. Inquiries and visits can only be undertaken in relation to states that have recognised treaty-monitoring bodies' competence in this regard and following receipt of reliable information to substantiate allegations.

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200. Communication No. 1457/2006, 24 April 2009.

201. CERD, Early warning and urgent action procedure – Decision 1 (68) USA, 11 April 2006, CERD/C/USA/DEC/1.

## Treaty body guidance

Signalling that greater attention is now being paid by UN treaty bodies to business-related human rights abuses, the CESCR and CRC have recently issued general guidance on business and human rights issues:

- ▶ CRC: General comment No. 16 on State obligations regarding the impact of the business sector on children's rights (CRC 2013);
- ▶ CESCR: General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR 2017).

Other procedures by which complaints can be made in the UN human rights system, besides treaty monitoring bodies, include the Human Rights Council Complaint Procedure and the Special Procedures of the Human Rights Council (OHCHR 2017d).

### *UN Working Group on Business and Human Rights*

The UN Working Group on the issue of human rights and transnational corporations and other business enterprises ("Working Group") is a special procedure with a [mandate](#) *inter alia*:

- ▶ To promote the effective and comprehensive dissemination and implementation of the UNGPs;
- ▶ To identify, exchange and promote good practices and lessons learned on the implementation of the UNGPs and to assess and make recommendations thereon and, in that context, to seek and receive information from all relevant sources, including Governments, transnational corporations and other business enterprises, national human rights institutions, civil society and rights-holders; and
- ▶ To continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas (UNHRC 2011).

Given its mandate permits it to "receive information from rights-holders", the Working Group can receive communications from alleged victims of business-related human rights abuses. It cannot however adjudicate on these, nor impose sanctions, but only exhort states and companies to prevent or redress abuses.

## Submitting complaints to the UN Working Group on Business and Human Rights

The Working Group can receive information on alleged human rights abuses or violations and, where deemed appropriate, intervene directly with states, business enterprises and others on such allegations. Such intervention can relate to a human rights abuse or violation which has already occurred, is on-going, or which has a high risk of occurring. The process involves sending a letter to the concerned states and business enterprises to draw their attention to the facts of the allegations made and the applicable international human rights norms and standards, in particular the UNGPs.

Communications sent and replies received remain confidential until they are published in joint communications reports submitted to each regular session of the Human Rights Council (in March, June and September). In certain situations, including those of grave concern, the Working Group may issue a public statement earlier.

The Human Rights Council, in its resolution 26/22 encourages all states, relevant UN agencies, funds and programmes, treaty bodies and civil society actors, including non-governmental organizations, as well as public and private businesses to cooperate fully with the Working Group by responding to communications transmitted.

Communications of the Working Group deal with allegations in relation to cases involving or impacting on one or more individuals or a particular group. The Working Group also receives information related to concerns of a broader, structural nature, including related to laws, draft laws, or policies that may impact a large number of individuals.

Communications of the Working Group can take various forms including:

- a) **Urgent appeals** which are used in cases where the alleged abuses or violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or on-going damage of a very grave nature to victims that cannot be addressed in a timely manner by the procedure of allegation letters.
- b) **Allegation letters** which are used to communicate information about abuses or violations that are said to have already occurred or in cases not covered by urgent appeals.

The dialogue established with governments and business enterprises through communications does not constitute a statement of facts on the

part of the Working Group; it rather aims to encourage the Governments and business enterprises concerned to investigate the situation and take all necessary steps to provide redress, within their respective areas of obligations and responsibilities.

The information provided to the Working Group may reflect cross-cutting issues and it might therefore send communications jointly with other Special Procedures mandate holders (OHCHR 2017e).

### **Examples of the Working Group's work on individual cases of alleged human rights violations and abuses**

*3 December 2012:* Together with Special Procedures mandates on Food, Health, Toxic Waste, and Water and Sanitation; we expressed concerns to the Government of Armenia regarding the Teghut copper-molybdenum mining project, which allegedly caused serious environmental, health, social and other negative human rights impacts.

*21 June 2013:* Together with Special Procedures mandates on Adequate Housing, Extreme Poverty, Foreign Debt, and Water and Sanitation; we expressed concern to the Government of Portugal at the unaffordability of water and sanitation for vulnerable groups as an alleged consequence of the privatization of water and sanitation services as part of the Government's austerity measures. Concern was also raised about allegations that concerned populations which had not participated in the decision-making process.

*29 August 2013:* Together with Special Procedures mandates on Extreme Poverty, and Water and Sanitation; we expressed concern to the Government of the United Kingdom at the alleged negative impact of rising water costs on people with the lowest incomes, leading to water poverty (OHCHR 2014).

### *ILO Freedom of Association Committee*

Trade unions and employer organisations may bring collective complaints alleging violations of the right to freedom of association before this tripartite body.

#### *i) Other regional and international accountability mechanisms*

Other bodies and procedures at regional and international levels have mandates that should allow them to contribute to remediation of business-related human rights abuses, including:

## *World Bank Group*

The World Bank Inspection Panel is an independent complaints mechanism for people and communities who believe that they have been or are likely to be adversely affected by a World Bank-funded project. The Panel is intended to serve as an impartial fact-finding body, independent from the World Bank management and staff, reporting directly to the Board. The Inspection Panel process aims to promote accountability at the World Bank, give affected people a greater voice in activities supported by the World Bank that affect their rights and interests, and promote redress for any harms suffered (World Bank 2017).

## *International Finance Corporation (IFC)*

The Compliance Advisor/Ombudsman of the IFC and the Multilateral Investment Guarantee Agency (MIGA) is responsible for handling complaints from individuals and communities that are adversely impacted by a project that has received financing from IFC or MIGA (Office of the Compliance Advisor/Ombudsman 2017).

Scope for remediation via the ICC is discussed above in Section 3.5.2.

### 3.7.2. Effectiveness criteria for non-judicial grievance mechanisms

As well as strengths, potential weaknesses attach to non-judicial grievance mechanisms for business-related abuses. As the UNGPs note,

A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. ... Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process (UNGP 31, Commentary).

Criteria for ensuring the effectiveness of non-judicial grievance mechanisms, whether state-based and non-state-based, are hence set forth, and the Council of Europe Recommendation urges member states to ensure that state-based and non-state non-judicial grievance mechanisms meet these criteria (Appendix, paragraph 50).

#### **UNGPs effectiveness criteria for non-judicial grievance mechanisms (UNGP 31)**

(a) **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) **Predictable:** providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, and advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) **Transparent:** keeping the parties to a grievance informed about its progress and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

(f) **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognised human rights;

(g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

**Operational-level mechanisms should also be:**

(h) **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Nonetheless, concerns are frequently raised by civil society organisations and victims' representatives about non-state-based operational-level grievance mechanisms. For example, victims may be offered and may accept compensation that does not reflect the damage caused or their entitlement, for instance, to restitution, other human rights and cultural preferences. Confidentiality of such processes may also hinder their deterrent effect. Non-judicial mechanisms are also ill-equipped to address gross and systemic human rights abuses.

Example:

- ▶ *Olgeta Meri Igat Raits* (All Women Have Rights) Framework of Remediation Initiatives

Canadian mining company Barrick Gold established a process to address sexual violence against women committed by security officers around its Porgera Joint Venture mine in Papua New Guinea

(Barrick Gold n.d.). Local women who had been sexually assaulted were offered monetary compensation, health and education services, but only if they waived their legal rights to sue the company in future. The legitimacy of this approach and its impact on State law enforcement was questioned by NGOs (Earthrights International 2013). In 2015, victims who had refused the compensation offered and instead launched legal proceedings in the US, where the mining company has substantial activities, [reached an out of court settlement with Barrick Gold](#) (The Guardian 2015).

### 3.7.3. Non-judicial grievance mechanisms and the right to effective remedy

In the European context it is important to recall that Article 13 ECHR requires that any remedy allows the competent domestic authorities to deal with any relevant substantive ECHR complaint and to grant appropriate relief: see Section 3.2 above. Even if Article 13 ECHR does not require any particular form of remedy; permits consideration of the aggregate of remedies provided under domestic law; and does not necessarily require a 'national to be a judicial authority. Anybody granting a remedy must still must have sufficient powers guarantees at its disposal, with regard to the circumstances, if Article 13 is to be met. Hence non-judicial grievance mechanisms, particularly non-state based grievance mechanisms, do not in themselves qualify satisfy Article 13 or indeed remedy guarantees provided for by other international human rights instruments.

# Annex

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## Business and human rights: key developments, instruments and initiatives

Recent initiatives by the Council of Europe and its member states on business and human rights as related in this handbook are linked to a number of other policy developments internationally and at the European regional level.

### Global developments: business and human rights in the UN

In 2008, the UNHRC approved the “Protect, Respect, Remedy” framework for business and human rights submitted by the Special Representative of the UN Secretary-General, Professor John Ruggie (SRSG).<sup>202</sup> The framework is based on three principles, or “pillars”: firstly, that states have a duty to protect rights-holders against abuses by businesses within their territory or jurisdiction; secondly, that all businesses have a responsibility to respect human rights; and thirdly, that victims of business-related human rights abuses have a right to access an effective remedy.

Three years later, the UNHRC unanimously endorsed a set of “Guiding Principles” (UNGPs) based on and further elaborating the “three-pillar” framework,<sup>203</sup> and providing guidance for governments, businesses, victims and other stakeholders on what existing human rights standards require in the business context, as discussed throughout this handbook. The UNGPs quickly drew widespread support. The OECD sought to align its *Guidelines for Multinational Enterprises* with the UNGPs during their revision in 2011, while with its ISO 26000 Guidance on Social Responsibility the International Standards Organisation sought a similar result. The UNGPs have subsequently been welcomed by business and employers’ associations as well as by trade unions, CSOs and NHRIs, while many individual companies have undertaken to uphold them or refer to them in corporate policies.<sup>204</sup>

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202. *Report of the Special Representative of the Secretary-General, Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5, 7 April 2008, <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>.

203. *Guiding Principles on Business and Human Rights: Implementing the United Nations’ Protect, Respect and Remedy Framework*, Annex, UN Doc. A/HRC/17/31, 21 March 2011, <http://business-humanrights.org/en/un-guiding-principles/text-of-the-un-guiding-principles>

204. <https://business-humanrights.org/en/company-policy-statements-on-human-rights>



Given the expiry, in 2011, of the SRSG's mandate, the UNHRC simultaneously established a mandate for a new UN Working Group on business and human rights (UNWG) to promote the dissemination and implementation of the UNGPs, and to support the holding of an annual global Forum on Business and Human Rights open to all stakeholders (see below).

As a further measure to promote the UNGPs' implementation, when renewing the UNWG's mandate in 2014, the UNHRC encouraged all states to develop national action plans (NAPs) on business and human rights, welcoming the submission of information by governments and stakeholders on NAPs, as well as the development by the UNWG of guidance on best practices and processes in relation to NAPs.<sup>205</sup> Alongside, the UNHRC established an inter-governmental working group to consider "the content, scope, nature and form" of an international human rights treaty to regulate the activities of transnational corporations and other business enterprises.<sup>206</sup> Finally, the UNHRC also mandated the OHCHR to focus on the "third pillar" of the UN Framework, which has resulted in the development of detailed guidance for states on improving access to remedy for victims of business-related human rights abuses.<sup>207</sup>

## European regional developments: Council of Europe and European Union

The first step taken within the framework of the Council of Europe with a dedicated focus on business and human rights was the adoption by the Council of Europe's Parliamentary Assembly of two Resolutions on "Human Rights and Business" ([Resolution 1757](#) and [Recommendation 1936](#) of the Parliamentary Assembly on "Human rights and Business", 2010). Shortly afterwards, in 2011, the Council of Europe Committee of Ministers' Steering Committee for Human Rights (CDDH) published a [preliminary document listing existing standards and outstanding issues](#) and a [study on the feasibility and the added value of new standard-setting work](#) by the Council of Europe on corporate social responsibility in the field of human rights.

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205. Human Rights Council, Human rights and transnational corporations and other business enterprises, A/HRC/RES/26/22 (15 July 2014), [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/22](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/22). For the UNWG's guidance on NAPs and a list of all NAPs published by states and those in development, see: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

206. Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9 (14 July 2014), [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/9](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9).

207. <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>

Subsequent to these reports, the Committee of Ministers requested the CDDH to elaborate, by the end of 2015, a declaration supporting the UNGPs, as well as a non-binding instrument, including a guide to good practice, and addressing gaps in the implementation of the UNGPs at the European level. A Drafting Group on Human Rights and Business (CDDH-CORP) was then established to support the drafting of these new materials.

Based on the work of the CDDH-CORP, the Council of Europe welcomed the UNGPs in a Declaration of the Committee of Ministers adopted in April 2014. The Declaration expressed strong support for the implementation of the UNGPs by Council of Europe member states. Following this, a drafting process was initiated in the CDDH-CORP that culminated in Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, adopted in March 2016.

Recommendation CM/Rec(2016)3 calls on the governments of all Council of Europe member states to implement the UNGPs “as the current globally agreed baseline” on business and human rights (Appendix, paragraph 1) and to review and evaluate national legislation and practice for compliance at regular intervals (paragraph 1).

As one measure to support this aim, the Recommendation calls on Council of Europe member states to develop business and human rights NAPs (see above Section 1.3 *National Action Plans on Business and Human Rights*). Additionally, it provides for the establishment of a process of information-sharing amongst Council of Europe member states on business and human rights, to be facilitated by the Council of Europe, to review its implementation (paragraphs 3-5). More detailed guidance, contained in an *Appendix*, draws on relevant legal principles from the ECHR, ESC and other Council of Europe human rights standards, linking these to the various provisions of the UNGPs.

In parallel to the above developments, within the framework of the EU, the European Commission expressed support for the UNGPs through its 2011 *Strategy for Corporate Social Responsibility*. Amongst a number of measures, this policy stated an expectation that all EU companies should “meet the corporate responsibility to respect human rights as defined in the [UNGP]” and undertook to monitor commitments made by European enterprises to internationally-recognised CSR principles and guidelines.<sup>208</sup> The *Communication*

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208. European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU strategy 2011-14 for CSR*, COM(2011) 681 final (25 October 2011), <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.

further called on all EU member states to develop business and human rights NAPs, a request subsequently reiterated by the European Council.<sup>209</sup> Prompted by a request from the European Council, the EU Agency for Fundamental Rights also issued an Opinion on “Improving access to remedy in the area of business and human rights at the EU level” in 2017.<sup>210</sup>

## Selected human rights instruments with relevance to business and human rights

### *Council of Europe*

Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”) of 1950 (ETS No. 5) and its additional protocols (Protocols 1 (ETS No. 009), 4 (ETS No. 046), 6 (ETS No. 114), 7 (ETS No. 117), 12 (ETS No. 177), 13 (ETS No. 187), 14 (STCE 194), 15 (CETS No. 213) and 16 (CETS No. 214)

European Social Charter of 1961 (ETS No. 035); its Additional Protocol (ETS No. 128) of 1988; the 1995 Additional Protocol Providing for a System of Collective Complaints (ETS No. 158) and the 1996 European Social Charter (revised) (ETS No. 163) containing all the rights guaranteed by the 1961 Charter and the 1988 Additional Protocol

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) of 1981, relating to automated personal data files and automatic processing of personal data in the public and private sectors (article 3)

Convention on the Exercise of Children’s Rights (ETS No. 160) of 1996

Convention on Human Rights and Biomedicine (ETS No. 164) of 1997 and its additional protocols, for example, concerning the cloning of human beings (1998), human organs and tissue transplants (2002) and genetic testing (2008)

Criminal Law Convention on Corruption (ETS No. 173) of 1999, which addresses active and passive bribery in the private sector (articles 7 and 8)

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209. *EU Strategic Framework on Human Rights and Democracy* (25 June 2012) available at: [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/foraff/131181.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/131181.pdf) and Council of the European Union, Council Conclusions on Business and Human Rights (20 June 2016), [http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-business-human-rights-conclusions/?utm\\_source=dsms-auto&utm\\_medium=email&utm\\_campaign=Council+conclusions+on+business+and+human+rights](http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-business-human-rights-conclusions/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Council+conclusions+on+business+and+human+rights)

210. <http://fra.europa.eu/en/opinion/2017/business-human-rights>

[Convention on Cybercrime](#) (ETS No. 185) of 2001, which addresses private as well as public entities that are “service providers” in the sense that they provide service users with “the ability to communicate by means of a computer system” (article 1) and enumerates state parties’ obligations to adopt legislative and other measures to combat cybercrime

[Convention on Action against Trafficking in Human Beings](#) (CETS No. 197) of 2005

[Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#) (CETS No. 201) of 2007

[Convention on Preventing and Combating Violence against Women and Domestic Violence](#) (CETS No. 210) of 2011

[Recommendation of the Committee of Ministers to member States on a Guide to human rights for Internet users](#) of 2014.

### *United Nations*

In addition to the 1948 [Universal Declaration of Human Rights](#), the following nine specialised instruments or “core conventions” have been concluded which address particular rights-holders or specific rights or types of rights:

- ▶ [International Convention on the Elimination of All Forms of Racial Discrimination](#) (1965)
- ▶ [International Covenant on Civil and Political Rights](#) (1966)
- ▶ [International Covenant on Economic, Social and Cultural Rights](#) (1966)
- ▶ [Convention on the Elimination of All Forms of Discrimination against Women](#) (1979)
- ▶ [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (1984)
- ▶ [Convention on the Rights of the Child](#) (1989)
- ▶ [International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families](#) (1990)
- ▶ [International Convention for the Protection of All Persons from Enforced Disappearance](#) (2006)
- ▶ [Convention on the Rights of Persons with Disabilities](#) (2006).

Together, the [Universal Declaration of Human Rights](#), along with the [Covenant on Civil and Political Rights](#) and [Covenant on Economic, Social and Cultural Rights](#) (1966) are referred to as the “International Bill of Human Rights”.

Further relevant UN instruments include:

- ▶ [Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography](#) (2000)
- ▶ [Convention against Transnational Organised Crime](#) (2000) and [Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children](#) (“the Palermo Protocol”)
- ▶ [Convention against Corruption](#) (2003)
- ▶ [Declaration on the Rights of Indigenous Peoples](#) (2007).

Human rights bodies within the UN system have considered the UNGPs in the following materials:

- ▶ Committee on the Rights of the Child’s [General Comment No. 16 on State obligations regarding the impact of the business sector on children’s rights](#) (2013)
- ▶ Economic and Social Rights Committee’s “[Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights](#)” (2011) and [General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities](#) (2017).

### *International labour standards*

The [International Labour Organisation \(ILO\)](#) is a specialised agency of the UN with responsibility for international labour standards. Its tripartite structure engages representatives of governments, employers and workers to jointly shape policies and programmes promoting decent work. The ILO has developed more than [100 conventions and other instruments](#) addressing, for example, the right to form and join trade unions, working hours, annual and maternity leave provisions, minimum age standards for employment, prohibitions on forced labour and workplace discrimination.

In its 1998 Declaration on Fundamental Principles and Rights at Work, the ILO identified the following Conventions as embodying “Core Labour Standards”, acknowledged as binding on all 187 ILO member states regardless of ratification status:

- ▶ [Freedom of Association and Protection of the Right to Organise Convention, 1948 \(No. 87\)](#)
- ▶ [Right to Organise and Collective Bargaining Convention, 1949 \(No. 98\)](#)
- ▶ [Forced Labour Convention, 1930 \(No. 29\)](#)
- ▶ [Abolition of Forced Labour Convention, 1957 \(No. 105\)](#)
- ▶ [Minimum Age Convention, 1973 \(No. 138\)](#)

- ▶ Worst Forms of Child Labour Convention, 1999 (No. 182)
- ▶ Equal Remuneration Convention, 1951 (ILO No. 100)
- ▶ Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

Additional ILO instruments relevant in the business and human rights context include:

- ▶ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977, revised 2017)
- ▶ Occupational Safety and Health Convention (No. 155, 1981) and the Promotional Framework for Occupational Safety and Health Convention (No. 187, 2006)
- ▶ Prevention of Major Industrial Accidents Convention (No. 174, 1993)
- ▶ Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989).

### *International humanitarian and criminal law*

International humanitarian law defines obligations applicable to actors operating in situations of armed conflict, which may include businesses. This body of law includes the [Geneva Conventions](#).

International criminal law provides for legal accountability for involvement in war crimes, crimes against humanity, and genocide. The [International Criminal Court](#), established in 2002, provides direct international legal liability for persons involved in such international crimes. Scenarios in which corporate personnel might be held criminally liable, on grounds of complicity or other forms of involvement in international crimes include, for example, human trafficking, the financing of armed conflict or illegal arms trading.

### *Selected policy frameworks, bodies and initiatives*

#### *Business and Human Rights Resource Centre*

The [Business and Human Rights Resource Centre](#) is a global knowledge hub, whose website provides information on business and human rights issues. It tracks human rights policies and performance of more than 6000 companies in over 180 countries, as well as that of 40 governments in eight languages.

#### *Children's Rights and Business Principles*

The [Children's Rights and Business Principles](#), developed by [UNICEF](#), the [UN Global Compact](#) and [Save the Children](#) provide guidance to companies on actions they can take in the workplace, marketplace and community to respect and support children's rights.

### *Global Network Initiative*

The [Global Network Initiative](#) (GNI) is a multi-stakeholder initiative for the information and communications technology sector, which aims to secure respect for the rights to freedom of expression and privacy by participating companies.

### *International Standards Organisation*

The International Standards Organisation has developed two sets of guidance aligned with the UNGPs, [ISO 26000 Guidance on Social Responsibility](#) and [ISO 20400 Guidance on Sustainable Procurement](#).

### *OECD Guidelines for Multinational Enterprises*

The Organisation for Economic Co-operation and Development (OECD) was established with the aim to improve economic and social well-being. The OECD's [Guidelines for Multinational Enterprises](#) (OECD 2011) apply to OECD member states and other, non-OECD member states that have elected voluntarily to adhere to the Guidelines. The Guidelines, which are recommendations to multinational enterprises (MNEs) operating in, or from, adhering countries address topics including: human rights, employment and professional relations, environment, anti-corruption and consumer protection. As regards human rights, the Guidelines require MNEs to respect human rights, including by performing human rights due diligence in line with the UNGPs.

Promotion of the Guidelines is supported by [National Contact Points](#) (NCPs), which are bodies established by each adhering country. They are also mandated to resolve alleged non-observances of the Guidelines by companies in [specific instances](#). Linked to the Guidelines, the OECD has produced materials to support responsible business conduct, such as its [Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#) as well as due diligence guidance addressing specific [industry sectors](#).

### *Security sector standards*

A number of standards have been developed that address the obligations of states and companies in relation to the activities of private security and military contractors (PMSCs). The [Montreux Document on Private Military and Security Companies](#) (2008) is an inter-governmental statement reaffirming states' obligations to ensure that PMSCs with whom they contract uphold international humanitarian and human rights law and providing some 70 recommendations to this end. The [Voluntary Principles on Security and Human Rights](#) (2000) provide guidance for extractive sector companies to ensure respect for human rights in the context of their safety and security

operations. The [International Code of Conduct for Private Security Service Providers](#) details operating standards for PMSCs and aims to promote oversight and accountability of security companies on a multi-stakeholder basis.

### *UN Global Compact*

The [UN Global Compact](#) (UNGC) is the UN's corporate responsibility initiative. Participation in the UNGC is open to any company as well as to public bodies and CSOs. The UNGC aims to secure voluntary promotion by participants of its ten principles relating to human rights, labour, environment and anti-corruption in their business activities. Participants are expected to integrate the ten UNGC principles into their policies and decision-making and to communicate publicly on their progress.

The UNGC's principles on human rights are:

1. Businesses should support and respect the protection of internationally proclaimed human rights;
2. Businesses should make sure that they are not complicit in human rights abuses.

### *UN Working Group on Business and Human Rights*

The [UN Working Group on the issue of human rights and transnational corporations and other business enterprises](#) (Working Group) is a five-member expert body with a mandate from the UNHRC to:

- ▶ Promote the dissemination and implementation of the UNGPs;
- ▶ Identify, exchange and promote good practices and lessons learned;
- ▶ Support efforts to promote capacity-building and the use of the UNGPs, and provide advice on the development of domestic legislation;
- ▶ Conduct country visits;
- ▶ Explore options for enhancing access to effective remedies;
- ▶ Integrate a gender perspective and give special attention to persons living in vulnerable situations;
- ▶ Cooperate with relevant international bodies and regional human rights organisations.

The Working Group also guides the work of the [UN Forum on Business and Human Rights](#), an annual meeting open to all relevant stakeholders to discuss trends and challenges in implementing the UNGPs, to promote dialogue and cooperation and to identifying good practices.





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