

Human Rights and Businesses

14th Informal ASEM Seminar on Human Rights

Background Paper

Sumithra Dhanarajan

Claire Methven O' Brien

This document has been produced with the financial assistance of the European Union. The contents of this document are the sole responsibility of the rapporteurs and can under no circumstances be regarded as reflecting the position of the European Union or as reflecting the views or opinions of the organisers and the host of the 14th Informal ASEM Seminar on Human Rights, namely the Asia-Europe Foundation, the Raoul Wallenberg Institute, the French Ministry of Foreign Affairs and International Development, the Philippine Department of Foreign Affairs and the Vietnamese Ministry of Foreign Affairs.

Main Rapporteurs

Sumithra DHANARAJAN

Research Associate, Centre for Asian Legal Studies, Faculty of Law, National University of Singapore

Sumi Dhanarajan is an international development practitioner specialising in the impacts of the private sector on human rights and poverty reduction. She is currently a doctoral candidate at the National University of Singapore's law school where she is also a Research Associate to the Centre on Asian Legal Studies. From 2009 – 2011, Sumi led a programme on the 'Public Roles of the Private Sector' for the Centre on Asia and Globalisation at the Lee Kuan Yew School of Public Policy. Previous to that, she spent ten years at the international development agency, Oxfam GB as a policy adviser on the private sector, latterly as the head of the private sector advocacy team. Other roles include being a senior legal adviser to the Hong Kong Democratic Party's legislative councillors and human rights officer to the Malaysian Bar Council. Sumi is a founding Trustee to the Business and Human Rights Resource Centre, the world's leading web-based independent resource on the subject. She has recently completed a two-year term as a member of the World Economic Forum Global Agenda Council on Human Rights. She holds an LLB from the University of Durham, and MA in Understanding and Securing Human Rights from the University of London and an LLM in Asian Legal Studies from the National University of Singapore. She was called to the Bar in 1998 and is a member of Gray's Inn.

Claire METHVEN O'BRIEN

Strategic Adviser, Danish Institute for Human Rights

Claire Methven O'Brien is Strategic Adviser at the Danish Institute for Human Rights, Denmark's national human rights institution, where her work is focused on business and human rights and national human rights institutions. Since joining DIHR in 2008, Claire has led development assistance-funded projects and consultancies in the area of business and human rights for multinational companies, international organisations, international financial institutions, national public bodies and NGOs, in Europe, Africa, Asia and the Americas. Claire has led advocacy on behalf of national human rights institutions on business and human rights issues in the UN, OECD, EU, Council of Europe and other international fora, and was Coordinator of the Working Group on Business and Human Rights of the International Coordinating Committee (ICC) of National Human Rights Institutions.

Claire teaches and publishes on a range of human rights topics. Most recently, she authored the influential DIHR-ICAR report, "National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation and Review of State Commitments to Business and Human Rights." Other current research addresses public procurement and human rights, and alternative models for an international business and human rights treaty.

Claire holds a PhD in Law from the European University Institute in Florence, a BA in Philosophy from the University of Cambridge, an LLM in Public Law from the London School of Economics and a Diploma in Law from City University, London. She completed the Bar Vocational Course and has been called to the Bar of England and Wales. Claire is a Research Fellow at the International Law Department of the University of Groningen, a Board Member of the International Work Group for Indigenous Affairs (IWGIA), and a member of the Expert Working Group on business and human rights of the Council of Europe's Programme for Human Rights Education of Legal Professionals.

Table of Contents

ACKNOWLEDGEMENTS	5
SECTION I. INTRODUCTION AND CONTEXT	6
1. Introduction	6
2. The evolution of the business and human rights agenda	6
2.1 <i>The UN Guiding Principles on business and human rights</i>	9
2.2 <i>Implementation and ongoing challenges</i>	10
3. International human rights law and business: concepts and principles	12
3.1 <i>Corporations as non-State actors under international law</i>	12
3.2 <i>Extraterritoriality</i>	13
3.3 <i>Positive obligations</i>	13
3.4 <i>Serious or gross human rights violations or abuses</i>	14
3.5 <i>Complicity</i>	14
3.6 <i>Sphere of influence versus leverage</i>	15
SECTION II: IMPLEMENTING THE UN FRAMEWORK IN ASIA AND EUROPE	15
4. An evolving business and human rights agenda in Asia	15
4.1 <i>Laws and policy instruments</i>	17
4.2 <i>Stock exchanges and business-led initiatives</i>	19
4.3 <i>Asia and the GPs</i>	20
4.4 <i>Critical business and human rights challenges in Asia</i>	22
5. European responses to business and human rights	24
5.1 <i>Council of Europe</i>	24
5.2 <i>European Union</i>	28
5.3 <i>NAPs: Connecting regional and national action on business and human rights</i>	31
SECTION III: WORKING GROUPS	33
6. Working group I: State duty to protect	33
6.1 <i>General regulatory and policy functions, and due diligence requirements</i>	33
6.2 <i>The State-business nexus</i>	37
6.3 <i>Conflict-affected areas</i>	40
6.4 <i>Policy coherence</i>	41
7. Working Group II: Corporate Responsibility to Respect.....	44
7.1 <i>Human rights due diligence</i>	45
7.2 <i>Human rights policies</i>	45
7.3 <i>Human rights impact assessment</i>	46
7.4 <i>Responding to human rights impacts and remediation</i>	48
7.5 <i>Supply chain responsibility</i>	49
7.6 <i>Transparency and corporate reporting</i>	51
8. Working group III: Access to remedies.....	53
8.1 <i>Defining access to remedies in the context of business and human rights</i>	53
8.2 <i>Access to remedy through judicial mechanisms</i>	54
8.3 <i>Extraterritorial jurisdiction over business-related human rights abuses</i>	57
8.4 <i>State-based non-judicial mechanisms</i>	59
8.5 <i>Non-State-based grievance mechanisms</i>	60
8.6 <i>Improving access to remedy</i>	61
9. Working group IV: Multi-stakeholder collaboration.....	62
9.1 <i>Defining multi-stakeholder initiatives and Corporate Responsibility Coalitions</i>	62
9.2 <i>Rationales for MSIs</i>	63
9.3 <i>Scope of MSIs</i>	63
9.4 <i>MSI governance</i>	64
9.5 <i>Examples of MSIs in the area of business and human rights</i>	66
9.6 <i>Examples of business-led corporate responsibility coalitions</i>	68
9.7 <i>Evaluating MSIs and their impacts</i>	70
SECTION IV: BUSINESS AND HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT	71

ANNEX 1 : LIST OF ACRONYMS	74
ANNEX 2: SELECT BIBLIOGRAPHY.....	77

ACKNOWLEDGEMENTS

Both authors would like to thank warmly Tram-anh Nguyen for research and editorial assistance, and to acknowledge Ratna Mathai-Luke of the ASEF Secretariat, members of the Steering Committee for the 14th Informal ASEM Seminar on Human Rights, and the staff of the Business and Human Rights Resource Centre for helpful input. Sumi Dhanarajan extends thanks for the same to Surya Deva and Thomas Thomas.

HUMAN RIGHTS AND BUSINESSES: EMERGENCE AND DEVELOPMENT OF THE FIELD IN ASIA, EUROPE AND GLOBALLY

Sumi **DHANARAJAN**, Research Associate at the Centre for Asian Legal Studies, National University of Singapore

Claire **METHVEN O'BRIEN**, Strategic Advisor at the Danish Institute for Human Rights

SECTION I. INTRODUCTION AND CONTEXT

1. Introduction

The purpose of this Background Paper is to give an overview of the topic of human rights and business and to provide some common foundations for discussion by participants during the 14th Informal ASEM¹ Seminar on Human Rights.

Section 1 reflects on the evolution of the business and human rights field. Propelled by community mobilisation and networked social activism during the 1990s and 2000s, a proliferation of transnational corporate accountability norms, standards and initiatives led ultimately to the endorsement of the UN Guiding Principles on Business and Human Rights in 2011. Section 1 then recalls some of the central principles and concepts of international human rights law most relevant to area of business and human rights.

Section 2 relates developments with regard to business and human rights in the European and Asian regions respectively, including steps taken to implement the UN Guiding Principles specifically.

Section 3 addresses the four working group themes:

1. State duty to protect against human rights abuses by businesses
2. Corporate responsibility and its contribution to human rights implementation
3. Monitoring, reporting and access to remedies
4. Multi-stakeholder cooperation

The paper concludes by highlighting some emerging issues that may influence the business and human agenda in the future.

In this paper, broad references to Asia refer to the Asian ASEM Member States of Bangladesh, China, India, Japan, Korea, Mongolia, Pakistan; the ASEAN Member States of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam, and also the ASEM Member States of Australia and New Zealand and Russia.

Europe refers to the European ASEM Member States of the 28 European Union Member States of Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Norway and Switzerland are also ASEM members².

2. The evolution of the business and human rights agenda

The social and environmental implications of commercial activity have been a constant feature of our political economy. From abhorrence of the transnational trade in slaves, to the harsh working

¹ The Asia-Europe Meeting (ASEM) is an intergovernmental forum for dialogue and cooperation which fosters political dialogue, reinforces economic cooperation, and promotes cooperation in other areas.

² At the time of writing, Croatia and Kazakhstan were not yet ASEM members. Croatia and Kazakhstan acceded to ASEM at the 10th ASEM Summit (16–17 October 2014).

conditions associated with the Industrial Revolution, incidences of human rights abuses from earlier era have played a role in shaping today's business and human rights discourse. Likewise, responses to such abuses, such as the birth of the trade union movement, recognition of fundamental workers' rights, and the establishment of the International Labour Organisation (ILO) at the end of World War I, manifestly influenced the contemporary scene. The Universal Declaration of Human Rights in 1948 heralded the first global expression of human rights to which "all organs of society" bore responsibility for its respect. At that moment some of history's worst business-related human rights abuses were also revealed, with companies both facilitating and benefiting from the horrors of war.³

The post-War era witnessed decolonisation and corresponding calls for economic self-determination by newly independent States marked, for instance, by the establishment of the UN Conference on Trade and Development and Group of 77 developing countries.⁴ Amongst this group, the power of transnational business was perceived as a threat and, in 1972, the UN General Assembly was warned by them of "... a coming conflict between multinational corporations ['MNCs'] and democratic governments."⁵ A UN Commission and Centre on Transnational Corporations (TNCs) was duly established with one of its tasks to devise a TNC Code of Conduct.⁶ This project was highly controversial: capital-exporting States sought a non-binding instrument to secure protections for MNCs in host States, whilst conversely, developing countries pursued a set of binding rules to allow them to regulate TNC activities and social impacts, including on human rights.⁷ After ten years, negotiations were suspended and the UN bodies focused on TNCs dismantled.

During this period, however, other international organisations did manage to conclude soft standards addressing TNC activities. The OECD Guidelines for Multi-National Enterprises (MNEs) were established in 1976 and addressed issues such as employment relations, environment, science and technology, competition and consumer protection.⁸ The ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, promulgated in 1977, stated that all parties should respect the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as the Constitution of the ILO and its principles, according to which, freedom of expression and association are essential to sustained progress.⁹ The 1970s and 1980s saw the first steps towards socially responsible investment, with the Sullivan Principles and MacBride Principles brought forth to address companies' conduct in apartheid South Africa and Northern Ireland, respectively.¹⁰

3. See, for example, Edwin Black, *IBM and the Holocaust: The Strategic Alliance between Nazi Germany and America's Most Powerful Corporation* (Dialog Press, 2001). See further discussion of the IG Farben case below.

4. Peter T. Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell Publishing, 1999).

5. This was given by Salvador Allende, President of Chile, in part reacting to allegations that ITT, the American telecoms company, was conspiring with the CIA to overthrow his government. He continued, "We are faced by a direct confrontation between the large transnational corporations and the states. The corporations are interfering in the fundamental political, economic and military decisions of the states. The corporations are global organisations that do not depend on any state and whose activities are not controlled by, nor are they accountable to any parliament or any other institution representative of the collective interest. In short, all the world political structure is being undermined." (Salvador Allende, Speech to the UNGA, 4 December 1972).

6. See "UNCTC Origins", *United Nations Centre on Transnational Corporations*, <http://unctc.unctad.org/asp/UNCTCOrigins.aspx>. This followed a 1973 study by UN-appointed Group of Eminent Persons on the impact of multinational corporations on the development process and on international relations.

7. Claire Methven O'Brien, "Human Rights and Transnational Corporations: For a Multi-Level Governance Approach", PhD Thesis, European University Institute (2009). The UN "Draft Code on Transnational Corporations" can be found in United Nations Center on Transnational Corporations, *Transnational Corporations, Services and the Uruguay Round* (New York: United Nations Publications, 1990), Annex IV, p. 231. See also Surya Deva and David Bilchitz, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013).

8. "OECD Guidelines for Multinational Enterprises", <http://mneguidelines.oecd.org/>.

9. International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (17 November 2000).

10. Christopher McCrudden, "Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?", *Oxford Journal of Legal Studies* 19, no. 2 (1999), 167. Though less well-known, two further codes, both concerned principally with forced labour, focused respectively on the then Soviet Union and China: the Slepak Principles and the Miller Principles. See Jorge F. Perez-Lopez, "Promoting

Alongside continuing economic liberalisation, a steady rise in the number and size of TNCs continued in the 1980s and 1990s. Relaxation of trade, investment and capital controls brought about a gradual shift from locally-integrated to globalised supply chains and, to some extent, downwards pressure on protective regulations. Manufacturing sites could now be readily relocated according to labour costs and tax advantages, weakening the bargaining power of organised labour and triggering, amongst other things, Special Economic Zones designed to attract foreign direct investments.

Yet globalisation brought other changes. Wider access to the means of receiving and distributing information through new communications technologies and networks opened the way to transnational activism and coordinated global campaigns by NGOs and trade unions. Early targets of such actions were consumer-facing brands such as from the garment sector and abusive working conditions prevailing amongst their suppliers were brought to public attention.¹¹ Another focus was the extractive industry. The 1990s saw a series of allegations that security forces had committed gross human rights abuses against communities while acting on behalf of oil companies.

A tragic, stark example is seen in the hanging of Ken Saro-Wiwa and eight other activists who had campaigned against environmental damage resulting from Shell's operations in the Niger Delta. This sparked widespread outrage around the world and crystallised public concerns about corporate impunity.¹² So did the Bhopal disaster of 1984, in which an estimated 24,000 died and more than half a million were injured as a result of a gas leak at a pesticide plant belonging to Union Carbide India Limited (UCIL).¹³ A 1989 settlement with the Indian Government for US\$470 million secured an average of a mere US\$400 per victim.¹⁴ From an ethical viewpoint, international human rights standards such as the UDHR and subsequent international and regional human rights instruments ought to have provided the natural frame for those seeking redress for corporate human rights abuses. Yet legal as well as political obstacles stood in the way of using human rights instruments and courts to challenge corporate wrongs. Top amongst these, at the time, was the limited scope to apply human rights obligations to non-State actors and in the "private sphere".¹⁵ Another was the transnational character of the companies usually in question, which often obscured both the locus of responsibility within firms. Although the State duty bearer could be held accountable in those circumstances, Home States denied all responsibility for their companies' activities abroad; host States, equally, were unwilling or unable to challenge the conduct of TNCs as vehicles of much-needed foreign direct investment.

Business itself actively resisted any expansion of the scope of the social "licence to operate" to encompass human rights through the 1990s. Popular concern and frustration at the apparent governance "vacuum" attaching to globalisation prompted world-wide mobilisation against institutions perceived as its vehicles, such as the World Bank and the World Trade Organisation, climaxing in the 1999 "Battle of Seattle"¹⁶.

Yet into this vacuum had already crept the beginnings of an alternative approach to the social regulation of transnationally-integrated markets. With early supply chain campaigns directed at consumer-facing brands hitting their mark, companies under pressure to respond — often with cajoling or support from civil society organisations (CSOs) — had begun to develop "voluntary" human rights codes of conduct. Soon, a number of multi-stakeholder initiatives emerged based often upon voluntary codes. Perhaps the highpoint of this trend, in 1999 the UN established its

International Respect for Worker Rights through Business Codes of Conduct", *Fordham International Law Journal* 17 (1993), 9.

¹¹. See, for example, Jeffery Ballinger, "The New Free Trade Heel. Nike's Profits Jump on the Backs of Asian Workers", *Harper's Magazine*, August 1992.

¹². Other high-profile cases presenting in this period included those relating to operations connected to BP and Occidental Petroleum in Colombia, ExxonMobil in Indonesia and Total in Myanmar.

¹³. The US-based Union Carbide Corporation (UCC) was the majority owner of UCIL, with Indian Government-controlled banks and the Indian public holding a 49.1 per cent stake.

¹⁴. See further Peter Muchlinski, "The Bhopal Case: Controlling ultra-hazardous industrial activities undertaken by foreign investors", *Modern Law Review* 50 (1987), 545.

¹⁵. Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1996).

¹⁶. On November 30, 1999, anti-globalisation protests surrounding the WTO Ministerial Conference in Seattle saw an unprecedented protest crowd of at least 40,000.

own “Global Compact”, comprising initially nine principles for companies drawn from the UDHR, ILO Core Labour Standards and other international conventions relating to the environment, with a tenth on anti-corruption added later.

In terms of Corporate Social Responsibility (CSR), this represented the beginning of the integration of human rights into the social component of the “triple-bottom line” concept, to be identified, measured, audited, verified, reported and assessed as a risk, along with financial and environmental factors.¹⁷ Nevertheless, during the 1990s and early 2000s intense debate continued over the virtues and value, or otherwise, of corporate “voluntarism” as an approach to addressing companies’ human rights impacts¹⁸, and what room there might be under existing international law to hold States and companies accountable for the latter’s defaults.¹⁹

Within the UN, these issues were taken up for a second time in 1998, when a Working Group on the Working Methods and Activities of Transnational Corporations was established by the then Sub-Commission on the Promotion and Protection of Human Rights. By 2003, this Working Group had drafted its set of “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”. According to these “Draft Norms”, while the State had a primary duty to protect, respect and promote human rights, within their respective spheres of activity and influence, companies were also identified as human rights duty-bearers.²⁰ Though greeted warmly by most NGOs, the draft norms were criticised by business associations and some trade unions and finally rejected by States in the then Commission on Human Rights as having “no legal standing”.²¹

With reported corporate involvement in abuses still increasing however,²² the UN Human Rights Commission invited the UN Secretary-General to appoint a Special Representative (SRSG) on the issue of human rights and transnational corporations and other business enterprises in 2005. Assuming this role, Professor John Ruggie was requested *inter alia*: to identify and clarify standards of corporate responsibility and accountability for human rights; to elaborate on the role of States in effectively regulating and adjudicating business enterprises; and to clarify the implications of business enterprises for concepts such as “complicity” and “spheres of influence”.²³

2.1 The UN Guiding Principles on business and human rights

The SRSG sought to apply an approach of “principled pragmatism” to his mandate, with the aim of devising a framework that would “reduce corporate-related human rights harms to the maximum extent possible in the shortest possible period of time”²⁴. From the outset, he rejected the Draft

17. John Elkington, *Cannibals with Forks: Triple bottom line of the 21st century business* (Oxford: Capstone Publishing Ltd, 1999).

18. According to Stephens, the “economic incentives [remained] insufficient to trigger voluntary compliance with international human rights standards”. See Beth Stephens, “Amorality of Profit: Transnational Corporations and Human Rights”, *Berkeley Journal of International Law* 20 (2002), 45.

19. International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (Geneva: International Council on Human Rights Policy, 2002).

20. United Nations Sub-Commission on the Promotion and Protection of Human Rights, **Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, (13 August 2003)**. The “Draft Norms” provided a detailed enumeration of human rights and how they applied to companies, and provided for their implementation via internal adoption, assessment, monitoring, verification and compensation.

21. Commission on Human Rights, *Agenda Item 16, E/CN.4/2004/L.73/Rev.1* (16 April 2004), para. (c). Exceptionally amongst the business community, the Business Leaders Initiative on Human Rights that made commitments to “road test” the Draft Norms. See “Business Leaders Initiative on Human Rights (BLIHR)”, *Business & Human Rights Resource Centre*, <http://business-humanrights.org/company-policysteps/other/business-leaders-initiative-on-human-rights-blihr>.

22. The Business and Human Rights Resource Centre contributed significantly to dissemination of reports of business involvement in human rights abuses from its launch by Chris Avery in 2002: “Who and Where We Are”, *Business & Human Rights Resource Centre*, <http://business-humanrights.org/en/about-us/who-and-where-we-are>.

23. Commission on Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/2005/L/87* (15 April 2005).

24. John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton & Company, 2013)

Norms, criticising what he suggested were their “exaggerated legal claims and doctrinal excesses”.²⁵ Accepting that human rights laws did not place direct obligations on companies, the SRSG accordingly emphasised the status of human rights norms as much as an ethical and moral framework as one of legal responsibilities. Cautioning against an international treaty, he argued that negotiating such an instrument would take years, and could result in a lowest common denominator outcome.²⁶

In 2008, at the end of his first three-year mandate, the SRSG outlined a “three-pillar” framework as a conceptual architecture for understanding the respective roles and responsibilities of government and business for human rights: Pillar 1 is the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; Pillar 2 is corporate responsibility to respect human rights, meaning that companies are expected to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved; and Pillar 3 is access to remedy, which requires both States and businesses to ensure greater access by victims of business-related human rights abuses to effective judicial and non-judicial remedies.²⁷

Unanimously welcoming his report, the UN Human Rights Council (UNHRC) granted the SRSG a second mandate to “operationalise” the UN Protect, Respect and Remedy Framework, and to provide guidance on steps that States, businesses and others should take to implement it. In 2011, at the end of this second term, the UNHRC, again unanimously, endorsed its principal product, the UN Guiding Principles on Business and Human Rights (hereafter referred to as the GPs),²⁸ whose contents are discussed at length in the sections relating to Working Groups I–III below.

2.2 Implementation and ongoing challenges

At the same time as it endorsed the GPs, the UNHRC established a new Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG)²⁹, and mandated it to promote the dissemination and implementation of the GPs; promote good practices and lessons learned on GPs implementation; support capacity-building and the use of the GPs; undertake country visits;³⁰ make recommendations at national, regional and international levels for enhancing access to effective remedies for those whose human rights are affected by corporate activities; and develop dialogue with governments and other actors, such as the UN Global Compact, ILO, World Bank, International Finance Corporation (IFC) and UNDP, as well as TNCs and other business enterprises, national human rights institutions (NHRIs), representatives of indigenous peoples, civil society organisations and regional and sub-regional international organisations. The UNWG is also requested to integrate a gender perspective into all its work.

The UNHRC further provided for an annual, global Forum on Business and Human Rights to discuss trends and challenges and promote dialogue and cooperation with participation from all

²⁵. The SRSG attributed the Draft Norms’ failure to win support to, amongst other things, their assignation to companies of duties ranging over matters that had not yet been accepted by states such as the “principle of free, prior and informed consent”. Ibid.

²⁶. Ibid.

²⁷. John Gerard Ruggie, *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>

²⁸. John Gerard Ruggie, *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>.

²⁹. Human Rights Council, *Human rights and transnational corporations and other business enterprises*, A/HRC/RES/17/4 (16 June 2011), <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf?OpenElement>.

³⁰. To date, the UNWG has conducted visits to Mongolia, United States of America, Ghana and Azerbaijan: “Country visits of the Working Group on the issue of human rights and transnational corporations and other business enterprises”, *United Nations Office of the High Commissioner for Human Rights*, <http://www.ohchr.org/EN/Issues/Business/Pages/WGCountryVisits.aspx>.

stakeholders.³¹ Additionally, the UNWG has held regional forums in Latin America³² and Africa, with plans for others.³³ Renewing the mandate of the UNWG in 2014, the UNHRC expressed its support in particular for the development of guidance in the areas of national action plans (NAPs) on business and human rights, and study of possible developments in the areas of domestic law remedies to address corporate involvement in gross human rights abuses, including with regard to a possible international instrument on legal remedy.³⁴

In parallel, other UN human rights bodies³⁵ and international organisations³⁶ have aligned their own frameworks and standards to the GPs. Many governments, business associations, individual corporations, NGOs, labour organisations and NHRIs have likewise responded to the GPs to varying degrees, and numerous initiatives of this kind are discussed in later sections.

As a significant marker in the contemporary evolution of norms and standards on the responsibility and accountability of corporate actors for their social, environmental and human rights impacts, the GPs set down a framework that – consistent with the conventional restrictions imposed by international human rights law – maintains the primary responsibility of States to protect against human rights violations. At the same time, they give explicit recognition to the responsibility of businesses to respect, and not harm, human rights. Arguably, they thus contribute to preserving the legitimacy of human rights through a re-orientation of human rights norms, if not laws, in line with a changed global environment, and at a time when this is essential to ensuring their relevance as a narrative responsive to people’s lived experiences of indignity and injustice.

Notwithstanding, doubts persist about the regulatory effectiveness of the GPs’ voluntary approach. In 2014, only 272 out of 80,000 or so transnational firms have a human rights policy. While the GPs rhetoric may have captured the policy-making “peaks”, uptake on the ground seems slow, prompting claims that “firms are still not ready to be safe rather than sorry”.³⁷ It may be the case that only law can bind,³⁸ but questions remain as to whether a legal approach would yield any better results, in terms of increased awareness, implementation and enforcement. A hard law, punitive approach has long had its own sceptics, particularly where corporations are the objects of

31. “United Nations Forum on Business and Human Rights”, *United Nations Office of the High Commissioner for Human Rights*,

<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx>.

32. “2013 Regional Forum on Business and Human Rights for Latin America and the Caribbean”, *United Nations Office of the High Commissioner for Human Rights*,

<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2013LACRegionalForumBusinessandHumanRights.aspx>.

33. “African Regional Forum on Business and Human Rights, 16–18 September 2014, Addis Ababa (Ethiopia)”, *United Nations Office of the High Commissioner for Human Rights*

<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/AfricaRegionalForum.aspx>.

34. Human Rights Council, “Human rights and transnational corporations and other business enterprises”, A/HRC/26/L.1 (23 June 2014), [http://daccess-dds-](http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G14/062/40/PDF/G1406240.pdf?OpenElement)

[ny.un.org/doc/UNDOC/LTD/G14/062/40/PDF/G1406240.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G14/062/40/PDF/G1406240.pdf?OpenElement).

35. See, for example, Committee on Economic, Social and Cultural Rights, *Statement on the obligations of states parties regarding the corporate sector and economic, social and cultural rights*, E/C.12/2011/1 (12 July 2011),

[http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2011%2f1](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2011%2f1&Lang=en)

[&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2011%2f1&Lang=en); and United Nations Convention on the Rights of the Child, *General Comment No. 16 regarding the impact of the business sector on children’s rights*, CRC/C/GC/16 (17 April 2013),

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en.

36. The 2011 revision of the OECD Guidelines for MNEs included a new chapter on human rights intended to align with the GPs; likewise the ISO26000 social standard.

37. Susan Ariel Aaronson and Ian Higham, “‘Re-righting Business’: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms”, *Human Rights Quarterly* 35:2 (2013), 333.

38. Bilchitz contrasts the GPs’ “moral normativity” with “binding normativity”, which in his view is needed to achieve corporate accountability for human rights abuses and which he argues only law can provide: David Bilchitz, “A chasm between ‘is’ and ‘ought’? A critique of the normative foundations of the SRSG’s Framework and the Guiding Principles”, in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013), 107-137.

rules,³⁹ with numerous empirical studies disclosing the significance of social factors, both internal and external to regulated companies.⁴⁰

If these questions are not settled empirically, neither will their political debate be over. In June 2014, the UNHRC adopted two human rights and business resolutions. One was advanced by the Core Group of States supportive of the GPs.⁴¹ The other, proposed by group of States led by Ecuador and South Africa, pushed for the establishment of an intergovernmental working group with a mandate to elaborate an international legally binding instrument on human rights and transnational corporations.⁴²

3. International human rights law and business: concepts and principles

3.1 Corporations as non-State actors under international law

Classically, public international law recognises only States as its actors and subjects.⁴³ Since positivist international human rights law takes the same position, its instruments principally address the relationship between States and individuals. International law does not therefore impose direct liabilities upon corporate actors for human rights violations, except in very exceptional cases⁴⁴ – a limitation that some human rights lawyers and advocates have questioned.⁴⁵

Human rights instruments and jurisprudence do however assert the responsibility of non-State actors not to harm human rights. The preamble to the UDHR states that every individual and every organ of society is expected to promote human rights. Article 30 of UDHR further states that non-State actors have a duty to not engage in the destruction of rights.⁴⁶ Beyond this, though, international law as it currently stands does not provide precise and explicit legal standards for civil or criminal liability of corporations at the domestic level with regard to human rights abuses as such. Regional and national systems, however, have in some cases developed what might be termed “functional equivalents” of direct corporate liability, through jurisprudential developments connected to the State duty to protect, on one hand (see section 3.2 below), and civil causes of action in tort, on the other (as discussed further in section 8.2).

With regard to international criminal liability, the statute of the International Criminal Court provides for jurisdiction over natural, not legal, persons.⁴⁷ Individuals within or connected to

³⁹. See, for example, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992), Julia Black, “Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-regulatory’ World”, *Current Legal Problems* 54 (2001), 103.

⁴⁰. See, for example, Neil Gunningham et al., *Shades of Green: Business, Regulation and Environment* (Stanford: Stanford University Press, 2003).

⁴¹. Human Rights Council, *Human rights and transnational corporations and other business enterprises*, A/HRC/25/L.1. This resolution was supported by 22 countries.

⁴². Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/26/L.22/Rev.1 (24 June 2014). This resolution was supported by 20 countries. Commentaries from a range of actors, including the former SRSG, in response to Resolution and the idea of a treaty, can be found here: ‘Binding Treaty’, *Business & Human Rights Resource Centre*, <http://business-humanrights.org/en/binding-treaty>.

⁴³. Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1995), Ch.3.

⁴⁴. These exceptions include where the company perpetrates or is complicit in genocide, war crimes and some crimes against humanity.

⁴⁵. See Philip Alston et al, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006); Olivier De Schutter, *Transnational Corporations and Human Rights* (Oxford: Hart Publishing, 2006).

⁴⁶. See also Article 17 of European Court of Human Rights, Council of Europe, *European Convention on Human Rights* (4 November 1950).

⁴⁷. Art. 25§1. A motion was tabled to the Preparatory Committee and the Rome Conference to consider liability for legal persons, see Mordechai Kremnitzer, ‘A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law’, *Journal of International Criminal Justice* 8 (2010), 909; Andrew Clapham, ‘The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’, in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Enterprises under International Law* (The Hague: Kluwer, 2000).

corporations can however be held liable for acts of corporations leading to human rights abuses.⁴⁸

3.2 Extraterritoriality

Within human rights law, as in public international law more broadly, jurisdiction remains primarily territorial.⁴⁹ Jurisdiction over matters beyond the State's territorial boundaries is exceptional and requires an internationally recognised basis, such as nationality, where the actor in question, or the victim, is a national; where the acts concerned have significant adverse effects on State,⁵⁰ or universality; and where specific international crimes are involved.

On the basis of current rules, setting or enforcing standards for corporate behaviour in another State's territory, or adjudicating on matters that occur there, in the absence of one of the exceptional bases mentioned above, would exceed the jurisdiction of a home State, that is, the State in which a corporation is domiciled. The exercise of such jurisdiction may thus "prove controversial if other States regard it as interference in their sovereign rights to regulate corporations within their own borders and to pursue their own economic, social and cultural interests".⁵¹

The persistence of human rights abuses implicating TNCs, however, gives rise to ongoing debate about the extent to which current rules are adequate, with some commentators arguing for a more expansive interpretation of extraterritorial jurisdiction, based on the State duty to protect human rights and the doctrine of positive obligations.⁵² Some UN treaty bodies, indeed, appear already to have taken this or similar positions.⁵³ Thus, the future direction of the issue of extraterritoriality remains open to speculation (see further section 8).

3.3 Positive obligations

Under most human rights instruments, State Parties agree to guarantee the effective enjoyment of the rights described to all persons within their jurisdiction. International law does therefore impose duties on States to ensure that private actors within their jurisdiction do not abuse human

48. In the IG Farben trial, 23 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: *Law Reports of Trials of War Criminals*, Vol. X (London: HMSO, 1949), and the International Criminal Tribunal of Rwanda convicted the owner of a company for its logistical support to the Rwandan genocide: *Prosecutor v Nahimana, Barayagwiza, & Ngeze* [3 December 2003] ICTR No. ICTR-99-52-T.

49. Higgins, *Problems and Process*, Ch. 4-5.

50. See discussion on Singapore's Trans-boundary Haze Pollution Act in Section 8.3.

51. The EU reacted against US legislation that was viewed as a "violation of the territorial jurisdiction of EU Member States and an abuse of the nationality principle", in Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (University of Edinburgh, 2010), p.12, http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf.

52. Robert McCorquodale and Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law", *The Modern Law Review* 70, no. 4 (2007), 598. See also Expert Meeting, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (Maastricht Centre of Human Rights and the International Commission of Jurists, 2011).

53. In particular, UN 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" (Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights*, E/C.12/2011/1, para. 5). CESCR has made similar statements in some of its *Concluding Observations* and *General Comments*. The UN Committee on the Elimination of Racial Discrimination (CERD) has also indicated that states should take appropriate measures to prevent adverse impacts on the rights of indigenous peoples from corporations registered in their state. See Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, CERD/C/CAN/CO/18, 25 May 2007 [17]; Committee on the Elimination of Racial Discrimination, *Concluding Observations: United States of America*, CERD/C/USA/CO/6, 8 May 2008; Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia*, CERD/C/AUS/CO/15-17, 27 August 2010 [13]; Committee on the Elimination of Racial Discrimination, *Concluding Observations: United Kingdom*, CERD/C/GBR/CO/18-20, 14 September 2001.

rights.⁵⁴ In the jurisprudence of the European Convention of Human Rights (ECHR), this duty to guarantee the effectiveness of human rights has led to the development by the European Court of Human Rights (ECtHR) of the doctrine of “positive obligations”. This is discussed more fully in section 5.1 below.

3.4 Serious or gross human rights violations or abuses

The term “abuses”, rather than “violations”, is used to refer to infractions of human rights by non-State actors as opposed to States or other public actors. However, international human rights law currently neither relies on nor defines the terms “serious” or “gross”. Previously, this question gave rise to some discussion within the UN system, in connection with attempts to define the scope of the right to reparation for human rights violations. An early proposed definition of gross violations would have encompassed genocide, slavery and slavery-like practices; summary or arbitrary executions, torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination.⁵⁵ Yet, complexities were identified. For example, what should be the relationship between the widespread or systematic nature of violations or abuses, and their status as “serious” or “gross”? Ultimately, though the term “gross violations” was included in the relevant soft law standard, owing to various complications recognised in preparatory works, it was left undefined.⁵⁶

Notwithstanding, the GPs mention “gross” human rights abuses in GP7, saying that such abuses are more likely in conflict-affected areas. Again, the term “gross” was left undefined, though the Interpretive Guidance on the GPs later produced by OHCHR does venture a definition. It states:

*There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave.*⁵⁷

What may be at stake here is the potential for the establishment of a hierarchy of corporate human rights abuses, with acts also counting as crimes against humanity having the status of “gross”, while, for example, environmental devastation or land grab leading to loss of livelihood, would not. Many voices caution against such an approach.⁵⁸ In principle, corporations may in any case be charged for complicity with public actors in relation to crimes against humanity, at least where domestic criminal law permits, raising a question as to why a new legal regime is needed to address this category of wrongs (see next section on “complicity”). For now, the matter is thus open and likely to be the subject of much further debate.

3.5 Complicity

54. See *Velásquez Rodríguez v. Honduras* [1989] 28 I.L.M 291 where the Inter-America Court of Human Rights held that states parties are required to take active measures to protect against, prosecute and punish private actors who commit human rights violations.

55. UN Sub-Commission on the Promotion and Protection of Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report*, E/CN.4/Sub.2/1993/8 (2 July 1993), p. 56.

56. UN Commission on Human Rights, Resolution 2005/35 on 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, E/CN.4/RES/2005/35 (19 April 2005), Preamble.

57. Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, HR/PUB/12/02 (2012), http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, p. 6. This definition relied was adopted in the Zerk study referred to above (p. 27–28).

58. For example, see Global Initiative for Economic, Social and Cultural Rights, *Submission to the UN Office of the High Commissioner for Human Rights on the Zerk Report on Corporate Liability for Gross Human Rights Abuses* (May 2014), <http://globalinitiative-escr.org/wp-content/uploads/2014/06/GI-ESCR-Submission-re-Corporate-liability-for-gross-human-rights-abuses-May-2014.pdf>.

In criminal law, complicity is defined as aiding and abetting human rights violations committed by third parties.⁵⁹ A finding of complicity requires evidence of substantial contribution to the crime. In jurisdictions where corporations can be liable under criminal law, *direct* complicity could thus occur when a company knowingly and actively assists State actors in perpetrating human rights violations, or where it should have known that its actions would have those consequences, for example, where a company promotes, or assists with, forced relocations in circumstances that would constitute a violation of international human rights law.

Human rights scholars have identified other, non-legal forms of complicity relevant in the business context. Thus, a business benefiting from human rights violations committed by the State, where it knew that the benefits derived from an activity causing a human rights violation, might be guilty of *beneficial* complicity. *Silent* complicity, on the other hand, refers to corporate culpability where a business failed to exercise influence in a situation where it could have acted or drawn attention to systematic or continuous human rights abuses. For their part, the GPs stipulate that the extent of a company's responsibility to act varies according to whether it causally contributed to a violation or was merely linked to it.⁶⁰ It has been argued that this limited formulation excludes silent complicity and thus neglects some of the complex interconnections there can be between violations and corporate abuses of human rights.⁶¹

3.6 Sphere of influence versus leverage

The “sphere of influence” was a term used in early discussions of business and human rights. It encompassed the idea that: (i) a company has influence over people closest to a company and those that it has a special relationship to; (ii) within this sphere, a company is most likely to know, or ought to know, the human rights consequences of its actions or omissions; and (iii) the company has most power, authority, influence, leverage or opportunity within its sphere and thus should use this to prevent or mitigate human rights abuses.⁶² But the SRSG challenged the concept, on the basis that it implies, “can” equals “ought”.⁶³ In his view, companies should not be held responsible for the human rights impacts of every entity over which they have some leverage because this would include cases that they are not contributing to, nor are the causal agent of the harm in question. The SRSG preferred that companies' responsibility be defined with reference to their *impact* on human rights, and what leverage the company might have over abuses through its business relationships.⁶⁴ The idea of leverage is discussed further in section 7.4 below.

SECTION II: IMPLEMENTING THE UN FRAMEWORK IN ASIA AND EUROPE

This section relates business and human rights developments in Asia and Europe. In line with respective governance configurations of the two regions, for Asia the national level and business-led initiatives provide the main focus, while in Europe's case, responses at regional level are highlighted.

4. An evolving business and human rights agenda in Asia

59. See further, Andrew Clapham and Scott Jerbi, “Categories of Corporate Complicity in Human Rights Abuses”, *Hastings International and Comparative Law Review* 24 (2000), 340.

60. John Gerard Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, A/HRC/17/31, 2011, Guiding Principles 13, 19.

61. Florian Wettstein, “Making Noise about Silent Complicity”, in Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect* (Cambridge: Cambridge University Press, 2013), 243–268.

62. John Gerard Ruggie, *Clarifying the Concepts of “Sphere of influence” and “Complicity”*, A/HRC/8/16, 15 May 2008.

63. *Ibid.*

64. *Ibid.*

Rapid economic development has delivered growth and reduced poverty in a number of Asian States⁶⁵. It has however also placed pressures upon marginalised, disenfranchised and disadvantaged groups whose human rights have been often traded off in the interests of short-term investment and financial gains. This manifests in systemic business-related human rights abuses, such as land-grabbing, gender discrimination, abusive working conditions, environmental degradation and associated violations of the rights to health, water, food, housing and livelihoods. Two-thirds of the world's indigenous peoples live in the Asia-Pacific, and these communities often bear the brunt of growth-related human rights violations. Ethnic conflicts, corruption and institutional capacity problems also limit the human rights benefits that could derive from economic development in the region.⁶⁶ The impact on human rights from an influx of investment in countries in transition, such as Myanmar⁶⁷ and Cambodia requires particular attention.

Asian civil society actors have engaged with these issues from a human rights perspective. Asian companies and governments, however, have mostly addressed them through the lens of CSR. The advantage of this is that a growing number of firms in Asia are integrating CSR into their policies and practices. The CSR paradigm in Asia is however voluntary, top-down and philanthropic, making it difficult to embed human rights-compatible policies and practices into core business operations.⁶⁸ Compounding these challenges are the weak rule of law and human rights protection, high levels of corruption and the lack of watchdogs in the form of strong civil society and independent media in some Asian States.⁶⁹

Where Asian companies have engaged with human rights as CSR, they have largely taken a risk-management approach, measuring risk to the corporation rather than risk to the human rights of individuals and communities. This is partly because Asian firms have usually adopted CSR practices to integrate into global value chains of TNCs: the pressure to do so whilst still maintaining competitiveness has sometimes resulted in a “de-coupling” of company policies from actual human rights impacts.⁷⁰ As an example, global garment retail brands have been known to keep “double-books” in order to satisfy both the ethical teams of global firms (who want good working conditions and fair wages for workers) as well as the buying teams (who want cheaper prices and faster turn-around times).⁷¹ As such, this approach has not provided the optimal response to business-related human rights abuses.

State responses to the business and human rights agenda in Asia are in flux. A recent study on the State duty to protect human rights concludes that, by and large, ASEAN States have “fairly robust legal frameworks governing the core areas of land, labour and the environment”.⁷² Yet, these laws

65. General references to Asia in this section exclude Australia, New Zealand and Russia.

66. “OHCHR Human Rights Programme for Asia-Pacific (2008-2009)”, *United Nations Office of the High Commissioner for Human Rights*, <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AsiaPacificProgramme0809.aspx>.

67. Ron Gluckman, “Why Western Oil Companies Love Myanmar’s Moe Myint”, *Forbes Asia*, 3 April 2013, <http://www.forbes.com/sites/forbesasia/2013/04/03/why-western-oil-companies-love-myanmars-moe-myint/>

68. Thomas Thomas and Alex Chandra, *A baseline study on the nexus between corporate social responsibility and human rights: An Overview of Policies and Practices in ASEAN* (ASEAN Intergovernmental Commission on Human Rights, 2014). Similar findings emerge from studies on CSR in China with regard to the predominance of philanthropy, as well as in other Asian states. See Jian Wang and Vidhi Chaudhri, “Corporate Social Responsibility Engagement and Communication by Chinese Companies”, *Public Relations Review* 35, no. 3 (2009), 247–50; Bindu Sharma, ‘Discovering the Asian Form of Corporate Social Responsibility’, *Social Space* (2010), 28–35, <https://centres.smu.edu.sg/lien/files/2013/10/SocialSpace2010-BinduSharma.pdf>.

69. Carl Middleton and Ashley Pritchard, *Corporate Accountability in ASEAN: A Human Rights-Based Approach* (Asian Forum for Human Rights and Development, 2013).

70. Elisa Giuliani, *Human Rights and Corporate Social Responsibility in Developing Countries’ Industrial Clusters* (Lund University, CIRCLE-Center for Innovation, Research and Competences in the Learning Economy, 2014).

71. Sumi Dhanarajan, “Managing Ethical Standards: When Rhetoric Meets Reality”, *Development in Practice* 15, no. 3–4 (2005), 529–38.

72. Delphia Lim, “Synthesis Report”, in *Business and Human Rights in ASEAN: A Baseline Study* (Human Rights Resource Centre, 2013), <http://hrrca.org/system/files/u6/Business%20and%20Human%20Rights%20in%20ASEAN%20Baseline%20Study%20ebook.pdf>

are not always being effectively implemented or enforced.⁷³ Similar conclusions can be reached with regard to the legal frameworks in the countries of South and East Asia.⁷⁴ Since the business and human rights discourse is still a ‘State-driven act’ in most of Asia, where the State does not actively demand corporate respect for human rights, this may signal to companies that human rights are not a requisite for operating within that State’s jurisdiction.⁷⁵ Conversely, where the State does make clear that human rights is important, companies may be more likely to follow suit.⁷⁶

4.1 Laws and policy instruments

A recent ASEAN-based study suggests that weak enforcement of laws regulating corporate behaviour is due to a lack of implementation mechanisms, technical capacity and resources, inadequate awareness of relevant regulations, problems with central-local government coordination, pro-investment attitudes and policies that incentivise lax enforcement by local governments, and public corruption. Additionally, the pace of law reforms in this area is apparently out of synch with the ability of regulatory entities to implement and enforce provisions.⁷⁷

Very few States have integrated provisions that address social and environmental impact into corporate governance laws. A rare example of this is Article 5 of China’s Company Law which provides that:

... a company must, when engaging in business activities, abide by the laws and administrative regulations, observe social morals and business ethics, be in integrity and good faith, accept regulation of the government and the public, and undertake social responsibilities.

Directors and supervisors are required by law to act in a socially responsible manner towards internal and external stakeholders in pursuing shareholder wealth.⁷⁸

A more common mechanism in Asia is CSR-type legislation imposing obligations on companies to contribute financially towards States’ development policies, particularly in middle-income ASEAN States, where CSR is seen by governments as an opportunity to “fill funding gaps in key government programmes in education, livelihood development and health services, amongst others.”⁷⁹ The Companies Act 2013 of India mandates companies to spend 2% of the previous three years’ average net profit on CSR projects and activities in order to establish a culture of sustainable development governance and board level.⁸⁰ The Act includes the Corporate Social Responsibility Voluntary Guidelines previously issued by Ministry of Corporate Affairs (MCA) in 2009. Section 135 of the 2013 Act provides that every company having a net worth of a certain amount during any financial year shall establish a CSR committee of the board to put in place a range of community investment activities.⁸¹

73. Ibid.

74. Thomas and Chandra (2014) as well as Lim (2013) reach similar findings *apropos* the ASEAN region, *supra*; Bindu Sharma, however, highlights Japan as the exception. See Bindu Sharma, “Contextualising CSR in Asia: Corporate Social Responsibility in Asian Economies”, (Singapore: Lien Centre for Social Innovation, 2013), http://ink.library.smu.edu.sg/lien_reports/5/.

75. Robert J. Hanlon, *Corporate Social Responsibility and Human Rights in Asia* (New York: Routledge, 2014).

76. Hanlon looks at three countries: Thailand, Cambodia and China (Hanlon, *supra*). Larry Catá Backer, “China’s Corporate Social Responsibility with National Characteristics: Coherence and Dissonance with the Global Business and Human Rights Project”, in Jena Martin and Karen E. Bravo (eds.), *Human Rights and Business: Moving Forward, Looking Back* (2014), <http://ssrn.com/abstract=2448030> or <http://dx.doi.org/10.2139/ssrn.2448030>

77. Delphia Lim and Geetanjali Mukherjee, “Business and Human Rights Challenges in ASEAN: The Role and Modalities of the State”, in Mahdev Mohan and Cynthia Morel (eds.), *Business and Human Rights in South East Asia: Risk and the Regulatory Turn* (Taylor & Francis, 2014).

78. The People’s Republic of China, *Companies Law* (2006), Articles 17, 18, 52, 117, 118 and 126. Article 17 requires a company to “protect the lawful rights and interests of its employees, conclude employment contracts with the employees, buy social insurances, [and] strengthen labour protection.”

79. Thomas and Chandra, *A baseline study on the nexus between corporate social responsibility and human rights*.

80. Indian Ministry of Law and Justice, *The Companies Act (No.18 of 2013)* (29 August 2013), <http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>

81. See Schedule VII, *ibid*.

Other examples of CSR-type legislation include the Philippines Corporate Social Responsibility Act of 2011, which mandates all large taxpayer corporations, whether domestic or foreign to allocate a reasonable percentage of their net income to CSR-related activities.⁸² In Indonesia, various legislative provisions makes it mandatory for limited liability companies (domestic and foreign),⁸³ that manage, utilise or impact natural resources,⁸⁴ or are involved in mining,⁸⁵ or are State-owned enterprises⁸⁶ to make contributions to community development and empowerment,⁸⁷ and to disclose these in their annual reports. Law No.25 of 2007 concerning investment defines CSR as an inherent responsibility of every investor to continuously maintain harmonious and balanced relations with the environment, values, norms and cultures of the local communities.⁸⁸ In the Government of Indonesia's Medium-Term Development Plan of 2010-2014, CSR is seen as a funding scheme that contributes towards national development.⁸⁹

No extant CSR-type legislation however reflects the GPs' human rights due diligence requirements (see further discussion in section 7.1). As a regulatory instrument, it has also been criticised for relegating State responsibilities for development to the private sector.⁹⁰ Emphasising corporate contributions may also divert attention from the adverse impacts of business operations and the State's duties to protect against them.⁹¹ Whilst CSR-type legislation at least secures the concept of corporations having such responsibilities within the political and economic paradigm, there is a risk that these are overly associated with philanthropic obligations rather than what is termed "strategic CSR".⁹²

In terms of Asian governments' policies on CSR, again, these only occasionally reference human rights *per se* although references to "social impacts or issues" could be seen as inclusive. In India, the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business state that businesses should respect and promote human rights and provides a framework for business responsibility reports, which includes a statement on their human rights policy as well as a statement on complaints of human rights abuses filed during the reporting period.⁹³

82. These are tax-deductible and defined as charitable, scientific, relating to youth or sport development, educational, providing service to veterans and senior citizens or address environmental sustainability, social welfare health and disaster relief: Fifteenth Congress of the Republic of the Philippines, *Senate Committee Report No 22*, 16 March 2011, <https://www.senate.gov.ph/lisdata/1097993571.pdf>

83. The Republic of Indonesia, *Law No. 25 of 2007 concerning Investment (2007)*, Article 15(b), http://www.bkpm.go.id/file_uploaded/Investment_Law_Number_25-2007.pdf. Article 34 of the said law provides for sanctions for non-compliance.

84. The Republic of Indonesia, *Government Regulation No. 47 of 2012 Concerning Social and Environmental Responsibility of Limited Liability Companies (2012)*; The Republic of Indonesia, *Law No. 4 of 2009 on Minerals and Coal Mining (2009)*, Articles 71, 79, 96 and 107; The Republic of Indonesia, *Law of East Belitung Regency No. 13 on Corporate Social Responsibility (2011)*, Article 6; The Republic of Indonesia, *Batam Law No. 2 on Corporate Social Responsibility (2012)*, Article 10.

85. The Republic of Indonesia, *Government Regulation No. 23 of 2010 Concerning the Implementation of Mineral and Coal Mining Business Activity (2010)*.

86. The Republic of Indonesia, *Law No. 19 of 2007 on the State-Owned Enterprise and Regulation of the Ministry of State-Owned Enterprise (2007)*.

87. Cornel B Juniarto and Andika D Riyandi, "Corporate social responsibility regulation in Indonesia", *International Bar Association (2012)*, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=103427a1-0313-4d6c-b7f7-c5deb0bedbb5> and Lim and Mukherjee, 'Business and Human Rights Challenges in ASEAN'.

88. *Ibid.*

89. For example, *Presidential Instruction No.3 of 2010 concerning the Equitable Development Program* provides that the National Planning and Development Agency of Indonesia construct a Guideline for Harmonising CSR Implementation with the Acceleration of the Millennium Development Goals Attainment in Indonesia.

90. Lim and Mukherjee, "Business and Human Rights Challenges in ASEAN".

91. *Ibid.*; Sabella Gayo, "Mandatory and Voluntary Corporate Social Responsibility Policy Debates in Indonesia", *ICIRD (2012)*.

92. Ghuliani observes, for example, that given Indian companies still equate CSR with philanthropy rather than with addressing their social and environmental impacts of their operations, the legislation could distract companies who are poised to embrace "strategic CSR". (See Chhavi Ghuliani, "India's Company Act 2013: Five key points about India's CSR mandate", *BSR*, 22 November 2013, <http://www.bsr.org/en/our-insights/blog-view/india-companies-act-2013-five-key-points-about-indias-csr-mandate>).

93. See Shulagna Sarkar and Punam Singh, "CSR Guidelines for Indian Companies", *Indian Journal for Corporate Governance* 6, no. 1 (2013), 76; and Afra Afsharipour and Shruti Rana, "The Emergence of New

China has perhaps been most prolific amongst the Asian States in promulgating such policy instruments.⁹⁴ The *Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities* issued by the State Owned Assets Supervision and Administration Commission (SASAC) in 2008 encourage State-owned enterprises (SOEs) to publish CSR or sustainability reports with information on the status of their CSR practices, planning and measures to improve CSR and to enhance the communication and dialogue mechanisms to facilitate responses to opinions and suggestions of stakeholders in the wider society.⁹⁵ Other Chinese examples include the *Draft Guidelines on Performing Social Responsibility of Foreign Investment Enterprises* as published by the Investment Ministry of Commerce, which encourage foreign companies to integrate best-practice CSR standards to “advance China’s social fabric, having regard to their social and environmental impact on Chinese society”; and the *Shanghai Municipal Local Standards on Corporate Social Responsibility, 2008* issued by the Shanghai Municipal Bureau of Quality and Technical Supervision, which encourages enterprises to self-assess their CSR performance periodically and release the results to the community and employees.⁹⁶

4.2 Stock exchanges and business-led initiatives

In Asia, various countries’ stock exchanges have put in place either mandatory or voluntary disclosure requirements for social and environmental impacts. Apparently, stock exchanges based in emerging markets are on track to overtake those based in developed markets by 2015, in terms of the proportion of their large listings that disclose the seven first-generation sustainability indicators.⁹⁷ The Malaysian Stock Exchange, Bursa Malaysia, mandatorily requires listed issuers to annually report on the CSR practices and activities undertaken by them and their subsidiaries. In 2012, the Securities Commission adopted a CSR Framework and a Code for Corporate Governance that applies to government-linked and publicly listed companies. Further, the Bursa Corporate Governance Guide encourages directors to consider producing sustainability reports that address community involvement, equal opportunity, workforce diversity, human rights, supplier relations, child labour, freedom of association and fair trade. It has been recently announced that the Singapore Stock Exchange will follow suit with mandatory disclosure requirements for listed companies with regard to sustainability policies, social and environmental activities.⁹⁸

Other bourses with environmental and social impact disclosure requirements – albeit voluntary ones – include the Stock Exchange of Thailand, which refers to human rights as one of the core subjects of social responsibility referencing ISO26000⁹⁹; the Indonesian Capital Market and

Corporate Social Responsibility Regimes in China and India”, *UC Davis Business Law Journal* 14 (2014), 175, <http://ssrn.com/abstract=2472146>, <http://ssrn.com/abstract=2472146>

94. Li-Wen Lin, “Corporate Social Responsibility in China: Window Dressing or Structural Change”, *Berkeley Journal of International Law* 28 (2010), 64. The basis of these instruments, it has been argued, is the “harmonious society” concept put forward by President Hu Jintao in 2005, the purpose of which was to reconcile aspects of the Chinese socialist market economy with the problems faced in “rural areas, farmers and agriculture, the drainage of farmland, heavy pressure in the workplace and an incomplete social security system”. See “Harmonious Society”, *People’s Daily*, 29 September 2007. Cited in Jingchen Zhao, *Corporate Social Responsibility in Contemporary China* (Cheltenham: Edward Elgar Publishing, 2014).

95. See Section 18 in “Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities”, *State-owned Assets Supervision and Administration Commission of the State Council (SASAC), the People’s Republic of China*, <http://www.sasac.gov.cn/n2963340/n2964712/4891623.html>.

96. Shanghai Bureau of Quality and Technical Supervision, *Corporate Social Responsibility, DB31/421-2008 (2008)*, <http://csrsh.com/info/3764-1.htm>

97. Doug Morrow, Michael Yow, and Brian Lee, *Trends in Sustainability Disclosure: Benchmarking the World’s Stock Exchange* (CK Capital, 2013), <http://static.corporateknights.com/StockExchangeReport2013.pdf>

98. Vaidehi Shah and Jessica Cheam, “SGX to make sustainability reporting mandatory”, *Eco-Business*, 17 October 2014, http://www.eco-business.com/news/sgx-make-sustainability-reporting-mandatory/?utm_medium=email&utm_campaign=Oct+23+newsletter&utm_content=Oct+23+newsletter+Version+A+CID_846bc5f7b53d39a95ba3af16b9cee582&utm_source=Campaign%20Monitor&utm_term=READ%20FULL%20STORY

99. The Securities and Exchange Commission, in conjunction with the Corporate Social Responsibility Institute (under the Stock Exchange of Thailand), plans to make it mandatory for firms to disclose their CSR operations

Financial Institution Supervisory Agency (Bapepam-LK); the Shenzhen Stock Exchange Social Responsibility Guidelines for Listed Companies¹⁰⁰; the Shanghai Stock Exchange¹⁰¹; the Stock Exchange of Hong Kong Limited¹⁰²; and the Securities and Exchange Commission of Pakistan (SECP)¹⁰³. Some operate on a “comply or explain” principle, including Japan's Financial Services Authority (FSA)'s “Principles for Responsible Institutional Investors”¹⁰⁴. India's Securities and Exchange Board mandates that the top 100 companies by market capitalisation meet this principle with regard to disclosures on their “National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business”.

Sector-specific regulatory initiatives are also emerging. China Banking Association's Guidelines on CSR for Banking Financial Institutions apply to all banking institutions with corporate status in China. They address CSR in relation to economic responsibility, social responsibility and environmental responsibility and make recommendations for management control mechanisms and systems, and annual reporting on CSR.¹⁰⁵ The Guidelines on Social Responsibility for Industrial Corporations and Federation issued in 2011 encourage companies across a range of sectors¹⁰⁶ to establish a CSR system for management and to produce an annual report.¹⁰⁷ Finally, the Sustainability Reporting Guidelines for Apparel and Textile Enterprises set out indicators for Chinese companies publishing annual reports on sustainability.¹⁰⁸ The impact of these regulatory initiatives, however, is yet to be measured.

4.3 Asia and the GPs

The institutional uptake of the GPs in Asia has been low so far. At regional level, only the ASEAN Intergovernmental Commission on Human Rights (AICHR) has engaged with them specifically

on form 56-1 and their annual report. Any firms planning to issue new securities will have to disclose whether they have operated in accordance with the 2012 guidance from 1 January 2014 onwards.

100. Listed companies are encouraged to establish a social responsibility mechanism prepare social responsibility reports on a regular basis. The disclosure requirements are mandatory for only companies in SZSE 100 index. The SZSE also trains companies on how to apply the guidelines. See: 'Shenzhen Stock Exchange Social Responsibility Instructions to Listed Companies,' *Shenzhen Stock Exchange*, www.szse.cn/main/en/rulseandregulations/sserules/2007060410636.shtml

101. Research & Corporate Development Department, *Initiatives in Promoting Corporate Social Responsibility in the Marketplace by HKEx and Overseas Exchanges* (Exchange, 2011), <https://www.hkex.com.hk/eng/newsconsul/newsltr/2011/Documents/2011-10-13-E.pdf>

102. In 2012, it published its Consultation Conclusions on Environmental, Social and Governance Reporting Guide as a guide for 'recommended practice' within the Listing Rules, but there are plans to establish a “comply or explain” basis of ESG reporting by 2015. Entities following the guide make disclosures on workplace quality, environmental protection, operating practices, and community involvement.

“The Exchange Publishes Consultation Conclusions on Environmental, Social and Governance Reporting Guide”, *HKEx News Release*, www.hkex.com.hk/eng/newsconsul/hkexnews/2012/120831news.htm

103. Its CSR Voluntary Guidelines 2013 are applicable to all public companies. They identify processes that companies can undertake to integrate CSR policies and practices including developing a CSR Policy, establishing a CSR consultative committee, disclosure and reporting practices and seeking independent assurance of CSR performance. The Board of Directors is expected to play an active role in formulating CSR policy. There is no set definition of CSR but the Guidelines suggest issues that companies can focus on including climate change, governance and product responsibility. See Securities and Exchange Commission of Pakistan, *Corporate Social Responsibility Voluntary Guidelines 2013* (2013), http://www.secp.gov.pk/notification/pdf/2013/VoluntaryGuidelinesforCSR_2013.pdf and Nazish Sheka, “Regulating Corporate Social Responsibility in Pakistan”, *TBL Sustainability Advocacy*, <http://www.tbl.com.pk/regulating-corporate-social-responsibility-in-pakistan/>

104. “Global CSR Disclosure Requirements”, *Initiative for Responsible Investment at Harvard University*, <http://hausercenter.org/iri/about/global-csr-disclosure-requirements>.

105. China Banking Association, *Zhongguo yinhang ye jinrong jigou qiye shehui zeren zhiyin [Chinese Banking Social Responsibility Report of 2009]*, 2009, <http://www.docin.com/p-281617256.html>. Cited in Yunwen Bai, Michael Faure, and Jing Liu, “The Role of China's Banking Sector in Providing Green Finance”, *Duke Environmental Law and Policy Forum* (2014), Vol. XXIV.

¹⁰⁶. This covers national industrial federations and associations engaged in iron, steel, oil, chemicals, light industry, textiles, building materials, non-ferrous metals, electric power and mining.

¹⁰⁷. This should address scientific development, environmental protection, energy conservation, production safety, interests of employees, interests of stakeholders and social commonwealth.

¹⁰⁸. “China”, *Global Reporting Initiative*, <https://www.globalreporting.org/information/policy/initiatives-worldwide/Pages/China.aspx>.

through its thematic study on CSR and human rights.¹⁰⁹ Its baseline study into the CSR practices of States, businesses, civil society and other actors in the region that reference human rights, is aimed at identifying promotional activities; tools and mechanisms that facilitate engagement between the different stakeholders; and mechanisms that enabled access to remedies for victims of corporate-related human rights abuses.¹¹⁰

The Asian landscape is changing, however, and current developments may lead to a greater prominence of the GPs in the future. Public protest against corporate-related human rights abuses is becoming more commonplace. With the aid of mobile communications technologies, these protests are supported through transnational advocacy where actors draw from international human rights standards.¹¹¹ Affected communities, with support from CSOs, are also increasingly seeking remedies in transnational fora, raising the profile of abuses and framing them as violations of international human rights standards. The struggle of some 450 families from the Koh Kong province in Cambodia provides a pertinent example. In response to alleged illegal land grab by the government in connection with new sugar plantations, the families filed complaints with: the Cambodian courts against the sugar companies with BonSucro, a socially-responsible sugar industry initiative; the Thai National Human Rights Commission, concerning the Thai sugar company involved; and with the U.S. National Contact Point for the OECD Guidelines on Multinational Enterprises in relation to the US-based company purchasing sugar grown in the plantations.¹¹² The victims also filed a case against the UK-based sugar companies seeking a declaration that they are the rightful owners of the sugar purchased by these companies from the Cambodian companies since it was produced on their land.

Increasingly, Asian companies operating in developing countries are applying or are compelled to apply international human rights standards to secure their social license to operate or to address the concerns raised. Where projects receive financing through international financial institutions or multinational banks, loan requirements may include impact assessments and human rights due diligence.¹¹³ Malaysian corporations such as PETRONAS and Malaysian Smelting Corporation Berhad, in carrying out business in conflict zones in Iraq, Sudan, South Sudan, Myanmar and the Democratic Republic of the Congo (DRC), have had to respond to human rights concerns using the language of international standards. In 2012, the Chinese International Contractors Association released a *Guide on Social Responsibility for Chinese International Contractors*, the purpose of which is to encourage and guide those Chinese companies who take on overseas projects to manage their social and environmental impact and abide by disclosure standards.¹¹⁴

Finally, a focus upon responsible investment in Myanmar has drawn attention to business and human rights issues¹¹⁵ that are prevalent throughout the region. Myanmar may prove to be the

109. The report was completed in June 2014 but to date, the various country studies have not been made public. See “Workshop on CSR and Human Rights in ASEAN: Outcomes of the AICHR Thematic Study”, ASEAN Intergovernmental Commission on Human Rights, 17 June 2014, <http://aichr.org/press-release/workshop-on-csr-and-human-rights-in-asean-outcomes-of-the-aichr-thematic-study/>.

110. The study sought to make recommendations for a common framework for the promotion of CSR and human rights in ASEAN in alignment with the ASEAN Socio-Cultural Community Blueprint’s aspirations to incorporate CSR principles into the agenda of ASEAN-based businesses so as to contribute towards sustainable socio-economic development of ASEAN member states. See C.3 (29) of ASEAN, *ASEAN Socio-Cultural Community Blueprint* (ASEAN Secretariat, 2009), <http://www.asean.org/archive/5187-19.pdf>.

111. A large-scale strike against low pay by 30,000 workers at a Hong Kong-owned Chinese facility garnered so much attention that the strike ended when China’s Ministry for Human Resources ordered the company to rectify the benefit payments. See Stephanie Wong, “Yue Yuen Resumes Production at Dongguan Factory After Strike”, *Bloomberg*, April 28 2014, <http://www.bloomberg.com/news/2014-04-28/yue-yuen-resumes-production-at-dongguan-factory-after-strike.html>.

112. “The Sre Ambel communities and the Koh Kong sugar plantation”, *EarthRights International*, <http://www.earthrights.org/legal/sre-ambel-communities-and-koh-kong-sugar-plantation>; and “Koh Kong sugar plantation lawsuits (re Cambodia)”, *Business & Human Rights Resource Centre*, <http://business-humanrights.org/en/koh-kong-sugar-plantation-lawsuits-re-cambodia>.

113. Where a complaint is made through a mechanism such as the IFC’s Compliance Advisor or Ombudsman office, international human rights standards would apply.

114. “The First Guidance on Social Responsibility of China’s International Project Contracting Industry Officially Released”, Ministry of Commerce People’s Republic of China, <http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/201209/20120908367021.html>

115. U.S. Department of State, *Fact Sheet: Burma Responsible Investment Reporting Requirements*, U.S. Department of State, 19 June 2013, <http://www.humanrights.gov/2013/06/19/fact-sheet-burma>

test-bed for business and human rights¹¹⁶ in Asia, with knock-on national and regional effects. This is especially so given that the main investors in Myanmar are from the Asian region.

4.4 Critical business and human rights challenges in Asia

Although the region faces a range of concerns, the following four issues perhaps deserve particular attention at this time.

Land-grabbing: This is rampant in many countries across Asia,¹¹⁷ and often connected to economic land concessions¹¹⁸ supporting agro-industries such as palm oil, rubber and sugar, as well as extractive projects, forestry, special economic zones, large-scale infrastructure projects such as hydropower dams, tourism and property developments. Though business still accounts for most land-grabs, State land-grabs, directly or through SOEs or sovereign wealth funds, have increased.

Investment contracts and negotiations are usually opaque; affected communities are rarely forewarned and unlikely to participate in decision-making. Smallholder farmers, pastoralists, indigenous and nomadic peoples are amongst those most impacted by land-grabs by agro-businesses or extraction companies, with human rights violations often owing to a clash between customary and formal land ownership. These may include violations of the right to food, the right to adequate housing, the right to water, the right to self-determination, and exploitation of natural resources.¹¹⁹ Civil and political rights violations abound where communities resist or protest against being displaced from their land. Over the longer term, the broader population may also suffer from human rights abuses especially where fresh-water supplies are threatened by large-scale acquisitions of arable land; and where extensive land areas are dedicated to mono-cropping, damage is done to ecological systems. Smaller-scale and urban land-grabs are equally pervasive in parts of Asia. With the rapid growth of cities, areas designated as “wasteland” are often acquired and evictions and displacement of communities in occupation likewise result in abuses.

Workers’ rights abuses: According to the ILO, policies aimed at flexibilising labour through deregulation are a major contributory factor to poor working conditions in Asia.¹²⁰ Mostly, abuses occur within the labour-intensive manufacturing sector in global supply-chains, agriculture, mining, construction and infrastructure projects. Workers face excessive working hours, poor wages, forced overtime, poor health and safety conditions, physical abuses, race and gender discrimination, physical and sexual harassment, and restrictions on rights to freedom of association, movement and collective bargaining rights. A recent empirical study into the impact of voluntary labour codes of conduct indicates that whereas “outcome standards” such as health and safety can improve, often “process rights”, such as rights to freedom of association and collective bargaining remain under threat.¹²¹

Nearly 21 million people are subjected to forced labour, with the Asia-Pacific region accounting for 56% of the total number.¹²² Migrant workers arriving in receiving States such as Malaysia, Thailand, Singapore, Korea and Japan are not availed of the usual protections offered by labour

[responsible-investment-reporting-requirements/](#); Office of Foreign Assets Control (OFAC), US Department of the Treasury, *General License No 17* (2012).

¹¹⁶. For example, note the establishment of the Myanmar Centre for Responsible Business, a joint initiative of the Institute of Human Rights and Business and the Danish Institute for Human Rights.

¹¹⁷. Surya P. Subedi, “Land Grabbing in Asia: The Response of International Law”, in Andrew Harding and Connie Carter (eds.), *Land Grabs in Asia: What Role for the Law?* (Routledge, forthcoming 2015).

¹¹⁸. These are contracts between the government and a state or private actors that give the latter specific rights over the land for a (usually extended) period of time.

¹¹⁹. Sumithra Dhanarajan, “Transnational State Responsibility for Human Rights Violations resulting from global land grabs”, in Andrew Harding and Connie Carter (eds.), *Land Grabs in Asia: What Role for the Law?* (Routledge, forthcoming 2015).

¹²⁰. Sangheon Lee and Francois Eyraud (eds.), *Globalization, Flexibilization and Working Conditions in Asia and the Pacific* (International Labour Organization, 2008).

¹²¹. Niklas Egels-Zandén and Jeroen Merk, “Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights”, *Journal of Business Ethics* (2013), 1–13.

¹²². International Labour Organization, Asian Development Bank, *Women and Labour Markets in Asia: Rebalancing for Gender Equality* (Thailand: 2011), <http://www.adb.org/sites/default/files/pub/2011/women-labor-markets.pdf>.

laws. Under the threat of repatriation, many endure unreasonable wage deductions, excessive working hours, verbal, physical and sometimes sexual abuse. Employers regularly confiscate passports. When workplace accidents happen, they are often denied medical expenses or compensation for injuries sustained. Migrant workers rarely have the ability to organise effectively, nor is it common for local unions to help protect their rights.¹²³ Access to justice and remedies when abuses occur are regularly denied. Many abused workers forgo the opportunity to raise their grievance through the formal channels for fear of losing their jobs and working permits. Further, the cost of not earning a wage during the grievance process is difficult to endure especially where the worker is in debt as a result of fees paid to recruitment agencies. Sometimes, loopholes in the law allow for repatriation to take place before the worker has a chance to engage the dispute resolution process. Workers' rights abuses disproportionately impact women workers operating at the lower end of value-chains¹²⁴ but sex-based discrimination is problematic higher up the value chain too.¹²⁵ Sexual harassment continues to be a serious problem.¹²⁶ As an example, a survey of female factory workers in Guangzhou found that up to 70% had experienced this. Women are however starting to use the law to challenge discrimination, although with mixed success.¹²⁷

Human rights defenders: Those who work on issues of corporate accountability in Asia are particularly at risk of death threats, physical violence, abductions, hounding by law enforcement, assassinations or various forms of harassment by the police, defamation campaigns, and threats against family members.¹²⁸ Attacks against these individuals have a high level of impunity with less than one in 10 cases properly investigated and prosecuted.¹²⁹ This problem is exacerbated where there is weak rule of law and if elite interests are threatened. Activists addressing the extractive industries and agri-businesses such as palm oil face some of the worst abuses.¹³⁰ Trade unionists and other workers' rights activists also face violence and intimidation. A recent international fact-finding mission on human rights defenders in the Philippines, for example, concluded, "there is compelling evidence that HRDs [human rights defenders]... are under serious threat, are constantly vilified, intimidated and 'terrorised.' A climate of pervasive and systematic impunity is at the heart of this alarming situation". The report highlights the effects of the ongoing militarisation including the emergence of multiple illegal private armies, legalised paramilitary

¹²³. Jolovan Wham, Statement to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, 7 April 2014, <http://www.ohchr.org/Documents/HRBodies/CMW/Discussions/2014/JolovanWham.pdf>.

¹²⁴. Apart from abuses unique to women (e.g., lack of protection due to pregnancy) women are more likely than men to be hired on short-term, casual, seasonal or homework contracts. See Kate Raworth, "Trading Away Our Rights: Women Working in Global Supply Chains", *Oxfam Policy and Practice: Private Sector* 1, no. 1 (2004), 1–52.

¹²⁵. An ADB-ILO study revealed that gender inequality in wage differentials remains entrenched, with women typically earning 70%–90% less of men. See International Labour Organization, Asian Development Bank, *Women and Labour Markets in Asia: Rebalancing for Gender Equality* (Thailand: 2011).

¹²⁶. In Australia, complaints of sexual harassment in the workplace were one of the most common complaints received by the NHRI. See "Sex Discrimination and Sexual Harassment", *Catalyst* (2014), <http://www.catalyst.org/knowledge/sex-discrimination-and-sexual-harassment-0>. In 2013, India passed the Anti-Sexual Harassment of Women at Workplace Act, to address a critical problem in the country. See Indian Ministry of Law and Justice, *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (No.14 of 2013)* (22 April 2013), <http://wcd.nic.in/wcdact/womenactsex.pdf>. In Japan, although sexual harassment is illegal, the Equal Employment office received 9,981 sexual harassment complaints, 60% of which were made by female employees in 2012. See "Women and Men in Japan 2013", *Japan Gender Equality Bureau Cabinet Office*, http://www.gender.go.jp/english_contents/pr_act/pub/pamphlet/women-and-men13.

¹²⁷. Tania Branigan, "China: Woman Settles in First Gender Discrimination Lawsuit", *The Guardian*, 28 January 2014, <http://www.theguardian.com/world/2014/jan/28/china-woman-settles-first-gender-discrimination-lawsuit>; G Vinod, "Eight Women Lose Gender Discrimination Suit", *Free Malaysia Today*, 21 March 2012, <http://www.freemalaysiatoday.com/category/nation/2012/03/21/eight-women-lose-gender-discrimination-suit/>.

¹²⁸. Special Rapporteur on the situation of human rights defenders, *Situation of human rights defenders*, A/69/259, 5 August 2014, http://www.ishr.ch/sites/default/files/article/files/sr_on_hrd_2014_report_to_ga.pdf.

¹²⁹. See "Civil society identifies key issues for the new Special Rapporteur on Human Rights Defenders", *International Service for Human Rights*, <http://www.ishr.ch/news/civil-society-identifies-key-issues-new-special-rapporteur-human-rights-defenders>.

¹³⁰. See "Thailand: Protect Human Rights Defenders Fighting Corporate Mining in Loei Province", Asian Human Rights Commission, <http://www.humanrights.asia/news/urgent-appeals/AHRC-UAC-073-2014>.

groups, and the large-scale possession of armament contributes to the spread human rights violations with impunity.¹³¹

Corruption: This continues to be a serious problem in some Asian countries. According to Transparency International's (TI's) Corruption Perceptions Index of 2013, only nine of the 28 countries surveyed in Asia-Pacific scored above 50 points.¹³² Further, TI's Bribe Payers Index 2011 identifies Indonesian and Chinese companies as having a high propensity to bribe when doing business abroad.¹³³ Analysing corruption from a human rights perspective emphasises the harm caused to individuals and communities by corrupt behaviour and activities. Corruption can be directly linked to human rights abuse when a corrupt act is deliberately used to cause the abuse; or indirectly linked where it is an essential contributory factor to the human rights abuses; or creates the conditions that enable the abuse to take place and corruption disproportionately impacts upon marginalised and disenfranchised groups. Yet, little attention has been paid to the links between corruption and human rights in defining responses.¹³⁴

5. European responses to business and human rights

As in Asia, understandings of both CSR and business and human rights in Europe, and responses to them have many influences. National politics, laws, institutions, attitudes and histories have influenced the configurations of national economies as they have the evolution of diverse mechanisms regulating business operations and their impacts. A marked difference between the two continents does exist, however, in terms of the contribution of regional-level institutions, in particular the Council of Europe (CoE) and the European Union (EU) to shaping the reception of the GPs in European States. As will be seen, this derives as much, if not more, from the pre-existing framework of human rights and other laws and policies established at regional level, as from specific measures taken since 2011 to promote the GPs' implementation.

5.1 Council of Europe

The Council of Europe (CoE) is the European region's principal human rights organisation. Of its 47 Member States, 28 are also EU members. All CoE Member States are parties to the European Convention on Human Rights (ECHR). Individuals can bring complaints of human rights violations under the ECHR to the European Court of Human Rights (ECtHR) in Strasbourg, once all possibilities of domestic remedy have been exhausted. The European Union is preparing to sign the ECHR, with the aim of creating a common legal space for Europe's 820 million citizens.¹³⁵

5.1.1 The European Convention on Human Rights

Like other human rights treaties, the ECHR does not establish direct legal human rights obligations for corporations: only States can be sued before the ECtHR, and responsibility for human rights violations arises from the acts or omissions of public bodies, not private actors. Nevertheless, the ECHR as it has been interpreted and applied in cases by the ECtHR over past decades contains a number of protections relevant to business and human rights.¹³⁶ In other

¹³¹. "Philippines: Defending Ancestral Lands: Indigenous Women Human Rights Defenders In The Philippines", Indigenous Peoples Human Rights Defenders Network, <http://www.iphrdefenders.net/country-updates/philippines/237-philippines-defending-ancestral-lands-indigenous-women-human-rights-defenders-in-the-philippines>.

¹³². The 2013 Corruption Perceptions Index measures the perceived levels of public sector corruption in 177 countries and territories around the world with 0 equating to "highly corrupt" and 100, to "very clean". See "Corruption Perceptions Index 2013: Asia Pacific", *Transparency International*, http://www.transparency.org/files/content/pressrelease/CPI2013_AsiaPacific_EN.pdf.

¹³³. "Bribe Payers Index 2011", *Transparency International*, <http://www.transparency.org/bpi2011>.

¹³⁴ International Council on Human Rights Policy (ICHRP), *Transparency International, Corruption and Human Rights: Making the Connection* (Geneva: 2009), <http://www.ncjrs.gov/App/AbstractDB/AbstractDBDetails.aspx?id=248148>.

¹³⁵. Accession of the EU to the ECHR became a legal obligation under the Treaty of Lisbon, Article 6, and is foreseen by Article 59 of the ECHR as amended by Protocol 14. On 17 March 2010, the Commission proposed negotiation of Directives for the EU's accession to the ECHR (IP/10/291).

¹³⁶. See Jörg Polakiewicz, "Corporate Responsibility to Respect Human Rights: Challenges and Opportunities for Europe and Japan", *CALE Discussion Paper No. 9* (2012), 8.

respects, however, the ECtHR's jurisprudence imposes limits on remedies potentially available to victims, particularly with regard to business-related abuses taking place outside Europe.

Positive obligations

As already noted above in section 3.3, based on the obligation on States under Article 1 ECHR "... to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention", the ECtHR has developed the doctrine of positive obligations, according to which, a State's duties are not restricted to abstaining from interference with human rights. Rather, States may be obliged to adopt protective or preventive measures, "even in the sphere of the relations of individuals between themselves", where this is necessary to protect human rights and provide remedies for abuses perpetrated by private individuals.

In some circumstances, the Court has considered that effective deterrence requires a State to criminalise private actors' conduct; in others, it warrants the adoption of legislation or policies, or the deployment of resources. Acquiescence or complicity with the acts of private individuals breaching ECHR rights can, in addition, engage State responsibility,¹³⁷ even where agents of the State act *ultra vires* or contrary to instructions.¹³⁸ This rule has been widely applied by the ECtHR to hold States responsible for abuses by non-State actors.¹³⁹ States are also obliged to provide effective remedies for human rights violations, regardless who the perpetrator is, and whether they are public or private.

Cases where the doctrine of positive obligations has been applied have included a number where States have been found liable for breaches of the ECHR as a result of failure to protect individuals from interference with human rights resulting from the acts of corporations.¹⁴⁰ The Court has held that a "state's responsibility in environmental cases 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.¹⁴¹ A limitation, though, is that the actions or defaults of the State or public actors should have "sufficiently direct repercussions" on human rights; 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.¹⁴²

In relation to the acts of -owned or controlled enterprises or companies performing public functions that may breach human rights, under the ECHR, the State can be held directly responsible. The ECtHR has held that the "State cannot absolve itself entirely from its responsibility by delegating its obligations to secure the rights guaranteed by the Convention to private bodies or individuals."¹⁴³ This principle is, of course, of potential relevance in connection with the "contracting" out of the delivery of public services. A combination of criteria is applied by

¹³⁷. *Ireland v. UK* [1978] Judgment of 18 January 1978, Series A, no. 25, p. 64, §159.

¹³⁸. *Cyprus v. Turkey* [2001] ECHR GC No. 25781/94-IV, §81.

¹³⁹. For example, see *Osman v. UK* [1998] Judgment of 28 October 1998, Reports 1998-VIII, p. 3164 (relating to Article 2); *Ireland v. UK* [1978] Judgment of 18 January 1978, Series A no. 25, p. 64 (relating to Article 3); *Siliadin v. France* [2005] Judgment of 26 July 2005 (relating to Article 4); *Storck v. Germany* [2005] Judgment of 16 June 2005 (relating to Article 5); *Wilson and Others v. UK* [2002] Judgment of 2 July 2002 (applications nos. 30668/96, 30671/96 and 30678/96).

¹⁴⁰. In *Lopez Ostra v. Spain* [1994] ECHR App. No. 16798/90, 303-C (ser. A), Spain was held liable for failing to protect residents from environmental and health problems at a nearby waste treatment facility.

The plant was built on State property and funded by state subsidies. The ECtHR found the interference with the rights protected by Article 8 was disproportionate and hence unlawful. In *Taşkin and Others v. Turkey* [2004] ECHR No. 46117/99 10, the State failed to prevent environmental damage by a private gold mining company, breaching the rights of local residents. In *Guerra and Others v. Italy* [1998] ECHR App. No. 14967/89, 7, the state was held liable for having failed to inform the local population about the potential for accidents at a chemical factory.

¹⁴¹. *Fadeyeva v. the Russian Federation* [2005] ECHR No. 55273/00, §89 and §92. The case related to a private steel plant. The ECtHR held that the state was "certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them," giving a "sufficient nexus between the pollutant emissions and the State Applying similar reasoning, the case of *Powell and Rayner v. the UK* [1990] concerned nuisance caused to the applicants by a private airport.

¹⁴². *E and Others v. UK* [2002] ECHR (a case concerning private psychiatric care).

¹⁴³. *Van der Musselle v. Belgium* [1983] Judgment of 23 November 1983, Series A no. 70, pp. 14–15, §§ 28–30; *Costello-Roberts v. UK* [1993] Series A no. 247–C, § 27; *Storck v. Germany* [2005] Judgment of 16 June 2005, § 103.

the ECtHR to determine whether a corporation, on a given occasion, was acting as an agent of the State.¹⁴⁴ These include: the corporation's legal status, asking, for example, whether it is established under public law, or as a separate legal entity under private law; the rights conferred upon the corporation by virtue of its legal status, where the question is whether the corporation enjoys rights normally reserved to public authorities; whether the corporation is institutionally independent; whether the corporation is operationally independence, with reference, for instance, to *de jure* or *de facto* State supervision and control; the nature of the corporation's activity in question – whether it is ordinarily considered to be a “public function” or rather “ordinary business” activity; the context in which the corporate activity is carried out, considering issues such as whether the corporation has a monopoly position in the market.¹⁴⁵

A second avenue by which the ECtHR subjects the acts of corporations to review, indirectly, is through its consideration of the rights-compatibility of domestic court cases between private parties, one of which is a private business entity. Cases of this kind adjudicated by the ECtHR to date have considered workplace discrimination, freedom of association and collective bargaining,¹⁴⁶ privacy against media intrusion,¹⁴⁷ and freedom of expression and to receive information.¹⁴⁸

Extraterritoriality

In general the scope of application of ECHR, like other treaties, is territorial and “jurisdiction” under Article 1 refers to the national territory of contracting States. Only exceptionally, then, are acts or omissions performed or producing effects outside a State's territory within ECtHR's jurisdiction.¹⁴⁹

The ECHR can apply where a State exercises effective overall control over a foreign territory, or authority and control over individuals outside their own territory; but even then, it will apply only to the acts or omissions of State organs. According to one authoritative source, “It must therefore be concluded that the Convention does not generally require High Contracting Parties (HCPs) to exercise control on the conduct abroad of business enterprises incorporated under the High Contracting Parties' laws or having their headquarters in their territories, even when such conduct leads to human rights abuses.”¹⁵⁰ This is despite the obligation on States to provide an effective remedy before a national authority for any violation under the ECHR.¹⁵¹ While corporations are entitled to enjoy Convention rights,¹⁵² overall, and with the exception of State-owned enterprises, it can be concluded that the ECHR “does not apply directly to private entities, nor is there any case law so far requiring HCPs to control the activities of their MNES operating abroad, even if they participate in or otherwise contribute to human rights abuses”.¹⁵³

As the discussion relating to Working Groups I to III will highlight, these general principles enunciated and given effect to by the ECtHR in decided cases, and the possibilities and limitations they pose, provide a large component of the international legal basis for the UN Framework and have strongly influenced its three key elements of the state duty to protect, corporate responsibility to respect, and the right of victims to remedy. Extraterritoriality in relation to European civil law is considered further under Working Group III.

¹⁴⁴. Polakiewicz, “Corporate Responsibility to Respect Human Rights”, 16.

¹⁴⁵. *Yershova v. Russia* [2010] Judgment of 8 April 2010 §§ 55–58.

¹⁴⁶. *Young James and Webster v. UK* [1981] ECHR.

¹⁴⁷. *Axel Springer AG v. Germany* [2012] ECHR, *Von Hannover v Germany* [2012] ECHR–GC, no 2.

¹⁴⁸. *Steel and Morris v. UK* [2005] ECHR.

¹⁴⁹. *Al Skeini and Others v. the United Kingdom* [2011] ECHR GC §§ 131 et seq; *Issa and Others v. Turkey* [2004] Judgment of 16 November 2004, §§ 68 and 71; *Isaak v. Turkey* [2006] Decision of admissibility of 28 September 2006; *Ilaşcu and Others v. Moldova and Russia* [2004] ECHR GC App. No 48787/99, §§ 314 and 318.

¹⁵⁰. Polakiewicz, “Corporate Responsibility to Respect Human Rights”, 14.

¹⁵¹. European Court of Human Rights, Council of Europe, *European Convention on Human Rights*, Article 13.

¹⁵². There are numerous cases where corporations have benefited from the protection of the ECHR: for an overview, see Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006).

¹⁵³. Polakiewicz, “Corporate Responsibility to Respect Human Rights”, 31.

5.1.2 The European Social Charter

The European Social Charter (ESC) is the second major human rights treaty of the Council of Europe, guaranteeing social and economic human rights, besides the ECHR's protections for civil and political rights.¹⁵⁴ The European Committee of Social Rights monitors compliance with the ESC through State reports, and decides on collective complaints that may be brought by European social partners.¹⁵⁵ Less often relied on in the past than the ECHR, the financial crisis and austerity measures have brought the ESC into renewed focus.¹⁵⁶

The ESC establishes rights including those to a safe, healthy, just and dignified working conditions, a living wage, freedom of employment and protection in cases of termination of employment, association and collective bargaining, non-retaliation against workers' representatives, other collective workplace rights, vocational training, health, social security, free movement of workers, equal treatment, and to protection against poverty and social exclusion. Employed women, children, the persons with disabilities, the elderly and the family are entitled to additional protections.¹⁵⁷ The ESC thus contains many provisions with potential to impact on relations between businesses and individuals. However, as with the ECHR, obligations under the ESC are addressed to States, not businesses, albeit with scope for reliance on the notion of positive obligations. Similarly, it also applies only to the metropolitan territory of each party.¹⁵⁸

5.1.3 New standards on human rights and business

Within the Council of Europe, the Steering Committee on Human Rights (CDDH) sets standards on human rights. Since 2011, at the request of the Council of Europe's Committee of Ministers, a process has been undertaken to develop new standards specifically addressing business and human rights.

Already this has led to the conclusion of a new Declaration of the Committee of Ministers on the United Nations Guiding Principles on Business and Human Rights. The Declaration expresses strong support for implementation of the GPs by Council of Europe Member States, calling on them, *inter alia*, to take appropriate steps to protect against human rights abuses by companies; to formulate and implement policies and measures to promote that all business enterprises respect human rights, within and beyond national jurisdictions; to ensure access to remedy within their territory and/or jurisdiction, and to develop national action plans (NAPs) on business and human rights.¹⁵⁹

Beyond this Declaration, in September 2014, a Draft Recommendation of the Committee of Ministers to Member States on human rights and business was discussed.¹⁶⁰ This soft legal standard, if adopted, would recommend to the CoE governments that they, *inter alia*:

154. Council of Europe, *European Social Charter* (1996), <http://www.coe.int/T/DGHL/Monitoring/SocialCharter/>.

155. The social partners include the European Trade Union Confederation, ESCR Business Europe and the International Organisation of Employers, international NGOs with participatory status in the CoE, and social partners at national level. Any state can give national NGOs the right to bring complaints before the ESC but to date only Finland has taken this step.

156. See, for example, European Union Agency for Fundamental Rights, *The European Union as a community of values: safeguarding fundamental rights in times of crisis* (Luxembourg: Publications Office of European Union, 2013), http://fra.europa.eu/sites/default/files/fra-2013-safeguarding-fundamental-rights-in-crisis_en.pdf.

157. "European Social Charter (revised) CETS No.:163", *Council of Europe*, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&CL=ENG>

158. *Marangopoulos Foundation for Human Rights v. Greece Collective* [2005] ECSR Complaint No.30/2005, Case Doc. No.1.

159. Committee of Ministers, *Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights* (2014), <https://wcd.coe.int/ViewDoc.jsp?id=2185745&Site=CM>.

160. Council of Europe, *Draft Recommendation of the Committee of Ministers to Member States on human rights and business*, CDDH-CORP(2014)10 (22 August 2014), http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/hr_and_business/Documents/CDDH-CORP%20Draft%20Recommendation%20Human%20Rights%20and%20Business%20Final%20ENG.pdf.

- Review national legislation and practice to ensure compliance with legal requirements and standards on business and human rights;
- Evaluate the effectiveness of measures taken at regular intervals;
- Share their NAPs and best practices of implementing the GPs and present these via a shared information system, to be established and maintained by the Council of Europe, and accessible to the public; and
- Engage in a peer discussion process with the participation of all relevant stakeholders, including business, to review progress.

Attached to the Draft Recommendation is a substantial Appendix, which includes guidance for States in a number of areas, in particular those addressed by Pillars I and III of the UN Framework.¹⁶¹ Notably, regarding extraterritoriality, the Draft Recommendation states that this should have the same meaning as under Article 1 of the ECHR. As discussed above, this would entail that extraterritoriality should be understood as remaining exceptional and not generally applicable to the conduct of private companies outside Council of Europe Member States, unless one of the special circumstances noted above has been met.

5.2 European Union

The founding vision of European federalists following World War II may be described, somewhat crudely, as that of binding Europe together in peace through commerce. Though not an explicit goal initially, over time, it became evident that, beyond dismantling of barriers to trade and free movement of goods, certain rights and freedoms for workers, and common minimum standards in areas such as product safety, and environmental quality were also necessary to avoid social dumping and market distortion, and to achieve a more fully integrated single European market.¹⁶² Early EU legislation established the right of equal treatment in employment for women.¹⁶³ The Community Charter of Fundamental Social Rights of Workers of 1989 established a range of protections in the employment context. The later EU Equal Treatment Directive prohibits discrimination in the area of employment and working conditions on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, and applies to both the public and private sectors.¹⁶⁴

Up to a point, protecting human rights in the context of business activities was then incidental to other regulatory aims in the EU, perhaps understandably so, given the Council of Europe's prerogative over setting and enforcing standards in the area of human rights. However, this demarcation of institutional competence was not to endure. Since the Treaties of Amsterdam and Lisbon, EU primary law explicitly provides for an EU that is "... founded on the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."¹⁶⁵

Under the Treaty on European Union, the European Charter of Fundamental Rights of 2000 is now afforded equal legal value to the EU's founding treaties and the market freedoms for which they provide. Thus, the Charter is legally binding on EU institutions and Member States when

161. The Draft also recalls CoE standards in a number of areas that address issues relevant to business and human rights, e.g. Article 12 of Convention on Cybercrime, Article 18 of Criminal Law Convention on Corruption.

¹⁶². See, for example, Christian Joerges, "What is left of the European Economic Constitution?", *EUI Working Paper* 13 (2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=635402; and Christian Joerges and Florian Roedel, "Social Market Economy' as Europe's Social Model?", *EUI Working Paper* 8 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=635362.

¹⁶³. Council of the European Communities, *Council Directive on the implementation of the principle of equal treatment for men' and women as regards access to employment, vocational training and promotion, and working conditions*, 76/207/EEC (9 February 1976), and Council of the European Communities, *Council Directive on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood*, 86/613/EEC (11 December 1986).

¹⁶⁴. Council of the European Union, *Council Directive establishing a general framework for equal treatment in employment and occupation*, 2000/78/EC (27 November 2000), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0078>.

¹⁶⁵. European Union, *The Treaty on European Union* (1992), Article 2.

implementing or claiming exceptions from EU law.¹⁶⁶ Fundamental rights under the ECHR and Member States' common constitutional traditions also have the status of general principles of EU law¹⁶⁷, and the EU will itself accede to the ECHR.¹⁶⁸

These developments have set the stage for a number of new legal dilemmas and policy challenges. Internally, the European Court of Justice has faced clashes between fundamental human rights and market freedoms. Whether the EU will in practice retain its character as an essentially market-based order, or is capable of resolving such conflicts without weakening human rights protections remains to be seen.¹⁶⁹

A second set of tensions attach to the relationship between the EU's internal and external commitments to human rights. The EU has committed at various times to integrating human rights through all policy areas and to aligning its external policies in particular with the European Charter.¹⁷⁰ Yet, critiques, including from the European Parliament (EP),¹⁷¹ have long pointed to a lack of coherence between the Union's domestic human rights regime and measures in areas such as trade, commercial, foreign policy and development whose impacts on human rights in countries outside the EU have been claimed to be often negative.¹⁷²

5.2.1 CSR and business and human rights in EU policy

The evolution of EU policies on corporate social responsibility reflects these broad tensions, as well as changing ideas in the EU and world at large about the role of business in society and sustainable development, models for EU-level law and policy-making and approaches to business regulation.¹⁷³

Published after the UN Human Rights Council's adoption of the GPs,¹⁷⁴ and also after the start of the global financial crisis, the European Commission Communication on CSR of 2011 marks the

166. European Union, *The Treaty on European Union* (1992), Article 6(1).

167. European Union, *The Treaty on European Union* (1992), Article 6.

168. European Union, *The Treaty on European Union* (1992), Article 6(2). A recent paper revives the case for EU accession to the European Social Charter, see Olivier De Schutter, "The Accession of the European Union to the European Social Charter", *EUI Working Paper* (2014), http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Presentation/PublicationCSEUEODESchutterJuly2014_en.pdf.

169. See, for example, Anne CL Davies, "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ", *Industrial Law Journal* 37, no. 2 (2008), 126–48; Cf. Eric Engle, 'A Viking we will go! Neo-corporatism and Social Europe', *German Law Journal* 11(6) (2010), 633.

170. Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament – The European Union's role in promoting human rights and democratization in third countries*, EU Doc COM/2001/0252 final (2001).

171. The EP has passed resolutions regarding companies and their impacts since 1999. Recently, see Committee on Employment and Social Affairs, *Report on Corporate Social Responsibility: promoting society's interests and a route to sustainable and inclusive recovery* (2013),

<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0023&language=EN>.

European Parliament, *Resolution on Corporate Social Responsibility: accountable, transparent and responsible business behaviour and sustainable growth*, A7-0017/2013 (6 February 2013).

172. See discussions on EU approaches to trade and investment under WG1 and contributions in Philip Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 2000) and Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union* (University of Edinburgh, 2010),

http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf.

On TNCs, the European Parliament has proposed measures including a binding code of conduct for EU companies in developing countries and a remedy mechanism for victims from third countries in EU national courts: European Parliament, *Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct* (2009).

173. See, for example, Daniel Kinderman, "Corporate Social Responsibility in the EU, 1993-2013: Institutional Ambiguity, Economic Crises, Business Legitimacy and Bureaucratic Politics", *Journal of Common Market Studies* 51(4) (2013), 701; and Olivier De Schutter, "Corporate Social Responsibility European Style", *European Law Journal* 14, no. 2 (2008), 203–36.

174. 2009 Swedish Presidency and incoming Spanish Presidency of the EU held a conference "Protect, Respect, Remedy" on CSR, concluded that "EU and its MS [Member States] should take a global lead and service as a good example on CSR..." and expressed support for the UN Protect Respect Remedy framework.

EU's first explicit engagement with business and human rights, and departs from previous EU CSR policy in a number of respects.¹⁷⁵ Most significantly, in the present context, this concerns the definition of CSR. Up to 2011, the EU defined CSR as “a *concept* whereby companies integrate social and environmental concerns in their business”. The 2011 Communication, by contrast, makes a point of re-defining CSR as “the responsibility of enterprises for their impacts on society”: CSR is thus no longer *just* an idea, but has become more of a social reality. Though still emphasising the “business case” for CSR, in terms of competitiveness, risk management, cost savings and access to capital, for instance, this responsibility now integrates the need to respect legal standards, including human rights standards: CSR, assumes “respect for applicable legislation, and for collective agreements between social partners”, excluding the notion of CSR as purely voluntary affair.

Reinforcing this, the policy asserts a specific approach for European businesses to adopt, consequent on their responsibilities to society:

To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:

- *maximising the creation of shared value for their owners/shareholders and for their other stakeholders and society at large;*
- *identifying, preventing and mitigating their possible adverse impacts.*

A number of dedicated measures on human rights are then laid out. Responding to the GPs' call for governments to communicate clear expectations to business under Pillar I of the UN Framework, the EU policy states a clear expectation by the Commission on all EU companies “to meet the corporate responsibility to respect human rights as defined in the GPs”. Commitments were also made by the Commission to develop guidance based on the GPs for specific industry sectors, as well as small and medium enterprises (SMEs), based on the GPs (such guidance has now been produced, see further WG1 below) and to report on EU-level priorities for the implementation of the GPs.¹⁷⁶ As to the “external” dimensions of business and human rights, in other words, impact beyond EU borders, the policy commits only to “Identify ways to promote responsible business conduct in its future policy initiatives towards more inclusive and sustainable recovery and growth in third countries.”¹⁷⁷

In the area of Pillar II, the Communication invited large European enterprises “to make a commitment to respect the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy” and to take account of the GPs or another “GP-aligned framework” when developing their approach to CSR, both by 2014.¹⁷⁸ The Commission then undertook to “monitor the commitments made by European enterprises with more than 1,000 employees to take account of internationally recognised CSR principles and guidelines, and take account of the ISO 26000 Guidance Standard on Social Responsibility in its own operations.”¹⁷⁹ Yet, as further discussed in Section 7.2 below, a 2013 study for the European Commission, surveying a sample

See also Danish EU Presidency, *From Principles to Practice: The European Union operationalizing the United Nations Guiding Principles on Business and Human Rights*, Expert Conference (Copenhagen: 2012).

175. 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> (known as the EU Strategy for Corporate Social Responsibility). The Communication states, “The economic crisis and its social consequences have to some extent damaged consumer confidence and levels of trust in business. They have focused public attention on the social and ethical performance of enterprises.”

176. Section 4.8.2, p.14. Though a commitment was made to identify EU level priorities by end 2012, publication of this report is still awaited.

177. *Ibid*, p.15.

178. In this connection, the Communication refers to the OECD Guidelines for MNEs, ISO26000 *Guidance Standard on Social Responsibility*, and the UN Global Compact.

179. *Ibid*, p.13.

of European companies found that only 33% referred to the UN Global Compact, OECD Guidelines or ISO 26000, and only 3% to the GPs as such.¹⁸⁰

5.3 NAPs: Connecting regional and national action on business and human rights

An invitation was also issued to EU Member State governments by the Commission's 2011 CSR Communication, namely, to develop NAPs to support the implementation of the GPs.¹⁸¹ This invitation built on, but went beyond, an earlier request to EU Member States to produce NAPs on CSR. At the time of writing, 24 of the 28 EU Member States had already developed, or were in the process of developing, a CSR NAP.¹⁸² To support Member States in implementing and improving their respective CSR plans, the European Commission set up a process of peer review of CSR NAPs in 2013, based on collaborative working among small groups of States to scrutinise measures taken on a constructive basis, and share best practices.¹⁸³

At the time of writing, four EU Member States have published NAPs.¹⁸⁴ Given the reliance on NAPs placed by the Council of Europe's Draft Recommendation on business and human rights, and the new focus on NAPs by the UN Human Rights Council in its 2014 business and human rights resolution, NAPs, as a vehicle for promoting implementation of the GPs and other business and human rights frameworks clearly hold strong potential relevance beyond the EU; notably, in this regard, the US Government has recently committed to develop a NAP.¹⁸⁵ Consequently, the approaches followed by those EU Member States that have already concluded NAPs, and an outline of their contents is briefly described here.¹⁸⁶

United Kingdom: The UK Government was the first to publish a NAP.¹⁸⁷ This followed a process marshalled by a cross-departmental steering group, and a series of stakeholder workshops. The

¹⁸⁰. Only 2% of surveyed companies referred to the ILO MNE Declaration. See Caroline Schimanski, *An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles* (European Commission, March 2013), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en.pdf.

¹⁸¹. This request was repeated and reinforced by the Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12 (25 June 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

¹⁸². Including Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Malta, the Netherlands, Spain, Sweden, and the United Kingdom. See European Commission, *European Commission Communication on CSR 2011: Implementation Table* (March, 2014), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/documents/csr_agenda.pdf. At least two Member States' CSR plans also include measures in support of the GPs. See The Danish Government, *Action Plan for Corporate Social Responsibility* (May 2008), http://samfundsansvar.dk/file/318799/action_plan_CSR_september_2008.pdf, and Government of Cyprus Planning Bureau, *National Action Plan for CSR* (2012), on file.

¹⁸³. European Commission and ICF GHK, *Peer Review Report: Peer Review on CSR* (The Hague: 28 November 2013), <http://ec.europa.eu/social/BlobServlet?docId=11477&langId=en>.

¹⁸⁴. A list of published NAPs and NAPs in development worldwide is maintained in the "National Action Plans", *Business and Human Rights Resource Centre*, <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>. Though not discussed here, draft NAPs have been published by Italy and Spain. See Government of Italy, *The Foundations of the Italian Action Plan on the United Nations "Guiding Principles on Business and Human Rights"* (2014), <http://business-humanrights.org/media/documents/foundations-ungps-nap-italy.pdf>; and Government of Spain, *Draft of National Action Plan on Business and Human Rights* (2013), <http://www.business-humanrights.org/UNGuidingPrinciplesPortal/ToolsHub/Governments/TypeInitiative/natlactionplans>.

¹⁸⁵. The commitment was announced by President Obama on 24 September 2014: "Fact Sheet: The U.S. Global Anticorruption Agenda", Office of the Press Secretary, The White House (September 24, 2014), <http://www.whitehouse.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda>. Switzerland has initiated a process towards the development of a NAP.

¹⁸⁶. For a fuller discussion, see Claire Methven O'Brien et al., *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (The Danish Institute for Human Rights, The International Corporate Accountability Roundtable, 2014).

¹⁸⁷. Foreign and Commonwealth Office, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf.

NAP applies to all UK government departments and is addressed to all businesses “domiciled” within the United Kingdom. It collates actions already taken that promote human rights in the business context, including the overall legal framework provided by UK legislation and policy. It also identifies some new measures taken specifically in response to the GPs, for example, responsible business investment guidelines for companies in Myanmar, and a requirement that new bilateral investment treaties incorporate a company’s responsibility to respect human rights. The NAP commits all UK government departments to provide advice to companies about their human rights responsibilities. Acknowledged as a starting point, a promise is made to review its effectiveness and issue a new NAP in 2015.

Denmark: Here, the decision to develop a NAP followed a formal recommendation from Denmark’s multi-stakeholder CSR Council, representing Danish trade unions, local municipalities, NGOs, business and financial organisations. Following a short dialogue with the CSR Council, although not wider stakeholder consultation, a NAP was published in 2014.¹⁸⁸ Like the UK NAP, Denmark’s summarises actions already taken, however, this is done more transparently, through a table identifying, for each GP, its “status in Denmark”, with reference to relevant domestic law and policies prior to 2011, as well as specific initiatives taken or planned “as a dedicated measure” to implement the GP in question since 2011. Some examples of the latter include: establishing an inter-ministerial Working Group to consider the issue of extra-territoriality; providing advice to and holding workshop for exporting companies on Responsible Supply Chain management via the Danish Trade Council; requiring companies involved in Danida Development Partnerships to undertake CSR due diligence including human rights, and including terms in contracts with such businesses to live up to the UN Global Compact; and supporting human rights in the negotiation of international standards (e.g. the OECD Common Approaches on export credit) and agreements (e.g., trade and development clauses in EU trade agreements).

The Netherlands: Development of the Dutch NAP was prompted by a request from the Dutch Parliament. Led by the Ministry of Foreign Affairs, the NAP process proceeded with support from an inter-ministerial Working Group involving the Ministries of Economic Affairs, Finance, Security and Justice, and Social Affairs and Employment. An internal analysis of how Dutch policy lined up with the GPs was conducted, and separate consultations held with business representatives, CSOs and public agencies, to ensure to each a chance to voice their opinions adequately. Adopting a risk-based approach, the resulting NAP focuses on “five main points” that came up during the consultation process: (1) an active role for the government; (2) policy coherence; (3) clarifying due diligence; (4) transparency and reporting; and (5) scope for remedy.

Finland: This time led by the Ministry of Employment and the Economy, an inter-ministerial Working Group prepared the ground for Finland’s NAP with a memo on the status of implementation of the GPs in Finland, on which stakeholders were invited to comment. Taking these inputs into account, a final NAP was published in October 2013.¹⁸⁹ Its key elements include: preparation of a baseline study to review consistency of Finnish legislation with the GPs; carrying forward respect for human rights in new legislation on public procurement, pursuant to the EU Public Procurement Directive; actions focused on State-owned enterprises; a review of the functioning of Finland’s national contact point (NCP); and establishing a multi-stakeholder dialogue on human rights due diligence to identify requirements and best practices. Monitoring of implementation of the NAP is proposed to be undertaken on a multi-stakeholder basis via Finland’s Committee on Corporate Social Responsibility.

A final word should be reserved for actions triggered amongst civil society by the arrival of NAPs in Europe. CSOs and NHRIs have separately¹⁹⁰ and together¹⁹¹, engaged in advocacy around NAPs,

188. The Danish Government, *Danish National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights* (2014),

http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf.

189. Ministry of Employment and the Economy, *National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights*, Publication 46/2014 (2014),

http://www.tem.fi/files/41214/TEMjui_46_2014_web_EN_21102014.pdf.

190. A full list of responses and commentaries on published NAPs is maintained here: “National Action Plans”, *Business and Human Rights Resource Centre*, <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>.

both at the national¹⁹² and regional¹⁹³ levels. In some cases, the formal input of NHRIs have been directly sought by governments.¹⁹⁴ Business associations and representatives have been involved in every NAP process to date. However, based on experiences so far, NAPs dialogues could still be better exploited as an opportunity to establish inclusive national discussion on business human rights impacts inside and outside the country's territorial jurisdiction. In particular, input from those representing groups experiencing discrimination in employment, access to goods and services, such as persons with disabilities and minorities, should be more actively sought; and regrettably, NAPs so far pay scant attention to the issue of gender, which should be of matter of concern given strong EU legal commitments in that area.

SECTION III: WORKING GROUPS

6. Working group I: State duty to protect

6.1 General regulatory and policy functions, and due diligence requirements

Pillar I of the UN framework reflects the position under international law that States must protect against abuses by third parties, including businesses, within their jurisdiction. Accordingly, GP1 requires States to protect rights-holders by taking appropriate steps to prevent, investigate, punish and redress such abuses through effective policies, legislation, regulations and adjudication, while GP2 obliges States to set out clearly the expectation that business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

The GPs give further guidance on four specific areas where State action is required to meet these obligations, providing that States should:

- a) Enforce laws aimed at, or having the effect of, requiring business enterprises to respect human rights, and periodically assess the adequacy of such laws and address any gaps;
- b) Ensure that other laws and policies governing the creation and ongoing 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; and
- d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.¹⁹⁵

¹⁹¹. See, for example, coordinated responses to UNWG on NAPs by European Coalition for Corporate Justice (ECCJ), ICAR and DIHR: "ECCJ Contribution to the consultation on the National Action Plans on UNGPs", *European Coalition for Corporate Justice*, <http://www.corporatejustice.org/UNWG-on-BHR-consultation-on-the.html?lang=en>.

¹⁹². See, for example, Netherlands Institute for Human Rights, *Advice: Response to the National Action Plan on Human Rights, "Knowing and Showing"* (February 2014), <http://business-humanrights.org/sites/default/files/documents/netherlands-nhri-re-national-action-plan.pdf>; and "Dutch National Plan on Business and Human Rights", *Dutch MVO Platform*, <http://mvoplatfom.nl/news-en/dutch-national-action-plan-on-business-and-human-rights>.

¹⁹³. The ECCJ will undertake a review of published EU Member States NAPs in 2014. See "National Action Plans UNGPs: an assessment", *European Coalition for Corporate Justice*, <http://www.corporatejustice.org/National-Action-Plan-UNGPs-an.html?lang=en>. The European Group of NHRIs published a Discussion Paper on NAPs in 2012. See European Group of National Human Rights Institutions, *Implementing the UN Guiding Principles on Business and Human Rights: Discussion paper on national implementation plans for EU Member States* (June 2012), <http://business-humanrights.org/sites/default/files/media/eu-nhris-paper-on-national-implementation-plans-for-ungps-210612-short.pdf>.

¹⁹⁴. The French NHRI was requested by the government to develop recommendation: Commission Nationale Consultative des Droits de L'Homme, *Business and human rights: opinion on the issues associated with the application by France of the United Nations' Guiding Principles* (24 October 2013), <http://business-humanrights.org/sites/default/files/media/documents/cncdh-opinion-france-ungp-oct-2013.pdf>.

¹⁹⁵. See Guiding Principle 3 in John Gerard Ruggie's *Guiding Principles on Business and Human Rights: Implementing the United Nations' Protect, Respect and Remedy Framework*.

There are two ways in which a State's laws can require businesses to respect human rights. First, a country's general laws can *indirectly* require business to respect human rights, by requiring them to meet standards of conduct and performance in areas such as labour, environment, health and safety, product safety and anti-corruption, where, without such laws, there would be violations of rights, for instance, the rights to life, health, freedom of association, equal treatment, and so on. Here, respecting human rights may be incidental to the explicit regulatory goal of the legislation. In many countries, current business practice already largely respects human rights because it is in line with such national legal requirements. The task then is in detecting shortcomings in the general legal and policy framework, which may result in human rights abuses occurring with impunity.¹⁹⁶

Second, a State can enact measures specifically intended to secure business respect for human rights. Such measures need not explicitly instruct businesses "not to violate" human rights. Rather, their focus may be procedural, requiring or encouraging companies to undertake a process of due diligence by which they identify and respond to their actual or potential impacts on human rights (see further Working Group II below). Though many States already require companies to do due diligence in other areas, and human rights-specific due diligence requirements are for the time being rare, recent developments in France and Switzerland may indicate the beginning of a broader movement towards mandatory human rights and environmental due diligence as a matter of law.¹⁹⁷

Some due diligence requirements have also been instituted in relation to specific human rights geographies and issues. The US government, for example, has introduced requirements for disclosure of companies' policies and processes in connection with new investments in Myanmar.¹⁹⁸ The UN Security Council endorsed due diligence for all companies sourcing minerals from Democratic Republic of Congo (DRC) in 2010,¹⁹⁹ and the OECD published Due Diligence Guidance for Responsible Supply Chain of Minerals concerning the sourcing of natural resources from conflict-affected and high-risk areas.²⁰⁰ Following suit, Section 1502 of the 2010 U.S. Dodd Frank Wall Street Reform and Consumer Protection Act requires all companies listed with the US Securities and Exchange Commission (SEC) to carry out due diligence to a nationally or internationally recognised due diligence framework in order to determine whether their products contain minerals that have funded armed groups in the DRC or bordering countries. In parallel, 12 African States of the International Conference of the Great Lakes Region (ICGLR) have made meeting the OECD due diligence requirements a condition of their regional mineral certification scheme. In 2012, Congo's government introduced legislation requiring companies operating in its tin, tantalum, tungsten or gold mining sectors to undertake supply chain due diligence according to the OECD standard, and Rwanda's government adopted similar legislation. The Chinese government, through the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters has committed to launching a "Guideline for Social Responsibility in Outbound Mining Investments" during 2014.²⁰¹ The European Commission has proposed a regulation to establish a voluntary self-certification scheme, based on the OECD Guidance, for the 300-400 companies

¹⁹⁶. Such weaknesses may lie in the substance of legislation (e.g., failing to make unlawful discrimination on all grounds prohibited by international standards) or in its scope (e.g., exclusion of Special Economic Zones from application of legal regime applicable in the rest of the state).

¹⁹⁷. Assemblée Nationale, *Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, No.1524 (6 November 2013); the Foreign Affairs Committee of Switzerland's Lower Chamber has called for draft legislation anchoring company due diligence requirements in law. See "A Milestone for Human Rights", *Corporate Justice*, 2 September 2014, http://www.corporatejustice.ch/media/medialibrary/2014/09/140902_sccj_-_swiss_foreign_affairs_committee_wants_mandatory_hrdd.pdf.

¹⁹⁸. "Burma Responsible Investment Reporting Requirements", U.S. Department of State, <http://www.state.gov/r/pa/prs/ps/2013/05/209869.htm>.

¹⁹⁹. United Nations Security Council, *Resolution 1952 (2010)*, S/RES/1952 (29 November 2010), [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1952\(2010\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1952(2010)).

²⁰⁰. The Organisation for Economic Development and Co-operation (OECD), *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (Paris: Organisation for Economic Co-operation and Development, 2013), <http://www.oecd-ilibrary.org/content/book/9789264185050-en>.

²⁰¹. The draft guideline includes supply chain due diligence in accordance with international standards.

that import tin, tantalum, tungsten and gold ores and metals into Europe.²⁰² Together, these measures have prompted some significant changes in companies' sourcing practices.²⁰³ Yet, a cost-benefit analysis undertaken for the European Commission in 2013 revealed that only 4% of 330 companies surveyed were voluntarily preparing a public report on how they identify and address the risk of funding conflict or abuses in their supply chains, raising questions about the efficacy of a voluntary approach at least in the European context.²⁰⁴

6.1.1 National action plans

Since 2011, there has been a concerted movement towards the idea that States should develop National Action Plans (NAPs) to support their implementation of the GPs and other business and human rights frameworks. As mentioned above in Section 5.3, the EU was the first authority to call for NAPs,²⁰⁵ with the UN Human Rights Council following suit shortly after,²⁰⁶ while the Council of Europe has called for States to develop NAPs in a recent Declaration of its Council of Ministers, and envisages supporting a periodic multi-stakeholder dialogue about NAPs in the future.²⁰⁷ In response to the EU's request, NAPs have, to date, been published by the governments of the UK, Denmark, the Netherlands, Italy and Finland, and are being prepared by a number of others.²⁰⁸

Civil society organisations and NHRIs have however emphasised the need for greater attention to the quality and completeness of NAPs.²⁰⁹ One recent report has highlighted that, given the multiplicity of regulations that touch on business and human rights issues indirectly, which can include regulation by non-governmental public or private bodies, such as independent regulatory or licensing authorities, or stock exchanges, developing a coherent NAP requires a baseline analysis as a "stock-taking" exercise. The report also calls for NAPs processes themselves to be human rights-based, to ensure transparency, participation, and inclusion in particular by groups at risk of vulnerability and marginalisation such as indigenous populations, women and children.²¹⁰

202. Proposal for a Regulation for "setting up a Union system for a supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas".

203. Global Witness, *Seeing the Light: Responsible Mineral Sourcing from the DRC* (2014), <http://www.globalwitness.org/sites/default/files/Seeing%20the%20Light%20April%202014.pdf>.

204. Katie Böhme, Paulina Bugajski-Hochriegl and Maria Dos Santos, *Assessment of due diligence compliance costs, benefits and related effects on the competitiveness of selected operators in relation to the responsible sourcing of selected minerals from conflicts-affected area* (Germany: European Commission, 2014), 61. A recent NGO study found that over 80% of 186 European companies surveyed did not provide any public information about the checks they had undertaken to ensure their supply chains had not funded conflict or human rights abuses. See SOMO, *Conflict Due Diligence by European Companies* (November 2013), <http://somo.nl/news-en/sourcing-of-minerals-could-link-eu-companies-to-violent-conflict> (note that 19 of the companies surveyed by SOMO (11%) are dual listed in the US and Europe, and so are directly impacted by Dodd Frank Act Section 1502).

205. European Commission, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final (Brussels: 25 October 2011). Notably, 24 of 28 EU Member States had already developed, or were in the process of developing CSR-related NAPs and to support Member States, the European Commission set up a process of peer review of CSR NAPs in 2013.

206. Human Rights Council, *Human rights and transnational corporations and other business enterprises*, A/HRC/26/L.1.

207. Council of Europe, *Declaration of the Committee of Ministers on the UN Guiding Principles on Business and Human Rights* (2014); Council of Europe, *Draft Recommendation of the Committee of Ministers to Member States on human rights and business*. For these and an overview of Council of Europe action on business and human rights, see 'Human Rights Law and Policy', *Council of Europe*, http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/hr_and_business/default_EN.asp.

208. An updated list of published NAPs is maintained by the UN Working Group on business and human rights. See "State national action plans", *United Nations Office of the High Commissioner for Human Rights*, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>. A brief summary of published NAPs is provided in section 5.3.

209. For recommendations on NAPs to their governments from the NHRIs of France and the Netherlands, amongst others, see "National Action Plans", *Business and Human Rights Resource Centre*, <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>.

210. Claire O'Brien et al., *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (The Danish Institute for Human Rights, The International Corporate Accountability Roundtable, 2014). This Toolkit is being used by governments and other stakeholders to inform and evaluate NAPs

6.1.2 Providing effective guidance

Existing guidance provided by public bodies to companies on topics such as how to meet equal opportunities or health and safety requirements in the workplace, can obviously contribute to fulfilment of the GPs. However, a wide array of dedicated guidance for companies on how to respect human rights and, in particular, how to implement human rights due diligence, has also been produced, directly by governments or with their support. The EU, for instance, has published human rights guidance for employment and recruitment agencies,²¹¹ the information and communication technology (ICT)²¹² and oil and gas sectors,²¹³ as well as guidance for SMEs.²¹⁴ Yet, measuring the uptake of guidance by businesses can be difficult, making “effectiveness” hard to assess and no State, to date, has produced statutory human rights guidance, which companies would be legally obliged to follow, even if some appear to be venturing in this direction, through rules on corporate reporting, discussed above, and on public procurement, considered below.

6.1.3 Promoting corporate reporting on human rights

In line with the concepts of sustainability and the “triple bottom line”, social and environmental reporting is an established practice in an increasing number of countries. In Asia, India issued National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business in 2011, which encourage companies to disclose responsible business practices on “comply or explain” basis. In Europe, France was the first to mandate triple bottom line reporting for publicly listed companies in 2001, passing legislation requiring companies 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.²¹⁵ Since 2004, the Netherlands has implemented benchmarking based on companies’ CSR reporting. In Denmark, a non-financial reporting duty for the largest 1,100 companies and Danish State-owned enterprises was established in 2009.²¹⁶ The Danish Business Authority periodically evaluates the effectiveness of the reporting requirement,²¹⁷ and provides guidance on implementation for companies and auditors, who in turn award prizes for the best CSR reports. In 2012, Denmark set new requirements for the same class of companies to report specifically on

processes in a number of countries in Europe and the Americas. See further, “National Action Plans UNGPs: an assessment”, *European Coalition for Corporate Justice*, <http://www.corporatejustice.org/National-Action-Plan-UNGPs-an.html?lang=en>.

211. Shift and the Institute for Human Rights and Business (IHRB), *Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights* (European Commission, 2013), http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-era-hr-business_en.pdf.

212. Shift and the Institute for Human Rights and Business (IHRB), *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights* (European Commission, 2013),

http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf.

213. Shift and the Institute for Human Rights and Business (IHRB), *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights* (European Commission, 2013),

http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-oag-hr-business_en.pdf.

214. GLOBAL CSR and BBI International, *My Business and Human Rights: A Guide to Human Rights for Small and Medium-Sized Enterprises* (European Commission, 2012),

http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/human-rights-sme-guide-final_en.pdf.

215. The law was implemented through regulations adopted in 2012, Grenelle I Act 2009 and Grenelle II Act 2010.

216. Companies are required to report on social responsibility policies; how these are translated into action; and what has been achieved through them during the financial year, or, to indicate that they are not reporting. Instead of including social content directly in the annual financial statement, companies can refer to separate corporate sustainability reports, information on a company website or a UN Global Compact Communication on Progress. See The Danish Government, *Action Plan for Corporate Social Responsibility*.

CSR reports are subject to a consistency check by auditors under the Danish Financial Statements Act §135.

217. The most recent analysis, undertaken by Copenhagen Business School, showed that almost all companies report on CSR (97%), while 41% report on human rights and labour rights – a significant increase from 19% doing so in 2009.

business respect for human rights and climate change.²¹⁸ In 2013, Norway enacted legislation, requiring companies to report on steps to integrate considerations for human rights into their strategies.²¹⁹

In 2014, after prolonged debate,²²⁰ the EU resolved to adopt a new Directive requiring all Member States to implement non-financial reporting based on a “comply or explain” model.²²¹ Under the Directive, “public interest enterprises” with more than 500 employees must be required by national law to report annually on principal risks in relation to human rights, the environment and social impacts linked to their operations, relationships, products and services, as well as aspects related to bribery and diversity. They must also provide information on relevant policies, any due diligence procedures for identifying, preventing and mitigating risks identified, and significant incidents occurring during the reporting period.²²² Whilst the Directive has been welcomed as a step towards greater corporate accountability,²²³ it has also been criticised for its narrow scope, given that only approximately 6,000 of 42,000 large companies incorporated in the EU are covered; potentially wide-ranging exemptions for information²²⁴; a weak clause on supply chains — a high risk area for many companies — that requires reporting only “when relevant and appropriate”; and the lack of a common reporting framework or indicators.²²⁵ Moreover, the Directive does not provide for monitoring or mechanisms to sanction defaults by companies: auditors need only indicate whether non-financial information has been provided, or not.²²⁶

6.2 The State-business nexus

6.2.1 Government ownership, control or support

State-owned enterprises (SOEs) and corporations acting as State agents are directly obliged not to violate human rights. This flows from the State’s role as the primary duty-bearer under human rights law, and the doctrine of positive obligations. Individual States have their own rules for determining if corporations are State agents at national law, which usually refer to State ownership and control, the exercise of public functions or a combination thereof. The ECtHR relies on a set of criteria to determine State agency, which includes legal status, institutional and

218. 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>. In scope, the requirement extends to business relationships.

219. KPMG, United Nations Environment Programme, The Global Reporting Initiative and The Centre for Corporate Governance in Africa, *Carrots and Sticks: Sustainability Reporting Policies Worldwide-Today’s Best Practice, Tomorrow’s Trends* (2013), 33–34.

220. “Non-financial reporting reform on thin ice”, *European Coalition for Corporate Justice*, <http://www.corporatejustice.org/Non-financial-reporting-reform-on.html?lang=en>.

221. The European Parliament and the Council of the European Union, *Directive 2014 of the European Parliament and of the Council amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups*, A7-0006/52 (4 August 2014). The Directive will enter into force in 2014 and Member States have two years to transpose it into national legislation. The European Commission is required to produce guidelines within one year to assist companies in reporting.

222. Public interest entities (PIE) are defined as listed companies, credit institutions, insurance undertakings and any other entity designated by an EU Member State as a PIE. In providing information, companies are to be guided by the GPs, the UN Global Compact, the OECD Guidelines for MNEs and the ILO Tripartite Declaration on principles concerning multinational enterprises and social policy, and risks must be disclosed regardless of what a company considers relevant or “material” to the interests of its shareholders.

223. “EU Directive on the disclosure of non-financial information by certain large companies: an analysis”, *European Coalition for Corporate Justice*, <http://www.corporatejustice.org/On-15-April-2014-the-European.html?lang=en>

224. For instance, information “impending developments” or where disclosure would be “seriously prejudicial” to a company’s commercial position: see proposal, Article 1(3) at page 28 of “Non-financial reporting reform on thin ice”, *European Coalition for Corporate Justice*, <http://www.corporatejustice.org/Non-financial-reporting-reform-on.html?lang=en>.

225. The European Commission is however mandated under the Directive to publish within two years non-binding guidelines on a methodology for reporting, including general and sector non-financial Key Performance Indicators.

226. *European Coalition for Corporate Justice, Why Is the Corporate Reporting Reform Important?* (Media briefing, February 26 2014), http://www.corporatejustice.org/IMG/pdf/media_briefing_26-02-2014.pdf.

operational independence, the nature of the activity, and its context. Despite clarity over States' duties in this area, it is one which has still seen relatively little action in the wake of the GPs.²²⁷

The State duty to protect and positive obligations also oblige States to ensure that companies they, control, support, do business with, or rely on to provide essential public services, do not abuse human rights. Government support for business can be supplied through bodies such as export credit agencies (ECAs), official investment insurance or guarantee agencies, and State-owned investments, such as sovereign wealth and public pension funds. ECAs are a significant source of official finance and insurance for business activities in developing economies²²⁸; OECD Guidance on ECAs is contained in the so-called "Common Approaches", which are being aligned with the GPs.²²⁹ Sovereign wealth funds are State-owned funds that can invest in real and financial assets, including stocks, bonds, real estate, or investment vehicles like equity or hedge funds. Often amounting to thousands of billions of dollars, their funds accrue from the export by the State of commodities, or foreign-exchange reserves.²³⁰ While the Norwegian Pension Fund Global was until recently viewed as the vanguard of responsible investment practice amongst sovereign wealth funds, with investments excluded from its portfolio on human rights grounds by an independent ethical council, in 2014 this body was disbanded, a move met with criticism from civil society.²³¹

6.2.2 Private delivery of public services

The State retains the duty to protect human rights when it privatises or contracts with private actors for the provision of public services.²³² Such services, which can include health and social care, housing, education, immigration services, criminal justice and security services, and public utilities, such as water, energy and transport, frequently touch directly on the human rights of service users.²³³ The government or other public bodies must thus provide for adequate service standards; monitoring and accountability mechanisms; adequate human rights due diligence in the context of public-private partnerships and privatisations.

In reality, privatisation of public services has often created the context for abuses, with examples abounding in relation to water²³⁴ and health,²³⁵ in particular, but also with regard to other "core"

227. See generally, Camilla Wee, *Regulating the Human Rights Impact of State-Owned Enterprises: Tendencies of Corporate Accountability and State Responsibility* (International Commission of Jurists, October 2008), <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/State-owned-enterprises-Oct-08.pdf>; and Clifford Chance, *State Immunity and State-Owned Enterprises* (December 2008), <http://business-humanrights.org/sites/default/files/media/bhr/files/Clifford-Chance-State-immunity-state-owned-enterprises-Dec-2008.PDF>.

228. Karyn Keenan, *Export Credit Agencies and the International Law of Human Rights* (Halifax Initiative Coalition, January 2008), http://www.halifaxinitiative.org/updir/ECAs_and_HR_law.pdf; "Working with SOEs", *Human Rights and Business Dilemmas Forum*, <http://hrbdf.org/dilemmas/working-soe/#.VMXg4NLF89Q>

229. OECD Council, *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches")*, TAD/ECG(2012)5 (28 June 2012),

<http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en>. See also Danish Institute for Human Rights, French National Consultative Commission on Human Rights and German Institute for Human Rights, *Submission to OECD Consultation between Civil Society Organisations (CSOs) and Members of the OECD's Working Party on Export Credits and Credit Guarantees (ECG)* (2013), <http://business-humanrights.org/en/pdf-submission-to-oecd-consultation-between-civil-society-organisations-csos-and-members-of-the-oecd%E2%80%99s-working-party-on-export-credits-and-credit-guarantees-ecg>

230. "Fund Rankings", *SWFI*, <http://www.swfinstitute.org/fund-rankings/>.

231. Emily Woodgate and Nina Berglund, "Critics Attack Oil Fund Changes", *News in English: Views and News from Norway*, April 4, 2014, <http://www.newsinenglish.no/2014/04/04/critics-attack-oil-fund-plans>.

232. According to GP5, "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." See generally Koon de Feyter et al., *Privatisation and Human Rights in the Age of Globalisation* (Antwerp: Intersentia, 2005).

233. See, for example, Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia, 2012); Antenor Hallo de Wolf, "Human Rights and the Regulation of Privatized Essential Services", *Netherlands International Law Review* 60, no. 02 (2013), 165–204.

234. "How Privatisation Undermines the Human Right to Water", *Public Services International*, <http://www.world-psi.org/en/how-privatisation-undermines-human-right-water>.

public functions, such as housing, immigration detention and removals and criminal justice.²³⁶ Gaps in protection arise where, for instance, available remedies for human rights abuses can only review public bodies even though the perpetrator is a private company.

As observed by the UK Parliament's Committee on Human Rights, this entails a heavy onus on public authorities to take appropriate measures to ensure human rights compliance when privatising or "contracting out" services. This includes developing and actively disseminating accessible guidance,²³⁷ producing template contracts, and checklists and other tools for commissioning authorities to address specific service areas. The Scottish Government, with support from the Scottish Human Rights Commission, and the UK Equality and Human Rights Commission, has begun to take steps to meet these needs.

6.2.3 Public procurement

The GPs call for governments to "promote respect by business enterprises with which they conduct commercial transactions." Public procurement, also called public tendering, is the procurement of goods and services on behalf of public authorities. Government spending in procurement of goods and services is a major component of the overall global economy, accounting for an average of 12% of GDP across OECD countries²³⁸ and around one fifth of GDP in the EU.²³⁹ Governments thus wield great influence over respect for and enjoyment of human rights through their procurement of goods and services. This includes their capacity to affect conditions in global supply chains, given their status as "mega-consumers" and, therefore, their capacity to "make" and sustain markets.²⁴⁰ Yet, suppliers of goods to governments have been implicated in the use of child labour,²⁴¹ forced labour,²⁴² interference with the right to freedom of association and to form trade unions,²⁴³ and breaches of other workers' rights.²⁴⁴ In Denmark, as a further

235. 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>.

236. "Privatisation", *Business & Human Rights Resource Centre*, <http://business-humanrights.org/privatisation>.

237. See, for example, Joint Committee on Human Rights, *Any of Our Business? Human Rights and the UK Private Sector: Government Response to the Committee's First Report of Session 2009-10* (Great Britain Parliament, 2010), Vol. 1, HL Paper 5-I, HC64-I, paras. 132–150, and Joint Committee on Human Rights, *The Human Rights of Older People in Healthcare* (Great Britain Parliament, 2007), HL Paper 156-I, HC 378-I.

238. Note, this figure excludes procurement by state-owned utilities: '40. Size of Public Procurement Market', *OECD iLibrary*, http://www.oecd-ilibrary.org/sites/gov_glance-2011-en/09/01/index.html?contentType=%2fns%2fStatisticalPublication%2c%2fns%2fChapter&itemId=%2fcontent%2fchapter%2fgov_glance-2011-46-en&imeType=text%2fhtml&containerItemId=%2fcontent%2fserial%2f22214399&accessItemIds.

239. Including procurement by public utilities European Commission *Annual Public Procurement Implementation Review*, SWD (2012) 342 final (October 9 2012), http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf.

240. Robert Stumberg et al., *Turning a Blind Eye? Respecting Human Rights in Government Purchasing* (The International Corporate Accountability Roundtable (ICAR), September 2014), <http://accountabilityroundtable.org/wp-content/uploads/2014/09/Procurement-Report-FINAL.pdf>.

241. A 2014 audit at Zongtex Garment Manufacturing in Phnom Penh, Cambodia, which makes clothes sold by the US Army and Air Force found nearly two dozen under-age workers, some as young as 15: Ian Urbina, "U.S. Flouts Its Own Advice in Procuring Overseas Clothing", *The New York Times*, December 22, 2013, <http://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html>.

242. In a pending lawsuit, the families of Nepalese workers allege that they were fraudulently recruited by a U.S. defence subcontractor, transported to Iraq against their will, and kidnapped by Iraqi insurgents while en route to a U.S. military base. The workers' executions were broadcast on Nepali television: *Adhikari v. Daoud & Kellogg Brown Root*, et al [2013] United States District Court Southern District of Texas No. 09–1237, 1–3.

243. "Vaqueros Navarra Background", *Maquila Solidarity Network*, <http://en.maquilasolidarity.org/node/711>.

244. "A defence contractor that makes body armour and tactical gear failed to pay overtime wages at its factory in Tijuana, Mexico", in Bjorn Claeson et al., *Subsidizing Sweatshops II: How Our Tax Dollars Can Foster Worker Rights and Economic Recovery rather than Fuel the Race to the Bottom* (SweatFree Communities, 2009).

example, the purchase of Chinese granite extracted by labourers working under dangerous conditions, and child labour in the supply chain for hospital equipment caught public attention.²⁴⁵

Surprisingly, free trade and “fair competition” requirements under international agreements have in the past been perceived as obstructing public authorities’ ability to select suppliers who respect human rights over those who do not. The World Trade Organization (WTO) Government Procurement Agreement, for instance, requires a WTO-proof justification of public procurement measures aimed at protecting human rights against abuse in third countries, allowing the EU, for example, to take action against a US State in response to a law it had passed prohibiting government procurement from companies that invested in Myanmar.²⁴⁶ Historically, doubts were also cast over whether the principles of free movement of goods, services, capital and people within EU boundaries²⁴⁷ constrained the authority of public bodies in EU Member States to promote equality, “green,” or “ethical” considerations through public procurement.²⁴⁸

Developments over recent years have however emphasised the constitutional status of human rights within the EU legal order, as well as the role of public purchasing in securing sustainable development. In this context, a new EU public procurement Directive,²⁴⁹ aims to “increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money...”, but also to “Allow procurers to make better use of public procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.” Thus, the new Directive will allow for inclusion of societal, environmental or other characteristics in technical specifications of the tender, contract award criteria, and conditions for contract performance, including obligations concerning sub-contractors, and permits public bodies to exclude companies or their bids on human rights grounds.²⁵⁰

6.3 Conflict-affected areas

Businesses operating in conflict-affected areas risk becoming involved in human rights abuses committed, for instance, by security forces, 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.²⁵¹ The GPs call on States to take specific steps in relation to businesses operating in conflict-affected areas. GP7 stipulates that States should assist businesses to avoid being involved in human rights abuses, with special attention to gender-based and sexual violence, while denying public support to any recalcitrant businesses that have been. A number of government-backed initiatives are found in the former area. The Voluntary Principles on Security and Human Rights were the first initiative to attempt to address

245. DanWatch and Danida, *Har Du Husket Gummiet?* (2013), http://www.danwatch.dk/sites/default/files/documentation_files/danwatch_2013_-_har_du_husket_gummiet.pdf.

246. World Trade Organization, *United States – Measure Affecting Government Procurement*, WT/DS88 (14 February 2000). The US legislation in question was later found unconstitutional for other reasons.

247. “EU Internal Market”, *Europa*, http://europa.eu/legislation_summaries/internal_market/index_en.htm.

248. Consistency of “social” preferences with the on public purchasers to select the most “efficient” or “most economically advantageous tender” (MEAT) was questioned: Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford: Oxford University Press, 2007), chap. 10–14.

249. On 15 January 2014 the European Parliament adopted a Directive on public procurement (COM (2011) 896) as part of the Europe 2020 Strategy for Smart, Sustainable and Inclusive Growth (see COM (2010) 2020).

250. The *Explanatory Memorandum to the Commission’s proposed Draft Directive* explains that contracting authorities are required reject tenders if their low price is due to non-compliance with EU legislation or international law related to social, labour or environmental standards, or where a business has been convicted of child labour or human trafficking; optional exclusions are allowed where a public purchaser is aware of violations of obligations, by a tenderer, in the areas of social, labour law or environmental law.

251. See, for example, *Red Flags: Liability Risks for Companies Operating in High-Risk Zones*, <http://www.redflags.info/>, “Economy”, *International Alert*, <http://www.international-alert.org/economy>, Thorbjørn Waal Lundsgaard, ‘Peace for Sale: What Is the Role of Human Rights-Based CSR in the Extractive Industry in Post-Conflict Environments?’, *Business, Peace and Sustainable Development* 2014, no. 3 (June 1, 2014), 73–98.

human rights risks arising from security operations as such.²⁵² Subsequently, the International Code of Conduct for Private Security Providers has established practice standards for the private security industry as well as an emerging independent accountability mechanism.²⁵³ Less encouragingly, the Kimberley Process, which established a certification scheme for rough diamonds with the aim of eliminating the diamond trade as a source of revenue for paramilitary forces, has become severely criticised with doubts cast on its governance and effectiveness.²⁵⁴

6.4 Policy coherence

As discussed, States mostly protect rights-holders against human rights abuses by businesses in the same way they do against abuses by public or other non-State actors: through their general laws, policy and programmes, rather than through dedicated measures with a “human rights” label attached. However, just as they can promote enjoyment of human rights unintentionally, so laws and policies outside the human rights or CSR area can, without meaning to, undermine them. Given the regulatory and institutional complexity of modern States, and the volume of rule-making that goes on bilaterally between States, as well as at regional and international levels, ensuring “coherence” with human rights commitments across all policy areas is a major challenge.

The GPs accordingly call for States to map the impacts they may have on business respect for human rights, via State organs and practices that influence business practices (GP8); agreements concluded with other States or businesses (GP9); and membership of multilateral institutions (GP10). In this context, NAPs and national baseline assessments can be an important tool for promoting both “vertical” coherence, that is, consistency between international human rights obligations, and domestic law, policy and practices, and “horizontal” coherence, in other words, consistency with human rights across functional units of national and sub-national government.

6.4.1 Trade

At a macro level, there have been three prominent narratives historically about trade and human rights. The first has focused on the impacts of the terms of trade²⁵⁵ on poverty, and poverty reduction, in connection especially with tariff regimes for agricultural produce.²⁵⁶ The second has concerned the use of human rights clauses in trade agreements, and whether these really serve to promote human rights, or should rather be viewed as covert protectionism, with ultimately negative effects for human rights in that they stifle developing country exports and depress national and individual incomes. A third theme, that of whether trade liberalisation is leading to a global race to the bottom in terms of labour standards and social protection, is one that has recently been reanimated in connection with the proposed EU-US Transatlantic Trade and Investment Partnership.²⁵⁷

The EU has exclusive competence on trade policy, excluding independent action in these areas by Member States. EU common commercial policy must be conducted “in the context of the principles and objectives of the Union’s external action”, which includes human rights and

²⁵². “What Are The Voluntary Principles?”, *The Voluntary Principles on Security and Human Rights*, <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>.

²⁵³. *International Code of Conduct for Private Security Service Providers*, http://www.icoc-ppsp.org/Home_Page.html.

²⁵⁴. *The Kimberley Process (KP)*, <http://www.kimberleyprocess.com/>. And James Melik, 'Diamonds: Does the Kimberley Process Work?', *BBC*, 28 June 2010, <http://www.bbc.co.uk/news/10307046>.

²⁵⁵. Especially border measures, i.e., quantitative restrictions (quotas, embargoes and licensing) and tariffs.

²⁵⁶. Here, the European Union’s Common Agricultural Policy has been a particular target for criticism. See, for example, Mark Curtis, *Milking the Poor: How EU Subsidies Hurt Dairy Producers in Bangladesh* (ActionAid Denmark, 2011), http://www.actionaid.org/sites/files/actionaid/milking_the_poor.pdf.

²⁵⁷. “In Focus: Transatlantic Trade and Investment Partnership (TTIP)”, *European Commission*, <http://ec.europa.eu/trade/policy/in-focus/ttip/>. Jacques Pelkmans et al., *EU-US Transatlantic Trade and Investment Partnership: Detailed Appraisal of the European Commission’s Impact Assessment* (European Parliamentary Research Service, 2014), [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/528798/IPOL-JOIN_ET\(2014\)528798_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2014/528798/IPOL-JOIN_ET(2014)528798_EN.pdf); John Hilary, *The Transatlantic Trade and Investment Partnership: A Charter for Deregulation, an Attack on Jobs, an End to Democracy* (War on Want, 2014), <http://www.waronwant.org/campaigns/trade-justice/more/inform/18078-what-is-ttip>.

fundamental freedoms.²⁵⁸ On this front, the EU applies a Generalised System of Preferences for market access granted to developing countries that apply. “Duty-free” market access is granted on a range of tariff lines to countries designated as “vulnerable”, and which are implementing and accept monitoring under international conventions on human rights and labour standards.²⁵⁹ Serious, systematic human rights violations can lead to temporary withdrawal of preferences, as happened in the past in relation to Myanmar and Sri Lanka.²⁶⁰

EU “economic partnership agreements” are concluded bilaterally or with groups of countries. Generally, these have not mainstreamed human rights.²⁶¹ Recent bilateral trade agreements, however, contain provisions on sustainable development, which can include human rights. Under the EU-Korea Free Trade Agreement, the parties commit to respecting, promoting and realising ILO Core Labour Standards, and to effectively implementing other ILO Conventions, “to promote foreign direct investment without lowering or reducing environmental, labour or occupational health and safety standards”.²⁶² Bilateral agreements, and the GSP, are subject to the WTO Enabling Clause,²⁶³ which requires that any restrictions imposed on trade in pursuit of “public morals” are strictly limited, especially if the object of protection lies outside the borders of the contracting party.²⁶⁴

Trade agreements, then, can be vehicles for fulfilling the State duty to protect and it should be considered how their processes and content could give better effect to government commitments to the GPs and other relevant frameworks.²⁶⁵ In this context, a variety of ideas have been ventured, which include proposals for a standard human rights clause to be included in EU Free Trade Agreements,²⁶⁶ that States should undertake human rights impact assessments of all new

258. European Union, *The Treaty on the Functioning of the European Union* (1958), Article 207. Article 205 of TFEU and Article 3(5) of TFEU provide EU external action shall contribute to human rights, and external action includes common commercial policy and development cooperation. Commercial policy is an area of exclusive EU competence and includes trade agreements in goods: Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005).

259. The European Parliament and the Council of European Union, *Regulation (EU) No 978/2012 of the European Parliament and of the Council (25 October 2012) applying a scheme of generalised tariff preferences and repealing Council Regulation (EC), No 978/2012 (25 October 2012)*, http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf. The scheme includes Pakistan, Mongolia and Armenia.

260. The Council of the European Union, *Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar*, No 552/97 (24 March 1997), based on labour rights violations; The Commission of the European Communities, *Commission Decision of 11 June 2009 amending Decision 2008/938/EC on the list of the beneficiary countries which qualify for the special incentive arrangement for sustainable development and good governance, provided for in Council Regulation (EC) No 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011*, No 454/2009 (11 June 2009); The Council of the European Union, *Implementing Regulation (EU) No 143/2010 of the Council of 15 Feb 2010 temporarily withdrawing the special incentive arrangement for SD and good governance provided for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka* (15 February 2010).

261. The Cotonou Agreement and many agreements do not contain human rights clauses, and sector trade agreements e.g. on fisheries, steel and textile do not: Lorand Bartels, *The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries* (the European Parliament's Committee on International Trade, 2008).

262. *Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, OJ L 127, 14 May 2011, p.8, Article 1(1), Objectives, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2011:127:TOC>.

263. World Trade Organization, *Differential and more favourable treatment reciprocity and fuller participation of developing countries*, L/4903 (28 November 1979) http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm.

264. Human rights can be addressed via import and export bans on goods harmful to human rights (e.g., conflict diamonds) or a WTO waiver requiring adoption of measures at national level, as used in relation to torture equipment, e.g., Council Regulation (EC) No 1236/2005 gives effect *inter alia* to the UN Convention Against Torture, prohibiting import and export of goods with no practical purpose other than capital punishment or torture, etc.

²⁶⁵. Trade Sustainability Impact Assessments (SIAs) for instance, rely of indicators including Employment, Biodiversity, Environmental Quality, Natural Resource Stocks, Poverty, Equity, Health and Education but lack any explicit human rights focus.

266. The proposed clause would read: “respect for democratic principles and fundamental human rights, as laid down in the [UDHR], and for the principle of the rule of law, underpins the internal and international policies of both parties. Respect for these principles constitutes an essential element of this agreement”:

trade agreements,²⁶⁷ and for more extensive monitoring and remediation mechanisms to apply during the implementation phase.²⁶⁸

6.4.2 Investment

Recent years have seen a proliferation of bilateral investment treaties (BITs). These primarily protect and encourage FDI, and whilst they require companies to comply with national law, rarely do they refer to respect for human rights.²⁶⁹ BITs typically also allow enterprises to seek compensation from host States through legally binding arbitration (for example, for discrimination or expropriation), the legitimacy of which, taking place beyond a host State's courts, has increasingly been called into question, with many emerging economies cancelling or renegotiating BITs.²⁷⁰

State-investor contracts, made between a host State and a foreign business investor for the development of specific projects, for instance, in the extractive, energy or agricultural sectors, can have significant implications for human rights. Such contracts may stipulate operating standards for a project, for example, in the area of security, or set the terms on which the State can monitor the project's impacts. So-called "stabilisation clauses" in such agreements can "freeze" social and environmental regulation in the host State, inhibiting the progressive realisation of economic and social rights.²⁷¹ Yet, both BITs and State-investor agreements can, in principle, be drafted to avoid such outcomes, with new tools and guidance launched towards this goal.²⁷²

6.4.3 External relations and development assistance

The GPs call on States to mainstream business and human rights in external relations, which naturally includes their membership of international organisations. Some of these, such as the OECD, have already attempted to align their standards with the GPs. Others, most notably the World Bank, but also other international financial institutions (IFIs), have not, to loud complaints from human rights defenders and affected communities, given a poor track record.²⁷³ At least at a high level, the EU appears to be taking steps in the right direction: business and human rights is

Lorand Bartels, "The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries", European Parliament's Committee on International Trade (2008).

267. Olivier De Schutter, Report of the Special Rapporteur on the Right to Food, Addendum: Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5 (Human Rights Council, 19 December 2011), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-59-Add5_en.pdf.

268. Here, the EU FLEGT scheme could be a model to consider. On a voluntary basis, FLEGT establishes a national licensing scheme for legal timber, with "legality" defined with reference to national law but also social responsibility agreements, cultural norms, health and safety legislation. A new Regulation applying to all non-FLEGT timber imposes due diligence and risk assessment obligations on corporations putting timber into the European market, with fines and sanctions for non-compliance. See The European Community and the Republic of Ghana, *Voluntary Partnership Agreement Between the European Community and the Republic of Ghana on Forest Law Enforcement, Governance and Trade in Timber Products into the Community* (2009).

269. Marc Jacob, *International Investment Agreements and Human Rights* (Duisburg: INEF, Institute for Development and Peace, University of Duisburg-Essen, 2010), http://humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf.

270. See, for example, Ben Bland and Shawn Donnan, "Indonesia to terminate more than 60 bilateral investment treaties", *Financial Times*, 26 March 2014. The EU has exclusive competence on foreign direct investment as part of commercial policy. See The European Union, *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 2007/C 306/01 (13 December 2007).

271. See, for example, Andrea Shemberg, *Stabilization Clauses and Human Rights* (IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, 2009).

272. See, for example, UN Principles for Responsible Contracts by John Ruggie, providing guidance on matters such as operating standards, stabilisation clauses, compliance and monitoring, transparency, and grievance mechanisms for third parties. See also, Nora Götzmann and Mads Holst Jensen, *Human Rights and State-Investor Contracts* (Copenhagen: Danish Institute for Human Rights, 2014).

273. See, for example, Human Rights Watch, *Abuse-free development: How the World Bank should safeguard against human rights violations* (2013), <http://www.hrw.org/news/2013/07/22/world-bank-ducking-human-rights-issues>.

now included in its principal human rights policy instrument,²⁷⁴ if not yet systematically in its human rights dialogues²⁷⁵ and regional partnerships.

Recently, the potential role of the private sector as an agent and vehicle of international development assistance has been emphasised by a number of national governments in Europe and Asia²⁷⁶ and by the EU.²⁷⁷ Since many of the same States have committed to a human rights based approach to development (HRBA),²⁷⁸ as well as the GPs, there is once again a clear need for “joined-up” policies, to ensure that the implementation of development assistance promotes, and does not undermine human rights, in practice.²⁷⁹

7. Working group II: Corporate Responsibility to Respect

The corporate responsibility to respect human rights under Pillar II of the UN Framework requires businesses to avoid infringing human rights and to address adverse human rights impacts they may be involved in. Businesses should thus seek to prevent or mitigate impacts that they have caused or contributed to, as well as those directly linked to their operations, products or services through their business relationships, both contractual and non-contractual (GP13).

International law still does not establish direct human rights duties on non-State actors.²⁸⁰ Yet, the measures and behaviour required of businesses to fulfil their responsibility to respect human rights can and should be provided for by each State’s respective national laws and policies, in all the various areas these touch on business activities, from labour, environmental, non-discrimination and product safety standards, to those in the areas of intellectual property, privacy, financial sector and essential services regulation. In many jurisdictions, businesses do, to a large extent, already respect human rights, via this route of compliance with existing legal rules. Yet, this mechanism can be an unreliable one: it may assume too much, in terms of the ability, or will, of governments and subordinate public authorities to regulate business conduct in line with human rights requirements – a tendency which, arguably, has been exacerbated by pressure on States to relax regulatory regimes in the context of liberalisation and a resulting competition between States for FDI.

274. The EU’s Strategic Framework and Action plan on Human Rights addresses business and human rights, and undertakes to promote human rights in all areas of EU external action, in particular, “trade, investment, technology and telecommunications, Internet, energy, environmental, corporate social responsibility and development policy...”. See Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12 (25 June 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf. A joint EU-African Union workshop on “Fostering the implementation of the UN Guiding Principles on Business and Human Rights through regional cooperation” was held in September 2014, which could serve as inspiration for Europe-Asia cooperation in future.

275. The European Union, *EU guidelines on human rights dialogues with third countries* (2008), <http://www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf>.

276. Australia, for example, recently merged AusAid with its Department of Foreign Affairs and Trade. See Brian Doolan, “AusAID into DFAT: opportunity not threat”, *Devpolicy*, 14 October 2013, <http://devpolicy.org/ausaid-into-dfat-opportunity-not-threat-20131014/>.

277. The EU’s 2011 *Agenda for Change* identifies the private sector as a “main partner” in EU development cooperation, and in 2014 the EU launched a specific policy to promote the role of the private sector in development: European Commission, *A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries*, COM(2014) 263 final (13 May 2014), http://www.cosv.org/wp-content/uploads/2014/08/psd-communication-2014_en1.pdf. The latter registers the need to promote responsible business practices and HRBA throughout EU development cooperation, and indicates the expectation that EU-based companies adhere to global responsible business standards, such as the UNGC, GPs, ILO Tripartite Declaration and OECD Guidelines for MNEs.

278. Stamford Interagency Workshop on a Human Rights-Based approach in the Context of UN Reform, *Statement on a Common Understanding of a Human Rights-Based Approach to Development Cooperation* (Stamford: United Nations, 2003).

279. “European Commission Risks Putting Business Profits before the Needs of the World’s Poorest”, *Oxfam International*, <http://www.oxfam.org/en/eu/pressroom/reactions/european-commission-risks-putting-business-profits-needs-world-poorest>. See further section 4.4.

280. See further Section I and Working Group I above and Working Group III below. Note, though, companies are subject to limited direct obligations under, for instance, international environmental law, and may also be subject to duties under international humanitarian and international criminal law in certain circumstances.

Such was the backdrop to the governance “gaps” accompanying globalisation highlighted by the SRSG when launching the UN Framework and, accordingly, the GPs asserted the corporate responsibility to respect human rights as a free-standing, universally-applicable minimum standard of business conduct, driven by global social expectation while at the same time based on international law. Though sometimes criticised for being a legal “fudge”, seen in this setting, the hybrid status of the corporate responsibility to respect can perhaps be understood as a necessary compromise. The corporate responsibility to respect recognises the enduring role of States as *de jure* duty bearer for human rights, on one hand, but on the other, the ethically unacceptable limitations imposed by the still State-centric structure of international law.

7.1 Human rights due diligence

The GPs afford a central role to human rights due diligence, a process said to enable any corporation to achieve full respect for all human rights. A business’ first step, in undertaking due diligence, should be to have a published policy commitment to respect human rights (GP15). Thereafter, due diligence is envisaged to comprise four steps, taking the form of a typical continuous improvement cycle (GPs 17–20):

- 1) Assessing actual and potential impacts of business activities on human rights – human rights risk and impact assessment;
- 2) Acting on the findings of this assessment, including by integrating appropriate measures to address impacts into company policies and practices;
- 3) Tracking how effective the measures the company has taken are in preventing or mitigating adverse human rights impacts; and
- 4) Communicating publicly about the due diligence process and its results.

Companies should also take steps to remediate any adverse impacts of their activities on rights-holders (GP22; see further Working Group III below).

This process is said to be adaptable to the specific character and context of any enterprise: companies are to adjust the scale and complexity of the measures to meet the responsibility to respect human rights depending on factors including size, industry sector, and the seriousness of human rights impacts to which the company’s activities can give rise (GP14).

Also, since the corporate responsibility to respect human rights refers to all internationally-recognised human rights, not just those in force in any one particular jurisdiction (GP11), in terms of scope, human rights due diligence should encompass, at minimum, all human rights enumerated in the International Bill of Human Rights, the labour standards contained in the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work and, based on its specific circumstances, additional standards, such as those relating to indigenous peoples²⁸¹ or conflict-affected areas (GP12).

7.2 Human rights policies

While it is by no means a foregone conclusion that paper promises are turned into reality, at the same time, without an explicit written commitment, systemic change within a business towards respect for human rights is highly unlikely. At a minimum, a human rights policy should help to raise company awareness of the need to consider human rights impacts, and serve as an entry point for dialogue for stakeholders such as workers or communities. According to the GPs, a high-level company policy statement expressing company commitment to respect human rights is essential: only Board-level buy-in will give a policy the authority needed to permit proper implementation, especially in face of any conflict with any conflicting business imperatives. A company’s human rights policy should furthermore be public, so that external stakeholders have a proper platform for engagement with, and scrutiny of, companies affecting them. (GP16).

Establishing the state of play in terms of business practice in this area can be hard. A paper published by the SRSG in 2006 found that, amongst a (non-representative) sample of Fortune 500 companies, where respondents were mainly based in the US and Europe, 90% reported

281. International Labour Organization, *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, No 169 (27 Jun 1989). United Nations, *Declaration on the Rights of Indigenous Peoples*, A/61/L.67 and Add.1 (13 September 2007).

having an explicit set of principles or management practices in place with regard to human rights.²⁸² A survey of 153 companies of all sizes and from 39 countries undertaken by the UNWG in 2013 (again based on a non-random sample) found 58% with a public statement on human rights.²⁸³ But the Business and Human Rights Resource Centre, which has recently begun to document published company policies on human rights, currently lists just over 350 worldwide.²⁸⁴ Matters are further complicated given that companies participating in the UN Global Compact or stating support for the OECD Guidelines for MNEs are also now implicitly committed to respect for human rights. Nonetheless, a 2013 study for the European Commission, assessing 200 randomly selected, large European companies, found that only 33% referred to the UN Global Compact, OECD Guidelines or ISO 26000, only 3% to the GPs themselves, and 2% to the ILO MNE Declaration.²⁸⁵

Unsurprisingly, the same study found that very large companies (those with over 10,000 employees) were more likely to refer to international standards in CSR policies than smaller companies. It also detected significant variation between surveyed countries in the likelihood that companies have a human rights policy – suggesting that national factors, including government encouragement or support, can influence outcomes in this area. From the viewpoint of “early adopters” of human rights policies, government steps to promote their adoption by the rest would help to level the playing field, so that it should be a business-friendly initiative.²⁸⁶ On the basis of available data, it seems clear that more needs to be done by both government and business itself to improve performance in this area.

7.3 Human rights impact assessment

Human rights impact assessment (HRIA) is the first step in a due diligence process.²⁸⁷ 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. Companies can be connected to adverse human rights impacts in a number of distinct ways. They are potentially responsible for:

- *Causing* a human rights impact through intended or unintended actions, for example, deliberate discrimination in hiring practices, or accidental pollution of a local waterway, interfering with the right to health;
- *Contributing to* a human rights impact, by being one of a number of entities whose conduct together curtails human rights, for instance, where a global brand changes its order specifications at short notice so that its suppliers breach labour standards in meeting them; and

282. John Gerard Ruggie, “Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey”, *Corporate Social Responsibility Initiative, Working Paper*, no. 28 (2006), http://www.humanrights.ch/upload/pdf/070706_Ruggie-survey-Fortune-Global-500.pdf.

283. Human Rights Council, *Addendum: Uptake of the Guiding Principles on Business and Human Rights: practices and results from pilot surveys of Governments and corporations*, A/HRC/23/32/Add.2 (16 April 2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-32-Add2_en.pdf.

284. The list does not include company policies referring only to employees or suppliers. See “Company Policy Statements on Human Rights”, *Business & Human Rights Resource Centre*, <http://business-humanrights.org/en/company-policy-statements-on-human-rights>.

285. Caroline Schimanski, *An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles*.

286. Danish Institute for Human Rights, International Corporate Accountability Roundtable, and Global Business Initiative on Human Rights, *Business Dialogue on National Action Plans: Report of Key Themes* (London: 2014), <http://accountabilityroundtable.org/wp-content/uploads/2014/05/Business-Dialogue-ICAR-DIHR-GBI-Key-Themes.pdf>.

287. For an overview, see Désirée Abrahams and Yann Wyss, *Guide to Human Rights Impact Assessment and Management (HRIAM)* (International Finance Corporation, International Business Leaders Forum and the UN Global Compact, 2010), <http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES>. See also ‘Human Rights Impact Assessment Tools’, *NomoGaia*, <http://nomogaia.org/tools/>.

- Impacts *directly linked* to a business' operations, products or services: a company may be connected to human rights abuses through its business relationships, including those with suppliers, joint-venture partners, direct customers, franchisees and licensees.²⁸⁸

The GPs further indicate that companies should, in the course of performing an HRIA, 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 marginalisation, and gender issues; and repeat risk and impact identification at regular intervals, for instance, before entering into a new activity, prior to significant decisions about changes in activities, and periodically throughout the project lifecycle (GP18).

Yet, the GPs' guidance on HRIA remains high-level, without detailed descriptions of an HRIA process or orientation on how HRIA should be adapted to particular industries or contexts. Various initiatives are now attempting to address this, with guidance recently issued, for example, on HRIA for particular sectors,²⁸⁹ and for thematic HRIAs, for instance, focusing on the rights of children²⁹⁰ and indigenous people.²⁹¹ Some individual companies have devised methodologies for impact assessment in connection with specific issues arising in their own operating environments.²⁹² So far, only a small handful of HRIAs undertaken by companies have been published,²⁹³ with most meeting criticism from civil society stakeholders *inter alia* for the methodology adopted. Thus, civil society organisations and NHRIs are also undertaking HRIAs,²⁹⁴ which typically go beyond current corporate practice, for instance, in terms of involvement of rights-holders and transparency.²⁹⁵

Thus, the parameters and process of HRIA under the GPs remain emergent and rather contested. One question attracting continuing interest is whether HRIA should be integrated into environmental or social impact assessment processes, particularly where these are provided for by statute or licensing regulations, or undertaken as a separate, "stand-alone" exercise. Another

288. See further Margaret Wachenfeld and Mark Hodge, *State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships* (Institute for Human Rights and Business and Global Business Initiative on Human Rights, 2012), <http://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf>.

289. See, for example, International Council on Mining & Metals, *Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes* (2012), <http://www.icmm.com/page/75929/integrating-human-rights-due-diligence-into-corporate-risk-management-processes>, and IPIECA and the Danish Institute for Human Rights, *Integrating human rights into environmental, social and health impact assessments. A Practical Guide for the oil and gas industry* (2013), http://www.humanrights.dk/files/media/dokumenter/tools/integrating_hr_into_eshia.pdf.

290. UNICEF and the Danish Institute for Human Rights, *Children's Rights in Impact Assessments: A guide for integrating children's rights into impact assessments and taking action for children* (2013), http://www.unicef.org/csr/css/Children_s_Rights_in_Impact_Assessments_Web_161213.pdf.

291. See, for example, Johannes Rohr and José Aylwin, *Interpreting the UN Guiding Principles for Indigenous Peoples* (Berlin: IWGIA, 2014), http://www.iwgia.org/iwgia_files_publications_files/0684_IGIA_report_16_FINAL_eb.pdf; and IBIS, *Guidelines for Implementing the Right of Indigenous Peoples to Free, Prior and Informed Consent* (2013), http://www.socialimpactassessment.com/documents/Guidelines_Implementing_rights_Indigenous_Peoples_FPIC.pdf.

292. See, for example, Coca-Cola Company, *Human Rights Due Diligence Checklists Background and Guidance* (2011), <http://assets.coca-colacompany.com/7d/59/b2a85d9344bdb7da350b81bcd364/human-rights-self-assessment-checklists.7.14.pdf>.

293. See, for example, Nestlé and the Danish Institute for Human Rights, *Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in Its Business Activities* (2013), http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-hria-white-paper.pdf, and On Common Ground Consultants Inc., *Human Rights Assessment of Goldcorp's Marline Mine (Vancouver: 2010)*, <http://www.hria-guatemala.com/en/MarlinHumanRights.htm>.

294. See, for example, Brigitte Hamm, Anne Schax, and Christian Scheper, *Human rights impact assessment of the Tampakan Copper-Gold Project, Mindanao, Philippines* (MISEREOR and Fastenopfer, 2013) http://www.misereor.org/fileadmin/redaktion/HRIA_Human_Rights_Impact_Assessment_Tampakan_Copper-Gold_Project_August2013.pdf.

295. Rights and Democracy, *Getting it Right: Human Rights Impact Assessment Guide*, <http://hria.equalit.ie/en/>; 'Community-Based Human Rights Impact Assessments', FIDH, <http://www.fidh.org/en/globalisation-human-rights/business-and-human-rights/7502-community-based-human-rights-impact-assessments>.

relates to the issues of independence, and equality of arms, in the conduct of impact assessments, and how to achieve this given power asymmetries between companies and communities, which may taint assessments facilitated by company personnel, but also where legislation provides for community consultation to be undertaken by public bodies, who themselves may be, or perceived to be, interested parties in the outcome of an HRIA.²⁹⁶ Still further questions relate to the potential future role of strategic or sector-wide HRIA, mirroring environmental practice²⁹⁷; the role in HRIAs of human rights indicators; and the value of risk-based approaches²⁹⁸ and of the notion of “impact” assessment itself.²⁹⁹

7.4 Responding to human rights impacts and remediation

Once an assessment is completed, the GPs call for businesses to respond to its findings, to prevent human rights abuses and address any that may have been uncovered. Clearly, such responses will be wide-ranging. Internally, a company might need to amend recruitment processes or contractual terms for employees, change its purchasing, sales or marketing practices, improve worker accommodation, introduce due diligence for land acquisitions, and so on. In addition, ensuring the effectiveness of any such changes will usually require the allocation of new resources, for instance, for training and awareness-raising, monitoring and management of human rights impacts on a continuous basis.³⁰⁰ Businesses are expected to address all their impacts, though they may prioritise their actions. Here, the GPs recommend that companies first seek to prevent and mitigate their severest impacts, or those where a delay in response would make consequences irremediable (GP24).

Where risks or impacts derive from a company’s business relationships, rather than from its own activities, the GPs require it to consider what leverage it has over the entity in question; how crucial the relationship is; the severity of the abuse; and whether terminating the relationship would itself have adverse human rights consequences. According to the GPs, “leverage” is a company’s ability to effect change in the wrongful practices of an entity, be that an element within the company itself, another business, or a public actor. Modalities of leverage are thus numerous, ranging from communications emphasising human rights by top managers to subordinate units to capacity building and amending contract terms for suppliers.³⁰¹ If a business has leverage, it is expected to exercise it. This will be so where impacts are *caused by* elements within the business itself, in which case it should cease or prevent the impact, and provide for, or collaborate in, remediation. Where a company has *contributed to* or is *directly linked* to impacts, it should cease and prevent its contribution, exercise leverage, if it has it, and provide, or cooperate in, remediation. If, on the other hand, the company lacks leverage, it is expected to seek ways to increase it, for example, by offering incentives, or applying sanctions to the relevant entity, or collaborating with others to influence its behaviour.³⁰²

While the GPs’ concept of leverage appears straightforward, views often differ about its application in practice. With regard to the financial sector, banks have tended to emphasise

296. Almut Schilling-Vacaflor, “Democratizing Resource Governance Through Prior Consultations? Lessons from Bolivia’s Hydrocarbon Sector”, *GIGA Working Paper No.184* (2012), http://www.giga-hamburg.de/en/system/files/publications/wp184_schilling.pdf

297. “Sector-Wide Impact Assessments (SWIA)”, *Myanmar Centre for Responsible Business*, <http://www.myanmar-responsiblebusiness.org/news/sector-wide-impact-assessments.html>.

298. Mark B. Taylor et al, “Due Diligence for Human Rights: A Risk-Based Approach”, *Corporate Social* (2009) http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_etal.pdf.

299. Richard Boele and Christine Crispin, “Should we take the ‘impact’ out of impact assessment?”, *Paper presented at IAIA12* (2012), http://www.iaia.org/conferences/iaia12/Final_Non_Review.aspx.

³⁰⁰. See, for example, “Monitoring and Remediation”, *Gap Inc. Social & Environmental Responsibility Report 2011|2012*, <http://www.gapinc.com/content/csr/html/human-rights/monitoring-and-remediation.html>, and “Human Rights”, *Nestlé Global*, <http://www.nestle.com/csv/human-rights-compliance/human-rights>.

³⁰¹. Shift, *Using Leverage in Business Relationships to Reduce Human Rights Risks* (New York; 2013), <http://shiftproject.org/sites/default/files/Using%20Leverage%20in%20Business%20Relationships%20to%20Reduce%20Human%20Rights%20Risks.pdf>.

³⁰². John Gerard Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations’ Protect, Respect and Remedy Framework*, Guiding Principle 19. Cf. Stepan Wood, “The Case for Leverage-Based Corporate Human Rights Responsibility”, *Business Ethics Quarterly* 22, no. 1 (2011), 63–98.

constraints on their leverage over those they lend to,³⁰³ while outsiders argue that, as controllers of access to credit, they wield much greater influence,³⁰⁴ and point to opportunities to piggy-back human rights screening on anti-corruption due diligence obligations that are already established in many jurisdictions.³⁰⁵ Another area of concern is that of companies' leverage over the use of their products by customers,³⁰⁶ especially with regard to policing and military supplies, information technology and surveillance equipment,³⁰⁷ and dual use technologies. Though the export of such products may be permissible under national standards, the GPs require companies to look beyond technical legality in order to ascertain whether, in reality, their products or services facilitate human rights abuses.³⁰⁸ More complex still is the question of the responsibility and leverage of internet service providers and social media platforms to prevent their use as a medium for propaganda and the organisation of criminal acts, especially given the need, on the other hand, to ensure any restrictions on free speech are lawful, rational and proportionate.³⁰⁹

7.5 Supply chain responsibility

Since large corporations usually have the resources on paper to prevent or remediate impacts in line with GPs, for many, the widespread persistence of abuses questions whether they have the will to do so.³¹⁰ Yet chronic abuses may be indicative of the existence of genuine dilemmas about how to implement and control standards throughout value chains. For some companies, the production process may be relatively static and concentrated³¹¹ but for others their contractual

³⁰³. The Thun Group of Banks, *UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16–21* (2013), <http://business-humanrights.org/sites/default/files/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf>.

³⁰⁴. BankTrack and The Berne Declaration, *BankTrack on the Thun Group Paper on Banks and Human Rights* (December 2013); Ariel Meyerstein, 'Are Big Banks Short-Selling Their Leverage over Human Rights?', *The Guardian*, October 31, 2013, <http://www.theguardian.com/sustainable-business/banks-short-selling-leverage-human-rights>.

³⁰⁵. See, for example, "Human Rights Guidance Tool for the Financial Sector", *UNEP Finance Initiative*, <http://www.unepfi.org/humanrightstoolkit/>; "About", *Finance Against Trafficking*, <http://financeagainstrafficking.org/>.

³⁰⁶ See e.g. *CSRD et al vs Andritz AG* [2014] *OECD Watch*, http://oecdwatch.org/cases/Case_326.

³⁰⁷. "German Companies Are Selling Unlicensed Surveillance Technologies to Human Rights Violators — and Making Millions", *Global Voices Advocacy*, <http://advocacy.globalvoicesonline.org/2014/09/05/exclusive-german-companies-are-selling-unlicensed-surveillance-technologies-to-human-rights-violators-and-making-millions/>. Ben Wagner, *Exporting Censorship and Surveillance Technology* (Humanist Institute for Co-operation with Developing Countries (Hivos), 2012), https://www.hivos.org/sites/default/files/exporting_censorship_and_surveillance_technology_by_ben_wagner.pdf; Cindy Cohn, Trevor Timm, and Jillian York, *Human Rights and Technology Sales: How Corporations Can Avoid Assisting Repressive Regimes* (Electronic Frontier Foundation [EFF], 2012), <https://www.eff.org/files/filenode/human-rights-technology-sales.pdf>; *Dual Use Items: Big Business Profits Put before Human Rights*, 2014, <https://www.youtube.com/watch?v=s21JCGcdDX8>; Carola Frediani, "A Global Campaign to Monitor the 'Digital Weapons' Trade", *TechPresident*, 8 April 2014, <http://techpresident.com/news/wegov/24901/curtailing-international-surveillance-tech-trade>.

³⁰⁸. Francesca Marotta, *Request from the Chair of the OECD Working Party on the Responsible Business Conduct* (United Nations Human Rights Office of the High Commissioner, 27 November 2013), <http://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf>.

³⁰⁹. Loek Essers, "Google, Facebook to Discuss Online Extremism at Dinner with EU Officials", *PCWorld*, 8 October, 2014, <http://www.pcworld.com/article/2813132/google-facebook-to-discuss-online-extremism-at-dinner-with-eu-officials.html>. See also Council of Europe, ICANN's procedures and policies in light of human rights, fundamental freedoms and democratic values, DG2014/12, and other materials available at "Internet governance", *Council of Europe*, <http://www.coe.int/t/information/society/icann-and-human-rights.asp>.

³¹⁰. See, for example, "Indonesian Wage Trial: Human Rights Violations 'Systemic'", *Clean Clothes Campaign*, <http://www.cleanclothes.org/news/2014/06/24/indonesian-wage-trial-human-rights-violations-systemic>; Janell Ross, "Major American Brands Silent on Alleged Rights Abuses At Overseas Factories", *Huffington Post*, 21 July 2011, http://www.huffingtonpost.com/2011/07/21/american-brands-abuses-factories-jordan-labor-conditions_n_903995.html.

³¹¹. Many companies rely extensively on single suppliers, for example, Apple/Foxconn: Connie Guglielmo, "Apple's Supplier Labor Practices In China Scrutinized After Foxconn, Pegatron Reviews", *Forbes*, 12 December 2013, <http://www.forbes.com/sites/connieguglielmo/2013/12/12/apples-labor-practices-in-china-scrutinized-after-foxconn-pegatron-reviewed/>.

networks are as dynamic as they are vast, while commodities can present their own distinct challenges in terms of traceability.³¹²

Supplier codes of conduct ranked amongst the earliest business and human rights initiatives and pre-date the GPs.³¹³ While uptake of this model by consumer-facing companies was relatively rapid in some sectors, strong critiques of practice also quickly emerged, for instance, with regard to reliance by third-party auditors on a superficial checklist approach, on one hand, and for lack of coordination amongst purchasers leading to “audit-fatigue” amongst inspected businesses, on the other.³¹⁴ Subsequent innovation has aimed to address these problems with, for example, the launch of virtual data-sharing platforms³¹⁵ and an increasing emphasis on capacity strengthening measures for suppliers along with other stakeholders.³¹⁶

Yet egregious abuses continue. In 2013, over 1,000 mainly female garment workers were killed and more than 2,500 injured in the Savar building collapse. Various factors contributed to the “Rana Plaza” disaster, amongst them breaches of construction, health and safety regulations and labour standards by local suppliers based in the factory, who were suppliers to large numbers of well-known European and American brands, and defective inspection arrangements and social audits, on the part of purchasers, that failed to pick them up.

These problems, as well as a broader context of exploitation and marginalisation of female garment workers in Bangladesh, were widely documented³¹⁷ and had contributed to earlier workplace disasters.³¹⁸ The Rana Plaza catastrophe, because of its horrendous scale, attracted unprecedented public attention and outrage, and triggered a significant multi-actor mobilisation. Brands were convened by the ILO³¹⁹ and global unions to coordinate an arrangement for the payment of compensation to workers. In May 2013, within a few weeks of the tragedy, brands and retailers entered into a five-year binding agreement with Bangladeshi and global trade unions. The *Accord on Fire and Building Safety in Bangladesh* commits more than 150 companies to collaborative efforts to ensure safety in almost half of the country’s garment factories, through measures such as independent inspections by trained fire and building safety experts, public reporting, mandatory repairs and renovations to be financed by brands, a central role for workers and unions in both oversight and implementation, supplier contracts with sufficient financing and adequate pricing and worker training.³²⁰ Other international organisations have sought to support these efforts.³²¹

³¹². United Nations Global Compact and BSR, *A Guide to Traceability: A Practical Approach to Advance Sustainability in Global Supply Chains* (2014),

https://www.unglobalcompact.org/docs/issues_doc/supply_chain/Traceability/Guide_to_Traceability.pdf.

³¹³. For example, the Ethical Trading Initiative, the Fair Labour Association, Worldwide Responsible Apparel Production Program (WRAP) and Social Accountability International (SAI) were launched before the GPs: see further Working Group IV.

³¹⁴. Jeremy Prepscius, “Building Sustainable Supply Chains”, *The Guardian*, 6 August 2012,

<http://www.theguardian.com/sustainable-business/blog/building-sustainable-supply-chains>.

³¹⁵. “Sedex Global partners with World Bank Institute to develop Open Supply Chain Platform”, *Sedex*, 12 May 2014, <http://www.sedexglobal.com/world-bank-institute-partners-with-sedex-global-to-develop-open-supply-chain-platform/>.

³¹⁶. See, for example, cases in Shift, *From Audit to Innovation: Advancing Human Rights in Global Supply Chains* (New York: 2013), http://shiftproject.org/sites/default/files/From%20Audit%20to%20Innovation-Advancing%20Human%20Rights%20in%20Global%20Supply%20Chains_0.pdf.

³¹⁷. Khorshed Alam and Laia Blanch, *Stitched Up: Women Workers in the Bangladeshi Garment Sector* (War on Want, 2011), <http://www.waronwant.org/attachments/Stitched%20Up.pdf>.

³¹⁸. Liana Foxvog et al., *Still Waiting – Six Months after History’s Deadliest Apparel Industry Disaster, Workers Continue to Fight for Reparations* (Clean Clothes Campaign and International Labor Rights Forum (ILRF), 2013); Syeda Sharmin Absar, “Women Garment Workers in Bangladesh”, *Economic and Political Weekly* 37, no. 29 (July 20, 2002), 3012–16.

³¹⁹. International Labour Organization, *The International Labour Organization Response to the Rana Plaza Tragedy* (2013), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/article/wcms_241219.pdf.

³²⁰. *The Bangladesh Accord on Fire and Building Safety*, <http://bangladeshaccord.org/>; Foxvog et al., *Still Waiting – Six Months after History’s Deadliest Apparel Industry Disaster, Workers Continue to Fight for Reparations*, 29.

³²¹. National Contact Points for the OECD Guidelines on Multinational Enterprises, *One Year after Rana Plaza* (Organisation for Economic Co-operation and Development (OECD), 25 June 2014), <http://mneguidelines.oecd.org/NCP-statement-one-year-after-Rana-Plaza.pdf>. A further initiative led by US purchasers is the Alliance for Bangladesh Worker Safety, see “About the Alliance for Bangladesh Worker

Yet, various companies have refused to sign the accord, opting for non-binding commitments to improved factory safety. Moreover, the *Rana Plaza Donor's Trust Fund*, set up under the accord has still received only half the US\$40 million needed to compensate workers or their families, while only half the companies associated with factories in the collapsed building have contributed to the fund at all.³²²

7.6 Transparency and corporate reporting

With the rise of ethical investment, and increasing recognition of the materiality of social and sustainability issues, in terms of investment risk,³²³ corporate sustainability reporting, as a device by which companies can be held accountable to markets, has become increasingly prominent, to the extent that some would suggest there has been a “disclosure revolution”.³²⁴ In line with this trend, the final step called for by the GPs’ due diligence process is for businesses to “communicate” on how they are addressing their human rights impacts.³²⁵ This may be done in a variety of ways, including formal and informal public reporting, in-person meetings, online dialogues, and consultations with affected rights-holders. Information provided should be: (i) published in a format, and with a frequency, matching the scope and severity of impacts, and should be accessible to intended audiences, for example, company communications should be in relevant languages, address any issues of literacy amongst impacted rights-holders and be accessible even to remote communities affected by their activities; (ii) sufficient to permit evaluation of the adequacy of company responses to any specific impact; (iii) designed not to pose risks to rights-holders or others such as human rights defenders, journalists, local public officials or company personnel, or to breach legitimate commercial confidentiality requirements. Businesses whose operations or operating contexts pose risks of severe human rights impacts are expected to report formally (GP21).

Measures taken by States and, in the European case, regionally, to encourage or require corporate reporting on human rights and supply chain transparency have been discussed above (Section 6.1). Many such measures are too new to permit a review of their influence upon business practice. Voluntary frameworks and guidance on corporate sustainability reporting, discussed next, have existed for much longer, and companies are in any case likely to use these to produce sustainability reports, whether voluntarily or as a result of new legal requirements.

The Global Reporting Initiative (GRI) is an international not-for-profit organisation. It has developed, within a multi-stakeholder process, a comprehensive [Sustainability Reporting Framework](#), comprising [Reporting Guidelines](#), [Sector Guidance](#) and [other resources](#) that provides “metrics and methods for measuring and reporting sustainability-related impacts and performance”.³²⁶ The GRI ranks as the “first-mover” of sustainability reporting and is widely used: European enterprises using the GRI Framework to produce sustainability reports rose from 270 in 2006 to over 850 in 2011.

Safety”, *Alliance for Bangladesh Worker Safety*, <http://www.bangladeshworkersafety.org/about/about-the-alliance>.

³²². “Who Needs to Pay Up?”, *Clean Clothes Campaign*, <http://www.cleanclothes.org/ranaplaza/who-needs-to-pay-up>.

³²³. Margaret Wachenfeld, *Investing the Rights Way: A Guide for Investors on Business and Human Rights* (Institute for Human Rights and Business, 2013), <http://www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way.pdf>.

³²⁴. Paul Hohnen, “The Future of Sustainability Reporting”, *EEDP Programme Paper 2012/02* (2012), http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy.%20Environment%20and%20Development/0112pp_hohnen.pdf.

³²⁵. John Gerard Ruggie, *Addendum: Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/17/31/Add.2 (23 May 2011), <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add2.pdf>.

³²⁶. “An Overview of GRI”, *Global Reporting Initiative*, <https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx>.

The GRI has provided basic guidance on reporting on human rights from 2006.³²⁷ A 2009 survey of corporate reports undertaken for the GRI and the UNGC (which requires participants to include human rights within the scope of the annual *Communication on Progress*³²⁸) identified some creative approaches by companies to human rights reporting, but concluded that, overall, corporate human rights reporting was weak with regard to the criteria of balanced reporting (that is, presentation of both positive and negative aspects of an issue), completeness, and inclusion of the most relevant issues.³²⁹

Subsequently, GRI's standard for human rights reporting has been expanded, in line with the GPs. Under this, a company is now expected to report on: (i) material issues, namely, those relevant to the human rights impacts of the company or operation, considering its sector and location; (ii) human rights due diligence, that is, the company's human rights policy, assessment process; allocation of responsibilities for human rights within the organisation; (iii) measures to promote human rights awareness, such as training; (iv) monitoring of impacts of company activities; and (v) company measures to follow-up and remediate any human rights impacts detected.

In addition, the framework includes a wide set of performance indicators that allow the effectiveness of a company's human rights due diligence processes and remediation to be measured.³³⁰ Human rights risks are further integrated into GRI's 10 Sector Supplements – versions of the general reporting framework tailored to specific industry sectors, such as airport operators, mining and metals, media, event organisers, electrical utilities and also NGOs.³³¹ UNICEF has issued guidance on how to integrate child rights into reporting under the GRI Framework.³³² Along with the International Federation of Accountants, the GRI participates in the International Integrated Reporting Council, which aims to establish an internationally accepted, unitary framework for integrated financial and sustainability reporting.³³³

Doubts are voiced about the value of current reporting practice as an accountability mechanism in relation to human rights. It is often thought that the businesses that most need to report on human rights, i.e., those with negative impacts, may be reluctant to do so, given commercial sensitivities, potential legal liability, and the likelihood of reputational damage.³³⁴ If the development of universal human rights indicators is seen by some as crucial for comparability across company reports, the potential for irrelevance, perverse outcomes and selectivity is emphasised by others.³³⁵ Equally, while civil society actors are at the forefront of calls for mandatory sustainability reporting requirements, they frequently criticise published reports as instruments for “green-” or “blue-washing”, the presentation of an unduly favourable image of company impacts on people and the environment, following from a selective approach to what information is communicated.³³⁶ One solution to this dilemma may be independent assurance of

³²⁷. Global Reporting Initiative, *Sustainability Reporting Guidelines* (2011), 32,

<https://www.globalreporting.org/resourcelibrary/G3-Guidelines-Incl-Technical-Protocol.pdf>.

³²⁸. “What Is a COP?”, *United Nations Global Compact*, <https://www.unglobalcompact.org/COP/index.html>.

³²⁹. Elizabeth Umlas, *Corporate Human Rights Reporting: An Analysis of Current Trends* (Global Reporting Initiative, The UN Global Compact, and Realizing Rights, 2009), https://www.globalreporting.org/resourcelibrary/Human_Rights_analysis_trends.pdf.

³³⁰. Global Reporting Initiative, *Sustainability Reporting Guidelines* (2011), 32; and Global Reporting Initiative, *G4 Sustainability Reporting Guidelines* (2013), 70, <https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf>.

³³¹. “G3 / G3.1 Sector Supplements”, *Global Reporting Initiative*,

<https://www.globalreporting.org/reporting/sector-guidance/sector-guidance/Pages/default.aspx>.

³³². Catherine Rutgers (ed.), *Children's Rights in Sustainability Reporting: A Guide for Incorporating Children's Rights into GRI-Based Reporting* (Geneva: United Nations Children's Fund, 2014), http://www.unicef.org/csr/css/Childrens_Rights_in_Reporting_Second_Edition_HR.pdf.

³³³. “Integrated Reporting”, The IIRC, <http://www.theiirc.org/>.

³³⁴. Cf. Christopher Marquis and Michael W. Toffel, “Scrutiny, Norms, and Selective Disclosure: A Global Study of Greenwashing”, *Harvard Business School Organizational Behavior Unit Working Paper*, no. 11–115 (2014), http://www.hbs.edu/faculty/Publication%20Files/11-115_eb3f204e-3a5f-4a8d-a471-35ce66adc1a7.pdf.

³³⁵. See, for example, Damiano de Felice, “Challenges and Opportunities in the Production of Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect”, *Human Rights Quarterly* 37, no. 2 (2015), <http://papers.ssrn.com/abstract=2423305>.

³³⁶. Rina Horiuchi et al., *Understanding and Preventing Greenwash: A Business Guide* (BSR and Futerra, 2009), http://www.bsr.org/reports/Understanding_Preventing_Greenwash.pdf.

corporate sustainability reports. The GPs maintain, “independent verification of human rights reporting can strengthen its content and credibility”.³³⁷ But the quality and reliability of assurance has also been impugned.³³⁸ Ultimately, in this complex area, it seems likely that a more potent mixture of mandatory disclosure rules, credible independent assurance, and continuing, enhanced investor and civil society scrutiny of company information will be needed if reporting’s potential as a lever to improve corporate sustainability and business respect for human rights is to be delivered.

8. Working group III: Access to remedies

8.1 Defining access to remedies in the context of business and human rights

Access to effective remedy for any violation of human rights is established under international law.³³⁹ States have the duty to afford remedies that are capable of leading to a prompt, thorough and impartial investigation; cessation of violations; and adequate reparation, including restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. Where abusive activity is ongoing, states should ensure interim measures to prevent irreparable harm. Victims have a right to a truthful account of the facts and circumstances surrounding human rights violations and unless it causes further harm to the victim, public access and transparency to this information should be guaranteed.

Victims therefore must be availed of the means of halting business activities that are harmful to their human rights and claiming effective remedy for damage done. Access to remedies is primarily addressed under GPs 25 to 31, albeit its substance is signposted earlier on, i.e., GP1 establishes a state duty 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.”³⁴⁰ GP13 states the necessity for businesses to remediate adverse human rights impacts, and GP20 provides that where a company is responsible for adverse impacts, it should provide for or cooperate in their remediation through legitimate processes. GP25 reaffirms the state duty to take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when business-related abuses occur within their territory and/or jurisdiction that those affected have access to effective remedy.

The GPs rely on the notion of “grievance”, defined as “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”.³⁴¹ On this basis, a grievance may arise before an actual human rights abuse does. A “grievance mechanism” is “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.”³⁴²

³³⁷. Global Reporting Initiative, *The External Assurance of Sustainability Reporting* (2013), <https://www.globalreporting.org/resource/library/GRI-Assurance.pdf>. See also “Human Rights Reporting and Assurance Frameworks Initiative - RAFI”, *Shift Project*, <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi>.

³³⁸. Alberto Fonseca, “How Credible Are Mining Corporations’ Sustainability Reports? A Critical Analysis of External Assurance under the Requirements of the International Council on Mining and Metals”, *Corporate Social Responsibility and Environmental Management* 17, no. 6 (November 1, 2010), 355–70.

³³⁹. United Nations, *Universal Declaration of Human Rights* (1948), Article 8; United Nations, *International Covenant on Civil and Political Rights* (1966), Article 2; United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), Article 6; United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/RES/39/46 (10 December 1984), Article 14; and United Nations, *Convention on the Rights of the Child*, (20 November 1989), Article 39. It is further provided for in a range of international humanitarian and international criminal law sources. See also United Nations, *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* (16 December 2005).

³⁴⁰. *Ibid.*

³⁴¹. John Gerard Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations’ Protect, Respect and Remedy Framework*, Guiding Principle 25, Commentary.

³⁴². *Ibid.*

8.2 Access to remedy through judicial mechanisms

8.2.1 Criminal law

Some States recognise the concept of corporate criminal liability³⁴³ but its scope and conditions vary considerably across jurisdictions. Some States provide a list of offences to which it applies³⁴⁴; others identify when it does not.³⁴⁵ Seventeen EU Member States now provide for some form of corporate criminal liability, which usually turns on a company's failure to act with due diligence to prevent certain crimes. Sanctions may include confiscation of proceeds and fines.³⁴⁶ It has been suggested that where Member States recognise corporate criminal liability and have ratified the Rome Statute of the International Criminal Court, corporations may be prosecuted for international crimes, even if the Rome Statute itself does not apply to corporate actors.³⁴⁷

It is still uncommon, however, for companies to be prosecuted for crimes connected to human rights abuses. Examples of exceptions include Switzerland, where a gold refiner suspected of money laundering was prosecuted in connection with alleged war crimes in the Democratic Republic of Congo³⁴⁸. In France, a judicial investigation took place for the sale of a surveillance system to the Gaddafi regime in Libya³⁴⁹. In Germany, a complaint was taken up against a timber manufacturer's senior manager regarding abuses by its contracted security forces against a community in the Democratic Republic of Congo.³⁵⁰ In the Netherlands, it is government policy to discourage Dutch companies from investing in settlements in the Israeli-occupied West Bank, viewing these as illegal under international law, and the Dutch public prosecutor has confirmed that it considers such business activity a potential war crime.³⁵¹

8.2.2 Civil law

Civil or private law causes of action against businesses for harm or loss as well as failing to act with due care exist in most jurisdictions. Claimants relying on these in relation to alleged human rights abuses, however, 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", which was then breached either by the company itself or through the conduct of

343. "Business and International Crimes", Fafo, <http://www.fafo.no/liabilities/>. Regarding European countries, see further Clifford Chance, *Corporate Liability in Europe* (2012), http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf

344. See Indonesia and Japan, *ibid*.

345. See France, *ibid*.

346. Applicable to Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Spain, and the United Kingdom. See Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union*.

347. *Rome Statute of the International Criminal Court*, A/CONF.183/9, 39 I.L.M. 999 (17 July 1998). Article 25(1) restricts ICC jurisdiction to natural legal persons. France, Belgium, Germany, the Netherlands, Spain, and the United Kingdom, for example, criminalise genocide, crimes against humanity, and war crimes within their national laws. International Commission of Jurists (ICJ), *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability* (Geneva: 2008), <http://www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/>.

348. Tom Miles and Emma Farge, "Switzerland Opens Probe into Gold Refiner Argor for Congo Dealings", *Reuters*, November 4, 2013, <http://www.reuters.com/article/2013/11/04/congo-gold-idUSL5NOIP29K20131104>.

349. International Federation for Human Rights, *Amesys Case: The Investigation Chamber green lights the investigative proceedings on the sale of surveillance equipment by Amesys to the Khadafi regime* (2013), <http://www.refworld.org/docid/511cb668a.html>.

350. "Criminal Complaint Filed Accuses Senior Manager of Danzer Group of Responsibility over Human Rights Abuses against Congolese Community", *European Center for Constitutional and Human Rights* (ECCHR), <http://www.ecchr.de/danzer-en.html>.

351. Mark B. Taylor, *Human Rights Due Diligence: The Role of States – 2013 Progress Report* (International Corporate Accountability Roundtable, 2013), 11, <http://accountabilityroundtable.org/wp-content/uploads/2013/11/ICAR-Human-Rights-Due-Diligence-2013-Update-FINAL.pdf>.

individuals for whom it was vicariously liable, and that this breach resulted in harm.³⁵² 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.³⁵³ The French Parliament is currently considering a bill that would amend the penal, civil and commercial codes to put a duty on French companies to monitor their human rights impacts and take action accordingly. Companies would be liable for abuses unless they could demonstrate that they had put in place due diligence systems, while a defence to liability would be proof that the company was unaware of any activity having negative human rights impacts and that it made every effort to avoid such impacts.³⁵⁴

8.2.3 Administrative law

In some States, administrative law is used to penalise companies for breaching regulations, for example, environmental or health and safety regulations.³⁵⁵ Penalties can include fines, restricting company operations in specific economic areas, exclusion from public procurement, publicising convictions and penalties, and confiscation of property.³⁵⁶

8.2.4 Constitutional law

It is possible, albeit challenging, to find constitutional causes of action for corporate-related human rights abuses. Traditionally, constitutional rights have been seen as protecting freedoms from excesses of State power. For a constitutional rights claim to proceed in connection with a business, then one of the following must apply: i) the constitution must expressly provide that legal persons (including corporations) are bound by constitutional rights provisions³⁵⁷; ii) a court must have recognised that some or all of the rights guaranteed in the constitution apply directly to non-state actors; or iii) the court must recognise:

- a) that constitutional rights can be extended to a private actor either by virtue of its being an agent of the State or because its activities amount to “State action”³⁵⁸; or because it is carrying out “functions of a public nature”.³⁵⁹
- b) that constitutional rights require States to protect rights-holders against third party interferences with his or her rights; or

352. Richard Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States”, *City University of Hong Kong Law Review* 3 (2011), 1. Under English law, whether or not a duty arises is dependent on a three-stage test: (a) was the harm foreseeable; (b) was there sufficient proximity between the parties; and (c) is it fair, just and reasonable to impose a duty of care?

353. *Ibid.*

354. Assemblée Nationale, *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, No 1524 (2013), <http://www.assemblee-nationale.fr/14/propositions/pion1524.asp>. See Mark B. Taylor, 'Due Diligence: A Compliance Standard for Responsible European Companies', *European Company Law* 11, no. 2 (2014), 86.

355. Business and Human Rights Resource Centre, *Annual Briefing - Corporate Legal Accountability: Executive Summary* (2013), <http://business-humanrights.org/sites/default/files/media/documents/corp-legal-acc-annual-briefing-final-nov-2013.pdf>.

356. *Ibid.* See, for example, U.S. Sentencing Guidelines where companies can be put on probation, which 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. See further: United States Sentencing Commission, *US Sentencing Guidelines Manual* (2012), para.8D1.4, page 527, http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_8.pdf.

357. See, for example, The Republic of South Africa, *Constitution of the Republic of South Africa* (1996), section 8(2), 8(3) and 39(2); in India, certain fundamental rights are expressly guaranteed against non-state actors, e.g., Articles 15(2), 17, 23 and 21. See Surya Deva, *Access to Justice: Human Rights Abuses Involving Corporations – India* (International Commission of Jurists, 2011), <http://papers.ssrn.com/abstract=2034813>.

358. Stephen Gardbaum, “Where the (state) Action Is”, *International Journal of Constitutional Law* 4, no. 4 (2006), 760.

359. The United Kingdom, *Human Rights Act 1998* (1998), Section 6(3)(a) and 6(3)(b) http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1. See further Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (The House of Commons London: The Stationery Office Limited, 2007).

- c) that the court has a duty to uphold constitutional rights, or at least to apply constitutional values in deciding cases, even if the actors involved are private parties.³⁶⁰

Comparative studies highlight a fairly conservative jurisprudence with regard to constitutional rights in the private sphere, more so with regard to business-related abuses. Successful cases are few in number and confined to restricted areas such as defamation, privacy or labour disputes. Securing *locus standi* is difficult, especially where victims are reliant upon public interest groups to pursue cases on their behalf. One positive example, however, is a Seoul High Court ruling in July 2013 that Nippon Steel & Sumitomo Corp were liable to pay compensation of Won 100 million (USD88,000) 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 Korea as well as Japan.³⁶¹

8.2.5 Regional human rights mechanisms in Europe and Asia

At present, there is no regional human rights mechanism in Asia. The response to business and human rights issues of regional human rights mechanisms in Europe is discussed in section 5.1 above.

8.2.6 Barriers to accessing remedy through judicial mechanisms

The GPs identify judicial mechanisms as fundamental to access to remedy but note that their effectiveness is dependent upon judiciaries and the judicial systems being impartial, having integrity and following due process. Further, GP26 highlights that States must not erect legal, procedural or practical barriers to prevent cases from reaching their courts. Yet such barriers exist and typically make seeking access to remedy for corporate-related human rights abuses very difficult for victims. This is demonstrated, for instance, by the discrepancy between the vast numbers of reported business-related human rights abuses and the small number of cases reaching court, and the even smaller number that succeed.³⁶²

Whilst identifying a cause of action under domestic law is one challenge, the doctrine of *forum non conveniens* can be another. This allows a court to decline jurisdiction on the basis that the courts of another State provide the more appropriate forum, for instance, given the location of the parties, witnesses or evidence, or because the courts of the other forum (usually that of the host State) are more familiar with the applicable law. Studies of cases dismissed on this basis have found that they are rarely if ever refiled in an alternate forum.³⁶³ Further legal and procedural barriers include the “act of State” doctrine, rules on immunity, and statutes of limitations, as well as restrictions on class actions or other forms of group litigation.³⁶⁴

Practical barriers to legal redress are highly relevant because many individuals and communities impacted negatively by business activities often experience poverty and social exclusion. Such rights-holders often lack the financial resources needed to pay for lawyers and other costs of filing a case. Navigating the legal system can be difficult if victims do not have the requisite knowledge, skills or language. Many poor people 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

360. This German constitutional law doctrine known as *Mittelbare Drittwirkung* is premised upon the idea that the judiciary, as an arm of the state, is bound by fundamental rights in all its operations. See further Eric Engle, “Third Party Effect of Fundamental Rights (Drittwirkung)”, *Hanse Law Review* 5 (2009), 165–173.

361. Ida Torres, “South Korean Court Orders Japanese Firm to Compensate Forced WWII Laborers”, *The Japan Daily Press*, 10 July 2013, <http://japandailynews.com/south-korean-court-orders-japanese-firm-to-compensate-forced-wwii-laborers-1032080/>.

362. Mark B. Taylor et al., *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses* (Fafo, Amnesty International and Norwegian Peacebuilding Centre, 2010), <http://www.fafo.no/pub/rapp/20165/20165.pdf>.

363. Gwynne Skinner et al, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (The International Corporate Accountability Roundtable, CORE, and the European Coalition for Corporate Justice, 2013)

364. See further Skinner et al., *ibid.*; and Taylor et al., *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses*.

injurious experiences.³⁶⁵ Moreover, human rights lawyers may be inexperienced in dealing with business cases; or lawyers with the requisite skills may be reluctant to take such cases on, due to legal uncertainty, financial risks, political sensitivity or judicial corruption.

The complex corporate structures of transnational businesses alongside the doctrine of separate corporate personality which raises a presumption against “piercing the corporate veil” to hold a parent company liable for the wrongs of a subsidiary presents a critical legal barrier to remedy. Whilst the mismatch between corporate legal structures and the business reality of economic interdependence of companies within a group has been often criticised,³⁶⁶ courts remain hesitant to weaken this general rule. As such, parent companies are only rarely held liable at home for the transnational actions of members of their corporate group. Exceptionally, a number of negligence actions have succeeded in the UK on the basis that a parent company has been responsible for the occurrence of human rights abuses in a host State.³⁶⁷ In 2012, a UK court held a parent company liable in negligence for harm to employees of one of its South African-based affiliates in the area of health and safety.³⁶⁸

8.3 Extraterritorial jurisdiction over business-related human rights abuses

For a variety of reasons, victims may try to seek remedies in either the State in which the perpetrator company is domiciled (“the home State”) or another State with a basis for taking jurisdiction over the case. The GPs take the position that international law does not impose any duty upon States to assume responsibility for regulating the extraterritorial activities of businesses domiciled in their territory by adjudicating such cases; on the other hand, the GPs also state that international law does not prohibit States from doing so “provided there is a recognised jurisdictional basis.”³⁶⁹

Currently, acceptance of jurisdiction and adjudication by home-State courts with regard to extraterritorial abuses by companies domiciled or resident in their jurisdiction is very limited. Most instances have occurred under the US Alien Tort Statute of 1789 (ATS), under which US courts have applied international human rights standards in cases between private parties on the basis of universal jurisdiction over gross human rights abuses.³⁷⁰ Though cases initially focused on torture by public agents,³⁷¹ subsequent claims have raised corporate complicity with State agents in the perpetration of human rights abuses.³⁷² A 2013 judgement of the US Supreme Court in case of *Kiobel v. Royal Dutch Petroleum*³⁷³ ostensibly sought to limit the ATS as an avenue of

365. Michael R. Anderson, “Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs”, *IDS Working Paper 178* (2003), 16–19, <https://www.ids.ac.uk/files/dmfile/Wp178.pdf>.

366. See, for example, Jodie A. Kirshner, “Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute”, *Berkeley Journal of International Law* 30 (2012), <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/1>

367. Richard Meeran, “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States”.

368. *Chandler v. Cape PLC* [2012] 1 WLR 3111.

369. John Gerard Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations’ Protect, Respect and Remedy Framework*, Guiding Principle 9. para.4.

370. The ATS provides that US district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

371. In 1980, in the case of *Filartiga v. Pena-Irala*, two Paraguayan nationals present in the US successfully used the ATS to sue another Paraguayan citizen for torture he had perpetrated on them in Paraguay: *Filartiga v. Pena-Irala* [1980] 630 F.2d 876, 878 (2d Cir.).

372. See, for example, *Doe v. Unocal* [2002] 395 F.3d 932 (9th Cir.), opinion vacated and *reh’g en banc* granted; *Doe v. Unocal* [2003] 395 F.3d 978 (9th Cir.).

373. *Kiobel v. Royal Dutch Petroleum Co and Shell Transport and Trading Company Plc* [2013] 133 S. Ct. 1659. In this case, 12 Nigerian nationals resident in the US made a claim against the companies on the basis that their Nigerian subsidiary had enlisted, aided and abetted the Nigerian Government in committing crimes against humanity, arbitrary arrest and detention and acts of torture. In a majority opinion, the US Supreme Court held that where a statute makes no clear indication of extraterritoriality, as is the case in the ATS, there is a presumption against its extraterritorial application, while also noting that prudential concerns about judicial interference in foreign policy are particularly strong in ATS litigation. It was held however that where claims “touch and concern the territory of the United States”, and do so with sufficient force, this may displace the presumption.

recourse for victims of business-related abuses, though later decisions of the US lower courts indicate that this route may not be entirely closed off for the future.³⁷⁴

8.3.1 Extraterritorial adjudication in Europe

In general, the scope of application of the ECHR, like other treaties, is territorial, and “jurisdiction” under Article 1 refers to the national territory of contracting States. Despite the obligation upon Member States to provide an effective remedy,³⁷⁵ it is only in exceptional circumstances that the ECtHR will accept jurisdiction over acts or omissions performed or producing effects outside a State’s territory.³⁷⁶

The Brussels I Regulation/Lugano Convention allows companies domiciled in one EU Member State to be sued in that State for damages caused by harms occurring in another State covered by the Regulation.³⁷⁷ European States must also recognise and enforce judgments for civil damages entered by other States. These rules have provided a platform for a handful of corporate-related human rights cases. In *People of Nigeria v. Shell*,³⁷⁸ a Netherlands court accepted jurisdiction over three cases in which Nigerian fisherman and farmers claimed that Royal Dutch Shell had been negligent in overseeing oil production by its Nigerian subsidiary. In *Yao Essaie Motto v. Trafigura Ltd*,³⁷⁹ a UK court exercised jurisdiction over a claim against a British company for its role in dumping toxic waste in the Ivory Coast.

While the Brussels I Regulation currently does not confer jurisdiction on EU Member State courts over claims lodged against third-country subsidiaries and contractors of European corporations, the laws of some European States do allow claimants to sue these entities if they can be considered a necessary or proper party to the claim. For example, 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 for alleged complicity with the government in using violence against protestors.³⁸⁰ In Germany, § 23(1) of the Code of Civil Procedure confers civil courts jurisdiction over monetary claims if the defendant’s assets are located within Germany. In the Netherlands, if there is a possibility that a Dutch-domiciled parent company can be held liable, then its foreign subsidiaries can come under the jurisdiction of the Dutch court. Additionally, the principle of *forum necessitates* determines grounds for the exercise of international civil jurisdiction over claims that would normally not fall within national courts’ jurisdiction if effective opportunities to bring those claims in foreign fora are absent.

8.3.2 Extraterritorial adjudication in Asia

To date, no court in Asia has adjudicated over extraterritorial corporate-related human rights abuses. One development to note though is the Singaporean Transboundary Haze Pollution Act 2014.³⁸¹ This establishes criminal and civil liability, and significant penalties, for business entities whose activities cause haze which results from burning of forests and peatlands in neighbouring

³⁷⁴. See *Al Shamari v. CACI*, in which four Iraqi torture victims brought a claim against a US-based private contractor for providing interrogation services at Abu Ghraib prison. See: “Al Shimari v. CACI et al.”, *Center for Constitutional Rights*, <http://ccrjustice.org/alshimari>.

³⁷⁵. European Court of Human Rights, Council of Europe, *European Convention on Human Rights*, Article 13.

³⁷⁶. See, for example, *Al Skeini and Others v. UK* [2011] ECHR–GC, §§ 131 et seq; Jörg Polakiewicz, “Corporate Responsibility to Respect Human Rights: Challenges and Opportunities for Europe and Japan”.

³⁷⁷. The Council of the European Union, *Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, No 44/2001 (22 December 2000); *Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 2007 OJ L339/3 (30 Oct 2007).

³⁷⁸. *Oguru v. Royal Dutch Shell PLC* [2009] Court of the Hague, Docket Number HA ZA 09-579 (Neth.). See, e.g., Milieudefensie, *The People of Nigeria Versus Shell: The Course of the Lawsuit*, <https://milieudefensie.nl/publicaties/factsheets/the-course-of-the-lawsuit/view>.

³⁷⁹. *Motto & Ors v. Trafigura Ltd & Anor* [2011] EWHC 90206 (Costs) (29 June 2011).

³⁸⁰. *Guerrero v. Monterrico Metals Plc*, [2009] EWHC (QB) 2475.

³⁸¹. The Republic of Singapore, *Transboundary Haze Pollution Bill*, No. of 2014 (2014), <https://www.reach.gov.sg/Portals/0/EConsult/144/Draft%20Transboundary%20Haze%20Pollution%20Bill%202014%20Public%20consultation.pdf>.

countries.³⁸² Section 4 of the Act states that it “shall extend to and in relation to any act or thing outside Singapore which causes or contributes to any haze pollution in Singapore,” entailing liability even for foreign companies without assets in Singapore. Note however, that liability derives from harm caused in Singapore, which presents a different situation from the extraterritoriality cases described above where the harm occurred outside of the jurisdiction of the court approached.

A second example in Asia of a trans-boundary case relates to the Laotian-based Xayaburi Dam which, once built, will supply most of its power output to the Electricity Generating Authority of Thailand (EGAT). In June 2014, the Thai Supreme Administrative Court held that it had jurisdiction to hear a case filed by Thai villagers living along the Mekong River against EGAT and four other government bodies, who claim that environmental and health impact assessments were inadequate thus invalidating relevant government agreements relating to the construction of the dam and the electricity supply.³⁸³

8.3.3 The viability of judicial mechanisms for business-related human rights abuses

Whilst an “expanding web of liability” exists to potentially close some of the current “gaps” in remedy for corporate-related human rights abuses, this does not yet translate into effective systems of remedy. According to Zerk, “... in practice, from the perspective of those seeking to hold companies to account, the system is patchy, uneven, often ineffective, and fragile.”³⁸⁴ The use of extraterritorial adjudication also remains controversial. It can provide redress for victims where this would otherwise be lacking; and can also contribute to deterrence and generally strengthen respect for human rights and the rule of law. Arguably, however, it can distract from efforts to strengthen local access to justice, regulation and good governance in states where abuses take place. It may also encroach on their sovereignty and, by drawing courts into such matters, carry risks in the areas of foreign policy and diplomacy.³⁸⁵

8.4 State-based non-judicial mechanisms

Even effective, well-resourced judicial systems cannot address all wrongs. Sometimes a judicial remedy is not required or favoured by claimants. GP27 highlights state-based non-judicial mechanisms as an important complement to judicial remedies in these situations. Expanding the mandate of administrative, legislative and other non-judicial mechanisms – which may be “mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes...” – is recommended by the GPs. The GPs specifically highlight NHRIs and National Contact Points under the OECD Guidelines for Multinational Enterprises.

NHRIs are independent bodies established by national law or constitutions to promote and protect human rights, for instance, through monitoring, investigations, research and education.³⁸⁶ The

382. Civil liability is incurred if any person in Singapore (a) sustains any personal injury, contracts any disease, sustains any mental or physical incapacity or dies; (b) sustains any physical damage to property; or (c) sustains any economic loss, including a loss of profits. An entity will be criminally liable if it: (i) engages in conduct, or condones conduct by another entity, which causes or contributes to haze pollution in Singapore; (ii) manages another entity which owns or occupies land overseas, if that other entity engages in conduct, or condones the conduct of another, which causes or contributes to haze pollution in Singapore. Fines of up to S\$100,000 may be imposed for each day that the Pollution Standard Index (PSI) threshold is crossed, up to an aggregate fine of S\$2 million.

383. “Justice for the Mekong – Thai Villagers Back to Court”, *Chiangrai Times*, June 22, 2014, <http://www.chiangraitimes.com/justice-for-the-mekong-thai-villagers-back-to-court.html>.

384. Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies* (Office of the United Nations High Commissioner for Human Rights, 2013),

<http://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticlawremedies.pdf>.

385. Nadia Bernaz, “Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?”, *Journal of Business Ethics* 117, no. 3 (2013), 508.

386. United Nations General Assembly, *Principles relating to the status of National Institutions (Paris Principles)*, Resolution 48/134 (4 March 1994), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement>.

UNHRC recognises that the mandate of NHRIs includes business and human rights³⁸⁷ and NHRIs are increasingly putting this mandate into action both in Europe and Asia.³⁸⁸ The Scottish and Northern Ireland Human Rights Commissions, for example, have considered the issue of public procurement.³⁸⁹ India's National Human Rights Commission, in focusing on labour standards, has developed a specific approach to responding to suspected bonded labour, using a combination of its powers to trigger inspections by relevant agencies, alternatively to inspect businesses itself and, where needed, issue discharge certificates to free workers and organise their rehabilitation, and take legal action against employers.³⁹⁰

In Asia, victims of abuses are increasingly seeking out NHRIs as a means of accessing remedy. Between 2007 and 2012, the Malaysian NHRI, SUHAKAM received 39 complaints against logging companies, plantations, security and finance companies for trespass and damage to native customary land as a result of logging activities, denial of rest days for employees, late payment of salary, unfair dismissal. Similarly, 1,009 of the 5,422 human rights cases handled by Komnas HAM, the Indonesian Human Rights Commission in the period January–November 2012 were complaints against businesses in areas such as land and labour disputes. Victims are also starting to file complaints with the NHRI of the State where the perpetrating company is based.³⁹¹

Countries adhering to the OECD Guidelines are required to have an NCP to promote respect for the Guidelines and to handle complaints about breaches by corporations, which some NCPs approach through mediation and conciliation.³⁹² As a result of sustained civil society campaigns³⁹³ and OECD support for capacity strengthening, NCPs are adopting more proactive approaches to human rights issues. For example, the Italian NCP, together with the OECD Secretariat, have taken steps to promote coherence amongst OECD registered companies operating in Myanmar.³⁹⁴ Further, the Norwegian NCP has undertaken a full investigation of alleged abuses of indigenous peoples' rights by a Norwegian mining company in the Philippines.³⁹⁵

8.5 Non-State-based grievance mechanisms

387. United Nations General Assembly, *Human rights and transnational corporations and other business enterprises*, A/HRC/17/L.17/Rev.1, (15 June 2011).

388. In 2010, NHRIs' International Coordinating Committee issued its Edinburgh Declaration ("The 2010 Edinburgh Declaration [10th Biennial Conference of the ICC]", *International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights*), <http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/10th%20Biennial%20Conference%20of%20the%20ICC.aspx>, and subsequently both the Asia Pacific Forum of NHRIs and European Network of NHRIs have developed regional action plans on business and human rights: "NHRI Capacity Building", *International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)*, <http://nhri.ohchr.org/EN/Themes/BusinessHR/Pages/Capacity%20Building.aspx>. Business and Human Rights: A Guidebook for NHRIs was published on behalf of the ICC in 2013: Nora Götzmann and Claire Methven O'Brien, *Business and Human Rights: A Guidebook for National Human Rights Institutions* (International Coordinating Committee of National Human Rights Institutions and Danish Institute for Human Rights, 2013), <http://www.humanrights.dk/publications/business-and-human-rights>.

389. "Our Work", *Scottish Human Rights Commission*, <http://scottishhumanrights.com/ourwork>; and Northern Ireland Human Rights Commission, *Public Procurement and Human Rights in Northern Ireland* (Belfast, 2013), http://www.nihrc.org/uploads/publications/NIHRC_Public_Procurement_and_Human_Rights.pdf.

390. National Human Rights Commission, *Business And Human Rights: The Work of the National Human Rights Commission of India On the State's Duty to Protect* (New Delhi: 2014).

391. For example, villagers from Cambodia and Thailand, along with their NGO representatives, delivered a complaint to SUHAKAM raising human rights and environmental concerns about the work of Malaysian company, Mega First, on the Don Sahong Dam project in Laos. "No Fish, No Food: NGO Coalition Files Complaint Against Don Sahong Dam Developer", *EarthRights International*, <http://www.earthrights.org/media/no-fish-no-food-ngo-coalition-files-complaint-against-don-sahong-dam-developer>

392. The OECD hosts a database of "specific instances", the term for complaints. See "Database of specific instances", *OECD Guidelines for Multinational Enterprises*, <https://mneguidelines.oecd.org/database/>.

393. OECD Watch has led a long campaign for improved handling of specific instances by NCPs: *OECD Watch*, <http://oecdwatch.org/>.

394. "The Italian NCP in Myanmar", *Punto Di Contatto Nazionale*, <http://pcnitalia.sviluppoeconomico.gov.it/en/news/item/285-the-italian-ncp-in-myanmar>.

395. Jill Shankleman and Susan Tamondong, *Report of the fact-finding mission to Mindoro, the Philippines* (Royal Ministry of Foreign Affairs, 2013), http://www.responsiblebusiness.no/files/2013/12/intex_fivh_fact_finding2.pdf

The GPs promote non-State-based grievance mechanisms on the basis that they can offer a remedy to victims where grievances do not raise actionable matters of law. They can be faster and cheaper than legal action; they can provide an “early warning system” about potential abuses before situations escalate, and they provide a means of enabling companies to improve stakeholder relationships whilst empowering communities to engage effectively with companies.³⁹⁶ The GPs identify two categories of such mechanisms: (a) regional or international human rights bodies and (b) operational or project-level grievance mechanisms designed and administered either by the company alone or with its stakeholders, or by an industry association or a multi-stakeholder group (see section 9).³⁹⁷ GP28 establishes that States are to facilitate access to these mechanisms. GP31 sets out eight criteria for ensuring their effectiveness. These are their legitimacy, accessibility and predictability, fairness and equitability between parties, transparency, rights compatibility, continuous learning and the requirement that such mechanisms be based upon engagement and dialogue as a means for addressing the grievance and delivering effective remedy.

Practical experiences have, however, raised concerns about non-State-based operational-level grievance mechanisms. Where national legislation does not comply with human rights standards, remedies provided may not be compatible with human rights. Victims may be offered (and they may accept) compensation that does not reflect the damage caused or their entitlement, for instance, to restitution, other human rights and cultural preferences.³⁹⁸ Confidentiality may hinder the deterrent effect, and non-judicial mechanisms may be ill-equipped to address gross and systemic human rights abuses. This last concern arose in relation to the *Olgeta Meri Igat Raits* (“All Women Have Rights”) Framework of Remediation Initiatives established by Barrick Gold to address sexual violence against women committed by security officers around its Porgera Joint Venture mine in Papua New Guinea.³⁹⁹ Local women who were sexually assaulted were offered monetary compensation, health and education services, but only if they waived their legal rights to sue the company in future.⁴⁰⁰ The legitimacy of this approach and its impact on State law enforcement has been heavily questioned.⁴⁰¹

8.6 Improving access to remedy

In light of the legal, procedural and practical barriers highlighted in this section, there are important debates about what steps should be taken to ensure effective access to remedy. Some take the view that solutions lie at the national level. A recent report recommends that States should legislate to establish criminal and civil liability for companies that fail to implement due diligence policies, to provide for collective redress mechanisms, and for legal aid to be extended to victims of corporate human rights abuses occurring outside the territory.⁴⁰² Currently, the only means of punishing businesses in many jurisdictions is through fines, which may be inadequate for a variety of reasons: they may not necessarily have the desired deterrent value; the liability to

³⁹⁶. Emma Wilson and Emma Blackmore, *Dispute or Dialogue? Community Perspectives on Company-Led Grievance Mechanisms* (International Institute for Environment, 2013), <http://pubs.iied.org/16529IIED.html>.

³⁹⁷. See *Human Rights & Grievance Mechanisms*, <http://grievancemechanisms.org/> and Access Facility, a descriptive database of non-judicial mechanisms and case stories: *ACCESS Facility*, <http://www.accessfacility.org/>. See also: Shift, *Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights* (New York: 2014), <http://shiftproject.org/sites/default/files/May%202014%20Shift%20BLP%20Workshop%20Report%20Remediation.pdf>

³⁹⁸. ACCESS Facility and the United Nations Working Group on Business and Human Rights, *Expert Meeting Report: ACCESS to Remedy in Context of Business and Human Rights: Improving the Effectiveness of Non-Judicial Grievance Mechanisms*, (The Hague: April 3, 2014), http://business-humanrights.org/sites/default/files/documents/Report%20Expert%20Meeting%20on%20Grievance%20Mechanisms_ACCESS%20Facility_The%20Hague_%203-4%20April%202014_0.pdf

³⁹⁹. Barrick Gold Corporation and the Porgera Joint Venture, *Olgeta Meri Igat Raits* (“All Women Have Rights”): *A Framework of Remediation Initiatives in Response to Violence against Women in the Porgera Valley* (2012), <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>.

⁴⁰⁰. Jonathan Kaufmann, *Letter to the UN High Commissioner on Human Rights* (Business and Human Rights Resource Centre, 2013), <http://business-humanrights.org/en/doc-letter-to-un-ohchr-regarding-the-porgera-joint-venture-remedy-framework>.

⁴⁰¹. Sarah Knuckey, “On Australia’s Doorstep: Gold, Rape, and Injustice”, *The Medical Journal of Australia* 199, no. 3 (2013).

⁴⁰². Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*.

pay does not always rest upon the entity that is ultimately responsible, and they may be viewed as not being commensurate with serious human rights abuses.⁴⁰³ One proposal has been that companies found guilty of such abuses should have their right to operate withdrawn.⁴⁰⁴ Access to information, disclosure and transparency are critical, as victims need to be aware of their human rights and of available remedies in order to pursue them. Most recognise the importance of building the capacity of public authorities, business enterprises and civil society to better prevent abuses in the first place. A recent UNHRC resolution requested OHCHR to continue to work on domestic law remedies for gross human rights abuses and asked the UNWG to launch an inclusive and transparent consultative process to facilitate the sharing of legal and practical measures to improve access to remedy, both judicial and non-judicial, and to consider the benefits and limitations of a legally binding instrument.⁴⁰⁵

The UNWG can and has received communications from alleged victims. It cannot however adjudicate on these nor impose sanctions, only exhort States and companies to prevent or redress abuses.⁴⁰⁶ Hence, the proposals for international agreements to oblige States to provide remedies in either national criminal or civil law for business-related abuses (see section 2.2). One focus, encouraged by the SRSG, has been the idea of a treaty to criminalise corporate conduct leading to “serious” or “gross” human rights abuses, taking inspiration from the UN Convention Against Corruption.⁴⁰⁷ A more recent idea has been for a tribunal of experts to hear and apply civil law principles and alternative dispute resolution methods such as arbitration and mediation to resolve cases involving corporate-related human rights abuses.⁴⁰⁸

9. Working group IV: Multi-stakeholder collaboration

9.1 Defining multi-stakeholder initiatives and Corporate Responsibility Coalitions

Multi-stakeholder initiatives (MSIs) involve companies, other non-State actors such as NGOs and sometimes governments and public bodies in setting standards with regard to the social and environmental dimensions of business behaviour, and contributing to aspects of good governance, including transparency, participation and accountability. By alternative means of ensuring compliance by corporate actors with human rights standards, for handling grievances arising from alleged violations and for broadly securing businesses’ social license to operate in a globalised context, they can be viewed as an efficient mechanism for managing the human rights impacts of global corporate activity.⁴⁰⁹

Corporate responsibility coalitions are another alternative governance mechanism used to address human rights. These may be defined as “independent, non-profit membership organisations that are composed mainly or exclusively of for-profit businesses that have a board of directors composed predominantly or only of business people; that are core-funded primarily from business; and whose purpose is to promote responsible business practice.”⁴¹⁰ According to one

403. Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies*.

404. Email communication with Sif Thorgeirsson, Business and Human Rights Resource Centre, 11 September 2014.

405. Human Rights Council, *Human rights and transnational corporations and other business enterprises*, A/HRC/26/L.1.

406. UN Working Group on Business and Human Rights, *The UN Working Group on Business and Human Rights’ work in handling individual cases of alleged violations and abuses* (United Nations Office of the High Commissioner for Human Rights, 2014)

http://www.ohchr.org/Documents/Issues/Business/WGBrief_Communications_with_States_and_non-State_actors_12.03.2014.pdf.

407. The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Recommendations on Follow-up to the Mandate* (2011), 5, <http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>.

408. Claes Cronstedt et al., *An International Arbitration Tribunal on Business and Human Rights* (2014), <http://www.i4bb.org/news/IntlArbTribunal25Feb2014.pdf>.

409. Peter Utting, “Introduction: Multi-stakeholder regulation from a development perspective”, in Darryl Reed et al. (eds.), *Business Regulation and Non-State Actors: Whose standards? Whose development?* (London: Routledge, 2012).

410. David Grayson and Jane Nelson, *Corporate Responsibility Coalitions: the past, present and future of alliances for sustainable capitalism* (Stanford University Press and Greenleaf Publishing, 2013).

study, such coalitions can have the following impacts: first, they may raise awareness and make the case for responsible business; second, they can help companies to embed responsible practices into core operations and value chains; third, they may support the development of common visions and agendas for action; and fourth, they can constitute a platform for collective action to drive scale and systemic change.⁴¹¹

9.2 Rationales for MSIs

Both the models discussed above reflect a broader trend towards private rule-making. Indeed, a shift away from State-based regulation has been viewed by some as inevitable in a globalised, transnational, multi-sector world,⁴¹² where a “regulatory fracture” within the global economy puts highly globalised systems of production beyond individual States’ regulatory reach.⁴¹³ Some perceive States and intergovernmental organisations as now lacking the institutional capabilities and capacities to address problems satisfactorily. Others view an increase in non-State regulatory instruments as being driven by a rise of neo-liberal policies.⁴¹⁴ Yet others suggest that their appearance is as a result of pressure from transnational advocacy movements seeking new means of holding corporations to account for social and environmental “externalities”. Their emergence have also been attributed to a corporate imperative to respond quickly with risk management tools that are capable of deflecting State-based regulation, quelling reputational damage and ensuring the viability of business operations in the face of social resistance.⁴¹⁵

According to the SRSG, MSIs are a necessary “gap-filler” that can help to manage corporate activities that slip through existing frameworks, either by design or default⁴¹⁶; some suggest this to be the case *apropos* the steady marginalisation of labour in the management of production and workplace relations over recent decades.⁴¹⁷ The purpose of human rights and business MSIs is, according to this view, to allocate shared responsibilities and establish mutual accountability mechanisms for human rights within complex networks that can include any combination of host and home States, corporations, civil society actors, industry associations, international institutions and investor groups.

9.3 Scope of MSIs

Current MSIs encompass a range of activities including: norm-development and standard-setting, monitoring, verification and certification, awareness-raising, providing a platform for sharing dilemmas, analysing problems and finding collaborative solutions; encouraging experimentation with forms of collaborative governance; promoting learning and capacity-building; and providing grievance mechanisms and alternative dispute resolution.⁴¹⁸ In pursuing these tasks, most MSIs

⁴¹¹. Ibid.

⁴¹². Maurits Barendrecht et al., *Rulejungling: When Lawmaking Goes Private, International and Informal* (Hiil, 2012), [http://www.hiil.org/data/sitemanagement/media/Hiil_TrendReport2_compleet_041012_DEF%20\(2\).pdf](http://www.hiil.org/data/sitemanagement/media/Hiil_TrendReport2_compleet_041012_DEF%20(2).pdf).

⁴¹³. Boaventura de S Santos and Cesar A. Rodriguez-Garavito, “Law, Politics and the Subaltern in Counter-Hegemonic Globalisation”, in Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito (eds.), *Law and Globalisation from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, 2005).

⁴¹⁴. Tim Bartley, “Certifying Forests and Factories: States, Social Movements and the Rise of Private Regulation in the Apparel and Forest Product Fields”, *Politics and Society* 31 (2003).

⁴¹⁵. Walter Mattli and Tim Büthe, “Setting International Standards: Technological Rationality or Primacy of Power?”, *World Politics* 56(1) (2003), 1–42.

⁴¹⁶. John Gerard Ruggie, *Just Business*. See also Susan Strange, *The Retreat of the State* (Cambridge University Press, 1996).

⁴¹⁷. Claire Methven O’Brien, “Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law — Parts I/II”, *German Law Journal* 9 (2008), <http://www.germanlawjournal.com/index.php?pageID=11&artID=983>, and Claire Methven O’Brien, “The UN Special Representative on Business and Human Rights: re-embedding or dis-embedding transnational markets?”, in Christian Joerges and Joseph Falke (eds.), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart, 2011).

⁴¹⁸. See Mariette van Huijstee, *Multistakeholder Initiatives: A strategic guide for civil society organizations* (Amsterdam: SOMO, 2012); Scott Jerbi, *Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda* (International Review of the Red Cross, 2012), <https://www.icrc.org/eng/resources/documents/article/review-2012/irrc-887-jerbi.htm>; *MSI Integrity*, <http://www.msi-integrity.org/>.

rely on collaborative approaches.⁴¹⁹ Whereas early MSIs concentrated upon working conditions in global supply-chains and the extractive sector, today a variety of initiatives exist to tackle issues for wide range of specific industries or issues. Alternatively, some bring together companies, civil society and governments to dialogue and act on a whole plethora of sustainability and human rights related issues, for example, the UN Global Compact.

MSIs may require their members to comply with relevant national laws, or alternatively, to meet standards going beyond current national legal requirements by referencing international standards such as the UDHR or ILO Conventions. Certain MSIs may be grouped into a category characterised as “non-State market-driven” governance systems. The key characteristics of these sorts of regimes are that they: (i) create binding and enforceable internal rules for their members or stakeholders; (ii) set standards and monitor compliance with both standards and internal rules; (iii) may provide certification for a product or service following monitoring and verification processes; and (iv) may have a grievance mechanism or dispute resolution procedure. Some argue that these MSIs “offer the strongest regulation and potential to socially embed global markets.”⁴²⁰ Examples include the Forest Stewardship Council (FSC),⁴²¹ the Fair Labor Association,⁴²² the Ethical Trading Initiative,⁴²³ the Roundtable on Sustainable Palm Oil⁴²⁴ and others established specifically to regulate primary commodity industries.

Within this category of MSIs, participating companies respond primarily to the need to ensure that the goods or services they sell are not disadvantaged in the marketplace through association with bad environmental or social impacts; alternatively that their goods and services benefit from association with good practices and impacts. Non-State market governance regimes can be regarded as promoting and enforcing norms that are public goods, though a risk of being market-driven is that markets do not always incentivise environmentally or socially-responsible behaviour.

9.4 MSI governance

Given the variety of players involved in MSIs, each with different interests, visions and stakes, resources and forms of power at their disposal, having a clear internal governance framework based on principles such as transparency, accountability, equitable stakeholder representation and participation is crucial to an MSI’s effectiveness. Equally essential is that the MSI maintain outward transparency and accountability with regard to standards, working procedures, and complaints mechanisms.⁴²⁵ This raises the question of which stakeholder category, if any, should be “in charge”. The European Parliament, for instance, has indicated that in the area of CSR a leading role should be afforded to businesses, which “must be able to develop an approach tailored to their own specific situation...”⁴²⁶ On the other hand, having labour or civil society participants in leadership roles could better ensure that rights-compatibility of standards and governance arrangements are paramount, lending greater credibility and legitimacy to the MSI and ultimately delivering greater benefit to businesses taking part.

With the aims of strengthening MSI governance and harmonising practice across them, a number of meta-MSI governance initiatives have been established. The ISEAL Alliance is an NGO that aims

419. Scott Jerbi, *Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda*.

420. Steven Bernstein and Benjamin Cashore, “Can non-state global governance be legitimate? An analytical framework”, *Regulation and Governance* 1 (2007).

421. See Forest Stewardship Council, <https://us.fsc.org/>.

422. See Fair Labor Association, <http://www.fairlabor.org>.

423. See Ethical Trading Initiative, <http://www.ethicaltrade.org/>.

424. Roundtable on Sustainable Palm Oil, <http://www.rspo.org/>. These include the Roundtables on responsible soy (RTRS), the Better Cotton Initiative (BCI), Better Sugarcane Initiative (BSI) and Roundtable on sustainable biofuels (RSB).

425. Mariette Van Huijstee, *Multistakeholder Initiatives: A strategic guide for civil society organizations*.

426. Raffaele Baldassarre, *Report on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth*, 2012/2098(INI) / A7-0017/2013 (2013), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2013-0017+0+DOC+PDF+VO//EN>.

to “strengthen sustainability standards systems”.⁴²⁷ Membership is open to “any multi-stakeholder sustainability standards and accreditation body” that can show it meets the ISEAL Codes of Good Practice and commits to “learning and improving”. Though not eligible for membership, governments, researchers, consultants, private sector bodies, non-profits and other “stakeholders with a demonstrable commitment to the ISEAL objectives” can also participate. A code for impact assessment launched by ISEAL in 2010 requires members to develop and implement a monitoring and evaluation plan, by identifying the impact they seek to achieve, defining strategies, choosing indicators and collecting data, conducting regular analysis and reporting as well as additional impact evaluations, and setting up feedback loops to improve their standard’s content and systems over time.⁴²⁸ Another initiative that aims to map and evaluate business and human rights MSIs is the US-based Institute for Multi-Stakeholder Initiative Integrity. Its objective is to analyse whether MSIs are effective human rights mechanisms and how their effectiveness can be improved.⁴²⁹

Analysis, standards and guidance of the kind that meta-MSIs intend to generate ought to help harness the potential of MSIs to contribute to good governance and the rule of law, in spite of a dynamic global environment that can readily elude slower and more formal State-based forms of rule-making, monitoring and enforcement. Yet it will remain important to guard against a “cut-and-paste” approach with regard to MSI design, which should be sensitive and responsive to the particularities of their sector(s) and context.⁴³⁰

9.4.1 Government involvement with MSIs

In some cases governments are key targets of MSIs: the Extractive Industry Transparency Initiative (EITI), for instance, seeks governments’ commitments to revenue transparency.⁴³¹ In general, though, there is no presumption of government involvement although in some cases, government buy-in has been critical to the success of individual initiatives. For example, it has been suggested that the arrival of an additional batch of governments a decade into its existence played an important role in strengthening the governance and effectiveness of the Voluntary Principles on Security and Human Rights.⁴³² By contrast, government absence has been important to success in other MSIs. In the case of the Fair Labor Association (FLA), although the initial convening role of the US Government was important in bringing together the stakeholders, its later withdrawal apparently permitted the FLA to be more agile and creative. More specifically, it allowed the FLA to operate in exporting countries without being challenged as an agent of US foreign or trade policy.⁴³³

The impact of MSIs can be boosted where there is alignment with State-based regulation and policies. Incorporating references to MSI certification schemes, for example, into screening and evaluation procedures during public procurement processes has potential to be a “market-making” step, given the status of governments as “mega-consumer”.⁴³⁴ MSIs can also play a role in laying the groundwork for State intervention by scoping out in advance its necessary elements, viable regimes, and likely implementation challenges in practice.

⁴²⁷. The four goals of ISEAL Alliance are to: [Improve the impacts](#) of standards; [Define credibility](#) for sustainability standards; [Increase the uptake](#) of credible sustainability standards; and [Improve the effectiveness](#) of standards: ISEAL Alliance, <http://www.isealalliance.org/>.

⁴²⁸. The ISEAL Code of Good Practice for Assessing the Impacts of Social and Environmental Standards (Impacts Code). See: 'Impacts Code', ISEAL Alliance, <http://www.isealalliance.org/our-work/defining-credibility/codes-of-good-practice/impacts-code>.

⁴²⁹. MSI Integrity, <http://www.msi-integrity.org/>.

⁴³⁰. Mariette Van Huijstee, *Multistakeholder Initiatives: A strategic guide for civil society organizations*.

⁴³¹. Ethical Trading Initiative, <http://www.ethicaltrade.org/>.

⁴³². Scott Jerbi, *Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda*.

⁴³³. Justine Nolan, “Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights”, *Utrecht Journal of International and European Law* 30:78 (2014).

⁴³⁴. Mariette Van Huijstee, *Multistakeholder Initiatives: A strategic guide for civil society organizations*; Northern Ireland Human Rights Commission, *Public Procurement and Human Rights in Northern Ireland*, and Stumberg et al., *Turning a Blind Eye? Respecting Human Rights in Government Purchasing*.

9.4.2 Civil society engagement with MSIs

Most MSIs include civil society organisations and in many cases, the MSIs' effectiveness can depend upon their participation. The importance of involving trade unions in MSIs dealing with workers' rights cannot be over-stated.⁴³⁵ Yet, CSOs involved in MSIs need to constantly evaluate their participation. One question they should ask is how their participation in an MSI aligns with their overall goals and strategies to achieve change.⁴³⁶ CSOs taking part in MSIs often come under scrutiny from others in their community who fear they may be co-opted by other stakeholders or that the collaboration with other members of the MSI may undermine broader advocacy agendas. Another key consideration is that involvement in MSIs can be highly demanding, in terms of time, staff and money, and CSOs, especially those in the global South, may experience multiple demands from MSIs that they do not have the resources or capacity to fulfil.

9.5 Examples of MSIs in the area of business and human rights

This section describes a sample of MSIs active in the business and human rights area.⁴³⁷

Ethical Trading Initiative (ETI): Launched in 1998 with the support of the UK government, the ETI is an alliance of companies, trade unions and NGOs that promotes respect for workers' rights around the world. Currently, the ETI focuses on: promoting good workplaces via support for suppliers in building strong management, human resource and industrial relations systems; payment of living wages; integrating ethics into core business practices; tackling workplace discrimination and improving audit practices.⁴³⁸ Company members are expected to commit to implementing the ETI Base Code of labour practice,⁴³⁹ which draws on core ILO Conventions, and to adopt its Principles of Implementation.⁴⁴⁰ These require companies to demonstrate a clear commitment to ethical trade which respects labour standards; to integrate ethical trade into their core business practices; to drive year-on-year improvements to working conditions; to support suppliers to improve working conditions; and to report openly and accurately about their activities. Member companies must also work in partnership with trade unions and NGO members on projects aimed at tackling ethical trade issues, and submit annual reports to the ETI Board, setting out steps they are taking to tackle problems concerning working conditions in their supply chains. The ETI Secretariat, together with trade union and NGO representatives, conducts random validation visits to a minimum of 20% of ETI supplier members.

Extractive Industry Transparency Initiative (EITI): The EITI is a global coalition of governments, companies and civil society working together to improve government openness and accountability in the management of revenues from oil, gas and mineral resources.⁴⁴¹ EITI countries are required to disclose information on tax payments, licenses, contracts, production and other key elements around resource extraction.⁴⁴² The EITI Standard lays out seven requirements on how to report activity in the oil, gas and mining sectors along the value chain, from extracting a resource to converting it into public benefit. These are: i) permitting effective oversight by the multi-stakeholder group; ii) timely publication of EITI reports containing iii) contextual information about the extractive industries; and iv) full government disclosure of extractive industry revenues, and disclosure of all material payments to government by oil, gas and mining companies; v) a credible assurance process, applying international standards; vi) publication of reports that are comprehensible, actively promoted, publicly accessible, and that contribute to public debate; and

⁴³⁵. Ibid.

⁴³⁶. Mariette Van Huijstee, *Multistakeholder Initiatives: A strategic guide for civil society organizations* points out that it is crucial for a CSO to choose a role within the MSI that matches its organisational identity as it is projected internally as well as externally, in order to maintain its legitimacy and negotiating position.

⁴³⁷. For a more comprehensive listing, see "Coalitions and Multi-stakeholder Initiatives promoting corporate responsibility", Cranfield University, <http://www.som.cranfield.ac.uk/som/p18696/Research/Research-Centres/Doughty-Centre-Home/Further-Resources/Coalitions-and-multi-stakeholder-initiatives>.

⁴³⁸. "Our strategy", *Ethical Trading Initiative*, <http://www.ethicaltrade.org/about-eti/our-strategy>.

⁴³⁹. "ETI Base Code", *Ethical Trading Initiative*, <http://www.ethicaltrade.org/eti-base-code>.

⁴⁴⁰. "Principles of Implementation", *Ethical Trading Initiative*, <http://www.ethicaltrade.org/resources/key-eti-resources/principles-implementation>.

⁴⁴¹. Extractive Industries Transparency Initiative, <https://eiti.org/>.

⁴⁴². Forty-eight countries implement the EITI, with 31 currently compliant with its standards. Extractive Industries Transparency Initiative, *Fact Sheet* (2014), https://eiti.org/files/EITI_Factsheet_EN_0.pdf.

vii) for the stakeholder group to take steps to act on lessons learned and review the outcomes and impact of EITI implementation.

The Roundtable on Sustainable Palm Oil (RSPO): Established under the Swiss Civil Code, the RSPO is based in Malaysia, with a liaison office in Indonesia.⁴⁴³ The RSPO's membership comprises stakeholders from seven sectors of the palm oil industry: oil palm producers, palm oil processors and traders, consumer goods manufacturers, retailers, banks and investors, environmental and development NGOs. Its mission is to (i) advance the production, procurement, finance and use of sustainable palm oil products; (ii) develop, implement, verify, assure and periodically review credible global standards for the entire supply-chain of sustainable palm oil; (iii) monitor and evaluate the economic, environmental and social impacts of the uptake of sustainable palm oil in the market; and (iv) engage and commit all stakeholders throughout the supply chain including governments and consumers.⁴⁴⁴ The RSPO's regulatory standards are pluralistic, drawing on national laws, international standards, customary laws, public discourses and *lex mercatoria*.⁴⁴⁵ Certification of members' palm oil production units follows verification of the production process by accredited agencies according to various indicators. Amongst these indicators are: commitment to the principle of Free, Prior and Informed Consent with regard to land acquisitions; compliance with international standards on human rights, labour and the environment; respect for customary rights of communities; environmental provisions on pesticide usage, agro-chemicals, maintenance of the quality of water and soil fertility, biodiversity, waste, energy efficiency, greenhouse gas emissions; labour standards, including on freedom of association, child labour and sexual harassment; impact assessments in advance of new plantings; commitments to transparency and accountability, and a grievance procedure for dispute resolution.⁴⁴⁶ RSPO's grievance mechanism, which is competent to receive complaints relating to its members, has a mandate to decide on the legitimacy of the complaint and to decide on the course of action that the member needs to take, with reference to its own statutes, by-laws and Code of Conduct.⁴⁴⁷ Additionally, the RSPO makes available a dispute settlement facility to support RSPO members (notably growers), local communities and other stakeholders to use mediation to resolve disputes.⁴⁴⁸

Voluntary Principles on Security and Human Rights (VPs): Established in 2000, the VPs aim to ensure that companies respect human rights in the context of security operations to protect their facilities, personnel and assets.⁴⁴⁹ VPs norms require: regular consultations between companies and host governments, and local communities; proportionality in the use of force; company engagement in promoting protection of human rights by security contractors; monitoring of the progress of investigations into alleged abuses; ensuring security contracts reflect VPs terms and requirements; and background checks on private security companies that participants intend to employ.⁴⁵⁰ The VPs membership comprises seven States, 11 NGOs, 21 companies and five organisations with observer status. In response to concerns about transparency, the VPs were amended to establish minimum requirements for participation; a dispute resolution process, allowing concerns about participants' performance to be raised; clearer accountability mechanisms; and a measure of public reporting on implementation. A greater focus is now put upon local implementation through "in-country processes", that is, multi-stakeholder fora that

443. Roundtable on Sustainable Palm Oil, <http://www.rspo.org/>.

444. "About Us", Roundtable on Sustainable Palm Oil, <http://www.rspo.org/about>.

445. "Membership Documents", Roundtable on Sustainable Palm Oil, <http://www.rspo.org/resources/key-documents/membership>.

446. Roundtable on Sustainable Palm Oil, *Principles and Criteria for the Production of Sustainable Palm Oil* (2013), http://www.rspo.org/file/RSP0%20P&C2013_with%20Major%20Indicators_Endorsed%20by%20BOG_FINAL_A5_v1.pdf.

447. "Complaints", Roundtable on Sustainable Palm Oil, <http://www.rspo.org/members/complaints>.

448. "Dispute Settlement Facility", Roundtable on Sustainable Palm Oil, <http://www.rspo.org/members/dispute-settlement-facility>.

449. Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org/>. Note the International Code of Conduct for Private Security Providers as a complementary initiative addressing directly the responsibilities of private security firms in conflict zones. See *International Code of Conduct for Private Security Service Providers* (Switzerland: 2010), http://www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.

450. Ibid.

support implementation and integration of the VPs at a national level.⁴⁵¹ Despite this, dialogue amongst VPs members remains confidential and reporting requirements are voluntary.

The Global Network Initiative (GNI): The GNI comprises a group of companies, NGOs, investors and academics that collaborate towards the protection and advancement of freedom of expression and privacy in the ICT sector.⁴⁵² It was launched in the context of increasing pressure being put on ICT companies to comply with domestic laws in ways that undermine human rights, in particular from governments and their law enforcement agencies. The GNI is based on a set of “Principles on Freedom of Expression and Privacy”. These oblige participating companies to respect and protect the freedom of expression and privacy rights when confronted with government demands, laws or regulations that compromise these in a manner inconsistent with internationally recognised laws and standards. Correspondingly GNI companies undertake to avoid or minimise the impact of government restrictions, including on information available to users and opportunities for users to create and communicate ideas and information, regardless of frontiers or media of communication. They also vow to protect personal information so as to protect the privacy rights of users.⁴⁵³ A set of Implementation Guidelines guide companies on how to operationalise the Principles in an accountable manner.⁴⁵⁴

Electronics Industry Citizenship Coalition (EICC): EICC attempts to improve social, ethical, and environmental responsibility in the global electronic industry supply chain. Founded in 2004 by a small group of electronics companies, it now comprises of nearly 100 electronics companies.⁴⁵⁵ EICC members must commit to implementing a Code of Conduct which references international norms and standards including the UDHR, ILO Core Labour Standards, OECD Guidelines for Multinational Enterprises and ISO standards, throughout their supply-chain. All EICC members’ Tier 1 suppliers are required to implement the Code.⁴⁵⁶ The EICC offers assessment tools to help members measure and understand if, and to what extent they are meeting EICC standards and membership requirements.⁴⁵⁷ Where they are not being met, it provides tools that may help to remedy gaps in standards and establish systems to prevent reoccurrences in the future. The EICC does not, however, publicly comment on individual members’ implementation or activities.

9.6 Examples of business-led corporate responsibility coalitions

As discussed above, business-led corporate responsibility coalitions are sector-specific initiatives providing companies with the opportunity to engage with each other as members of a common “epistemic” or knowledge-based community, in order to discuss shared dilemmas and challenges and possible solutions. According to a recent survey, there are now more than 110 national and international general-focus business-led corporate responsibility coalitions, as well as several hundred more sector- and issue-specific ones.⁴⁵⁸ Five examples of such coalitions addressing business and human rights issues are briefly described below:

The Global Business Initiative on Human Rights (GBI): Led by a core group of eighteen major corporations headquartered in each of the world’s major geographical regions, the GBI works through two tracks: Member Peer Learning, which enables participating companies to share practices, challenges and innovations with regard to the implementation of the GPs; and Global Business Outreach, where member companies engage with other businesses around the world to raise awareness and to support capacity building.⁴⁵⁹ GBI also seeks to support constructive

⁴⁵¹. For commentary, see “Voluntary Principles on Security and Human Rights”, *Business & Human Rights Resource Centre*, <http://business-humanrights.org/en/conflict-peace/special-initiatives/voluntary-principles-on-security-and-human-rights>.

⁴⁵². See Global Network Initiative, <https://globalnetworkinitiative.org/>.

⁴⁵³. See “Principles”, Global Network Initiative, <https://globalnetworkinitiative.org/principles/index.php>.

⁴⁵⁴. See “Implementation Guidelines”, Global Network Initiative, <https://globalnetworkinitiative.org/implementationguidelines/index.php>.

⁴⁵⁵. See Electronic Industry Citizenship Coalition, <http://www.eiccoalition.org/>.

⁴⁵⁶. See “Code of Conduct”, Electronic Industry Citizenship Coalition, <http://www.eiccoalition.org/standards/code-of-conduct/>.

⁴⁵⁷. See “Assessment”, Electronic Industry Citizenship Coalition, <http://www.eiccoalition.org/standards/assessment/>.

⁴⁵⁸. David Grayson and Jane Nelson, *Corporate Responsibility Coalitions: the past, present and future of alliances for sustainable capitalism*.

⁴⁵⁹. See Global Business Initiative on Human Rights, <http://www.global-business-initiative.org/>.

business inputs into international policy agenda. For example, it recently issued its position on the UN Human Rights Council's adoption of the resolution regarding the binding treaty on business and human rights.⁴⁶⁰

CSR Europe: Established as an international non-profit organisation, CSR Europe is a membership network comprising 70 corporate members and 39 national partner CSR organisations from around Europe.⁴⁶¹ In all, over 10,000 European-based companies are engaged through a platform, which seeks to support business towards enhancing sustainable growth and to make positive contributions to society. Its portfolio involves supporting companies in building sustainable competitiveness, fostering cooperation between companies and their stakeholders, and strengthening Europe's global leadership on CSR. Its workstreams are based on the EU's *Europe 2020* strategy; consequently, they are orientated around the five targets of reducing unemployment; boosting investment in research and development; tackling climate change and energy sustainability; increasing educational opportunities; and fighting poverty and social exclusion.⁴⁶² CSR Europe also collaborates with CSR organisations across the world.

ASEAN CSR Network: The ASEAN CSR Network was launched in 2011. It is an initiative of the ASEAN Foundation and business organisations from Indonesia, Malaysia, Philippines, Singapore, Thailand and the Chamber of Commerce and Industry of Viet Nam. Its purpose is to encourage businesses within ASEAN to take account of economic, social and environmental impacts in the way they operate by aligning their business strategies and operations with the needs and expectations of stakeholders. As a normative base, the Network refers extensively to the Ten Principles of the UN Global Compact and ISO 26000. It describes itself as a platform for networking, exchange of best practice and peer discussions; a repository of ASEAN knowledge on CSR; a capacity-builder through training and the provision of common standards and benchmarking; an advocate for CSR; and a representative of the ASEAN business community to regional and intergovernmental agencies on policy issues regarding CSR. Interestingly, it also specifies that it is not "... a market place for CSR consultancies; a philanthropic or grant-giving organisation; an implementer of social or environmental projects at national level; or a regulating or 'policing' body".⁴⁶³

The Equator Principles (EPs): The EPs provide a risk management framework for financial institutions committed to assessing and managing environmental and social risk in large-scale projects.⁴⁶⁴ Of global and sector-wide application, the EPs are applicable to four financial products: project finance advisory services; project finance; project-related corporate-loans; and bridge loans. Launched in 2003, and revised in 2006 and 2013, at present, 80 financial institutions in thirty-four countries have adopted the EPs, covering over 70% of international project finance in emerging markets. Banks that are signatories to the EPs commit to meeting the performance standards set by the International Finance Corporation (IFC) when providing project finance to clients. The 2013 revision of the EPs was intended to align them with the UN Framework.

International Council for Mining and Metals (ICMM)⁴⁶⁵: The ICMM's membership comprises 21 mining and metals companies and 32 national and regional mining associations and global commodity associations. Member companies are required to implement and measure their achievement against ten sustainable development principles; make public commitments towards improving sustainability performance and report annually on progress made. Principle 3 commits member companies to uphold fundamental human rights and to respect cultures, customs and

⁴⁶⁰. Five early recommendations for business: Responding to the prospect of an international treaty on Business and Human Rights (October 2014). See Mark Hodge, *Five Early Recommendations for Business: Responding to the prospect of an international treaty on Business and Human Rights* (Global Business Initiative on Human Rights, 2014), http://www.global-business-initiative.org/wp-content/uploads/2014/10/Article_BHR_Treaty.pdf.

⁴⁶¹. See CSR Europe, <http://www.csreurope.org>

⁴⁶². See Europe 2020 targets, *European Commission*, http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/targets/index_en.htm.

⁴⁶³. "About Us", ASEAN CSR Network, <http://www.asean-csr-network.org/c/about-us/asean-csr-network>.

⁴⁶⁴. "About the Equator Principles", *Equator Principles*, <http://www.equator-principles.com/index.php/about-ep/about-ep>.

⁴⁶⁵. "About Us", International Council on Mining & Metals, <http://www.icmm.com/about-us/about-us>.

values in dealings with employees and others affected by their activities.⁴⁶⁶ The ICMM enters into strategic partnerships with other stakeholders.

9.7 Evaluating MSIs and their impacts

Whereas policy-makers have actively promoted MSIs, in line with a paradigmatic shift from “government to governance”⁴⁶⁷, this, according to one collective view, “...does not mean that they are necessarily the better way to govern”.⁴⁶⁸ Experiences of individual MSIs suggest some successes, but also areas of weakness. Impact assessments of MSIs are rare; so far, those undertaken have mostly studied the effectiveness of internal governance and processes for ensuring compliance, rather than ultimate benefits for rights-holders.

An assessment by the Ethical Trading Initiative (ETI) of members’ implementation of the ETI Code demonstrates the challenges of evaluation.⁴⁶⁹ The ETI’s study was conducted over three years; undertook five case studies to trace impacts through the supply chains across a sample of eleven ETI members⁴⁷⁰; collected qualitative and quantitative information from all key stakeholders, including retailers and brands, agents, factory and farm managers, trade union and non-governmental organisations at international and national levels and workers; and interviewed over 400 workers from 23 supply sites, including men and women, and migrant and contract workers as well as permanent workers. Even then, the evaluation team drew attention to the limitations of the methodology, pointing out that ETI member companies source from tens of thousands of suppliers in over 100 countries, so that studying a representative sample of the supply base was impossible. The team also noted the possible bias towards more progressive suppliers in the selection process. Amongst the conclusions, the study found some improvements to working conditions, mostly in the areas of health and safety, child labour, reduction in regular and overtime hours, minimum wage, meeting State insurance and pension requirements; however, these results varied across sectors. Serious non-compliances persisted with regard to freedom of association, discrimination, regular employment and harsh treatment, and benefits of implementation of the ETI Code were found mainly to accrue to permanent, rather than contract or migrant workers, while there was little reduction in gender-based discrimination. More positively, management awareness and compliance with legislation at assessed sites increased significantly.

A scarcity of empirically-based studies of this kind leaves the ground open for an ongoing debate about MSIs with a broad spectrum of views on almost every point of contention. Proponents urge that a proliferation of governance mechanisms including MSIs brings the benefits of pluralism: different types of rule-making and increased rule-making capacity can mean thicker protection for human rights.⁴⁷¹ Where MSIs provide a well-designed grievance mechanism, this may respond to the needs and interests of rights-holders more efficiently, accessibly and sensitively than State-based formal remedial processes⁴⁷² which may be too inflexible to achieve sound, rights-compliant solutions, especially where abuses derive from complex socio-economic situations. As an example, where child labour is revealed in a supply-chain, a mediation-based grievance mechanism provided by an MSI can take account of the reasons why children are being employed

⁴⁶⁶. “10 Principles”, International Council on Mining & Metals, <http://www.icmm.com/our-work/sustainable-development-framework/10-principles>.

⁴⁶⁷. Bop Jessop, “The Rise of Governance and the Risks of Failure: The Case of Economic Development”, *International Social Science Journal* 50 (1998).

⁴⁶⁸. The World Bank, *Increasing the effectiveness of multi-stakeholder initiatives through active collaboration* (Wilton Park Conference Report: 2014), <https://www.wiltonpark.org.uk/wp-content/uploads/WP1314-Report1.pdf>.

⁴⁶⁹. Stephanie Barrientos and Sally Smith, *The ETI Code of Labour Practice: Do workers really benefit? Report on the ETI Impact Assessment 2006* (Institute of Development Studies, University of Sussex, 2006), <http://www.ethicaltrade.org/sites/default/files/resources/Impact%20assessment%20summary.pdf>.

⁴⁷⁰. The three country studies were in South Africa (fruit), Vietnam (garments and footwear) and India (garments). The two company studies concerned a UK company’s horticultural supply chain and Costa Rican bananas.

⁴⁷¹. Martijn W. Scheltema, “Does CSR Need More (effective) Private Regulation in the Future?” in Sam Muller, Stavros Zouridis Morly Frishman and Laura Kistemaker (eds.), *The Law of the future and the future of law: Volume II* (The Hague: Torkel Opsahl Academic EPublisher, 2012).

⁴⁷². Caroline Rees, “Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges”, *Corporate Social Responsibility Initiative Working Paper* (2010), [http://ebooks.narotama.ac.id/files/Berkeley%202010-2011%20\(pdf\)/Mediation%20in%20Business-Related%20Human%20Rights%20Disputes%20%20Objections,%20Opportunities%20and%20Challenges.pdf](http://ebooks.narotama.ac.id/files/Berkeley%202010-2011%20(pdf)/Mediation%20in%20Business-Related%20Human%20Rights%20Disputes%20%20Objections,%20Opportunities%20and%20Challenges.pdf)

in reaching a resolution, while a court case may not. Sceptics, on the other side, question the scope for MSIs, in reality, to ensure access to justice, adequate, open and just remedies, especially for the disenfranchised.⁴⁷³

Certainly there remain live questions about the accountability of MSIs to rights-holders, and the impacts on MSIs of pre-existing power imbalances between rights-holders or victims and companies, on one hand, and on whether MSIs exacerbate or mitigate such asymmetries. The relative merit of a voluntary approach over formal regulation backed by law is another contentious issue, and concern has been expressed that MSIs encourage States to renege on their own duties to protect. On one view, MSIs should only come into play in the event of an actual governance failure, such as the inability to pass or enforce standards.⁴⁷⁴ Where MSIs assume that there is a “business case” for compliance with human rights this is also problematic: whilst on one level this makes sense, in terms of seeking alignment with corporate mandates, what happens when the business case cannot be made?

On the basis of a survey of MSIs across the sustainability, environmental and human rights fields, Abbott and Snidal conclude there is a significant orchestration deficit,⁴⁷⁵ resulting in a “a patchwork of uncoordinated schemes competing vigorously for adherents, resources, legitimacy, and public notice.”⁴⁷⁶ They suggest that international organisations can, and should, provide the missing “orchestration” by engaging intermediaries and leveraging their combined capacities.

Scant attention has so far been given to the longer-term implications of MSIs on norms, practices and expectations of human rights more generally. MSIs pluralise human rights protection at the municipal level by introducing, into traditionally public terrain, alternative private fora for determining applicable human rights norms and standards and for adjudicating or mediating disputes arising in connection with corporate-related rights abuses. This seems likely to trigger changes to human rights discourse and praxis, whose consequences should be tracked. As one commentator notes, “MSIs entail opportunity costs as their processes may substitute for other avenues of pursuing change, such as efforts to mobilise democratising citizens’ movements or to create broader collations of pro-reform actors across multiple scales of governance....”⁴⁷⁷ It is important, then, to consider the role of MSIs within the whole ecosystem of human rights protection. To this end, the idea of creating joint learning platforms of communities of practice for those who run and participate in MSIs, though valuable seems incomplete: the discussion needs to be extended to include actors and observers also from “traditional” rights institutions.⁴⁷⁸

SECTION IV: BUSINESS AND HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT

By providing a global framework regarding the human rights duties and obligations of States and business, the GPs embody important progress. Steps taken to operationalise the GPs have encouraged innovation by government actors, the corporate sector, amongst CSOs, labour unions and NHRIs and other institutions. Yet change on the ground is slow and partial, and severe business-related human rights abuses remain endemic across industry sectors across Asia and Europe. Although it is too early to draw conclusions regarding the impact of the GPs and other current approaches to this persistent problem, it would be prudent to remain alert as to whether

473. Surya Deva, *Regulating Corporate Human Rights Violations* (New York: Routledge, 2012).

474. Jonas Moberg and Eddie Rich, “Governance of the last resort? – When to consider a multi-stakeholder approach”, *Extractive Industries Transparency Initiative* (21 May 2014), <https://eiti.org/blog/governance-last-resort-when-consider-multi-stakeholder-approach>. The authors reflect upon their experiences of leading the EITI.

475. Kenneth W. Abbott and Duncan Snidal, “Strengthening International Regulation through Transmittal New Governance: Overcoming the Orchestration Deficit”, *Vanderbilt Journal of Transnational Law* 42 (2009).

476. Kenneth W. Abbott and Duncan Snidal, “Taking Responsive Regulation Transnational: Strategies for International Organizations’ *Regulation and Governance* 7 (2013), 95–113. See also John Gerard Ruggie, “Global Governance and ‘New Governance Theory’: Lessons from Business and Human Rights”, *Global Governance* 20 (2014).

477. Mariette Van Huijstee, *Multistakeholder Initiatives: A strategic guide for civil society organizations*.

478. The World Bank, *Increasing the effectiveness of multi-stakeholder initiatives through active collaboration*.

these are “fit for purpose” to deal with further complex problems associated with sustainable development including climate change and vaulting inequality.⁴⁷⁹

Transnational corporations today are powerful, dynamic, networked entities which control and dispose of vast natural and social wealth. They continue to be formally driven by the distinctly “private” principles of profit and shareholder value, but lack mechanisms of democratic accountability. This state of affairs has substantially challenged the pursuit of socially and environmentally sustainable economies. The profile of human rights in the quest to redress the balance has arguably not been as high as is required. Recognising this deficit, the rhetoric of the “post-2015” agenda seeks to centralise human rights within the forthcoming Sustainable Development Goals to be adopted by the UN General Assembly in September 2015.⁴⁸⁰

The Millennium Development Goals (MDGs) emphasised the vital role and positive contributions of the private sector but paid scant attention to the negative impacts of business activity upon human rights, poverty and the environment with regard to achieving the goals.⁴⁸¹ It seems that some attempt is being made to rectify this imbalance in the SDGs.⁴⁸² The UN System Task Team for example calls for businesses to be accountable to the public, especially for the management of public goods and services, highlighting particularly the importance of including the GPs as part of the normative, policy and accountability framework for the private sector in connection with the post-2015 agenda.⁴⁸³ Pinpointing the need “to realign the power relationships between corporations, states and communities at the country level and to shift the power dynamics at the multilateral level so that the rich and the strong are no longer privileged at the expense of the poor and the marginalised...”, it has vouched that such a human-rights based framework would grant people “... the right to decide for themselves how natural resources should be utilised, without having to contend with the monopolies of a few powerful companies or leaders.” NHRIs and civil society groups are strongly calling for the same.⁴⁸⁴ The EU has also stated its commitment to ensure “inclusion of a rights-based approach, encompassing all human rights, and gender equality, in the post-2015 agenda”.⁴⁸⁵

The challenge of appropriately positioning the role of the private sector within the sustainable development agenda equally and importantly touches upon how the State prioritises human rights in attaining sustainable development and how it positions itself within the business and human rights regulatory regime. This paper highlights increasing efforts by States to fulfil their duty to protect against business-related human rights abuses pointing to examples across Asia and Europe. Yet, it is clear that in too many instances, weaknesses in the rule of law, fragile human rights cultures and reluctance to regulate corporate power are still leaving individuals and communities vulnerable to business-related human rights abuses and without meaningful remedy,

⁴⁷⁹. Oxfam International, *Working for the few. Political capture and economic inequality*, (Oxfam Briefing Paper 178, 2014), <http://www.oxfam.org/sites/www.oxfam.org/files/bp-working-for-few-political-capture-economic-inequality-200114-en.pdf>.

⁴⁸⁰. The World We Want 2015, a platform created by the United Nations and civil society to amplify peoples voices in the Post-2015 Agenda held national, global and thematic consultations, the summary of which called for “a new agenda built on human rights, and universal values of equality, justice and security.” It also emphasised the central importance of empowerment and participation, gender responsive and rights based governance, human rights accountability and monitoring (including corporate accountability) and access to justice: *The World We Want, Global Thematic Consultation on Governance and the post-2015 development framework* (2013), <http://www.worldwewant2015.org/governance/finalreport>; See also UN System Task Team on the post-2015 development agenda, *Towards freedom from fear and want: human rights in the post-2015 agenda*, (Office of the High Commissioner for Human Rights, 2012), http://www.un.org/millenniumgoals/pdf/Think%20Pieces/9_human_rights.pdf.

⁴⁸¹. Penny Fowler and Sumi Dhanarajan, *Business and the Millennium Development Goals: Your Call to Action* (Oxfam Policy and Practice, 2008).

⁴⁸². Lou Pingeot, *Corporate Influence in the Post-2015 Process* (Bischofliches Hilfswerk MISEREOR e.V, Brot für die Welt, Global Policy Forum, 2014), https://www.globalpolicy.org/images/pdfs/GPFEurope/Corporate_influence_in_the_Post-2015_process_web.pdf.

⁴⁸³. UN System Task Team on the post-2015 development agenda, *Towards freedom from fear and want: human rights in the post-2015 agenda*.

⁴⁸⁴. See, for example, Mabelde Lourence Mushwana, *Re: National Human Rights Institutions and the Post-2015 Development Agenda*, Ref: 19/2/4 (13 October 2014), http://www.humanrights.dk/files/media/dokumenter/business/icc_chairperson_letter_on_sdg_15102014.pdf.

⁴⁸⁵. European Council, *Conclusions on EU priorities at the UN Human Rights Fora* (10 Feb 2014), http://eu-un.europa.eu/articles/en/article_14578_en.htm.

despite the existence of other regulatory mechanisms provided by corporate self-regulation or MSIs.

This 14th ASEM Seminar on Business and Human Rights provides a unique opportunity to reflect on what steps are needed at regional and national levels to bring effective human rights accountability to the business sector in ways that achieve a common vision of human-centred and sustainable development. It is important to critically evaluate the progress to date, taking a careful and honest look at both the successes and failures. In doing so, it is important to remember that the GPs did not emerge in a vacuum. Rather, they epitomise decades of struggle by labour, communities, human rights defenders, and CSOs, in Asia and Europe, as well as human rights principles and discourse transacted by experts and institutions, regionally and internationally. By the same token however, the challenges demand transformative rather than incremental change if our future economic development is to unfold in a human rights-compatible and human rights-promoting way. A step-change in political will is required of governments in implementing effective systems for protections against business-related human rights abuses and ensuring this is mirrored within policy-making in multilateral forums, including in the realm of trade and investment. Equally, business needs to approach its due diligence obligations with a clear and unequivocal imperative to respect human rights through their core business operations and practices and across their value-chains.

ANNEX 1 : LIST OF ACRONYMS

ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
ASEM	Asia-Europe Meeting
ATS	The US Alien Tort Statute
BIT	Bilateral Investment Treaty
BRICS	Brazil, Russia, India, China and South Africa
CDDH	Council of Europe Steering Committee on Human Rights
CESCR	Committee on Economic, Social and Cultural Rights
CIA	Central Intelligence Agency
CoE	Council of Europe
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DIHR	Danish Institute for Human Rights
ECA	Export Credit Agencies
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EGAT	Electricity Generating Authority of Thailand
EICC	Electronic Industry Citizenship Coalition
ETI	Ethical Trading Initiative
EITI	Extractive Industry Transparency Initiative
EO	Executive Order
EP	Equator Principles
ESC	European Social Charter
ESG	Environmental, social and corporate governance
EU	European Union
FDI	Foreign Direct Investment
FLA	Fair Labor Association
FLEGT	EU Forest Law Enforcement, Governance and Trade Scheme
FSA	Financial Services Authority
FSC	Forest Stewardship Council
GBI	Global Business Initiative on Human Rights
GDP	Gross Domestic Product
GNI	Global Network Initiative
GP	United Nations Guiding Principles on Business and Human Rights

GRI	Global Reporting Initiative
HCP	High Contracting Party
HRBA	Human Rights-Based Approach to Development
HRD	Human Rights Defenders
HRIA	Human Rights Impact Assessment
HRIAM	Human Rights Impact Assessment and Management
ICAR	International Corporate Accountability Roundtable
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICGLR	International Conference of the Great Lakes Region
ICMM	International Council for Mining and Metals
ICT	Information and Communications Technologies
IFC	International Finance Corporation
IFI	International Finance Institution
IGO	Inter-Governmental Organization
ILO	International Labour Organization
ISO	International Organization for Standardization
MCA	Ministry of Corporate Affairs
MNC	Multinational Corporation
MNE	Multi-National Enterprise
MSC	Marine Stewardship Council
MSI	Multi-stakeholder Initiative
NAP	National Action Plan
NCP	National Contact Point
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
OECD	Organisation for Economic Development and Co-operation
OHCHR	Office of the UN High Commissioner for Human Rights
PIE	Public Interest Entities
RSPO	Roundtable on Sustainable Palmoil
SASAC	State Owned Assets Supervision and Administration Commission
SEC	US Securities and Exchange Commission
SECP	Securities and Exchange Commission of Pakistan
SIA	Sustainability Impact Assessment
SME	Small and medium-sized enterprise
SOE	State-Owned Enterprises
SRI	Socially Responsible Investment
SRSR	UN Special Representative of the Secretary-General

SWIA	Sector Wide Impact Assessment
SZSE	Shenzhen Stock Exchange
TFEU	Treaty on the Functioning of the European Union
TNC	Transnational Corporation
UCC	Union Carbide Corporation
UCIL	Union Carbide India Limited
UDHR	Universal Declaration on Human Rights
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNGC	United Nations Global Compact
UN HRC	UN Human Rights Council
UNICEF	United Nations Children's Fund
UNPRI	UN Principles for Responsible Investment
UNWG	UN Working Group on the issue of human rights and transnational corporations and other business enterprises
VPs	Voluntary Principles on Security and Human Rights
WTO	World Trade Organization

ANNEX 2: SELECT BIBLIOGRAPHY

- Abbott, Kenneth W., and Duncan Snidal. "Strengthening International Regulation through Transmittal New Governance: Overcoming the Orchestration Deficit." *Vand. J. Transnat'l L.* 42 (2009): 501.
- Absar, Syeda Sharmin. "Women Garment Workers in Bangladesh." *Economic and Political Weekly* 37, no. 29 (July 20, 2002): 3012–16.
- Access Facility. "Barrick Gold Corporation: Olgeta Meri Igat Raits." Accessed October 19, 2014. <http://accessfacility.org/barrick-gold-corporation-olgeta-meri-igat-raits>.
- Alam, Khorshed, and Laia Blanch. *Stitched Up: Women Workers in the Bangladeshi Garment Sector*. War on Want, 2011.
- Alexy, Robert. *A Theory of Constitutional Rights*. Oxford ; New York: Oxford University Press, 2002.
- Almuttaqi, Ibrahim. "ASEAN's Role in Corporate Social Responsibility." *The Jakarta Post*, January 29, 2013.
- Anderson, Michael R. *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs*. IDS Working Paper 178. Brighton, Sussex: Institute of Development Studies, 2003. <https://www.ids.ac.uk/files/dmfile/Wp178.pdf>.
- Augenstein, Daniel, and David Kinley. "Beyond the 100 Acre Wood: In Which International Human Rights Law Finds New Ways to Tame Global Corporate Power." *The International Journal of Human Rights* forthcoming (September 26, 2014).
- Austin, Granville. *The Indian Constitution: Cornerstone of a Nation*. Oxford University Press, 1966.
- BankTrack and The Berne Declaration. "BankTrack on the Thun Group Paper on Banks and Human Rights." December 2013.
- Barendrecht, Maurits, David Raic, Ronald Janse, and Sam Muller. *Rulejuggling: When Lawmaking Goes Private, International and Informal*. Trend Report. Hiil, 2012. [http://www.hiil.org/data/sitemanagement/media/Hiil_TrendReport2_compleet_041012_DEF%20\(2\).pdf](http://www.hiil.org/data/sitemanagement/media/Hiil_TrendReport2_compleet_041012_DEF%20(2).pdf).
- Barrick Gold Corporation and the Porgera Joint Venture. *Olgeta Meri Igat Raits "All Women Have Rights": A Framework of Remediation Initiatives in Response to Violence against Women in the Porgera Valley*. 2012. <http://www.barrick.com/files/porgera/Framework-of-remediation-initiatives.pdf>.
- Bartels, Lorand. *Human Rights Conditionality in the EU's International Agreements*. Oxford ; New York: Oxford University Press, 2005.
- Bartley, Tim. "Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields." *Politics & Society* 31, no. 3 (2003): 433–64.
- Bernaz, Nadia. "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?" *Journal of Business Ethics* 117, no. 3 (2013): 493–511.
- Bernstein, Steven, and Benjamin Cashore. "Can Non-State Global Governance Be Legitimate? An Analytical Framework." *Regulation & Governance* 1, no. 4 (2007): 347–71.
- Branigan, Tania. "China: Woman Settles in First Gender Discrimination Lawsuit." *The Guardian*, January 28, 2014. <http://www.theguardian.com/world/2014/jan/28/china-woman-settles-first-gender-discrimination-lawsuit>.
- Business & Human Rights Initiative - Global Compact Network Netherlands. *How to Do Business with Respect for Human Rights: A Guidance Tool for Companies*. 2010. http://www.gcnetherlands.nl/docs/how_to_business_with_respect_for_human_rights_gc_n_netherlands_june2010.pdf.
- Chance, Clifford. *State Immunity and State-Owned Enterprises*, December 2008.
- Claeson, Bjorn, Steven Brown, Stewart Sweatfree Communities, Jesse Dyer, and others. "Subsidizing Sweatshops II: How Our Tax Dollars Can Foster Worker Rights and Economic Recovery rather than Fuel the Race to the Bottom," 2009. <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2327&context=globaldocs>.
- Clapham, Andrew. "Drittwirkung of the Convention." In *The European System for the Protection of Human Rights*, edited by R. St J. MacDonald, Franz Matscher, and Herbert Petzold.

- Martinus Nijhoff, 1993.
- Clapham, Andrew. *Human Rights Obligations of Non-State Actors*. Oxford University Press, 2006.
- Clapham, Andrew, and Scott Jerbi. "Categories of Corporate Complicity in Human Rights Abuses." *Hastings International and Comparative Law Review* 24 (2000): 339.
- Clifford Chance. *Corporate Liability in Europe*. 2012.
http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf.
- Coca-Cola Company. *Human Rights Due Diligence Checklists Background and Guidance*. 2011.
<http://assets.coca-colacompany.com/7d/59/b2a85d9344bdb7da350b81bcd364/human-rights-self-assessment-checklists.7.14.pdf>.
- Corporate Social Responsibility Initiative. "Rights Compatible Grievance Mechanisms—A Guidance Tool for Companies and Their Stakeholders." *Cambridge, MA: John F Kennedy School of Government, Harvard University*, 2008.
- CSR Compass. "Get off to a Good Start with Responsible Supply Chain Management." Accessed October 17, 2014. <http://www.csrcompass.com/>.
- Cronstedt, Claes, Rachel Chambers, Adrienne Margolis, David Ronnegard, Robert C. Thompson, and Katherine Tyler. *An International Arbitration Tribunal on Business and Human Rights*, 2014. <http://www.l4bb.org/news/IntlArbTribunal25Feb2014.pdf>.
- Curtis, Mark. *Milking the Poor: How EU Subsidies Hurt Dairy Producers in Bangladesh*. ActionAid Denmark, 2011. http://www.actionaid.org/sites/files/actionaid/milking_the_poor.pdf.
- Davies, Anne CL. "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ." *Industrial Law Journal* 37, no. 2 (2008): 126–48.
- De Felice, Damiano. "Challenges and Opportunities in the Production of Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect." *Human Rights Quarterly* 37, no. 2 (May 2015). <http://papers.ssrn.com/abstract=2423305>.
- De Schutter, Olivier. "Corporate Social Responsibility European Style." *European Law Journal* 14, no. 2 (2008): 203–36.
- De Schutter, Olivier. *The Accession of the European Union to the European Social Charter*. EUI Working Paper, July 8, 2014.
http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Presentation/PublicationCSEUEODeSchutterJuly2014_en.pdf.
- Deva, Surya, *Regulating Corporate Human Rights Violations: Humanizing Business*. Routledge, 2012.
- De Wolf, Antenor Hallo. "Human Rights and the Regulation of Privatized Essential Services." *Netherlands International Law Review* 60, no. 02 (2013): 165–204.
- Dhanarajan, Sumi. "Managing Ethical Standards: When Rhetoric Meets Reality." *Development in Practice* 15, no. 3–4 (2005): 529–38.
- Dhanarajan, Sumithra, "Transnational State Responsibility for Human Rights Violations resulting from global land grabs", *Land Grabs in Asia*, Andrew Harding and Connie Carter (eds.), De Gruyter Press 2014 (forthcoming, 2014).
- D'Hollander, David, Axel Marx, and Jan Wouters. "Integrating Human Rights in EU Development Cooperation Policy: Achievements and Challenges," 2014.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2431190.
- Egels-Zandén, Niklas, and Jeroen Merk. "Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights." *Journal of Business Ethics*, 2013, 1–13.
- Engle, Eric. "Third Party Effect of Fundamental Rights (Drittwirkung)." *Hanse L. Rev.* 5 (2009): 165.
- Equality and Human Rights Commission. *Guidance on Human Rights for Commissioners of Home Care*. May 2013.
http://www.equalityhumanrights.com/sites/default/files/publication_pdf/guidance_on_human_rights_for_commissioners_of_home_care.pdf.
- European Center for Constitutional and Human Rights (ECCHR). "Criminal Complaint Filed Accuses Senior Manager of Danzer Group of Responsibility over Human Rights Abuses against Congolese Community." Accessed October 19, 2014. <http://www.ecchr.de/danzer-en.html>.
- European Commission. *An Analysis of Policy References Made by Large EU Companies to*

- Internationally Recognised CSR Guidelines and Principles*. March 2013.
- European Commission, Shift, and Insitute for Human Rights and Business (IHRB). *Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*. 2011.
http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-era-hr-business_en.pdf.
- European Commission, Shift, and Insitute for Human Rights and Business (IHRB). *ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*. 2011.
http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf.
- European Parliament's Committee on International Trade. *The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries*. 2008.
- European Union - European External Action Service. "The EU's Human Rights Dialogues."
 Accessed October 18, 2014.
http://eeas.europa.eu/human_rights/dialogues/index_en.htm.
- Fafo. "Business and International Crimes." Accessed October 19, 2014.
<http://www.fafo.no/liabilities/>.
- Feyter, K. de (Koen), Felipe Gómez Isa, Universiteit Maastricht. Centre for Human Rights, and Universidad de Deusto. Instituto de Derechos Humanos. *Privatisation and Human Rights in the Age of Globalisation / Koen de Feyter, Felipe Gómez Isa (eds.)*. Antwerp: Intersentia ; Holmes Beach, Fla, 2005.
- FIDH. "Community-Based Human Rights Impact Assessments." July 14, 2014.
<http://www.fidh.org/en/globalisation-human-rights/business-and-human-rights/7502-community-based-human-rights-impact-assessments>.
- Fonseca, Alberto. "How Credible Are Mining Corporations' Sustainability Reports? A Critical Analysis of External Assurance under the Requirements of the International Council on Mining and Metals." *Corporate Social Responsibility and Environmental Management* 17, no. 6 (November 1, 2010): 355–70. doi:10.1002/csr.230.
- Fowler, Penny and Dhanarajan, Sumithra, *Business and the Millennium Development Goals: Your Call to Action* (Oxfam: Oxford), 2008.
- Gardbaum, Stephen. "Where the (state) Action Is." *International Journal of Constitutional Law* 4, no. 4 (2006): 760–79.
- Gereffi, Gary, Ronie Garcia-Johnson, and Erika Sasser. "The NGO-Industrial Complex." *Foreign Policy*, July 1, 2001.
http://www.foreignpolicy.com/articles/2001/07/01/the_ngo_industrial_complex.
- Giuliani, Elisa. *Human Rights and Corporate Social Responsibility in Developing Countries' Industrial Clusters*. Lund University, CIRCLE-Center for Innovation, Research and Competences in the Learning Economy, 2014.
http://www.circle.lu.se/upload/CIRCLE/workingpapers/201409_Giuliani.pdf.
- Global Compact Network, Germany twentyfifty Ltd., and German Institute for Human Rights. *Respecting Human Rights: An Introductory Guide for Business*. 2013.
http://www.globalcompact.de/sites/default/files/themen/publikation/respectinghumanri ghts_148x220_131029_download.pdf.
- Global Witness. *Seeing the Light: Responsible Mineral Sourcing from the DRC*. April 2014.
<http://www.globalwitness.org/sites/default/files/Seeing%20the%20Light%20April%202014.pdf>.
- Gluckman, Ron. "Why Western Oil Companies Love Myanmar's Moe Myint." *Forbes Asia*, April 3, 2013. <http://www.forbes.com/sites/forbesasia/2013/04/03/why-western-oil-companies-love-myanmars-moe-myint/>.
- Grayson, David. *Corporate Responsibility Coalitions : The Past, Present, and Future of Alliances for Sustainable Capitalism*. Stanford, California: Stanford Business Books, an imprint of Stanford University Press, 2013.
- Great Britain Parliament - Joint Committee on Human Rights. *The Human Rights of Older People in Healthcare: Eighteenth Report of Session 2006-07*. August 14, 2007.
- Guglielmo, Connie. "Apple's Supplier Labor Practices In China Scrutinized After Foxconn, Pegatron Reviews." *Forbes*, December 12, 2013.
<http://www.forbes.com/sites/connieguglielmo/2013/12/12/apples-labor-practices-in>

- china-scrutinized-after-foxconn-pegatron-reviewed/.
- Hale, Thomas (Thomas Nathan), and David Held. *Handbook of Transnational Governance : Institutions and Innovations / Edited by Thomas Hale and David Held*. Cambridge ; Malden, MA: Polity, 2011.
- Held, David, and Mathias Koenig-Archibugi, eds. "Taking Embedded Liberalism Global: The Corporate Connection." In *Taming Globalization: Frontiers of Governance*, 1 edition. Cambridge, UK : Malden, MA: Polity, 2003.
- Hilary, John. *The Transatlantic Trade and Investment Partnership: A Charter for Deregulation, an Attack on Jobs, an End to Democracy*. War on Want, 2014.
<http://www.waronwant.org/campaigns/trade-justice/more/inform/18078-what-is-ttip>.
- Horiuchi, Rina, and Ryan Schuchard. *Understanding and Preventing Greenwash: A Business Guide*. BSR and Futerra, 2009.
http://www.bsr.org/reports/Understanding_Preventing_Greenwash.pdf.
- Human Rights Resource Centre. *Business and Human Rights in ASEAN: A Baseline Study*. 2013.
<http://hrrca.org/data/business-and-human-rights-asean-baseline-study>.
- IIRC. "Integrated Reporting." Accessed October 19, 2014. <http://www.theiirc.org/>.
- International Council on Human Rights Policy and Transparency International. *Corruption and Human Rights: Making the Connection*. 2009.
<http://www.ncjrs.gov/App/AbstractDB/AbstractDBDetails.aspx?id=248148>.
- International Council on Mining & Metals (ICMM). *Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes*. March 2012. <http://www.icmm.com/page/75929/integrating-human-rights-due-diligence-into-corporate-risk-management-processes>.
- International Finance Corporation. *Guide to Human Rights Impact Assessment and Management (HRIAM)*. 2010.
<http://www.ifc.org/wps/wcm/connect/8ecd35004c0cb230884bc9ec6f601fe4/hriam-guide-092011.pdf?MOD=AJPERES>.
- Institute for Human Rights and Business (IHRB). *Investing the Rights Way - A Guide for Investors on Business and Human Rights*. 2013. <http://www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way.pdf>.
- Institute for Human Rights and Business. *State of Play Human Rights in the Political Economy of States: Avenues for Application*. 2014. http://www.ihrb.org/pdf/2014-03-18_State-of-Play_HR-Political-Economy-States.pdf.
- International Labour Organization. *Globalization, Flexibilization and Working Conditions in Asia and the Pacific*. 2008.
- International Labour Organization and Asian Development Bank. *Women and Labour Markets in Asia: Rebalancing for Gender Equality*. 2011.
<http://www.adb.org/sites/default/files/pub/2011/women-labor-markets.pdf>.
- IPIECA. "Integrating Human Rights into Environmental, Social and Health Impact Assessments." Accessed October 18, 2014. <http://www.ipieca.org/news/20131206/integrating-human-rights-environmental-social-and-health-impact-assessments>.
- Jacob, Marc. *International Investment Agreements and Human Rights*. Duisburg: INEF, Institute for Development and Peace, University of Duisburg-Essen, 2010. http://humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf.
- Jessop, Bob. "The Rise of Governance and the Risks of Failure: The Case of Economic Development." *International Social Science Journal* 50, no. 155 (1998): 29–45.
- Keenan, Karyn. *Export Credit Agencies and the International Law of Human Rights*. Halifax Initiative Coalition, January 2008. "Working with SOEs," Human Rights and Business Dilemmas Forum, accessed October 15, 2014,.
- Kirshner, Jodie A. "Why Is the US Abdicating the Policing of Multinational Corporations to Europe: Extraterritoriality, Sovereignty, and the Alien Tort Statute." *Berkeley J. Int'l L.* 30 (2012): 259.
- Knuckey, Sarah. "On Australia's Doorstep: Gold, Rape, and Injustice." *The Medical Journal of Australia* 199, no. 3 (2013): 1–1.
- Kolk, Ans, and Rob Van Tulder. "Setting New Global Rules?" *Transnational Corporations* 14, no. 3 (2005): 1–17.
- Kremnitzer, Mordechai. "Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law, A." *Journal of International Criminal Justice* 8 (2010): 909.

- Lin, Li-Wen. "Corporate Social Responsibility in China: Window Dressing or Structural Change." *Berkeley Journal of International Law* 28 (2010): 64.
- Locke, Richard M. "The Promise and Limits of Private Power." *Australian Journal of Human Rights* 19 (2013).
- Lundsgaard, Thorbjørn Waal. "Peace for Sale: What Is the Role of Human Rights-Based CSR in the Extractive Industry in Post-Conflict Environments?" *Business, Peace and Sustainable Development* 2014, no. 3 (June 1, 2014): 73–98.
doi:10.9774/GLEAF.8757.2014.ju.00005.
- Malan, D. *Carrots and Sticks: Sustainability Reporting Policies Worldwide-Today's Best Practice, Tomorrow's Trends*. KPMG, 2013. <http://scholar.sun.ac.za/handle/10019.1/87606>.
- Mann, Howard Lawrence, and John Ruggie. *International Investment Agreements, Business, and Human Rights: Key Issues and Opportunities*. International Institute for Sustainable Development Winnipeg, MB., Canada, 2008.
http://www.iisd.org/pdf/2008/iia_business_human_rights.pdf.
- Marquis, Christopher, and Michael W. Toffel. "Scrutiny, Norms, and Selective Disclosure: A Global Study of Greenwashing." *Harvard Business School Organizational Behavior Unit Working Paper*, no. 11–115 (2014). http://www.hbs.edu/faculty/Publication%20Files/11-115_eb3f204e-3a5f-4a8d-a471-35ce66adc1a7.pdf.
- Martin-Ortega, Olga. "Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?" *Netherlands Quarterly of Human Rights Law* 32, no. 1 (2014).
http://gala.gre.ac.uk/9567/?utm_source=twitterfeed&utm_medium=twitter.
- Mattli, Walter, and Tim Büthe. "Setting International Standards: Technological Rationality or Primacy of Power?" *World Politics* 56, no. 01 (2003): 1–42.
- McCrudden, Christopher. *Buying Social Justice : Equality, Government Procurement, and Legal Change*. Oxford ; New York: Oxford University Press, 2007.
- McCrudden, Christopher. "Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?" *Oxford Journal of Legal Studies* 19, no. 2 (1999): 167–202.
- Meeran, Richard. "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States." *City UHKL Rev.* 3 (2011): 1.
- Methven O'Brien, Claire. "Human Rights and Transnational Corporations: For a Multi-Level Governance Approach" (PHD Thesis, European University Institute, 2009).
- Methven O'Brien, Claire. "Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law - Parts I/II," 9 *German Law Journal* 1007-1042 (2008), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=983>.
- Methven O'Brien, Claire. "The UN Special Representative on Business and Human Rights: re-embedding or dis-embedding transnational markets?", Ch13 in Christian Joerges and Joseph Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford: Hart, 2011).
- Methven O'Brien, Claire, Amol Mehra, Cathrine Poulsen-Hansen, and Sara Blackwell. *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*. The Danish Institute for Human Rights (DIHR), The International Corporate Accountability Roundtable (ICAR), June 2014.
- Methven O'Brien, Claire and Nora Gotzmann, *Business and Human Rights: A Guidebook for NHRIs*. (Copenhagen: DIHR, 2013). <http://www.humanrights.dk/publications/business-and-human-rights>.
- Meyerstein, Ariel. "Are Big Banks Short-Selling Their Leverage over Human Rights?" *The Guardian*, October 31, 2013, sec. Guardian Sustainable Business.
<http://www.theguardian.com/sustainable-business/banks-short-selling-leverage-human-rights>.
- Michelman, Frank I. "W (H) Ither the Constitution." *Cardozo L. Rev.* 21 (1999): 1063.
- Middleton, Carl, and Ashley Pritchard. *Corporate Accountability in ASEAN : A Human Rights-Based Approach*. Asian Forum for Human Rights and Development, FORUM-ASIA, 2013.
<http://www.forum-asia.org/?p=16404>.
- Morrison, John, and David Vermijs. *The "State of Play" of Human Rights Due Diligence: Anticipating the Next Five Years*. Institute for Human Rights and Business, 2011. <http://www.ihrb>.

- org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf.
- Morrow, Doug, Michael Yow, and Brian Lee. *Trends in Sustainability Disclosure: Benchmarking the World's Stock Exchange*. CK Capital, 2013.
- Myanmar Centre for Responsible Business. "Sector-Wide Impact Assessments (SWIA)." Accessed October 18, 2014. <http://www.myanmar-responsiblebusiness.org/news/sector-wide-impact-assessments.html>.
- National Human Rights Commission of India. *Business And Human Rights: The Work of the National Human Rights Commission of India On the State's Duty to Protect*. 2014.
- Nestle and Danish Institute for Human Rights. *Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in Its Business Activities*. 2013. http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-hria-white-paper.pdf.
- Northern Ireland Human Rights Commission. *In Defence of Dignity: The Human Rights of Older People in Nursing Homes*. March 2012. <http://www.nihrc.org/documents/research-and-investigations/older-people/in-defence-of-dignity-investigation-report-March-2012.pdf>.
- Northern Ireland Human Rights Commission, Public Procurement and Human Rights in Northern Ireland", available at http://www.nihrc.org/uploads/publications/NIHRC_Public_Procurement_and_Human_Rights.pdf.
- OECD. *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*. Paris: Organisation for Economic Co-operation and Development, 2013. <http://www.oecd-ilibrary.org/content/book/9789264185050-en>.
- Parrish, Austen L. "Reclaiming International Law from Extraterritoriality." *Minnesota Law Review* 93, no. 3 (February 1, 2009): 815–74.
- Pelkmans, Jacques, Arjan Lejour, Lorna Schrefler, Federic Mustilli, and Jacopo Timini. *EU-US Transatlantic Trade and Investment Partnership: Detailed Appraisal of the European Commission's Impact Assessment*. European Parliamentary Research Service, 2014.
- Perez-Lopez, Jorge F. "Promoting International Respect for Worker Rights through Business Codes of Conduct." *Fordham Int'l LJ* 17 (1993): 1.
- Polakiewicz, Jörg. "Corporate Responsibility to Respect Human Rights: Challenges and Opportunities for Europe and Japan," 2012. <http://ir.nul.nagoya-u.ac.jp/jspui/handle/2237/20105>.
- Policy, International Council on Human Rights. *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*. Geneva: ICHRP, 2002.
- Potoski, Matthew, and Aseem Prakash. "A Club Theory Approach to Voluntary Programs." In *Voluntary Programs: A Club Theory Perspective*. MIT Press, 2009.
- Public Services International. "How Privatisation Undermines the Human Right to Water." Accessed October 17, 2014. <http://www.world-psi.org/en/how-privatisation-undermines-human-right-water>.
- Raworth, Kate. "Trading Away Our Rights: Women Working in Global Supply Chains." *Oxfam Policy and Practice: Private Sector* 1, no. 1 (2004): 1–52.
- Rees, Caroline. *Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges*. Corporate Social Responsibility Initiative Working Paper, 2010. [http://ebooks.narotama.ac.id/files/Berkeley%202010-2011%20\(pdf\)/Mediation%20in%20Business-Related%20Human%20Rights%20Disputes%20%20Objections,%20Opportunities%20and%20Challenges.pdf](http://ebooks.narotama.ac.id/files/Berkeley%202010-2011%20(pdf)/Mediation%20in%20Business-Related%20Human%20Rights%20Disputes%20%20Objections,%20Opportunities%20and%20Challenges.pdf).
- Risse. "Transnational Governance and Legitimacy." In *Governance and Democracy: Comparing National, European and International Experiences*, edited by Arthur Benz and Ioannis Papadopoulos. Routledge, 2006.
- Ruggie, John G. "Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey." *Corporate Social Responsibility Initiative, Working Paper*, no. 28 (2006). http://www.humanrights.ch/upload/pdf/070706_Ruggie-survey-Fortune-Global-500.pdf.
- Ruggie, John G. *Just Business : Multinational Corporations and Human Rights / John Gerard Ruggie*. First edition. New York: WWNorton & Company, 2013.
- Ruggie, John G. "Recommendations on Follow-up to the Mandate." Mandate of the Special

- Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, February 11, 2011. <http://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>.
- Ruggie, John G., Michael Wright, and Amy Lehr. "Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations." *Corporate Social Responsibility Initiative, Working Paper*, no. 31 (2006). http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_31_wright_lehr.pdf.
- Sabel, Charles, Archon Fung, and Dara O'Rourke. "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace." KSG, 2000. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=262178.
- Santos, Boaventura de Sousa, and César A. Rodríguez-Garavito. "Law, Politics and the Subaltern in Counter-Hegemonic Globalisation." In *Law and Globalization from Below: Towards a Cosmopolitan Legality*. Cambridge University Press, 2005.
- Scott, Colin, Fabrizio Cafaggi, and Linda Senden. "The Conceptual and Constitutional Challenge of Transnational Private Regulation." *Journal of Law and Society* 38, no. 1 (2011): 1–19.
- Securities and Exchange Commission of Pakistan. *Corporate Social Responsibility Voluntary Guidelines 2013*. 2013. http://www.secp.gov.pk/notification/pdf/2013/VoluntaryGuidelinesforCSR_2013.pdf.
- Shaffer, Gregory C. *Transnational Legal Ordering and State Change*. Cambridge University Press, 2012.
- Sharma, Bindu. "Contextualising CSR in Asia: Corporate Social Responsibility in Asian Economies," 2013. http://ink.library.smu.edu.sg/lien_reports/5/.
- Sharma, Bindu. "Discovering the Asian Form of Corporate Social Responsibility." *Social Space*, 2010, 28–35.
- Shift. *From Audit to Innovation: Advancing Human Rights in Global Supply Chains*. 2013. http://shiftproject.org/sites/default/files/From%20Audit%20to%20Innovation-Advancing%20Human%20Rights%20in%20Global%20Supply%20Chains_0.pdf.
- Shift. *Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights*. 2014. <http://shiftproject.org/sites/default/files/May%202014%20Shift%20BLP%20Workshop%20Report%20Remediation.pdf>.
- Shift. *Using Leverage in Business Relationships to Reduce Human Rights Risks*. 2013. <http://shiftproject.org/sites/default/files/Using%20Leverage%20in%20Business%20Relationships%20to%20Reduce%20Human%20Rights%20Risks.pdf>.
- Skinner, Gwynne, Robert McCorquodale, and Olivier De Schutter. *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. ICAR, CORE and ECCJ, 2013.
- Slaughter, Anne-Marie, and Thomas N. Hale. "Transgovernmental Networks." In *The SAGE Handbook of Governance*, 342–51. United Kingdom: SAGE Publications Ltd, 2011.
- SOMO. *Conflict Due Diligence by European Companies*. November 2013.
- Stephens, Beth. "Amorality of Profit: Transnational Corporations and Human Rights." *Berkeley J. Int'l L.* 20 (2002): 45.
- Strange, Susan. *The Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge University Press, 1996.
- Stumberg, Robert, Anita Ramasastry, and Meg Roggensack. *Turning a Blind Eye? Respecting Human Rights in Government Purchasing*. The International Corporate Accountability Roundtable (ICAR), September 2014. <http://accountabilityroundtable.org/wp-content/uploads/2014/09/Procurement-Report-FINAL.pdf>.
- Surya P. Subedi, *Land Grabbing in Asia: The Response of International Law*, Land Grabs in Asia, Andrew Harding and Connie Carter (eds), De Gruyter Press (forthcoming, 2014).
- Scottish Government. *Procurement of Care and Support Services*. Guidance. 2010. <http://www.scotland.gov.uk/Publications/2010/09/21100130/0>.
- Taylor, Mark B. *Human Rights Due Diligence: The Role of States - 2013 Progress Report*. ICAR, 2013. <http://accountabilityroundtable.org/wp-content/uploads/2013/11/ICAR-Human-Rights-Due-Diligence-2013-Update-FINAL.pdf>.
- Taylor, Mark B., Robert C. Thompson, and Anita Ramasastry. *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights*

- Abuses. Fafo, Amnesty International and Norwegian Peacebuilding Centre, 2010. <http://www.fafo.no/pub/rapp/20165/20165.pdf>.
- Taylor, Mark B., Luc Zandvliet, and Mitra Forouhar. "Due Diligence for Human Rights: A Risk-Based Approach." *Corporate Social*, 2009. http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_53_taylor_et al.pdf.
- The Danish Government. *Danish National Action Plan - Implementation of the UN Guiding Principles on Business and Human Rights*. March 2014. http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf.
- The Thun Group of Banks. *UN Guiding Principles on Business and Human Rights: Discussion Paper for Banks on Implications of Principles 16–21*. 2013. <http://business-humanrights.org/sites/default/files/media/documents/thun-group-discussion-paper-final-2-oct-2013.pdf>.
- The World Bank and the Nordic Trust Fund. *Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development*. 2013. http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf.
- Torres, Ida. "South Korean Court Orders Japanese Firm to Compensate Forced WWII Laborers." *The Japan Daily Press*, July 10, 2013. <http://japandailynews.com/south-korean-court-orders-japanese-firm-to-compensate-forced-wwii-laborers-1032080/>.
- Transparency International. "Corruption Perceptions Index 2013: Asia Pacific." 2013. http://www.transparency.org/files/content/pressrelease/CPI2013_AsiaPacific_EN.pdf.
- Tushnet, Mark. "The Issue of State Action/horizontal Effect in Comparative Constitutional Law." *International Journal of Constitutional Law* 1, no. 1 (2003): 79–98.
- Umlas, Elizabeth. *Corporate Human Rights Reporting: An Analysis of Current Trends*. Global Reporting Initiative, The UN Global Compact, and Realizing Rights: The Ethical Globalization Initiative, 2009. https://www.globalreporting.org/resourcelibrary/Human_Rights_analysis_trends.pdf.
- UNEP Finance Initiative. "Human Rights Guidance Tool for the Financial Sector." Accessed October 18, 2014. <http://www.unepfi.org/humanrightstoolkit/>.
- United Nations Children's Fund. *Children's Rights in Sustainability Reporting: A Guide for Incorporating Children's Rights into GRI-Based Reporting*. 2014. http://www.unicef.org/csr/css/Childrens_Rights_in_Reporting_Second_Edition_HR.pdf.
- United Nations Global Compact. "Human Rights and Business Dilemmas Forum: Doing Business in Conflict-Affected Countries." Accessed October 18, 2014. <https://www.unglobalcompact.org/resources/691>.
- United Nations Human Rights Office of the High Commissioner. "Corporate Liability for Gross Human Rights Abuses – Towards a Fairer and More Effective System of Domestic Law Remedies – An OHCHR Initiative to Contribute to More Effective and Comprehensive Implementation of the UN Guiding Principles on Business and Human Rights." 2014. <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/Two-pagesummaryMainStudyConsultationProcess.pdf>.
- United Nations Human Rights Office of the High Commissioner. *Human Rights Indicators: A Guide to Measurement Implementation*. 2012. http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf.
- Urbina, Ian. "U.S. Flouts Its Own Advice in Procuring Overseas Clothing." *The New York Times*, December 22, 2013, sec. World. <http://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html>.
- Utting, Peter, Darryl Reed, and Amany Mukherjee-Reed, eds. "Introduction: Multistakeholder Regulation from a Development Perspective." In *Business Regulation and Non-State Actors: Whose Standards?: Whose Development?*. London ; New York: Routledge, 2012.
- Vandenbergh, Michael P. "New Wal-Mart Effect: The Role of Private Contracting in Global Governance, The." *UCLA L. Rev.* 54 (2006): 913.
- Van Huijstee, Mariette. *Multi-Stakeholder Initiatives: A Strategic Guide for Civil Society Organizations*. SOMO, 2012. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117933.
- Wachenfeld, Margaret, and Mark Hodge. *State of Play: The Corporate Responsibility to Respect*

- Human Rights in Business Relationships*. Institute for Human Rights and Business and Global Business Initiative on Human Rights, 2012. <http://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf>.
- Wagner, Ben. *Exporting Censorship and Surveillance Technology*. Humanist Institute for Cooperation with Developing Countries (Hivos), 2012. https://www.hivos.org/sites/default/files/exporting_censorship_and_surveillance_technology_by_ben_wagner.pdf.
- Wee, Camilla. *Regulating the Human Rights Impact of State-Owned Enterprises: Tendencies of Corporate Accountability and State Responsibility*. International Commission of Jurists, October 2008. <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/State-owned-enterprises-Oct-08.pdf>.
- Wilson, Emma, and Emma Blackmore. *Dispute or Dialogue? Community Perspectives on Company-Led Grievance Mechanisms*. International Institute for Environment (IIED), 2013. <http://pubs.iied.org/16529IIED.html>.
- Wolf, Antenor Hallo de. *Reconciling Privatization with Human Rights*. Intersentia, 2012.
- Wood, Stepan. "The Case for Leverage-Based Corporate Human Rights Responsibility." *Business Ethics Quarterly* 22, no. 1 (2011): 63–98.
- Wouters, Jan, and Nicolas Hachez. *Business and HR in EU External Relations: Making the EU a Leader at Home and Internationally*. European Parliament's Subcommittee on Human Rights., 2009.
- Zerk, Jennifer. *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies - A Report Prepared for the Office of the UN High Commissioner for Human Rights*. OHCHR, 2013. <http://www.ohchr.org/documents/issues/business/domesticlawremedies/studydomesticelawremedies.pdf>.

The aim of the Informal ASEM Seminar on Human Rights is to promote mutual understanding and co-operation between Europe and Asia in the area of political dialogue, particularly on human rights issues.

Previous seminar topics include:

- *Access to Justice; Regional and National Particularities in the Administration of Justice; Monitoring the Administration of Justice* (1997, Sweden)
- *Differences in Asian and European Values; Rights to Education; Rights of Minorities* (1999, China)
- *Freedom of Expression and Right to Information; Humanitarian Intervention and the Sovereignty of States; Is there a Right to a Healthy Environment?* (2000, France)
- *Freedom of Conscience and Religion; Democratisation, Conflict Resolution and Human Rights; Rights and Obligations in the Promotion of Social Welfare* (2001, Indonesia)
- *Economic Relations; Rights of Multinational Companies and Foreign Direct Investments* (2003, Sweden)
- *International Migrations; Protection of Migrants, Migration Control and Management* (2004, China)
- *Human Rights and Ethnic, Linguistic and Religious Minorities* (2006, Hungary)
- *Human Rights and Freedom of Expression* (2007, Cambodia)
- *Human Rights in Criminal Justice Systems* (2009, France)
- *Human Rights and Gender Equality* (2010, The Philippines)
- *National and Regional Human Rights Mechanisms* (2011, The Czech Republic)
- *Human Rights and Information and Communication Technologies* (2012, Republic of Korea)
- *Human Rights and the Environment* (2013, Kingdom of Denmark)

The Seminar series is co-organised by the Asia-Europe Foundation (ASEF), the Raoul Wallenberg Institute (delegated by the Swedish Ministry of Foreign Affairs), the French Ministry of Foreign Affairs and International Development and the Department of Foreign Affairs of the Philippines. ASEF has been the secretariat of the Seminar since 2000.

Supervision of the seminar is entrusted to a Steering Committee, composed of the Seminar's four co-organisers as well as representatives of the ministries of Foreign Affairs of China and Indonesia as well as the European Commission.

The Informal ASEM Seminar on Human Rights series is a partnership between:



**RAOUL
WALLENBERG
INSTITUTE**
OF HUMAN RIGHTS AND HUMANITARIAN AID



The 14th Informal ASEM Seminar on Human Rights is hosted by the Ministry of Foreign Affairs of Viet Nam

ASEF's contribution is with the financial support of the European Union



With the support of the Section for Development Cooperation at the Embassy of Sweden, Bangkok, Thailand

