

National Action Plans on Business and Human Rights ECCJ recommendations to European governments

In October 2011, the European Union (EU) became the first region worldwide to call on its governments¹ to develop specific National Action Plans (NAPs) to implement the UN Guiding Principles on Business and Human Rights (UNGPs)².

These plans for the implementation of the States' duties under the UNGPs, if developed through a coordinated, open, transparent and evidence-based approach, have the potential to catalyse political discussions across different government bodies, enhance policy coherence, assess the legal and policy gaps and identify concrete areas for progress. They can pave the way to ambitious national policies on business and human rights.

To date, 7 European States have released NAPs³. Despite some positive initiatives, these NAPs have many shortcomings, in terms of both process and content, and they have failed to effectively address the challenges faced by victims of corporate-related abuses⁴. Every NAP process should learn from the strengths and shortcomings of previous and ongoing efforts both at national level and in other countries. The development of NAPs should be seen as an evolving process in which the active participation of civil society is key.

The purpose of this paper is to provide decision-makers in European States with recommendations for the achievement of what ECCJ considers the current ideal process and content for a NAP. These recommendations build on the *NAPs Toolkit*⁵ developed by the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR), the joint ECCJ and ICAR assessments of existing NAPs⁶; previous ECCJ recommendations to EU and Member States⁷; recommendations and comments of civil society platforms and organisations⁸ and research centres⁹; the guidance developed by the UN Working Group on Business and Human Rights¹⁰, and the outcomes of the ECCJ-CORE-Frank Bold-ECCHR project on Access to Remedies¹¹. These recommendations also build on the Recommendation on Business and Human Rights adopted by the Council of Europe's Committee of Ministers on March 2016¹².

This paper looks into Pillar 1 and 3 which are related to the State's duty to protect human rights and improving access to justice respectively. The document analyses Pillar 2 through the duty of States to ensure through legal and other measures that human rights are respected by business enterprises.

Recommendations on the process

An in-depth process is essential to ensure that a NAP's drafting, implementation and monitoring attain the highest standard of human rights protection, in accordance with the UNGPs. Governments are encouraged to follow the process guidelines from the ICAR and DIHR *NAPs Toolkit*, of which key elements are highlighted here.

1. CSR Action Plan vs Business and Human Rights Action Plan

While these two policy areas are closely related and action plans are sometimes integrated, it is important that governments adequately address the specificities of the business and human rights approach – which is grounded in law and largely focuses on State duties – through a specific NAP on Business and Human Rights. While State support of CSR initiatives can be part of a 'smart mix' of policies to implement the State duty to protect, it does not substitute for the adoption of policy and regulatory measures to implement the corporate responsibility to respect human rights. Business and human rights priorities should be defined, implemented and monitored through specific processes.

2. An evidence-based process through a National Baseline Assessment

For a NAP to be tailored to the specific challenges of each national context, it is essential that its content draws from a thorough National Baseline Assessment of the implementation of international and regional treaties, the development and enforcement of national laws and regulations and the existing standards, models and tools at national level. When some initiatives are underway (draft law, draft treaties), they should also be mentioned and the process of adoption / development should be described. As part of this process, specific attention should be granted to high-risk sectors and countries. This process will support the identification of the gaps specific to each State, as well as giving a sense of priority¹³.

3. A transparent, inclusive, multi-stakeholder process

The formulation of the content of a NAP should be generated by meaningful consultation with all stakeholders, including business, NGOs, trade unions and communities adversely affected by business activities and/or their representatives. Information on the process and drafts of the NAP itself should be available (including information on who is being consulted) in advance, with sufficient margin for reaction. Documents should be accessible and public and they should provide with clear and comprehensive account of measures undertaken by the government and the nature of measures for affected companies. Additionally, feedback should be provided to those stakeholders consulted, including justification on the dismissal of some recommendations.

4. A holistic, cross-government strategy

The NAP should be developed in a way to ensure the effective commitment of the government's different departments, agencies and other State-based institutions which should be aware of and observe the State's human rights obligations. All relevant governmental departments must be involved, as well as other relevant and independent bodies such as the National Human Rights Institution (NHRI). Horizontal as well as vertical policy coherence must be ensured through inter-departmental dialogue, for instance by means of the creation of an inter-ministerial working group. Within the government, a specific entity should have a clear responsibility to oversee the process.

5. A forward-looking plan with concrete set of actions and adequate follow up

The NAP should not only focus on the "state of play" which is the outcome of the baseline assessment, but focus on on-going and future actions. It should define clear goals, relevant criteria, timelines and clear attribution of responsibilities to a specific governmental department. Clearness and coherence is expected at every level, hence the NAP has to differentiate the lists of measures at the political, legislative, and regulatory levels.

The implementation should be monitored, regularly evaluated and should contain a review clause. States should consider examples of revision processes of existing NAPs, like the one taking place in the UK. At the end of the NAP's timeframe, an assessment of its effectiveness and results should be provided in order to share learning and address any gaps.

It is recommended to use the structure developed by the UN Working Group Guidance¹⁴, so as to ensure all GPs, commitment and follow up measures are captured by the NAP.

Recommendations on the content

General recommendations

- **NAPs should contain a high-level political commitment to the UNGPs.** Governments should explicitly state that they expect all nationally-domiciled businesses to meet their responsibility to respect human rights in all their activities, both within the national territory of their home State and extra-territorially, and both in their operations and with respect to the operations of their business partners.
- **The NAP should mainly rest on regulatory measures.** Focusing solely on the model of voluntary guidelines and self-regulation by companies is not an adequate approach to fulfil the State duty to protect. Regulatory actions are more likely to effectively and efficiently address some of the major existing governance gaps. This is consistent with the 'smart mix' approach which is central to the EU strategy on CSR and the UNGPs¹⁵.

Pillar I: The State duty to protect

States have a duty to protect against human rights abuses by third parties, including businesses, by taking appropriate steps to prevent, investigate, punish, and redress such abuses through effective policies, legislation, regulations, and adjudication.

1. Foundations of States' duty to protect under International Law

- The NAP should clearly express that the State's obligation to protect human rights from non-state actors, including business enterprises, **is firmly grounded in norms of international law**, and it is an accepted principle of international human rights law¹⁶.
- The NAP should accordingly include a **list of regional and international law instruments** whereby the State is bound to protect human rights *vis à vis* private actors. At the minimum, reference should be made to the instruments referred to by the UNGPs as the benchmark of the corporate responsibility to respect, i.e. the *International Covenant on Civil and Political Rights* (ICCPR), *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Universal Declaration on Human Rights* (UDHR) and the ILO's *Declaration of Fundamental Principles and Rights at Work*, as settled in Principle 12 of the UNGPs.
- The inclusion of other instruments of regional and universal character protecting the **rights of vulnerable groups or minorities** (children, women, indigenous peoples)¹⁷, or specific groups (such as workers¹⁸) is also encouraged, especially the *EU Charter of Fundamental Rights*, which is binding for Member States when implementing EU law.

2. Mandatory Human Rights Due Diligence

- The NAP should clearly state that **the business responsibility to respect human rights exists independently from the States' regulations**. This would make the NAP consistent with Principle

11 of the UNGPs as well as with reports by the former Special Representative on Business and Human Rights¹⁹.

- The NAP should in this sense **follow the recently adopted Council of Europe Recommendation** calling on States to adopt measures requiring companies to respect all human rights, including in their global operations²⁰.
- The NAP should include measures to **introduce and enforce corporate duty of care and mandatory human rights due diligence in national legislation**. This is coherent with States' obligation to regulate private conduct and with the UNGPs²¹. In the same line, the Council of Europe Recommendation calls on States to encourage or, where appropriate, require that business enterprises domiciled within their jurisdiction apply human rights due diligence throughout their operations²².
- **The duty of parent companies** to take measures to prevent negative human rights impacts and the extent of the obligation to monitor foreign subsidiaries and suppliers regarding their human rights risks management should be clearly defined. Recommendations could be developed through consultation of legal experts – academics and practitioners with expertise in civil law, commercial law and human rights law – and relevant stakeholders²³.
- A commitment to develop **specific due diligence requirements for business which source from high-risk areas or engage in high-risk activities** should be also included. Such requirements could build on the OECD Due Diligence Guidance for the extractive industry and be adapted to other sectors' specificities, including but not limited to garment, agribusiness, oil and gas, chemicals and mining.

3. Reporting on Human Rights Risks and Impacts

- In line with EU law²⁴, reiterating in the Council of Europe Recommendation, **companies must be legally required to report on the human rights, social and environmental risks** linked to their operations, relationships, products and services as well as on the due diligence procedures that they have put in place for identifying, preventing and mitigating those risks.
- At a minimum, Member States should ensure a **robust transposition of the EU Directive on non-financial reporting** and ensure appropriate monitoring of its implementation by companies once the new obligation applies. Reporting should be in line with the UNGPs' approach to human rights due diligence and business relationships. Particular attention should be given to ensuring that the scope of the reporting legislation is not limited to listed companies; that rules will apply to all companies operating in high-risk sectors regardless of their size; that effective monitoring and enforcement mechanisms are put in place; that companies' non-financial information is available to the public. Member States should provide for a wide definition of risk and reflect the new approach that companies need to depart from the usual "materiality" threshold and report on the salient risks to human rights²⁵.
- The NAP should include measures to introduce requirements for business enterprises to **disclose the full list of consolidated entities, ownership structure and the list of subcontractors**. This transparency on the companies' structure and supply chain is a necessary condition to ensure that human rights impacts linked to business activities are adequately addressed.
- The NAP should include measures to introduce requirements for business enterprises to fully disclose **country by country** tax payments. Transparency in tax policies is essential in order to guarantee that companies do not fail to comply with their tax obligations and States are not deprived of financial resources needed to implement human rights policies and measures²⁶.

4. Policy Coherence

- All government officials working across departments to implement the NAP should receive **training** regarding human rights and on how they should respond in cases of alleged human rights violations.
- Governments should conduct meaningful and adequate human rights and environmental **impact assessments of any legislative proposals**, in line with the UNGPs and the Council of Europe Recommendation²⁷.
- Governments should conduct meaningful and adequate human rights and environmental impact assessments prior to, during and after the conclusion of **multilateral and bilateral trade and investment agreements and the attribution of development aid**. This includes taking appropriate steps to mitigate and address identified risks or impacts²⁸.
- States should also ensure that **privatization projects** do not adversely impact human rights. Special emphasis should be put on the provision of essential public services such as health care, water or power supply when delivered by private companies. *Ex ante* impact assessments should rule out that human rights guaranteed by those services are jeopardized²⁹.
- There should be a **designated independent institution with a mandate in the field of business and human rights in charge of ensuring the adequate implementation of the NAP** as well as monitoring policy coherence. This body should work in close coordination with all relevant departments as well as national relevant institutions (NHRI, national ombudsmen...).

5. The State-business nexus

- The NAP should give **immediate and particular attention to companies with a State nexus**. Human rights due diligence should be immediately required in cases where business enterprises are owned or controlled by the State, receive substantial support and services from State agencies such as Export Credit Agencies (ECAs) or official investment insurance, guarantee agencies, or aid and development agencies, in case of public procurement, or when enterprises enjoy other commercial benefits and advantages (i.e. trade missions, diplomatic services) or receive funding from European public financial institutions³⁰. Following the UN Working Group on Business and Human Rights Guidance, human rights conditionality should be included in the investment strategies of all public finance institutions as well as in other non-investment ways of supporting companies³¹.
- **Governments should not support any project if human rights abuses cannot be excluded**. Competent authorities should carry out Human Rights Impact Assessments³² and only support projects where the adverse impacts can be prevented and which are carried out by business enterprises that apply due diligence processes in line with the UNGPs and based on an existing human rights policy. State financial support should be withdrawn from companies which fail to meet their responsibility to respect human rights³³. States should consider developing international or national blacklist of companies where there is evidence of involvement with serious human rights abuses.
- The NAP has to make sure that **ECAs include respect of human rights in their operations**. The ECAs should make sure they are not financing exports and investments if associated with abuses of human rights. The NAP should in this sense include the development of a policy detailing how the ECAs will implement the UNGPs throughout their operations. This should include, among others, requiring HRDD as a requisite for export credits granting; refraining from supporting projects with high risks of adversely impacting human rights, and allocating adequate resources for the monitoring of human rights impacts of supported companies or projects³⁴.
- States should ensure a **robust implementation of the EU Public Procurement Directives, and introduce legal measures for socially responsible public procurement**, including a minimum standard for the respect of human rights and labour rights, and provide effective and credible tools

for their application and monitoring. Companies that are directly or indirectly linked to human rights violations should not be considered for public procurement unless effective remediation has been demonstrated.

6. High-risk sectors and countries

- Specific attention should be given to high-risk sectors and countries, and specific actions should be taken in this respect (more details above in mandatory human rights due diligence section).

7. Foreign policy

- The NAP should clearly state that the **promotion and protection of human rights take priority over the State's trade and economic objectives**. The definition and implementation of trade frameworks should thus never undermine the implementation of human rights policies and measures.
- One of the objectives of foreign policy is often to support companies' internationalization, including exports, by providing non-financial support to these companies. In this sense, the NAP should include measures to guarantee that the **State's external actions are coherent with its international human rights obligations and with the companies' responsibility to respect human rights**³⁵.
- As a minimum, the NAP should provide that the **delivery of export promotion support measures by embassies or specialized export promotion is conditional on the parallel engagement of the company in an effective human rights due diligence process**. Ultimately, States should refrain from providing support to and partnering with business enterprises which adversely impact on human rights and fail to adopt the adequate mitigating measures.
- The NAP should also highlight the **role of embassies and delegations in raising awareness** among companies about the human rights risks of their activities. Moreover, the personnel should be trained regarding the procedure in case of abuse of human rights, since they are the intermediaries between the government and the company.

8. Protection and promotion of the work of human rights defenders

- In line with the EU Action on Human Rights and Democracy 2015-2019³⁶, the NAP should include a **clear and comprehensive outline as to how the government will protect and support human rights defenders** working in business-related human rights abuses.
- In this sense, States should adopt measures to ensure a **safe and enabling environment** for human rights defenders, as recommended by the UN Special Rapporteur on the issue³⁷. This includes providing a conducive institutional and regulatory framework; guaranteeing access to justice and ending impunity for violations against human rights defenders, and assisting criminalized protesters. Special focus should be put in women human rights defenders.
- In line with the Council of Europe Recommendations, the NAP should provide measures for States' support of **human rights defenders in third countries** who address impacts associated to the activities of business enterprises domiciled within the State jurisdiction³⁸.

9. Guaranty of participatory rights of communities

- The NAP should guarantee the **participatory rights of communities** potentially affected by private projects or programmes, including their rights to be informed, to participate in the decision-making processes and access to justice, in line with European Court of Human Rights (ECHR) case-law³⁹.
- In cases of projects, including businesses operations in third countries, with potential impacts on **indigenous peoples**, the NAP should include or refer to legally enforceable mechanisms regulating their consultation and free, prior and informed consent (FPIC), pursuant to current international

law⁴⁰. Furthermore, States are encouraged to guarantee the aforementioned rights to also **non-indigenous communities**, in coherence with ECHR case law and following on-going developments at UN level⁴¹. In this sense, the NAP could establish communities' participatory rights as part of the companies' duty to develop **human rights impacts assessments (HRIAs)**, in accordance with the UNGPs⁴² and with best practice in corporate HRDD guidance⁴³.

10. Engage constructively in international and regional processes aimed at improving protection of human rights against corporate abuse

- For all States the NAP should include a commitment to participate in good faith in regional and international processes aimed at strengthening frameworks on business and human rights, such as the UN Open-Ended Intergovernmental Working Group with a mandate to elaborate an internationally binding instrument on transnational corporations and other business enterprises.

Pillar III: Access to remedy

States and businesses ensure that victims of business-related human rights abuses have access to effective remedy, both judicial and non-judicial.

1. Identifying and addressing barriers to remedies

- NAPs should clearly state that **ensuring access to remedy for victims of corporate human rights violations** is part of States' international obligation to protect human rights, as established in the third Pillar of the UNGPs⁴⁴ and basic principles of international human rights law⁴⁵.
- In this sense, pursuant to Principle 26 of the UNGPs⁴⁶, governments should address **the financial, procedural, legal, and judicial barriers** faced by victims of corporate abuse and identify and propose measures to make access to judicial remedy possible for them. The NAP should look at concrete examples of legal gaps that prevent national courts from investigating cases of human rights violations by national companies⁴⁷.
- When revising the state of the legislative framework, the NAP should clearly **specify the existing forms of civil and, if any, criminal liability** for companies applicable to human rights violations. The assessment should be geared towards identifying and promoting the adoption of effective measures that remove or alleviate these barriers.
- The NAP should ensure it addresses obstacles faced by **claimants based in third countries**. This is coherent with Principle 2 of the UNGPs⁴⁸ and is in line with general recommendations of international experts in the field⁴⁹.
- The NAP must also pay a particular attention to obstacles faced by **marginalised and vulnerable groups**, including human rights defenders, indigenous communities, children, workers.

2. Judicial, legislative, and administrative remedies⁵⁰

- Following the Council of Europe Recommendation⁵¹, the NAP should include legislative measures to ensure that **domestic courts can hear civil claims from business-related human rights abuses** against companies domiciled in their jurisdiction and consider *forum non convenience* doctrine non applicable.
- The NAP should explore different legal and judicial mechanisms **to go beyond the corporate veil** in order to hold a company accountable for remedy for human rights violations by its subsidiaries. This includes:
 - Explore the introduction of mandatory due diligence/duty of care as referred above.
 - Include legislative measures to lift jurisdictional and procedural barriers and to ensure that domestic courts can hear claims concerning business-related human rights abuses against subsidiaries of parent companies domiciled in their jurisdiction⁵².
 - Allow domestic courts to hear claims concerning business-related human rights abuses against companies not domiciled within their jurisdiction if no other effective forum guaranteeing a fair trial is available and there is connection to the State concerned, thus applying, as recommended by the Council of Europe, the *forum necessitatis* doctrine⁵³.
- It should also address **abuses in supply chains**. It should propose options to improve access to effective remedy for harms which occur in the supply chains of home companies, even if the harm occurs beyond the State's borders.
- The NAP should contain measures to **reverse the burden of proof** and to require companies to demonstrate that they took all reasonable steps to prevent the damage or that they were not in control of the activities that caused the harm.

- It should improve rules addressing the **disclosure of evidence**. In this sense, it should ensure that claimants have timely access to the information needed to prove the role of the defendant company in causing the alleged harm, and effective rules should empower a court to order the disclosure of information in the company's possession⁵⁴.
- The NAP should also tackle **cost barriers**. Options should be explored to address the costs barriers to bringing civil actions against business for human rights harms. In this sense, policy developments should take into account relevant case-law of the European Court of Human Rights, which under certain circumstances considers the right to free legal aid as part of the right to due process (art. 6 European HR Convention).⁵⁵ In line with Council of Europe Recommendation, such legal aid should be obtainable in a manner which is practical and effective⁵⁶.
- The NAP should provide for **group claims**. Taking into account the Commission Recommendation on collective redress⁵⁷, mechanisms for collective redress should be available in order to reduce the procedural, time and financial burden on claimants and litigators in cases of human rights harm, even in circumstances where victims are located outside the EU⁵⁸.
- The NAP should clearly identify if the State legal framework **defines specific and proportionate fines and damages** for civil wrongs or crimes committed by companies. The adequacy of these sanctions should be assessed and they shall be subject to revision in order to guarantee the effectiveness of the law.
- States should address the aforementioned issues in their national legislative framework and, when necessary or appropriate, **engage proactively and constructively with the European Commission** in promoting the pertinent legal reforms at EU level.

3. Non-judicial remedies

- Non-judicial remedies cannot replace the existence of judicial remedies. In accordance with the UNGPs⁵⁹, the NAP should cover both, while clearly stating the different scope and binding nature of these voluntary and judicial mechanisms
- The government should **review the effectiveness of existing non-judicial grievance mechanisms** such as the National Contact Points (NCP) for the OECD Guidelines, National Human Rights Institutions, labour inspectorates, consumer protection authorities and environmental agencies and equity bodies. States should review their structure and mandates to ensure that such bodies are effective and have the capacity to adjudicate on business-related human rights complaints and afford reparation to victims⁶⁰.
- Particular attention should be paid to the **complaint procedures pertaining to international law instruments binding for the State**, where existing, including United Nations or ILO Conventions. The NAP should assess if the required mechanisms are put in place and if the decisions issued by the monitoring bodies of such instruments are given due fulfilment.
- Besides, OECD member states and adhering governments of the EU should **review their National Contact Point** to ensure that its structures and procedures comply with the 2011 update of the procedural guidance of the OECD Guidelines for MNEs and ensure the impartial and effective handling of grievances. Of particular importance, NCP should be independent from State influence.

ENDNOTES

- ¹ EC, [A renewed EU strategy 2011-14 for Corporate Social Responsibility](#), 25 October 2011.
- ² [United Nations Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework](#). United Nations, HR/PUB/11/04, 2011.
- ³ The UK, the Netherlands, Denmark, Finland, Lithuania, Norway and Sweden have released NAPs. At least 8 others are in the process of developing one (Italy, Switzerland, France, Germany, Ireland, Belgium, Austria, Spain).
- ⁴ ECCJ and ICAR, [Assessments of existing NAPs on Business and Human Rights, November 2015 Update](#).
- ⁵ [National Action Plan on Business and Human Rights - A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks](#). 2014.
- ⁶ See ECCJ and ICAR, [Assessments of existing NAPs on Business and Human Rights](#), op. cit.
- ⁷ [The ECCJ’s recommendations on EU priorities for the implementation of the UN Guiding Principles on Business and Human Rights - Danish EU Presidency Expert Conference on Business & Human Rights - May 2012](#).
- ⁸ MVO Platform, [Dutch National Action Plan on Business and Human Rights](#), The Netherlands, 2014; CORA, [Position Paper on Business and Human Rights – Expectations of a German Action Plan](#), Germany, 2013; CORE, [Good Business? Analysis of the UK Government Action Plan on Business & Human Rights](#). UK, 2013; ICAR and DIHR, [“National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool”](#), BHRJ, 2016; Sarah Blackwell (ICAR), “Time for a NAP: Five recommendations for the U.S. National Action Plan on Responsible Business Conduct”, published in [IBHR website](#), December, 2014. This paper also gathered inputs from the Swiss Coalition for Corporate Justice (Switzerland), CCFD (France), Polish Institute for Human Rights and Business (Poland), ICAR (US), FIDH (International) and Peace Brigades International (International).
- ⁹ FAFO, [A Mapping and Gap analysis: The State’s Duty to Protect](#), Norway, 2013; Scuola Superiore Sant’Anna, [Imprese e Diritti Umani: il Caso Italia](#), Italy, 2013.
- ¹⁰ UN Working Group on Business and Human Rights, [Guidance on National Actions Plans on Business and Human Rights](#).
- ¹¹ Frank Bold, ECCJ, ECCHR, CORE and SHERPA, [“The EU’s Business. Recommended Actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts”](#), 2014.
- ¹² Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on human rights and business, 2 March 2016 (hereinafter, CoE Recommendation, 2016).
- ¹³ For examples of NBAs see the German Institute for Human Rights’s [“National Baseline Assessment. Implementation of the UN Guiding Principles on Business and Human Rights”](#), April 2015 (in German only); ICAR’s Shadow US Baseline Assessment (for [Pillar I](#) and [Pillar III](#)); ICAR’s [“Shadow” National Baseline Assessment \(NBA\) of Current Implementation of Business and Human Rights Frameworks in South Africa](#).
- ¹⁴ The structure can be found p14 Annex 1, UN Working Group on Business and Human Rights, [“Guidance on National Actions Plans on Business and Human Rights”, December 2014](#).
- ¹⁵ “A renewed EU strategy 2011-14 for Corporate Social Responsibility. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions”. COM(2011) 681 FINAL, at point 3.4. “The role of public authorities and other stakeholders” and UNGPS, Principle 3 and Comment.
- ¹⁶ Both major regional human rights systems (Inter-American and Council of Europe system) have recognized that States duty of diligence is part of the States international duty to prevent human rights infringements by private parties. See for instance Inter-American Court of Human Rights (I/A Court H.R.), *Velásquez Rodríguez vs. Honduras*. Judgement of 29th of July 1988. Serie C No. 4 and *Godínez Cruz vs. Honduras*. Judgement of 20th January 1989. Serie C No. 5. Regarding Council of Europe System, relevant case-law of European Court of Human Rights (ECHR) includes Case *Osman v. United Kingdom*, Judgement of 28th of October 1998 and *Öneriyıldız vs. Turkey* [HC] Judgement of 30th November 2004. Additionally, previous documents published by ECCJ or by platforms that have been taken as a reference in this report stress the same principle. See for instance ECCJ, [“ECCJ Recommendations on EU priorities for the implementation of the UN Guiding Principles on Business and Human Rights](#). Danish EU Presidency Expert Conference on Business and Human Rights”, May 2012, p. 1 and CorA, Amnesty International Deutschland, Brot für die Welt, *et al*, [“Position Paper on Business and Human Rights – Expectations for a German Action Plan”](#), 2013, p. 7.
- ¹⁷ For instance, the *International Convention on the Right of the Child* has been interpreted by the enforcing body, the Committee on the Rights of the Child, to include obligations to regulate private actors. See GC GC n 16 (2013) on the States Obligations regarding the impact of business sector on children’s rights”, p. 9.
- ¹⁸ CoE Recommendation, 2016, paras. 58-68.
- ¹⁹ See in this regard “Protect, Respect and Remedy: a Framework for Business and Human Rights” Report of the Special Representative of the SG on the issue of human rights and transnational corporations and other business enterprises. A/HRC/8/5, para. 54, where it affirms that “in addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion- comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts”.
- ²⁰ CoE Recommendation, 2016, para. 13.
- ²¹ For States’ international obligations towards private actors, see above point 1. For UNGPs, see Principle 1 (States’ duty to protect can comprise undertaking “effective policies, legislation, regulations and adjudication) and Principle 3: (In meeting their duty to protect, States should: a. Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps). See in this regard ECCJ and ICAR

report “CCJ and ICAR, “Human Rights Due Diligence: The Role of States - update 2013”, pp. 6 and followings, where it is explained that “a business responsibility to respect human rights is independent of the State’s duty to protect human rights, but it is not isolated from it”, [available in \ <http://www.corporatejustice.org/IMG/pdf/icar-human-rights-due-diligence-2013-update-final1.pdf>].

²² CoE Recommendation, 2016, para. 20.

²³ More detailed information on available legal tools see ECCJ and ICAR, “[Human Rights Due Diligence: The Role of State](#)”; ECCJ and “[ICAR, Human Rights Due Diligence: The Role of States – update](#)”.

²⁴ CoE Recommendations, 2016, para 21. On EU Law, see Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups.

²⁵ ECCJ, “[EU Directive on the disclosure of non-financial information by certain large companies: an analysis](#)”, may 2014 and also SHIFT project, “[UN Guiding Principles Reporting Framework](#)”, February 2015.

²⁶ A report by several CSOs, including SOMO, revealed deficiencies in EU tax transparency system leading to tax avoidance by corporations. See “[Fifty shades of tax dodging. The EU’s role in supporting an unjust global tax system](#)”.

²⁷ CoE Recommendation, 2016, para 18.

²⁸ *Ibid*, para. 23

²⁹ CorA, “Position Paper on Business and Human Rights – Expectations for a German Action Plan”, op. cit. p. 9.

³⁰ CoE Recommendation, para 22.

³¹ UN Working Group on Business and Human Rights, “[Guidance on National Action Plans](#)”, p. 22.

³² CoE Recommendation, 2016, para 47.a.

³³ *ibid*, para 22.

³⁴ UN Working Group on Business and Human Rights, “Guidance on National Action Plans”, p. 22.

³⁵ *id*.

³⁶ EC, “Action Plan on Human Rights and Democracy (2015-2019). Keeping Human Rights at the heart of the EU agenda”. See Objective I, Action 9 on “Invigorating support to Human Rights Defenders (HRDs), including in the international fora” and 10 on “Addressing threats to NGOs space”. See also Council of Europe Recommendation, para. 69.

³⁷ HRC, “Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya”, 23 December 2013, UN Doc. A/HRC/25/55.

³⁸ CoE Recommendation, 2016, para. 70.

³⁹ ECHR, *Taşkın and Others v. Turkey*, 10 November 2004, para. 199; *Hatton and Others v. the United Kingdom* (GC), 8 July, 2003, paras. 104, 127-8; *Tătar v. Romania*, 27 January 2009, para. 88.

⁴⁰ International Labour Organisation (ILO), *Indigenous and Tribal Peoples Convention*, 1989 (No 169). See also in this line, CoE Recommendation, para. 65.

⁴¹ See Human Rights Council, “Promotion and protection of the human rights of peasants and other people working in rural areas”, Resolution A/HRC/RES/26/26, 15th July 2014. This resolution has mandated for the creating of a Working Group to draft a declaration on the rights of peasants and other people working in rural areas, that includes participatory rights for communities (even non-indigenous) affected by big private projects.

⁴² Principle 18 of the UNGPs.

⁴³ See for instance “[Guide to Human Rights Impacts Assessment and Management \(HRIAM\)](#)”, by The International Business Leaders Forum (IBLF), the International Finance Corporation (IFC) in association with the Global Compact, Point 3. For the purpose of the Guidelines, “stakeholders are those directly or indirectly affected by the business activity”, and it includes workers, customers, indigenous peoples, local communities organisations, among others. See *ibid*, p. 37. See also OECD Guidelines for Multinational Enterprises, Version of 2011. Chapter II, “[General Policies](#)” where it says that enterprises should “engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities”.

⁴⁴ Principle 25 of the UNGPs: “As part of their duty to protect against business-related human rights abuse, States must undertake appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territories and/or jurisdiction those affected have access to effective remedy”.

⁴⁵ The ICCPR establishes this right in its article 2.3. Enforcing bodies of other universal HR instruments have also clearly addressed this right and its relation to the State duty to protect. See for instance Committee on ECSR, “GC No. 9 on the Domestic Application of the Covenant”, U.N. Doc E/C.12/1998/24 (Dec. 3, 1998), at para. 9.

⁴⁶ Principle 26 affirms that “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, *including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy*” (emphasis added).

⁴⁷ In 2013 a joint report by ICAR, CORE and ECCJ found that the existence of legal, procedural and institutional barriers still prevent victims of corporate abuses from gaining access to an effective remedy in the EU. The report includes a list of cases that provided the basis for the analysis. See Gwynne Skinner, Robert McCorquodale, Olivier de Schutter and Andie Lambe, “[The Third Pillar: Access to judicial remedies for human rights violations by transnational business](#)”, (ICAR, CORE & ECCJ).

⁴⁸ UNGPs, Principle 2, Commentary, where it says that States are not required by international law to regulate extraterritorial activities of companies but neither are they “prohibited from doing so”.

⁴⁹ See the “Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights”, 2012. Text available in the website of the ETO (Extra-territorial Obligations) Consortium, see <http://www.etoconsortium.org>

⁵⁰ ECCJ, [“The EU’s Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts”](#).

⁵¹ CoE Recommendation, para. 34.

⁵² *ibid*, para. 35.

⁵³ *ibid*, para. 36.

⁵⁴ *ibid*, para. 43.

⁵⁵ The Court has stated that the right to access to the courts comprised within the right to due process (art. 6 ECHR) may include the right to free legal assistance in certain civil cases, when such assistance proves indispensable for effective access to the courts, either because legal representation is mandatory under domestic law or because of the complexity of the procedure or the type of case. See the landmark decision *Airey v. Ireland*, Judgement of 9th October, 1979.

⁵⁶ CoE Recommendation, 2016, para. 41.

⁵⁷ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

⁵⁸ CoE Recommendation, 2016, para. 39.

⁵⁹ UNGPs, Comment to Principle 26.

⁶⁰ CoE Recommendation, 2016, para. 51.