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Human rights and business

Report¹

Committee on Legal Affairs and Human Rights

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Summary

With globalisation, large multinational companies have faced charges that they are violating human rights, especially in developing countries: child labour in the textile industry, environmental disasters caused by the oil industry, or breaches of the right to privacy by telecommunication companies are all recent examples. Yet such alleged abuses often take place outside Europe, and bringing them before European courts is usually difficult.

Council of Europe member states should start by investing ethically, refusing to work with corporations associated with abuses, and insist that firms fully respect human rights standards when they carry out government contracts – especially if the work involves classic state functions which have been “privatised”, such as law enforcement or military activities. More generally, they should introduce laws to protect individuals from corporate abuses of human rights enshrined in the European Convention on Human Rights.

The Committee of Ministers, for its part, could prepare studies – and eventually a recommendation to Europe's governments – on corporate responsibility in the area of human rights. It could even set up a system for assessing the social responsibility of businesses, leading to a Council of Europe “label” for the best. In the meantime, the Council of Europe should co-operate with other international organisations already working in this field, and develop partnerships with the business community to promote its standards.

1. Reference to committee: [Doc. 11673](#), Reference No. 3480 of 29 September 2009.



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A. Draft resolution²

1. The globalisation of the economy challenges the effectiveness of international human rights protection. Large multinational corporations have been criticised for violations of human rights, especially in developing countries. Child labour in the textile industry, environmental disasters caused by the oil industry or breaches of the right to privacy in telecommunication companies are examples of these concerns.
2. Whilst the duty to protect human rights falls primarily on states, businesses also have responsibilities in this area, especially where states have “privatised” classic state functions such as parts of law enforcement or military activities. The Parliamentary Assembly reiterates its call in [Recommendation 1858 \(2009\)](#) on private military and security firms and erosion of the state monopoly on the use of force, to fill the legal vacuum in this area.
3. The Assembly notes that many of the alleged human rights abuses by businesses occur in third countries, especially outside Europe, and that it is currently difficult to raise extraterritorial abuses by companies before national courts or the European Court of Human Rights.
4. The Assembly is also concerned about the existing imbalance in the scope of human rights protection between individuals and businesses. While a company may bring a case before the European Court of Human Rights claiming a violation by a state authority of its rights protected under the European Convention on Human Rights, an individual alleging a violation of his or her rights by a private law company cannot effectively raise his or her claims before this jurisdiction.
5. The Assembly notes that, over the past few decades, a number of frameworks and toolkits have been adopted at the international and European levels in an attempt to define the responsibilities of businesses. They are principally based on the concept of “corporate social responsibility”. These are essentially only soft law instruments or voluntary codes of conduct. They lack effective judicial or other legally binding mechanisms to protect victims of abuses by businesses and do not provide adequate guidance to businesses on measures that should be taken to avoid human rights abuses.
6. The Assembly points out that the economic crisis is no excuse for non-observance of human rights standards. Indeed, the future of the social market economy as a reasonably just and efficient model of economic development should depend on the respect of basic rules of fairness by all economic actors.
7. Therefore, the Assembly calls upon member states to:
 - 7.1. foster accountability for corporate human rights conduct, in particular by:
 - 7.1.1. adopting guidelines on public procurement and investment of public funds excluding companies associated with human rights abuses;
 - 7.1.2. establishing bodies to advise governments on ethical issues and investment;
 - 7.1.3. include, in public procurement and investment contracts, clauses recalling the obligation to protect human rights;
 - 7.2. encourage the implementation of the United Nations Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, by transnational corporations;
 - 7.3. legislate, if necessary, to protect individuals from corporate abuses of rights enshrined in the European Convention on Human Rights;
 - 7.4. raise awareness of the Council of Europe’s human rights standards among businesses, in particular by:
 - 7.4.1. devising a toolkit on mainstreaming best practices in the field of human rights protection into every aspect of a business and on how to conduct human rights impact assessments, in co-operation with business organisations and human rights groups;
 - 7.4.2. co-operating with national human rights institutions in disseminating relevant information to companies and assessing progress and possible problems.

2. . Draft resolution adopted by the committee on 16 September 2010.

8. The Assembly also calls on member states to enhance their co-operation with other international bodies, in particular the European Union, the United Nations, the International Labour Organization, the Organisation for Economic Co-operation and Development, in order to consolidate coherent standards on corporate responsibilities in the area of human rights protection.

B. Draft recommendation³

1. The Council of Europe's activities in the area of human rights protection cover a wide range of issues of direct relevance to business activities, such as property rights, social rights, bioethics, information society, anti-corruption, anti-money laundering and environmental protection measures. Therefore, the Parliamentary Assembly considers that the Council of Europe is well placed to promote corporate responsibility in the area of human rights.
2. Referring to its Resolution ... (2010) the Assembly recommends that the Committee of Ministers explore ways and means to enhance the role of businesses in respecting and promoting human rights. The Committee of Ministers should in particular consider:
 - 2.1. preparing a study on corporate responsibilities in the area of human rights, taking into account in particular the case law of the European Court of Human Rights and the decisions of the European Committee of Social Rights;
 - 2.2. preparing a recommendation on corporate responsibility in the area of human rights, possibly supplemented by flexible guidelines for national authorities, businesses and other actors;
 - 2.3. putting into place a reporting system on the social responsibilities of businesses, either by establishing a Council of Europe labelling mechanism or by delegating this task to an outside body using Council of Europe human rights standards; such a label would allow consumers to make informed choices;
 - 2.4. developing co-operation between the Council of Europe and other international organisations, in particular the Organisation for Economic Co-operation and Development, its National Contact Points and the International Labour Organization, with a view to promoting consolidation of coherent standards on corporate responsibilities in the area of human rights.
3. The Assembly also recommends that the Committee of Ministers examine ways and means of developing partnerships with the business community in order to promote the Council of Europe's values and standards.

3. . Draft recommendation adopted by the committee on 16 September 2010.

C. Explanatory memorandum by Mr Haibach, rapporteur

1. Introduction

1. On 30 June 2008, members of the Parliamentary Assembly submitted a motion for a recommendation on human rights and business (Doc. 11673). The Committee on Legal Affairs and Human Rights appointed me as rapporteur at its meeting on 10 and 11 November 2008.
2. On 31 May 2010, in order to determine the scope of future action of the Council of Europe in this area, the committee held an exchange of views with the following experts:
 - Professor Emmanuel Decaux, Vice-Chair of the French National Consultative Commission on Human Rights (Paris)
 - Professor David Kinley, Chair in Human Rights Law, University of Sydney (Australia)
 - Dr Jernej Letnar Čerňič, European University Institute (Italy)
 - Dr René Schmidpeter, Project Manager, Corporate Social Responsibility Programme, Bertelsmann Stiftung (Germany)
3. The issue of “human rights and business” is closely related with that of globalisation, which not only contributes to raising living standards all around the world, but also poses new challenges to the effectiveness of international human rights protection.
4. Due to globalisation, since the 1960s and 1970s businesses have grown in power and influence. Indeed, many of the largest multinational corporations have revenues greater than the gross domestic product (GDP) of some states. A study conducted in 2000 found that multinational corporations accounted for 29 of the world’s 100 largest economic entities. Royal Dutch/Shell was larger than the GDP of Ukraine and the tobacco giant Phillip Morris was comparable in size to the GDP of Slovakia, Croatia or Luxembourg.⁴
5. There can be no doubt that businesses, be they national, European or multinational corporations bring enormous economic benefits to society through creating jobs, producing economic growth, generating tax revenues and transferring skills and technology. In doing so, companies can help to reduce poverty and have the potential to assist in the realisation of a great number of human rights.⁵
6. Despite this potential to have a positive impact, in recent years businesses, and multinational corporations in particular, have become the target of intense scrutiny and criticism for their impact on human rights in developing countries. For instance, allegations of the use of child labour in the garment manufacturing industry; complicity in state violations of human rights in the oil industry; and concerns over the right to privacy and large telecommunications companies are merely a sample of the challenges that globalisation poses to the effectiveness of current frameworks on international human rights protection. Nevertheless, concerns about human rights and business are not limited to developing countries and can also have a real impact on people living within Council of Europe member states.
7. Traditionally, the duty to protect human rights has rested with the state.⁶ There is increasing legal recognition, however, that private individuals and legal persons, including businesses, have responsibilities. Indeed, there has been a slow shift away from a purely state based model of international law in this realm. Case law of the European Court of Human Rights, the Court of Justice of the European Union and the International Criminal Tribunals for the former Yugoslavia and Rwanda have indicated that private individuals and legal persons, such as businesses, can play a role which is as important as states in some respects.⁷

4. . UNCTAD, Are Transnationals Bigger than Countries?, Press release, 12 August 2002, TAD/INF/PR/47.

5. . Professor John Ruggie, United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises presented the “Protect, Respect and Remedy: A Framework for Business and Human Rights” paper to the United Nations Human Rights Committee on 7 April 2008, UN document A/HRC/8/5, paragraph 2, This paper is hereinafter referred to as “the Ruggie Report”.

6. . See, for example, Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in ... this Convention.”

7. . John Ruggie, Business and Human Rights: The Evolving International Agenda, Kennedy School of Government Faculty Paper Working Series, 2007, p. 8. See also Jernej Letnar Čerňič, Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights (Europa Law Publishing, Groningen, 2010), *passim*.

8. Over the past few decades, a number of initiatives, frameworks and toolkits have been adopted at the international and regional level in an attempt to define the responsibilities that businesses have towards society and, in particular, towards human rights. This report analyses the effectiveness and the ability of these initiatives to protect human rights. It subsequently looks at recent case law on business and human rights. Finally, it assesses whether there is a role for the Council of Europe in developing co-operation between its member states on business practices and human rights.

2. Impact of business on human rights

2.1. Outside the European space

9. Businesses have the potential to impact upon all internationally recognised human rights,⁸ anywhere on the planet. Over recent years, non-governmental organisations (NGOs) and the media have highlighted many cases where subsidiaries of European-based multinational corporations are either alleged to have committed, or have been complicit in, human rights abuses. This has included unfair labour conditions, abuses by security forces, displacement of indigenous communities and environmental destruction. The following examples are illustrative of this.

10. The European Centre for Constitutional and Human Rights, an NGO based in Germany, has recently filed a legal opinion, in the form of an *amicus curiae* brief, with a criminal tribunal in Argentina. The case is against Mercedes-Benz Argentina SA a subsidiary of the German based Mercedes Benz. The European Centre for Constitutional and Human Rights alleges that the company was involved in the kidnapping and enforced disappearance of unionised members of its workforce during the military dictatorship between 1976 and 1983.⁹

11. A group of claimants from the Ivory Coast recently brought a claim in the United Kingdom against the oil trader Trafigura. The United Kingdom-based company chartered a ship, the *Proba Koala*, in 2006, which allegedly took toxic waste to the country's capital, Abidjan. The waste was subsequently dumped in various locations across the city. About 100 000 people sought medical treatment and 15 deaths were reported,¹⁰ representing a serious violation of the right to life.¹¹ Ultimately, Trafigura opted to settle the case out of court (without making any admissions of liability) and agreed to pay £1 000 to each of the 30 000 claimants.¹²

12. Royal Dutch/Shell is a multinational corporation which has its headquarters in the Netherlands and its registered offices in the United Kingdom. In June 2009, it agreed to settle a case for US\$15.5 million which had been brought against it in the United States¹³ for alleged complicity in murder, torture and other human rights abuses in the 1990s in Nigeria.¹⁴ Security forces were alleged to have beaten and shot at local people protesting against the devastation of their property for the construction of a pipeline.¹⁵

13. The huge environmental disaster in the Gulf of Mexico caused by British Petroleum shows that even governments of powerful states such as the United States of America are relatively helpless in the face of the sheer scale of the impact of negligent behaviour of multinational corporations.

*Business impact on human rights*¹⁶

14. The following table has been reproduced from Professor John Ruggie's report to the Human Rights Council entitled "Protect, Respect and Remedy: A Framework for Business and Human Rights". The table is used to support Professor Ruggie's proposition that businesses can impact upon all internationally recognised

8. . The Ruggie Report, *supra* note 5, at paragraph 6. See also the table below.

9. . See www.ecchr.eu/mercedes-benz-argentina.301.html for more information.

10. . Amnesty International UK, Trafigura, Ivory Coast: toxic waste dump victims pin hopes on 19 November appeals 12 November 2009.

11. . The right to life is cited by Article 2 of the Convention.

12. . The Guardian, Trafigura offers £1,000 each to toxic dumping victims, 18 September 2009.

13. . The Alien Torts Claims Act 1789 provides that federal district courts in the United States of America have jurisdiction to hear civil actions by aliens for a tort suffered. See paragraphs 93-95 below.

14. . BBC News, Shell Settles Nigeria Death Cases, 9 June 2009.

15. . For a more detailed account of the allegations see Human Rights Watch, The price of oil: corporate responsibility and Human Rights in Nigeria's Oil Producing Communities and C. Kaeb, "Emerging issues of human rights responsibility in the extractive and manufacturing industries: patterns and liability risk", *Northwestern Journal of Human Rights*, Vol. 6, Issue 2, (2008), pp. 327-53.

rights. It was based on a study of 320 cases from all sectors and regions of the world for alleged corporate related human rights abuses. These cases were reported on the Business and Human Rights Resource Centre's website from February 2005 to December 2007.

Labour rights

Freedom of association	Right to equal pay for equal work	Right to organise and participate in collective bargaining
Right to equality at work	Right to non-discrimination	Right to just and favourable remuneration
Abolition of slavery and forced labour	Right to a safe working environment	Abolition of child labour
Right to rest and leisure	Right to work	Right to family life

Non-labour rights

Right to life, liberty and security of person	Right to peaceful assembly	Right to an adequate standard of living (including food, clothing and housing)
Freedom from torture or cruel, inhuman or degrading treatment	Right to marry and form a family	Right to physical and mental health; access to medical services
Equal recognition and protection under the law	Freedom of thought, conscience and religion	Right to education
Right to a fair trial	Right to hold opinions, freedom of information and expression	Right to participate in cultural life, the benefits of scientific progress, and protection of authorial interests
Right to self determination	Right to political life	Right to social security
Freedom of movement	Right to privacy	Right to the peaceful enjoyment of possessions

15. Although the cases cited above are perhaps the most shocking, the potential negative impact that businesses can have on human rights is not limited to large multinational corporations operating in far off, mostly developing countries. There are many other layers to the issue of how businesses affect human rights, which are relevant to Council of Europe member states. The following are examples of alleged violations by businesses of human rights protected by the European Convention on Human Rights (ETS No. 5, "the Convention") within Europe.

2.2. Right to respect for private and family life in the information age

16. Article 8 of the Convention enshrines the right to respect for private and family life. One of the toughest questions is how can this right be protected in the information age? For instance, on the one hand the Internet has the potential to raise awareness on human rights issues in places where freedom of expression has hitherto been limited. On the other hand, however, the Internet also poses severe challenges to the right to respect of private life within Council of Europe member states. There is a perennial debate¹⁷ about how much personal information Internet service providers and companies operating search engines, such as Google, Microsoft and Yahoo, should be able to store about their customers. What are the limits to the amount of information that they are able to pass on to third parties, including governments, about their service users? How long should companies be able to store information for? To what extent should the people concerned be protected?

17. Other forms of modern communications technologies cause similar problems. In the United Kingdom there have been allegations of journalists from newspapers tapping the phones of celebrities including a footballer's wife¹⁸ and members of staff working for the Royal Family.¹⁹ Such activity is, in fact, illegal, and one private investigator that provided information to a daily newspaper was jailed in 2007.²⁰ However, these

16. . The Ruggie Report supra note 5, pp. 15 and 16. Each case was coded for what right(s) the alleged abuse impacted, referencing the rights in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights, and the International Labour Organization's Conventions.

17. . See, for example, Council of Europe, "Europe's strong views on openness and democracy", Press release 363(2010), 3 May 2010.

18. . The Guardian, "Exclusive: inquiry over Vanessa Perroncel phone-tapping allegations", 10 April 2010; www.guardian.co.uk/media/2010/apr/10/newspapers-phone-hacking-inquiry.

cases raise questions about communications technologies and the methods used to find out information and therefore intrude on the private lives of private individuals. They also raise the issue of complicity of businesses that own these newspapers in human rights abuses when they purchase such information and what responsibilities they have to respect private people's private lives.²¹

18. Similarly, there was an outcry in 2009 when Google launched its Street View service across Europe. The service allows Internet users to have a 360° view of streets anywhere. Although Google took some measures such as blocking the faces of passers by, there were serious fears about privacy. The Greek Government prevented Google from launching the service in Greece²² and the Swiss Government is in the process of taking Google to court to establish whether the service is indeed a violation of the right to privacy.²³

19. All member states of the Council of Europe, of course, have a duty to protect the rights of individuals in their jurisdiction under Article 8 of the Convention, but it has yet to be established how states are able to ensure that companies respect this right when very often individuals voluntarily disclose so much information about themselves on the Internet.

2.3. Gagging freedom of expression

20. Article 10 of the Convention enshrines the right to freedom of expression. There have been cases where businesses have attempted to stifle this right. A well-known example of this was where McDonald's issued a writ for libel against two members of London Greenpeace for distributing leaflets entitled "What's wrong with McDonald's?" in the 1980s.²⁴ The defendants were refused legal aid and therefore represented themselves. The United Kingdom's Court of Appeal found the defendants guilty and ordered the defendants to pay £76 000 in damages between them to McDonald's. The defendants subsequently brought a case against the United Kingdom to the European Court of Human Rights²⁵ where it was held that there had been a breach of Article 6 – the right to a fair trial. This in itself gave rise to a breach of Article 10 due to the procedural unfairness caused by two relatively low paid individuals having to defend themselves against a large multinational corporation and subsequently being found to have committed libel against the company and obliged to pay it disproportionate damages.

21. More recently, following an out-of-court settlement by Trafigura for the victims of the toxic waste dumping in the Ivory Coast,²⁶ the *Guardian*, a British daily newspaper, was threatened with legal action by the Trafigura's lawyers if it printed a Parliamentary Question on the subject.²⁷ This caused a controversy and raised concerns on the power of companies to obtain injunctions in a case which would have essentially restricted a democratically elected Member of Parliament's right to freedom of expression. Eventually the Question was published, albeit with a delay, and the lawyers sought no further action.

22. Both cases highlight that there are legal mechanisms available to companies to limit freedom of expression. While in some cases there may be a genuine and justifiable reason for this, decisions to limit this right should always be taken with great caution.

2.4. Preventing pollution and environmental damage

23. Businesses can have a devastating impact on the environment, which can affect the health and well-being of those living in the areas where certain companies operate. This issue has been dealt with by the European Court of Human Rights on a number of occasions.²⁸ For example, in *Taşkın and others v. Turkey*, a

19. . The Guardian, "Murdoch papers paid £1 million to gag phone-hacking victims", 8 July 2009; www.guardian.co.uk/media/2009/jul/08/murdoch-papers-phone-hacking.

20. . Ibid.

21. . See the European Court of Human Rights' judgment of 24 June 2004 in the case of *Von Hannover v. Germany*, Application No. 59320/00. For all judgments of the European Court of Human Rights, see the HUDOC database: www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

22. . BBC News Online, Greece puts brakes on Street View, 12 May 2009; the [Guardian.co.uk](http://www.guardian.co.uk), Google Street View banned from Greece, 12 May 2009.

23. . BBC News Online, Switzerland takes Google to Court, 13 November 2009.

24. . For a more detailed account of this case see E. Fura-Sandstrom, "Business and human rights – who cares?" in L. Cafilisch (ed.), *Human Rights: Strasbourg Views* (N.P. Engel Verlag, Kehl, 2007), pp. 159-76.

25. . Steel and Morris v. the United Kingdom, Application No. 68416/01, judgment of 15 February 2005.

26. . Discussed in paragraph 11 above.

27. . The Guardian, "Trafigura gag attempt unites house in protest", 13 October 2009; www.guardian.co.uk/media/2009/oct/13/trafigura-carter-ruck-gag.

gold mining company had used dangerous levels of cyanide to extract gold from below the earth's surface. This had an impact on residents living in the vicinity and following unsuccessful attempts to get the Turkish State to act against the company, a case was brought to the Court. It was held that the company had polluted the local environment to such an extent that the detriment to the applicants' health and well-being reached a sufficient level to bring it within the scope of the Article 8 right to a private and family life.

2.5. The public/private law divide

24. Over the past few decades, governments have increasingly privatised functions that have traditionally belonged to the state such as law enforcement, health care, education and telecommunications. In some cases this has led to, what Professor Clapham describes as, the "evaporation of controls which were placed on the sectors to ensure respect for civil and political rights".²⁹ An example of this is the increasing use of private security companies to run detention centres and prisons. In the United Kingdom, such companies are used to run immigration detention centres and provide escort services for removal and deportations of immigrants where Article 5 of the Convention, right to liberty and security of person comes into play.³⁰ Where cases have been brought against the Secretary of State for Home Affairs under the Human Rights Act 1998,³¹ the government department has argued that they are not responsible for the actions of private companies.³² The use of private companies in this sort of sector raises the question of what are the limits of state functions and where the duty to protect human rights ends. This is an ongoing debate in the United Kingdom that the courts have been grappling with³³ but it has an impact on all member states of the Council of Europe as private companies deliver services that were once the preserve of the state.

25. The European Court of Human Rights has addressed this issue in several cases, too. In *Costello-Roberts v. the United Kingdom*, the fact that a school, whose corporal punishment practices were in question, was a private establishment did not stop the Court from holding the United Kingdom responsible in principle for the policies implemented by the school.³⁴ Similarly, the fact that the Heathrow airports authority had been privatised did not exonerate the United Kingdom of potential responsibility for nuisances caused by equally privately owned aircraft.³⁵ In the case of *Calvelli and Ciglio v. Italy*,³⁶ the European Court of Human Rights stressed that the principles concerning states' "positive obligations", apply in the public health sphere too and require states to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. Furthermore, in the case of *K.U. v. Finland*, the European Court found the Finnish Government responsible for a violation of the applicant's private life (Article 8 of the Convention) because of a failure to put in place a system to protect children from being targeted by paedophiles via an Internet dating site.³⁷

26. This brings the discussion full circle and back to the international level. The increased use of controversial private military and security companies (PMSCs) in areas of armed conflict raises serious issues about human rights, which has affected a number of Council of Europe member states. For example, following the conflict in Bosnia and Herzegovina between 1992 and 1995, DynCorp, a US company, was contracted by the US Government to provide personnel to the NATO-led Security Forces (SFOR). The company repatriated some of its employees after it received allegations that those employees had been involved with purchasing

28. . See López Ostra v. Spain, Application No. 16798/90, judgment of 9 December 1994; Taşkin and others v. Turkey, Application No. 46117/99, judgment of 9 December 1994; and Fadeyeva v. Russia, Application No. 55273/00, judgment of 9 June 2005. See also case law cited by Christopher Chope in the opinion of the Committee of Legal Affairs and Human Rights concerning "Preparation of an additional protocol to the European Convention on Human Rights, on the right to a healthy environment", [Doc. 12043](#), part II.ii.

29. . A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford, 2007), p. 8.

30. . Article 5 of the Convention.

31. . The Human Rights Act 1998 gives further effect to the rights and freedoms in the United Kingdom which have been guaranteed under the Convention.

32. . Joint Committee on Human Rights (2009), *Any of our Business? Human Rights and the UK Private Sector* (House of Commons, London), p. 45, paragraph 141.

33. . *YL v. Birmingham City Council* [2007] UKHL 27; Health and Social Care Act 2008. See also applications before the European Court of Human Rights, brought against the UK, concerning use of private security companies: see note 70 below.

34. . See *Costello-Roberts v. the United Kingdom*, Application No. 13134/87, judgment of 25 March 1993.

35. . See *Powell and Rayner v. the United Kingdom*, Application No. 9310/81, judgment of 21 February 1990, paragraphs 39 and 41; *Hatton and others v. the United Kingdom*, Application No. 36022/97, judgment of 8 July 2003 (Grand Chamber), paragraph 119.

36. . *Calvelli and Ciglio v. Italy*, Application No. 32967/96, judgment of 17 January 2002 (Grand Chamber), paragraph 49. See also *Oyal v. Turkey*, Application No. 4864/05, judgment of 23 March 2010.

37. . *K.U. v. Finland*, Application No. 2872/02, judgment of 2 December 2008.

women for the purpose of sexual and domestic slavery. Ultimately, no prosecutions were made, despite this being a serious and obvious breach of Article 4 of the Convention, which prohibits slavery and forced labour.³⁸

27. Similarly, the use of private military and security companies in the more recent conflicts in Afghanistan and Iraq, where several Council of Europe member states have sent forces, has not been without controversy and companies have been accused of being complicit in torture, breaching Article 3.³⁹ Concerns about the human rights implications of using private military and security companies has led the Assembly to call for the adoption of a convention dealing precisely with this issue.⁴⁰

28. The above examples illustrate that businesses can have an adverse effect on all types of human rights. They also serve to demonstrate that the issues surrounding business and human rights in Europe are complicated and any discussion on a framework should address the following issues:

- European multinational and transnational corporations and operating outside the European space;
- companies operating internally (within their country of incorporation and/or other European countries);
- companies that are providing services that were at one time seen as functions of the state.

3. Existing international frameworks and corporate social responsibility

29. Since the 1970s, there have been a number of initiatives that have attempted to define businesses' responsibilities towards society, including human rights. Certain United Nations human rights bodies (including regional human rights organs within the Organization of American States and the African Union), have done so; similarly, there exist trade law and investment rules, including criminal liability in certain circumstances, with respect to the business and human rights "agenda". That said, existing international frameworks are essentially soft law instruments and are centred principally on voluntary codes of conduct, which have emphasised the benefits of corporate social responsibility (CSR) over rigorous legal accountability.

30. CSR is "a concept whereby companies integrate social and environmental concerns in their business operations and their interactions with their stakeholder on a voluntary basis".⁴¹ CSR can encompass much more than just respect for human rights and extends to issues such as corporate philanthropy and investment into the community.

31. Proponents of CSR argue that it can in fact be advantageous to the companies themselves to create social policies and practices that go beyond their legal obligations and responsibilities as it can have a positive impact on the company's reputation and profitability. Consumers, for instance, are more likely to buy goods and services from companies with a reputation for good ethical behaviour.⁴² Other benefits might include an increased sense of loyalty and pride in the company's workforce.⁴³ Social irresponsibility, such as environmental damage or complicity in human rights abuses, on the other hand, can lead to bad publicity and a consumer backlash, thereby undercutting profitability. The adoption of CSR policies is presented as being the rational economic choice for businesses and therefore an extensive legal framework is not required.

32. The CSR approach is the basis behind existing international frameworks concerning businesses and social issues that are discussed below.

38. . Human Rights Watch and the Center for Human Rights and Global Justice (2008), *On the margins of profit: rights and risks in the global economy*, Vol. 20, No. 3 (G); and Human Rights Watch (2002), *Hopes betrayed: trafficking of women and girls to Bosnia and Herzegovina for forced prostitution*, Vol. 14, No. 9 (D).

39. . Article 3 of the Convention prohibits torture, inhuman or degrading treatment or punishment. The European Court of Human Rights appears to be more progressive compared to other (regional) international human rights bodies as regards human rights protection in relation to private actors and as regards extraterritorial protection.

40. . See Recommendation 1858 (2009) on private military and security firms and erosion of the state monopoly on the use of force, 29 January 2009.

41. . European Commission, "Implementing the partnership for growth and jobs: making Europe a pole of excellence for CSR", 22 March 2006, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0136:FIN:en:PDF>.

42. . European Union, Corporate Social Responsibility, Press release Memo/09/109, 16 March 2009; <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/109&type=HTML>.

43. . P. deMaCarty, "Financial returns or corporate social responsibility, and the moral freedom and responsibility of business leaders", *Business and Society Review*, Vol. 114, No. 3 (2009), pp. 393-433.

3.1. The OECD Guidelines for Multinational Enterprises

33. The Organisation for Economic Co-operation and Development (OECD) adopted the Guidelines for Multinational Enterprises in 1976. This was in response to concerns about the impacts of multinational corporations, based in Europe and North America, establishing manufacturing subsidiaries in developing countries to take advantage of cheaper labour and raw materials.⁴⁴ The guidelines are the only comprehensive, multilaterally endorsed code of conduct for multinational enterprises.

34. The guidelines are voluntary principles and standards that adhering states⁴⁵ undertake to promote to their businesses and are meant to represent good practice for companies operating both nationally and internationally. They were updated in 2000 and cover a broad range of issues in business ethics, including sustainable development, respect for human rights, combating bribery, contributing to the local community, employment and industrial relations.

35. There have been a number of criticisms about the effectiveness of the guidelines. First, they are vague and lack specificity. For instance, businesses are expected to “respect human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”⁴⁶ No guidance is given, however, on how this can be best achieved and how companies can prevent themselves from becoming complicit in human rights abuses by third parties. Moreover, the specific wording of this principle suggests that companies are able to operate differently depending on what international human rights instruments the host state is signatory to. The guidelines are also now slightly outdated and have been criticised for falling behind voluntary standards adopted by many business organisations.⁴⁷

36. The guidelines are not legally binding but are overseen by national contact points (NCPs) established by adhering states. The NCPs are tasked with promoting the guidelines and producing an annual report on their implementation. Perhaps the most important role of these NCPs is to provide consultation, conciliation and mediation between parties in conflicts and issue clarifications over the guidelines’ meanings.⁴⁸

37. There are many concerns about the effectiveness of NCPs and the way in which they operate. Not all adhering states have established NCPs and their function and effectiveness varies from state to state. In states where they do exist, they are often placed in the government department tasked with promoting business, trade and investment, which means there can be a significant conflict of interest.⁴⁹ Finally, the NCPs have little power to take action where they find that a company has been involved in human rights abuses. Recently, the United Kingdom NCP upheld a complaint by Global Witness that a United Kingdom-based company, Afrimex, had not respected human rights by failing to take adequate steps to abolish child and forced labour in the Democratic Republic of the Congo.⁵⁰ Nevertheless, the NCP was able to do little other than issue recommendations, which reportedly were not taken up by other government departments.⁵¹

38. The guidelines are possibly the most developed monitoring mechanism that assesses business and human rights. However, they are not binding and there is no effective mechanism to act on findings that human rights violations have occurred.

39. The OECD has recognised that there are shortcomings and is currently reviewing its guidelines.⁵² The OECD has launched an update of its guidelines in June 2010 during the Roundtable on Corporate Responsibility. There are some significant proposals on the table: the addition of a chapter on human rights, including business and human rights; a more consistent approach to human rights as regards export credit guarantees, and the need to improve the effectiveness of NCPs.

44. . J. Scott, “Business and human rights at the UN: what might happen next”, *Human Rights Quarterly*, Vol. 31, No. 2 (2009), p. 301.

45. . The following Council of Europe member states are also members of the OECD: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Turkey and the United Kingdom. Estonia, Latvia, Lithuania, and Romania have also signed the guidelines.

46. . OECD Guidelines for Multinational Enterprises, Part II, General Principles No. 2. The text of the guidelines is available at: www.oecd.org/dataoecd/56/36/1922428.pdf.

47. . Ruggie Report, *supra* note 5, paragraph 46.

48. . Cernic J (2008), “Corporate responsibility for human rights: a critical analysis of the OECD Guidelines for Multinational Enterprises”, 3 *Hanse L.R* 71, p. 84.

49. . The Ruggie Report, *supra* note 5, paragraph 98.

50. . Final Statement by the UK National Contact Point for OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd, 28 August 2008.

51. . See Joint Committee on Human Rights, *supra* note 32, p. 30, for a detailed criticism of the United Kingdom National Contact Point.

3.2. The International Labour Organization's Tripartite Declaration

40. The International Labour Organization's (ILO) eight core conventions encompass four main areas: freedom of association, ending of forced labour, ending of child labour and ending discrimination in the workplace. While the ILO Conventions are international treaties and therefore binding on state parties, there are no provisions that can be directly applied to businesses themselves.

41. The ILO's governing body adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977.⁵³ The Tripartite Declaration brings together states, businesses and employers in an attempt to address concerns about the role of multinational corporations. The principles were most recently updated in 2000 and their aim is to encourage positive contributions from multinational corporations to economic and social progress.

42. The declaration calls upon multinational corporations to respect the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights. It specifically stipulates that companies should respect work-related rights such as freedom of association, health and safety and freedom from discrimination. The declaration encourages companies to address the grievances of workers and the setting up of internal dispute resolution mechanisms. It also calls for a periodic survey on the implementation of the principles.

43. Nevertheless, as with the OECD Guidelines, the implementation and enforcement of the principles are entirely voluntary. As it is only a declaration of principles, it lacks the legally binding status of an international treaty. Besides the naming and shaming effect of the survey, there are no further mechanisms to ensure compliance.

3.3. The United Nations Global Compact

44. The United Nations Global Compact was launched in 2000 at the request of the then Secretary-General of the United Nations, Kofi Annan. The compact is comprised of 10 principles divided into four sections on human rights, labour, environment and anti-corruption. Companies are expected to make a general commitment to support, respect and promote internationally recognised human rights. They are specifically expected to uphold freedom of association, the elimination of all forms of forced and compulsory labour, elimination of child labour and the elimination of discrimination in respect of employment and occupation. At the same time, companies are admonished not to be complicit in human rights abuses by the host government of the state they are operating in.⁵⁴

45. Interestingly, the Global Compact introduced the concept of "sphere of influence", whereby companies are encouraged to promote respect for human rights to other companies that they may work with including suppliers, contractors and sub-contractors.

46. Companies are invited to sign the Global Compact, which they can do by sending a letter from the Chief Executive to the United Nations Secretary-General stating that they wish to join. Subsequently they are expected to make the Global Compact part of their business strategies, incorporate it into their decision-making processes and keep a record of how it is being implemented in their annual report. By 2008, 4 000 companies had signed up for it.⁵⁵

47. The Global Compact has specifically advocated for the "business case" for corporate social responsibility. It is based on a voluntary approach and does not include any form of enforcement, implementation or monitoring mechanisms. Although a Global Compact board was formed to bring together business, labour and civil society with UN officials to provide a strategy and policy advice,⁵⁶ such advice is limited to suggestions and dialogue. While the board can be useful in creating a culture of rights protection, it nonetheless lacks teeth to bind companies or states.

52. . OECD, Consultation for an Update of the OECD Guidelines for Multinational Enterprises, presented on 8 December 2009, Paris.

53. . International Labour Organization, The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 28 March 2006, www.ilo.org/empent/Whatwedo/Publications/lang--en/docName--WCMS_094386/index.htm.

54. . UN Global Compact Principles 1 and 2, www.unglobalcompact.org/.

55. . Scott J, *supra* note 44, p. 304.

56. . Information on the composition of the board is available at http://unglobalcompact.org/AboutTheGC/The_Global_Compact_Board.html.

48. The Global Compact has been criticised for being an extremely weak document that has very little impact on business and human rights⁵⁷ and fears have been expressed that it only serves as a marketing tool for companies that sign up to it, as there is no verification of statements made on it in companies' annual reports.

3.4. The Protect, Respect and Remedy framework

49. In 2003, the United Nations Sub-Commission on Human Rights adopted the United Nations Norms on the responsibilities of transnational corporations and other business enterprises (the Norms).⁵⁸ The Norms were drafted with strong language, placing an obligation on businesses "to promote, secure the fulfilment of, respect, ensure respect of and protect human rights".⁵⁹ This effectively would have given businesses the same duties as states in certain areas of human rights in the sense that they are required to positively ensure that rights were realised in their sphere of control. On the one hand, the Norms indicate businesses' general obligations towards their employees and/or partners, in particular in the area of non-discrimination (see Rule B). On the other hand, they also contain more specific obligations such as those related to the right to security (Rule C), rights of workers (Rule D), consumer protection (Rule F) and environmental protection (Rule G).⁶⁰

50. The Norms also contained strong provisions against complicity in human rights abuses. Businesses were expected to "refrain from any activity which supports, solicits or encourages states or any other entities to abuse human rights" and to ensure that the products and services that they created did not contribute to human rights violations.⁶¹

51. The Norms were never adopted by the United Nations General Assembly, due to strong opposition from states and business leaders, and for some time no progress was made on the international arena. To move the debate on, Professor John Ruggie was appointed as the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises, with a mandate to find a solution to the failure of the Norms.

52. In April 2008, Professor Ruggie proposed the "protect, respect and remedy" policy framework as a way of resolving the impasse on business and human rights.⁶² The framework rests on three pillars:

- the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;
- the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing the rights of others;
- greater access by victims to effective remedies, judicial and non-judicial.⁶³

53. The United Nations Human Rights Council unanimously welcomed the report and have extended Professor Ruggie's mandate until 2011. He is tasked with making practical recommendations on ways to help states protect human rights from abuses involving businesses, and to enhance access to remedies for those

57. . O. Maurel, *La responsabilité des entreprises en matière des droits de l'homme* (Commission Nationale consultative des Droits de l'Homme, Paris, 2009), p. 114. See also, in this connection, critical comments recently made by Amnesty International with respect to the International Finance Corporation's (IFC, part of the World Bank Group) 2006 "Sustainability Framework" concerning the revised draft Sustainability Framework text issued in June 2010 and the need to ensure that IFC-supported projects and business activities are conducted in a manner that respects human rights: Time to invest in human rights: A human rights due diligence framework for the International Finance Corporation, issued on 1 September 2010; www.amnesty.org/en/library/asset/IO80/004/2010/en/4c6c3700-22ba-47fd-9da7-a442d7e19594/ior800042010en.pdf.

58. . Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights, adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights on 13 August 2003 (document E/CN.4/Sub 2/2003/L.11).

59. . Norms, Part A (1). See also the preamble of the Norms: "... Recognising that even though states have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights, ...".

60. . For a more detailed analysis see E. Decaux, "La responsabilité de sociétés transnationales en matière des droits de l'homme", *Revue de science criminelle et de droit pénal comparé*, RSC No. 4 (October-December 2005), pp. 789-98.

61. . Norms, Part E (12).

62. . See the Ruggie Report, *supra* note 5.

63. . Taken from Professor John Ruggie (2009), *Business and Human Rights: Towards Operationalising the "Protect, Respect and Remedy" Framework*, A/HRC/11/13, paragraph 2.

whose human rights are affected. Unfortunately, as Professor Ruggie recently told a United Kingdom Parliamentary enquiry, he did not expect that a legally binding human rights treaty would be drafted at the end of his mandate.⁶⁴

54. The United Nations Special Representative's recommendations have been well received but are not without criticism. For example, Professor David Kinley has suggested that the framework does little to answer the problem "in which states are so weak or unwilling to protect human rights and corporations are so comparatively strong or conveniently transnational to evade human rights responsibilities".⁶⁵

3.5. Interstate initiatives

55. Beyond broad international frameworks, there have been several multilateral attempts, both between governments and among businesses themselves, to create codes of conduct in specific sectors. In particular, the problem of PMSCs⁶⁶ has garnered international attention and led to two initiatives: the Voluntary Principles on Security and Human Rights⁶⁷ and the Montreux Document.⁶⁸

56. The Voluntary Principles on Security and Human Rights were established as an agreement between the United Kingdom and United States governments, which the governments of the Netherlands and Norway subsequently joined. The principles seek to regulate the use of private security forces that operate abroad but which are incorporated in these states. The principles encourage companies to assess the risks of their actions, set clear ethical standards for their security forces, use force only where necessary and adhere to the rule of law.

57. Along a similar vein, 17 states and a number of non-governmental organisations came together in Switzerland in 2006 to sign up to the Montreux Document. This was an initiative of the Swiss Federal Government and the International Committee of the Red Cross, to define the legal obligations of states with regards to PMSCs in international humanitarian and human rights law. The document seeks to clearly define the responsibilities of states, which include setting clear standards for PMSCs and building human rights concerns into contracts. Furthermore, it recommends that states take into consideration past conduct of companies when making decisions on contracting and licensing such companies.

58. Again, both documents are only voluntary undertakings. Under the Voluntary Principles, companies are supposed to record and report credible accusations of human rights abuses, but no further concrete action is required.

59. Similarly, the Montreux Document requests that adhering states create an authorisation and monitoring system for PMSCs,⁶⁹ but it does not have the binding status to require such action. Although the Assembly has fully supported the document in [Recommendation 1858 \(2009\)](#) on private military and security firms and the erosion of the state monopoly of the use of force, it cannot be denied that it lacks an effective enforcement mechanism.⁷⁰

3.6. Private sector agreements

60. It is increasingly common for businesses to publish their own codes of conduct that are based around CSR. These codes of conduct outline voluntary goals to which companies aspire and promise to improve their practices. Most corporate codes of conduct contain a general commitment to ethical corporate behaviour and often include promises to protect the environment and to improve health and safety in the workplace. The advantage of these sorts of codes of conducts is that companies themselves take an interest in social issues.

61. Some companies have collaborated with each other to create codes of conduct, an example of which can be found with the Global Network Initiative. In 2008, many of the major information technology corporations, including Microsoft, Google and Yahoo came together with human rights NGOs and press

64. . See Joint Committee on Human Rights, *supra* note 32, paragraph 102. But Ruggie has also pointed out that there are no legal obstacles to adopting such a treaty: see United Nations document E/CN.4/2006/97, 22 February 2006, at paragraph 65.

65. . *Ibid.*, paragraph 94.

66. . See paragraphs 26-27 above for more information on private military and security companies (PMSCs).

67. . www.fco.gov.uk/resources/en/pdf/pdf7/fco_voluntaryprinciples.

68. . www.icrc.org/web/eng/siteeng0.nsf/html/montreux-document-170908.

69. . *Ibid.*, Part A(IV) and (V).

70. . See also [Doc. 11787](#), report of the Political Affairs Committee on private military and security firms and the erosion of the state monopoly of force, rapporteur: Mr Wodarg, and [Doc. 11801](#), opinion of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Sasi.

freedom NGOs to create the Global Network Initiative. This was an attempt to establish principles to ensure that companies guaranteed freedom of expression over computer networks and the right to privacy of their customers.⁷¹ This is relevant to all member states of the Council of Europe, as the majority of these companies operate across the continent.

62. Adhering companies have committed themselves to guaranteeing the freedom of expression and protecting the privacy of their customers from governments that attempt to violate international human rights standards. The principles set out guidelines for companies where they are confronted by government demands for information on customers, removal of content or restriction of access to websites.⁷² Companies are supposed to take into account the principles in their action and when negotiating contracts.

63. There is some evidence to suggest that this initiative has had a positive impact. Prior to the inception of the Global Network Initiative, Google launched a service in China in 2006. At the time it made an agreement with the Chinese Government to filter its search engine services. It announced in January 2010 however, that it intended to launch an unfiltered service and on 22 March 2010 it started to redirect its customers in China to servers in Hong Kong.⁷³ This represents a case where a company has assisted in the realisation of the right to freedom of expression.

64. Business for Social Responsibility is another initiative. It was set up in 1992 to work with its network over 250 companies to develop sustainable business strategies and solutions through consulting, research and cross-sector collaboration. It uses its expertise in the environment, human rights, economic development, transparency and accountability to guide global companies to promote CSR strategies. It produces reports and organises training work to advance CSR in specific areas, which include human rights. It places a particular emphasis on labour rights, freedom of expression and the right to privacy. It has recently published a document entitled "Human Rights in a Wired World: How Information and Communications Technology Impacts on Human Rights".⁷⁴ The document analyses the opportunities that information communications technologies bring on the subject of human rights and at the same time advises companies of the risks of how these technologies can be used to abuse human rights.

3.7. Civil society initiatives

65. Perhaps the strongest push for human rights accountability has come from civil society. Many NGOs have created voluntary mechanisms for businesses to assess how their actions impact on human rights and how they measure up to ethical codes of conduct in general. The Fair Trade movement is an example of these sorts of initiatives.

66. Another example is the SA 8000 label, created by Social Accountability International.⁷⁵ The SA 8000 has basic requirements that companies signing up to it allow freedom of association, refrain from using or benefitting from forced or child labour, end discrimination in its hiring or employment practices, provide a safe and healthy work environment and treat employees with dignity and respect.⁷⁶ Finally, companies are asked to respect laws on working hours and holidays and provide all workers with a living wage,⁷⁷ which meets minimum legal and industry standards.

67. What makes initiatives such as the SA 8000 effective is that they have some form of enforcement mechanism by way of labelling certificates. Companies have to be accredited and certified as compliant by an independent organisation accredited by the Social Accountability Accreditation Services.⁷⁸ Companies are regularly audited and a violation of the guidelines could lead to the company not having its certificate renewed.

71. . Global Network Initiative, www.globalnetworkinitiative.org.

72. . Global Network Initiative Principles, www.globalnetworkinitiative.org/principles/index.php.

73. . BBC News, "Timeline: China and net censorship", 23 March 2010.

74. . www.bsr.org/research/human-rights-wired-world.cfm.

75. . www.sa-intl.org.

76. . Social Accountability 8000 Guidelines (2008), www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf.

77. . *Ibid.*, Part 7.

78. . www.saasaccreditation.org/accreditation.htm.

3.8. European Union initiatives

68. The promotion of human rights is enshrined into the founding documents of the European Union. Article 21-2 of the Treaty on European Union states “the Union shall define and pursue common policies and actions, and shall work for a high degree of co-operation in all fields of international relations. In order to: consolidate and support democracy, the rule of law, human rights and the principles of international law ...”. European Union policy is important in the context of business and human rights as it is host to many of the largest multinational corporations and, together with its member states, it is a significant player on the international stage.

69. The European Union has a long history of trying to develop a policy in the sphere of business and human rights. As early as 1999 the European Parliament advocated developing a legal approach to CSR for European companies operating in developing countries,⁷⁹ a position that it continues to maintain to this day. Nevertheless, the European Commission has, until now, preferred a voluntary approach to CSR.

70. It launched the European Alliance on CSR in 2006, which is an alliance of European enterprises or companies that express their support for CSR. It acts as a political umbrella for new or existing CSR initiatives by large companies, small and medium enterprises and other stakeholders. The European Commission has emphasised that the alliance is a political process and not a legal instrument and companies do not actually need to sign up to it. The European Commission shies away from imposing legal obligations and attempts instead to build processes for exchanging best practices, mutual learning and raising awareness.

71. Of interest, in this connection, is a report which the European Commission has commissioned with the University of Edinburgh (Scotland). This relates to an analysis of the legal framework for human rights and the environment applicable to European enterprises operating outside the European Union, with a view to contributing to the Ruggie Report. An interim report⁸⁰ was submitted to the Commission on 8 March 2010, and it is understood that the definitive version of the text will soon be issued. This report is likely to take into account a number of recent important developments on this subject.

72. A document commissioned by the European Parliament has called upon the European Commission to reconsider its all-voluntary approach to CSR and has made specific recommendations on how the European Union should strive for a legally binding international instrument on business and human rights. It has also recommended that the European Union Institutions and member states consider establishing judicial mechanisms whereby individuals can bring complaints of human rights abuses by corporations before the courts in member states.⁸¹

3.9. Domestic policies of Council of Europe member states

73. Many European states have established their own systems of corporate social responsibility. Although most policies do not focus on human rights specifically, they have the potential to impact on them.

74. The German Government has been actively promoting human rights awareness in the business sector. The Working Group on Human Rights and Business, comprised of the Federal Government, industry and employers associations, trade unions and civil society associations, has signed a joint declaration entitled “International Protection of Human Rights and Business” affirming the commitment of all its signatories to the Universal Declaration of Human Rights and other international human rights instruments.⁸² Moreover, the German Federal Foreign Office and the Ministry for Economic Development and Cooperation joined the Bertelsmann Foundation’s project “CSR WeltWeit” (CSR Worldwide) in order to promote social engagement by German companies abroad and to assist them in tailoring their CSR activities to the social needs of target countries in the developing world.⁸³

75. Belgium has established a number of CSR related certificates and labels. A 2002 law created a label for products that have come from supply chains that respect the ILO core conventions, which is administered by the Ministry of Economic Affairs.⁸⁴ Similarly, a 2006 law created an “equality and diversity” label for companies that complied with equal opportunity and diversity laws.⁸⁵

79. . European Parliament, Resolution on EU standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, A4-05-08/98, 15 January 1999, OJC 104, 14 April 1999, p. 180.

80. . The text of the interim report is available at www.law.ed.ac.uk/euenterpriseslf/documents/files/InterimReportEC.pdf.

81. . European Parliament, Business and Human Rights in EU External Relations: Making the EU a Leader at Home and Abroad Internationally, EXPO/B/DROI/2009/2, April 2009.

82. . European Commission, Corporate Social Responsibility: National Public Policies in the European Union 2007, <http://ec.europa.eu/social/BlobServlet?docId=1577&langId=en>.

83. . www.csr-weltweit.de/en/index.nc.html.

76. The United Kingdom's Foreign and Commonwealth Office has devised a Toolkit on Business and Human Rights, which gives guidance to political, economic, commercial and development officers on international missions to "promote good conduct for UK companies overseas". It is centred mainly on the OECD Guidelines but gives additional guidance to staff on how to promote human rights within United Kingdom businesses.

77. The United Kingdom's Companies Act requires directors to "have regard" to such matters as "the impact of the company's operations on the community and the environment".⁸⁶

78. Many states now have National Human Rights Institutions that seek to promote human rights across the country. An example of good practice comes from the Danish Institute for Human Rights. Its chief objective is to promote and develop knowledge about human rights on a national, regional and international basis.⁸⁷ Its work includes research, analysis and information dissemination. It conducts programmes that operate both nationally and internationally. In 1999, the institute initiated the Human Rights and Business Project in conjunction with the Confederation of Danish Industries, the Danish Industrialisation Fund for Developing Countries and the Danish International Development Agency. The project aims to develop concrete achievable standards for companies operating abroad through its training and advisory services.

79. Some states have gone further and have attempted to put measures in place that have a material impact upon businesses that may be involved in human rights abuses. In certain European states, there exist disclosure requirements – relating to the investment sector – which are imposed on pension funds. The Norwegian State Pension Fund, for example, has publicly withdrawn money from a number of companies and projects that have been associated with human rights abuses. The Council of Ethics was established in 2005 to advise the Ministry of Finance on ethical issues and investment. Its guidelines state that the ministry may exclude a company from the fund where there is an "unacceptable risk that the company contributes to or is responsible for:

- serious and systematic human rights violations such as murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other forms of child exploitation;
- serious violations of individuals' rights in situations of war or conflict;
- severe environmental damage;
- gross corruption;
- other particular serious violations of fundamental ethical norms".⁸⁸

80. Recently, the International Metalworkers Federation has requested that the fund divest of shares in Grupo Mexico, a mining conglomerate for alleged violations of labour rights including preventing employees from freely associating in Mexico.⁸⁹ If the allegations are substantiated and the Ministry of Finance takes a decision to divest, it would demonstrate how a company had been financially penalised for abusing human rights.

3.10. Conclusion: a patchwork of voluntary initiatives and toolkits

81. Despite these positive steps taken by some governments, the current international framework for governing businesses in relation to human rights is extremely weak. It is almost entirely based on a mixed bag of soft law principles, voluntary corporate social responsibility initiatives and toolkits, without any effective judicial mechanisms to ensure that businesses respect human rights. Professor John Ruggie has argued that:

*"[t]he root cause of business and human rights predicament today lies in the governance gaps created by globalisation – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation."*⁹⁰

84. . Ibid, pp. 7-8.

85. . Ibid, p. 8.

86. . Section 172 (1)(d) Companies Act 2006.

87. . www.humanrights.dk/about+us.

88. . Guidelines for observation and exclusion from the Government Pension Fund Global's investment universe, Section 2, issued 22 December 2005.

89. . International Metal Workers Federation, "Trade union asks Norwegian Pension Funds to divest of Grupo Mexico shares", 16 March 2010; www.imfmetal.org/index.cfm?c=22456.

82. One of the major problems lies in the reliance on the concept of corporate social responsibility. The concept has been heavily criticised because it depends on the assumption that all consumers are concerned enough about human rights and other social issues to penalise those companies that are found to have acted irresponsibly. However, not all consumers take an interest in these issues. While there has been a marked increase in the sale of fair trade produce, for example, the impact of the socially conscious consumer appears still to be somewhat limited.⁹¹ Moreover, consumers need to have detailed impartial knowledge about what companies' records are. This may be easy to find for larger companies but that sort of information is not necessarily available for smaller unknown ones.

83. This is not to say that there is no role for voluntary initiatives based on CSR. Indeed it would be favourable for companies to strive to make their practices better than they are obliged to under law. However, many authors argue that voluntary initiatives alone should not be the basis of regulation of business in relation to human rights. Some argue that the amount of power that has been amassed by some of the largest multinational corporations should be accompanied by corresponding responsibilities.⁹² There is recognition that the current system is simply not adequate. Nevertheless, it appears that few steps will be taken at the international level in the near future to radically improve current frameworks.

4. Evolving case law on business and human rights

84. Despite the reluctance of the international community and individual states to impose a coherent set of obligations on multinational corporations and other companies in relation to human rights, there is a growing body of case law, which may ultimately have an impact on the way businesses operate with respect to human rights. This section analyses some recently made decisions and discusses what implications these cases could have on businesses in the future.

4.1. European Court of Human Rights

85. Under the Convention, contracting states have a duty to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".⁹³ The European Court of Human Rights' case law suggests that states not only have a duty to respect the human rights of those within its jurisdiction but they also have a positive obligation to take reasonable measures to protect individuals from violations of their Convention rights by private parties.⁹⁴

86. For example, Article 4 of the Convention prohibits servitude and forced labour. In *Siliadin v. France*,⁹⁵ the Court held that the state had failed to fulfil its positive obligations by not having in place a penal law system which could effectively prevent, prosecute and punish non-state actors that were involved in forms of trafficking and slavery.⁹⁶ The case involved a complaint by a Togolese woman who had been trafficked into France to work as a maid for a French family without pay. The failure to criminalise these sorts of acts amounted to a failure to provide a specific and effective protection for victims. In this sense, the Convention places obligations on states to prevent non-state actors, including individuals, from infringing upon the rights of others within their jurisdiction. Moreover, the Court's judgments do not only impact upon the defendant state, but also upon other signatories to the Convention. Following the judgment in this case, human rights NGOs, including Amnesty International, lobbied the United Kingdom Government ensuring that domestic legislation was amended⁹⁷ to make it an offence to hold another person in servitude or subject a person to forced or compulsory labour.⁹⁸

90. . The Ruggie Report, *supra* note 5, paragraph 3. See also, in this connection, the International Federation for Human Rights recent publication, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms* (Summer 2010), www.fidh.org/corporate-accountability-for-human-rights-abuses.

91. . J. Wouters and L. Chanet, "Corporate human rights responsibility: a European perspective", *Northwestern Journal of Human Rights*, Vol. 6, Issue 2 (2008), p. 268.

92. . *Ibid.*

93. . Article 1 of the Convention.

94. . A. Clapham, *supra* note 29, p. 351. See also *H.L.R v. France*, judgment of 29 April 1997, especially paragraphs 40-44.

95. . Application No. 73316/01, judgment of 26 July 2005.

96. . See also *Rantsev v. Cyprus and Russia*, Application No. 25965/04, judgment of 7 January 2010. This case concerned the death of a 20-year old Russian cabaret artist in Cyprus. The European Court concluded, among other things, that there had been a violation by Cyprus of its positive obligations arising under Article 4 due to its failure to put in place an appropriate legal and administrative framework to combat trafficking as a result of the existing regime of "artiste" visas.

97. . Joint Committee on Human Rights, *supra* note 32, paragraph 153.

87. Similarly, as discussed above,⁹⁹ in *Fadeyeva v. the Russian Federation*; *López Ostra v. Spain*; and *Taskin and others v. Turkey*, the Court held that there had been violations of the Article 8 right to a home, private and family life where companies had polluted the local environment. In these cases, the states concerned had issued licences or provided subsidies, which had effectively enabled the offending companies to pollute and damage the health of residents in the local vicinity. It was therefore the state that had failed in its positive obligation to protect the applicants' rights vis-à-vis the polluting companies. In *López Ostra v. Spain*, the Court found that the state had not succeeded in striking a fair balance between the interests of the town's economic well-being, by granting a subsidy to a tannery company which went on to pollute. There had therefore been a violation of the applicant's right to the effective enjoyment of the right to respect for private and family life and the home.

88. Businesses themselves are deemed to have rights under the Convention. Article 1 of Additional Protocol No. 1 of the Convention (ETS No. 9) states that every "natural or legal person" enjoys protection of his property. Businesses are considered to be legal persons and the Court's case law has confirmed that they have rights under the Convention.¹⁰⁰ It is sometimes extremely important that the rights of businesses are respected. For example, in the *Sunday Times v. UK*,¹⁰¹ the Court held that there had been a violation of a national newspaper's right to freedom of expression (Article 10 of the Convention), when it had been prevented from publishing its opinion on aspects of a settlement between Distillers, the company that had produced Thalidomide, and the parents of the children that had suffered as a result of the drug being prescribed to pregnant women in the 1960s. In these circumstances, it is important in a democratic society that the media is able to publish opinions on issues as important as this and therefore freedom of expression should be upheld.

89. Private individuals, however, are unable to bring cases directly against businesses to the Court and such complaints would be struck out as inadmissible if they did. That said, national courts are not necessarily bound by the same conditions. For instance, the French *Cour de Cassation* has applied the Convention in cases between private parties. In the case of *Société Nikon France SA v. M. Frédéric*,¹⁰² Article 8 (right to a private and family life) was invoked by the *Cour de Cassation*. The case involved an employee who was dismissed after his employer had read his personal emails that had been written on a computer provided to him by the employer.¹⁰³

90. This "horizontal"/"inter-individual" effect of the Convention is referred to as *Drittwirkung* (third party effect theory). It is also applied in Germany to some degree, where rights that are defined in the German Constitution are considered to be enforceable against individuals and private companies as well.¹⁰⁴

91. Although cases can be brought for state failure to protect an individual's rights, states are not necessarily under a duty to protect individuals outside their jurisdiction from the actions of multinational corporations or other businesses that are incorporated within a state. The European Court of Human Rights will accept extra-territorial jurisdiction only in exceptional circumstances and this is only where the state has effective control of the relevant territory.¹⁰⁵ It would be interesting to see how the European Court of Human Rights were to react if an Iraqi citizen were to allege that he had been tortured by employees of a PMSC that had been contracted by, for example, the United Kingdom Government in an area where the United Kingdom had been operating. Similarly, in cases where there is an allegation that a multinational corporation has been involved in human rights abuses abroad, recourse to a remedy under the Convention against a government that has underwritten the multinational corporation's activities through its export credit guarantee agency might well be possible, in certain circumstances.

98. . Section 71, Coroners and Justice Act 2009.

99. . See paragraph 23 above.

100. . *Sunday Times v. the United Kingdom*, judgment of 26 April 1979, Application No. 6538/74.

101. . *Ibid.*

102. . *Cour de Cassation (Chambre Sociale)*, judgment No. 4164, 2 October 2001.

103. . For a more detailed discussion see A. Clapham, *supra* note 29.

104. . This concerns, in particular, the so-called indirect horizontal effect, whereby a court is bound by human rights norms when adjudicating private disputes. See A. Drzemczewski, *European Human Rights Convention in Domestic Law*, Clarendon Press, Oxford, 1983, pp. 200-201. For further details on *Drittwirkung* ("third party effect") consult: Rolf Sack in Staudinger, BGB, new edition 2003, Rn. 39-41, paragraph 134; BGB Münchener Handbuch zum Arbeitsrecht, 3rd edition 2009, Rn. 6-15, paragraph 12; Annette Guckelberger in JuS 2003, 1151, Section XI. As to the extension of the concept of *Drittwirkung* with respect to the EU and the Convention, see Annette Guckelberger in JuS 2003, 1151, Section XI.

105. . *Bankovic et al. v. Belgium and 16 other states* [Grand Chamber], Application No. 52207/99, decision of 12 December 2001, paragraph 71.

4.2. Claims under international human rights law

92. There are some precedents for making businesses subject to international human rights law. Indeed, the history of holding private persons accountable for human rights violations dates back to the Nuremberg trials where British, French and US military courts convicted a number of German industrialists for assorted war crimes including the use of slave labour and the plundering of private property. For example, in 1946, a British military court convicted the two top officials of a company as accessories to war crimes after they supplied Zyklon B to the Nazi gas chambers.¹⁰⁶

93. One of the most interesting manners in which business and human rights have found their way into domestic legal systems is through the Alien Tort Claims Act of 1789, in the United States of America.¹⁰⁷ This one sentence statute gives US federal courts the jurisdiction over “any civil action by an alien for a tort only committed in violation of the law of nations”.¹⁰⁸

94. In *Doe v. Unocal*,¹⁰⁹ it was held that companies could be sued for aiding and abetting human rights violations by a state. The case was brought by Burmese residents against a US firm, Unocal, and Total SA, a French company, for alleged human rights violations. This included being subjected to forced labour, forced displacements, murder and rape by Burmese military officials in the course of a pipeline construction project. Since this case was heard, a number of cases have been brought against large European multinationals for alleged complicity in human rights abuses including: United Kingdom-based Barclay’s Bank for doing business with the South African apartheid regime¹¹⁰ and Switzerland-based Nestlé for purchasing cocoa and providing services to cocoa farmers allegedly employing child labour.¹¹¹

95. Many cases have settled out of court, without admissions of liability being made by the alleged human rights violator, including in the Unocal case. Rather than creating a detailed body of case law on the issue of corporations and human rights, the real benefits in the Alien Tort Claims Act may lie in naming and shaming of corporations through publicity of a court case. Nevertheless, the act is important for the purposes of this report because cases are being brought against European-based companies in the US courts. It demonstrates that companies need information on human rights, responsibilities and the risks that they take by disregarding them when they operate extra-territorially.

96. There have also been some interesting judgments from domestic courts in Europe on international human rights law and businesses. For example, in van Anraat, the Dutch courts tried and convicted a Dutch citizen for complicity as an accessory to violations of the laws and customs of war. He had supplied chemicals to Saddam Hussein’s regime in Iraq in the 1980s, which could have been used in the production of mustard gas. The court related his supply of chemicals to the use of chemicals in both Iran and Iraq by the regime in the late 1980s. The defendant was sentenced to seventeen years’ imprisonment. This case demonstrates that international criminal law is no longer just directed at state agents, but also at businessmen and companies where it can be proved that they have been complicit in violations of international criminal law.¹¹²

4.3. A European “foreign tort claims act”?

97. European Union Law is composed of regulations, directives and decisions. Regulations issued by the European Commission or jointly by the European Union Council and the European Parliament have direct effect on the national laws of the 27 member states of the European Union. The Court of Justice of the European Union (previously known as the European Court of Justice) is the court of last instance in all matters concerning European Union Law.¹¹³

106. . Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 Law Reports of Trials of War. Crim. 93 (1947) (Brit. Mil. Ct., Hamburg, 1-8 March 1946) discussed in D. Cassel, “Corporate aiding and abetting of human rights violations: confusion in the courts”, *Northwestern Journal of International Human Rights*, Vol. 6, Issue 2 (2008), p. 304. See also F. Jessberger, “On the origins of individual criminal responsibility under international law for business activity: IG Farben on trial”, *Journal of International Criminal Justice*, Vol. 8., No. 3 (2010), pp. 783-802; V. Nerlich, “Core crimes and transnational business corporations”, pp. 895-908 and H. Vest, “Business leaders and the modes of individual criminal responsibility under international law”, pp. 851-72.

107. . Also known as the Alien Tort Statute.

108. . 28 United States Constitution Section, 135D.

109. . 963 F.Supp.880 (C.D.Cal.1997) (Unocal I).

110. . *Khulumani v. Barclay National Bank Limited*, 504 F.3d 254 (2d Cir. 2007).

111. . *Doe v. Nestle S.A.*, No. 05-CV-5133 (C.D.Cal. 14 July 2005).

112. . For a more detailed analysis of the case see A. Clapham, “Extending international criminal law beyond the individual to corporations and armed opposition groups”, *Journal of International Criminal Justice*, 6 (2008), pp. 912-14 and M. Kremnitzer, “A possible case for imposing criminal liability on corporations in international criminal law”, *Ibid.*, Vol. 8, No. 3 (2010), pp. 909-18.

98. It is possible to make claims against multinational corporations registered or domiciled within the European Union, for violations of human rights under European Union law. Under the European Council's Regulation 44/2001,¹¹⁴ concerning the allocation of jurisdiction in civil and commercial matters, known as the "Brussels I Regulation", courts of EU member states are competent to adjudicate civil proceedings against corporations based in the EU for acts which have taken place outside the European Union, even if the damage occurred outside the EU and the victim is not domiciled in the EU.¹¹⁵

99. The Brussels I Regulation is different to the Alien Tort Claims Act in that it allows cases to be brought against companies in all civil proceedings, whereas the Alien Tort Claims Act can only be relied on for an alleged violation of the law of nations (customary international law) upon which can be based a civil claim for damages.¹¹⁶

100. The regulation is an interesting development, particularly in the United Kingdom, which has traditionally been the jurisdiction where actions against companies in tort law have been brought.¹¹⁷ In the past cases have failed on the grounds of *forum non conveniens* principle.¹¹⁸ Nevertheless, this principle was rejected by the European Court of Justice in light of the Brussels I Regulation in 2005 in *Owusu v. N.B. Jackson*.¹¹⁹ Cases can be brought within the European Union, even where it may have traditionally been viewed as better if the case was heard where the damage occurred.

101. The Brussels I Regulation is an important piece of legislation as it could potentially pave the way for litigants from across the globe to bring cases against European Union-based companies for alleged human rights violations by way of civil law. Until now, few litigants have brought claims on these grounds. One reason may be lack of knowledge that this legal avenue exists. However, claimants often lack funding to bring cases against companies and there are few law firms that offer contingency funding for such cases.¹²⁰ A major problem is that violations may be committed by subsidiaries or suppliers of Europe-based parent corporations that are legally distinct entities. If the parent corporation is sued according to Brussels I Regulation, one would need to establish liability for a (human rights) violation by the subsidiary, which is very difficult to prove. Nevertheless, recently, a group of litigants from the Ivory Coast brought a case against the oil firm Trafigura in the United Kingdom.¹²¹ The High Court allowed the case to proceed in November 2006 based on the ECJ decision in *Owusu*. Although this case eventually settled out of court, the High Court's decision to hear the case demonstrates how useful the Regulations may become to litigants seeking redress for human rights abuses committed by companies based in the European Union operating extraterritorially. Furthermore, the case also shows that the threat of litigation ensures that large corporations will choose to settle rather than attracting publicity by going to court. This suggests that there is a need for both judicial and non-judicial mechanisms to resolve cases.

4.4. Conclusion: businesses have responsibilities

102. These examples are a few, of the small number of cases, where the courts have decided that businesses and private individuals do have responsibilities to respect human rights. They demonstrate that even in the absence of a detailed international consensus on what responsibilities businesses have, some courts will be willing to impose them on corporations in any event. Case law is running ahead of current regulatory frameworks, which leaves businesses open to legal challenges.

113. . For more information see the European Commission's website: http://ec.europa.eu/community_law/introduction/treaty_en.htm

114. . Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 22 December 2000, 2001 O.J. (L 12) 1-23 (EC).

115. . See L. Wouters and L. Chanut, *supra* note 91, pp. 295-99 for full discussion.

116. . *Ibid.*, p. 296.

117. . *Ibid.*, p. 296.

118. . M. Badge, *Transboundary Accountability for Transnational Corporations: Using Private Civil Claims*, Chatham House, London, 2006, p. 32.

119. . Case C-281/02, *Andrew Owusu v. N.B. Jackson*, 2005 E.C. R. OJ C 106.

120. . *Ibid.*

121. . The material facts of this case were discussed in paragraph 11 above.

5. A European framework for businesses and human rights

103. There is a growing awareness of the impact that businesses can have on human rights. However, at the same time existing frameworks do not provide adequate guidance to businesses on what steps they can take to ensure that they do not become complicit in human rights abuses. Nor do they provide adequate remedies to victims where abuses do occur.

104. Some action is being taken: the OECD has launched an update of its Guidelines for Multinational Enterprises and the United Nations Special Representative on business and human rights is due to issue further guidance in 2011. Nevertheless, it seems unlikely that there will be an international agreement on the responsibilities and obligations of business with respect to human rights in the near future. We are therefore left with a number of frameworks that are simply not fit to regulate the obligations and responsibilities of businesses in the 21st century.

105. In the absence of an international agreement, there are calls from within Europe for governments to begin to unilaterally bring in measures on business and human rights. Recently, an influential Parliamentary Committee in the United Kingdom called for the government to adopt a strategy on business and human rights¹²² and the French *Commission nationale consultative des droits de l'homme* has made similar proposals to the French Government.¹²³ In a study commissioned by the European Parliament, the European Commission is urged to change its policies with regards to business and human rights and to foster accountability for corporate human rights conduct, including ending the all-voluntary approach to corporate social responsibility.¹²⁴

106. At the same time, businesses rightly want clarity on what their obligations and responsibilities are. Google, for example, has recently called for a discussion about international privacy standards, which would work to protect everyone's privacy on the Internet.¹²⁵ Requests of this sort from businesses may become more frequent as more cases are filed against corporations both in Europe and the United States for alleged human rights abuses.

5.1. A role for the Council of Europe?

107. The Council of Europe's current human rights and legal standards cover a wide range of issues of direct relevance to business activities (property rights, social rights, equality rights, bioethics, child protection, data protection, anti-corruption measures and anti-laundering measures) and are recognised as the most advanced at the international level. The Council of Europe has long-standing experience in monitoring and implementing these standards across Europe through its various monitoring bodies that were established to ensure that states complied with the commitments they made when contracting to the organisation's treaties.

108. Some of the Council of Europe legal standards are of relevance for certain branches of industry. For example, the Council of Europe's conventions on bioethics, like the so-called "Oviedo Convention",¹²⁶ which reaffirms the states parties' commitment to safeguard human dignity and the fundamental rights and freedoms of human beings with regard to biomedical research,¹²⁷ may directly concern the activities of pharmaceutical companies. One of its protocols concerns more specifically biomedical research,¹²⁸ including pharmaceutical research. It covers the full range of biomedical research activities involving interventions on human beings and sets up rules concerning this kind of activities. It also stipulates that states parties should provide for appropriate sanctions to be applied in the event of infringement of its provisions.¹²⁹ Another example might be that of the European Social Charter¹³⁰ and the revised European Social Charter.¹³¹ The European Social Charter and its revised version guarantee a series of rights concerning conditions of employment and such rights are obviously of direct relevance to business activities: prohibition of forced labour, fair, safe and healthy

122. . Joint Committee on Human Rights, *supra* note 32, Conclusions and recommendations, pp. 93-109.

123. . CNCDH, *supra* note 57.

124. . European Parliament, DG External Policies, *Business and Human Rights in EU External Relations: Making the EU a Leader at Home and Internationally*, April 2009.

125. . Google Blogspot, "Call for global privacy standards", 14 September 2007; <http://googlepublicpolicy.blogspot.com/2007/09/call-for-global-privacy-standards.html>.

126. . Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, adopted in Oviedo on 4 April 1997, ETS No. 164.

127. . Preamble of this convention.

128. . Additional Protocol to the Convention on Human Rights and Biomedicine concerning Biomedical Research, opened for signature on 25 January 2005. CETS No. 195.

129. . Article 32.

130. . Opened for signature in Turin on 18 October 1961, ETS No.35.

131. . Opened for signature on 3 May 1996, ETS No.163.

working conditions, protection from sexual and psychological harassment, freedom to form trade unions, non-discrimination and others. Although the European Social Charter grants to the states parties some flexibility in implementing its provisions,¹³² this is still a very important instrument of protecting social and economic rights at the European level. Its supervisory mechanism, based on a governmental reporting system, allows a regular, systematic, comprehensive review of all aspects of national legislation and practice in respect of the provisions of the Charter accepted by a state.¹³³ Moreover, the system of collective complaints implies the participation of civil society actors, such as NGOs¹³⁴ and trade unions.

109. The remainder of this report explores how the Council of Europe's standards could be incorporated into business practices and what role it may be able to take in relation to human rights and business.

5.1.1. A Committee of Ministers recommendation?

110. The Committee of Ministers of the Council of Europe could address a recommendation on human rights and business to the governments of member states. Using the United Nations Special Representative's "Protect, Respect and Remedy" framework,¹³⁵ the following are possible areas that such a recommendation could address: strengthening the state's duty to protect, promoting measures aimed at enforcing corporate responsibility to respect human rights and victims' access to remedies.

111. Concerning the strengthening of the state's duty to protect, there are many realms in which states can have a direct impact upon businesses without having to regulate companies directly, in particular:

Public procurement

Public authorities purchase goods and services from the private sector. This gives public authorities a great deal of power to influence the conduct of businesses in the supply chain. States could commit to deal only with companies with good human rights records. This could be a strong tool for imposing respect for human rights on companies that bid for public procurement contracts.

Ethical investment

Similarly, public pensions and other insurance schemes invest large amounts of funds. In some states this financial power has increased recently due to the partial and possibly temporary nationalisation of banks during the recent financial crisis. Again, states could commit to only investing in companies that adopt ethical and socially responsible policies and divest of those that do not. The Norwegian Government Global Pension Fund could be used as a model.¹³⁶

Export credit guarantee agencies

Many governments provide insurance to companies that are involved in providing a service in another state, in the case of non-payment. They also provide guarantees for bank loans for such projects.¹³⁷ Governments could withhold these services from companies known to have been involved in human rights abuses abroad.

Strengthening the role of national human rights institutions

Many states now have national human rights institutions that provide guidance on human rights to governmental and other bodies. The United Nations Special Representative recommended that the national human rights institutions consider how they can work more to address alleged human rights violations by companies.¹³⁸ The Danish Institute for Human Rights has been held up as an example of good practice in this field¹³⁹ and could be used as a basis for provisions on national human rights institutions.

132. . See Part III of the revised European Social Charter.

133. . Foreword by P.-H. Imbert, in L. Samuel, *Fundamental Social Rights: Case Law of the European Social Charter* (Council of Europe Publishing, Strasbourg, 1997), p. 11.

134. . See, for instance, complaint No. 30/2005, *Marangopoulos Foundation for Human Rights v. Greece and the European Committee for Social Rights* decision of 6 December 2006, concerning security and safety of persons working in lignite mines, which may be found in the European Social Charter data base, available at: www.echr.coe.int/echr/en/hudoc/.

135. . See paragraphs 52-54 above.

136. . See paragraph 79 above.

137. . See the websites of the United Kingdom's Export Credits Guarantee Department (www.ecgd.gov.uk) and the Danish Export Credit Agency, www.dk-export.dk/media/ekf_engelsk.pdf.

138. . Ruggie, J, *supra* note 63, paragraph 103.

139. . See paragraph 78 above. Also, the work of the Scottish Human Rights Commission focuses explicitly on business and human rights; see www.scottishhumanrights.com/ourwork/business.

112. A recommendation could also encourage member states to impose direct human rights obligations on businesses. For instance, it could require member states to criminalise serious corporate violations of human rights whether they are committed in a Council of Europe member state or elsewhere.¹⁴⁰ There is some precedent for doing this: in the United Kingdom, the Corporate Manslaughter Act 2007¹⁴¹ provides that organisations can be found guilty of corporate manslaughter as a result of serious management failures resulting in a gross breach of a duty of care. It is the corporation rather than an individual that is prosecuted under this act. The act therefore seeks to protect the right to life of individuals enshrined in Article 2 of the Convention.

113. A recommendation could also address the issue of legal remedies for claimants/complainants in human rights cases against businesses. Currently, states are required to take appropriate steps to investigate, punish and redress corporate-related abuse within their territory or jurisdiction. States could allow individuals to bring cases directly against companies for alleged human rights abuses extending beyond the possibility of civil litigation. This could take both a judicial and non-judicial form.¹⁴² Non-judicial mechanisms may be as important as judicial mechanisms because, as has been shown in the *Trafigura* case, companies are often willing to settle out of court, rather than attracting bad publicity. Moreover, providing alternative dispute resolution mechanisms outside the courtroom could allow cases to be dealt with more quickly.

5.1.2. A convention on human rights and business?

114. The strongest possible course of action for the Council of Europe would be to adopt a new convention specifically on human rights and business. The advantage of such a convention, at least in theory, would be that it could potentially lay down a set of regulations that businesses would have to adhere to that is consistent across all 47 member states of the Council of Europe. A monitoring body could be established in the same way as for other treaties. It could also serve as a starting point for any international text that may be negotiated in the future.

115. Such a convention could include a whole range of issues, such as some or all the issues discussed above, and take many forms.

116. A convention at its strongest could impose direct human rights obligations on businesses that would be actionable in the same way as they are under the European Convention on Human Rights against states. This could be controversial as traditionally, under international law, it has been the duty of states to uphold internationally recognised human rights within their jurisdiction. As the courts increasingly find companies complicit in human rights abuses, it may be useful for businesses themselves to have their responsibilities laid down in a legally binding instrument for the sake of clarity and consistency. However, there may be significant resistance by some governments to impose direct regulations on businesses in the realm of human rights.¹⁴³

117. A convention could also expand on the provisions laid out in the OECD Guidelines on Multinational Enterprises, the ILO Tripartite Declaration and the Global Compact and state explicitly which rights should be respected. Further guidance would also need to be issued on how companies can ensure that these rights are respected. This could be done by using such concepts as “sphere of influence”¹⁴⁴ and “due diligence”. Extra assistance would be needed for small and medium-sized enterprises if obligations were imposed as they are not as likely to be able to find out information about companies that they work with as larger multinational corporations.

118. A further area for consideration is whether states should be held responsible for the activities of a multinational corporation that is incorporated within the jurisdiction, but where there has been an allegation of a human rights violation elsewhere. Currently, it appears that under international law states are not required to regulate the extraterritorial activities of multinational corporations or other companies. On the other hand, there is nothing to stop them from regulating this sort of conduct either.¹⁴⁵ As discussed above, claimants can now bring a civil claim within the European Union for a civil wrong that occurred anywhere in the world against

140. . This measure was suggested by Professor Olivier de Schutter in relation to the European Union; see Olivier De Schutter, “The accountability of multinationals for human rights violations in European law”, in P. Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, Oxford, 2005, pp. 282-95. It should be added that a part of domestic and international criminal law relevant to human rights protection already applies to corporate violations.

141. . The act came into effect on 6 April 2008.

142. . This has been recommended by Professor Ruggie, *supra* note 63, pp. 22-25.

143. . The United Kingdom Government, in its response to the Joint Committee on Human Rights report into business and human rights, stated it would not support such measures. Any of our Business? Human Rights and the UK Private Sector: Government Response to the Committee’s First Report of Session 2009-10, 8 March 2010, HL Paper 66.

144. . See paragraph 45 above.

a European Union-based multinational corporation. The question is: if ever the idea of a Council of Europe convention were pursued, should there be a special provision within such a convention which would enable claimants to bring cases against any European multinational corporation, regardless of where the violation occurred?

119. If a convention were to be drafted, there would need to be detailed discussions on access to remedies for claimants/complainants in human rights cases against businesses.¹⁴⁶

120. Other issues that would need to be explored are: how cases would be funded; whether a convention monitoring body would be able to hear complaints against states or businesses; and who would be entitled to make a complaint under a convention (namely NGOs, individuals, trade unions or other companies).

121. As regards the choice for future Council of Europe action in the field of human rights and business between the form of a recommendation of the Committee of Ministers and a new convention, the following considerations speak for the more pragmatic solution of a recommendation. Recommendations are not legally binding but they do represent a common position of all member states, especially as such recommendations are adopted unanimously. There are many advantages to using this soft law instrument, rather than that of negotiating a convention. First, due to their non-legally binding status, they can be agreed upon more easily than a convention. Secondly, recommendations are a quicker form of creating an international arrangement as they are applicable upon adoption, whereas conventions only come into effect once states have ratified them. Thirdly, it is relatively easy to modify recommendations once they have been adopted as circumstances and practices change. Finally, states are unlikely to agree to a recommendation if it is contrary to domestic policy, which means that the document is more likely to be acted on despite the fact that it is not legally binding.¹⁴⁷ What is especially needed is a clarification of (a) what states expect from business in terms of human rights protection (abroad) and (b) under what conditions states will be liable for human rights violations committed by businesses (abroad).

5.1.3. Guidelines

122. In the absence of an international agreement on human rights and business, the United Nations Special Representative has suggested that regional human rights treaty bodies can play an important role in making recommendations to states on implementing their human rights obligations vis-à-vis the activities of businesses.¹⁴⁸

123. If neither a convention nor a recommendation is seen as an appropriate way forward, the Council of Europe is also free to issue detailed guidelines on human rights, business and the topics discussed in the previous section. Businesses could sign up to these guidelines, which could take the form of a voluntary code of conduct. Member states could also decide whether or not to implement measures prescribed in such guidelines according to their own political priorities.

124. In any case, even after a recommendation or a convention were to be adopted, more detailed guidelines for governments and companies could be issued in addition, on specific measures that states and businesses can take to ensure that rights are protected and respected. Such guidelines could be adapted over time to incorporate responses to new human rights challenges.

5.1.4. Training

125. The Council of Europe could also consider providing training to small and medium-sized enterprises and multinational corporations to raise awareness of the Council of Europe's human rights standards. It could work with business organisations, trade unions and NGOs to try to devise a toolkit on mainstreaming human rights best practices into every aspect of a business and how to conduct human rights impact assessments. It could also provide training to national human rights institutions so that they could disseminate the information to companies within their states.

145. . Ruggie J, *supra* note 63, paragraph 15. Ruggie rightly qualifies this claim: the conditions for assertions of extraterritorial jurisdiction under public or private international law must first be met!

146. . See paragraph 113 above.

147. . See de Vel G and Markert T, "Importance and weakness of the Council of Europe conventions and the recommendations addressed by the Committee of Ministers to member states", in B. Haller, H.C. Krüger and H. Petzold (eds), *Law in Greater Europe: Towards a Common Legal Area*, Kluwer, The Hague, 2000, pp. 345-53.

148. . The Ruggie Report, *supra* note 5, paragraph 43.

5.1.5. A Council of Europe label

126. One of the biggest flaws of a voluntary approach to CSR is that consumers of goods and services do not have access to consistent and independent information on companies' human rights records. The Council of Europe could either consider establishing its own labelling mechanism or sponsor someone else to do this using Council of Europe human rights standards. This could be akin to the domestic labelling system that has been set up in Belgium.¹⁴⁹ If the Council of Europe could provide unified, clear standards that are well promoted and recognisable, consumers would be able to make informed choices. A European-wide label would also have real tangible effects on the reputations of businesses and would encourage them to adopt best practices in the field of human rights.

5.1.6. Leading by example

127. If the Council of Europe is to advocate steps to ensure that businesses respect human rights, it must ensure that its own house is in order. It could publish and make visible its own CSR policy centred on human rights. This could include information on its sphere of influence and how it ensures that its suppliers respect human rights. More detailed information about the Council of Europe's position on this subject should be sought.

6. Conclusion

128. There are current ongoing discussions on human rights and business at the national, European and international level. Existing frameworks do not appear to adequately protect individuals from potential human rights abuses by companies. Nevertheless, it seems unlikely that an international agreement on business and human rights will be reached in the near future.

129. The Council of Europe, with its vast institutional knowledge and experience in the field of human rights, may be in the best position to begin developing a new framework or guidelines for businesses on human rights. Whatever role the Council of Europe decides to take, it should only be done if it adds value to existing frameworks. However, in addressing these issues, the Council of Europe should also make use of existing international soft law instruments as well as voluntary corporate social responsibility initiatives and toolkits. In particular, the Council of Europe could work profitably with the OECD, which has many contacts in this field, through its National Contact Points.

149. . See paragraph 75 above.