

Appendix: Civil Society Recommendations

Addressing the lack of access to remedy for victims of corporate human rights abuses

Today victims of human rights **abuses** involving European companies face multiple obstacles to access judicial remedies. These include several obstacles on admissibility; the often prohibitive costs associated with pursuing remedies through the courts; restrictive procedural rules related to the disclosure of evidence in civil litigation, the absence of clear liability standards for corporate involvement in human rights abuses and the lack of clarity regarding the application of EU rules of private international law in transnational civil litigation. While some barriers are specific to certain Member States (ie. they relate to the specific features of a given Member State judicial or legal system), some are common to many or all Member States (eg. when they arise from EU legislation such as "Rome II"). Often combined, these obstacles make it virtually impossible for victims to access justice.

The EU has committed to implementing the UNGPs in their entirety. However, despite access to remedy being a fundamental pillar and core principle of the UNGF's, the EU has so far given very little attention to this issue. **The Council of Europe Recommendation on Human Rights and Business** adopted on 2nd¹ March 2016¹ to facilitate the implementation of the UNGPs places particular emphasis on the need to remove barriers to remedy, including in particular barriers to accessing Member States' courts. This instrument provides a number of concrete recommendations which should be placed at the heart of the Council conclusions.

As a matter of priority, the Council conclusions should **address obstacles to access remedy and:**

- *Invite the European Commission to undertake a thorough examination, in consultation with civil society of existing barriers to justice in cases brought before Member State courts for alleged abuses to human rights committed by EU enterprises abroad. This assessment should be geared towards identifying and promoting the adoption of effective measures that remove or alleviate these barriers.*
- *Invite the EU and Member States to:*
 - *Tackle financial and procedural burdens in civil litigation for alleged corporate human rights abuses, including setting minimum common standards to allow associations to bring claims on behalf of alleged victims and ensure collective redress including for non-EU claimants for abuses committed outside of the EU.*

¹ Council of Europe, Recommendation CM/Rec (2016)3 of the Committee of Ministers to Member States on "human rights and business", 2 March 2016.

- *Improve access to evidence through better evidence disclosure procedures and by reversing the burden of proof in certain cases, so that it is down to the most well- resourced party in the best position to do so to prove that it took all necessary due diligence steps to prevent abuses throughout its global operations.*
- *Establish clear corporate liability standards in line with the scope of the corporate responsibility to respect human rights of the UNGPs.*
- *Address legal, procedural and practical obstacles that prevent prosecution authorities from investigating and prosecuting EU companies involved in crimes linked to human rights abuses.*

Embedding human rights due diligence in law

Over the last few years a number of legislative initiatives at European and national levels have paved the way towards embedding the corporate responsibility to respect human rights into law. In their business operations and global value chains². It is essential that the EU builds on these legal developments towards more responsible global value chains. Human rights due diligence (HRDD) should be mandatory for all companies.

The **Council of Europe Recommendation on Human Rights and Business** includes a number of strong recommendations in relation to legislative measures to ensure companies respect human rights and to require HRDD. These should be implemented as matter of urgency throughout the EU and be expressly referenced in the Council Conclusions.

The Council Conclusions should emphasise the need to ensure EU **companies respect human rights throughout their global operations**, and:

- *Urge the EU and the Member States to take legal measures to make sure that companies respect human rights throughout their operations and in relation to their business relationships including outside the EU. Mandatory HRDD should follow the steps required in the UNGPs (identify, prevent/mitigate, remedy and account for). It should furthermore be guided by certain overarching principles related to the proactive identification of risks to human rights, the elaboration of rigorous and demonstrable action plans to prevent or mitigate these risks, adequate response to known abuses, and transparency. Consultation with relevant actors should be ensured at all stages as well as disclosure of all relevant project or investment-specific information to affected stakeholders.*
- *Call on the EU and Member States to prioritise for immediate action the establishment of mandatory HRDD for:*

² French legislative proposal on Duty of Vigilance, UK Modern Slavery Act, and the Swiss popular initiative for mandatory human rights due diligence; EU Non-Financial Reporting Directive, EU legislative proposal on Conflict Minerals.

- business enterprises which are owned or controlled by the State, receive substantial support and services from State agencies or European institutions (such as export credit agencies, official investment insurance and guarantee agencies aid and development agencies and European financial institutions) businesses that provide goods or services to Member States or EU institutions (through public procurement contracts), and enterprises which enjoy other commercial benefits and advantages (i.e. trade missions, diplomatic services).
 - business enterprises whose activities pose particularly high risks to human rights including in third countries and / or sourcing from high risk or conflict-affected areas.
 - business enterprises responsible for the delivery of privatised services that may impact upon the enjoyment of human rights.
- *Support, within in the current legislative process on conflict mineral, mandatory human rights due diligence for upstream and downstream operators consistent with the OECD Due Diligence Guidance.*

Enhancing the global legal framework and ensuring policy coherence between the trade and the business and human rights agendas

Efforts to implement the UNGPs should be accompanied by positive engagement in further normative developments in the context of the ILO, the OECD and the UN, including in particular the process initiated by the Human Rights Council to elaborate a binding instrument on business and human rights. Regarding the latter, UNGPs implementation and participation in negotiations on a binding instrument on business and human rights should be regarded as complementary as both are essential pathways to achieving greater protection against business-related human rights abuses across the globe.

The Council conclusions should recognize the need **to enhance the international normative framework** and encourage Member States' positive and constructive participation in multilateral processes alongside domestic action, by:

- *Including a commitment to engage in good faith in all normative development processes related to business and human rights.* In particular, governments should participate in the UN Inter-Governmental Working Group developing a legally binding instrument on business and human rights, and support its efforts to bridge gaps in the global protection of human rights.

The Council conclusions should also address EU **trade and investment policies** as far as they are relevant for the business and human rights agenda. EU on-going negotiations of trade and investment agreements include a call to parties to encourage the implementation of the UNGPs. However, these agreements fail to fully address their potential human rights implications, thus adding further challenges to the gaps in protection identified so far. The Council Conclusions should:

- *recall the necessity to consider the potential human rights impacts of such agreements and to take the appropriate preventive measures, including through the incorporation of human rights clauses, as required in the **Council of Europe Recommendation on Human Rights and Business**.*
- *invite EU and Member States to continue to develop a robust and methodologically sound approach to the analysis of human rights impacts of trade and investment agreements, in line with the 2012 EU strategic framework on human rights and democracy and its 2015 action plan.*
- *recall the need to ensure that those agreements are consistent with international human rights obligations and responsibilities of all stakeholders (the EU, Member States and business enterprises), and enhance in those trade agreements the human rights monitoring, enforcement and grievance mechanisms in line with the aforementioned documents and the UNGPs.*

Developing robust EU and Member States Action Plans on Business and Human Rights

Action plans for the implementation of the UNGPs that are evidence-based and developed through a transparent and participatory process have the potential to catalyse much needed political discussion across different government bodies and deliver a coherent, integrated and accountable program of action to improve human rights protection in the context of business activity.

The Council conclusions should emphasise the need for a **European action plan** as well as coherent and robust **National Action Plans** and:

- *Include a renewed commitment from Member States and a call on the European Commission and the External Action Service to implement the UNGPs in all areas falling under their respective competence;*
- *Invite Member States to develop or review National Action Plans in line with the guidance provided by the UN Working Group on Business and Human Rights. In particular, Action Plans should build on baseline assessments that identify gaps in laws, policies and practice. The plans should be developed through meaningful stakeholder participation and feedback. They should identify priorities, define specific actions and timelines, allocate responsibilities between government bodies or EU institutions and ensure policy coherence. They should establish a mechanism to monitor the implementation of these plans and assess their effectiveness, with the participation of stakeholders.*

Committing to regularly assessing and addressing remaining gaps

The Council conclusions should:

- *include a commitment to report regularly, at least every two years, on the steps taken to ensure effective protection of human rights in the context of business activity and results achieved, the remaining gaps in protection and the recommended future actions to address these gaps.*
- *invite the Commission and Member States to report annually on their efforts, actions, achievements and obstacles in pursuing the implementation of all three pillars of the UNGPs at national, regional and global level.*