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în şedinţa Biroului permanent al Camerei Deputaţilor
din data de 14.06.2010
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Parlamentul României
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ROMANIA

PARLAMENTUL ROMÂNIEI
CAMERA DEPUTAŢILOR

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Biroului Permanent al Camerei Deputaţilor

Pentru informare:

În data de 31.05.2010, am participat, în prima parte a zilei, la şedinţa Comisiei Juridice a APCE şi, în cea de-a doua parte a zilei, la şedinţa Sub-Comisiei Juridice pentru selectarea judecătorilor CEDO.

Cel mai important punct din ordinea de zi a Comisiei Juridice a fost Proiectul de rezoluţie (AP/jur(2010)22), intitulat "*Remediile legale pentru încălcările drepturilor omului în regiunea Caucazului de Nord*" (raportor Dick Marty, Elveţia). Fiind redactat în termeni neutri (vezi chiar titlul – care nu pomeneşte că este vorba despre o regiune a Federaţiei Ruse!), delegaţia rusă a propus un şir de amendamente, multe dintre ele fiind acceptate cu bunăvoinţă de către raportor şi majoritatea membrilor Comisiei.

O mare dispută a fost provocată de dispoziţiile Articolului 9.5 al Proiectului de rezoluţie, care învinuia autorităţile Federaţiei Ruse pentru practica "*lichidării fizice a suspecţilor, în locul arestării lor*". Amendamentul propus de mine, care critica Federaţia Rusă pentru "*lichidarea fizică a suspecţilor, care nu au opus rezistentă armată...*", a fost acceptat fără rezerve atât de către raportor şi membrii Comisiei, cât şi de către delegaţia Federaţiei Ruse. De menţionat că amendamentul meu dezvoltă critica la adresa Federaţiei Ruse, această subtilitate nefiind sesizată de delegaţia rusă.

Cu toate amendamentele de "îndulcire" a limbajului, Proiectul de rezoluţie este unul foarte critic la adresa Federaţiei Ruse.

O altă chestiune interesantă discutată, cu participarea experţilor invitaţi, a fost tema intitulată "*Drepturile Omului şi Afacerile*" ("*Human Rights and Business*"). Având în vedere că la acest punct nu s-a adoptat nicio decizie (date fiind opiniile divergente ale membrilor Comisiei), Vă alătur, pentru informare, opiniile scrise ale experţilor invitaţi.â

Şedinţa Sub-Comisiei pentru selectarea judecătorilor CEDO este una strict confidenţială. Vă informez că Sub-Comisia a acceptat listele de candidaţi prezentate de Germania şi Malta şi a decis să recomande APCE alegerea judecătorilor german şi maltez în baza listelor propuse. Numele candidaţilor preferaţi de Sub-Comisie vor fi făcute publice în ziua alegerilor din cadrul APCE.

Cu respect,
Deputat Tudor Panţîru.

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AS/Jur (2010) 20
25 May 2010
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Committee on Legal Affairs and Human Rights

Human rights and business

Introductory memorandum

Rapporteur: Mr Holger Haibach, Germany, Group of the European People's Party

Contents

I. Introduction

1. Due to globalisation, since the 1960s and 1970s businesses have grown in power and influence. Indeed, many of the largest multinational corporations (MNCs) have revenues greater than the gross domestic product (GDP) of some states. A study conducted in 2000 found that MNCs accounted for 29 of the world's largest 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.[1]

2. 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.[2]

3. Despite this potential to have a positive impact, in recent years businesses, and MNCs 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.

4. Traditionally, the duty to protect human rights has rested with the state.[3] 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.[4]

5. 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 introductory memorandum 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 cooperation between its member states on business practices and human rights.

II. Impact of business on human rights

i. Outside the European space

6. Businesses have the potential to impact upon all internationally recognised human rights,[5] anywhere on the planet. Over recent years, non-governmental organisations (NGOs) and the media have highlighted many cases where subsidiaries of European based MNCs 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:

[1] UNCTAD, Are Transnationals Bigger than Countries?, 12 August 2002, TAD/INF/PR/47.
[2] 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".
[3] 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.*"
[4] John Ruggie, Business and Human Rights: The Evolving International Agenda, Kennedy School of Government Faculty Paper Working Series, p. 8.
[5] The Ruggie Report, *supra* note 2, at paragraph 6. See also table below.

7. 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* report, with a criminal tribunal in Argentina. The case is against Mercedes-Benz Argentina S.A. a subsidiary of the German based Mercedes Benz. The European Centre for Constitutional and Human Rights alleges that the company was involved with the kidnapping and forced disappearances of unionised members of its workforce during the military dictatorship, which lasted between 1976 and 1983.[6]

8. A group of claimants from the Ivory Coast recently brought a claim in the UK against the oil trader Trafigura. The UK based company chartered a ship, the Proba Koala in 2006, which allegedly took toxic waste to the Ivorian capital, Abidjan. The waste was subsequently dumped in various locations across the city. 100,000 people sought medical treatment and 15 deaths were reported,[7] representing a serious violation of the right to life.[8] Ultimately, Trafigura opted to settle the case out-of-court (without making any admissions on liability) and agreed to pay £1,000 to each of the 30,000 claimants.[9]

9. Royal/Dutch Shell is an MNC which has its headquarters in the Netherlands and its registered offices in the UK. In June 2009, it agreed to settle a case for $15.5 million which had been brought against it in the United States[10] for alleged complicity in murder, torture and other human rights abuses in the 1990s in Nigeria.[11] 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.[12]

Business impact on human rights[13]

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 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

[6] See www.ecchr.eu/mercedes-benz-argentinia.301.html for more information.
[7] Amnesty International UK, *Trafigura, Ivory Coast: toxic waste dump victims pin hopes on 19 November appeals*, 12 November 2009.
[8] The right to life is enumerated by Article 2 of the ECHR.
[9] The Guardian, *Trafigura offers £1,000 each to toxic dumping victims*, 18 September 2009.
[10] 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 86-88 below.
[11] BBC News, *Shell Settles Nigeria Death Cases*, 9 June 2009.
[12] For a more detailed account of the allegations see Human Rights Watch (1999) *The price of oil: corporate responsibility and Human Rights in Nigeria's Oil Producing Communities* and C. Kaeb (2008) 'Emerging issues of human rights responsibility in the extractative and manufacturing industries: patterns and liability risks' *Northwestern Journal of Human Rights* Vol. 6, Issue 2, pp. 327-353.
[13] The Ruggie Report *supra* note 2, 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 Organisation's Conventions.

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

10. 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 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 (ECHR) within Europe.

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

11. Article 8 of the ECHR enshrines the right to respect 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 debate[14] on how much personal information should Internet service providers and companies operating search engines, such as Google, Microsoft and Yahoo 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 people be protected?

12. Other forms of modern communications technologies cause similar problems. In the UK there have been allegations of journalists from newspapers tapping the phones of celebrities including a footballer's wife[15] and members of staff working for the Royal Family.[16] Such activity is, in fact, illegal, and one private investigator that provided information to a daily newspaper was jailed in 2007.[17] However, these 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.

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

[15] 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.

[16] 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.

[17] Ibid.

13. 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 Greece[18] 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.[19]

14. 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 ECHR, 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.

iii. Gagging freedom of expression

15. Article 10 of the ECHR 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 McDonalds issued a writ for libel against two members of London Greenpeace for distributing leaflets entitled "What's wrong with McDonalds?" in the 1980s.[20] The defendants were refused legal aid and therefore represented themselves. The UK's Court of Appeal found the defendant's guilty and ordered the defendants to pay £76,000 in damages between them to McDonalds. The defendants subsequently brought a case against the UK to the European Court of Human Rights[21] 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 MNC and subsequently being found to have committed libel against the company and obliged to pay it disproportionate damages.

16. More recently, following an out-of-court settlement by Trafigura for the victims of the toxic waste dumping in the Ivory Coast,[22] *the Guardian*, a UK daily newspaper, was threatened with legal action by the Trafigura's lawyers if it printed a Parliamentary Question on the subject.[23] 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 it with delay, and the lawyers sought no further action.

17. Both cases highlight that there are legal mechanisms available to companies to limit freedom of expression. Whilst 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.

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[18] BBC News Online, *Greece puts brakes on Street View*, 12 May 2009, the Guardian.co.uk *Google Street View banned from Greece*, 12 May 2009.

[19] BBC News Online, *Switzerland takes Google to Court*, 13 November 2009.

[20] For a more detailed account of this case see Fura-Sandstom, E (2007) 'Business and Human Rights – who cares?' in Caflisch, L ed. (2007) *Human Rights: Strasbourg Views* (Kehl), pp 159-176.

[21] *Steel and Morris v. United Kingdom,* Application No. 68416/01, 15 February 2005. For all judgments of the European Court of Human Rights, see at HUDOC database: http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/.

[22] Discussed in paragraph 8 above.

[23] The Guardian, *Trafigura gag attempts unites house in protest*, 13 October 2009.

iv. Preventing pollution and environmental damage

18. 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.[24] For example, in *Taşkin and others v. Turkey*, a 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 local 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.

v. The public/private Law divide

19. 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'.[25]An example of this is the increasing use of private security companies to run detention centres and prisons. In the UK, such companies are used to run immigration detention centres and provide escort services for removal and deportations of immigrants where the ECHR Article 5 right to liberty and security of person comes into play.[26] Where cases have been brought against the Secretary of State for Home Affairs under the Human Rights Act 1998,[27] the government department has argued that they are not responsible for the actions of private companies.[28] 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 UK that the courts have been grappling with[29] 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.

20. This brings the discussion full circle and back to the international level. The increased use of controversial private military and security companies (PMSC) 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 women for the purpose of sexual and domestic slavery. Ultimately, no prosecutions were made, despite this being a serious and obvious breach of ECHR Article 4, which prohibits slavery and forced labour.[30]

21. Similarly, the use of PMSCs 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.[31] Concerns about the human rights implications of using PMSCs has led the Assembly to call for the adoption of a Convention dealing precisely with this issue.[32]

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[24] 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 Chope opinion, re. Protocol to ECHR).
[25] A. Clapham (2007) *Human Rights Obligations of Non-State Actors* (Oxford University Press: Oxford), p. 8.
[26] Article 5 ECHR.
[27] The Human Rights Act 1998 gives further effect to the rights and freedoms in the UK which have been guaranteed under the ECHR.
[28] 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.
[29] *YL v. Birmingham City Council* [2007] UKHL 27; Health and Social Care Act 2008.
[30] Human Rights Watch and CHR&GJ (2008), *On the margins of profit: rights and risks in the global economy and Human Rights Watch* Vol. 20, No.3 (G) and HRW (2002), *Hopes betrayed: trafficking of women and girls to Bosnia and Herzegovina for forced prostitution,* Vol. 14, No 9 (D).
[31] Article 3 ECHR prohibits torture inhuman or degrading treatment or punishment.
[32] See Recommendation 1858 (2009), Private military and security firms and erosion of the state monopoly on the use of force, 29 January 2009.

22. The above examples illustrate that businesses can have an adverse affect 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 MNCs and TNCs 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

III. Existing international frameworks and corporate social responsibility

23. Since the 1970s, there have been a number of initiatives that have attempted to define businesses' responsibilities towards society, including human rights. Existing international frameworks are essentially soft law instruments and are centred principally round voluntary codes of conduct, which have emphasised the benefits of corporate social responsibility (CSR) over rigorous legal accountability.

24. 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.'[33] CSR can encompass much more than just respect for human rights and extends to issues such as corporate philanthropy and investment into the community.

25. 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.[34] Other benefits might include an increased sense of loyalty and pride in the company's workforce.[35] 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.

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

i. The OECD Guidelines for Multinational Enterprises

27. The Organisation for Economic Cooperation and Development (OECD) adopted the Guidelines for Multinational Enterprises in 1976. This was in response to concerns about the impacts of MNCs, based in Europe and North America, establishing manufacturing subsidiaries in developing countries to take advantage of cheaper labour and raw materials.[36] The Guidelines are the only comprehensive, multilaterally-endorsed code of conduct for multinational enterprises.

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

[34] European Union (2009), *Corporate Social Responsibility*, Press Release Memo/09/109, 16 March 2009.

[35] deMaCarty (2009) "Financial Returns or Corporate Social Responsibility, and the Moral Freedom and Responsibility of Business Leaders" *Business and Society Review,* 114(3).

[36] J. Scott (2009), 'Business and Human Rights at the UN: What Might Happen Next', *Human Rights Quarterly,* Vol. 31, No. 2, p. 301.

28. The Guidelines are voluntary principles and standards that adhering states[37] 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.

29. There have been a number of criticisms about the effectiveness of the Guidelines. Firstly, 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."[38] 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 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.[39]

30. 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.[40]

31. 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.[41] Finally, the NCPs have little power to take action where they find that a company has been involved in human rights abuses. Recently, the UK NCP upheld a complaint by Global Witness that a UK based company, Afrimex, had fallen foul of respecting human rights by failing to take adequate steps to abolish child and forced labour in the Democratic Republic of the Congo.[42] Nevertheless, the NCP was able to do little other than issue recommendations, which reportedly were not taken up by other Government departments.[43]

32. 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.

33. The OECD has recognised that there are shortcomings and a review of the Guidelines is currently underway.[44] The consultation process closed in March 2010 and it is expected that adhering states will be able to take a decision on launching an update at the OECD Ministerial meeting in May 2010.

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[37] 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, Span, Sweden, Turkey and the United Kingdom. Estonia, Latvia, Lithuania, Romania and Slovenia have also signed up to the Guidelines.

[38] 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.

[39] Ruggie Report, *supra* note 2, paragraph 46.

[40] J. Cernic (2008), "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises" 3 Hanse L.R 71, 84.

[41] The Ruggie Report, *supra* note 2, paragraph 98.

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

[43] See Joint Committee on Human Rights, *supra* note 28, p. 30, for a detailed criticism of the UK NCP.

[44] OECD, *Consultation for an Update of the OECD Guidelines for Multinational Enterprises* presented on 8 December 2009, Paris.

ii. The ILO Tripartite Declaration

34. The International Labour Organisation'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 considered to be international treaties and therefore binding on state parties, there are no provisions that can be directly applied to businesses themselves.

35. The ILO's governing body adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977.[45] The Tripartite Declaration brings together states, businesses and employers in an attempt to address concerns about the role of MNCs. The Principles were most recently updated in 2000 and their aim is to encourage positive contributions from MNCs to economic and social progress.

36. The Declaration calls upon MNCs 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.

37. 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.

iii. The UN Global Compact

38. The United Nations (UN) Global Compact was launched in 2000 at the request of the then Secretary General of the UN, Kofi Annan. The Compact is comprised of ten 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.[46]

39. 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.

40. Companies are invited to sign up to the Global Compact, which they can do by sending a letter from the Chief Executive to the UN 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 to it.[47]

41. 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[48], 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.

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[45] International Labour Organisation (2006), *The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 28 March 2006.
[46] UN Global Compact Principles 1 and 2, www.unglobalcompact.org/.
[47] J. Scott, *supra* note 36, p. 304.
[48] Information on the composition of the board is available at http://unglobalcompact.org/AboutTheGC/The_Global_Compact_Board.html.

42. The Global Compact has been criticised for being an extremely weak document that has very little impact on business and human rights[49] 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.

iv. The Protect, Respect and Remedy Framework

43. In 2003, the UN Sub-Commission on Human Rights adopted the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises (the Norms)[50]. 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"[51]. 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.

44. These 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.[52]

45. The Norms were never adopted by the UN 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.

46. 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.[53] The Framework rests on three pillars:

- the state duty to <u>protect</u> against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;

- the corporate responsibility to <u>respect</u> human rights, which in essence mean to act with due diligence to avoid infringing on the rights of others; and

- greater access by victims to effective <u>remedies</u>, judicial and non-judicial.[54]

47. The UN 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 whose human rights are affected. Unfortunately, Professor Ruggie recently told a UK Parliamentary enquiry that he did not expect that a legally binding human rights treaty would be drafted at the end of his mandate.[55]

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[49] O. Maurel 2009), La responsabilité des entreprises en matière des droits de l'homme (Commission Nationale consultative des Droits de l'Homme: Paris), p. 114.
[50] UN Sub-Commission on the Promotion and Protection of Human Rights, *Responsibilities of transnational corporations and other business enterprises with regards to human rights*, UN Doc E/CN.4/Sub 2/2003/L.11.
[51] Norms, Part A (1).
[52] Norms, Part E (12).
[53] See the Ruggie Report, *supra* note 2.
[54] Taken from Professor John Ruggie (2009) *Business and Human Rights: Towards operationalising the "protect, respect and remedy" framework*, A/HRC/11/13, paragraph 2.
[55] See Joint Committee on Human Right, *supra* note 28, paragraph 102.

48. The UN 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."[56]

v. Interstate Initiatives

49. 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 PMSCs[57] has garnered international attention and led to two initiatives: The Voluntary Principles on Security and Human Rights[58] and the Montreux Document.[59]

50. The Voluntary Principles on Security and Human Rights were established as an agreement between the UK and US 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.

51. 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.

52. 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.

53. Similarly, the Montreux document requests that adhering states to create an authorisation and monitoring system for PMSCs,[60] 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[61].

vi. Private Sector Agreements

54. 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.

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[56] Ibid., paragraph 94.
[57] See paragraphs 20-21 above for more information on PMSCs.
[58] Voluntary Principles on Security and Human Rights, www.voluntaryprinciples.org/.
[59] The Montreux Document, www.icrc.org/web/eng/siteeng0.nsf/html/montreux-document-170908.
[60] Ibid., Part A(IV) and (V).
[61] 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 Wordag and Doc. 11801, *Opinion of the Committee on Legal Affairs and Human Rights*, Rapporteur: Mr Sasi.

55. 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 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.[62] This is relevant to all member states of the Council of Europe, as the majority of these companies operate across the continent.

56. 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.[63] Companies are supposed to take into account the Principles in their action and when negotiating contracts.

57. 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.[64] This represents a case where a company has assisted in the realisation of the right to freedom of expression.

58. Business for Social Responsibility (BSR) is another initiative. BSR 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.*[65] The document analyses the opportunities on human that information communications technologies (ICTs) bring on the subject of human rights and at the same time advises companies of the risks of how ICTs can be used to abuse human rights.

vii. Civil Society Initiatives

59. 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.

60. Another example is the SA 8000 label, created by Social Accountability International[66]. 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.[67] Finally, companies are asked to respect laws on working hours and holidays and provide all workers with a living wage,[68] which meets minimum legal and industry standards.

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62 Global Network Initiative, www.globalnetworkinitiative.org.
63 Global Network Initiative Principles, www.globalnetworkinitiative.org/principles/index.php.
64 BBC News, Timeline: China and net censorship, 23 March 2010.
65 www.bsr.org/research/human-rights-wired-world.cfm.
66 www.sa-intl.org.
67 Social Accountability 8000 Guidelines (2008), www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf.
68 Ibid., Part 7.

61. 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 (SAAS).[69] Companies are regularly audited and a violation of the Guidelines could lead to the company not having its certificate renewed.

viii. European Union Initiatives

62. The promotion of human rights is enshrined into the founding documents of the European Union (EU). 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 cooperation 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 MNCs and, together with its member states, it is a significant player on the international stage.

63. 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,[70] a position that it continues to maintain to this day. Nevertheless, the European Commission has preferred a voluntary approach to CSR.

64. 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.

65. A document recently 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 EU should strive for a legally binding international instrument on business and human rights. It has also recommended that the EU 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.[71]

ix. Domestic policies of Council of Europe member states

66. 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.

67. 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.[72]

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[69] www.saasaccreditation.org/accreditation.htm.

[70] 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.

[71] 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.

[72] European Commission, *Corporate Social Responsibility: National public policies in the European Union* 2007, http://ec.europa.eu/social/BlobServlet?docId=1577&langId=en.

68. 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.[73] Similarly, a 2006 law created an 'equality and diversity' label for companies that complied with equal opportunity and diversity laws.[74]

69. The UK'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 round the OECD Guidelines but gives additional guidance to staff on how to promote human rights within UK businesses.

70. The UK'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".[75]

71. 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 (DIHR). Its chief objective is to promote and develop knowledge about human rights on a national, regional and international basis.[76] Its work includes research, analysis and information dissemination. It conducts programmes that operate both nationally and internationally. In 1999, the DIHR 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.

72. Some states have gone further and have attempted to put measures in place that have a material impact upon businesses that are involved in human rights abuses. 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; or
- other particular serious violations of fundamental ethical norms'.[77]

73. 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.[78] 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.

[73] Ibid, pp. 7-8.
[74] Ibid, p. 8.
[75] Section 172 (1)(d) Companies Act 2006.
[76] www.humanrights.dk/about+us.
[77] Guidelines for observation and exclusion from the Government Pension Fund Global's investment universe, Section 2, issued 22 December 2005.
[78] International Metal Workers Federation, *Trade union asks Norwegian Pension Funds to divest of Grupo Mexico shares*, 16 March 2010.

x. *Conclusion: a patchwork of voluntary initiatives and toolkits*

74. Despite these positive steps taken by some governments, the current international framework for governing businesses in relation to human right 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.[79]

75. 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. Whilst 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.[80] 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.

76. 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 MNCs should be accompanied by corresponding responsibilities.[81] 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.

IV. Evolving case-law on business and human rights

77. Despite the international community and individual states reluctance to impose a coherent set of obligations on MNCs 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.

i. *European Court of Human Rights*

78. Under the ECHR, contracting states have a duty to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".[82] 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.[83]

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[79] The Ruggie Report, *supra* note 2, paragraph 3.
[80] J. Wouters and L. Chanet (2008) 'Corporate Human Rights Responsibility: A European Perspective' *Northwestern Journal of Human Rights*, Vol. 6, Issue 2, p. 268.
[81] Ibid.
[82] Article 1 ECHR.
[83] A. Clapham, *supra* note 25, p. 351.

79. For example, Article 4 of the ECHR prohibits servitude and forced labour. In *Siliadin v France,*[84] 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. The case involved a complaint by a Togolese woman who had been trafficked into France to work as a maid 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, such as businesses, 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 UK Government ensuring that domestic legislation was amended[85] to make it an offence to hold another person in servitude or subject a person to forced or compulsory labour.[86]

80. Similarly, as discussed above,[87] 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 a home, private and family life.

81. Businesses themselves are deemed to have rights under the Convention. Article 1 of Additional Protocol 1 of the ECHR 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.[88] It is sometimes extremely important that the rights of businesses are respected. For example, in the *Sunday Times v. UK*,[89] the Court held that there had been a violation of a national newspaper's right to freedom of expression (Article 10 ECHR), 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 diagnosed 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.

[84] Application No. 73316/01, judgment of 26 July 2005.
[85] Joint Committee on Human Rights, *supra* note 28, paragraph 153.
[86] Section 71, Coroners and Justice Act 2009.
[87] See paragraph 18.
[88] *Sunday Times v. the United Kingdom*, judgment of 26 April 1979, Application No. 6538/74.
[89] Ibid.

82. 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 ECHR in cases between private parties. In the case of *Societé Nikon France SA v. M. Fredéric*[90], 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.[91]

83. This 'horizontal'/'inter-individual' effect of the ECHR 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 persons as well.[92]

84. Although cases can be brought for state failure to protect an individual's rights, states are not under a duty to protect individuals outside of its jurisdiction from the actions of MNCs or other businesses that are incorporated within it. 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.[93] Therefore, for example, there would possibly be no recourse for an Iraqi citizen who alleges that he has been tortured by employees of a PMCS that has been contracted by the United Kingdom Government in an area where the United Kingdom had been operating. Similarly, in cases where there is an allegation that an MNC has been involved in human rights abuses abroad, there is no recourse to a remedy under the ECHR against a Government that has underwritten the MNCs activities through its export credit guarantee agency.

ii. Claims under international human rights law

85. 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.[94]

86. 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 Claim Act (ATCA) 1789, in the United States of America (US).[95] 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'[96].

87. In *Doe v Unocal*[97], 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 S.A, 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: UK-based Barclay's Bank for doing business with the South African apartheid regime[98] and Switzerland-based Nestlé for purchasing cocoa and providing services to cocoa farmers allegedly employing child labour.[99]

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[90] Cour de Cassation (Chambre Sociale), judgment No. 4164, 2 October 2001.
[91] For a more detailed discussion see A. Clapham, *supra* note 25.
[92] A. Drzemczewski (1983), *European Human Rights Convention in Domestic Law* (Clarendon Press: Oxford), 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, paragraph 12, Rn. 6-15, Annette Guckelberger in: JuS 2003, 1151, section XI. As to the extension of the concept of *Drittwirkung* with respect to the EU and the ECHR see: Annette Guckelberger in : JuS 2003, 1151, section XI.
[93] *Bankovic et al. v. Belgium and 16 other States* [Grand Chamber], Application No 52207/99, decision of 12 December 2001, paragraph 71.
[94] 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 Cassel, D (2008) 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' *Northwestern Journal of International Human Rights* Vol. 6, Issue 2
[95] Also known as the Alien Tort Statute.
[96] 28 United States Constitution Section, 135D.
[97] 963 F.Supp.880 (C.D.Cal.1997) (*Unocal I*).
[98] *Khulumani v. Barclay National Bank Limited*, 504 F.3d 254 (2d Cir. 2007).
[99] *Doe v Nestle* S.A., No. 05-CV-5133 (C.D.Cal. 14 July 2005).

88. 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 ATCA's may lie in naming and shaming of corporations through publicity of a court case. Nevertheless, ATCA 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.

89. 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 17 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.[100]

iii. A European "Foreign Tort Claims Act"?

90. 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 European Court of Justice is the court of last instance in all matters concerning European Union Law.[101]

91. It may be possible to make claims against MNCs registered or domiciled within the European Union, for violations of human rights under European Union law. Under the European Council's Regulation 44/2001,[102] *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 EU, even if the damage occurred outside the EU and the victim is not domiciled in the EU.[103]

92. The Brussels I Regulation is different to ATCA in that it allows cases to be brought against companies in all civil proceedings, whereas ATCA can only be relied on for an alleged violation of the law of nations.[104]

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[100] For a more detailed analysis of the case see Clapham, A (2008) 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' Journal of International Criminal Justice 6 (2008) 912-914.
[101] For more information see the European Commission's website: http://ec.europa.eu/community_law/introduction/treaty_en.htm
[102] 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).
[103] See L. Wouters and L. Chanet, *supra* note 80, pp. 295-299 for full discussion.
[104] Ibid., p. 296.

93. The Regulation is an interesting development, particularly in the UK, which has traditionally been the jurisdiction where actions against companies in tort law have been brought.[105] In the past cases have failed on the grounds of *forum non conveniens* principle.[106] 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.*[107] 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.

94. 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 EU based companies for alleged human rights violations by way of civil law. Until now, few litigants have brought claims on these grounds. One major reason may be due to 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.[108] Nevertheless, recently, a group of litigants from the Ivory Coast brought a case against the oil firm Trafigura in the UK.[109] 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 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.

iv. Conclusion: businesses have responsibilities

95. 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.

V. A European Framework for Businesses and human rights

96. 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 no become complicit in human rights abuses. Nor do they provide adequate remedies to victims where abuses do occur.

97. Some action is being taken, the OECD will be updating the Guidelines on Multinational Enterprises imminently and the UN 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.

98. 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 UK called for the government to adopt a strategy on business and human rights[110] and the French *Commission nationale consultative des droits de l'homme* has made similar proposals to the French government.[111] The European Parliament has also urged the European Commission 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 CSR.[112]

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[105] Ibid., p. 296.
[106] M. Badge (2006), *Transboundary Accountability for Transnational Corporations: Using Private Civil Claims* (Chatham House: London), p. 32.
[107] Case C-281/02, *Andrew Owusu v. N.B. Jackson*, 2005 E.C. R. OJ C 106.
[108] Ibid.
[109] The material facts of this case were discussed in paragraph 8 above.
[110] Joint Committee on Human Rights, *supra* note 28, Conclusions and recommendations pp. 93-109.
[111] CNCDH, *supra* note 49.
[112] European Parliament, DG External Policies, *Business and Human Rights in EU External Relations: Making the EU a leader at home and internationally*, April 2009.

99. 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.[113] Requests of this sort from businesses may become more frequent as more cases are filed against corporations both in Europe and the US for alleged human rights abuses.

i. A role for the Council of Europe?

100 . 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 such as the European Committee for the Prevention of Torture and the Group of Experts against Trafficking in Human Beings that were established to ensure that states complied with the commitments they made when contracting to the organisation's treaties.

101. The remainder of this introductory memorandum 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.

a. A Convention on Human Rights and Business?

102. The strongest possible course of action for the Council of Europe, would be to adopt a new Convention specifically on human right 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.

103. Such a Convention could include a whole range of issues and take many forms. Using the UN Special Representative's *'Protect, Respect and Remedy'* framework,[114] the following are possible areas that a Convention could address:

<u>Strengthening the state duty to protect</u>

104. There are many realms in which states can have a direct impact upon businesses without having to regulate companies directly.

<u>Public Procurement</u>
Most public authorities in most states invest a lot of financial resources in purchasing 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 only providing contracts to companies with good human rights records and withdrawing contracts where a company is found to have been complicit in human rights abuses.

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[113] Google Blogspot, *Call for global privacy standards*, 14 September 2007, http://googlepublicpolicy.blogspot.com/2007/09/call-for-global-privacy-standards.html.
[114] See paragraphs 46-48 above.

As more state based industries and services are privatised this could potentially be an extremely powerful tool for imposing respect for human rights onto companies that bid for tenders to provide services.

Ethical Investment
Similarly, public authorities invest large amounts of money into companies through their pensions and other insurance schemes. In some states this potential 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.[115]

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.[116] 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 (NHRI) that provide guidance on human rights to governmental and other bodies. The UN Special Representative recommended that NHRI consider how they can work more to address alleged human rights violations by companies.[117] The Danish Institute for Human Rights (DIHR) has been held up as an example of good practice in this field[118] and could be used as a basis for provisions on NHRIs.

Measures aimed directly at businesses to enforce respect for human rights

105. 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 of 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 sakes 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.[119]

106. A Convention could instead include provisions that require member states to criminalise serious corporate violations of human rights whether they are committed in a Council of Europe member state or elsewhere.[120] There is some precedent for doing this: in the UK, the Corporate Manslaughter Act 2007[121] 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 than is prosecuted under this Act. The Act therefore seeks to protect individuals' right to life as enshrined in Article 2 of the ECHR.

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[115] See paragraph 72 above.
[116] See the websites of the UK's Export Credits Guarantee Department (www.ecgd.gov.uk) and the Danish Export Credit Agency, www.dk-export.dk/media/ekf_engelsk.pdf.
[117] J. Ruggie, *supra* note 54, paragraph 103.
[118] See paragraph 71 above.
[119] The UK 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.
[120] 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', pp. 282-295, *in* Alston, P (ed.) *Non-State Actors and Human Rights.*
[121] The Act came into effect on 6 April 2008.

107. 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'[122] and 'due diligence'. Extra assistance would be needed for small and medium 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 MNCs.

108. A further area for consideration is whether states should be held responsible for the activities of a MNC that has 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 MNCs or other companies. On the other hand, there is nothing to stop them from regulating this sort of conduct either.[123] 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 a European Union based MNC. 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 MNC, regardless of where the violation occurred?

Remedies

109. 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. Currently, states are required to take appropriate steps to investigate, punish and redress corporate-related abuse within their territory or jurisdiction. A new convention could possibly strengthen the obligations of states to do this or allow individuals bring cases directly against companies for alleged human rights abuses.

110. In any case, an effective complaints mechanism would need to be established in member states. This could take both a judicial and non-judicial form.[124] 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 publicity. Moreover, having alternative dispute mechanisms outside the courtroom could allow cases to be dealt with more quickly.

111. 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 (e.g. NGOs, individuals, trade unions or other companies).

b. A Committee of Ministers Recommendation?

112. The Committee of Ministers of the Council of Europe could also address a Recommendation on human rights and business to the Governments of member states as an alternative to a Convention. It could include some or all of the issues discussed above. Recommendations are not legally binding but they do represent a common position of all member states, especially as such Recommendations are adopted in the form of a unanimous decision. This may be considered a more pragmatic step to take, prior to promoting the idea of a convention.

113. There are many advantages to using this *soft law* instrument. Firstly, due to their non-legally binding status, they are much easier to negotiate than Conventions. Secondly, Recommendations are a quicker form of creating an international agreement 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, which means that a Recommendation could be amended 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.[125]

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[122] See paragraph 39 above.
[123] J. Ruggie, supra note 54, paragraph 15.
[124] This has been recommended by Professor Ruggie, *supra* note 54, pp. 22-25.
[125] See G. de Vel and T. Markert (2000), 'Importance and Weakness of the Council of Europe Conventions and the Recommendations Addressed by the Committee of Ministers to Member States' in B. Haller et al. (eds.) *Law in Greater Europe: Towards a Common Legal Area*, pp. 345-353.

c. Guidelines

114. In the absence of an international agreement on human rights and business, the UN 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.[126]"

115. If neither Convention nor a Recommendation are seen as appropriate ways forward, the Council of Europe is also free to issue detailed guidelines on human rights, business and the topics discussed in the previous section. But here the question is: how could/should this be done? Businesses could sign up to these guidelines or a voluntary code of conduct. member states also could decide whether or not to implement measures prescribed in the guidelines on their own volition.

116. In any case, if either a Convention or a Recommendation was adopted, detailed guidelines for governments and companies would also have to be issued on specific measures that they can take to ensure that rights are protected and respected. The guidelines could be adapted as time went by to incorporate responses to new human rights challenges.

d. Training

117. The Council of Europe could also consider providing training to small and medium enterprises and MNCs to raise awareness of 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 practice into every aspect of a business and how to conduct human rights impact assessments. It could also provide training to NHRIs so that they could disseminate the information to companies within their states.

e. A Council of Europe Label

118. 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.[127] 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 practice in the field of human rights.

f. Leading by example

119. If the Council of Europe is to advocate for its member states to take 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 around 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.

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[126] The Ruggie Report, *supra* note 2, paragraph 43.
[127] See paragraph 68 above.

ii. Conclusion

120. There are current on-going 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.

121. The Council of Europe, with its vast institutional knowledge and experience in the field of human rights, may be in the best position therefore 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.