

BUSINESS AND HUMAN RIGHTS IN EUROPE: NEXT STEPS IN STRENGTHENING IMPLEMENTATION AND ACCOUNTABILITY

**REPORT OF STAKEHOLDER WORKSHOP
FRIDAY 2 DECEMBER 2016, Copenhagen**

In March 2016, the Committee of Ministers of the Council of Europe adopted a new [Recommendation on Human Rights and Business](#). This Recommendation provides important guidance to governments, businesses and other stakeholders across the Council of Europe region regarding the implementation of human rights in the business context, based on the *European Convention on Human Rights*, *European Social Charter* and other Council of Europe human rights standards, and informed by the [UN Guiding Principles on Business and Human Rights](#) (UNGPs). It further provides for a process of review and information-sharing amongst Member States, to be facilitated by the Council of Europe, to promote and review its implementation. The Council of Europe will hold a high-level seminar on the Recommendation in Strasbourg in June 2017, in the run-up to Denmark's Presidency of the Council of Europe, commencing in November 2017.

In advance of that seminar, the 'Business and Human Rights in Europe: Next steps in strengthening implementation and accountability' workshop, organised by the Danish Institute for Human Rights with support from the Danish Ministry of Foreign Affairs, brought together stakeholders from member states of the Council of Europe comprising representatives of governments, civil society and business representatives, national human rights institutions and multilateral organisations.

Specifically, the Copenhagen workshop aimed to:

- Increase knowledge of the Recommendation and relevant contextual developments amongst European business and human rights stakeholders;
- Facilitate stakeholder dialogue on priority areas and needs to support effective implementation of the Recommendation across Council of Europe member states;
- Generate proposals to forward to the Council of Europe on the Recommendation, to promote a multi-stakeholder, human rights-based follow-up review process under the Recommendation.

SCOPE AND CONTENT OF THE RECOMMENDATION

In responding to the UNGPs, the Committee of Ministers' first step was to mandate its Human Rights Committee (CDDH) to develop both a political declaration on business and human rights, and a non-binding instrument, with a focus on addressing gaps in the implementation of the UNGPs at the European level, including with respect to access to justice for victims of corporate human rights abuses.

The [*Declaration on Business and Human Rights*](#), which was adopted by the Committee of Ministers on 16 April 2014, called on Council of Europe member states to:

- Take appropriate steps to protect against human rights abuses by business enterprises;
- Formulate and implement policies and measures to promote that all business enterprises respect human rights throughout their operations, within and beyond their national jurisdiction;
- Take appropriate steps to ensure that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy;
- Develop national action plans on the implementation of the UN Guiding Principles.

Subsequently, the CDDH's Human Rights and Business Subcommittee, with input from stakeholders, elaborated the text of a Recommendation, which was adopted by the Committee of Ministers, in amended form, on 2 March 2016. The Recommendation consists of five operative paragraphs. These urge Council of Europe member states to:

- Review national legislation and practice to ensure compliance with the recommendations, principles and further guidance set out in the *Appendix*
- Ensure a wide dissemination of the Recommendation
- Share examples of good practice related to the implementation of the Recommendation
- Share national action plans and best practice concerning their development and review
- Examine the implementation of the Recommendation no later than five years after its adoption with the participation of relevant stakeholders.

The *Appendix* to the Recommendation comprises seventy paragraphs which request Council of Europe member states to take action or consider taking action with regard to:

- Implementation of the UN Guiding Principles in general
- The State duty to protect against business-related human rights abuses
- State action to enable corporate responsibility to respect human rights
- Access to remedy for victims of business-related human rights abuses
- Additional protection of workers
- Additional protection of children
- Additional protection of indigenous peoples
- Protection of human rights defenders.

It was noted that, apart from its substantive content, by virtue of its status as a technically non-binding instrument, the Recommendation has a number of potential strengths and weaknesses.

In terms of potential strengths, as a non-binding instrument, the Recommendation had become immediately operational upon its adoption by the Committee of Ministers, whereas a binding instrument would not be operational until its entry into force, which could be many years after adoption. The Recommendation was also effective across the whole Council of Europe community, since this did not require signature and ratification, or parliamentary approval. On the other hand, there was evidently less likelihood of accountability in the event of non-compliance with “soft” instruments such as the Recommendation, since it would not be enforceable in a court of law, albeit it might in principle serve as an aid to judicial interpretation.

Finally, it was highlighted that, to promote its effective implementation and review, the Recommendation provided that the Council of Europe should establish and maintain a centralised and publicly-accessible system for the sharing of good practices and National Action Plans on business and human rights.

BUSINESS AND HUMAN RIGHTS: TODAY’S EUROPEAN CONTEXT

Participants recognised that the Council of Europe’s *Recommendation on Human Rights and Business* was an important development which had the potential to strengthen and accelerate implementation of the UNGPs across Europe, to address current gaps in human rights protection and remedy, and to inspire regional efforts elsewhere in the world.

A growing number of European governments, including Denmark’s, had adopted, or were in the process of developing, National Actions Plans (NAPs) on business and human rights, in the wake of

requests to states to develop such plans from the Council of Europe, United Nations Human Rights Council and European Union.

While participants welcomed this, it was recognised as essential that proper review and follow-up mechanisms, drawing on such plans, should be established to support implementation of the Recommendation, if its potential was to be realised.

In addition, the future of human rights was currently subject to debate in a number of countries within the Council of Europe. In this environment, it was important to reflect on existing and new narratives of human rights. Holding duty-bearers to account would always be an important dimension of human rights but there could also be advantages in emphasising the development opportunities that a culture of respect for human rights creates, and in demonstrating its economic and social benefits.

In line with this, some businesses were beginning to understand human rights due diligence not only as a risk management tool but also as a platform for creating value. It was important for the Council of Europe, in sustaining its relevance, in a dynamic political and economic environment, to engage and show leadership in such debates, and to demonstrate its role in tackling the challenges to human rights that people today face in their everyday lives. Here again, participants felt, the Recommendation presented an important opportunity.

Accordingly, the objectives of the current seminar were to provide an opportunity for collective reflection amongst stakeholders on how the Recommendation could provide a platform to foster renewed and strengthened support for human rights in general; for the Council of Europe and its instruments; and the UNGPs, across stakeholder groups in the European context, with the ultimate aim to extend the effectiveness of human rights in Europe at the ground level.

BUSINESS AND HUMAN RIGHTS: GLOBAL AND REGIONAL DEVELOPMENTS

Participants identified policy and institutional developments beyond the Council of Europe as relevant in evaluating the Council of Europe's role and potential "added value" in the area of business and human rights.

In the UN setting, the Office of the High Commissioner for Human Rights (OHCHR) was currently focused on supporting implementation of Pillar III of the UN Framework which relates to access to remedy. Its "Accountability and Remedy Project" had recently published guidance for

governments and other stakeholders on how to address barriers to access to justice in connection with judicial remedies for business-related human rights abuses. This guidance, it was suggested, could also be useful for States in implementing the Council of Europe Recommendation given its emphasis on access to remedy. During its second phase, the OHCHR project would turn its attention to non-judicial grievance mechanisms, with the aim of publishing guidance in 2018.

A further observation was that the UN human rights system currently provided limited scope for systematic review of national efforts of States in the area of business and human rights. There is no dedicated process of review of states' human rights and business NAPs, for example, and existing monitoring mechanisms, such as the human rights treaty bodies, do not provide a forum for detailed scrutiny or comparison of national implementation efforts connected to the UNGPs, even if some treaty bodies were engaging with the business and human rights agenda through General Comments, and stakeholders such as national human rights institutions (NHRIs) had in a few cases raised relevant issues via submissions to treaty bodies and the Universal Periodic Review.

Turning to the European Union (EU), it had embedded its commitment to the UNGPs in several policy instruments, for example, the European Commission's 2011 *Communication on CSR*, and the June 2016 EU Council Conclusions on Business and Human Rights, the latter of which *inter alia* called on Member States to develop business and human rights NAPs; committed to developing an EU Strategy on business and human rights; and highlighted the need for a "smart mix" of policy measures to promote the UNGPs' implementation.

Some participants felt that, taking into account the framework of the competences conferred by the Treaties, significant progress had been made in the area of access to justice in the EU, with reference to rules of jurisdiction, applicable law and legal aid for victims in cross border situations. Others however felt that not enough had yet been done to address the remedy pillar of the UN Framework at EU level. Participants observed that, given this, further action was needed on remedy at EU and member state level to lend credibility to commitments made by governments and EU institutions to uphold the UNGPs. Overall, the EU's role in driving the business and human rights agenda was seen as critical, given its influence on the economic policies in particular of member states and near neighbours, and also in light of governments' reluctance to adopt national measures that might be perceived as harming the competitiveness of their national enterprises. Collective European action was therefore essential.

This also entailed that a European-level peer dialogue on state efforts to implement the UNGPs was vital. Participation in such discussions should, furthermore, be extended to all relevant government bodies, and not just those typically associated with human rights, such as foreign ministries, while business, labour and other stakeholders should also be involved.

The UN 2030

Sustainable Development Agenda, it was noted, provided an important opportunity to broaden the circle in this context.

Concerning NAPs, participants agreed on their value, both in promoting the UNGPs amongst governments and businesses, and in building supportive national constituencies and networks. Nevertheless, it was important to recall that a NAP was not an end in itself, but was rather to be seen as the start of an ongoing and dynamic process, while NAPs themselves required review and revision over time and in light of experience. Here it was noted that NHRIs could potentially play an important role.

Finally it was highlighted that, besides the UN and EU, discussions about the need to align economic priorities and policies with human rights considerations were taking place across a range of international bodies and governance institutions, for instance, the G7 and G20, the International Labour Organisation and the International Standards Organisation, and at national level, via parliamentary and citizens' initiatives, giving rise to the need to recognise the business and human rights space as "polyarchic". In this context, the Council of Europe would need to continue to reflect carefully in targeting its own interventions, while remaining faithful to its role as the European region's primary human rights organisation.

SUPPORTING BUSINESS AND HUMAN RIGHTS IN EUROPE: NEEDS AND PRIORITIES

This session canvassed perspectives on business and human rights challenges facing the European region; the future focus and role of the Council of Europe on human rights and business; and how stakeholders, including business and civil society, should be involved in the promotion, monitoring and review of the Council of Europe Recommendation.

Business and human rights challenges for Europe

Participants generally agreed that integrating respect for human rights and environment into the internal functioning of corporations was prerequisite to sustainable economies. Today, however, Europe remained far from achieving this goal: many countries were still competing for investment based on low social protection, labour exploitation and weakening of the fiscal base, for example.

Highlighted, amongst key challenges for Europe, were: corruption; the encroachment of governments on civic space, freedom of assembly and freedom of expression, including in connection with the impacts of business activities; as well as deliberate attacks on human rights defenders; and hate speech via the internet and social media platforms. High rates of youth

unemployment were endemic in most European countries, as were human trafficking and modern slavery in both government as well as private sector supply chains.

Refugees, regular and irregular migrants were at especially high risk of abuses connected to business activities through their vulnerability to forced labour, for instance, in the agriculture, footwear and construction sectors. Exploitation and discrimination were significant risks both migrant and indigent worker. New patterns of risk linked to work were emerging with the rise of the “new economy”, such as the abuse of self-employment arrangements to deprive workers of basic entitlements, such as paid holiday and sick leave. Privatisation of public services, such as health and social care, often gave rise to risks for both workers and service-users, while it could also undermine access to remedy. Children were increasingly exposed to risks of obesity, online violence, hate speech, and to denials of rights associated with climate change, and inadequate child care arrangements to support working parents, for example. Environmental pollution causing damage to human health remained a grave risk across the continent.

In almost all such scenarios, victims were at risk of being deprived of remedies as a result of legal and financial factors. A particular problem in many jurisdictions was the lack of effective collective redress mechanisms. While the integration of European economies into global markets clearly had benefits for countries at the general level, at the same time, it frequently had negative impacts on particular constituencies, for instance, via job losses and localised displacement of workers, which had rarely been acknowledged within the business and human rights narrative.

Overall, it was observed, there had so far been an inadequate focus on “domestic” business-related human rights abuses (i.e. those occurring inside European borders) during policy discussions on business and human rights amongst European actors. The Council of Europe’s Recommendation provided a unique opportunity to turn the spotlight on this internal dimension of human rights and business.

Future priorities and focus for the Council of Europe

It was widely agreed amongst participants that, at the present time, resources should be concentrated on implementation of existing standards, in particular the Recommendation and UNGPs, rather than deliberating on additional standards at this stage. Businesses, in particular, were already concerned at the proliferation of norms in the sustainability and human rights areas.

National action plans were seen as a vital instrument in this context. It was important to understand that the “journey” of developing a NAP, if undertaken with participation of

stakeholders, was as valuable as the “destination” of the final document. In countries where NAPs had been concluded, the NAP process was recognised as instrumental in strengthening relationships and dialogue. By bringing stakeholders together over an extended period of time, the NAP process could foster deeper understandings of the issues at hand, as well as a more balanced appreciation of other constituencies’ views and perceptions.

National baseline assessments (NBAs), which reviewed the state of play in a country, against the UNGPs and other standards such as the OECD Guidelines for Multinational Enterprises, relevant EU legislation and domestic rules were also remarked as valuable. In particular, they could identify gaps in protection, while also providing a platform for evaluating the impact of new measures later on. In this respect, they were also essential to NAPs’ function in holding governments to account for fulfilment of their human rights obligations.

Monitoring and review of the Recommendation and the role of stakeholders

Participants saw great potential value in business and human rights dialogue amongst states and stakeholders, at both regional and global levels. Even if, to date, most NAPs published had emanated from Europe, the majority of Council of Europe member states had not yet developed NAPs. A European regional dialogue or peer review process could provide a constructive and supportive environment to encourage such states, where they might also garner learnings from the experiences of others.

A European regional dialogue or peer review process could also shift its focus gradually, across different issues or themes. Topics that could be highlighted in this way, of broad relevance across the European region, would include, for example: corporate human rights due diligence, and state measures to require or promote it through incentives; non-financial reporting, including reporting specifically on human rights; state-owned or controlled enterprises; public procurement; challenges and opportunities as regards small and medium-sized enterprises, which comprised the vast majority of businesses in most European countries but which often lacked the leverage of larger companies to manage risks in their supply chains; approaches to remedy, which had been neglected in most NAPs to date; and children’s rights.

By providing a continuing focal point for human rights and business within the Council of Europe, such a process could also foster coherence between the Recommendation and efforts by member states, stakeholders and the Council of Europe itself to promote and implement other Council of

Europe instruments, such as the European Convention on Human Rights, European Social Charter and instruments on children's rights.

Participants expressed the view that the text of the Recommendation already provided a sufficient grounding for the establishment of such a regional dialogue. Such a dialogue, moreover, would not need to be mandatory: within the EU, a successful peer dialogue had already been held on a voluntary basis, at the initiation of the Dutch government, in 2016, while it was intended to repeat this exercise in early 2017. Such meetings could provide the basis for a high-level "baseline" assessment at regional level and an engine to promote consistency and coherence on business and human rights across the EU.

On the other hand, participants felt, the weakness of the EU's regional NAPs dialogue, thus far, was that it had involved governments only. As such, it was certainly useful as an inter-governmental learning forum, which could flag good practices. However, it was essential, for the legitimacy and credibility of any regional process, that other stakeholders should be closely involved and given an opportunity to take part, for instance, through submissions and participation at dialogue sessions.

It could also be considered whether, given the Council of Europe's broader geographical scope and diversity, dialogues might be held sub-regionally at least on some occasions, to promote local relevance, accessibility to stakeholders, while also capitalising on the network-building potential of such events. The majority of businesses in Europe still lacked basic information about their responsibilities and the "business case" for respecting human rights. Given this, they would benefit enormously from opportunities presented by such events to build their knowledge and capacity and hence to support the needed transition towards sustainability.

While some participants maintained an annual Council of Europe dialogue meeting as necessary, particularly during this early phase of implementation of business and human rights norms, most viewed the current provision in the Recommendation for a five-yearly review as inadequate.

As regards the information exchange platform provided for in the Recommendation, the need was emphasised for the Council of Europe to survey existing resources before designing its own. The UN Working Group on Business and Human Rights already hosted a webpage detailing published and in-process NAPs. The Danish Institute for Human Rights aimed to launch a micro-site permitting users to search published NAPs thematically and by each Guiding Principle, while the Business and Human Rights Resource Centre hosted a "Government Action Platform".

In line with the need for stakeholder participation in monitoring and review, any online platform provided by the Council of Europe should also facilitate the sharing of information from non-government sources. Ultimately, and to draw lessons, for instance, from monitoring provisions under the UN Convention on the Rights of Persons with Disabilities and the Convention Against Torture, it might be valuable to establish independent monitoring bodies on business and human rights at national level. Some countries had already established multi-stakeholder bodies which might serve that purpose, for instance, the French Platform on CSR, which had developed France's NAP on human rights and business and CSR, or the Netherlands' Socio-Economic Council. NHRIs in were mandated to serve as independent monitoring bodies in relation to specific treaties in some countries.

In sum, participants felt that recent political, social and economic developments in Europe demonstrated the imperative for a sustained and meaningful dialogue on the relationship between business activities, human rights and social sustainability across the European continent. Current tendencies appearing to demonstrate a reaction against economic globalisation, European integration and universal human rights, as well as intensifying social inequalities, might also be traced to weaknesses in the capacity of existing governance arrangements to support such dialogue and the identification of solutions at regional level. The Recommendation provided an opportunity to correct this, if Member States were willing to seize it.

FOLLOW-UP AND ACCOUNTABILITY UNDER THE COUNCIL OF EUROPE RECOMMENDATION: STAKEHOLDER PROPOSALS

During small group discussions, participants generated the following recommendations to the Council of Europe regarding monitoring and review arrangements to promote the implementation of the Recommendation.

General recommendations to the Council of Europe and its member states

1. The overall goal should be a robust system of reporting and monitoring of implementation of the Recommendation with involvement of stakeholders, for instance, via shadow reporting
2. It should be clearly acknowledged by the Council of Europe that effectiveness, legitimacy, accountability and good governance require stakeholder involvement at every stage and level of the process of implementation of the Recommendation as well as in the development of NAPs by individual countries



3. The 2017 High Level Seminar should involve stakeholders (including civil society organisations, labour unions, business associations, representatives of individual businesses, NHRIs and Ombudsmen)
4. The 2017 High Level Seminar should include a session focusing on arrangements for monitoring and review of implementation of the Recommendation, and options for stakeholder involvement therein, as well as one on National Action Plans
5. At minimum, the Council of Europe should host a preparatory meeting for stakeholders ahead of the 5-year review of implementation provided for in the Recommendation
6. Options should be explored for a permanent platform or monitoring body, to gather systematic information on implementation across Council of Europe member states, that would involve stakeholders in its operation
7. A review of existing approaches to peer review, for example, as used in the OECD, EU and UN Universal Periodic Review processes, should be undertaken to scope options and good practices that the Council of Europe could employ, and to avoid unnecessary duplication
8. Options should be explored for sub-regional activities to promote awareness and implementation of the Recommendation amongst governments and other stakeholders
9. Steps should be taken to build awareness of the Recommendation within Council of Europe structures, for instance, the Parliamentary Assembly, the Commissioner for Human Rights and other thematic mandates, such as those relating to children's rights and the internet, and the Turin Action Plan and Process for enhancing the European Social Charter at national level
10. The Council of Europe Commissioner for Human Rights should integrate the Recommendation into the scope of his work, for example, in relation to country visits
11. Consideration should be given to establishing focal points for the Recommendation in each country in order to create a hts "learning network" across the region
12. The Recommendation should be translated into the languages of Council of Europe member states
13. Consideration should be given to establishing a Rapporteur on Business and Human Rights in the Council of Europe to increase the visibility of business and human rights issues, to promote operationalisation of the Recommendation, and to provide a focal point for stakeholders
14. Member states holding the Chairmanship of the Council of Europe should promote the Recommendation and its implementation, starting with the forthcoming tenure of the Czech Republic and Denmark

15. The Recommendation should be disseminated through materials such as a factsheet regarding case law of the European Court of Human Rights relevant to business and human rights and training materials for civil servants
16. Member states should demonstrate political will by allocating adequate resources to support the implementation of the Recommendation, which would otherwise be seen as a “paper tiger” with negative consequences for the credibility of the Council of Europe and its members
17. Ultimately the Council of Europe should share its experiences and good practices with other regional organisations as well as via the UN

Recommendations on the ‘information system’ for sharing of good practices and NAPs

18. The Council of Europe should consult with stakeholders on expanded Terms of Reference for the information sharing system, as well as any draft questionnaires to be sent to States. Before developing such Terms of Reference, the Council of Europe should review current resources to identify needs and gaps, given that existing websites provide lists of NAPs
19. An evaluation of opportunities for communication and engagement provided by new social media, beyond the traditional static website format, as well as resource and competence requirements to sustain such media, should be undertaken
20. The platform should connect to existing sources of data, networks, and information sharing platforms on thematic issues where relevant (for example, Equinet and the European Fundamental Rights Agency for data on discrimination in EU member states)
21. The information sharing system should be used as a forum for sharing case studies on specific issues, for example, approaches to NAP development, implementation of specific UNGPs, or specific themes, such as discrimination; this would also encourage the mainstreaming of business and human rights across government, by involving representatives of different ministries and public agencies in reporting over time
22. The platform should support the identification of national good practices, though not necessarily engage in ranking or evaluation of state efforts
23. The platform could support online learning, for example, through the hosting of webinars combined with face-to-face annual meetings
24. The group of States requested to provide data for publication on the platform should not be restricted to those who have already published NAPs

Recommendations to stakeholders

Stakeholders should consider using existing possibilities within the CoE framework to promote awareness and effectiveness of the Recommendation:

25. They should seek to participate actively in the discussion of follow-up and review arrangements in the Steering Committee on Human Rights via organisations with observer status
26. They should engage with governments' permanent representatives in Strasbourg to raise the profile of the Recommendation and measures to promote its implementation
27. They should raise the Recommendation with members of the Council of Europe's Parliamentary Assembly
28. They should produce shadow reports or submit other reports on their own initiative regarding state implementation of the Recommendation to encourage a gradual movement towards a monitoring system, if one is not provided for by the Committee of Ministers
29. Stakeholders should refer to the Recommendation in their submissions to NAP processes
30. Stakeholders should lobby and engage in awareness-raising at national level, in particular with Parliamentarians, to seek an account of government steps to implement the Recommendation
31. Stakeholders should solicit expert reports on issues raised by the Recommendation at national and regional levels
32. Stakeholders should refer to the Recommendation in network events and capacity building on business and human rights and CSR within their constituencies
33. Stakeholders should explore scope for using existing human rights mechanisms, for example, the Universal Periodic Review, UN Working Group on Business and Human Rights, UN human rights treaty monitoring bodies and the International Labour Organisation, to highlight the Recommendation and the need for government action to implement it
34. NHRIs should include the Recommendation within the scope of their monitoring activities at national level
35. NHRIs and CSOs should, where relevant, cite the Recommendation in legal proceedings or human rights complaint processes at national level or before regional or international bodies
36. Stakeholders should request governments to hold national multi-stakeholder launch events on human rights and business where the agenda is new, with reference to the Recommendation.