Business Activity, Human Rights and International Criminal Law

Dr. Dimitra Papageorgiou
Fellow, Athens Public International Law Center
Legal and Policy Consultant | Certified Compliance Officer
dimitrapapageor@gmail.com

The foundations of international criminal law

International criminal law deals with individual criminal responsibility for the most serious crimes of concern to the international community as a whole

- genocide
- crimes against humanity
- war crimes
- the crime of aggression.

- Nuremberg and Tokyo Tribunals
- Accountability of individuals under international law
- Emergence of modern international criminal justice

Corporations in international criminal law – the origins

IG Farben – 23 directors tried for war crimes and 13 convicted

Krupp - company executives were prosecuted for support to the Nazi regime and use of forced labour

The legal response remained focused on individual executives. The corporation as such remains outside the scope of international criminal responsibility.

The Lafarge Case

- Complicity in crimes against humanity, financing of a terrorist enterprise, and endangerment of people’s lives

Court of Cassation Appeal No 19-87.367

- For a conviction on complicity in crimes against humanity, Lafarge did not need to be a part of ISIS but " *It is sufficient that the accomplice be aware that the main perpetrators are committing or will commit such a crime against humanity and that, through his aiding or abetting, he is facilitating the preparation or execution of said crime.”*
- Therefore, “the knowing payment of a sum of several million dollars to an organization whose object is only criminal is sufficient to characterize complicity by aiding and abetting”.

Corporations in international criminal law – the accountability gap

Prosecution of international crimes →not only States, but also individuals can be held criminally responsible for violations of those obligations

Art. 25 par. 1 ICC Statute: "The Court shall have jurisdiction over natural persons pursuant to this Statute."

Art. 25 par. 2 ICC Statute: A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute

What about corporations?

- **Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol),** Article 46 C – *Corporate criminal liability: 1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States. …..6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.*

"Who physically committed the crime?"

→

"Which actors economically enabled, facilitated, financed, or sustained the broader system within which these abuses occurred?"

→

BNP PARIBAS

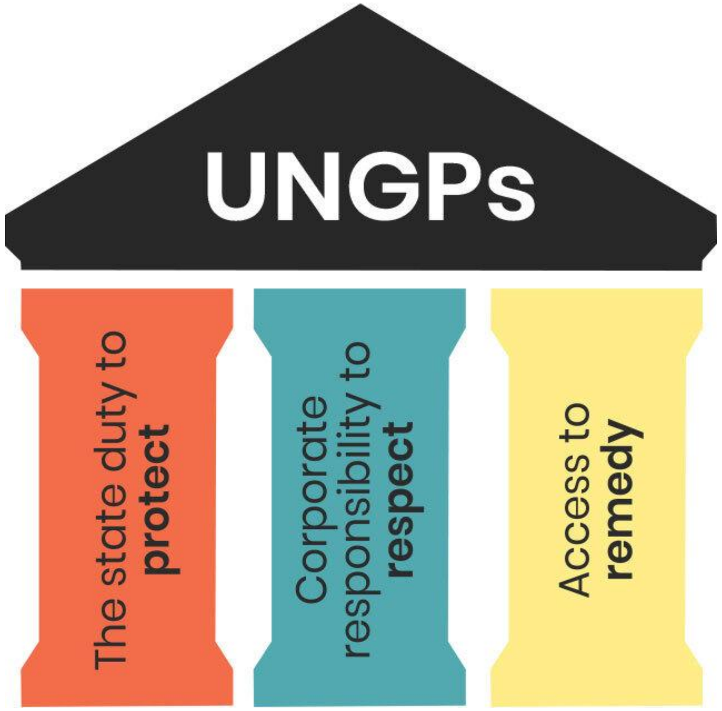
The UN Guiding Principles (UNGPs)

Three pillars:

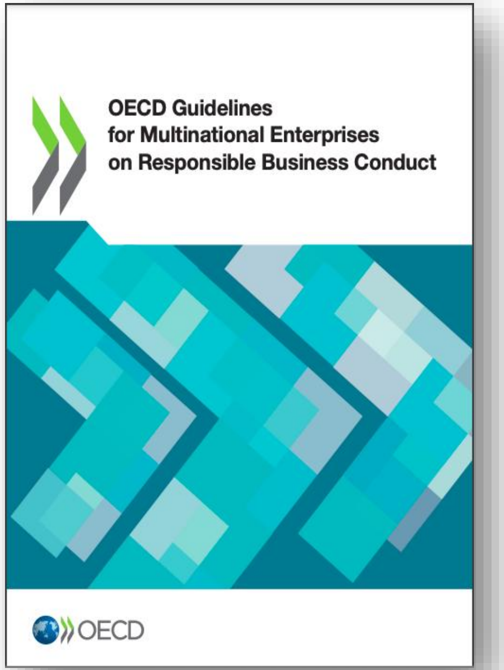
1. **Protect** – state duty to protect

2. **Respect** – corporate responsibility to respect

3. **Remedy** – access to remedy

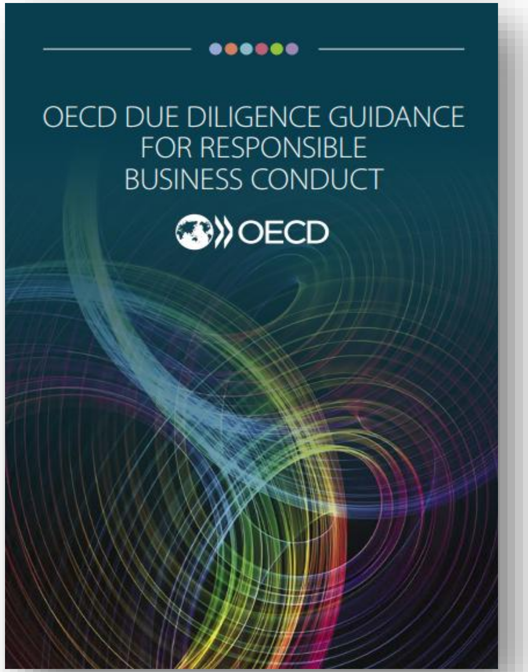


OECD Guidelines for Multinational Enterprises on Responsible Business Conduct



The most comprehensive international standard for responsible entrepreneurship

Set of **recommendations to businesses** to encourage responsible business behaviour



The UN Guiding Principles (UNGPs)

Which Rights Must Businesses Respect?

Principle 12: "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work."

- International Bill of Human Rights (UDHR, ICCPR, ICESCR)
- ILO Core Labour Standards

State Duty to Protect

Under international human rights law, States shall respect, protect and fulfil the human rights of individuals within their territory and/ or jurisdiction.

This includes the duty to protect against human rights abuse by third parties, including business enterprises.

- Prevent and investigate abuses
- Regulate corporate conduct
- Provide effective remedies

State Duty to Protect – Principle 3 UNGPs

In meeting their duty to protect, States should:

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

Corporate Responsibility to Respect

Businesses

- affect people directly (employees, consumers, communities)
- indirectly linked to human rights, through their supply chains
- have a responsibility to respect human rights

The value of businesses is no longer measured on the basis of profit, but also on the basis of its compliance with ESG criteria

Corporate Responsibility to Respect

What does it mean in practice? Businesses shall

- not violate human rights,
- not contribute to violations
- deal with the adverse effects when they arise.

It's not just about what the company does directly, it's also about what's happening in the value chain

	ESG	CSR	HRDD
What is it?	Assessing a company’s sustainability and risks	Corporate Social Responsibility and Voluntary Social Actions	Process for identifying, preventing and addressing human rights impacts
Main purpose	Measuring and managing ESG risks and performance	Improvement of social image and corporate responsibility	Preventing and responding to human rights violations
Legal Framework	Mandatory through ESG regulation	Voluntary	Becoming mandatory through European and international legislation
Relationship with human rights	Human rights are included in the "S" pillar	General references to human rights	Human rights are at the core of the process

Human Righs Due Diligence (HRDD)

Definition: The process for identifying, preventing, mitigating, and accounting for the adverse human rights impacts of operations.

(Guideline No. 13, Human Rights Council, Resolution, Human rights and transnational corporations and other business enterprise: A/HRC/RES/17/4, 06 July 2011)

Human Righs Due Diligence (HRDD)

The HRDD process includes four core components (Principle 17):

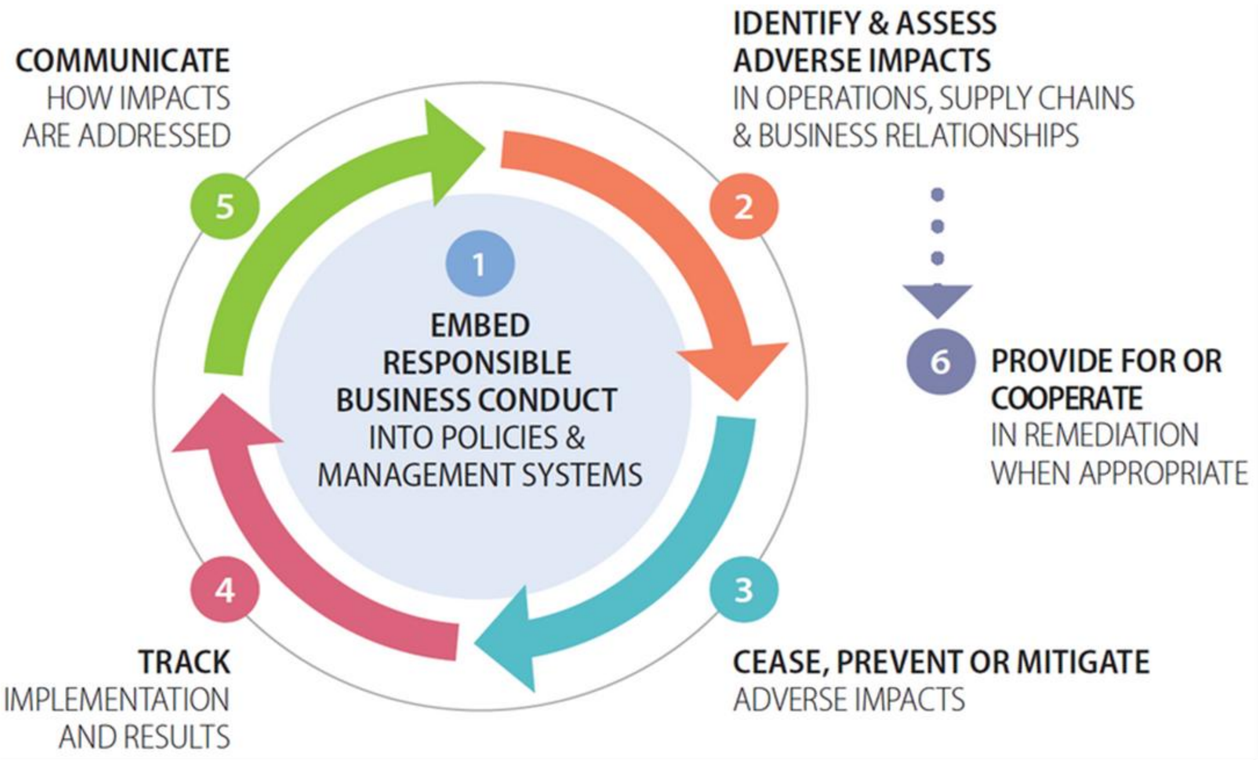
a) **identifying and assessing** actual or potential adverse human rights impacts that the company may cause, contribute to, or be directly linked to;

b) **taking appropriate action** and integrating findings from impact assessments across relevant company processes;

c) **tracking the effectiveness of measures** in order to assess whether they are working; and

d) **communicating with stakeholders** about how impacts are being addressed and showing stakeholders that there are adequate policies and processes in place.

Steps of Corporate Human Rights Due Diligence



@OECD

Corporate Responsibility to Respect

Soft law

- UNGPs
- OECD Due Diligence Guidance for Responsible Business Conduct

Hard law

- Regulatory turn in Europe
- Binding due diligence obligations
- Increased corporate accountability

Why companies care

- Legislation and regulatory framework
- Reputation and brand value
- Investment and financing
- Shareholder activism & social pressure
- Financial risk

The EU Corporate Sustainability Due Diligence Directive (2024/1760)

Scope of CSDDD

- EU Companies with net worldwide turnover > €1.5B & > 5k employees
- TC Companies with net turnover in the EU > €1.5B

Due diligence:

- Aligned with the 6 OECD DD stages
- Obligation of conduct

The Six Due Diligence Steps under the CSDDD

(1) integrating due diligence into policies and management systems,

(2) identifying and assessing adverse human rights and environmental impacts,

(3) preventing, ceasing or minimising actual and potential adverse human rights, and environmental impacts,

(4) assessing the effectiveness of measures,

(5) communicating,

(6) providing remediation.

The Corporate Sustainability Reporting Directive (2022/2464)

1. Sustainability reporting obligation

Companies are required to disclose ESG information, including human rights

2. Double Materiality → Companies must report both on how their operations impact the environment and society (outside-in, impact materiality), and how ESG-related risks affect the company's financial bottom line (inside-out, financial materiality).

3. Mandatory sustainability reporting will only be required for companies that meet both of the following criteria:

- Employment: over 1,000 employees
- Net turnover: over €450 million.

Can due diligence compensate for the limitations of international criminal law?