OPEN ACCESS

University of Dundee

University of Dundee

Public procurement and human rights

Methven O'Brien, Claire; Martin-Ortega, Olga

Published in:
Discretion in EU Procurement Law

Publication date:
2019

Document Version
Peer reviewed version

Link to publication in Discovery Research Portal

Citation for published version (APA):
Methven O'Brien, C., & Martin-Ortega, O. (2019). Public procurement and human rights: Discretion, divergence, paradox. In S. Bogojevic, X. Groussot, & J. Hettne (Eds.), *Discretion in EU Procurement Law* (pp. 189-210). (Studies of the Oxford Institute of European and Comparative Law). Hart Publishing.

General rights
Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Download date: 16. Jul. 2025

Discretion, divergence, paradox: Public and private supply chain standards on human rights

Claire Methven O'Brien and Olga Martin Ortega

To be published in S. Bogojevič, X. Groussot and J. Hettne (eds.), *Discretion in EU Procurement Law*, Oxford: Hart (forthcoming 2019).

Abstract

Expectations on businesses to manage supply chain human rights risks are becoming increasingly more detailed, demanding and widespread. In response to new legislation and official guidance, corporations have established human rights policies and detailed performance standards for their suppliers that take legal form via incorporation into purchase contracts. In contrast, public buyers' supply chain responsibilities for human rights have so far scarcely been addressed, notwithstanding increasing concerns about the human rights impacts of public purchasing. Following the introduction, which demonstrates the paradoxical character of this divergence, this chapter reviews relevant developments in law, policy and practice and considers their future implications. Section 2 analyses the framework of norms applicable to purchasing by public and private actors linked to human rights abuses as understood from the perspective of international human rights law. Section 3 illustrates how, in contrast, public buyers' discretion to promote the achievement of social objectives has conventionally been construed from the standpoint of EU public procurement law, namely as an exceptional derogation from the logic of competition. Section 4 surveys new supply chain standards, demonstrating a growing discrepancy between conduct expected of corporations and public buyers as regards human rights due diligence. Section 5 concludes.

Keywords

Public procurement, human rights, responsible business conduct, supply chain, value chain, due diligence

Keywords

H57, K23, K38, K42

Claire Methven O'Brien is Strategic Adviser, Danish Institute for Human Rights, Honorary Lecturer, School of Management, University of St.Andrews; Visiting Research Fellow, Department of International Law, University of Groningen. Email: cob@humanrights.dk

Olga Martin Ortega is Reader, Public International Law, University of Greenwich. Email: O.martin-ortega@greenwich.ac.uk.

I. Introduction

In Europe and globally, expectations on businesses to manage human rights risks in their supply chains are becoming increasingly more detailed, demanding and widespread.[1] The European Commission's 2011 Communication on Corporate Social Responsibility calls for enterprises "To identify, prevent and mitigate their possible adverse impacts" on human rights as well as environmental and social concerns. "Large enterprises", it states, "and enterprises at particular risk of having such impacts, are encouraged to carry out risk-based due diligence, including through their supply chains."[2] The Council of Europe, recognising "that business enterprises have a responsibility to respect human rights", has called for its member states to "apply such measures as may be necessary" to encourage or require business enterprises to apply human rights due diligence "throughout their operations".[3] Based on the UN Framework on Business and Human Rights and the Guiding Principles which implement it (UN Guiding Principles on Business and Human Rights, hereinafter UNGPs),[4] a large volume of guidance has been produced to describe how businesses should discharge their duty of "human rights due diligence"[5] in areas including supply chain management, most recently by the OECD.[6] High-level statements in similar terms have been adopted by the G7 and G20.[7] Legislation has been enacted by France and the United Kingdom, as well as in the United States, defining corporate responsibilities with human rights dimensions in the context of supply chain management.[8] Many large corporations have responded to such developments by establishing, besides human rights policies, detailed performance standards for their suppliers that take legal form via incorporation into purchase contracts.

In stark contrast, the supply chain responsibilities of public buyers for human rights have scarcely been addressed by new legislation, official guidance or contractual terms, notwithstanding increasing concerns about the human rights impacts of public purchasing.[9] Such a divergence

---

[1] For background and an overview of relevant normative developments, see: C. Methven O'Brien and S. Dhanarajan, "The Corporate Responsibility to Respect Human Rights: A Status Review", 29(4) *Accounting, Auditing and Accountability Journal* 2016, 542.

[2] European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final (25 October 2011), 6.

[33] Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business (2 March 2016), Appendix, para.20.

[4] UNHRC, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5, 7 April 2008 and UNHRC, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/Res. 17/4, 16 June 2011, para. 1 endorsing HRC, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework*, UN Doc. A/HRC/17/31, 21 March 2011, Annex, para. 2 (hereafter "UNGPs").

[5] O. Martin-Ortega, "Human rights due diligence for corporations: from voluntary standards to hard law at last?" 32(1) *Netherlands Quarterly of Human Rights Law* (2014), 44.

[6] OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018), available at: https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf

[7] *Leaders' Declaration G7 Summit*, 7-8 June 2015, p.5; *G20 Leaders Declaration Shaping an interconnected world*, Hamburg 7/8 July 2017, p.4.

[8] *Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneusesd'ordre*, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id (accessed 4 April 2017); UK Modern Slavery Act 2015, http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted (accessed 30 May 2018); California Transparency in Supply Chains Act 2010, https://oag.ca.gov/SB657 (accessed 30 May 2018).

[9] For a range of examples, see: R. Stumberg, A. Ramasastry and M. Roggensack (International Corporate Accountability Roundtable), *Turning a Blind Eye. Respecting Human Rights in Government Purchasing* (ICAR, 2016); C. Methven O'Brien *et al* (International Learning Lab on Public Procurement and Human Rights), *Public Procurement*

between norms applicable in the public and private supply chain contexts appears paradoxical, we contend, for at least four reasons. Firstly, human rights laws designate states and public authorities as primary duty bearers, in other words, as the actors on whom the role of safeguarding human rights in the first place falls. As non-state actors, however, corporations lack direct obligations in relation to human rights.[10] Rather, it is states who are responsible and potentially liable, under human rights standards, for abuses resulting from the acts of businesses within their jurisdiction. It would seem to contradict this position if, in the context of supply chain management, these roles are reversed.

Secondly, state duties to respect, protect and remediate human rights abuses are still generally restricted to the state's territorial jurisdiction.[11] Historically, states in Europe as elsewhere have often used their purchasing power to promote social goals including, prominently, labour market integration of vulnerable or marginalised groups.[12] Yet the objective of relevant measures has usually been to protect domestic constituencies, rather than attempting to advance social and labour concerns, or human rights, beyond national borders. On the other hand, supply chain standards addressed to businesses do not usually acknowledge such a distinction, or operationalise it. Corporations are enjoined to take measures to advance the enjoyment of human rights by persons beyond, as well as inside, the jurisdiction of the country of their seat or domicile. This may also be thought contradictory from the point of view of the status, noted above, of states as primary duty bearers and subjects of international human rights norms.[13]

Thirdly, the use of public procurement to advance social aims has generally been understood in doctrinal terms as an exercise of discretion to achieve "secondary" objectives, within restricted parameters defined by the logic of competition, its embodiment in trade law and more specifically by procurement law's "primary" objectives, understood as encompassing efficiency, value for money and non-discrimination if, at least in the EU, no longer lowest price *per se*. In the universe of human rights laws, on the other hand, their underpinning fundamental values, including human dignity, and states' obligations to honour these, should take precedence over states' obligations flowing from other sources of law, national or international, and so including procurement laws, deriving from the WTO or EU, for instance.[14] Securing such lexical priority, indeed, can readily be understood as the raison d'être of the post-World War II human rights framework. If this premise is accepted, particularly in the EU setting, given the Union's foundational commitments to human

and Human Rights: A Survey of Twenty Jurisdictions (DIHR/ICAR, 2016), available at: http://www.hrprocurementlab.org/resources/reports/.

[10] See below for the distinction in the UN Guiding Principles on Business and Human Rights between state obligations and corporate responsibilities with regard to human rights.

[11] C. Methven O'Brien, "The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal," (2018) 3 *Business and Human Rights Journal*, 47; C. Methven O'Brien, "Are European Home States of Transnational Corporations Responsible for Their Impacts Abroad Under The ECHR?" Ch. 6 in A. Bonfanti (ed.), *Business and Human Rights in Europe: International Law Challenges* (Routledge, forthcoming 2018).

[12] C. McCrudden, *Buying social justice. Equality, government procurement and legal change* (2007, OUP); S. Arrowsmith and P. Kunzlik, *Social and environmental policies in EU procurement law: New directives and new directions* (2009, CUP).

[13] Assuming this category is accepted. Cf. R. Higgins, *Problems and Process. International Law and How We Use It* (1994, Clarendon), 50.

[14] Subject of course to the discretion allowed to states in their manner of implementing human rights norms as recognised, for example, in the concepts of proportionality and margin of appreciation in the jurisprudence of the European Court of Human Rights.

rights,[15] states' discretion in the area of trade and procurement laws should be determined by, and where necessary extended insofar as needed to protect human dignity, at the very least within jurisdictional contours. *Vice versa*, the suggestion that the objectives of competition and non-discrimination between bidders might provide a pretext for public actors to avoid needed safeguards to avoid, for instance, complicity in the abuse of fundamental rights amongst supply chain workers or users of public services would not on this view be entertained.[16]

Finally, public buyers are highly significant in the global marketplace. Governments are mega-consumers of a vast array of manufactured products and services. EU member states spend around 14% of GDP on the purchase of services, works and supplies.[17] Globally, public procurement accounts for 15 to20% of GDP. Public procurement commitments under the World Trade Organization's Agreement on Public Procurement (GPA) are estimated at around EUR 1.3 trillion.[18] Governments ought correspondingly to be able to influence, through procurement, the terms of trade and corporate conduct across a wide range of sectors. Through their purchase contracts, they might exercise leverage over immediate suppliers and, through supply chain requirements, over second and subsequent tiers of the supply chain. By foregoing the imposition of minimum human rights standards in their supply chains, public actors undermine the achievement, and credibility, of the "sustainable value chain" standards they promote to businesses and other stakeholders.

This chapter explores the context for these developments and considers their implications for law, policy and practice.[19] Our focus is on Europe though in broad terms the analysis is of worldwide application. Section 2 extends the analysis sketched above of the framework of norms applicable to purchasing by public and private actors linked to human rights abuses as understood from the perspective of international human rights law. This part addresses, in particular, how the state duty to protect human rights and the doctrine of positive obligations play out in the procurement scenario with reference to the European Convention on Human Rights (ECHR). Section 3 illustrates, by contrast, how public buyers' discretion to promote the achievement of social objectives has conventionally been construed from the standpoint of EU public procurement law, namely as an exceptional derogation from the logic of competition. Section 4 surveys new supply chain

[15] Art. 6 Treaty of the European Union; European Union Charter of Fundamental Rights, 2000.
[16] Acknowledging the existence of more nuanced discussions of the interaction between human rights and international trade laws than space allows us to engage with here see e.g. E.U. Petersmann, "Human Rights, International Economic Law and 'Constitutional Justice'", 19 European Journal of International Law 769 (2008), R. Howse, "Human Rights, International Economic Law and Constitutional Justice: A Reply" 19 European Journal of International Law 945 (2008). See also L. Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements" (2013) 40(4) *Legal Issues of Economic Integration* 297–313.
[17] European Commission, DG Growth, Public Procurement, https://ec.europa.eu/growth/single-market/public-procurement_en (accessed 30 May 2018).
[18] Ibid. The GPA only covers a fraction of global public procurement, therefore the global figures are much higher.
[19] This chapter builds on our earlier work: O. Martin-Ortega and C. Methven O'Brien, "Advancing Respect for Labour Rights Globally through Public Procurement", 5(4) *Politics and Governance*, 2017, pp. 69-79.; O. Martin-Ortega, O. Outhwaite and W. Rook, "Buying power and working conditions in the electronics supply chain: Legal options for socially responsible public procurement", (2015) 19(3) *International Journal of Human Rights*; C. Methven O'Brien & O. Martin-Ortega, *Human rights and public procurement: Towards a holistic International law analysis* (2017, Unpublished Working Paper prepared for the International Law Association Study Group on Business and Human Rights); O. Outhwaite and O. Martin-Ortega, 'Human Rights in Global Supply Chains: Corporate Social Responsibility and Public Procurement in the European Union', Human Rights & International Legal Discourse, 2016, vol. 10 (1), pp. 41-71.

standards, demonstrating the existence of a growing discrepancy between conduct expected of corporations and public buyers as regards human rights due diligence. Section 5 concludes.

II. The human rights lens: dignity defines discretion (within limits)

1. Duties of states to protect human rights

Under international human rights treaties, states are bound to protect, respect and fulfil the human rights of persons within their jurisdiction. In particular, the duty to protect human rights extends to taking reasonable steps to preclude actions harmful of human rights by third parties, including both natural and legal persons. Generally speaking, such obligations are defined with reference to states' territorial jurisdiction.[20] Exceptionally, human rights jurisdiction has been recognised in relation to extraterritorial acts, in two scenarios: where the state exercises "effective overall control" of a geographical area beyond its own borders ("spatial model" of jurisdiction)[21] or where a state "exercises authority or control over an individual" outside its own territory (the "personal" or "state agent authority and control" model of jurisdiction).[22]

A state is only responsible for acts or omissions that are attributable to it.[23] Where a business actor, rather than the state itself, is the immediate perpetrator of conduct amounting to human rights abuses, before a state breaches its human rights obligations, it is required that either: i) the act of the business that harms human rights is attributable to the state; or ii) the state has defaulted on "positive obligations" to protect rights-holders against abuses by non-state actors. In either case, the harm to human rights that occurs must breach an obligation arising under a treaty to which the state is a party, a customary norm or principle of international law binding on the state in question.

Attribution of acts (or omissions) is addressed by Articles 4 to 11 of the International Law Commission's Draft Articles on State Responsibility (hereinafter ILC Articles). According to Article 4, states are responsible for the acts of their organs, including *de facto* organs. Article 8 provides that states are responsible for the acts of non-state actors where these are done under the state's instructions or where the state otherwise "directs or controls" such actions.[24]

The doctrine of positive obligations, which arises under international human rights instruments, amongst them the ECHR, can require states to protect rights-holders against abuses committed by

[20] Methven O'Brien, "The Home State Duty to Regulate" (n 11).
[21] E.g. *Loizidou v Turkey*, App.No.15318/89, Judgment (Preliminary Objections), 23 March 1995, para. 62, *Bankovic and Others v Belgium and Others* [GC] (dec.), App. No. 52207/99; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion* (9 July 2004), 136, paras.107-112; *Armed Activities on the Territory of the Congo (Congo v Uganda)*, Judgment 19 December 2005, paras.178-180.
[22] E.g.: *Lopez Burgos v Uruguay* (1981) 68 ILR 29, Communication No. R12/52, UN Doc. Supp. No. 40 (A/36/40) at 176); *Celiberti de Casariego v Uruguay*, Communication No. R 13/57, UN Doc. Supp No. 40 (A/37/40) at 157 (1981); *Öcalan v Turkey*, App. No. 46221/99, Judgment, 12 Mar 2003, para.93, *Öcalan v Turkey* [GC] App. No. 46221/99, Judgment, 12 May 2005; *Al-Skeini and others v UK* [GC], App. No.55721/07 7, Judgment, 7 July 2011.
[23] International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, extract from the Report of the ILC on the work of its fifty-third session, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed 19 January 2017), Chapter I, General Principles Article 2.
[24] ILC Article 8, Conduct directed or controlled by a State, provides that: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

private persons or entities, for instance, via deterrent measures, such as legislation, policies or, in the case of known threats, specific operational steps. It may also require of states certain responses to abuses once they have occurred.[25] Hence, a state may be responsible for abuses arising from its failure to take such measures and states have been found liable for harms arising from a failure to regulate businesses.[26] By virtue of positive obligations, complicity or acquiescence with the acts of individuals may also engage state responsibility in certain circumstances.[27]

Yet besides the requirement of jurisdiction, the establishment of positive obligations requires the existence of a "sufficient nexus".[28] That is to say, the defaults of the state or specific public actors should have "sufficiently direct repercussions"[29] on human rights. At the same time, positive obligations are circumscribed by requirements of reasonableness: their scope is influenced by the need for states to balance rights, interests and the potential resource implications of safeguarding measures, for example. At least under the ECHR, proportionality and the doctrine of margin of appreciation may also be in play, devices which influence the exact character of scrutiny exercised by the European Court of Human Rights (ECtHR) if called on to review state action, and which hence function to decide what discretion states should enjoy in implementing rights, or curtailing them, as the case may be. Relatedly, the precise scope and extent of positive obligations vary across human rights instruments, as well as between enumerated human rights within them.

2. The state duty to protect human rights as applied to public procurement

Applying the above principles, it can be seen that human rights abuses linked to public procurement activity, if they occur within a state's jurisdiction, could potentially give rise to a state's international legal liability (as well as domestic liability in monist systems) at least in certain cases, if by no means in all and every circumstance. Firstly, subject to the provisos noted above, a state's failure to implement adequate deterrent measures, such as legislation or policies to prevent human rights abuses by businesses with whom it contracts, or operational steps in the case of known threats, could entail a breach of positive obligations and hence international legal liability in the case of abuses occurring within the state's territorial jurisdiction. Arguably, this could apply to procurements of goods in sectors where workers in local supply chains are at high risk of serious human rights abuses, such as forced labour and human trafficking (as could be true, for example, in the apparel, agricultural produce and seafood sectors). Equally it could apply to procurements of services posing a known high risk either in terms of serious human rights abuses of local workers (as could be the case in contract cleaning and construction) or service users, with potential application insocial care, management and operation of prisons and other detention facilities, immigration removals and social benefit administration).

Secondly, beyond its territorial jurisdiction, but within a territory subject to its "effective overall control" (for example, a territory under military occupation) or where individuals are under the

[25] E.g. *Velasquez Rodriquez Case*, Judgment 29 July 1988, Inter-Am.Ct.H.R. (Ser.c), No.4 (1988); *X and Y v Netherlands*, App. No. 8978/80, Judgment, 26 March 1985, para.23; *Osman v. UK* [GC], App. No.23452/94, Judgment, 28 October 1998. See also Human Rights Committee, *General Comment No. 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004), CCPR/C/21/Rev.1/Add. 1326, para.8.
[26] E.g. *Fadeyeva v the Russian Federation* [2005] ECHR No. 55273/00 §89 and §92.
[27] E.g. *Ireland v. UK*, App. No.5310/71, Judgment, 18 January 1978, para.159.
[28] *Fadeyeva v. the Russian Federation*, App. No. 55273/00, Judgment, 30 November 2005, para.92.
[29] *Moldovan and Others v Romania*, App. Nos.41138/98 and 64320/01, Judgment, 30 November 2005, para.95, citing *Ilaşcu and others v Moldova and Russia* [GC] App.No. 48787/99, Judgment, 8 July 2004.

control of state agents, a state may be liable under similar circumstances as those described above in relation to public procurement within the territorial jurisdiction. Though at first sight an apparently marginal case, the continuing trend towards "contractorisation" of military and diplomatic support services renders this scenario increasingly salient.[30]

Thirdly, private and state-owned businesses are not generally assimilated to the status of *de facto* organs of the state. Yet, in addition, the requirement of attribution could, it seems, be satisfied by some types of procurements in relation to the delivery of certain services and works or some procurements by certain state-owned enterprises, at least under specific circumstances. States are not generally liable for the acts or omissions of state-owned or controlled enterprises. State responsibility requires that a corporate entity is exercising elements of governmental authority or that the state is using its ownership interest in or control of the corporate entity specifically to achieve a particular result. According to the ILC Commentary to Article 8, Draft Articles on State Responsibility:

> …international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5..."

However, the ECtHR has held states directly responsible for breaches of human rights by government-owned or controlled enterprises, applying a combination of criteria to determine whether a corporation acted as an agent of the state in a given case, including the degree of its institutional and operational independence with reference, for instance, to *de jure* or *de facto* state supervision and control; and the context in which the activity in question is carried out, where issues such as whether the corporation has a monopoly position in the market may be considered.[31]If European state-owned or controlled enterprises do qualify as state agents, then they might have potential liabilities, in relation to human rights abuses linked to their procurements, on the same footing as other public authorities, as outlined above. On the other hand, whether procurements by state-owned or controlled enterprises fall within, or outside, the scope of national procurement rules may be a matter specifically addressed by such regimes themselves and such provisions could be expected to bear on any determination of this issue by human rights mechanisms or other tribunals.

---

[30] J. Sinclair, "Contractorisation and bonded labour in military and diplomatic outsourcing: challenging the efficiency assumption", in O. Martin Ortega and C. Methven O'Brien, *Public Procurement and Human Rights. Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgard, forthcoming 2019).

[31] *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (Grand Chamber Judgment of 16 July 2014) para.114; *Mykhaylenky and Others v. Ukraine* (Judgment of 6 June 2005) para. 44; and *Liseytseva and Maslov v. Russia* (Judgment of 9 January 2015) paras. 187-190.

Returning to the private delivery of public services, where a state "contracts out" essential public services or establishes hybrid public-private bodies to deliver such services, the ECtHR has held that the "State cannot absolve itself entirely from its responsibility by delegating its obligations to secure the rights guaranteed by the Convention to private bodies or individuals". [32] Accordingly, states may be liable for the actions of private actors performing public functions. It is thus foreseeable that human rights may be engaged generally by arrangements for the delivery of contracted-out public services, or by specific services provided to particular users, for example: i) where access to the services in question is prerequisite to respect for human rights of service users; ii) where the quality or manner of delivery of the services may impact on the enjoyment of human rights by service users; or iii) where the terms of contracts between public authorities and private providers fail to secure respect for workplace rights of the employees or other workers of such providers, where these are also recognised as human rights. If, in these scenarios, a public authority's failure to take "reasonable and appropriate" measures to protect the rights of services users or workers results in their breach, the above principles may provide a basis for state liability.[33] This will be particularly relevant where the services in question relate to at-risk groups (for instance, detained persons or rights-holders at risk of vulnerability or marginalisation, such as children, the elderly or persons with disabilities).[34]

Beyond these situations, human rights treaties, including the ECHR, do not currently provide a general basis for state liability for human rights abuses occurring outside its territorial jurisdiction and linked to it by its procurement activity, because states do not usually have positive obligations in relation to extraterritorial acts by non-state actors, even if they are corporations linked to the state by a chain of purchase contracts, as discussed above. Consequently, as the law stands, European public purchasers would not be responsible for abuses in their supply chains occurring beyond national borders, apart from the scenarios outlined above, even if some international human rights bodies now appear keen for this to change.[35]

3. Corporations and human rights

Until recently, neither were corporations, whether in the capacity of private buyer, supplier to government or otherwise, viewed as responsible for international supply chain human rights abuses, or even local ones. As noted earlier, human rights instruments recognise states as duty-bearers, and not private actors, such as businesses, as a general rule. Consequently international human rights treaties do not generally impose direct obligations on corporate actors. The ECHR applies to violations of rights by a state and does not usually have direct effect between private parties. Under Article 34 ECHR, individual applications may only be received by the ECtHR from a person, non-governmental organisation or group of individuals "claiming to be the victim of a violation by one of the High Contracting Parties." Articles 1 and 2 of the additional Protocol to the European Social

[32] *Van der Mussele v. Belgium*, judgment of 23 November 1983, Series A no. 70, pp. 14-15, §§ 28-30; *Costello-Roberts v. UK* 1993, Series A no. 247-C, § 27; *Storck v. Germany*, judgment of 16 June 2005, § 103.
[33] C. Methven O'Brien, "Essential Services, Public Procurement and Human Rights in Europe", University of Groningen Faculty of Law Research Paper No.22/2015, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591898.
[34] See further C. Emberson and A. Trautrims, Ch (title TBC) in Martin-Ortega and Methven O'Brien, *Public Procurement and Human Rights. Opportunities* (n 30).
[35] UN Committee on Economic Social and Cultural Rights, *General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,* UN Doc. E/C.12/GC/24, 10 August 2017), Section C. Extraterritorial Obligations, para.25 et seq.

Charter have similar effect.[36] Individuals cannot rely upon these instruments to raise complaints against business enterprises directly before human rights supervisory mechanisms, even if they may seek to make claims against states for business-related abuses.

Nonetheless, a consensus is emerging amongst states, social actors and, not least, businesses themselves that companies have a "responsibility to respect" human rights, understood as a duty to refrain from interfering with human rights as well as to take measures, in particular human rights due diligence, to ensure that they do not impact adversely on human rights in practice.[37] A remarkable development, given the limited extent of the formal legal duties of public buyers as analysed above, the scope of private buyers' responsibilities for human rights in supply chains are discussed in greater detail in Section 4. First, though, we revisit the manner of public procurement law's engagement with "social" policy concerns in the past, before highlighting how this would seem to differ from the character of legal reasoning demanded by today's emergent human rights-based analysis.

III. The public procurement lens: competition before discretion

The principal policy objectives or "primary" aims of public procurement, as defined by national, supranational or international, procurement rules are: a) the achievement of value for money ("efficiency"); b) non-discrimination between tenderers; and c) open competition. [38] Yet governments often seek to use public purchasing to promote other policy objectives, typically labelled "secondary" or "horizontal" aims. Such "social", environmental or other objectives, such as local or national industrial and economic development are not necessarily connected with a procurement's functional objective of obtaining services and products at the best value for money.[39]

Links between social policy concerns and public procurement have manifested at least since the beginning of the nineteenth century.[40] As noted earlier, public procurement has often been harnessed to advance the integration of marginalised or disadvantaged groups into domestic labour markets. Attempts have also been made to use it in support of labour standards generally. As early as 1936 the ILO considered establishing minimum standards for those directly employed in public works and producing goods and services for the public sector.[41] In 1949, it adopted the Labour Clauses (Public Contracts) Convention (No. 94), followed and supplemented by Recommendation No. 84. The aim of such instruments was that public buyers ensure socially acceptable labour conditions in the course of work performed on the public's account.[42] The temptation to economise

[36] European Social Charter of 1961 (ETS No. 035); its Additional Protocol (ETS No.128) of 1988; the 1995 Additional Protocol Providing for a System of Collective Complaints (ETS No.158) and the 1996 European Social Charter (revised)(ETS No.163)1996 European Social Charter (revised)(ETS No.163).
[37] UNGPs (n 4).
[38] S. Arrowsmith, "Horizontal Policies in Public Procurement: A Taxonomy", *Journal of Public Procurement* (2010) 10(2), 149.
[39] Arrowsmith and Kunzlik, *Social and environmental policies* (n 12), p.9. In this chapter, for brevity, we refer to horizontal policies as including environmental, social and human rights considerations even if, for reasons described above, we maintain that human rights have a binding character that other "social" policy considerations may lack. In addition, as discussed later, it should also be noted that the interpretation of "social" considerations in the procurement context so as to include human rights beyond "core labour rights" is currently contested by some public procurement scholars: see text at fn.63.
[40] McCrudden, *Buying social justice* (n 12).
[41] International Labour Organisation, Report III (Part 1B), General Survey concerning the Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and Recommendation (No. 84); Report of the Committee of Experts on the Application of conventions and Recommendations (2008, Geneva: International Labour Office), p. 2.
[42] Ibid, p. 5.

on the cost of public works by diminishing labour protections was to be resisted and governments "should not be seen as entering into contracts involving the employment of workers under conditions below a certain level of social protection, but on the contrary, as setting an example by acting as model employers."[43] Under the mentioned ILO instruments, the required level of labour protection is set with reference to pre-existing national standards, while the scope of government obligations under them is domestic. Their main goal has therefore been to ensure consistent conditions for workers within a given country, whether labouring in the service of the public or private sector, albeit they may indirectly tend to promote labour rights abroad by discouraging "race to the bottom" dynamics. However, the ILO Convention has not been widely signed by states, and even signatory states have shown little interest in applying it.[44] According to the ILO, this can be explained with reference to the fact that "modern" public procurement has "promot[ed] competition at all costs among potential contractors" even if this "go[es] against the Convention's aim of requiring the application by all bidders of the best locally established working conditions."[45]

Closely linked, another broad tendency has been that, in mediating between procurement law's primary aims and secondary policy objectives, procurement law regimes have tended to attach greater weight to the former[46] on grounds, for instance, that measures supporting secondary aims within the procurement process embody market distortion or protectionism.[47] In the European Union, the award of public contracts above a certain monetary value by Member State authorities is required to comply with the principles of the Treaty on the Functioning of the European Union (TFEU) and the "four freedoms" guaranteed by the European Union's legal regime, namely, free movement of goods, services, capital and people within European Union boundaries as well as principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.[48] Hence, public procurement may limit cross-border flows in these four areas only if restrictions pursue the public interest while also meeting certain other conditions.[49] Relevant government purchases must also comply with the European Union's specialised procurement regime. Currently this includes Directive 2014/24 (the Public Sector Directive) and Directive 2014/25 which regulates procurement by entities operating in the water, energy, transport and postal services sector (the Utilities Directive).[50]

---

[43] Ibid, p. 1
[44] Ibid, p. xiii.
[45] Ibid.
[46] Martin-Ortega and Methven O'Brien, "Advancing Respect for Labour Rights" (n 19).
[47] C. Hanley, "Avoiding the issue: The Commission and human rights conditionality in public procurement," 6 *European Law Review* 714 (2002); C. McCrudden and S.G. Gross, "WTO government procurement rules and the local dynamics of procurement policies: A Malaysian case study," 17(1) *European Journal of International Law* 151 (2006), McCrudden, *Buying Social Justice* (n 12), Chapters 4, 11; A. Coravaglia, *Towards Coherence in International Instruments of Procurement Regulation* (Hart, 2017), p. 56. See also A. Sanchez- Graells, "Some Reflections on the 'Artificial Narrowing of Competition' as a Check on Executive Discretion in Public Procurement" in this volume on the primacy of competition as a principle in the European Union procurement legal framework.
[48] That is, where the EU procurement Directives are applicable, unless the contract in question has a certain cross-border interest: Case C-147/06 and C-148/06, Secap, EU:C:2008:277, para. 31.
[49] Case 2/74, *Reyners*, EU:C:1974:68.
[50] Directive 2014/24, of the European Parliament and of the Council of 26 Feb. 2014 on public procurement and repealing Directive 2004/18, 2014 O.J. (L 94) 65; Directive 2014/25 of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sector and repealing Directive 2004/17/EC, 2014 O.J. (L 94) 243.

The preceding procurement Directives (Directives 2004/18 and 2004/17) were particularly restrictive of public buyers' freedom to refer to secondary considerations.[51] This position was only marginally altered by cases in which the CJEU addressed secondary considerations.[52] In *Wienstrom*, for example, it was held lawful to use an ecological award criterion and to establish an award criterion related to the production method of the purchased product, but on condition that such a criterion is relevant for the contract and is expressly linked to its subject matter.[53] *Evropaïki Dynamiki v. European Environment Agency* considered a public purchaser could refer to whether bidders had a general environmental policy as part of award criteria. While the court held that they could, it noted that a buying authority's discretion in assessing bids was restricted. Though a purchaser could refer to third party certifications as evidence of a supplier's environmental standards, it could not require certifications as such. In the *Max Havelaar* case it was eventually held that award criteria may concern aspects of the production process that do not materially alter the final product, so that fair trade label requirements can constitute elements of contract performance under public contracts.[54] Other decisions also reinforce the impression of persisting tensions between primary and secondary criteria under the 2004 regime.[55] In the decade of practice between until the current Directives were adopted, public buyers in the EU periodically attempted to secure increased flexibility to pursue social objectives, with some allowance for this reflected gradually in interpretive guidance supplied by the European Commission.[56]

The 2014 procurement Directives were adopted with an explicit intention of enabling public bodies to use procurement to further common societal goals, including sustainability, at the same time as increasing the efficiency of public spending. The 2014 Public Sector Directive refers to sustainable development both in its recitals and provisions.[57] In addition, it requires EU member states to take appropriate steps to ensure that in the performance of public contracts economic operators comply with applicable social, environmental and labour law obligations.[58] The latter are defined with reference to the ILO's Core Labour Standards as reflected in the ILO Declaration on Fundamental Principles and Rights at Work.[59] Amongst other relevant measures, the Directive provides for the exclusion of economic operators from relevant tenders following convictions for offences including child labour or human trafficking, for example.[60]

Yet, if the Preamble to the new Directives gestures towards social considerations, these remain clearly subordinate to non-discrimination and competition principles in the rest of the text.[61] States

[51] Directive 2004/17, of the European Parliament and of the Council of 31 March 2004 consolidating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, 2004 O.J. (L. 134) 1; Directive 2004/18, of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 2004 O.J. (L. 134) 114.
[52] Nord-Pas de Calais case, Case C-225/98 Commission v. France, 2000 E.C.R. I-7445), and *Concordia* (Case C-513/99 Concordia Bus Finland v. Helsingin kaupunki & HKL-Bussiliikenne, 2002 E.C.R. I-7213); Case C-31/87 Gebroeders Beentjes BV v. the Netherlands, 1988 E.C.R. 4635.
[53] *Wienstrom* (Case C-448/01 EVN and Wienstrom, 2003 E.C.R. I-14527).
[54] *Max Havellaar*, Commission v Netherlands, C-368/10, 12 May 2012.
[55] *Bundesdruckerei GmbH v. Stadt Dortmund*, 2014; *Dirk Rüffert v. Land Niedersachsen*, 2008; *RegioPost GmbH & Co. KG v. Stadt Landau in der Pfalz*, 2015.
[56] European Commission (2004, 2010 and 2016). Buying Green! A Handbook on Green Public Procurement). European Commission (2010). Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement.
[57] Recitals 2, 41, 47, 91, 93, 95, 96, 123 and Arts. 2(22), 18(2), 42(3)(a), 43, 62, 68, 70
[58] Art. 18.2.
[59] Annex 10; ILO Declaration on Fundamental Principles and Rights at Work, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).
[60] Art. 57(1)(f).
[61] Outhwaite and Martin-Ortega, "Human Rights in Global Supply Chains" (n 19).

can only require economic operators to commit to corporate social responsibility or other sustainability measures that can be "linked" to the specific goods or services purchased, that is, to the subject matter of the contract.[62] Existing procedural and evidentiary requirements undoubtedly pose further challenges to public buyers wishing to take advantage of the discretionary room to pursue social objectives which, at first glance, the new legislation affords. Some procurement law scholars moreover go so far as to question whether new discretionary space as notionally provided for in the 2014 Directives to allow EU public buyers to safeguard minimum labour standards can, in reality, have any practical significance at all.[63] However, this interpretation, we suggest, for reasons set out in this chapter, appears unduly restrictive when judged in terms of the overall aims of the Directive and states' (and the EU's) human rights obligations. It is also runs counter to the trajectory of states' development and promotion of "responsible" and "sustainable" supply and value chain standards, as discussed in the next section.

IV. Divergence: The growing gap between public and private supply chain standards

1. New human rights standards for businesses

If sustained in the future, the orthodox procurement law analysis described above would situate government buyers in a reality different to that now experienced by large private sector buyers. From the early 1990s, attention to the negative impacts of multinational corporations on human rights became central to popular and academic critiques of globalisation.[64] Subsequently a transition to sustainable global value chains has been identified as critical to achieving inclusive development, global growth and "decent work".[65] "Responsible business conduct," understood as business behaviour that avoids, mitigates and addresses adverse human rights impacts in value chains, so "contributing positively to economic, environmental and social progress" [66] features centrally in a recent wave of supply chain initiatives intended to achieve these ends. One milestone, and the culmination of a process starting in 2005, are the UNGPs, endorsed by the UN Human Rights Council in 2011. Consolidating the evolution of expectations on companies beyond voluntary CSR and philanthropy, the UNGPs recognise the "role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights".[67] On the other hand, the UNGPs afford businesses a discrete and "complementary" role to that of states, while also acknowledging that the diversity of businesses, in terms of size, industry sector, corporate structure and operating location poses a challenge for legislating any single human rights standard for all companies. UNGPs 11 to 24 outline elements of the "corporate responsibility to respect human rights," the second "pillar" of the UN "Protect, Respect, Remedy"

[62] Ibid.
[63] A. Sanchez-Graells, "Some Reflections on the 'Artificial Narrowing of Competition' as a Check on Executive Discretion in Public Procurement", in S. Bogojevič, X. Groussot and J. Hettne (eds.), *Discretion in EU Public Procurement Law* (Hart, 2019 forthcoming); A. Sanchez-Graells, "Public Procurement and 'Core' Human Rights: A Sketch of the EU Legal Framework', in Martin-Ortega and Methven O'Brien, *Public Procurement and Human Rights: Opportunities* (n 19).
[64] E.g., N. Klein, *No Logo* (1999, Picador USA), D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization: The Frontiers of Governance* (1st Edition, 2003, Polity Press).
[65] ILO, Decent Work: http://www.ilo.org/global/topics/decent-work/lang--en/index.htm .
[66] OECD, *Responsible business conduct in government procurement practices*, available at: http:// mneguidelines.oecd.org/Responsible-business-conduct-in-government-procurement-practices.pdf.
[67] UNGPs (n 4), p.1.

framework on business and human rights.[68] This responsibility, in principle embracing any human right[69] entails that,

> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

An "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights. A business may be implicated in such impacts in three ways: (i) causing adverse human rights impacts through its own activities; (ii) contributing to adverse human rights impacts through its own activities — either directly or through another entity, whether government, business or otherwise; (iii) neither causing nor contributing to adverse impacts but still being indirectly involved in impacts directly linked to its operations, products or services because of relationships with business partners, entities in the value chain or any other non-state or state entity directly linked to its business operations, products or services.[70]

While the latter two modalities encompass supply chain amongst other business relationships, each of the three demands a different corporate response. Where a business causes an adverse impact, it should cease or change its own activities to prevent any further impact or recurrence. If the abuse cannot be prevented, an enterprise should engage actively in remediation directly or in cooperation with others. Where a business contributes to an impact, it should use its leverage to mitigate any remaining impact. If the business is merely directly linked to the impact, it should still use its leverage to encourage the offending entity to prevent its recurrence or at minimum mitigate it.[71]

The concept of leverage is thus an important one. It refers to the ability of a business "…to effect change in the wrongful practices of the party that is causing or contributing to the impact".[72] Such parties include suppliers. If a supplier is abusing human rights, a purchaser should asses its leverage to influence it, referring to a series of factors including: its degree of direct control over the supplier; the terms of the purchase contract; the proportion of the total business it represents for the supplier; its ability to incentivize the supplier to improve its human rights performance through measures relating to future business, reputational advantage and capacity building assistance, for example. Where a buyer is unable to increase its leverage, in the face of persisting abuses, it should consider ending the business relationship, particularly where abuses are severe. If this is not possible, because the relationship is crucial, or because terminating the relationship would itself have serious human rights consequences, a buyer should demonstrate a continuing effort to mitigate the adverse impacts and be prepared to accept the consequences of such relationship.[73]

---

[68] UN Framework (n 4).
[69] UNGP 12 lists the human rights instruments containing rights that should be respected, at a minimum, by business enterprises; based on their particular industry sector and operational context, business enterprises should also consider additional human rights standards, especially where they may impact on groups and populations at risk of vulnerability or marginalisation: UNGPs (n 4).
[70] UNGP 13.
71 *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, A/HRC/17/31, 2011, Guiding Principles 13, 19.
[72] UNGP 19, Commentary, p.21.
[73] UNGP 19, Commentary, p.22, UNGPs -Interpretative Guide, p.18.

The key to avoiding adverse impacts, according to the UNGPs, is "human rights due diligence." A "core requirement" of the corporate responsibility to respect human rights, this is a proactive process adaptable to all businesses, irrespective of individual characteristics.[74] After adopting and publishing a policy commitment to respect human rights, this comprises four steps. These are: i) human rights risk and impact assessment; ii) integrating assessment findings into company policies and procedures and taking appropriate action; iii) monitoring the effectiveness of company responses to human rights impacts; iv) communicating and reporting on human rights impacts and due diligence. Besides, as a final element of due diligence's minimum requirements, where they cause or contribute to abuses, businesses should provide for, or cooperate in, remediation, for instance, via judicial or non-judicial state-based remedy mechanisms.[75]

Because the corporate responsibility to respect human rights is based on social and political expectations, even if these in turn mirror the norms embodied in human right treaties, it applies across all jurisdictions. Accordingly, wherever they operate, companies should not seek to exploit gaps in domestic laws or their enforcement. They may also need to go further than required by applicable legislation.[76] If national rules and international human rights instruments conflict, a company should use its best efforts to respect internationally recognised rights. If this is not ultimately achievable, it should at minimum be able to demonstrate its efforts in this regard.[77]

Companies do not, as discussed in section 2.III, have direct human rights obligations. Yet Pillar II of the UNGPs has provided a platform for a proliferation of standards addressing the human rights supply chain responsibilities of the private sector. Indeed, since 2011, the scope and content of such responsibilities has been extensively expounded. For the OECD, since 2011, when the organisation's Guidelines for MNEs were last revised, "responsible business conduct" implies in particular that companies undertake human rights due diligence as defined by the UNGPs. In turn, as seen, the UNGPs indicate that companies' responsibility to respect human rights extends beyond their own operations to the activities of business partners, including suppliers and sub-contractors, wherever they are located.[78] This has provided a basis for the OECD to develop detailed supply chain management guidance by industry sector encompassing human rights, for instance, addressing the banking and financial sectors, footwear and apparel, beyond its prior focus on precious metals.[79] Most recently, it has issued comprehensive "responsible business conduct" due diligence guidance.[80] Multi-stakeholder initiatives, industry associations and governments have likewise produced guidance to support implementation of human rights due diligence on a sector-specific basis.[81]

[74] Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/17/31 (2011), para. 6.
[75] UNHRC 2011, GPs 15, 17-20, UNGP 22. Commentary, p.24
[76] UNGPs -Interpretative Guide p.77 and UNGP 23 (b).
[77] UNGP 23- Commentary, p.26.
[78] Ibid Martin-Ortega, "Human Rights Due Diligence" (n 5).
[79] All available at http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm (accessed 12 June 2018).
[80] OECD, *Due Diligence Guidance* (n 6).
[81] See for example material produced by the Responsible Business Alliance, http://www.responsiblebusiness.org/ (accessed 12 June 2018).

In the European context, the "responsible management of global supply chains" has been identified as essential "to align trade policy with European values"[82] and is a key element of the European Commission's last Corporate Social Responsibility Strategy.[83] Under the Strategy "[t]o identify, prevent and mitigate their possible adverse impacts, large enterprises, and enterprises at particular risk of having such impacts, are encouraged to carry out risk-based due diligence, including through their supply chains."[84] There has thus been, in the context of the EU, an increased focus on integrating respect for human rights, including but not limited to ILO Core Labour Standards, into company supply chain standards and management, which has triggered *inter alia* the development of binding obligations in the context of so-called conflict minerals, timber trade and non-financial reporting.[85] Supplementing and in some instances responding to the above international initiatives, at national level a number of governments have adopted standards embodying requirements on companies to undertake human rights due diligence across the supply chain. These include new legislation requiring companies to disclose information on their supply chain and their efforts to perform human rights due diligence in the United States, United Kingdom and France.[86]

2. Public procurement: limited policy developments

Such initiatives focus on "responsible business conduct" and the contribution business can make to sustainable development.[87] Albeit aimed primarily at business, at the same time new supply chain standards inevitably turn the spotlight on government consumption. It appears arguable that if fulfilling specific responsibilities to avoid and address adverse impacts in value chains is demanded by government of business, it should be demanded also of government itself. Yet public procurement standards analogous to those elaborated for the private sector as highlighted above are largely lacking even if, in recent years, civil society organisations, media, and national human rights institutions have exposed public purchasing practices associated with human rights abuses via supply chains, with numerous instances highlighted in which state buyers have purchased products, from textiles to electronics, produced with forced or child labour or under otherwise abusive conditions.[88]

---

[82] European Commission, "Trade for All: Towards a more responsible trade and investment policy" (COM(2015) 0497), 4.2.3.

[83] European Commission, n.2 above at 1.3.

[84] Ibid, 3.1.

[85] Regulation (EU) No. 2017/821 of the European Parliament and the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores and gold originating from conflict-affected and high r-risks areas; Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market; Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertaking and groups, respectively.

[86] See n.8 above.

[87] OECD Global Forum on Responsible Business Conduct, Session Note, Contributing to the Sustainable Development Goals through responsible business conduct, 30 June 2017 available https://mneguidelines.oecd.org/global-forum/2017-GFRBC-Session-Note-Contributing-to-SDGs.pdf .

[88] Methven O'Brien et al., *Public Procurement and Human Rights* (n 9); Stumberg et. al., *Turning a Blind Eye* (n 9); Claire Methven O'Brien and Olga Martin-Ortega (2017), "The Role of the State as Buyer under Guiding Principle 6". Submission to UN Working Group on Business and Human Rights consultation on "The State as an economic actor: the role of economic diplomacy tools to promote business respect of human rights". BHRE Research Series, Policy Paper no.4, September 2017, available at https://static1.squarespace.com/static/56e9723a40261dbb18ccd338/t/5a1be556f9619afa6a6a6d08/1511777629220/UN

To date the UNGPs are the most important soft law development linking public procurement and human rights in global supply chains. The "State duty to protect", Pillar I of the UN Framework, encompasses interactions between states and businesses of a commercial nature. UNGP 1 provides that "States shall take appropriate steps to prevent, investigate, punish and redress [business-related human rights abuses] through effective policies, legislation, regulation and adjudication". As UNGP 6 notes, this entails that states should promote awareness and respect for human rights by businesses in the context of public procurement, while UNGP 5 recalls that, where states privatise or "contract out" public services, they retain their human rights obligations and must "exercise adequate oversight" to ensure these are met, including by ensuring that contracts or enabling legislation communicate the state's expectation that service providers will respect the human rights of service users. UNGP 4 meanwhile provides that states should, where appropriate, require state-owned or controlled enterprises to exercise human rights due diligence, implicitly encompassing their purchasing function, and UNGP 8 calls for "policy coherence" to be achieved by alignment of goals and practice across governmental departments, agencies and institutions. Yet between 2011 and 2015, by contrast with the private supply chain management context, scarcely any governments produced new guidance, soft standards or tools on human rights and public procurement.[89]

Latterly, the OECD, apparently responding to analysis and advocacy by scholars and civil society practitioners, has acknowledged links between public procurement, its responsible business agenda and sustainable development.[90] The ISO's 2017 *Sustainable Procurement Guidance* (ISO 20400) urges the integration of human rights as well as green and other considerations in supply chain management, whether private or public. Adopted in 2015 by UN Member States, the 2030 Agenda for Sustainable Development sets new objectives on public procurement as part of the drive towards sustainable production and consumption and more inclusive economies. Goal 12 (Ensure sustainable consumption and production patterns) calls for a systemic approach and cooperation among actors operating in the supply chain, from producer to final consumer. In particular Goal 12.7 calls on all countries to promote sustainable public procurement practices and to implement sustainable public procurement policies and action plans, though without any specific mention of human rights, despite their centrality and integration across the SDGs package as a whole.

Addressing "Responsible Supply Chains", the G7's 2015 Leaders' Declaration committed to strive "for better application of internationally recognized labour, social and environmental standards, principles and commitments (in particular UN, OECD, ILO and applicable environmental agreements) in global supply chains". It further recognised that governments and business have a joint responsibility "to foster sustainable supply chains and encourage best practices", calling for tools to support public procurers in meeting social and environmental commitments.[91] Referring rather to "Sustainable Global Supply Chains", the 2017 G20 Leaders' Declaration undertook to "work towards establishing adequate policy frameworks in our countries" to "foster…the

WG+PP+submission+-+The+Role+of+the+State+as+Buyer+under+Guiding+Principle+6+-+OBrien+Martin-Ortega+03.10+3.pdf (accessed 12 June 2018).

[89] Methven O'Brien et al., *Public Procurement and Human Rights* (n 6).

[90] OECD, *Responsible business conduct in government procurement practices* (2017), available at: https://mneguidelines.oecd.org/Responsible-business-conduct-in-government-procurement-practices.pdf.

[91] G7 Leaders Declaration. Summit 7-8 June 2015, available at: https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf (accessed 12 June 2018).

implementation of labour, social and environmental standards and human rights in line with internationally recognised frameworks" though without specific reference to public procurement.[92] The ILO recently approved its Revised Programme of Action 2017–21 on Decent Work in Global Supply Chains with the aim of assisting ILO member States to make "significant strides in reducing the governance gaps and decent work deficits in global supply chains, thereby strengthening the role of supply chains as engines of inclusive and sustainable growth."[93] Again, however, in this document mention of public procurement is omitted.

Finally, in the EU context, the 2011 CSR Strategy explicitly referred to public procurement as one potential area for measures to enhance and promote "responsible business conduct", identifying Government buying as a means to strengthen market incentives for CSR, which the EU should leverage together with other policies in the field of consumption and investment.[94] Yet today there remain there are significant legal obstacles to giving full effect to this goal, as this chapter has already considered.

V. Conclusion

This chapter has exposed an increasing imbalance in international policy and regulatory developments addressing human rights in public and private supply chains. It seems likely that constraints imposed on public buyers' discretion in the notional pursuit of "free" and "fair" competition as a primary goal of public procurement law regimes has been an important and perhaps the principal driver of this discrepancy. As we have shown, this is despite the fact that public buyers have more compelling obligations to protect human rights emanating not just from human rights treaties voluntarily entered into, such as the ECHR, but also laws, internal and external policies of the European Union, the overall demand for coherence and consistency imposed via articles 7 AND 11 TFEU and by domestic constitutional frameworks in many countries.

We have further demonstrated that constraints on public buyers' discretion to use purchasing decisions to advance respect for human rights in their supply chains have a number of important consequences. They appear to exclude, or at least render marginal, the use of public buying to promote the objective, publicly and repeatedly espoused by government, of promoting respect for human rights and sustainability by the private sector. In particular, whereas it might be expected that governments would use public buying to enhance the effectiveness of recently adopted legislation on corporate non-financial (and human rights) reporting, this would seem to be ruled out by public procurement laws. In addition, even if some countries have already enacted statutory requirements on certain classes of businesses to undertake human rights due diligence as called for by the UNGPs and OECD Guidelines for Multinational Enterprises,[95] it would seem that public procurement decisions cannot be used to support companies' uptake of this process. Lastly, given the market value of public procurement, besides these constraints on the use of public procurement to buttress other aspects of sustainable business policies, there are significant direct human rights

[92] G20 Leaders' Declaration: Shaping an interconnected world. Hamburg, 7/8 July 2017, available http://www.g20.utoronto.ca/2017/2017-G20-leaders-declaration.pdf (accessed 12 June 2018)
[93] ILO, 2017, para. 6
[94] COM(2011) 681 final (n 2), p. 11.
[95] Methven O'Brien et al., *Public Procurement and Human Rights* (n 6).

consequences for workers locally and in global production systems and supply chains, as well as for vulnerable users of essential and non-essential public services.

In the past three decades, the international community, encompassing the EU and its member states, as well as business, labour and civil society actors, have all dedicated significant efforts to defining frameworks to analyse and address business-related human rights abuses. The fundamental aim of such activity can be seen as being that of rooting unfair, market distorting behaviour by corporations out of the economy. If public actors are precluded from eliminating such actors and practices from their own procurement, with reference to the need to advance and safeguard, fair and open competition, this is a clear contradiction in terms, and one that seriously undermines the credibility of sustainable production and consumption measures. Further analysis and clarification is thus needed of states' obligations to safeguard the rights of workers and others implicated in their supply chains, inside and beyond national borders and how these interact with European regional and global as well as national procurement regimes. Careful consideration must next be exercised in identifying how greater discretion can be returned to public actors to use their buying power in the pursuit of shared sustainability goals. For the EU, given its foundational commitments to human rights, and a bank of associated internal and external policy measures, this exercise should now be tackled with urgency and the counterproductive paradox of divergent public and private supply chain standards now brought to a close.